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CONJURING THE FLAG: THE PROBLEM OF IMPLIED GOVERNMENT ENDORSEMENTS

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This Article exposes a harmful form of advertising that exploits government actions like patent issuances, FDA authorizations, and trademark registrations. By calling upon the symbolic power of such regulatory approvals—i.e., "conjuring the flag"—marketers deceive consumers, distort competition, and undermine administrative agencies. Using machine-learning techniques to analyze hundreds of ads across multiple media formats, this Article offers the first comprehensive analysis of this pervasive practice. The study reveals that it is especially prevalent in industry settings where consumers are likely to seek reassurance that a product is safe and effective. Specifically, the examples examined show that patents are mentioned frequently in ads for supplements, cleansers, cosmetics, insect sprays, and hair products. It also shows that the USPTO contributes to the problem by registering trademarks that incorporate regulatory references. Consumer protection laws and regulations have failed to curb this practice, as advertisers have found subtle and legally permissible ways to manipulate consumer perception. This Article proposes two legal reforms to empower the FTC to address this issue more effectively, and suggests measures to better facilitate class action suits. This Article thus sheds light on a crucial intersection of intellectual property, consumer protection, and administrative law.

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INTRODUCTION

Picture an ad for an over-the-counter painkiller emblazoned with the phrase, "[t]he only FDA-approved non-prescription pain reliever."[1] While this claim may be technically accurate, many consumers will fail to understand the meaning of "FDA-approved."[2] Does this term guarantee the product's safety? Does it mean the product is superior? If so, in what respects? Survey evidence has shown that most consumers mistakenly interpret narrow stamps of approval like "FDA-approved" and "patented" as

1. *Excedrin Migraine*, BETTER HOMES & GARDENS, Oct. 2000, at 115.

2. Helen W. Sullivan et al., *Consumer Understanding of the Scope of FDA's Prescription Drug Regulatory Oversight: A Nationally Representative Survey*, 29 PHARMACOEPIDEMIOLOGY & DRUG SAFETY 134, 134 (2020) (reporting widespread public misunderstandings about what FDA approval means about a product—"[a]lthough most respondents (86%) knew that FDA approves prescription drugs, we found misperceptions about what that approval means"); Amie C. O'Donoghue et al., *Consumers' Understanding of FDA Approval Requirements and Composite Scores in Direct-to-Consumer Prescription Drug Print Ads*, 21 J. HEALTH COMMC'N 927, 933–34 (2016) ("Specifically, many participants were reassured by an FDA-approved statement, causing us to wonder how much participants know about the prescription drug approval process and the authority of the FDA. . . . The results of these investigations reveal that there are gaps in general knowledge about . . . FDA procedures generally . . . .").

oblique endorsements of quality.[3] Advertisers know this. It is why they routinely summon the goodwill consumers feel toward government agencies—i.e., "conjuring the flag." This Article explores how implied government endorsements skew competition, burden regulators, and cost us all.

The roots of the dilemma stretch back more than 600 years, to the predawn of trademark law, when two men fought over a heraldic emblem of blue and gold.[4] Sir Richard Scrope, a nobleman of high repute, claimed the right to the coat of arms.[5] But another knight, Sir Robert Grosvenor, had adopted and permitted businesses he associated with to use the same symbol.[6] This caused public confusion, as the blue and gold emblem had become so closely associated with Scrope and his noble reputation that it functioned as a de facto government endorsement. The matter was brought before the English Court of Chivalry,[7] where the poet Geoffrey Chaucer testified as a crucial witness. Chaucer recalled how he had once seen the blue and gold sign outside a London inn and mistakenly assumed that Scrope had lent his name to endorse the establishment.[8] The court decided in Scrope's favor and ordered Grosvenor to adopt a new symbol.[9]

3. O'Donoghue et al., *supra* note 2, at 931.

4. *See generally* SIR N. HARRIS NICHOLAS, THE CONTROVERSY BETWEEN SIR RICHARD SCROPE AND SIR ROBERT GROSVENOR IN THE COURT OF CHIVALRY (1832). By employing the symbolic power of coats of arms and royal warrants, some advertisers in the U.K. are able to still portray their wares as the highest quality—quite literally "fit for a king." *See Royal Warrants*, ROYAL HOUSEHOLD, https://www.royal.uk/royal-warrants-0 (last visited Jan. 22, 2024); *see also* PHILIP J. CAUDREY, MILITARY SOCIETY AND THE COURT OF CHIVALRY IN THE AGE OF THE HUNDRED YEARS WAR (2019); EDWARD SIDNEY ROGERS, GOOD WILL TRADE-MARKS AND UNFAIR TRADING (1914). American courts have recognized that unlicensed use of these royal symbols could lead consumers to mistakenly believe the product or service has been endorsed by royalty. *See In re* Shabby Chic Brands, 122 U.S.P.Q.2d 1139, 1144 (T.T.A.B. 2017) ("It is possible that consumers, upon viewing Applicant's mark on the identified goods, may believe that Applicant has been granted such a Royal Warrant signifying that its products are associated with or approved by the Prince of Wales.").

5. R. Stewart-Brown, *The Scrope and Grosvenor Controversy*, 89 TRANSACTIONS HIST. SOC'Y LANCASHIRE & CHESIRE 1, 3 (1937), https://www.hslc.org.uk/wp-content/uploads/2017/06/89-2-Stewart-Brown.pdf.

6. *Id.*

7. *Id.* at 1; *see also* CHARLES BOUTELL, ENGLISH HERALDRY: WITH FOUR HUNDRED AND FIFTY ILLUSTRATIONS 206 (6th ed., L.C. Page & Co. 1900). The English High Court of Chivalry is a special-purpose court existing under English and Welsh law since the fourteenth century, where disputes relating to coats of arms could be resolved, and where those regarded as having transgressed the law of arms could be prosecuted. *See generally* GEORGE DREWRY SQUIBB, THE HIGH COURT OF CHIVALRY: A STUDY OF THE CIVIL LAW IN ENGLAND (1959).

8. *Deposition of Geoffrey Chaucer, Esquire (1386)*, HARV.'S GEOFFREY CHAUCER WEBSITE (last visited Jan. 25, 2024), https://chaucer.fas.harvard.edu/pages/deposition-geoffrey-chaucer-esquire-1386.

9. Stewart-Brown, *supra* note 5, at 6.

This ancient dispute foreshadowed a more recent practice involving "patent medicines" in the nineteenth century. During this period, purveyors of unproven potions and tonics advertised them as patented remedies to the public. Many of these "patent medicines" often made outlandish claims about their curative powers, and some contained toxic substances.[10] The public was harmed because it was unable to distinguish genuine medicines from useless or dangerous concoctions.[11]

There is nothing inherently misleading in telling the public truthful information about government approvals, clearances, registrations, and the like. On the contrary, such information can be beneficial. A company that tells competitors about a patent it has obtained or applied for could place would-be patent infringers on notice, reducing the likelihood of litigation.[12] Information about Food and Drug Administration ("FDA") approvals and clearances on drugs and medical devices can be helpful to prescribing doctors. Even a statement that a company is an approved vendor of a government department could serve purposes other than to mislead. These words could help explain that the company can meet specific manufacturing or cost requirements, for instance.

The ads themselves reflect less admirable motives, however. Their goal is clearly to persuade rather than to inform. For example, advertisements that mention government approval usually provide no accompanying information.[13] If a patent holder or applicant wished to place potential patent infringers on notice, it would surely provide a patent number, an application

10. *See, e.g.*, John Parascandola, *Patent Medicines and the Public's Health*, 114 PUB. HEALTH REPS. 318, 318 (1999). In his article on the history of patent medicines in the United States, Dr. Parascandola explains how patent medicine makers made inflated claims about their products' curative abilities—"[they] were never modest about their claims"— but many contained no actual effective ingredients or even dangerous substances. *Id.* at 319–21. As an example, Parascandola points to "Mrs. Winslow's Soothing Syrup." Marketed as a drug to pacify teething babies, the product contained a form of morphine. Cocaine and high levels of alcohol were also common ingredients in patent medicines from this era. *Id.* at 320; *see also* J. Worth Estes, *The Pharmacology of Nineteenth-Century Patent Medicines*, 30 PHARMACY HIST. 3, 3 (1988) (citing exaggerated claims about effectiveness of products containing opiates, cocaine, and alcohol without disclosing these ingredients to consumers).

11. *See, e.g.*, David L. Dykstra, *The Medical Profession and Patent and Proprietary Medicines During the Nineteenth Century*, 29 BULL. HIST. MED. 401 (1955); JAMES HARVEY YOUNG, THE TOADSTOOL MILLIONAIRES: A SOCIAL HISTORY OF PATENT MEDICINES IN AMERICA BEFORE FEDERAL REGULATION (1961).

12. This is the purpose of the patent marking statute, which applies to objects and their packaging but not to advertisements for products. 35 U.S.C. § 287; *see also* Roger D. Blair & Thomas F. Cotter, *Strict Liability and Its Alternatives in Patent Law*, 17 BERKELEY TECH. L.J. 799, 829–45 (2002). This statute is designed to remove liability for patent infringement in situations where a patent owner could have, but failed to, mark their product with a patent number. However, there are many exceptions to the rule that limit the power of this statute significantly. Part I of this Article argues that this creates an enforcement gap.

13. *See infra* Part II.

number, or at least a statement about what technologies are patented.[14] Likewise, if a pharmaceutical company wished to inform the public or prescribing doctors about its product's risks and benefits, why would it present the words "FDA Approved" in a large and stylish typeface, set off from the rest of the ad copy like an advertising slogan? The answer is obvious: Like the innkeeper in Chaucer's London, modern advertisers name-drop the government to turn a sale, a practice I call "conjuring the flag."

Conjuring the flag encompasses a wide range of tactics. In some instances, the very subject matter of regulatory approval involved is the foundation of this effort. For instance, when a firm applies to register a trademark containing a phrase such as "FDA-APPROVED," it is intentionally calling upon the symbolic power of the FDA. In other cases, the misleading statements are ancillary to the content of the intellectual property ("IP") rights, but still draw leverage from them. The owner of a patent on a dietary supplement or a cosmetics product might, for instance, advertise that the product is patented to imply the government's stamp of qualitative approval.

These advertising practices harm consumers, competition, and administrative agencies.[15] Consumers prefer products they believe are superior. When that belief is based on a false impression, consumers lose. They are willing to pay more for products and services that are not of higher quality than less expensive alternatives. Competitors also lose. To compete, they must lower their prices, exit the market, or exploit the same false consumer impression their competitors exploit by advertising government approvals of their own. All three possibilities reduce competition, and the last one diverts resources from administrative agencies, such as the U.S. Patent and Trademark Office ("USPTO").

Doesn't the law forbid misleading ads? Technically, it does. The Lanham Act provides a civil cause of action for false and misleading advertisements. The Federal Trade Commission may likewise bring an action against a company that tries to dupe the public. There are also many state and federal statutes that work to achieve the same ends.[16] The trouble is, it is

14. Discussing one such ad, Jonas Anderson has written: "Nothing in this advertisement hints at what the patents cover (and with good reason; at least some of the eighty thousand patents are undoubtedly of questionable validity), but that's not the point." J. Jonas Anderson, *Nontechnical Disclosure*, 69 VAND. L. REV. 1573, 1594 (2016).

15. *See infra* Part III.

16. 4 U.S.C. § 8(i) ("The flag should never be used for advertising purposes in any manner whatsoever."); *see also* WASH. REV. CODE ANN. § 9.86.020 (West) (prohibiting "[i]mproper use of flag," including placing "advertisement of any nature upon any flag . . . of the United States"); 15 U.S.C. § 1052(b) (2022) (prohibiting registration of trademarks that "[c]onsist[] of or comprises the flag or coat of arms or other insignia of the United States, . . . or any simulation thereof"); TMEP § 1203.03(a) (Nov. 2023) (providing guidance to examiners regarding the application of Part 2(b)

difficult and costly to make these cases in court. The crux of the problem is that it is easy to prove a lie, but difficult to prove a misleading half-truth. Meanwhile, marketers have devised many subtle and legally permissible ways to imply that their goods have the government's seal of approval. They are masterful at saying things that are not false but not quite true either.[17]

This Article offers the first comprehensive qualitative analysis of this problem. This study presents an original collection of hundreds of advertisements spanning the past five years, drawn from diverse media formats, including magazines, newspapers, television, and Twitter.[18] The collection was assembled through a combination of manual and automated methods, including custom-written code used to identify and record advertisements posted on social media, and machine learning classification tools. The study also examined hundreds of trademarks across various industries. The goal of the study was to gain a rich qualitative understanding of the issue through collecting and studying specific examples.

This analysis uncovered two concerning trends.[19] First, a significant number of companies are using their patents to cultivate an aura of legitimacy and safety in industries that lack rigorous regulatory oversight. The examples examined show that patents are mentioned most frequently in ads for supplements, cleansers, skincare products, insect sprays, toothpaste, and hair products. Consumers seeking reassurance that such products are safe and effective may be especially responsive to the symbolic power of government approvals in these settings. The second discovery is that the USPTO has contributed to the problem by registering many trademarks that include regulatory references.

This Article fills a significant gap in the existing literature. Scholars, courts, and regulators have long expressed concerns about this being a potential problem, based on individual examples in discrete disciplines. Patent scholars, for instance, have noted with concern the practice of companies mentioning their patents, or patent portfolios, in ads. Ann Bartow, for example, has suggested that advertising the patents a company has

of the Lanham Act, including examples of marks likely to be refused registration under this provision).

17. As Justice Blackmun wrote in a widely cited 1976 Supreme Court decision, "Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading." Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

18. As of July 24, 2023, Twitter is known as "X." *See* Ryan Mac and Tiffany Hsu, *From Twitter to X: Elon Musk Begins Erasing an Iconic Internet Brand*, N.Y. TIMES (July 24, 2023), https://www.nytimes.com/2023/07/24/technology/twitter-x-elon-musk.html.

19. *See infra* Part II.

received is a "marketing ploy,"[20] akin to a celebrity endorsement. Jonas Anderson has speculated that this technique "may be used to try to deceive the public."[21] Scholars in both law and medicine have similarly cautioned on the dangers of an FDA halo effect influencing consumers in negative ways.[22] These concerns are widespread, but they have been based on anecdotes rather than comprehensive studies. This Article makes a crucial contribution to the field by presenting the first deep analysis that identifies instances of this problem across multiple domains of government regulation.

Advertisers are exploiting the symbolic power of regulatory agencies. This Article sets out to fix that. Part I of this Article introduces the problem of implied government endorsements in advertising. It defines the problem, explains why experts are worried about it, and details how this practice fits within the legal and regulatory framework. Most importantly, this discussion identifies a gap in the literature on this subject. Part II presents an original study that fills this gap, revealing many tools that advertisers use to conjure the flag. This study uncovers two unappreciated problems: Firstly, the USPTO has been granting trademark registrations on terms that extend and muddle the meaning of unrelated forms of government support; secondly, advertisers have been using patent rights as proxies for safety and clinical efficacy. Part III explains how these practices harm consumers, competition, and administrative agencies. Part IV proposes three solutions to address the problem in a manner that aims to balance the interests of consumers, companies, and government agencies.

I. THE CONCERN OVER IMPLIED GOVERNMENT ENDORSEMENTS

This Part explains the growing concern over implied government endorsements in advertising. The discussion covers three points: (1) the concerns that scholars and courts have expressed over implied government endorsements; (2) how the current legal framework falls short in addressing these concerns; and (3) why empirical evidence of advertising practices is a

20. Ann Bartow, *Separating Marketing Innovation from Actual Invention: A Proposal for a New, Improved, Lighter, and Better-Tasting Form of Patent Protection*, 4 J. SMALL & EMERGING BUS. L. 1, 5 (2000) ("Do the patents in some sense function like celebrity endorsements? Is touting these patents simply a marketing ploy, and if so, do people really buy a toothbrush because it implicitly embodies the innovations contained in twenty-three patent applications?").

21. *See* Anderson, *supra* note 14, at 1595 ("Inevitably, this nontechnical disclosure may be used for less than benevolent uses. . . . [B]ecause it is pitched at a nonexpert audience, [it] may be used to try to deceive the public. . . . [T]he nontechnical audience has a much harder time verifying claims of quality.").

22. *See* Jonathan J. Darrow, *Pharmaceutical Gatekeepers*, 47 IND. L. REV. 363, 387–89 (2014) (discussing an "FDA Approval Halo"); Sullivan et al., *supra* note 2; O'Donoghue et al., *supra* note 2.

missing piece in the puzzle. These ideas set the stage for the original study presented in Part II.

A. Regulatory Halos

In the eyes of some, the government bestows a kind of blessing upon certain enterprises and inventions when it grants them valuable rights and privileges. These may take the form of patents, trademarks, and FDA authorizations. Yet the government has no such power to confer praise. Its role is merely to regulate and grant, not to endorse or recommend. But many consumers do not know this. They may mistake a patent, a trademark, or FDA clearance for an oblique imprimatur of legitimacy or quality rather than the narrow permissions they really are.

A patent is a peculiar thing. It is not an award bestowed by the USPTO upon the very best inventions or products. It is not a guarantee of quality or safety. It is not even a license to use one's own creation as one pleases. It is, rather, a weapon of defense, a shield against competitors who might seek to use one's invention without permission. To obtain a patent, an inventor must file paperwork with the USPTO explaining the invention, and demonstrating that it is new, useful, and not obvious to someone with relevant knowledge of the technology.[23] It grants the inventor the sole right to say "no" to others.[24] To confuse a patent with a government seal of approval is to miss the essence of what a patent really is.

A patent can also be a lure. For decades, judges have warned of the perils of companies advertising patents for medical inventions, especially drugs. They were concerned that the public would mistake the patent grant for a guarantee of quality or trustworthiness. In two landmark cases, in 1957 and 1963, federal courts expressed their concerns about the potential for such deception and harm.[25] As the District Court of the District of Columbia wrote

23. 35 U.S.C. § 101 ("Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title."); *id.* § 102 (setting forth the requirement of novelty); *id.* § 103 (setting forth the requirement of non-obviousness).

24. A patent provides its owner with only the negative right "to exclude others from making, using, offering for sale, or selling the invention." 35 U.S.C. § 154(a)(1) (2000); *see also, e.g.*, Michael A. Carrier, *Cabining Intellectual Property Through A Property Paradigm*, 54 DUKE L.J. 1, 45 n.181 (2004) ("To be clear, the patent statute only provides the negative right to exclude . . . ."); John F. Duffy, *Rethinking the Prospect Theory of Patents*, 71 U. CHI. L. REV. 439, 456 (2004) ("Unlike mineral claims, which confer the positive rights of possession and enjoyment, patents grant only the negative right of exclusion.").

25. *In re* Citron, 325 F.2d 248, 253 (C.C.P.A. 1963) ("[I]t is against public policy to place the oblique imprimatur of the Government via the patent grant on incredible or misleading unproven assertions in view of the possibility of exploitation of such statements in issued patents by unscrupulous persons."); Isenstead v. Watson, 157 F. Supp. 7, 9 (D.D.C 1957) ("While the granting

in the first of these decisions, "[g]reat care and scrutiny should be particularly taken in connection with applications for medical patents," given that the public may place a moral reliance on the "official imprimatur" of the patent grant.[26]

This concern is alive today in the minds of intellectual property scholars. For example, Ann Bartow has referred to the use of patent claims as a "marketing ploy," akin to a celebrity endorsement.[27] Jonas Anderson has speculated that the technique may be used to deceive the public.[28] Cynthia M. Ho has suggested the issuance of patents covering controversial technologies can be interpreted as a government endorsement.[29] At the same time, Timothy Holbrook has explained that governments may choose to deny patents to eliminate the perception of official endorsement or encouragement.[30] Sean Seymore has similarly explained the potential confusion that arises from a misunderstanding that patents create affirmative rights or constitute a government endorsement.[31] Christopher R. Leslie recently stated that a patentee might advertise its patent to mislead consumers into thinking that a patent represents a government endorsement of the product's effectiveness.[32] These concerns have been based on selected anecdotal references to ads, however, rather than comprehensive studies.[33] As a result, questions remain about whether advertisers really are abusing the patent system, and if so, how widely.

What about trademark registrations? It is helpful to begin with what trademark registration is. The USPTO grants trademark registrations to applicants who meet its criteria of distinctiveness, functionality, and use in commerce.[34] Registration means that the USPTO believes a mark helps to

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of a patent does not legally constitute a certificate that the medicine to which it relates is a good medicine and will cure the disease or successfully make the test which it was intended to do, nevertheless, the granting of such a patent gives a kind of official imprimatur to the medicine in question on which as a moral matter some members of the public are likely to rely.").

26. *Isenstead*, 157 F. Supp. at 9.

27. Bartow, *supra* note 20, at 5.

28. Anderson, *supra* note 14, at 1595.

29. Cynthia M. Ho, *Splicing Morality and Patent Law: Issues Arising from Mixing Mice and Men*, 2 WASH. U. J.L. & POL'Y 247, 253 (2000).

30. Timothy R. Holbrook, *The Expressive Impact of Patents*, 84 WASH. U. L. REV. 573, 577 (2006).

31. Sean B. Seymore, *Atypical Inventions*, 86 NOTRE DAME L. REV. 2057, 2086 n.151 (2011) ("The fear is that some might view the patent grant, albeit improperly, as the government's endorsement of the technology.").

32. Christopher R. Leslie, *Patents of Damocles*, 83 IND. L.J. 133, 144 (2008) ("In many cases, a firm may advertise its patent to convince gullible consumers that a patent represents the government's endorsement or imprimatur that the advertised product is actually effective.").

33. *See, e.g.*, *Using Patents as a Marketing Tool: Good, Bad, and the Ugly*, INVNTREE (Aug. 23, 2011), https://www.invntree.com/blogs/using-patents-marketing-tool-good-bad-and-ugly.

34. *See* 15 U.S.C. § 1051.

identify the source of products or services and that the owners have the right to stop others from using them in a confusing way.[35] The law grants the owners of registered trademarks benefits, too. First, it allows them to use the familiar symbol of the letter "R" enclosed in a circle: ®.[36] Second, registration provides a trademark's owner with a presumption of validity.[37] This means that anyone challenging the mark in court bears the burden of showing that it is invalid. Nowhere in the law of trademarks is there a suggestion, however, that registration connotes a government endorsement of the products that bear the mark.[38]

But simplicity has not quelled the controversy surrounding the meaning of registration for decades. In 1993, a board of trademark judges confessed they had sensed an "undercurrent of concern" in the legal profession.[39] The focus of this concern, the judges explained, was the public's tendency to think the government's decision to register a trademark was an endorsement. They tried to dispel the idea, writing, "issuance of a trademark registration by this Office does not amount to a government endorsement of the quality of the goods to which the mark is applied."[40]

Confusion persisted, however. In the recent case of *Matal v. Tam*,[41] which involved an appeal from a trademark registration that had been rejected because it contained a disparaging term, the government argued that registration is a form of government speech. If registration were granted, the government argued, it would improperly imply the government's approval of the mark's meaning.[42] The Supreme Court ultimately ruled against the government, holding that trademarks were private, not government speech, and that the government did not express any view on the marks it registered. The Court dismissed the government arguments with a casual remark: "[I]t is unlikely that more than a tiny fraction of the public has any idea what federal registration of a trademark means."[43] The Court intended this to mean

35. Registering a trademark confers many benefits, but it is not necessary for defending one's mark under the Lanham Act. *See, e.g.*, 15 U.S.C. § 1125.

36. *Id.* § 1111.

37. *Id.* § 1115.

38. *See also* Rebecca Tushnet, *The First Amendment Walks into A Bar: Trademark Registration and Free Speech*, 92 NOTRE DAME L. REV. 381, 389 (2016) (discussing recent court decisions pertaining to the possible public perception that trademark registration connotes an endorsement of possible interpretations of the mark itself, rather than the underlying goods).

39. *In re* Old Glory Condom Corp., 26 U.S.P.Q.2d 1216, 1220 n.3 (T.T.A.B. 1993).

40. *Id.*

41. 137 S. Ct. 1744 (2017).

42. The government made the same argument in earlier cases involving the disparagement clause. Here the Supreme Court unanimously struck down the disparagement clause of the Lanham Act, which prohibited the registration of trademarks that may disparage persons, institutions, beliefs, or national symbols. *Id.* at 1753.

43. *Id.* at 1759.

that the public was unlikely to notice or read much into the registration symbol (®).[44] The Court's comment, however, could support the opposite view—i.e., that the public is likely to misinterpret trademark registration because it does not know what it means.[45]

FDA approvals mentioned in ads have prompted similar concerns. In part, such concerns might stem from the public's weak understanding of the complex and nuanced process of regulatory approvals that the agency follows.[46] The FDA has the authority to authorize drugs and medical devices that meet its standards, based on rigorous evaluation of their development, testing, and marketing.[47] FDA approval means that a product is safe and effective for its intended use.[48] FDA clearance, meanwhile, means that a product complies with the agency's requirements for marketing.[49] The FDA's authorization is a balance of science, policy, and public interest—not a simple stamp of qualitative approval or commercial superiority.

Nonetheless, scholars are aware of the potential for consumer misunderstandings, though. As Rachel Sachs has noted, "[t]he FDA is highly respected by both the public and experts in the relevant fields, meaning that its approval decisions are both trusted and important to other decision makers within the health care context."[50] Empirical research corroborates this, and shows that the public misunderstands the meaning of FDA authorizations. For example, a recent study by Dartmouth Medical School showed that a

44. *Id.*

45. *See supra* note 2; *see also* Tushnet, *supra* note 38, at 389 (explaining that some people view trademark registration as government speech). A careful literature search at the time of this writing revealed no empirical studies about what the public thinks of trademark registration.

46. *See* Sullivan et al., *supra* note 2; Sarah D. Kowitt et al., *Awareness and Trust of the FDA and CDC: Results from a National Sample of US Adults and Adolescents*, 12 PLOS ONE, May 16, 2017, at 1, https://doi.org/10.1371/journal.pone.0177546 (indicating that the FDA's process and role is not fully understood by the public).

47. 21 U.S.C. § 355 (describing the process for FDA approval of new drugs); *id.* § 360e (describing the process for FDA approval of medical devices); *id.* § 393(b) (providing that the FDA has the authority to make regulations for the efficient enforcement of the Federal Food, Drug, and Cosmetic Act).

48. *Id.* § 355(d) (stating that the FDA shall not approve an application for a new drug unless it finds that the drug is safe and effective for its intended use); *see also id.* § 321(g)(1) (defining a drug as an article "intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease").

49. *Id.* § 360(k) (describing the process for FDA clearance of medical devices); *see also* 21 C.F.R. § 807.92(a) (2021) (explaining that a medical device submitted for FDA clearance must be substantially equivalent to a legally marketed device).

50. Rachel E. Sachs, *Mobile Health Innovation and Interagency Coordination*, 26 ANNALS HEALTH L. 1, 12 (2017); *see also More About Science and Research*, U.S. FOOD & DRUG ADMIN. (Mar. 29, 2018), https://www.fda.gov/science-research/about-science-research-fda/more-about-science-and-research (describing the science and policy considerations involved in the FDA's decision-making process). *See generally* 21 U.S.C. §§ 301–399i (establishing the Federal Food, Drug, and Cosmetic Act and outlining the FDA's authority over the regulation of drugs, medical devices, and cosmetics).

little under forty percent of subjects representing the general consumer population believed that the FDA approves only drugs that are "extremely effective."[51] About twenty-five percent thought that if a drug presented side-effects, the FDA would refuse to approve it.[52] Neither belief is accurate.[53] Discussing this study, Jonathan J. Darrow suggested the FDA may enjoy a "halo effect," leading to consumer confusion that favors sales.[54]

For its part, the FDA seems worried about the potential for consumer confusion as well.[55] The agency's website states that its logo should not be used to suggest endorsement of any private organization, product, or service; regulators periodically send warning letters to companies that reference FDA approval in misleading ways;[56] the agency also tries to educate consumers on the meaning of FDA approval.[57] These efforts corroborate the concern that the public doesn't understand what the FDA's stamp of approval means.

Legal experts are concerned that the public is vulnerable to regulatory halos, the false glimmers of efficacy, safety, and quality that corporations use to lure them. But how far do marketers go to exploit the public's gullibility? To answer that, we must first identify the cracks and loopholes in the legal system that allow for such manipulation.

B. Shortcomings in the Law

The law comes up short in preventing and discouraging companies from conjuring the flag. This Section surveys the legal framework designed to protect consumers from deception and manipulation in advertising. The following paragraphs focus on the Lanham Act, which allows competitors to sue each other for false advertising, and the Federal Trade Commission ("FTC") Act, which authorizes the FTC to regulate unfair and deceptive

51. Lisa M. Schwartz & Steven Woloshin, *Communicating Uncertainties About Prescription Drugs to the Public: A National Randomized Trial*, 171 ARCHIVES INTERNAL MED. 1463, 1465 (2011).

52. *Id.*

53. *Id.*

54. Darrow, *supra* note 22, at 387–89 (discussing the FDA halo). The halo effect is a cognitive bias that makes us judge a person or a product based on one positive trait, and ignore or downplay any negative ones. This topic is discussed in greater detail in Part III.

55. *FDA Name and Logo Policy*, U.S. FOOD & DRUG ADMIN. (Aug. 31, 2023), https://www.fda.gov/about-fda/website-policies/fda-logo-policy ("Unauthorized use of FDA Marks on private sector materials could send a message to the public that the FDA favors or endorses a private sector organization or the organization's activities, products, services, and/or personnel (either overtly or tacitly), which the FDA does not and cannot do.").

56. *Id.*; *see also Warning Letters*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/compliance-actions-and-activities/warning-letters (last visited Jan. 20, 2024) (listing warning letters sent to companies that made false or misleading statements).

57. *Is It Really 'FDA Approved'?*, U.S. FOOD & DRUG ADMIN. (May 10, 2022), https://www.fda.gov/consumers/consumer-updates/it-really-fda-approved.

practices in commerce. The discussion also explores the role of state and federal laws prohibiting the misuse of government endorsements in advertising. These laws share a common goal: to ensure that consumers have access to accurate and reliable information. However, these laws face significant limits, especially from the First Amendment's commercial speech doctrine. This creates opportunities for advertisers to exploit the symbolic power of regulatory approvals.

1. The First Amendment.

In 1976, the Supreme Court declared that the First Amendment protected not only political and artistic expression, but also commercial speech—the kind of speech that sells products and services.[58] Commercial speech, the Court reasoned, is useful to consumers, who need information to make informed choices in the marketplace.[59] But the Court also recognized that commercial speech can be deceptive, misleading, or harmful, and that the government had a legitimate interest in regulating such speech.[60] The decision indicated that the First Amendment does not protect misleading commercial speech. A question lingered, though: How should courts balance the competing interests it had identified where truthful commercial speech is involved?

The answer came four years later, in another landmark case: *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[61] The case involved a challenge to a New York regulation that prohibited electric utility companies from advertising to promote the use of electricity.[62] The Court struck down the regulation.[63] In doing so, it clarified that "for commercial speech to come within th[e] [First Amendment], it at least must concern lawful activity and not be misleading."[64] The Court then established a four-part test to determine when the government could regulate truthful non-misleading commercial speech.[65] The test first considered whether the expression was constitutionally protected, then required that the regulation serve a substantial government interest; that the regulation directly advance

58. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771–72 (1976) ("The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.").

59. *Id.*; *see also* C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 981, 982 (2009) (discussing the informative value of commercial speech to its audience).

60. *Va. State Bd. of Pharmacy*, 425 U.S. at 771.

61. 447 U.S. 557 (1980).

62. *Id.* at 558.

63. *Id.* at 571.

64. *Id.* at 566.

65. *Id.*

that interest; and that the regulation be no more extensive than necessary.[66] The *Central Hudson* test became the standard way that courts assess the constitutionality of laws and regulations that aimed to protect the public from harmful commercial speech.[67]

Virginia State Board and *Central Hudson* provided a clear and well-established rule: False or misleading advertising is entitled to no constitutional protection.[68] The rule seems to express an important value judgment: Even though deceptive commercial speech may confer certain benefits, such as economic gains for sellers, the potential costs of misinforming or misleading consumers outweigh any such gains. This rule highlights the critical importance of truth in advertising and acknowledges the potential harms that can arise from deceptive commercial speech.[69]

These decisions also provide a space for the government to restrict and regulate misleading speech.[70] For example, a federal law prohibits the use of the American flag for advertising purposes.[71] Similarly, federal ethics rules forbid government employees from using their public office to endorse any product, service, or enterprise.[72] Federal and state laws also prohibit false or misleading statements or business names that imply government approval.[73]

66. *Id.*

67. *See* Baker, *supra* note 59, at 983.

68. *See, e.g.*, Fla. Bar v. Went for It, Inc., 515 U.S. 618, 623–24 (1995) ("Under *Central Hudson*, the government may freely regulate commercial speech that concerns unlawful activity or is misleading." (citing *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 563–64)); *see also* Zauderer v. Off. of Disciplinary Couns. of the Sup. Ct. of Ohio, 471 U.S. 626, 638 (1985) (holding that it is "well settled" that "[t]he States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading").

69. *See* Ramsi A. Woodcock, *The Obsolescence of Advertising in the Information Age*, 127 YALE L.J. 2270, 2289 (2018) ("The implication is clearly that courts and enforcers believe that the economic harm that comes from the making of product choices that do not reflect actual preferences, here because consumers have false information about those choices, exceeds any pleasure that the advertising may confer.").

70. *Id.* (noting that the FTC has pursued many actions in the time since these decisions).

71. 4 U.S.C. § 3 (forbidding use of the flag for advertising purposes). It seems that this law has rarely been enforced, though.

72. 5 C.F.R. § 2635.702 (see Subpart G—Misuse of Position; Use of Public Office for Private Gain).

73. *See, e.g.*, 18 U.S.C. § 709 (prohibiting false advertising or misuse of names to indicate federal agency). Most states have enacted laws prohibiting false or misleading statements in ads, including statements that falsely imply government sponsorship or endorsement. These laws typically appear in statutes related to deceptive trade practices or false advertising, such as California's Business and Professions Code Section 17500 (2022) and Texas's Business and Commerce Code Annotated Section 17.46. Some states, like California, have expressly prohibited the use of symbols or language that conveys a misleading impression of government affiliation. *See, e.g.*, CAL. BUS. & PROF. CODE § 17533.6(a) (West 2023) ("[I]t is unlawful for any person, firm, corporation, or association that is a nongovernmental entity to use a seal, emblem, insignia, trade or brand name, or any other term, symbol, or content that reasonably could be interpreted or construed

The common law also recognizes consumer claims for misrepresentations in advertisements.[74]

The legal mechanisms that loom largest in the fight against misleading speech are the Lanham Act and the FTC, which is enabled by the FTC Act.[75] *Virginia State Board* and *Central Hudson* show us something important about these acts: They cannot prevent companies from disseminating non-misleading and truthful information in their advertisements since such speech is shielded by constitutional protections. In this sense, these laws reside at the boundary between the commercial messages the law protects and those it prohibits.[76] As such, they are often involved in lawsuits where speech is not clearly true or false. Half-truths and implications are, of course, what conjuring the flag is all about.

2. The Federal Trade Commission

The Federal Trade Commission is designed to protect consumers from harmful practices and promote competition. The agency is charged with policing false and misleading advertising practices in the marketplace as part of its broader mission to promote fair competition and protect consumers.[77] The FTC Act gives the FTC the ability to investigate complaints, issue orders, levy civil penalties, and seek injunctions against advertisers who make false or misleading statements about their products or services in advertisements.[78]

The FTC has a high hurdle to meet in proving that an advertisement is misleading.[79] To successfully enforce the law against deceptive advertising, the FTC must demonstrate that the representation in question would mislead

as implying any federal, state, or local government . . . connection, approval, or endorsement of any product or service . . . .").

74. *See, e.g.*, Rory Van Loo, *Helping Buyers Beware: The Need for Supervision of Big Retail*, 163 U. PA. L. REV. 1311, 1364–65 (2015) ("Misrepresentation under the common law typically requires that the seller knows of a misrepresentation and intends to misrepresent. This is a high bar that often discouraged consumers from using the doctrine in private suits against sellers—even those who allegedly made a false or misleading statement." (footnote omitted)).

75. *See* 15 U.S.C. §§ 45, 1114(1)(a), 1125(a).

76. *See* Andra Lim, *Limiting NIFLA*, 72 STAN. L. REV. 127, 177–78 (2020) ("The acts can thus be considered a demarcation of the boundary where commercial speech moves from being protected because of the factual information it provides, to being unprotected because it is false or misleading.").

77. 15 U.S.C. § 45(a).

78. *Id.* § 45; FTC v. Colgate-Palmolive Co., 380 U.S. 374, 384 (1965) (discussing the "influential" role the FTC plays in preventing deceptive practices under the act). It is important to note that the FTC is the sole federal agency responsible for regulating advertisements, while other agencies such as the FDA regulate labeling to prevent misleading information.

79. *See infra* Part IV (analyzing the burden of proof in detail and arguing that it should be lessened).

a reasonable consumer and that such deception is material, meaning it is likely to impact the consumer's purchasing decision.[80]

To meet the materiality portion of the standard, the FTC has to prove how consumers interpret the ads, what claims are made and what evidence supports them, and whether there are any material connections between advertisers and endorsers. This demonstration can be made through a combination of consumer perception studies, expert testimony, surveys, consumer complaints, and industry custom and practice.

The FTC also has limited resources and cannot pursue every case of false or deceptive advertising.[81] The FTC faces challenges in detecting deceptive ads across different platforms and media, especially online where social media influencers and fake reviews can blur the line between authentic content and advertising.[82] The FTC has to deal with new and emerging forms of advertising, such as online, mobile, social media, influencer marketing, etc., that may pose different challenges to consumer protection.[83]

The FTC has published guidelines on endorsements in advertising, but they are of limited use in addressing the particular issue at hand.[84] Specifically, the FTC's Endorsement Guides make no explicit reference to implied government endorsements.[85] However, the Guides' definition of "endorsement" suggests that federal regulatory agencies may fall under the umbrella of the guidelines. In light of this, the most relevant rule would be that "[e]ndorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser."[86] A truthful statement that the FDA has

80. POM Wonderful, LLC v. FTC, 777 F.3d 478, 490–91 (D.C. Cir. 2015).

81. *See, e.g.*, Chris Jay Hoofnagle et al., *The FTC Can Rise to the Privacy Challenge, but Not Without Help from Congress*, BROOKINGS INST. (Aug. 8, 2019), https://www.brookings.edu/articles/the-ftc-can-rise-to-the-privacy-challenge-but-not-without-help-from-congress ("Resources are the FTC's greatest constraint. It is a small agency charged with a broad mission in competition and consumer protection."); *see also False Advertising Under Consumer Protection Laws*, JUSTIA, https://www.justia.com/consumer/deceptive-practices-and-fraud/false-advertising/ (last visited Jan. 20, 2024).

82. *FTC Puts Hundreds of Businesses on Notice About Fake Reviews and Other Misleading Endorsements*, FED. TRADE COMM'N (Oct. 13, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-puts-hundreds-businesses-notice-about-fake-reviews-other-misleading-endorsements.

83. *See* Tom Hooker, *Staying on the Legal Side: Misleading Ads & Regulations Around the Globe*, PROPELLER BLOG (May 18, 2018), https://propellerads.com/blog/adv-staying-on-the-legal-side-misleading-ads-regulations-around-the-globe/; *Complaints About Broadcast Advertising*, FED. COMMC'NS COMM'N (Jan. 12, 2021), https://www.fcc.gov/consumers/guides/complaints-about-broadcast-advertising.

84. Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255 (2022).

85. *Id.*

86. *Id.* § 255.1(a).

approved a product, or the patent office has approved a patent, would not run afoul of this rule.

An important note about prescription drugs: Congress has given the FDA authority to oversee misleading advertising of prescription drugs, while the FTC has authority over non-prescription or over-the-counter drugs.[87] The FDA has created a detailed set of required disclosures for prescription drug ads, including a complete disclosure of a drug's potential risks.[88] This is why television ads for prescription drugs are typically accompanied by recitals of risks while ads for over-the-counter products are not.

3. The Lanham Act

Turning to civil causes of action, the Lanham Act serves as the primary federal law for challenging false or misleading advertising and trademarks in the United States.[89] To succeed in a false advertising claim under the Lanham Act, a plaintiff must show not only that an ad is false, either in its literal wording or in its implied meaning, but also that it matters—that it sways the choices of consumers. And in cases where an ad is technically true but still misleading, the plaintiff must produce more evidence, usually a survey of consumers, to demonstrate that a significant number of them have fallen for the deception.[90]

As with the FTC, a court deciding if an advertisement is false or misleading under the Lanham Act must focus on consumer perceptions. The case *LG Electronics U.S.A. v. Whirlpool Corp*[91] illustrates this point. There, LG Electronics challenged Whirlpool's "steam dryer" product under the Lanham Act because it did not actually use steam.[92] In its defense, Whirlpool

87. *Basics of Drug Ads*, U.S. FOOD & DRUG ADMIN. (June 19, 2015), https://www.fda.gov/drugs/prescription-drug-advertising/basics-drug-ads ("[W]hile the FDA oversees ads for prescription drugs, the Federal Trade Commission (FTC) oversees ads for over-the-counter (non-prescription) drugs").

88. *Id.*

89. False and misleading advertising is governed by section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and section 43(a) of the Lanham Act, 15 U.S.C. § 1125. Under the Federal Trade Commission Act (FTC ACT), "an advertisement is deceptive . . . if it is likely to mislead consumers, acting reasonably under the circumstances, in a material respect." Kraft, Inc. v. FTC, 970 F.2d 311, 314 (7th Cir. 1992); Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 608 (2014).

90. Rebecca Tushnet, *Running the Gamut from A to B: Federal Trademark and False Advertising Law*, 159 U. PA. L. REV. 1305, 1337 (2011) ("[I]n cases of implicit falsity, a false advertising plaintiff must prove consumer deception with consumer perception evidence, which almost necessarily means an expensive, hotly contested survey."); *see also id.* at 1330 ("[C]elebrity plaintiffs alleging a false implicit endorsement need not show that consumers perceive an endorsement. By contrast, plaintiffs alleging any other false implicit message must show evidence demonstrating that consumers received that message.").

91. 661 F. Supp. 2d 940 (N.D. Ill. 2009).

92. *Id.* at 947.

argued its dryers met certain dictionary and patent definitions of "steam." But the court denied Whirlpool's motion for summary judgment based on evidence of consumer perceptions. Specifically, a consumer survey showed sixty-five percent of respondents believed Whirlpool's dryers used steam.[93] The case serves as a helpful example of the importance of consumer perceptions in Lanham Act false advertising claims.[94]

In the case of *Lexmark International Inc. v. Static Control Components Inc.*,[95] the Supreme Court explained what a plaintiff must show to bring a false advertising claim under the Lanham Act. Lexmark, a printer company, had argued that Static Control, a parts supplier, did not have standing to bring a Lanham Act claim for false advertising.[96] To analyze Lexmark's argument, the Court applied the "zone-of-interests" test.[97] The test requires a plaintiff to "allege an injury to a commercial interest in reputation or sales" that is "proximately caused by the defendant's misrepresentations."[98] The Court rejected other proposed tests, including the "reasonable interest" test used by the lower court. The decision clarified that a plaintiff must show harm to its commercial interests flowing directly from the defendant's false advertising.[99]

The Lanham Act also has a bearing on another channel for advertising: trademark registrations. Trademarks are used to identify the source of a product, but the "primary meaning" of a mark may sometimes serve an advertising function by telling the consumer something positive about the mark. If that information describes the product rather than evokes good thoughts about it, however, the mark's owner needs to show that it actually performs a trademark function as a source identifier.

The Lanham Act forbids the registration of trademarks that might mislead the public into thinking that a product or service had some official connection with the government.[100] But the law's interpretation of this rule rests on the whims of trademark examiners and the Trademark Trial and Appeal Board, a panel of experts who rule on the validity of trademark

93. The court also noted competing expert definitions of "steam," which prevented finding literal falsity as a matter of law. *Id.*

94. *Id.* at 953–54; *see also* Ayres & Schwartz, *supra* note 89, at 591–92 (discussing the case).

95. 572 U.S. 118 (2014).

96. *Id.* at 125–26.

97. *Id.* at 127.

98. *Id.* at 131–32.

99. *Id.* at 133, 137.

100. 15 U.S.C. § 1052 (barring registration for any mark that "[c]onsists of or comprises the flag or coat of arms or other insignia of the United States, or of any State or municipality, or of any foreign nation, or any simulation thereof"); *see also* Iancu v. Brunetti, 139 S. Ct. 2294 (2019) (briefly discussing the bar on registration of national symbols in the course of holding as unconstitutional the Lanham Act's ban on registration of marks that disparage).

applications.[101] As a result, some marks sailed through without a hitch, like "U.S. HEALTH CLUB," a brand of vitamins that claimed no special endorsement from Uncle Sam.[102] Others ran into trouble, like "NATIONAL COLLECTION & CREDIT CONTROL,"[103] a debt-collecting agency that sported an American eagle on a map of the country, as if it were an arm of the Treasury Department.[104] The Board also had to deal with more subtle cases, such as those involving names or images of federal agencies or institutions. Sometimes they rejected them, as in the case of "WESTPOINT," a gun manufacturer that tried to capitalize on the prestige of the famous military academy.[105] Sometimes they allowed them, as in the case of a mark that featured a picture of the Capitol building, which the Board deemed too generic to imply any official endorsement.[106] And sometimes they split the difference, as in the case of "USMC," a maker of orthopedic devices that used the same initials as the United States Marine Corps, but was not barred because the Board thought that consumers would not confuse the two.[107]

The law provides a variety of tools to crack down on advertisements that deceive the public. But deception is a slippery concept, and the line between misleading and legitimate commercial persuasion is blurry. Those who seek to challenge advertisers face daunting legal hurdles: They must prove that they had a right to sue and that consumers are truly confused by the ads. Many fail. Many more likely never try. And so, advertisers continue their game, unchecked. But how widespread are these advertising practices? This question concerns scholars, regulators, and the public. And it demands an answer.

C. Addressing a Gap in Existing Literature

The literature on implied government endorsements in advertising has a significant gap. While scholars have analyzed consumer vulnerabilities, such as the public's tendency to misunderstand patent claims, there have been no

101. *Trademark Trial and Appeal Board Manual of Procedure*, U.S. PATENT & TRADEMARK OFF. (June 2023), https://tbmp.uspto.gov/RDMS/TBMP/current.

102. *In re* Horwitt, 125 U.S.P.Q. 145, 146 (T.T.A.B. 1960).

103. *In re* Nat'l Collection & Credit Control, Inc., 152 U.S.P.Q. 200, 201 (T.T.A.B. 1966); *see also In re* Nat'l Intel. Acad., 190 U.S.P.Q. 570, 572 (T.T.A.B. 1976) (upholding the Examiner's refusal to register "NATIONAL INTELLIGENCE ACADEMY" as a service mark for educational services for law enforcement officers).

104. *In re* Nat'l Collection & Credit Control, Inc., 152 U.S.P.Q. at 201; *see* 18 U.S.C. § 712 (forbidding the use of "national," "Federal," and "United States" and other symbols or insignia in connection with debt-collection services).

105. *In re* Cotter & Co., 228 U.S.P.Q. 202, 205 (T.T.A.B. 1985).

106. Heroes, Inc. v. Boomer Esiason Hero's Found., Inc., 43 U.S.P.Q.2d 1193, 1197 (D.D.C. 1997), *amended*, No. CIV.A. 96-1260, 1997 WL 350097 (D.D.C. June 16, 1997) (a composite mark consisting of the word HEROES on a shield design with a picture of the U.S. capitol building).

107. U.S. Navy v. U.S. Mfg. Co., 2 U.S.P.Q.2d 1254, 1259–60 (T.T.A.B. 1987).

comprehensive studies of the ads themselves. This is an important omission because it concerns how widespread the practice is, and what sorts of government approvals it relates to most.

To fill this gap, we need to study the advertisements that use this technique, and not just rely on hypothetical examples or anecdotal evidence. This can help us gain a better understanding of the nature and extent of the problem, and how it varies across different industry settings. And an examination of advertising practices can also clarify the potential harms of implied government endorsements. This can lead to more effective solutions.

The following Part presents the first systematic study of implied government endorsements in advertising, based on a large and diverse sample of advertisements. The study addresses two main questions: (1) What kinds of terms do advertisers use to imply government endorsements? (2) What industries or product categories or commercial contexts are most prone to this practice? This study helps bring the harm of conjuring the flag into sharp relief, and guide the recommendations presented later in this Article.

II. A STUDY OF IMPLIED GOVERNMENT ENDORSEMENTS

This Part presents an original study of advertising practices that mention government approvals. The purpose of the study is to fill the gap in research identified in Part I of the paper—namely, the lack of evidence about how widely, and in what circumstances, advertisers "conjure the flag." The study examines three types of advertising that imply government endorsement: patents, FDA authorizations, and trademark registrations. The study's findings reveal new patterns and trends in the use of implied government endorsements and shed light on the potential effects and implications of such practices.

A. Methodology

To gain an understanding of where and how advertisements invoke government authority, this Article scoured a variety of sources and databases. The approach was qualitative, focusing more on gaining an in-depth contextual understanding of ads that conjure the flag, rather than statistical generalizability. The following paragraphs explain the process by which ads were identified and analyzed.

The most novel aspect of this study lies in its use of Twitter as a source of advertising data. At the time this study was carried out, Twitter was a significant player in the advertising landscape, with a large and diverse user base that attracted many well-known businesses. As of October 2021, Twitter

had an estimated 211 million daily active users.[108] At that time, some of the world's most prominent brands, including Coca-Cola, McDonald's, and Nike promoted their brands on the platform.[109] In short, Twitter served as an essential tool for advertising at the time of this study. As such, the site offered a meaningful window into contemporary advertising practices.

Identifying and analyzing advertisements posted to the platform began with a custom script that collected all tweets over specific time periods that contained certain keywords. These included references to patents and FDA approval, along with a library of potential keywords suggestive of advertising (e.g., "click here," "your journey," "on sale," etc.). The resulting data was cleaned of non-advertising content and saved in a file format that allowed for easy analysis.[110] Classification of the products in the Tweets was performed by a commercial machine-learning tool that was trained on sample data. The Twitter data spans the years 2020 through 2022.

To supplement the ads from Twitter, the study queried databases of print and newspaper ads. Finally, the portion of the study that focused on trademarks utilized the U.S. Patent and Trademark Office's website. These manual portions of the study's methodology included a combination of keyword searches and manual screening to identify relevant advertisements. The keywords used included terms such as "patented formula," "patented blend," "FDA cleared," "FDA registered," "authorized by the," and "official supplier."

The study excluded advertisements that clearly and explicitly stated that the product or service was not endorsed or approved by the government, or that the patent or FDA authorization was only for a specific feature or component of the product or service. The study also excluded advertisements for services that related to the authorizations themselves, such as an intellectual property advisory service that registered the name "PAINLESS PATENTING."[111]

After identifying relevant advertisements, the study categorized them into three types based on the kind of implied government endorsement:

108. *Twitter Announces Third Quarter 2021 Results*, PR NEWSWIRE (Oct. 26, 2021), https://www.prnewswire.com/news-releases/twitter-announces-third-quarter-2021-results-301409024.html (citing 211 million users, up from 206 million in the prior quarter).

109. Ads from these sellers appeared in individual users' feeds, and in their official accounts at https://twitter.com/CocaCola, https://twitter.com/McDonalds, and https://twitter.com/Nike.

110. Tweets that were not advertisements that contained the keywords were identified using a script that included keywords indicative of non-advertising content. These keywords were selected based on a manual review of the tweets, and included language suggesting opinion, negative sentiments, and the like. These terms included "lied," "hate," "illegal," "awful," "shameful," and the like. The data was stored to files in the "comma-separated value" (CSV) format, which is widely used for data analysis and viewable in spreadsheet apps such as Microsoft Excel.

111. PAINLESS PATENTING, Registration No. 6,499,996.

patents, FDA authorizations, and other forms of implied government endorsement. The study analyzed the advertisements for each type of government endorsement and recorded various data and information, including the industry, product or service, claim or representation, a description, source, and potential implications. The study also compared and contrasted the advertisements across the three types of government endorsements, identifying patterns and trends. The results and findings of the analysis are presented in the following sections.

While the methodology used in this study provides a large and representative set of advertisements that invoke government authority, there are several limitations to be considered. First, the study's reliance on keyword searches and screening techniques—both manual and automated—may have resulted in some relevant advertisements being excluded or overlooked. Second, the study's reliance on Twitter's archive of historical tweets may have introduced selection bias, as the demographics of Twitter users may not be representative of the broader population over the selected time period. Furthermore, the study's focus on ads that claim or imply patents and FDA authorizations may have missed other forms of implied government endorsement. Lastly, the study's analysis does not capture long-term trends or changes in advertising practices over time because it focuses on narrow time periods.

B. Advertising Patents to Suggest Safety or Efficacy

Advertisers often use patent claims, such as "Patented Technology," in their advertising campaigns to persuade consumers that their products are of high quality, effective, and safe. The study identified and analyzed a sample of 649 unique ads referencing patent ownership. None provided patent numbers or identified the nature of the invention, making it difficult for consumers to verify or evaluate the patent claims.

This study identified patent claims most often in ads for products that are ingested or applied to the body by consumers. As the table shows, patents are mentioned most frequently in ads for supplements, cleansers, skincare products, insect sprays, toothpastes, and hair products.

Table 1: Patent References in Ads by Product Type (2021–2023)

Product Type	Number of Ads
Supplements	386
Skincare	85
Cleansers	85
Hair Products	56
Insect Repellants	15
Toothpaste and Dental Care	4
Other	18
Total	631

These products are alike in important ways. None are subject to FDA approvals that are as stringent as those that apply to drugs or medical devices. Supplements are not subject to premarket approval by the FDA.[112] Cosmetics and skincare products, likewise, are subject to minimal standards and do not require FDA approval before being sold.[113] Because they are ingested or possibly absorbed into the body, consumers may be especially responsive to patents as a signal conveying that the products are effective, trustworthy, or safe.

To examine the potential harms of these patent ads in detail, it is helpful to examine specific examples. These examples provide a descriptive look at the specific ways these advertisements can be misleading.

Example 1: Chronolux[114]
Industry: Cosmetics

112. The FTC and FDA share responsibility for regulating the marketing of dietary supplements, and neither agency requires pre-market approval for claims made on ads or product labels. *See Health Products Compliance Guidance*, FED. TRADE COMM'N (Jan. 8, 2023), https://www.ftc.gov/business-guidance/resources/health-products-compliance-guidance ("The FTC Act doesn't require pre-market approval of health claims in the advertising of foods, dietary supplements, or other products. . . . Under FDA labeling law, dietary supplement marketers must notify the FDA of structure/function claims and other statements of nutritional support that appear in labeling, but don't need to seek FDA pre-approval."); *see also Dietary Supplements*, U.S. FOOD & DRUG ADMIN. (Mar. 6, 2023), https://www.fda.gov/food/dietary-supplements.

113. *Small Businesses & Homemade Cosmetics: Fact Sheet*, U.S. FOOD & DRUG ADMIN. (Sept. 29, 2023), https://www.fda.gov/cosmetics/resources-industry-cosmetics/small-businesses-homemade-cosmetics-fact-sheet#1.

114. *Advanced Night Repair Serum Synchronized Multi-Recovery Complex*, ESTÉE LAUDER, https://www.esteelauder.com/product/689/77491/product-catalog/skincare/repair-serum/advanced-night-repair-serum/synchronized-multi-recovery-complex?size=1.7_oz (last visited Jan. 21, 2024); *Advanced Night Repair Serum Travel Size Synchronized Multi-Recovery Complex*, ESTÉE LAUDER, https://www.esteelauder.com/product/689/79752/product-catalog/skincare/repair-serum/advanced-night-repair-serum-travel-size/synchronized-multi-recovery-complex (last visited Jan. 21, 2024).

Product: Advanced Night Repair Serum

Reference: "Patented until" claim

Description: The product is advertised on the manufacturer's website and through other online channels.[115] Contains the following language: "Experience the one, the only—the most comprehensive Advanced Night Repair serum ever. Patented until 2033." Powered by Chronolux™ Power Signal Technology.

Visual: Photo of the product against a white background.

Example 2: EarWax MD[116]

Industry: Grooming / Personal Care

Product: EarWax MD

Reference: "Patented Formula" claim

Description: Ad appearing on social media and advertised on manufacturer's website and through other online channels. "EARWAX MD's patented formula is safe, effective and clinically proven to dissolve earwax in a [sic] quick as 15 minutes. #eosera #earwax #earclean #patented."

Visual: Photo of the product against a white background. Product packing prominently presents the word "Patented."

Example 3: ProBiora[117]

Industry: Supplements

Product: Probiotics

Reference: "Patented Blend" claim

Description: Product advertised on the manufacturer's website and through other online channels. Contains language including, "[t]he [p]roof is in the [p]atent." and "Say goodbye to bad breath with our patented blend of oral care products."

Visual: Photos of product containers and satisfied users.

115. *See e.g.*, *An Iconic Night Repair Formula Experiences Another Breakthrough*, STAR (July 29, 2020), https://www.thestar.com.my/lifestyle/style/2020/07/29/an-iconic-night-repair-formula-experiences-another-breakthrough.

116. Eosera Inc. (@EoseraInc), TWITTER (Oct. 2, 2020, 11:00 AM), https://twitter.com/EoseraInc/status/1312044681551917058.

117. *The Proof Is in the Patent – The Science of Probiora*, PROBIORA HEALTH (Dec. 5, 2022), https://web.archive.org/web/20221205205503/https://probiorahealth.com/patented-formula/. The language contained within this advertisement has changed since this study was completed. *See* Patented Formula, PROBIORA HEALTH, https://probiorahealth.com/patented-formula/ (last visited Jan. 21, 2024).

Example 4: Whole Leaf Aloe Vera Juice[118]
Industry: Supplements
Product: Whole Leaf Aloe Vera Juice
Reference: "Patented" claim
Description: Product advertised on manufacturer's website and at retailers. Contains language including, "[o]ur patented formula may help and promote: Digestive Health[,] Skin Hydration & Moisturizing[,] Elimination of Harmful Free Radicals[,] Immunoregulation & Neuroprotection."
Visual: Photos of product shows the words, "Patented Formula" followed by "Guaranteed."

Comparing these four ads reveals some interesting similarities among them. They all use the word "patent" or "patented" to appeal to consumers' sense of authority, credibility, and novelty. They all also make claims about their products' benefits without providing much evidence. The first ad uses the word "patented" to suggest that the product has some scientific or legal merit, but patents do not necessarily guarantee quality or effectiveness. The statement also does not disclose what the patent covers or how it relates to the product's benefits. In the second ad, the use of "patented" again implies some kind of superiority or exclusivity without explaining what it means. The third ad, which states "[t]he [p]roof is in the [p]atent," relies on the word again "patent" as a form of "proof," which is fallacious and irrelevant. The patent does not prove anything about the product's efficacy or safety; it only shows that someone has claimed ownership of an invention.

Why do patents appear so frequently in ads for cosmetics, supplements, and personal care products? One reason might be that consumers lack reliable information from third-party sources about these products. Unlike drugs or medical devices, which undergo rigorous testing and evaluation by regulatory agencies, cosmetics, supplements, and personal care products are only lightly regulated. This means that consumers have to rely on the claims and promises made by the manufacturers themselves. Patents might help boost the credibility of these claims by suggesting that the products are based on scientific research and innovation.

Additionally, because these products are ingested or may be otherwise absorbed into the body, consumers may seek extra reassurance. Patents may help provide that sense of confidence by implying that these products have been tested and proven in some way.

118. *Whole Leaf Aloe Power - Potent Unflavored Aloe Vera Juice with Highest Acemannan, Guaranteed. Patented Formula, Water-Free for Ultimate Purity*, WHOLE LEAF ALOE, https://wholeleafaloe.com/products/unflavored-aloe-vera-juice (last visited Jan. 21, 2024).

Relatedly, there is an absence of government regulation that might provide such reassurance. The FDA does not approve or review these types of products before they enter the market. The FDA intervenes only if there is evidence of safety problems or false advertising after the fact. Patents can help fill this regulatory gap by creating a vague perception of oversight and accountability. Consumers may assume that if a product has been patented, it means that it has undergone rigorous testing and evaluation by experts. They may also think that patents imply novelty and innovation, which can be attractive features in a competitive market.

However, relying on patents as a proxy for quality and safety can be misleading and potentially harmful. Patents do not guarantee that a product is safe or effective for its intended use. They only indicate that the invention meets the criteria of novelty, non-obviousness, and usefulness.[119] Patents do not require any evidence of clinical trials or regulatory approval. In the end, these ads appear to be patently misleading.

C. Selling the FDA

Another strategy that companies use to persuade consumers to buy their products is to refer to the FDA's approval or authorization in their advertising campaigns. By doing so, they aim to create an impression that their products are safe, reliable, or superior to others on the market. However, not all FDA authorizations are equally meaningful or informative, and some companies may exploit consumers' lack of knowledge or understanding of the FDA's regulatory process to make misleading claims.

After narrowing the collection set to find relevant ads, the study analyzed a sample of 149 ads touting FDA approval, clearance, or registration. These included 124 ads that appeared on Twitter in the latter half of the year 2022, supplemented with 25 print ads appearing in magazines between the years 2000 and 2014. Most ads used the agency's name as a slogan, featuring it prominently in print and rarely mentioning other pertinent information, such as the uses for which the FDA approved the product, or related risks. The table below shows the most common product types from this collection.

119. *See supra* Section I.A.

Table 2: FDA References in Ads by Industry (2022)

Product Type	**Number of Ads**
Supplement	25
Skin Care	16
Weight Loss	10
Hair	12
Drugs to Improve Cognition	8

The following are a few examples of advertisements that refer to FDA authorization to promote their products. All were typical in their omission of additional information about the approvals or clearances that would help consumers understand what these terms mean. Another common feature is that the reference to the FDA is often set off from the main body of the ad with eye-catching typefaces and colors. It appears like a slogan. Stating that a product is FDA-approved means that the agency has decided that the benefits of the product outweigh the known risks for the intended use, based on the scientific evidence submitted by the manufacturer. This does not mean that the product is safe or effective for any other use, or that it has no side effects or complications.[120] It also applies to drugs and medical devices only.

Example 5: Botox[121]
Industry: Cosmetics
Product: Botox Cosmetic
Reference: Safety reference
Description: A print advertisement for Botox Cosmetic, a drug that claims to reduce the appearance of frown lines, features a heading titled "Is it safe?" followed by the statement, "BOTOX® . . . is now FDA-approved as BOTOX® Cosmetic for the temporary treatment of frown lines in people aged 18 to 65." The advertisement does not mention that the product has serious risks and warnings, such as the possibility of spreading to other parts of the body and causing botulism-like symptoms, or that the product is not approved for any other cosmetic or medical use.
Visual: Photo of a couple

120. *See supra* Part I.
121. *Advertisement for BOTOX Cosmetic*, LADIES' HOME JOURNAL, Sept. 2003, at 8.

Example 6: Semaglutide[122]
Industry: Diabetes Care
Product: Continuous Glucose Monitoring and Medication
Reference: General promotion
Description: An online ad featuring the text, "The best combination for weight loss and improved health in 2023: Continuous Glucose Monitoring with a low carb diet, and the new FDA-approved weight loss medication Wegovy (available as compounded generic semaglutide)."
Visual: Photo of product

Example 7: Excedrin [123]
Industry: Over-the-counter
Product: Excedrin
Reference: FDA-approved
Description: An advertisement for Excedrin, a drug that claims to relieve headaches, displays the statement "NOW FDA APPROVED" in all caps and in large font size. The use of all-caps and large font size emphasizes the FDA approval claim, making it the focal point of the advertisement. This implies that the FDA's approval of Excedrin is an endorsement of the product's overall quality and safety, leading consumers to believe that it is a superior product compared to others on the market. However, this is not the case, as the FDA's approval only pertains to the specific use for which the product was submitted and tested, and does not guarantee overall safety or efficacy. The advertisement does not mention that the product has potential side effects, such as stomach bleeding, liver damage, allergic reactions, or that the product is not approved for any other type of pain relief.
Visual: Photo of the product container

These examples illustrate how companies use the FDA's approval or authorization as a marketing tool, rather than as a source of reliable and accurate information for consumers. By focusing solely on the fact that the product is FDA-approved, for instance, the Botox advertisement implies that the FDA has endorsed the product's safety and efficacy, when in fact the FDA's approval only pertains to the specific use for which the product was submitted and tested. This marketing tactic is designed to create a sense of trust and reliability in the product, and to encourage consumers to overlook the potential risks associated with its use. By omitting important safety information from the advertisement, the product's manufacturer is

122. Paul Kolodzik, MD, FACEP, FASAM, (@drkolomd), TWITTER (Jan 4, 2023, 1:30 PM), https://twitter.com/drkolomd/status/1610705238092091393.

123. *See Excedrin Migraine*, *supra* note 1.

prioritizing marketing over consumer safety. Similarly, the Excedrin ad makes FDA approval the focal point of the ad. By emphasizing the FDA approval claim in this way, the advertisement implies that Excedrin is a superior product compared to others on the market. This is surely a marketing tactic designed to increase sales and market share, as it leaves out other pertinent information such as potential side effects. Examples like this show how FDA approval, on its own, may result in consumers making uninformed or inappropriate decisions about their health and well-being and expose them to unnecessary or avoidable risks and harms.

D. Registering Trademarks Including Regulatory References

Trademarks are words, symbols, or designs that identify the source and quality of a product or service.[124] They are intended to help consumers distinguish between different brands and avoid confusion or deception. However, some trademarks may also imply or suggest that the product or service has been endorsed, approved, or certified by a government agency or authority. This study revealed that the USPTO has registered many marks implying government endorsement. Many of these marks reference issued and pending patents, FDA approval, and other government agencies that provide certification and grants such as the USDA.[125]

The study uncovered 592 trademarks that referred to patents. These marks spanned a variety of products and services, including aprons,[126] lift chairs,[127] jeans,[128] and cosmetics.[129] The industry where these trademarks

124. *See supra* Part I.

125. The study excluded marks that sell services that help consumers with the federal approval mentioned in the mark, such as patent litigation services and FDA approval guidance.

126. THE MOST ADVANCED HOLLOW-CORE PATENTED TECHNOLOGY, Registration No. 87,469,427.

127. WE PATENTED COMFORT, Registration No. 87,943,446.

128. THIS IS A PAIR OF LEVI'S THEY ARE THE ORIGINAL JEANS AND HAVE A REPUTATION FOR DURABILITY KNOWN THE WORLD OVER. ONLY SELECTED MATERIALS HAVE BEEN USED IN THEIR MANUFACTURE. EVERY PAIR SATISFACTION GUARANTEED FOR OVER 140 YEARS OUR CELEBRATED AND ORIGINAL XX DENIM OVERALLS HAVE BEEN BEFORE THE PUBLIC. EXCLUSIVE XX SPECIAL TOP WEIGHT ALL COTTON DENIM AND SEWED WITH THE STRONGEST THREAD. WE SHALL THANK YOU TO CAREFULLY EXAMINE THE SEWING, FINISH & FIT CAUTION: SEE THAT THIS PAIR BEARS THE QUALITY NUMBER WHICH IS XX AND ALSO OUR TRADE MARK BY PULLING THE STAPLE THIS TICKET CAN BE REMOVED LEVI STRAUSS + CO. GRAND SILVER MEDAL AWARDED BY MECHANICS INSTITUTE SILVER MEDAL AWARDED BY CAL. STATE FAIR LEVI STRAUSS & CO. SAN FRANCISCO CAL. ORIGINAL RIVETED QUALITY CLOTHING PATENTED MAY 20 1873 TRADE MARK, Registration No. 86,199,622.

129. RAPID HEAL INNOVATIVE ACCELERATED HEALING THROUGH PATENTED CELLULAR TRANSPORT, NANO-SCIENCE AND BIOTECHNOLOGY, Registration No. 77,023,258.

appeared most was the medical device industry, with 121 marks. Some examples follow:

Example 8: PGX DAILY SOFTGEL ULTRA MATRIX SOFTGELS750 MG · 120 SOFTGELS PGX PATENT PENDING

Registration: 4222096

Product: Dietary Supplements

Reference: "Patent Pending" claim

Description: The mark was registered by a supplement maker in 2012 and refers to a pending patent application. However, the mark does not provide any information or evidence about the patent, such as the patent number, the patent date, or the patent owner. Moreover, the mark does not tell consumers about what invention the patent relates to.

Example 9: PATENTED BLEND TO HELP BALANCE CHOLESTEROL

Registration: 2943251

Product: Cheese and cooking sprays

Reference: "Patented" claim

Description: The mark claimed a patented invention would help to reduce consumers' cholesterol. However, the mark does not provide any information about the patent, such as the patent number, the patent date, or the patent owner. Moreover, the mark does not convey any information to support the underlying health claim.

It is difficult to know much about the patents or patent applications these trademarks relate to, as nearly all of them refer to patent ownership or patent applications obliquely. For instance, one mark was "WE PATENTED COMFORT"[130] for mattresses and pillows, and another was "PATENTED FAST DISSOLVING FORMULA" for dietary supplements.[131] With some of these marks, though, it is easy to see problems. Some of these marks appear to refer to expired patents or non-existent patent applications. For instance, the mark "PATENTED MAY 20 1873" for aprons refers to a patent from the late nineteenth century that has long expired.[132] A mark containing the words "PATENTED INGREDIENT"[133] for cosmetics was registered in 2023, but there is no way to tell what patent, if any, this mark relates to. A mark

130. WE PATENTED COMFORT, Registration No. 87,943,446.

131. PATENTED FAST DISSOLVING FORMULA, Registration No. 86,856,587.

132. PATENTED MAY 20 1873, Registration No. 97,316,082.

133. AD RESYL PATENTED INGREDIENT NATURAL ORIGIN, Registration No. 6,970,468.

containing the term "PATENT PENDING" for lidocaine patches was registered in 2017, but there is no patent associated with the mark's owner.[134]

Another type of trademark that implies government endorsement is the use of terms that reference the FDA. The study found seventy-eight trademarks that referred to FDA approval or related terms. Some examples include "FDA APPROVED MEDICAL SUPPLIES"[135] for medical devices, and "FDA REGISTERED" as part of a word mark for dietary supplements.[136] The industry where these trademarks appeared most was the dietary supplement industry, with thirty-two marks.

Many of these marks omit important information. None of the marks reflect the actual status or level of FDA oversight of the product. For example, the mark "FDA APPROVED" for medical devices claims to have "FDA approved" products that "provide pain relief and improve mobility."[137] However, the mark does not provide any evidence or support for the FDA approval, nor does it reference any source or authority. The mark "FDA REGISTERED" for dietary supplements implies that the product has been evaluated and approved by the FDA, but in reality, dietary supplements are not required to be registered with the FDA, nor are they subject to premarket approval or testing.[138]

III. IMPLICATIONS

Conjuring the flag is pervasive in advertising. It can deceive consumers, distort markets, stifle innovation, and burden regulators. Each of these harms is examined in detail in the following sections.

A. Consumer Harms

The study illustrates how some advertisers exploit the symbolic power of regulation to potentially manipulate consumers. By showing that their products or services have official approvals, they seek to create a baseless

134. FROM THE MAKERS OF BLUE-EMU LIDOCARE 4% LIDOCAINE PAIN RELIEF PATCH ARM, NECK & LEG PATENT PENDING PRESSURE ADHESIVE PATCH PATCH SIZE 1.25" X 6" MADE IN THE USA ULTRA-FLEXIBLE ODOR-FREE FOR THE TEMPORARY RELIEF OF PAIN 6 PATCHES 2 PATCHES PER POUCH, Registration No. 5,288,896.

135. FAMS FDA APPROVED MEDICAL SUPPLIES, Registration No. 90,138,841.

136. MOR ESSENTIALS ORGANIC BEAUTEA & BRAINS HAIR SKIN MIND BODY MEDICINAL PLANT THERAPY BRAIN & FOCUS SKIN REVITALISER NATURAL ENERGY USDA ORGANIC GOOD MANUFACTURING PRACTICE QUALITY ASSURED SOURCED FROM A GMP CERTIFIED FACILITY MANUFACTURED IN A FDA REGISTERED FACILITY THAT CONFORMS TO GMP STANDARDS 100% VEGAN DIETARY SUPPLEMENT 48 SERVINGS NET WT: 4 OZ (113 G), Registration No. 90,135,587.

137. *See supra* note 135.

138. *See supra* note 136.

sense of trust and credibility. Consumers susceptible to these cues may end up paying more than they should, ignoring potential dangers, or misunderstanding the actual benefits of the products and services.[139] These practices not only harm individuals but distort the market and stifle innovation.

Advertising can profoundly affect consumer preferences.[140] It shapes how we see the world, what we desire, and how we feel. It can also sway us to act in ways that are not in our best interests.[141] Advertising does this by exploiting our cognitive biases—mental shortcuts that help us navigate our complex modern world, often at the cost of accuracy and rationality. Researchers in the field of psychology have discovered that cognitive biases are hidden from our conscious awareness but influence our decisions, nonetheless.[142]

The halo effect is a cognitive bias that may hold special importance for advertising.[143] It leads consumers to judge a product or service based on a single attribute, such as a likable celebrity's endorsement. Consumers influenced by this bias will pay more for products bearing such endorsements because, subconsciously, they believe the endorsed product shares some of the positive attributes they see in the celebrity.

The ads uncovered by the study are designed to induce the halo effect by evoking the prestige and authority of government agencies. By referring to approvals by the USPTO and the FDA, they aim to suggest that the products advertised are better because the government approved them. This is misleading, though. The Patent Office does not require inventions to meet safety standards, yet advertisers use patents to suggest safety. Likewise, the FDA's registration of a manufacturing facility doesn't reflect efficacy, yet ads suggest it does.

While the precise costs to consumers are unknown, the case studies provide context to estimate potential impacts. The price premium consumers

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139. *See, e.g.*, Rachel E. Sachs, *Mobile Health Innovation and Interagency Coordination*, 26 ANNALS HEALTH L. 1, 12 (2017) ("If consumers have a choice between two products—one FDA-approved, recommended by their physician and paid for by their insurer, and another with more limited functionality and no recommendation from a trusted intermediary—they may be inclined toward the former.").

140. *See generally* DAVID OGILVY, CONFESSIONS OF AN ADVERTISING MAN (Southbank Publ'g 2004) (1963); PHIL ROSENZWEIG, THE HALO EFFECT . . . AND THE EIGHT OTHER BUSINESS DELUSIONS THAT DECEIVE MANAGERS (2007).

141. *See* sources cited *supra* note 140.

142. *See generally* MICHAEL LEWIS, THE UNDOING PROJECT (2016).

143. Edward L. Thorndike, *The Constant Error in Psychological Ratings*, 4 J. APPLIED PSYCH. 25, 28 (1920); Jerre B. Swann, *An Interdisciplinary Approach to Brand Strength*, 96 TRADEMARK REP. 943, 967 n.160 (2006) ("It is a human propensity to . . . 'bask in the reflected glory' of another or an institution." (citing Robert B. Cialdini et al., *Basking in Reflected Glory: Three (Football) Field Studies*, 34 J. PERSONALITY SOC. PSYCH. 366, 366 (1976))).

will pay for products bearing government endorsements likely varies depending on many factors, including the product, the medium of advertising, and the type of government approval. However, we can make a rough "back of the envelope" estimate based on patents. Begin with an assumption: Advertising is meant to be profitable. In other words, the expected benefits of higher sales will outweigh the expenses of acquiring the patent. As a corollary, the cost of obtaining and maintaining the patent should be less than the expected net revenue it drives.

There are, to be sure, many reasons for a company to obtain patents. However, a percentage of these patent grants—perhaps a tiny percentage—probably serves no other purpose than to help their owners advertise. This seems quite likely, at least in some industries like cosmetics, where the practical value of patents seems slim, and trends move quickly.[144]

One can sketch the consumer costs by looking at patenting costs. The average cost of obtaining a patent varies depending on the type of technology. In the cosmetics industry, a moderately complex patent costs about $15,000 to obtain in the United States.[145] Add to that a few thousand dollars per year in maintenance fees.[146] According to the USPTO, about 5,000 patents are granted for cosmetic products every year.[147] This equates to about $75 million in patenting expenses annually, industrywide. To be conservative, one might assume that just a tiny percentage of these patents are primarily valuable to their owners for advertising purposes. That would still suggest, very conservatively, that patents in this industry represent tens of millions of dollars a year in advertising investments.

144. *See* Perry Romanowski, *Why You Do Not Need to Patent Your Cosmetic Formulation*, CHEMISTS CORNER (July 20, 2012), https://chemistscorner.com/why-you-do-not-need-to-patent-your-cosmetic-formulation/ (pointing out that companies that patent cosmetic formulations gain little benefit from exclusivity or licensing); Marra M. Clay, *Copycat Cosmetics: The Beauty Industry and the Bounds of the American Intellectual Property System*, 106 MINN. L. REV. 425, 447 (2021) (discussing the slow patent registration process and its misalignment with rapidly changing beauty trends in the cosmetics industry).

145. *See Patent Application Cost*, BITLAW GUIDANCE, https://www.bitlaw.com/guidance/patent/what-does-a-patent-application-cost.html (last visited Jan. 22, 2024). A more detailed analysis would also calculate the initial cost of developing the invention, but here we ignore that for simplicity. Additionally, we will focus only on patenting and advertising activity in the United States.

146. *See USPTO Fee Schedule*, U.S. PATENT & TRADEMARK OFF., https://www.uspto.gov/learning-and-resources/fees-and-payment/uspto-fee-schedule (last visited Jan. 22, 2024).

147. *Patent Counts by Class by Year January 1977—December 2015*, U.S. PATENT & TRADEMARK OFF. PATENT TECH. https://www.uspto.gov/web/offices/ac/ido/oeip/taf/cbcby.htm (last visited Jan. 21, 2024) (see row for technology class "424"); *Calendar Year Patent Statistics (January 1 to December 31): General Patent Statistics Reports Available for Viewing*, U.S. PATENT AND TRADEMARK OFF., (last visited Jan. 21, 2024), https://www.uspto.gov/web/offices/ac/ido/oeip/taf/reports.htm#by_ptech (last visited Jan. 21, 2024).

These investments can result in higher prices for consumers. The purpose of advertising a regulatory reference is that it will make consumers desire the advertised product more. This means consumers will be willing to pay a higher price for the product relative to its competitors. However, this would not be true in every situation. The price-demand relationship is complex and depends on the product and the market, but in many cases, higher consumer demand can translate into higher prices.[148] This is especially true in markets with low competition (which, as the next section explains, is another possible consequence of conjuring the flag). The main point is that advertising behavior can lead to consumers paying more.

In addition to paying more, consumers lured by a regulatory halo may expose themselves to risks. Consumers may neglect to investigate the potential harms of certain products, such as drugs or medical devices, for instance, because they assume that the government has already ensured their safety and efficacy.

The advertisements in this study also reinforce preexisting consumer confusion and misperceptions regarding the significance of government approvals. Rather than clarifying these approvals' meaning, the advertisements leave consumers to rely on their own uninformed guesses. This will likely lead consumers to trust the symbolic meaning of government approvals and neglect searching for more pertinent and trustworthy information about the products or services they are evaluating.

This analysis has identified three potential consumer harms: overpayment, underestimation of risk, and reinforcement of misunderstanding government approvals. The next section turns to a fourth type of harm: reduced competition.

B. Competitive Harms

Conjuring the flag can have harmful consequences for competition and innovation.[149] How? As we have seen, it gives some products and services an undue edge in the consumer market. Consumers' preference for products

148. STEVEN A. GREENLAW ET AL., PRINCIPLES OF ECONOMICS § 3.1 (3d ed. 2022), https://openstax.org/details/books/principles-economics-3e (discussing the relationship between demand and supply and how they interact in a market).

149. *See generally* Michael A. Carrier & Rebecca Tushnet, *An Antitrust Framework for False Advertising*, 106 IOWA L. REV. 1841, 1844 (2021). Carrier and Tushnet present an antitrust framework for false advertising claims focusing on monopolists and attempted monopolists—parties most likely to harm the market. They apply this framework to "advertising for biosimilars, which are pharmaceutical products with a . . . growing role in treating numerous diseases." *Id.* The authors seek to "resolve the contradiction in the law by showing how false advertising threatens the proper functioning of markets." *Id.*; *cf.* Susannah Gagnon & Herbert Hovenkamp, *Antitrust Liability for False Advertising: A Response to Carrier & Tushnet*, 107 IOWA L. REV. ONLINE 82 (2022) (discussing the evidentiary hurdle of proving causation in the context of suits brought by private plaintiffs).

advertised with regulatory reference may lead them to ignore other relevant factors, such as quality, price, or features. In other words, competitors are at a disadvantage.[150]

The way competitors respond to this can make matters worse. Competitors might have to lower their prices to compete, which could reduce their profits and their ability to invest in innovation. A decline in market share may also prompt competing firms to pursue regulatory approvals for advertising products or services of their own. In the aggregate, this response could burden the administrative agencies that oversee and issue approvals. That potential harm is the focus of the section following this one.

Another adverse effect of this phenomenon is that it creates a barrier to entry for potential competitors or innovators who want to join a market.[151] They may predict that they will be unable to compete with companies that enjoy stronger reputations because of patents and FDA approvals. The potential harms could be particularly damaging to small and mid-sized companies.[152] These companies may lack the resources or influence to challenge the status quo or to persuade the regulators or the public of their value. This, in turn, can stifle innovation and diversity in the market and prevent consumers from benefiting from new products or services.[153]

The market advantages of conjuring the flag might also reduce the incentives for a dominant firm to innovate.[154] Consider, for example, a company that has obtained a cosmetics patent that, while of little practical value, drives sales powerfully. Such a company might be tempted to rest on its laurels and neglect the need for further research and development, quality control, customer service, or social responsibility. Such a company might also become resistant to any changes in government standards or regulations, fearing that it will lose its market share or reputation. This could lead to a decline or stagnation in the quality or variety of the products or services and a lack of creativity in, or adoption of, new technologies or practices that could enhance efficiency or effectiveness.

In effect, a patent obtained for advertising might function as an *anti-patent*—a property right that suppresses innovation instead of promoting it.

150. Carrier & Tushnet, *supra* note 149, at 1847 ("When consumers make purchasing choices based on sellers' false or misleading claims, they lose and so do honest competitors.").

151. *See, e.g.*, Harold Demsetz, *Barriers to Entry*, 72 AM. ECON. REV. 47 (1982); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 930 (1979).

152. *See* Demsetz, *supra* note 151.

153. *Id.*

154. Kevin A. Bryan & Erik Hovenkamp, *Antitrust Limits on Startup Acquisitions*, 56 REV. INDUS. ORG. 615, 615 (2020) ("[U]pon obtaining a pure monopoly, the leading incumbent's marginal willingness to pay for new technologies falls abruptly, which diminishes private returns on future innovations.").

This all ripples back to the preceding discussion of consumer harm. The potential harm that reduced competition may inflict on consumers is widely recognized in the literature. When markets are dominated by a few influential firms, consumers face higher prices, lower quality, and less variety. Consider the airline industry, where the consolidation of market power led to fewer carriers, routes, and seats. Consumers have suffered from higher fares, reduced service, and more administrative fees. Meanwhile, the airlines have invested little in improving their products or customer experience because they face little competitive pressure to do so.[155] This is a classic illustration of how a decline in competition harms consumers and stifles innovation.

C. Administrative Costs

Consumers and competitors are not the only ones who bear the costs of reduced competition. Conjuring the flag can also place significant burdens on administrative agencies. Implied government endorsements could trigger a snowball of applications for government approvals that burden agencies. This burden could divert agency resources away from more important public purposes.

Advertising a patent is certainly not the reason most companies apply for patents. Companies have a variety of better reasons to seek patents, such as exclusive rights, revenue through licensing, and other strategic advantages. However, this study indicates that, sometimes, the central role of a patent may be advertising. This seems especially likely in industries like cosmetics.

Such applications do not align with the patent system's primary goal of promoting innovation. Moreover, reviewing patent applications requires a high level of expertise and resources, which are already in short supply.[156] The USPTO has long been criticized for being slow and maintaining a large backlog of applications.[157] The patent system, in short, cannot afford to waste its capacity on patents that do not contribute to the advancement of science and technology.

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155. *See, e.g.*, *Perspectives: Through Passengers' Eyes: Delivering the 'Right' Airline Customer Experience*, DELOITTE, https://www2.deloitte.com/us/en/pages/consumer-business/articles/airline-customer-experience.html (last visited Jan. 23, 2024) (reporting that airlines could capture an additional $1.4 billion in revenue annually by improving the customer experience, suggesting that the financial benefits of such improvements are not being fully realized, possibly due to insufficient competitive pressure to invest in these areas).

156. *See, e.g.*, Michael P. Ellenberger, Note, *The Waiting Is the Hardest Part: Does Longer Patent Pendency Mean More Valuable Patents?*, 16 NW. J. TECH. & INTELL. PROP. 189, 192 (2019) (discussing recent statistics on delays between filing and examination of patents).

157. *See generally* JAMES BESSEN & MICHAEL J. MEURER, PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK (2008).

Advertising can theoretically play into seeking FDA approvals as well.[158] FDA authorization is mandatory for many products, regardless of the seller's advertising goals. This is true for drugs and many medical devices. However, for other products, such as cosmetics, it is possible to avoid FDA regulation through careful phrasing of advertising.[159] The same is true of smartphone apps that purport to improve symptoms of mental health disorders. By branding an app as a "wellness" tool or a cream as a beauty treatment rather than a drug, companies can stay outside of the FDA's purview. Despite this, a company may still decide to seek authorization from the FDA to advertise that the product has been "FDA cleared." In other words, the ability to seek the FDA's blessing for advertising purposes may sometimes be a choice. As with the USPTO, this could translate into administrative burdens—delays in drug approval and increased costs and uncertainty for drug developers.

The registration of trademarks plays a subtle role in this discussion. As the study in Part II shows, many companies have registered word trademarks that allude to patents and FDA approvals. These types of trademarks are blatant examples of regulatory references in advertising. The marks convey a clear message to consumers about the product's regulatory status, further bolstered by including the USPTO's symbol of the letter "R" enclosed in a circle. A hypothetical mark like "YOUR FAVORITE FDA-APPROVED ASPIRIN®" would thus bear not only the FDA's imprimatur, but also enjoys the credibility that comes with the USPTO's stamp of approval. It is a two-in-one.

To illustrate these ideas, imagine a cosmetic manufacturer whose rival has obtained a patent for a new cosmetic. The manufacturer may perceive the patent as an advantage because it signals to the market that the rival's cosmetic is unique and effective. To compete with the rival, the manufacturer

158. The advertising messages discussed in this Article are voluntary rather than mandatory. It is important to note this distinction, as there are instances where the government may require a company to issue a statement to consumers. Take, for example, the case of companies that manufacture and sell drugs or medical devices. These companies are required to obtain approval from the FDA, which, in turn, mandates the use of specific language on their product labels. However, the FDA does not require companies to reference the agency's authorization in ads. 21 C.F.R. §§ 801.1 (specifying labeling requirements for medical devices, including the requirement to include the "name and place of business of the manufacturer, packer, or distributor" on the label); *see also Prescription Drug Advertising: Questions and Answers*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/drugs/prescription-drug-advertising/prescription-drug-advertising-questions-and-answers (last visited Jan. 23, 2024); *FDA's Labeling Resources for Human Prescription Drugs*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/drugs/laws-acts-and-rules/fdas-labeling-resources-human-prescription-drugs (last visited Jan. 23, 2024)

159. Bryan A. Liang & Kurt M. Hartman, *It's Only Skin Deep: FDA Regulation of Skin Care Cosmetics Claims*, 8 CORNELL J.L. & PUB. POL'Y 249, 261 (1999) ("However, by carefully wording the product's advertisements, sellers are able to hide in the gray area between cosmetics and drugs that the FDA has yet to directly attack . . . .").

may seek a patent for its own cosmetic, even if it is similar to existing cosmetics or has some drawbacks. The purpose is to level the playing field. However, if many cosmetic manufacturers follow the same strategy, the Patent Office will be inundated with applications. The scenario represents a classic tragedy of the commons in which individuals acting rationally in a self-interested fashion deplete a shared resource.

IV. PROPOSALS FOR REFORM

This Part suggests three possible solutions to address the problem of implied government endorsements in advertising. The solutions are designed to discourage and correct misleading suggestions of qualitative government approval.

The FTC's mandate is to ensure that advertising claims have adequate support and are not false, misleading, or harmful.[160] The FTC also has a general authority to challenge unfair methods of competition that violate the FTC Act, and it has used this authority to challenge improper references to patents or FDA approvals in advertisements. These cases involved different issues than those discussed here, such as selling unapproved products with unfounded health claims or abusing patent litigation to block generic competition. Nevertheless, they show the FTC's expertise and authority in addressing problems that arise from deceptive or unfair uses of intellectual property rights in advertising.

In light of the FTC's authority over this issue, why has it not acted to stop companies from using government approvals in deceptive ways? One possible answer is that the Commission has yet to see how pervasive and damaging this practice is. The FTC cannot track every ad that reaches consumers. Another possible explanation is that FTC officials believe challenging such a widespread practice in court would be too expensive or unlikely to succeed. The following sections suggest some reforms to overcome these obstacles.

A. Improving Monitoring, Detection, and Education

This Article proposes that the FTC launch an initiative dedicated to monitoring and investigating ads that imply government endorsements. The FTC's Division of Advertising Practices would organize and administer the initiative. This division has the authority and resources to identify such ads, conduct inquiries and investigations, issue warnings and sanctions, and coordinate with other federal agencies to prevent and remedy consumer

160. *See supra* Section I.B.2 (discussing the powers of the FTC related to advertising).

harm.[161] By implementing this initiative, the FTC would enhance its ability to promote truth in advertising and safeguard consumer welfare.

Because this problem involves other regulatory agencies, the FTC would need to collaborate with them. By sharing information and coordinating enforcement actions with the FDA and USPTO, the FTC can put its resources to the best use. The FTC should therefore seek to establish formal mechanisms for interagency cooperation with the FDA and the USPTO, as well as other relevant agencies, to enhance its ability to protect consumers and promote public health.

As part of this initiative, the FTC should launch a public awareness campaign to inform consumers on how to identify and report misleading ads. Furthermore, businesses must be aware of the legal risks of using such ads. The goal of this campaign would be to improve the monitoring of such ads by allowing the public to be vigilant and report them. This would help by transferring some of the monitoring costs from the FTC to the industry and the public.

B. Shifting the FTC's Burden of Proof

The FTC uses a three-part test to determine if an advertisement violates the FTC Act for being misleading: The Commission will find an act or practice deceptive if, first, there is "a representation, omission, or practice that[, second,] is likely to mislead . . . a consumer acting reasonably in the circumstances … [, and] [t]hird, the representation, omission or practice . . . [is] material[.]"[162] This means that the ad would likely influence a purchasing decision. Federal courts have widely adopted this standard. Moreover, courts defer to the FTC's determinations, setting them aside only if they are not supported by "substantial evidence" or "are arbitrary, capricious, or an abuse of discretion."[163]

This standard places a significant burden on the FTC, as it requires the agency to demonstrate that many consumers are likely to be misled by the advertisement. The materiality component of this test is an especially fact-specific inquiry. In plain terms, materiality serves as a yardstick to assess the importance and relevance of the false or misleading statement in the context of the advertisement. It is not enough to show that a statement is false or misleading; the government must show that it matters. Courts have found materiality where an ad "involves information that is important to consumers

161. *Division of Advertising Practices*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection/our-divisions/division-advertising-practices (last visited Jan. 23, 2024).

162. FED. TRADE COMM'N, FTC POLICY STATEMENT ON DECEPTION 1 (1983).

163. Am. Fin. Servs. Ass'n v. F.T.C., 767 F.2d 957, 985 (D.C. Cir. 1985).

and, hence, likely to affect their choice of or conduct regarding, a product;"[164] "when they pertain to the central characteristics of the products or services being marketed;"[165] and if it "is likely to affect a consumer's choice of or conduct regarding a product or service."[166] The Supreme Court has defined materiality under the statute simply as "the misrepresentation of *any* fact so long as it materially induces a purchaser's decision to buy is a [prohibited] deception."[167]

The Commission also looks at whether important facts were left out that would concern a reasonable consumer regarding health, safety, or other areas. Depending on the circumstances, information regarding the product or service's central characteristics is presumed material.[168] This may include information about the product's purpose, safety, effectiveness, or cost. In addition, information regarding the product's durability, performance, warranties, or quality may also be material.

This legal framework significantly hinders the FTC's ability to challenge ads that conjure the flag. Because such ads do not neatly fall into the preceding exceptions, the FTC must present evidence such as consumer surveys and expert testimony to make its case. This high evidentiary burden may help explain why the FTC has not challenged companies that mislead the public by referencing FDA authorizations, patents, and the like in their ads.

To address this problem, this Article proposes modifying the current legal standard by creating a rebuttable presumption that any advertisement that refers to a patent, FDA approval, or other governmental action so as to express or imply approval of a product or service is potentially misleading. This rule would shift the burden of proof from the FTC to the advertiser to demonstrate that the advertisement is not misleading. This change to the law would align the legal standard for conjuring the flag with that of other forms of misleading advertising, such as making false express or implied claims about a product. Most importantly, it would help the Commission stop this practice.

This proposal is a natural extension of current FTC practice. In the past, the FTC has considered determinations concerning a product made by another agency when analyzing a potential violation of Section 5 of the FTC Act. For example, in *Simeon Management. Corp. v. FTC*,[169] the Commission

164. *In re* Cliffdale Associates, Inc., 103 F.T.C. 110, 165 (1984).

165. FTC v. John Beck Amazing Profits, LLC, 865 F. Supp. 2d 1052, 1076 (C.D. Cal. 2012) (citing *In re* Southwest Sunsites, 1980 FTC LEXIS 86, at *329 (F.T.C. Apr. 29, 1980)).

166. *Id.* at 1067 (citing *In re Southwest Sunsites*, 1980 FTC LEXIS 86, at *328).

167. FTC v. Colgate-Palmolive Co., 380 U.S. 374, 387 (1965).

168. *John Beck Amazing Profits*, 865 F. Supp. 2d at 1076.

169. 579 F.2d 1137 (9th Cir. 1978).

enjoined the publication of ads for a weight-loss clinic that administered doses of a drug the FDA had not approved for weight loss.[170] In finding the ads misleading under the FTC Act, the Commission reasoned that the public believes that the government strictly regulates drugs, and the fact that the FDA had not approved this drug was a material omission.[171] This reasoning can be extended to apply to an ad that references patent approvals which misleadingly suggest medical or clinical efficacy, or FDA approvals which suggest something more than the FDA's approval means. The proposal here is modest. It would merely give some form and definition to the Commission's precedents.

C. Consumer Class Action Standing

Class action litigation is another mechanism worth exploring to address advertisements that name-drop government agencies to confuse consumers. Class action lawsuits brought by consumers could serve as a powerful legal tool to aggregate many small claims that may be too minor or intangible to litigate individually. However, consumers exposed to misleading ads cannot easily bring such suits under the current legal framework. New legislation could be worth exploring, although it might not be possible to overcome the political barriers involved.

Consumers generally cannot bring suits for false advertising under federal law. Although the Lanham Act is the primary federal law designed to provide a cause of action for false or misleading advertising, courts have held that it does not provide consumers with standing to sue.[172] As a result, class action lawsuits for false advertising are typically rooted in consumer protection statutes. As Michael Carrier and Rebecca Tushnet have observed, "[s]tate consumer protection laws are limited in important ways, including state-law variation that makes multistate consumer class actions all but impossible."[173]

Moreover, courts have frequently denied class certification in these cases because plaintiffs failed to meet threshold requirements for class formation, such as predominance. For example, in *Fine v. ConAgra Foods, Inc.*,[174] the District Court of the Central District of California denied certification because the plaintiff did not establish that all proposed class members relied on the alleged misrepresentation.[175] Similarly, in *Weiner v.*

170. *Id.* at 1143.
171. *Id.* at 1145.
172. Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 132 (2014).
173. *See* Carrier & Tushnet, *supra* note 149, at 1865–66.
174. No. CV 10-01848, 2010 WL 3632469 (C.D. Cal. Aug. 26, 2010).
175. *Id.* at *3.

Snapple Beverage Co.,[176] the Southern District of New York found the plaintiffs' claims too individualized to satisfy predominance.[177] These examples illustrate how plaintiffs often struggle to litigate false advertising claims on a class-wide basis.

A new law enabling consumer standing under the Lanham Act could help to remedy some of these problems. By amending the Act to explicitly grant consumers the right to bring actions for false or misleading advertising, the federal courts could serve as a more unified forum for these claims. This would mitigate the issue of state-law variation that currently hampers the feasibility of multi-state consumer class actions.

A major challenge to amending the Lanham Act would be garnering sufficient political goodwill to pass such a proposal into law, however. Consumer protection is often a politically charged issue, and lawmakers might be unable to agree that an expansion of consumer standing is necessary or even desirable. Moreover, powerful industry lobbying groups funded by corporations would likely resist the change, arguing that it would open the floodgates to frivolous lawsuits and create a chilling effect on commerce. Even if lawmakers could agree to such a change, other pressing bills might simply be of higher priority.

Beyond these challenges, procedural rules could make it difficult for consumers to assemble classes even if the Lanham Act permitted it. As governed by Rule 23 of the Federal Rules of Civil Procedure, class actions allow one representative plaintiff, or a small group of named plaintiffs, to bring claims on behalf of a larger class of individuals who have allegedly suffered similar injuries caused by the defendant. However, the certification of a class involves meeting stringent criteria. As articulated in Rule 23, a party seeking certification must demonstrate numerosity, commonality, typicality, and adequacy of representation.[178] This requires showing that plaintiffs have suffered the "same injury," and not merely violations of the same law.[179] In the context of consumers exposed to misleading ads, this could be a difficult requirement to satisfy. Differences in individual experiences with ads, decisions to buy goods, and the like, could vary the severity of harm experienced by consumers. Relatedly, plaintiffs typically must demonstrate that they have suffered a concrete injury—mere exposure to an ad may be insufficient.[180]

176. No. 07 Civ. 8742, 2010 WL 3119452 (S.D.N.Y. Aug. 5, 2010).

177. *Id.* at *10.

178. FED. R. CIV. P. 23(a).

179. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349–50 (2011).

180. Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. REV. 793, 796 (2022); *see also* Marcy Hogan Greer, *Key Developments in Consumer Class Actions*, ABA: THE

In conclusion, class action lawsuits could theoretically be a powerful alternative mechanism to address misleading advertising, or as a complement to regulatory action. But bringing this solution from theory to reality would require commitment and interest on the part of lawmakers. Moreover, even with these reforms, aggregate litigation would likely continue to present inherent limitations and uncertainties compared to regulatory actions, making it crucial to understand this solution as complementary to regulation, but not as a substitute for it.

D. Challenges for Proposed Reforms

As with any proposal to modify the law, there are likely criticisms of the proposed modification to the legal standard for government endorsement advertising. One possible criticism is that the modification places an undue burden on legitimate advertisers engaging in lawful, non-deceptive commercial speech. However, it is essential to note that the proposed modification does not create an absolute bar on such advertising. Instead, it would make an advertisement that conjures the flag subject to a rebuttable presumption of deceptiveness that can be overcome with evidence that the advertisement is not misleading. This approach balances protecting consumers from potentially harmful advertising practices and avoiding undue burdens on legitimate businesses.

As a response, we can look at the FTC's cost-benefit analysis.[181] In one case, the FTC challenged advertisements that portrayed a fuel-efficiency device as a groundbreaking and "significant" invention and emphasized the cost-savings it would provide consumers.[182] The FTC examined whether the advertisements contained misleading representations, omissions, or practices likely to deceive reasonable consumers.[183] The agency also evaluated if any such statements would significantly influence consumer decisions.[184] Ultimately, the agency believed that the ads overstated the product's effectiveness and misrepresented the scientific evidence supporting the claims. While the ad contained some valuable information, the agency

BRIEF (Sept. 19, 2019), https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/the_brief/2018-19/summer/key-developments-consumer-class-actions/.

181. The first case in this section is analyzed in greater depth in Richard Craswell, *Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere*, 92 VA. L. REV. 565, 597–98 (2006). In this informative work, Craswell discusses FTC cases involving smoke detectors and fuel efficiency claims to illustrate the complexities of providing information to consumers and ensuring that such information is accurate.

182. *In re* Cliffdale Assocs., Inc., 103 F.T.C. 110 (1984).

183. *Id.* at 167–73.

184. *Id.*

decided that the misinformation and potential harm to consumers outweighed any benefits.[185]

On-point for the current discussion, we can also look to the FTC's recent Notice of Penalty Offenses regarding the substantiation of product claims.[186] This notice instructs that advertisers must support their claims with "reliable evidence," especially for "OTC drugs, homeopathic products, dietary supplements, or functional foods."[187] This approach reflects a recognition of the importance of promoting truth in advertising while making sure that consumers have access to accurate information so they can make informed decisions.

We can apply the same kind of "light" cost-benefit analysis to advertisements that contain references to patents and FDA approvals. Ads that contain references to patents could help would-be infringers avoid litigation and seek licenses. Thus, an ad that obliquely refers to patent ownership to give consumers confidence in a product's safety or clinical efficacy would likely fail the balancing test. In contrast, an ad that provides specific information, such as patent numbers and the nature of the patented invention, would probably pass muster. In this latter scenario, an advertiser might be able to overcome the benefit the FTC would enjoy from a presumption of materiality.

This analysis shows that the proposal here would not block or chill valuable commercial speech. Given the public's apparent widespread misunderstanding of what the FDA does, references to FDA authorizations in ads may pose a risk of the public being misled. On the other hand, it could be beneficial for the public and prescribing doctors to know the specific risks and benefits of a drug or medical device. The FDA already sees that such information is put on labels. The FDA could encourage advertisers to put the same information in ads conspicuously. That would again tilt the cost-benefit scales in the advertiser's favor. The point is that the change to the law proposed here would not prevent useful public information from being shared.

Critics of this proposal might similarly argue that restricting the ability to advertise a patented technology would effectively deny the patent's owner the ability to sell products incorporating the technology. However, the preceding distinction would obviate those worried about this. A patent owner who wishes to mention their patent in an advertisement must ensure they

185. *Id.*

186. *Advertising without Proper Proof Can Prove Costly Under New Notice of Penalty Offenses*, FED. TRADE COMM'N, (Apr. 3, 2023), https://www.ftc.gov/business-guidance/blog/2023/04/advertising-without-proper-proof-can-prove-costly-under-new-notice-penalty-offenses.

187. *Id.*

identify it and explain the underlying technology. This proposal does not deny patent holders anything they are owed, nor does it conflict with the Patent Act. Moreover, the grant of a patent does not carry with it any affirmative right to use the patent as an advertising device.

Suggesting a government endorsement in advertising can be highly misleading to consumers and undermine the regulatory framework designed to protect consumers. The proposals in this Article could better protect consumers by making it easier for the FTC to monitor, detect, and challenge these practices in court. Shifting the burden of proof that the FTC would need to carry is a natural extension of current FTC practices and aligns with other presumptions of materiality the agency currently makes. Likewise, enhancing the agency's monitoring and inter-agency capabilities extends the system already in place. Therefore, these proposals are practical, cost-effective, and politically realistic.

CONCLUSION

This Article has explored a harmful aspect of the American marketplace: the deceptive use of government approvals to lure consumers into buying products and services. The rigorous study in Part II demonstrates how this phenomenon works: Marketers exploit the symbolic power and allure of patents, trademarks, and FDA authorizations to create baseless impressions of quality and safety. This Article has woven insights from intellectual property, consumer protection, and administrative law to examine why this problem has persisted despite existing consumer protection laws and regulations. These insights give form to the three solutions proposed here: a new FTC initiative designed to better monitor these advertising practices, and to lessen the burden of proof the Commission must carry when seeking injunctions against advertisers who conjure the flag, as well as a proposal providing expanded class action standing. Because these proposals draw upon an evidence-based understanding of the harm and the legal framework, they are practical and likely to help. The next step is for the FTC to act. The stakes are high: When advertisers conjure the flag, it harms not only consumer welfare but also the health of markets, the operations of our government, and the shape of innovation.