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Ellen P. Goodman

VISUAL GUT PUNCH: PERSUASION, EMOTION, AND THE CONSTITUTIONAL MEANING OF GRAPHIC DISCLOSURE

Ellen P. Goodman†

The ability of government to "nudge" with information mandates, or merely to inform consumers of risks, is circumscribed by First Amendment interests that have been poorly articulated. New graphic cigarette warning labels supplied courts with the first opportunity to assess the informational interests attending novel forms of product disclosures. The D.C. Circuit enjoined them as unconstitutional, compelled by a narrative that the graphic labels converted government from objective informer to ideological persuader, shouting its warning to manipulate consumer decisions. This interpretation will leave little room for graphic disclosure and is already being used to challenge textual disclosure requirements (such as county-of-origin labeling) as unconstitutional.

Graphic warning and the increasing reliance on regulation-by-disclosure present new free speech quandaries related to consumer autonomy, state normativity, and speaker liberty. This Article examines the distinct goals of product disclosure requirements and how those goals may serve to vindicate, or to frustrate, listener interests. I argue that many disclosures, and especially warnings, are necessarily both normative and informative, expressing value along with fact. It is not the existence of a norm that raises constitutional concern but rather the insistence on a controversial norm. Turning to the means of disclosure, this Article examines how emotional and graphic communication might change the constitutional calculus. Using autonomy theory and the communications research on speech processing, I conclude that disclosures do not bypass reason simply by reaching for the heart. If large graphic labels are unconstitutional, it will be because of undue burden on the speaker, not because they are emotionally powerful.

This Article makes the following distinct contributions to the compelled commercial speech literature: critiques the leading precedent, Zauderer v. Office of Disciplinary Counsel, *from a consumer autonomy standpoint; brings to bear empirical communications research on questions of facticity and rationality in emotional and graphic communications; and teases apart and distinguishes among various free speech dangers and contributions of*

† Professor, Rutgers University School of Law. Thanks to Bob Adelson, Bob Brauneis, Frank Goodman, Greg Lastowka, Gary Lucas, Michael Madison, David Post, Michael Reich, and Felix Wu for their comments; to Joseph Cappella, Emily Brennan, Dan Romer, and members of the Annenberg School of Communication Center on Tobacco Health Communication for their research and feedback; to Anne Chen and Steven Gleeson for fantastic research assistance; and to the *Cornell Law Review* editors for high-quality editing.

commercial disclosure mandates with a view towards informing policy, law, and research.

INTRODUCTION

The free speech implications of graphic and emotionally disturbing cigarette labels[1] have split two federal appellate courts, with the D.C. Circuit Court of Appeals striking down the labels on First Amendment grounds.[2] The courts disagreed on the government's power to persuade, the nature of warning through graphic images,

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1 Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628 (June 22, 2011) (to be codified at 21 C.F.R. pt. 1141) [hereinafter Final Rule]. The Food and Drug Administration (FDA) acted under the authority of a 2009 federal statute. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776, 1796 (codified at 21 U.S.C. §§ 387–387t (2012)). *See generally* B. Ashby Hardesty, Jr., Note, *Joe Camel Versus Uncle Sam: The Constitutionality of Graphic Cigarette Warning Labels*, 81 FORDHAM L. REV. 2811 (2013) (describing the free speech issues surrounding cigarette labels).

2 Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 518 (6th Cir. 2012) (upholding statutory labeling requirement against a facial challenge); R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1221–22 (D.C. Cir. 2012) (striking down labels adopted by the FDA).

and the role of emotions in cognitive processing.[3] How the law addresses these questions will shape regulation-by-disclosure and other emerging policy strategies built on communicating with the public. This Article assesses competing claims of autonomy and the public interest, aided by the latest empirical research on emotional and cognitive processing of risk communication.

Any investigation of these issues must start with the recognition that government often seeks simultaneously to inform *and* to influence consumer purchases by mandating product disclosures. Nutritional labels, toxic chemical disclosures, and cigarette warnings are classic examples. Mandatory calorie disclosures figure in the war on obesity.[4] Social-change advocates have pressed for disclosure as a way to reduce hormones in milk[5] and mercury in landfills.[6] There is ongoing consideration of mandatory food labeling for genetically modified organisms[7] and product labeling for carbon "footprints."[8]

The use of mandatory product disclosures is a species of what Cass Sunstein and Richard Thaler have called "nudges" that guide the public towards more socially beneficial choices.[9] An emerging consensus among researchers is that nudges are most effective when in-

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3 *Compare R.J. Reynolds*, 696 F.3d at 1217 (characterizing the labels as "unabashed attempts to evoke emotion (and perhaps embarrassment) and browbeat consumers into quitting"), *with Disc. Tobacco*, 674 F.3d at 569 ("Facts [including those presented graphically] can disconcert, displease, provoke an emotional response, spark controversy, and even overwhelm reason, but that does not magically turn such facts into opinions.").

4 *See, e.g.*, N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114, 117–18 (2d Cir. 2009) (upholding requirement that New York City restaurants list fast food calorie counts); *see also* Lindsay F. Wiley, *Rethinking the New Public Health*, 69 WASH. & LEE L. REV. 207, 209 (2012) (discussing information regulation in public health policy).

5 *See* Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 75 (2d Cir. 1996) (Leval, J., dissenting) (discussing "frequent press commentary and debate" over the use of synthetic hormones in dairy cows).

6 Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115 (2d Cir. 2001); *see also, e.g.*, Paula J. Dalley, *The Use and Misuse of Disclosure as a Regulatory System*, 34 FLA. ST. U. L. REV. 1089, 1090 (2007) ("Mandatory disclosure has become a sort of 'regulation-lite' extolled even by those who would ordinarily oppose regulation.").

7 California's Proposition 37 in 2012 would have required labels for many foods containing genetically modified organisms. Stacy Finz, *Prop. 37: Genetic Food Labels Defeated*, SFGATE (Nov. 7, 2012, 10:27 AM), http://www.sfgate.com/news/article/Prop-37-Genetic-food-labels-defeated-4014669.php.

8 *See* Jason J. Czarnezki, *The Future of Food Eco-Labeling: Organic, Carbon Footprint, and Environmental Life-Cycle Analysis*, 30 STAN. ENVTL. L.J. 3, 18–21 (2011) (discussing nascent voluntary and mandatory programs in the United States and Europe for labeling consumer products with information regarding carbon footprints).

9 *See* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2009). Conservatives too have sought mandated disclosure, most notably in the form of mandatory fetal sonograms that are disclosed to abortion patients. *See* Leslie Gielow Jacobs, *What the Abortion Disclosure Cases Say About the Constitutionality of Persuasive Government Speech on Product Labels*, 87 DENV. U. L. REV. 855, 858 (2010); John A. Robertson, *Abortion and Technology: Sonograms, Fetal Pain, Viability, and Early Prenatal Diagnosis*, 14 U. PA. J. CONST. L. 327, 329 (2011); *see also* Gary M. Lucas, Jr., *Paternalism and Psychic Taxes: The Government's Use of Negative Emotions to Save Us from Ourselves*, 22 S. CAL.

formation is conveyed simply and at the point of consumer decision making.[10] With this in mind, nations are implementing graphic front-of-pack nutritional labels[11] and are considering the placement of graphic warnings on high-fat foods.[12] The future of product disclosures will not only be graphic but almost certainly digital as well, with information delivered opportunistically through mobile devices.[13] The future of product disclosure litigation is equally clear: it will grow.[14]

The government's ability to "nudge" with information mandates, or merely to inform consumers of risks, is circumscribed by First Amendment interests that have been poorly articulated in the relevant law and commentary. New graphic cigarette warning labels supplied courts with the first opportunity to assess the informational interests attending new forms of product disclosures. Two opposing narratives have emerged. One is that graphic and emotionally wrenching images merely update textual labels that have been in place for a half-century, providing consumers with full information about the risks of smoking.[15] The other narrative is that the graphic labels convert government from objective informer to ideological persuader,

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INTERDISC. L.J. 227, 227–28 (2013) (describing the increasingly popular use of paternalistic policies, especially to "provok[e] negative emotions such as fear, anxiety, or shame").

10 *See, e.g.*, Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 743 (2011) (explaining that "brief, simple, easy disclosures" have the most impact on consumer decision making); *see also* ARCHON FUNG, MARY GRAHAM & DAVID WEIL, FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY 57 (2007) ("Making information available at a time and place where users are accustomed to making decisions also maximizes the chances that information will become embedded.").

11 *See, e.g.*, Kristy L. Hawley et al., *The Science on Front-of-Package Food Labels*, 16 PUB. HEALTH NUTRITION 430, 430 (2013); Nick Triggle, *Food Labelling: Consistent System 'to Start Next Year,'* BBC NEWS (Oct. 24, 2012, 5:24 AM), http://www.bbc.co.uk/news/health-20050420 (describing the traffic-light food-labeling system, which displays the amount of calories in a food product surrounded by a box of either green, yellow, or red, indicating whether it is a high or low amount).

12 *See* Stacey Leasca, *Canadian Doctors Call for Warning Labels on Junk Food*, GLOBAL POST (Oct. 24, 2012, 4:02 PM), http://www.globalpost.com/dispatch/news/regions/americas/canada/121024/canadian-doctors-calls-warning-labels-junk-food (reporting on proposal of Ontario Medical Association).

13 *See, e.g.*, 40 C.F.R. § 600.302–12(b)(6) to (7) (2013) (establishing EPA guidelines for the implementation of smartphone QR Codes on new vehicle fuel-economy labels to provide customers with additional information on fuel economy).

14 The next big federal product labeling initiative—a 2013 USDA requirement that producers label certain meat products with the countries of origin of where the source animal was born, raised, and slaughtered—has been challenged on First Amendment grounds. *See* Chris Morran, *Big Meat Sues USDA over Country-of-Origin Labeling Requirement*, CONSUMERIST (July 10, 2013), http://consumerist.com/2013/07/10/big-meat-sues-usda-over-country-of-origin-labeling-requirement/; *see also* Am. Meat Inst. v. U.S. Dep't of Agric., No. 13-CV-01033 (KBJ), 2013 WL 4830778 (D.D.C. Sept. 11, 2013) (denying preliminary injunction against labeling requirement on grounds that it probably satisfies *Zauderer* standard for mandatory disclosure).

15 *See infra* notes 132–34 and accompanying text.

shouting its warning in order to manipulate consumer decisions.[16] Resorting to legal doctrine that is by turns insufficient and incoherent, adherents of each position grapple with a series of binary choices: that communication is informative or persuasive, emotional or rational. This kind of analysis blinks at the reality of communications in which these characteristics coexist on a continuum.

This Article explores the informational interests at stake when the government tries both to inform and to influence consumers and how its use of emotional imagery affects the constitutional calculus. I argue that the focus of the inquiry must return to the cornerstone of commercial speech law: consumer autonomy. Drawing on the communications literature about emotional appeals and visual processing, I show that the use of graphics and emotion need not render communication any less truthful or more ideological. The constitutional analysis should focus more on the ends of the communication than on the means. We should be most skeptical of mandatory disclosures that insert the state into a matter of controversy, using its regulatory power to advance a contested ideological position.

Parts I and II provide brief overviews, respectively, of the constitutional law of compelled commercial speech and the cigarette-labeling controversy. Part III looks at the ends of product disclosure requirements and how they may serve to vindicate, or to frustrate, listener interests. One of the conclusions is that warning, by its nature, is both normative and informative, expressing value along with fact. It is not the existence of a norm that raises constitutional concern but rather the insistence on a controversial norm. Part IV turns to the means of disclosure, examining the constitutional valance of emotional and graphic speech. Here, I apply the communications and philosophical literature to the central question in this matter: Has the government bypassed consumers' reason by reaching for their hearts? I will argue that it has not. Ultimately, it is not my goal to defend or attack the cigarette-labeling mandate—a policy choice of questionable utility. Rather, it is to show that sweeping and often baseless conclusions about the communicative function of product disclosures do not advance the constitutional values reflected in commercial speech protections.

I
Constitutional Law of Compelled Commercial Disclosure

First Amendment doctrine is fairly clear on compelled *noncommercial* speech. A speech compulsion is treated the same as a speech re-

16 *See infra* notes 133–40 and accompanying text.

striction.[17] That is, the government can no more easily compel a citizen to speak than it can muzzle her. It is strict scrutiny both ways. The law is also fairly clear about the status of commercial speech *restrictions*: they are disfavored, although not as much as noncommercial speech restrictions or compulsions.[18] They receive intermediate scrutiny. Where the law is not well developed is in the area of compelled *commercial* speech. The reasons for this, discussed below, have to do with the distinctive speech interests the law seeks to protect in commercial speech cases: the informational interests of listeners rather than the liberty interests of speakers.[19] To the extent that listeners benefit from having more information, compelled commercial speech may cut in favor of First Amendment interests rather than against them.

This Part sets out the background of commercial speech law, reviews the confused law on compelled commercial speech, and concludes with an analysis of the constitutional values implicated in this corner of First Amendment law.

A. Commercial Speech Background

Product labels are commercial speech.[20] Commercial speech generally receives less First Amendment protection than noncommercial speech, although the gap has been steadily closing in recent years.[21] Until the late twentieth century, commercial speech fell entirely outside the protection of the First Amendment, much like the speech of contracts and securities trading.[22] This changed in 1976 with *Virginia State Board of Pharmacy*, which invalidated Virginia's ban on prescription-drug price advertising by pharmacists.[23]

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17 *See infra* note 30 and accompanying text.

18 *See infra* note 38 and accompanying text.

19 *See infra* notes 33–43 and accompanying text.

20 Commercial speech is defined as speech that "does no more than propose a commercial transaction." Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)); *see* Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 473–74 (1989); *cf.* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66–68 (1983) (concluding that an advertisement that refers to a specific product and is motivated by the speaker's economic interests is commercial speech).

21 A number of justices appear ready to jettison the commercial speech distinction altogether. *See* Thompson v. W. States Med. Ctr., 535 U.S. 357, 367–68 (2002) (collecting cases and noting that at least five members of the Court have "expressed doubts about the [commercial speech] analysis"); *cf.* Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2665 (2011) (comparing state law restricting pharmaceutical advertising to content-based restrictions on noncommercial speech that is economically motivated).

22 *See* DANIEL A. FARBER, THE FIRST AMENDMENT 151 (2d ed. 2003).

23 425 U.S. at 770, 772 (1976); *see also* FARBER, *supra* note 22, at 151 (observing that commercial advertising once "fell completely outside the scope of the First Amendment" and that it was not until the mid-1970s that "commercial speech was brought firmly under First Amendment protection").

Significantly, the challenge to the ban came not from the regulated speakers but from the potential "listeners" or consumers.[24] The Court held that the state could not deprive consumers of information to save them from bad choices—in this case, the choice to buy cheap drugs at the expense of quality.[25] Leaning away from speaker rights, the Court evinced little sympathy for the pharmacists but chose instead to vindicate listener interests in access to information. It emphasized that First Amendment protection was afforded to the two ends of a communication, "to its source and to its recipients both."[26]

This emphasis on the informational interests of listeners, as distinct from the liberty of speakers, provides the distinctive rationale for commercial speech protection.[27] In developing the commercial speech doctrine, the Court has located the constitutional "concern for commercial speech" in "the informational function of advertising."[28]

B. *Zauderer* and Compelled Commercial Disclosures

This distinctive emphasis on listener interests is particularly evident in the treatment of compelled commercial speech.[29] Where ordinary, noncommercial speech is concerned, a government requirement to speak poses the very same First Amendment problem

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24 425 U.S. at 753.

25 *Id.* at 773. The posture of the case suggested that the law might have been ginned up by the regulated entities in order to stave off competition from upstart pharmacies and, therefore, that Virginia's stated rationale for the advertising restriction was pretextual. *See* Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579, 591 (2004) (noting that "an implicit distrust of the state's actual purpose" is one of the themes in the Court's rejection of paternalistic speech restrictions).

26 *Va. Pharmacy*, 425 U.S. at 756.

27 *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 628 (1985) ("[T]he extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides . . . ."); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563 (1980) ("The First Amendment's concern for commercial speech is based on the informational function of advertising."). *But cf.* Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 479 (1997) (Souter, J., dissenting) ("What stood against the claim of social unimportance for commercial speech was not only the consumer's interest in receiving information, . . . but the commercial speaker's own economic interest in promoting his wares." (citations omitted)).

28 *Cent. Hudson*, 447 U.S. at 563; *see also* Edenfield v. Fane, 507 U.S. 761, 766 (1993) (explaining that "First Amendment coverage of commercial speech is designed to safeguard" society's "interest[ ] in broad access to complete and accurate commercial information"); *Zauderer*, 471 U.S. at 651 ("[T]he extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information. . . ."); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 783 (1978) ("A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the 'free flow of commercial information.'" (quoting *Va. Pharmacy*, 425 U.S. at 764)).

29 For a general discussion, see Dayna B. Royal, *Resolving the Compelled-Commercial-Speech Conundrum*, 19 VA. J. SOC. POL'Y & L. 205, 216 (2011).

as a requirement to refrain from speaking.[30] In both cases, there is a threat to the liberty interests of the speaker—interests that are best framed as the "freedom of mind."[31] As much as liberal tenets of self-determination depend on the freedom to speak one's mind, they also depend on the freedom to be silent.[32] This choice of speech resides in the individual conscience.

All this changes for commercial speech because, here, the theory of First Amendment protection is not freedom of mind but freedom of information flow. The law of commercial speech therefore differentiates between restrictions and mandates.[33] Because commercial speech restrictions interrupt the flow of information to consumers, they are viewed with greater skepticism than commercial speech mandates, which typically increase information flow.[34] Consistent with the listener-centric rationale for (reduced) commercial speech protection, the Supreme Court held in the 1985 case *Zauderer v. Office of Disciplinary Counsel* that commercial speech mandates raise minimal constitutional concern where the mandates improve information flow to consumers.[35] Thus was born the disparate treatment of commercial speech *restrictions*—usually in the form of advertising limits—and

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30 *See* Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 133 S. Ct. 2321, 2332 (2013) (unconstitutional to make federal funding conditional on espousing a belief not within the scope of the government program); Riley v. Nat'l Fed'n of Blind of N.C., Inc., 487 U.S. 781, 796–97 (1988) (unconstitutional to require professional fundraisers to disclose to potential donors percentage of donations directed to charities); Wooley v. Maynard, 430 U.S. 705, 714 (1977) (unconstitutional to require expressive license plates); Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 258 (1974) (unconstitutional to require "right of reply" to newspaper editorials); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (unconstitutional to require school children to recite the Pledge of Allegiance).

31 *Wooley*, 430 U.S. at 714 ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" (quoting *Barnette*, 319 U.S. at 637)).

32 *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234–35 (1977) ("[I]n a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.").

33 *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651–52 n.14 (discussing disclosure requirements as applied to attorney advertisements and noting that "the First Amendment interests implicated by [commercial] disclosure requirements are substantially weaker than those at stake when speech is actually suppressed"); *id.* at 650 (citing "material differences between disclosure requirements and outright prohibitions on speech").

34 *See id.* at 646 (placing the burden on would-be regulators to distinguish between true and false commercial speech based on the value of the free flow of commercial information).

35 471 U.S. 626 (1985). *Zauderer* has also been applied in several other cases. *See* Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 249 (2010) (requiring law firm to identify itself as a "debt relief agency" under *Zauderer*); Spirit Airlines, Inc. v. Dep't of Transp., 687 F.3d 403, 412–15 (D.C. Cir. 2012) (upholding requirement that airline advertisements list most prominently the final price, including taxes); N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114, 131–34 (2d Cir. 2009) (applying *Zauderer* analysis to a regulation requiring posting of calorie counts in restaurants).

commercial speech *mandates*—usually in the form of disclosure requirements.

Zauderer concerned an Ohio requirement that attorneys advertising contingency fee services must disclose that clients were responsible for court costs, even when they had contracted for "no-fee" services.[36] The Court described the disclosure requirement as "purely factual and uncontroversial."[37] Since protection of commercial speech is "justified principally by the value to consumers of the information such speech provides," and these disclosures were valuable, the Court eschewed the *Central Hudson* intermediate standard of review appropriate for speech restrictions.[38] Rather, it held that disclosure requirements that were not "unjustified or unduly burdensome" would be upheld under a rational basis review if "reasonably related to the State's interest in preventing deception of consumers."[39]

If *Zauderer* was a carve-out from *Central Hudson*, it was also a departure from the other line of cases that might have applied: the compelled noncommercial speech cases. The Court distinguished commercial from noncommercial speech mandates.[40] It noted that in the classic compelled-speech cases, it applied strict scrutiny to rules that forced speakers to adopt state-mandated orthodoxies on "matters of opinion."[41] By contrast, Ohio's commercial speech mandate did not assault the regulated attorney's conscience and trenched very little on his First Amendment interests.[42] Indeed, the attorney's interest "in not providing any particular factual information in his advertising [was] minimal."[43]

Zauderer has led to considerable confusion in the lower courts about what sorts of commercial speech disclosure requirements are covered by its rational basis standard of review.[44] Some have held that it applies only when the government is attempting to prevent con-

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36 *See Zauderer*, 471 U.S. at 633.

37 *Id.* at 651.

38 *Id.* In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980), the Court established a four-part test for the constitutionality of commercial speech: (1) the speech must concern a lawful activity and not be misleading, (2) the asserted government interest relating to that speech must be substantial, (3) the regulation must directly advance the governmental interest, and (4) it must be no more extensive than necessary.

39 *Zauderer*, 471 U.S. at 651.

40 *See id.* (explaining that the interests at stake in commercial speech cases are different from noncommercial speech cases).

41 *Id.* (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

42 *See Zauderer*, 471 U.S. at 651 (explaining that commercial disclosure requirements trench more narrowly on an advertiser's interests than prohibitions).

43 *Id.* at 651 (emphasis omitted).

44 For an excellent review, see Jacobs, *supra* note 9, at 863–66.

sumer deception.[45] Others have held that it may apply also when the government has broader informational goals.[46] Courts have split on what kind of consumer deception counts and whether the term should have a narrow, technical meaning.[47] They also disagree on what the alternative to *Zauderer* review is: intermediate or strict scrutiny.[48] Commentary on the use of *Zauderer* in the cigarette-labeling cases has been similarly torn.[49]

One of the problems is that Z*auderer* itself was not well reasoned. The Court starts from the premise that it is carving out for more lenient treatment a state intervention that would otherwise have been subject to searching scrutiny.[50] But the law did not then, and does not now, support this premise. The regulation at issue in *Zauderer* was a corrective advertising requirement to fix a deceptive or misleading commercial ad. An ad that is false, deceptive, or misleading receives no First Amendment protection at all under *Virginia Pharmacy*.[51] *Central Hudson* went on to say that commercial speech must at least "not be misleading" to qualify for constitutional protection.[52] Ordinarily,

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45 *See, e.g.*, Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 74 (2d Cir. 1996) (dairy industry likely to prevail on merits in challenge to state law requiring disclosure of bovine growth hormone in dairy products in absence of consumer deception).

46 *See, e.g.*, Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115 (2d Cir. 2001) (upholding state law requiring disclosure of mercury content in product labels even though state interest was in protecting health and the environment, not preventing deception); *cf. Int'l Dairy*, 92 F.3d at 74 (Leval, J., dissenting) (arguing disclosure of "information consumers reasonably desire" even if not necessary to dispel deception is constitutional under *Zauderer*).

47 *Compare* Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 562 (6th Cir. 2012) (*Zauderer* deception includes tobacco industry's "decades-long deception" of the public about the health risks of smoking and need not be deception on the face of a product label or advertising), *with* R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1215–16 (D.C. Cir. 2012) (absence of any specifically misleading statements or omissions on cigarette labels and advertising means that *Zauderer* review is inappropriate).

48 *Compare* R.J. Reynolds Tobacco Co. v. FDA, 845 F. Supp. 2d 266, 272 (D.D.C. 2012) (default standard of review for compelled commercial speech is strict scrutiny), *with R.J. Reynolds*, 696 F.3d at 1212 (default standard of review for compelled commercial speech is intermediate scrutiny).

49 *Compare* Recent Case, *D.C. Circuit Holds that FDA Rule Mandating Graphic Warning Images on Cigarette Packaging and Advertisements Violates First Amendment:* R.J. Reynolds Tobacco Co. v. FDA, 126 HARV. L. REV. 818, 823 (2013) ("On its own terms, *Zauderer* need not be limited to these two descriptors ["misleading" and "deceptive"]—*Zauderer* also referred to 'manipulative' and 'confus[ing]" as defective qualities that would place commercial speech under its reach." (second alteration in original)), *with* Hardesty, *supra* note 1, at 2846 (arguing for strict scrutiny review outside the context of deceptive commercial speech).

50 *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 650–51 (1985) (treating the Ohio regulation as a commercial disclosure requirement, which receives less scrutiny than noncommercial compelled speech).

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

52 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (2010); *see also Zauderer*, 471 U.S. at 638 ("[T]he Federal Government [is] free to prevent the dis-

corrective advertising or affirmative disclosures that prevent or correct deception simply do not raise First Amendment concerns.[53]

The mistaken reasoning of *Zauderer* has created a paradox for First Amendment review of compelled commercial speech. Although *Zauderer* was not needed to hold that corrective advertising merited rational basis review, the very existence of *Zauderer* has led some lower courts to *limit* rational basis review to corrective advertising.[54] More recent Supreme Court precedent has seemed to support this view, without squarely endorsing it.[55]

C. The Constitutional Value of Consumer Autonomy

The justification for more deferential review of commercial speech mandates is located in notions of consumer autonomy and related informed consent principles.[56] Consumer autonomy blossoms under conditions of sufficient information, and sometimes government intervention is needed to foster these conditions. At the same time, interventions that circulate the wrong kind of information may undermine consumer autonomy by skewing autonomous choice.

1. *Interest in Receiving Information*

Commercial speech law has at its core the interests of the listener, which are principally autonomy interests. This is in contrast to the rest of free speech jurisprudence, where *speaker* autonomy rights are paramount.[57] In commercial speech law, the most important compo-

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semination of commercial speech that is false, deceptive, or misleading . . . ."); *In re* R.M.J., 455 U.S. 191, 200 (1982) ("False, deceptive or misleading advertising remains subject to restraint . . . .").

53 *See* Warner-Lambert Co. v. FTC, 562 F.2d 749, 758 (D.C. Cir. 1977); Beneficial Corp. v. FTC, 542 F.2d 611, 620 (3d Cir. 1976) (discussing a state actor's discretion when dealing with deceptive commercial speech).

54 *See* Glickman v. Wileman Bros. & Elliot, Inc., 521 U.S. 457, 490–91 (1997) (Souter, J., dissenting); R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1213–17 (D.C. Cir. 2012).

55 *Compare* Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 249–53 (2010) (applying *Zauderer* to uphold federal disclosure requirements for law firm advertisements that are "inherently misleading"), *with* Ibanez v. Fla. Dep't of Bus. and Prof'l Regulation, Bd. of Accountancy, 512 U.S. 136, 142–43 (1994) (declining to apply *Zauderer* to state regulation of attorney advertising that was not misleading); *see also Glickman*, 521 U.S. at 491 (Souter, J. dissenting) ("*Zauderer* carries no authority for a mandate unrelated to the interest in avoiding misleading or incomplete commercial messages.").

56 *See generally* Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153, 1171–80 (2012) (exploring autonomy justifications for commercial speech protection).

57 *See, e.g.*, Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95–96 (1972) ("To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship."); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (stating that "the final end of the State" is to make people "free to develop their faculties," and liberty is valuable "both as an end and as a means"); *see also* Martin H. Redish, *The*

nent of listener autonomy is the right to receive information, potently cast as a right against paternalistic state restrictions on speech.[58]

Paternalism is an especially dirty word in First Amendment jurisprudence.[59] In case after case, the Supreme Court has invalidated speech restrictions it has characterized as paternalistic attempts to deprive people of information that may lead them astray.[60] As Justice John Paul Stevens put it in his plurality opinion striking down a state law banning advertisements of liquor prices, the "First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."[61] Notably, the antipaternalism thrust of First Amendment law is far stronger than in the law more generally. Government is permitted, for example, to control all manner of commerce for the sake of consumer welfare.[62] It can ban products or limit their distribution or tax them to inutility. But it must tread very lightly when controlling information that is circulated about those products.[63]

It was antipaternalism that animated *Virginia Pharmacy*—the font of commercial speech protection and the first to foreground con-

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Value of Free Speech, 130 U. PA. L. REV. 591, 593 (1982) (emphasizing individual self-realization as the thrust behind the guarantee of free speech).

58 *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 646 (1985) (emphasizing the free flow of information as a justification for commercial disclosure requirements); Paul Horwitz, *The First Amendment's Epistemological Problem*, 87 WASH. L. REV. 445, 451 (2012) (describing the antipaternalistic approach to commercial speech regulation).

59 *See id.* at 451 (describing an antipaternalistic approach that justifies First Amendment values "because we are reluctant to hand over to the state the authority to make such determinations"); Carpenter, *supra* note 25, at 588–98 (tracing the antipaternalism impulse through Supreme Court free speech cases); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 338 (1991) (deriving the "persuasion principle" whereby government may not suppress speech because it may persuade people to do something harmful). *But see* Daniel Hays Lowenstein, *"Too Much Puff": Persuasion, Paternalism, and Commercial Speech*, 56 U. CIN. L. REV. 1205, 1240 (1988) (contending that the commercial speech cases do not reflect antipaternalism because the restrictions at issue seek the good of the collective, not the individual).

60 *See, e.g.*, Thompson v. W. States Med. Ctr., 535 U.S. 357, 375 (2002) (pharmaceutical advertising); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 565 (2001) (tobacco product advertising); Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 184 (1999) (casino advertising); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489 (1996) (liquor price advertising); Rubin v. Coors Brewing Co., 514 U.S. 476, 491 (1995) (beer alcohol-content labeling); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 458 (1978) (attorney soliciting); Bates v. State Bar of Ariz., 433 U.S. 350, 365 (1977) (attorney price advertising).

61 *44 Liquormart*, 517 U.S. at 503.

62 *See* Carpenter, *supra* note 25, at 587 (discussing examples of governmental regulations of commerce).

63 One explanation for the more stringent antipaternalism in speech jurisprudence is that we should be especially wary of state efforts to control behavior covertly by limiting information rather than through more direct and accountable regulation. *See, e.g.*, Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 601–02 (1996).

sumer autonomy.[64] Virginia thought that by depriving consumers of price information on prescription drugs, consumers would be forced to select products based on quality, not price. The Court supported "an alternative to this highly paternalistic approach[, which is to assume] that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them."[65] Of course, there is a chance that people will not perceive their own "best interests." *Virginia Pharmacy* and its kin put the state and the people to that risk, adopting in essence the perspective of liberal theorist Thomas Scanlon, who insists that "[t]he harm of coming to have false beliefs is not one that an autonomous man could allow the state to protect him against through restrictions on expression."[66]

2. *Interest in Truthful Information*

If the furtherance of consumer autonomy justifies commercial speech protection, the same goal prescribes the limits to that protection. The first limit, noted in *Virginia Pharmacy* itself, concerns the sphere of protection for commercial speech. In bringing commercial speech into constitutional bounds, the Court was clear that not all commercial speech belonged there. In particular, the First Amendment does not protect commercial speech that is false, deceptive, or misleading,[67] and the government is free to regulate such communication to ensure "that the stream of commercial information flow[s] cleanly as well as freely."[68]

Because the principal purpose of commercial speech protection is to safeguard the consumer's interests in accurate information, it naturally follows that inaccurate information would fall outside the zone of protection. Indeed, one might even say that individuals have a positive liberty interest in being protected from false or misleading speech. This is a view of autonomy that Richard Fallon, in his taxon-

64 *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Strauss, *supra* note 59, at 334–71 (discussing listener autonomy interest in First Amendment cases).

65 425 U.S. at 770. Of course Virginia's concern was not merely that individuals would make bad choices for themselves, but that individual choices—even individually rational choices—would turn out to be collectively bad. It was concerned about negative externalities (poor drug quality) imposed both on those who choose cheaper drugs and on those who do not. This concern for the collective consequences of individual decision making is evident in many commercial speech regulation cases. *See, e.g.*, Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85 (1977) (local regulation banning for-sale signs to combat collective segregating effects of individual decisions to sell homes).

66 Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 217 (1972).

67 425 U.S. at 771 ("Untruthful speech, commercial or otherwise, has never been protected for its own sake.").

68 *Id.* at 772.

omy of the concept, has described as "descriptive autonomy."[69] Lies undermine autonomy and self-realization. To desist from lying is a perfect duty in Immanuel Kant's ethics, never to be overridden.[70] Sissela Bok elaborates in the Kantian tradition that lying hinders autonomy by giving listeners false belief as to the world around them and the actual choices available to them.[71] Given the effect of lies, the government enhances consumer autonomy by penalizing (commercial) deception.[72]

The second autonomy-enhancing limit on commercial speech protection emerged in post–*Virginia Pharmacy* cases. The Court endorsed government strategies to put more information into the marketplace, often as an alternative to paternalistic speech restrictions.[73] In *Central Hudson*, the Court struck down a state regulation banning promotional advertising by an electric utility in order (paternalistically) to reduce consumer energy demands.[74] The state's suppression of information impermissibly intruded on listener autonomy. However, the Court noted that the government does have some ability, aside from disseminating its own advertising campaigns, to inject itself into the information market: for instance, it would have been permissible for the state to require that a private company's advertisements

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69 Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 878 (1994) ("[W]here descriptive autonomy refers to the actual condition of persons . . . . [it] is an ideal that can be promoted or protected, sometimes through paternalistic legislation . . . ."). I am simplifying Fallon's taxonomy, which actually breaks descriptive autonomy (and its obverse—ascriptive or formal autonomy) into positive and negative libertarian varieties.

70 *See* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 29–33 (Mary Gregor ed., rev. ed. 2012) (1785).

71 SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 17–20 (Random House 1989) (1978).

72 Even if inaccurate information is without value and is particularly baleful in commercial contexts, we might still be concerned that regulating it could chill the production of truthful information. That is certainly the case in the noncommercial speech context. The Court has avoided detailed consideration of this issue by asserting that commercial speakers have greater incentives and wherewithal to avoid the chill and bravely soldier on in the production of information. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 762 (1985) ("[A]dvertising . . . is hardy and unlikely to be deterred by incidental state regulation."); *Va. Pharmacy*, 425 U.S. at 772 n.24 ("Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely."). For criticism, see Redish, *supra* note 57, at 633.

73 *See, e.g.*, Meese v. Keen, 481 U.S. 465, 481–85 (1987) (holding required "propaganda" disclosures to be permissible and autonomy enhancing); Peel v. Attorney Registration & Disciplinary Comm'n of Ill., 496 U.S. 91, 109 (1980) (positing attorney disclosure mandates as an alternative to advertising restrictions); Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85, 97 (1977) (suggesting that the town could engage in its own counter-advertising campaign, including posting lawn signs to combat white flight); Bates v. State Bar of Ariz., 433 U.S. 350, 365 (1977) (noting that restrictions on attorney advertising alternative to advertising served to restrict consumers' access to information).

74 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 569–71 (1980).

"include information about the relative efficiency and expense of the offered service."[75] Even Justice Stevens—one of the earliest and most stalwart exponents of the antipaternalism principle in commercial speech cases—conceded in his concurrence in *Rubin v. Coors Brewing* that "regulations of statements . . . that increase consumer awareness would be entirely proper."[76]

Surprisingly, even in the area of noncommercial speech, the Court upheld the constitutionality of a federal law that required certain films to be labeled "government propaganda" in *Meese v. Keene*.[77] The Court found that the law, "[b]y compelling some disclosure of information[,] . . . recognizes that the best remedy for misleading or inaccurate speech contained within materials subject to the [law] is fair, truthful, and accurate speech."[78] In fact, exploiting the power of antipaternalism, the Court said that it was the trial court's injunction of the propaganda label that was paternalistic because it would deprive the public of useful information.[79] To the Court, the injunction was like a state statute that prohibited advertising on the assumption that citizens benefitted from "being kept in ignorance."[80]

The perspective on autonomy reflected in *Virginia Pharmacy*, *Central Hudson*, and *Meese* is that state interventions in commercial speech markets to provide truthful information are not paternalistic but interventions to deprive listeners of truthful information are. This is consistent with the definition of paternalism as coercive and liberty depriving.[81] State restrictions on truthful information, like private communication of falsities, are coercive because they deprive the listener of the ability to make informed decisions. The compelled circulation of truthful information, however, is not coercive and can enlarge opportunities for the exercise of informed self-determination. Sunstein and Thaler's recent articulation of "libertarian paternalism"

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75 *Id.* at 571.

76 514 U.S. 476, 498 (1995) (Stevens, J., concurring in judgment) (emphasis omitted) (striking down prohibition on beer label's display of alcohol content).

77 481 U.S. 465 (1987).

78 *Id.* at 481.

79 *Id.*

80 *Id.* at 482 (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 769–70 (1976)).

81 *See* Gerald Dworkin, *Paternalism*, *in* MORALITY AND THE LAW 107, 108 (Richard A. Wasserstrom ed., 1971) (defining paternalism as "the interference with a person's liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests[,] or values of the person being coerced"). As Dale Carpenter points out, most of the First Amendment cases concern regulations that are justified not by the welfare of the regulated party but by the welfare of the consumer or public. He notes that this is what Joel Feinberg calls "two-party" paternalism and Dworkin calls "impure" paternalism. Carpenter, *supra* note 25, at 615–16.

or "new paternalism" is built on this distinction.[82] They start with the idea that consumer choice is necessarily structured by someone and there is no purely neutral choice architecture.[83] When choice is structured well, it enhances both liberty and welfare by promoting better analysis and choices that increase social and individual welfare.[84]

There is yet another view of government interventions in speech markets—whether they be restrictions on false commercial speech or mandates to supply information—that places them very much in conflict with the libertarian strain of antipaternalism. The strongest antipaternalist approach to commercial information would be to keep the government out of information markets entirely.[85] This is what Richard Fallon calls an "ascriptive" or formal approach to autonomy.[86] He distinguishes this from the "descriptive autonomy" approach, which considers individuals to be more or less autonomous depending on what information and choices they have.[87] According to a libertarian version of formal autonomy theory, the law should treat individuals as

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82 SUNSTEIN & THALER, *supra* note 9, at 74, 248–49 (building on a theory of asymmetric paternalism) (citing Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism,"* 151 U. PA. L. REV. 1211, 1212 (2003)); Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1159–60 (2003) (discussing and supporting "libertarian paternalism" as a means of "steer[ing] people's choices in welfare-promoting directions without eliminating freedom of choice"); *see also* Mario J. Rizzo & Douglas Glen Whitman, *The Knowledge Problem of New Paternalism*, 2009 BYU L. REV. 905, 908 ("The new paternalism . . . takes the individual's own subjective preferences as the basis for policy recommendations. New paternalist policies allegedly help the individual to better achieve his own subjective well-being, which cognitive impediments prevent him from attaining on his own.").

83 Sunstein & Thaler, *supra* note 82, at 1182 ("[T]here is no way to avoid effects on behavior and choices. The task for the committed libertarian is, in the midst of such effects, to preserve freedom of choice.").

84 *Id.* at 1162 ("[I]n some cases individuals make inferior decisions in terms of their own welfare—decisions that they would change if they had complete information, unlimited cognitive abilities, and no lack of self-control."); *id.* at 1166 ("[P]rograms should be designed using a type of welfare analysis . . . to measure the costs and benefits of outcomes . . . . [S]ome results from the psychology of decisionmaking should be used to provide ex ante guidelines to support reasonable judgments about when consumers and workers will gain most by increasing options.").

85 *See, e.g.*, Redish, *supra* note 63, at 625 ("Any time government seeks to control the content of private communication, free speech concerns are implicated."); Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777, 780–83 (1993) (arguing that all commercial speech should receive the full protection of the First Amendment from government interference).

86 Fallon, *supra* note 69, at 878 ("[A]scriptive autonomy marks a moral right to personal sovereignty . . . that is incompatible with much if not all paternalism."). Fallon actually outlines both negative and positive libertarian versions of the ascriptive approach, and the positive version would presumably approve certain government interventions.

87 *Id.* ("[D]escriptive autonomy is an ideal that can be promoted or protected, sometimes through paternalistic legislation . . . .").

rational decision makers, fully capable of choosing what is best for them based on the information that free markets provide.[88]

Advertising law as we have it does not endorse this version of autonomy. False advertising laws interfere in commercial speech markets to curate information for consumers. In order to protect consumers, for example, the Lanham Act imposes liability for false advertising and the confusing use of trademarks.[89] The consumer imagined by these regulations is incapable of sifting true from false information in the marketplace, or at least should not be put to the expense of doing so.[90] These laws imagine an individual who is supremely capable when presented with truthful information but inept and vulnerable when presented with false or misleading information.[91] Commercial speech doctrine too rejects this formal view of autonomy, which is one reason the doctrine is under pressure.[92]

There is a persistent tension between formal and descriptive views of autonomy that very much inflect consideration of mandatory labels,

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88 Embedded in the antipaternalistic response to interventions in commercial speech markets is a conception of the market supply of information as neutral. Justice Clarence Thomas, who supports the elimination of any distinction between commercial and noncommercial speech, recounted the Court's decisions that "stress the importance of free dissemination of information about commercial choices in a market economy" with "free" meaning what the unregulated market economy produces. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 520 (1996) (Thomas, J., concurring in part and concurring in judgment).

89 15 U.S.C. § 1125(a), (b) (2012).

90 Stacey L. Dogan & Mark A. Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 HOUS. L. REV. 777, 786–87 (2004) ("In economic terms, trademarks contribute to economic efficiency by reducing consumer search costs. Rather than having to inquire into the provenance and qualities of every potential purchase, consumers can look to trademarks as shorthand indicators."); Mark P. McKenna, *A Consumer Decision-Making Theory of Trademark Law*, 98 VA. L. REV. 67, 81 (2012) ("According to the search costs theory, conflicting uses of a trademark undermine the informational quality of the mark, ultimately making it impossible for consumers to rely on the mark as an indicator of the source and qualities of the goods or services with which the mark is used.").

91 For a nuanced discussion of this conflict in the context of product warnings, see Laura A. Heymann, *Reading the Product: Warnings, Disclaimers, and Literary Theory*, 22 YALE J.L. & HUMAN. 393, 395–96 (2010).

92 Justice Thomas has been the leading advocate for abandoning any First Amendment distinction between commercial and noncommercial speech. *44 Liquormart*, 517 U.S. at 522 (Thomas, J., concurring in part and concurring in the judgment) ("I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech."). Thomas reiterated this position in later cases and indicated he would not be adverse to overruling *Zauderer*, saying he was "skeptical of the premise on which *Zauderer* rests." Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 255 (2010) (Thomas, J., concurring in part and concurring in the judgment). Some scholars see the Court as gradually inching towards Justice Thomas's position, noting that "[t]he Court came tantalizingly close to embracing Thomas's view in *44 Liquormart*" and that the Court's decision in *Edenfield v. Fane* constituted "a significant step toward Justice Thomas's desire to elevate the scrutiny of commercial speech restrictions." Allen Rostron, *Pragmatism, Paternalism, and the Constitutional Protection of Commercial Speech*, 37 VT. L. REV. 527, 545, 547 (2013).

like the cigarette warnings. The insurgent preference for formal autonomy explains the final listener interest discussed below, while the dominance of descriptive autonomy in the law explains the failure to vindicate this interest.

3. *Interest in Not Being Spoken To*

An informal survey of my law students revealed that many were uncomfortable with graphic cigarette warning labels because they experienced the communication as government haranguing. This revulsion against state preaching, though possibly widespread, finds little expression in First Amendment jurisprudence. Notwithstanding the aspirations of liberal theory to state neutrality,[93] the state is relatively unconstrained in its ability to say what it wants to the public.[94]

With respect to private speech as well as government speech, First Amendment law reflects a belief in the power of people to shrug off what they do not want to hear or see. The First Amendment does not allow the state to restrict the content of private speech in order to protect sensitive members of the public from exposure to intrusive or unwelcome messages.[95] In most cases, especially where visual communication is at issue, audience members are expected to avert their eyes.[96] Restrictions have been upheld for the sake of listener interests only in very limited contexts, such as when radio broadcasts invade the home.[97]

The unsettled question here is whether, and to what extent, the First Amendment bars the state, by means of mandatory disclosure

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93 *See, e.g.*, Ronald Dworkin, *Liberalism*, *in* PUBLIC AND PRIVATE MORALITY 113, 121–22 (Stuart Hampshire ed., 1978) (outlining the political positions of liberals, including a general opposition to unnecessary government intervention).

94 *See generally* MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA (1983) (arguing that the increasing governmental participation in communication processes threatens First Amendment protections); Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983 (2005) (discussing the government's active participation in communication and arguing that such participation should be transparent); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980) (attempting to reconcile the constitutional problems that arise when the government promotes particular values as a speaker rather than a censor); *see also* Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1 (2000) (contending that the government inevitably will and should express visions of the good).

95 There are limited exceptions, mainly involving cases of the "captive audience." Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. Rev. 939, 943 (2009).

96 Snyder v. Phelps, 131 S. Ct. 1207 (2011) (holding that funeral picketers were shielded from liability for intentional infliction of emotional distress and intrusion upon seclusion); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (holding that passerbys can avert their eyes from nudity on drive-in theater screens); Cohen v. California, 403 U.S. 15 (1971) (striking down state restriction on the display of a "Fuck the Draft" jacket in public because the viewer can turn away).

97 FCC v. Pacifica Found., 438 U.S. 726 (1978) (upholding FCC's ban on indecent speech broadcast during hours when children are likely to be in the audience).

requirements, from forcing private entities to deliver its messages. Some scholars have advocated a First Amendment doctrine, rooted in listener autonomy interests, to protect individuals from government-mandated speech.[98] In large part, these scholars focus on state requirements that women view fetal sonograms before terminating their pregnancies.[99] Caroline Mala Corbin, arguing for a "right against compelled listening," writes that "when the government makes a captive audience listen against its will to a government message, it runs roughshod over individuals' right to control their own development and decision-making processes."[100] Her argument is predicated on the captivity of the listener who is unable to avoid the government's message without forsaking a constitutionally protected right of access to abortion.[101] In this sense, it has limited applicability to the commercial product disclosure context. Listener autonomy is only one of several constitutional interests at stake for women seeking abortions. They are a special sort of listener, with much more liberty on the line than those in the typical product disclosure context by dint of the nature of their decision and the degree of their captivity.[102]

That said, there probably is a point at which state-mandated truthful and nonmisleading commercial speech will impair listener interests. Part III locates this point on a spectrum of the "controversialness" of the disclosure, which also serves to distinguish many product disclosures from abortion-related disclosures. Part II introduces these issues using graphic cigarette labels as a prime example.

II
New Graphic Cigarette Labels

Cigarette labeling is both old hat and innovative, and it has raised in a pointed way the conflicting values that surround mandatory prod-

98 *See* Corbin, *supra* note 95, at 940–42 (endorsing an audience's right against compelled listening and supporting restrictions on both private speech and state speech).

99 *See id.* at 1000–10 (discussing the right against compelled listening in the context of mandatory abortion counseling); Jacobs, *supra* note 9, at 885–94 (using abortion disclosure cases as a framework for analyzing government speech).

100 Corbin, *supra* note 95, at 980; *see also id.* at 989–90 (comparing state-compelled listening in the form of pamphlets for antismoking campaigns with a hypothetical anti-gay-marriage campaign).

101 *See id.* at 1000–01 (noting the two forms of mandatory abortion counseling); *see also* Jacobs, *supra* note 9, at 885–94 (discussing the abortion disclosure cases that provide the framework for an analysis of government-compelled listening). Another important distinction is that the fetal sonogram mandates burden physicians, who are not commercial speakers.

102 One could imagine a persistent cigarette warning that did capture its audience. Consider a digital chip embedded in the cigarette box that warned smokers every time they opened the box that "smoking can kill you." Of course, smokers could theoretically empty the box and keep the cigarettes in a case. This degree of captivity would be significantly greater than that exerted by an image from which smokers can avert their eyes.

uct disclosures. The federal government has required warning labels on cigarette packaging since 1965 without challenge.[103] Congress mandated new labels in 2009[104]—a mandate that one appellate court upheld against a constitutional challenge[105] and another struck down[106] in 2012. The new labels raised a swarm of questions about how to balance public health goals with communicative freedom and how to tease apart the uncontroversial warning from the emotional gut punch that delivered it.[107] This Part will lay out the genesis of graphic cigarette labels and their tangle in the courts. It is here that questions concerning the content and form of product admonitions as they relate to free speech interests and consumer autonomy came to the fore.

I start with the caveat that the policy choice to amplify tobacco warnings was ill-advised if smokers in fact do not need more information and will not be influenced by it. Congress's epistemic assumption was that consumers (especially children) do not "know" the risks of smoking.[108] The same was true in 1981, when the Federal Trade Commission reported to Congress that then-current warning labels had little effect on public awareness and attitudes toward smoking and that "a new informational remedy may now be necessary."[109] In 1984, Congress responded by replacing the old labels with the four new

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103 Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, § 2, 79 Stat. 282 (codified at 15 U.S.C. § 1331 (2012)). Indeed, it was the tobacco industry itself that was instrumental in getting the first warning labels passed as an alternative to more restrictive regulations on the sale of tobacco products. *See* Kristin Faucette, *First Amendment Challenges to the Family Smoking Prevention and Tobacco Control Act: Balancing Congress' Interest in Preserving Public Health with the Tobacco Industry's Right to Freely Communicate with Adult Smokers*, 6 J. HEALTH & BIOMED. L. 301, 305–06 (2010) (noting that "opponents of smoking viewed the [1965 labeling requirement] as a victory for cigarette manufacturers because the warning was weaker than critics of tobacco requested" and maintained the "recurrent omission of tobacco products from new laws the legislature passed that regulated hazardous or toxic substances").

104 Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009).

105 *See* Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509 (6th Cir. 2012).

106 *See* R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205 (D.C. Cir. 2012).

107 *See id.* at 1211–13 (discussing whether FDA smoking warnings go too far, becoming admonitions instead of warnings); *Disc. Tobacco*, 674 F.3d at 524–27 (addressing the constitutionality of new antismoking labels).

108 *See* Final Rule, *supra* note 1, at 36,632–33 (finding that smokers, especially poorly educated and low-income smokers, grossly underestimate both the statistical risk and personal risk of smoking, and even when smokers are aware of risks, such awareness may be too abstract to influence them at moment of purchase, especially for new smokers).

109 MATTHEW L. MYERS ET AL., FED. TRADE COMM'N, STAFF REPORT ON THE CIGARETTE ADVERTISING INVESTIGATION 20 (1981), *available at* http://legacy.library.ucsf.edu/tid/eiv99d00/pdf (finding that the old labels were "overexposed and . . . worn out," lacked novelty, were too abstract, and lacked personal relevance).

ones still found on U.S. cigarette packages today.[110] Over twenty years later, Congress mandated new graphic labels for the same reason: the old labels were stale and uninformative.[111] My goal is not to prove that consumers need additional information or that labels—whatever their form—can provide it effectively. I am not recommending information policy but instead examining the free speech implications of a policy choice.

A. Global Consensus on Health Warnings

In 2005, the World Health Organization's Framework Convention on Tobacco Control (Framework Convention) went into effect, embracing a new approach to warning consumers of smoking hazards.[112] Warnings should be large and graphic, the Framework Convention declared.[113] They should occupy most of the cigarette package in order to impress especially upon potential smokers the health problems associated with smoking.[114] The United States signed but did not ratify the convention.[115] To date, 177 countries have ratified or acceded to the Framework Convention,[116] and at least sixty have mandated graphic warnings on cigarette packages.[117] Most countries require that the warning labels cover at least half of the package. Some require "plain packaging" in addition to the graphic labels, meaning that the manufacturer is prohibited from using color and other elements of its trade dress on the packages.[118]

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110 Comprehensive Smoking Education Act, Pub. L. No. 98-474, 98 Stat. 2200 (1984). The amendments made in 1985 to cigarette warning labels are still in effect. *See* 15 U.S.C. § 1333 (2012).

111 Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776, 1777 (2009) (outlining the findings to support graphic antismoking labels).

112 World Health Organization, Framework Convention on Tobacco Control (2003), *available at* http://whqlibdoc.who.int/publications/2003/9241591013.pdf.

113 *Id.* at 9–10.

114 *Id.*

115 *Parties to the WHO Framework Convention on Tobacco Control*, World Health Org., http://www.who.int/fctc/signatories_parties/en/ (last updated Sept. 27, 2013) (listing countries who have either signed and ratified or only signed the Framework Convention).

116 *Id.* (Tajikistan is the newest party to the Framework Convention).

117 World Health Organization, *Article 11: Demand Reduction Measures*, FCTC Implementation Database, http://apps.who.int/fctc/reporting/database/ (last visited Jan. 18, 2014). The American and Western Pacific regions have the most picture-based health warnings. Canadian Cancer Society, Cigarette Package Health Warnings: International Status Report 3 (2010), *available at* http://www.tobaccolabels.ca/healthwarningsinfo/statusreport/.

118 These plain packaging requirements have kicked up litigation worldwide. Canada upheld its law against several claims, including a free speech claim. *See* Canada (Attorney General) v. JTI-MacDonald Corp., [2007] S.C.R. 610 (Can.). Litigation in Australia and other jurisdictions has involved industry claims that the labeling requirements infringe upon cigarette producers' trademark rights to identify their products. *See, e.g.*, *JT Int'l SA v. Commonwealth* [2012] HCA 43 (Austl.) (Australia's High Court upholding its tobacco labeling law). Trademark-related actions have been lodged at the World Trade Organization,

B. Family Smoking Prevention and Tobacco Control Act

In 2009, Congress enacted the Family Smoking Prevention and Tobacco Control Act (the Act),[119] the most significant overhaul of cigarette regulations since the federal government first started regulating cigarettes. The Act's stated purpose was twofold: to improve consumer information *and* to modify consumer behavior.[120] It required regulation to "ensure that consumers are better informed" and to "promote cessation to reduce disease risk and the social costs associated with tobacco-related diseases."[121]

Warning labels figured centrally in the achievement of these goals. The Act required the FDA to create nine color graphic warning labels emphasizing the causal links between tobacco and disease.[122] Consistent with the Framework Convention, the Act specified that the labels must occupy the top half of the front and rear panels of cigarette packages and also specified that there should be textual warnings taking up at least sixty percent of the total warning area.[123] The Act also prescribed the warning language to be used in conjunction with the images, including "WARNING: Smoking can kill you" and "WARNING: Tobacco smoke causes fatal lung disease in nonsmokers."[124]

After voluminous notice and comment, the FDA issued its final rules in June 2011, presenting nine color graphic images to be used on cigarette packages and advertisements.[125] A sampling is below:

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claiming that labeling laws (plain packaging in addition to graphic warning) constitute a trade barrier to tobacco products. For an overview, see Ari Afilalo, *Failed Boundaries: The Near-Perfect Correlation Between State-to-State WTO Claims and Private Party Investment Rights* 34–39 (Jean Monnet Working Paper Series 2013), *available at* http://centers.law.nyu.edu/jeanmonnet/papers/13/documents/JMWP01Afilalo.pdf. Despite the controversy, nations continue to roll out plain packaging and graphic warning requirements. *See, e.g.*, *Ireland to Introduce Plain Cigarette Packets*, THE GUARDIAN (May 28, 2013, 1:34 PM), http://www.guardian.co.uk/world/2013/may/28/ireland-plain-cigarette-packets (discussing Ireland's new reforms on cigarette warning labels).

119 Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009).

120 *Id.* at 1782.

121 *Id.* Cessation is a primary objective: "Because the only known safe alternative to smoking is cessation, interventions should target all smokers to help them quit completely." *Id.* at 1779.

122 *Id.* at 1845 (requiring cigarette manufacturers to visually "depict[ ] the negative health consequences of smoking").

123 *Id.* at 1843. The graphic warnings were also required on printed advertisements. *Id.*

124 *Id.* at 1842.

125 *See* Final Rule, *supra* note 1.

In selecting these images, the FDA considered the graphic warnings adopted by other nations, the scientific literature, and its own consumer research testing the effectiveness of the images.[126] The measure of effectiveness was explicitly normative. The FDA focused on the "salience" of the warning in provoking cognitive and emotional response because research suggests that the more salient the communication, the more likely it is to promote behavior change.[127] The agency concluded that the selected images proved most effective in "increas[ing] intentions to quit through evoked emotional responses."[128] By "eliciting strong emotional and cognitive reactions[,] [the] graphic warnings enhance[d] recall and information processing, which help[ed] to ensure that the warning [was] better processed, understood, and remembered."[129]

C. Cigarette Label Litigation: The Circuit Split on the Impact of Graphic Disclosure

Tobacco companies challenged the mandated warning labels as unconstitutional content-based speech restrictions that turned commercial speakers into governmental mouthpieces, expressing the government's disapproval of tobacco products through "subjective and highly controversial message[s]."[130]

The first lawsuit was a facial challenge in the Sixth Circuit to the Act's graphic warning requirement. In *Discount Tobacco City & Lottery, Inc. v. United States*,[131] a split panel concluded that the requirement merited *Zauderer* rational basis review because the textual warnings, whatever the accompanying images the FDA ultimately chose, were "factual" and "accurate."[132] Even if the graphics were emotionally

126 *Id.* at 36,634–37.

127 *Id.* at 36,635, 36,637–39.

128 *Id.* at 36,639 (citation omitted).

129 *Id.* at 36,641.

130 Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 524–25 (6th Cir. 2012) (alteration in original).

131 674 F.3d 509 (6th Cir. 2012).

132 *Id.* at 525–27 (finding that the warning labels were neither sufficiently "subjective" nor "highly controversial" to constitute a content-based restriction on speech and distinguishing them from affirmative limitations on speech that had elicited strict scrutiny review in other cases).

provocative and included nonliteral elements, their message was "purely factual and uncontroversial."[133]

In *R.J. Reynolds Tobacco Co. v. FDA*, the D.C. Circuit faced an as-applied challenge to the adopted labels.[134] In another split decision, the majority applied the *Central Hudson* standard to strike down the labels.[135] It ruled that *Zauderer* did not apply because the labeling requirement advanced governmental interests other than preventing consumer deception.[136] Most striking was the court's perspective on the role emotions play in free speech analysis. In its view, the mere fact that the images were "unabashed attempts to evoke emotion"[137] made them ineligible for deferential review.[138] They could not be considered purely factual and uncontroversial because "they are primarily intended to evoke an emotional response, or, at most, shock the viewer into retaining the information in the text warning."[139]

Once the problem was framed in this way as nonneutral speech, the government was handicapped by its public health agenda. The court in *R.J. Reynolds* heavily cited FDA statements that the goal of the warnings was to reduce tobacco use.[140] Because of this explicitly normative motivation, the court thought that the government should be judged on how effective the labels were at actually reducing tobacco use.[141] In other words, once the standard of review shifted from *Zauderer* to *Central Hudson*, the question shifted from achievement of informational goals to achievement of normative goals. The court concluded that the "FDA ha[d] not provided a shred of evidence" that the warnings would "*directly cause*[ ] a material decrease in smok-

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133 *Id.* at 559 n.8. The court noted that facts, including those presented graphically, "can disconcert, displease, provoke an emotional response, spark controversy, and even overwhelm reason, but that does not magically turn such facts into opinions." *Id.* at 569.

134 696 F.3d 1205 (D.C. Cir. 2012).

135 *Id.* at 1217–21. In a dissent, Judge Rogers argued that the majority erred in failing to apply *Zauderer*. She thought that "the government need show only that the targeted commercial speech presents the 'possibility of deception' or a 'tendency to mislead.'" *Id.* at 1227 (Rogers, J., dissenting) (citing Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229 (2010)). She found that "factually accurate, emotive, and persuasive are not mutually exclusive descriptions" and that emotional salience is a legitimate indicator of how effectively the warnings conveyed facts. *Id.* at 1230–31 ("[T]he emotive quality of the selected images does not necessarily undermine the warnings' factual accuracy." (footnotes omitted)).

136 696 F.3d at 1213–14 (*Zauderer* framework appropriate only if the government can show that, "absent a warning, there is a self-evident—or at least 'potentially real'—danger that an advertisement will mislead consumers." (citation omitted)).

137 *Id.* at 1217.

138 *Id.*

139 *Id.* at 1216.

140 *Id.* at 1209–11.

141 *Id.* at 1212–13, 1217–22.

ing."[142] The court vacated the FDA rule and remanded it back to the agency.[143] The government did not appeal the adverse ruling, leaving the FDA to rework its labels.[144]

The approach of *R.J. Reynolds* to the power of speech is deeply ironic. The more powerful and influential the mandated warnings are, the better their chance of modifying smoker behavior and, therefore, the more likely they are to survive a constitutional challenge. The more forgettable and meaningless the labels, the less likely they will influence smokers and the more vulnerable they are to constitutional challenge. In Australia, where graphic cigarette warnings are required, smokers complain that cigarettes have begun to taste worse.[145] We might think that, assuming no change in the product composition, the warning labels have reduced consumer autonomy by making smokers believe something that is not true.[146] The *R.J. Reynolds* reasoning runs precisely the other way and would approve the state's methods so long as smokers act on the imagined sensory experience to reduce tobacco use.[147]

One might explain this odd result by pointing to the burden on the speaker: if labels justified in part by normative goals are not effective in changing behavior, then they burden the speaker for nothing.

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142 *Id.* at 1219. The government's interest in smoking cessation disqualified it for *Zauderer* review. The government's failure to advance that interest then lost the case under *Central Hudson*. It is hard to imagine the original textual warnings surviving *Central Hudson* scrutiny either, since it was their ineffectiveness in achieving smoking cessation that led the government to amplify the warnings with graphics. *See id.* at 1217–22.

143 *Id.* at 1221–22; *see also Court Denies FDA's Request for Rehearing of Graphic Label Decision*, NATO (Dec. 6, 2012), http://www.natocentral.org/?p=2063 (stating that the FDA must decide whether to file for a Writ of Certiorari in light of five major tobacco companies requesting review of other decisions upholding "the constitutionality of the FDA's graphic cigarette health warnings").

144 No doubt concerned about a sweeping adverse ruling that would jeopardize other regulatory programs, the U.S. government decided not to appeal its loss in the D.C. Circuit. *See* Ronald Bayer, David Johns & James Colgrove, *The FDA and Graphic Cigarette-Pack Warnings—Thwarted by the Courts*, NEW ENG. J. MED. (July 18, 2013), http://www.nejm.org/doi/full/10.1056/NEJMp1306205?af=R&rss=currentIssue& ("Some feared that the Court would use the opportunity of an appeal . . . to articulate even more exacting standards for reviewing commercial speech cases, hobbling future public health initiatives."); *cf.* Michael Felberbaum, *Graphic Cigarette Warning Labels: Government Abandoning Legal Battle over Labels* (Mar. 19, 2013, 4:54 PM), http://www.huffingtonpost.com/2013/03/19/graphic-cigarette-warning-labels_n_2910101.html (highlighting the FDA's decision to develop new cigarette warning labels to replace those that violated the First Amendment).

145 Matt Siegel, *Labels Leave a Bad Taste*, N.Y. TIMES, July 11, 2013, at B1 (quoting Australian health minister explaining that "people being confronted with the ugly packaging made the psychological leap to disgusting taste").

146 I will argue that autonomy-reducing manipulation requires some intentionality, meaning that the images would not actually be manipulative unless they were designed to inculcate this false belief. *See infra* Part IV.A and accompanying text.

147 *See R.J. Reynolds*, 696 F.3d at 1221–25 ("The First Amendment requires the government not only to state a substantial interest justifying a regulation on commercial speech, but also to show that its regulation directly advances that goal.").

Although the regulated commercial entity has limited liberty interests, they are not zero.[148] At some point, when the labels are large enough and the message disparaging enough, the burden on the speaker becomes "undue."[149] Indeed, given the limited real estate on a product package, a large disclosure necessarily supplants so much speech that the speech mandate functions as if it were a (content-neutral) speech restriction.[150] This is probably where the analysis ultimately needs to go and where the cigarette labels might well fail. The undue burden analysis, like the content analysis required by the other parts of *Zauderer*, implicates positions on proper state goals and the communicative impact of the warnings.[151] On these matters, the two circuit court opinions diverged, revealing dramatically different perspectives on what it means to inform and the role of emotions in truthful communications. It is to these issues that I now turn in the next two Parts.

III
Product Disclosures and Consumer Autonomy

The cigarette labeling controversy surfaces fundamental questions about the communicative impact of mandatory product disclosure. Selecting a First Amendment standard of review is the doctrinal expression of values that can be stated more generally.[152] The law and theory of mandatory product labeling favor disclosure when it corrects for important information deficits, thereby supporting consumer autonomy (assuming acceptable burdens on speaker liberty).[153] In the absence of such information deficits, disclosure

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148 *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985) (acknowledging that although listeners' interests principally justify commercial speech protection, commercial speakers do possess "First Amendment rights" and must be protected from "unjustified or unduly burdensome disclosure requirements [that] might offend the First Amendment by chilling protected commercial speech").

149 *See id.* at 642 ("[P]rint advertising generally . . . poses much less risk of overreaching or undue influence.").

150 Had the tobacco companies used their packaging to accomplish something other than trade dress—for example, to advocate for a cause—the speech-supplanting effect of the labels would have been obvious.

151 *See Zauderer*, 471 U.S. at 638, 651 ("Commercial speech that is not false or deceptive . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980))).

152 *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563 (1980) (explaining the First Amendment standard of review in the context of commercial speech, which is based on the "informational function of advertising").

153 Commercial speech law, while not placing a heavy value on speaker liberty, places some value on it, so even autonomy-enhancing disclosures must not overburden speaker liberty. This question of the appropriate burden on the speaker circles back to the definition of the information deficit. The more trivial the information deficit, the more unreasonable the burden on the speaker will seem.

mandates are unjustified and, indeed, may harm autonomy and other listener interests by manipulating, confusing, or deceiving.

This formulation puts heavy weight on the identification of information deficits. In this Part and the next, I will use the case of cigarette labels to probe the distinct narratives about consumer autonomy and information deficits that the labels engender. This Part focuses on appropriate communications goals and the next on appropriate communications means.

Objections to the labels begin with the claim that there is no meaningful information deficit either because there was no preexisting deception or because people already know what the labels purport to say.[154] The argument continues that any autonomy gains the labels might advance are undercut by the imposition of the government's normative values about smoking.[155] I argue that the risk of tobacco use is an information deficit not because information has been withheld but because it has not been communicated effectively. The issue of information deficit concerns not only the supply of information but also its processing and consumption. I also argue that the existence of explicitly normative goals, if uncontroversial and not distorting, is consistent with consumer freedom.

A. Information Deficits Beyond Deception

Mandatory disclosures in commercial speech are premised on the notion that the market has failed to produce relevant consumer information, and this deficit warrants regulatory intervention. *Zauderer* was an easy case involving the commercial speaker's misleading or deceptive communications about price.[156] Lower courts have sparred over whether deception-correction is the only context in which commercial disclosure mandates should be subject to lenient review.[157] The *R.J. Reynolds* court held that it was.[158] The court in *Discount Tobacco* dis-

154 R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1211–12 (D.C. Cir. 2012).

155 *See id.* at 1216–17 (explaining that the FDA's "inflammatory images and . . . provocatively-named hotline cannot rationally be viewed as pure attempts to convey information to consumers").

156 *See Zauderer*, 471 U.S. at 631–34.

157 *Compare* Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115 (2d Cir. 2001) ("[T]he compelled disclosure at issue here was not intended to prevent 'consumer confusion or deception' per se but rather to better inform consumers about the products they purchase. Although the overall goal of the statute is plainly to reduce the amount of mercury released into the environment, it is inextricably intertwined with the goal of increasing consumer awareness . . . ." (internal citations omitted)), *with* Cent. Ill. Light Co. v. Citizen Util. Bd., 827 F.2d 1169, 1173 (7th Cir. 1987) ("While *Zauderer* holds that sellers can be forced to declare information about themselves needed to avoid deception, it does not suggest that companies can be made into involuntary solicitors for their idealogical [sic] opponents.").

158 *See R.J. Reynolds*, 696 F.3d at 1214 ("*Zauderer*, *Ibanez*, and *Milavetz* thus establish that a disclosure requirement is only appropriate if the government shows that, absent a warn-

agreed but went on to find that a history of tobacco industry deception qualified even in the absence of deception on cigarette packages.[159]

It is a stretch to find deception on cigarette labels merely because the industry has engaged in past deception. And it is a stretch that should be unnecessary. As a doctrinal matter, deceptive commercial speech never received First Amendment protection, and controls on deception were not subject to heightened scrutiny.[160] If the *Zauderer* rule applied only to corrective advertising—that is, only in cases where, absent the contested disclosure requirement, the plaintiff's advertisement would be false or misleading—the rule would be entirely superfluous, since in all such cases the government would prevail anyway under the first prong of the *Central Hudson* test.[161]

Moreover, if lenient review were reserved solely for deception-correction, then many noncontroversial and longstanding disclosure mandates would be subject to heightened First Amendment review.[162] These include requirements that manufacturers disclose product origin,[163] gas mileage,[164] light bulb lumens and energy cost,[165] textile content,[166] and hazardous material.[167] None of these was enacted to combat deception. All were meant to supply consumers with information that various constituencies wanted them to have

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ing, there is a self-evident—or at least potentially real—danger that an advertisement will mislead consumers." (internal quotation marks omitted)).

159 *See* Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 530–31 (6th Cir. 2012); *see also* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 560–61 (2001) (reviewing documentation of the deleterious effects of tobacco advertising); United States v. Philip Morris USA, Inc., 907 F. Supp. 2d 1, 5 (D.D.C. 2012) (discussing the public denial and distortion of the adverse health effects of tobacco).

160 *See supra* notes 51–53 and accompanying text.

161 The Supreme Court reiterated just three years before *Zauderer* that "when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely." *In re* R.M.J., 455 U.S. 191, 203 (1982).

162 *Sorrell*, 272 F.3d at 116.

163 *See, e.g.*, 16 C.F.R. § 303.33 (2013) (textile fiber products); *id.* § 301.12 (2013) (imported furs); 7 C.F.R. § 65.300 (2013) (certain foods).

164 16 C.F.R. § 259.2 (2013).

165 *Id.* § 305.15.

166 *Id.* § 303.15.

167 Federal Hazardous Substances Act, 15 U.S.C. § 1261 (2012). Other disclosure requirements include: federal election campaign contribution disclosures, 2 U.S.C. § 434 (2012); securities disclosures, 15 U.S.C. § 78*l* (2012); reporting pollutants in discharges to water, 33 U.S.C. § 1318 (2012); reporting releasing of toxic substances, 42 U.S.C. § 11023 (2006); prescription drug advertisement disclosures, 21 C.F.R. § 202.1 (2013); notification of workplace hazards, 29 C.F.R. § 1910.1200 (2013); warning of potential exposure to hazardous substances, "Proposition 65," CAL. HEALTH & SAFETY CODE § 25249.6 (West 2013); and pesticide disclosures, N.Y. ENVTL. CONSERV. LAW § 33-0707 (McKinney 2013).

and to move consumption choices in a particular direction.[168] In fact, under the narrow interpretation, *Zauderer* leniency would not apply to required disclosure of health or safety (or economic or other) risks where the plaintiff advertiser had made no health or safety claims of its own and therefore had made no deceptive ones. *Zauderer* would not even apply, for example, to a constitutional challenge against the Surgeon General's original cigarette labels—let alone against the beefed-up, as-yet uncontested, *textual* parts of the new graphic disclosures. The government would have to defend those disclosure requirements under the *Central Hudson* test and conceivably even under strict scrutiny with its required showing of efficacy. This would be no easy task in view of the fact that it is precisely the *inefficacy* of textual warnings that gave rise to the FDA's felt need for graphics.[169]

There is another view that *Zauderer* has substantially broader scope and that deception-correction is not the only consumer protection interest qualifying for rational basis review.[170] Robert Post has argued that the "extraordinarily lenient [*Zauderer*] test for the review of compelled commercial speech" applies whenever a mandatory disclosure serves to "promote transparent and efficient markets."[171] Improving market efficiency could justify any disclosures likely to inform consumption choices, ranging from price to composition to production methods and beyond. A number of courts have taken this posi-

168 *See, e.g.*, Federal Trade Commission, Appliance Labeling Rule, 75 Fed. Reg. 41,696, 41,697 (July 19, 2010) (The Energy Independence and Security Act of 2007, Pub. L. No. 110-140, sets new energy efficiency standards for light bulbs and, "[i]n conjunction with these new efficiency standards, EISA directs the FTC to consider the effectiveness of its current light bulb labeling requirements and possible alternatives to help consumers *understand and choose* new high efficiency bulbs that meet their needs." (emphasis added)); Revisions and Additions to Motor Vehicle Fuel Economy Label, 76 Fed. Reg. 39,478, 39,478, 39,482 (July 6, 2011) (stating that labeling "changes will help consumers to make more informed vehicle purchase decisions" and may prompt consumers to "place more weight on fuel economy and vehicle emissions for economic or environmental reasons").

169 *See* Final Rule, *supra* note 1, at 36,629–30 (noting that many public comments "stated that smokers would be more likely to quit smoking and that nonsmokers would be less likely to start smoking if cigarette advertisements and packages display[ed], visually and graphically, the health effects of cigarettes").

170 *See generally* Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in* United Foods, Zauderer, *and* Abood, 40 VAL. U. L. REV. 555, 562 (2006) ("Sometimes, as in *Zauderer*, disclosures are compelled in order to prevent potential deception. But frequently the disclosure of information is required in order to promote transparent and efficient markets.").

171 *See id.* at 560, 562 (citing SEC disclosure rules and credit disclosure rules); *id.* at 584 (noting that "commercial speech is routinely and pervasively compelled for reasons that have little to do with the prevention of deception," including mandatory disclosure of light bulb durability, gasoline octane ratings, textile care, car gas mileage, chemical toxicity, etc.).

tion in upholding product disclosures that inform consumers who were not in danger of being deceived.[172]

A trio of Second Circuit cases show the pitfalls of this expansive definition of information deficits.[173] In *National Electric Manufacturers Ass'n v. Sorrell*, the Second Circuit held that a governmental interest in the disclosure of "accurate, factual, commercial information," even if not necessary to prevent deception, qualifies for *Zauderer* review because it "contributes to the efficiency of the marketplace of ideas" and "does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests."[174] Another Second Circuit panel that included now-Justice Sonia Sotomayor affirmed a decision upholding a calorie disclosure mandate under rational basis review, where the court below had held that the mandate supplies "beneficial consumer information" and supplements "incomplete commercial messages."[175] In a third Second Circuit case, Judge Pierre Leval defined this generous approach to information deficits even more broadly.[176] Dissenting from a decision that invalidated a state mandate to disclose the use of bovine growth

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172 *See, e.g.*, Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 556 (6th Cir. 2012) (stating that disclosures do not have to directly, significantly, or exclusively prevent consumer deception, only be "reasonably related to preventing consumer deception"); Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 310 (1st Cir. 2005) (applying *Zauderer* where interest was "ensuring that [Maine's] citizens receive the best and most cost-effective health care possible"); *id.* at 310 n.8 (noting the court has "found no cases limiting *Zauderer*" to potentially deceptive advertising); Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115 (2d Cir. 2001) (applying *Zauderer* where interest was "protecting human health and the environment from mercury poisoning").

173 *See generally Sorrell*, 272 F.3d at 115 (stating that a reasonable relation to a commercial interest is sufficient for information); N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, No. 08 Civ. 1000(RJH), 2008 WL 1752455, at *9 n.10, *10 (S.D.N.Y. Apr. 16, 2008), *aff'd*, 556 F.3d 114 (2d Cir. 2009) (referencing that any useful consumer information qualifies as information); Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 73 (2d Cir. 1996) (Leval, J., dissenting) (stating that consumer interest alone does not qualify information for compelled disclosure).

174 272 F.3d at 114–15 (internal quotation marks omitted) (upholding mercury disclosure rule even though "the compelled disclosure at issue here was not intended to prevent 'consumer confusion or deception' per se but rather to better inform consumers about the products they purchase" (quoting Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985))); *see also* Promulgation of Trade Regulation Rule, 43 Fed. Reg. 59,614, 59,638 (Dec. 21, 1978) ("By establishing a uniform, minimal set of required information, disclosure requirements enhance the efficiency of markets by facilitating comparison of competing franchise offerings.").

175 *N.Y. State Rest. Ass'n*, 2008 WL 1752455, at *9 n.10, *10. The phrase "beneficial consumer information" comes from *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (Stevens, J.) (distinguishing permissible disclosure requirements from impermissible restrictions), and the phrase "incomplete commercial messages" comes from *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 491 (1997) (Souter, J., dissenting) (describing *Zauderer* coverage).

176 *See Amestoy*, 92 F.3d at 74, 80–81 (Leval, J., dissenting) (state law mandating the "disclosure of information consumers reasonably desire" advances First Amendment interests and should be subject to rational basis review).

hormones in dairy products, he argued that *Zauderer* extended to any information that "consumers reasonably desire."[177]

A broad view of information deficits is especially appealing for advocates of ethical consumption. Douglas Kysar, in his highly original scholarship on the exercise of consumer "preferences for processes," argues that the law insufficiently supports consumers who want to exercise preferences for ethically produced products.[178] Consumers desiring environmentally sustainable products, for example, might value knowing about product lifecycle environmental impact.[179] Voluntary certification regimes in fair trade coffee and sustainably harvested wood reflect a growing market for ethical manufacturing processes, signified on the product label.[180]

The problem is that the use of mandatory labels to support consumer preferences is not cost free.[181] They are expensive for manufacturers, they risk crowding out other messages on scarce labeling real estate, and they may be confusing for consumers.[182] Once we

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177 *Id.* at 74.

178 Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 623 (2004) ("[P]articularly at a time when consumption occupies such a strong position of influence over culture and identity, analysts should be hesitant to discount the importance of religious or ethical grounds for consumer decisionmaking." (citation omitted)); *see also* Jeffrey J. Minneti, *Relational Integrity Regulation: Nudging Consumers Toward Products Bearing Valid Environmental Marketing Claims*, 40 ENVTL. L. 1327, 1344–45 (2010) (arguing for a system of environmental marketing regulation that harnesses and develops the full range of consumer and manufacturer interests in sustainable products and processes).

179 Indeed, product lifecycle marketing has given rise to false advertising litigation as companies jockey for the sustainable consumer. *See, e.g.*, Hill v. Roll Int'l Corp., 128 Cal. Rptr. 3d 109, 111 (Ct. App. 2011) (alleging that a green drop on a water bottle misleadingly connoted sustainability); Complaint for Injunction, Civil Penalties, and Other Relief, California v. Enso Plastics, LLC, No. 30-2011, 2011 WL 5103052 (Cal. Super. Ct. Oct. 26, 2011) (alleging the labeling of some plastic containers as biodegradable was false); NAT'L ADVERTISING DIV. OF THE BETTER BUS. BUREAU, ENVIRONMENTAL DIGEST 2–11 (2012), *available at* http://www.asrcreviews.org/wp-content/uploads/2013/02/ASRC-Environmental-Claims-Digest-9-28-12-pdf.pdf (describing several cases decided by the NAD pertaining to misleading or deceptive marketing practices involving environmental claims).

180 *See* Margaret Chon, *Marks of Rectitude*, 77 FORDHAM L. REV. 2311, 2312 (2009) (examining how trademarks and certification marks can "facilitate consumer protection and access to quality market information").

181 *See generally* FUNG, GRAHAM & WEIL, *supra* note 10, at 56 ("[T]he cost of acquiring and using new information must be low enough to justify users' efforts in relation to expected benefits.").

182 *See* Ben-Shahar & Schneider, *supra* note 10, at 697–702 (describing reasons why mandatory disclosures fail to achieve their ends); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1455 (1999) ("Regardless whether manufacturers originally *caused* such consumer misunderstanding of dietary health issues, it is our contention that their packaging, labeling, and promotional efforts exacerbate it."); Lars Noah, *The Imperative to Warn: Disentangling the "Right to Know" from the "Need to Know" About Consumer Product Hazards*, 11 YALE J. ON REG. 293, 370 (1994) ("Consumer research conducted by industry and by FDA demonstrated that simpler, less cluttered label formats help consumers to make comparisons between

have ventured beyond deceptive or misleading speech, there is no natural limit to what Justice Stevens called "beneficial consumer information."[183] In the Second Circuit's bovine-growth hormone decision, from which Judge Leval dissented, the majority noted that "[w]ere consumer interest alone sufficient [to justify disclosure mandates], there is no end to the information that states could require manufacturers to disclose about their production methods," including "which grains herds were fed, with which medicines they were treated, or the age at which they were slaughtered."[184] That court did not limit disclosure mandates to deception correction.[185] But to reduce the likelihood of mandate proliferation, it did require "some indication that [the mandated] information bears on a reasonable concern for human health or safety or some other sufficiently substantial governmental concern."[186]

This limitation does not really resolve the question of what counts as a correctable informational deficit. It simply defines the deficit with reference to a "substantial governmental concern," which could relate to health and safety or to ethical considerations such as whether food contains genetically modified organisms.[187]

We are left with a continuum of information deficits, ranging from technical deception and moving through gaps in health and safety information all the way to any information that interests consumers.[188] It is not clear that the consumer-autonomy interest is strongest at the deception end of the spectrum.[189] Take a sneaker manufacturer. It could actively deceive consumers about the composition of the product while simply remaining silent on the fact that it was produced by slave labor—something that many consumers might care more about. It is perhaps because of the difficulty of connecting a particular class of information deficits to consumer-autonomy inter-

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products." (quoting Food Labeling: Mandatory Status of Nutrition Labeling and Nutrient Content Revision, Format for Nutrition Label, 58 Fed. Reg. 2079, 2122 (Jan. 6, 1993))).

183 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996).

184 Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 74 (2d Cir. 1996).

185 *See id.* (indicating that health and safety concerns also justify mandated disclosures).

186 *Id.*

187 *See* Amy Harmon & Andrew Pollack, *Battle Brewing over Labeling of Genetically Modified Food*, N.Y. TIMES (May 24, 2012), http://www.nytimes.com/2012/05/25/science/dispute-over-labeling-of-genetically-modified-food.html?_r=0 (describing California's failed 2012 Proposition 37, which would have required labeling of genetically engineered materials contained in food products, and mentioning labeling bills recently proposed in over a dozen states); Mark Bittman, *G.M.O.'s: Let's Label 'Em*, N.Y. TIMES (Sept. 15, 2012, 3:19 PM) http://opinionator.blogs.nytimes.com/2012/09/15/g-m-o-s-lets-label-em/ (characterizing such proposals as "right-to-know law[s]").

188 *See Amestoy*, 92 F.3d at 74 (favoring mandatory disclosures of health and safety information to the public); *id.* at 80–81 (Leval, J., dissenting) (favoring mandatory disclsoures of any information that consumers reasonably desire to be disclosed).

189 *See supra* notes 67–72 and accompanying text.

ests that courts have not tried and instead have looked for other binaries as independent grounds to differentiate among rationales for disclosure. These binaries are, like the antideception approach to information deficits, unsatisfying.

B. The Fact-Value Distinction and Precaution Advocacy

One of the strongest arguments a manufacturer can make against compelled commercial speech is that the government is using its regulatory powers to privilege a favored value rather than to fill a "purely factual" information deficit.[190] This subpart focuses on the opposition of facts and values, which entails a distinction between the government's informational goals to advance truth and its normative ones to push a substantive agenda—a distinction that is ultimately illusory.

As discussed above, the *R.J. Reynolds* court subscribed to the narrow, deception-limited reading of information deficits.[191] But even if the court had accepted the broader definition, it would have found the cigarette labels problematic and required heightened scrutiny because the labels "browbeat consumers into quitting" smoking.[192] The government made no secret that it was interested as much in changing consumer behavior as in informing consumers of risk.[193] This normative goal, particularly given the emotional impact of the message, made every cigarette pack a "mini billboard" for the government's opinion.[194] The labels "compel a product's manufacturer to convey the state's subjective—and perhaps even ideological—view" that consumers should not smoke.[195] In this way, the court suggested that the government's public health agenda overshadowed and undermined its autonomy-maximizing informational agenda.[196]

The invalidation of the cigarette labels raises questions about whether disclosures, much less warnings, can ever (or usually) be purely informative. The ideal of purely informative speech is an ideal of speech neutrality, where facts are shorn of value.[197] It is an ideal

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190 Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).

191 *See* R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1214 (D.C. Cir. 2012).

192 *Id.* at 1217.

193 Final Rule, *supra* note 1, at 36,633.

194 *R.J. Reynolds*, 696 F.3d at 1212 (quoting FDA, *Tobacco Strategy Announcement* (Nov. 10, 2010), *available at* http://www.fda.gov/%20TobaccoProducts/NewsEvents/ucm232556.htm).

195 *Id.*; *see also id.* at 1211 ("The Companies contend that, to the extent the graphic warnings go beyond the textual warnings to shame and repulse smokers and denigrate smoking as an antisocial act, the message is ideological and not informational.").

196 *See id.* at 1221.

197 *See, e.g.*, HILARY PUTNAM, THE COLLAPSE OF THE FACT/VALUE DICHOTOMY AND OTHER ESSAYS 43 (2002) (arguing that facts and values are intertwined); *see also* RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 364 (1979) (questioning the fact/value distinction); R. W. SLEEPER, THE NECESSITY OF PRAGMATISM: JOHN DEWEY'S CONCEPTION OF PRAGMATISM 141 (1986) (same). In other contexts, this insight has been used to debunk

that the philosophical literature on the fact-value distinction treats skeptically.[198] Pragmatist critics, most notably Hilary Putnam, teach that belief frequently infuses both the composition and the selection of facts.[199] With respect to the composition of facts, there are natural or empirical facts that exist with little to no judgment involved.[200] A "killing" is one such fact. It exists in nature as the taking of a life. But many other facts are what we might call "evaluative."[201] They cannot exist without judgment. Once we define some killings as "murder," entailing judgments as to justified homicide or self-defense, we have created an evaluative fact with value.[202] In addition, the choice to highlight certain facts, whether natural or evaluative, entails judgment as to salience.

Government labeling schemes will often use normative judgments to construct evaluative facts or to thrust facts into special prominence. Sugar is a natural fact. The choice to include sugar on a nutritional label is arguably free of normative content. But the choice to highlight sugar on a front-of-pack label reflects a norm that sugar is special among ingredients.

Sometimes, the value importation will work at both the fact-definition and the fact-selection levels. The voluntary federal organic certification creates an evaluative fact. What is considered "organic" is built on judgments about animal husbandry and agricultural health.[203] This evaluative fact is then embedded in a normative system that uses labels to promote the market for organic goods.[204] Sim-

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the notion that there is such a thing as a neutral algorithm or unprocessed data. *See* "RAW DATA" IS AN OXYMORON (Lisa Gitelman ed., 2013).

198 *See supra* note 197.

199 *See id.*

200 William D. Araiza, *Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. 878, 894 (2013).

201 Scholars use the term in different ways. *Compare, e.g.*, *id.* at 894–96 (distinguishing "evaluative facts," which "include an element of ideological precommitment" from "empirical facts," which are more "subject to conclusive proof or disproof"), *with* Justin Hughes, *Created Facts and the Flawed Ontology of Copyright Law*, 83 NOTRE DAME L. REV. 43, 68 (2007) (defining them as judgments about reality that are so widely accepted as to become treated as fact). I am using the term more in Araiza's way to describe a fact that is built on a moral judgment. *See generally* Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87, 127–28 (1996) (discussing "normative properties or facts").

202 *See* Araiza, *supra* note 200, at 894–95 (distinguishing between "empirical facts" and "evaluative facts").

203 *See* Food, Agriculture, Conservation, and Trade Act of 1990, S. REP. NO. 101-357, at 2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4656, 4657 ("The ultimate purposes of [the organic program] are to ensure consumers an abundance of food and fiber at reasonable prices, to maintain the competitiveness of American farm products while providing a fair return to producers, and to conserve the natural resources which serve as the basis for all agricultural production.").

204 7 U.S.C. §§ 6501–6523 (2012) (facilitating interstate commerce in organically produced fresh and processed food); *see* Jamie A. Grodsky, *Certified Green: The Law and Future of Environmental Labeling*, 10 YALE J. ON REG. 147, 172 (1993) ("[I]t may be impossible to

ilarly, the decision to require gas mileage performance disclosures on cars was driven by a conservation agenda.[205] Car stickers have recently been updated to include many other facts as the result of a law aimed at energy independence.[206]

The boundaries between facts and value are particularly porous when the facts are in the form of warning. The philosopher John Searle has shown that the nature of warning is argumentative. Searle's dissertation advisor, J.L. Austin, theorized that utterances can be analyzed according to their desired impact, or what he called their "illocutionary acts."[207] Building on this work, Searle created a five-part classification system for illocutionary acts. One class is the "directive," which includes warnings.[208] Directives "are attempts . . . by the speaker to get the hearer to do something."[209] If you say to someone before they touch a stovetop "That's hot!," you mean for the utterance to inform while at the same time effect a change in behavior. When a tobacco label, whether textual or graphic, tells you that smoking kills, the message is designed to inform and to direct.

The mandate to inform consumers of tobacco risks reveals the mingling of fact and value at every turn. Throughout the fifty-year history of tobacco marketing and reactive regulation, the industry and government have competed to persuade consumers of the utility and disutility of smoking, while variously hiding and exposing certain facts.[210] The tobacco industry has been at the leading edge of innova-

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prevent deceptive environmental advertising in a meaningful way without concurrently promoting environmental policy goals."). *But c.f.* Press Release, Dan Glickman, Sec'y of Agric., U.S. Dep't of Agric., Release of Final National Organic Standards (Dec. 20, 2000) (claiming that the organic designation was "a marketing tool" rather than "a value judgment about nutrition or quality"). *See generally* Michelle T. Friedland, *You Call* That *Organic? The USDA's Misleading Food Regulations*, 13 N.Y.U. ENVTL. L.J. 379 (2005) (providing an overview of organic program and its substantive pitfalls).

205 *See, e.g.*, Revisions and Additions to Motor Vehicle Fuel Economy Label, 76 Fed. Reg. 39,478, 39,481 (July 6, 2011).

206 40 C.F.R. § 600.006 (2013); The Energy Independence and Security Act of 2007, Pub. L. No. 110-140, § 105, 121 Stat. 1492 (codified at 49 U.S.C. § 32908 (2006)). For an exploration of the "preference-shaping effects" of labeling requirements, see Rebecca Tushnet, *It Depends on What the Meaning of "False" Is: Falsity and Misleadingness in Commercial Speech Doctrine*, 41 LOY. L.A. L. REV. 227, 250 & n.107 (2007).

207 *See* J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 98 (J.O. Urmson ed., 1962).

208 *See* John R. Searle, *A Classification of Illocutionary Acts*, 5 LANGUAGE SOC'Y 1, 11 (1976). Searle defined "directives" to include "ask, order, command, request, beg, plead, pray, entreat, and also invite, permit, and advise" as well as many of Austin's "exercitives." *Id.* (citations omitted). Austin's exercitives include warning. *See id.* at 7.

209 *Id.* at 11. Directives can be distinguished from representatives that "commit the speaker . . . to something's being the case, to the truth of the expressed proposition." *Id.* at 10.

210 *See infra* notes 212–16 and accompanying text.

tive marketing strategies.[211] In some cases the advertising was deceptive, but in the main, it was just seductive.[212]

From its first adoption of mandated warnings, government has viewed disclosure as a way to counteract tobacco marketing by informing consumers of risk and persuading them to act on this knowledge.[213] The government's labeling strategy merged the facts of tobacco risk with the value of tobacco-use reduction. It was a form of what one risk consultant has labeled "precaution advocacy"[214]—advocating a change in behavior through warning of risk. The normative strain in the warning strategy became more prominent in 2006 with the shift in responsibility for administering the warnings from the Federal Trade Commission, with its focus on false advertising, to the Federal Drug Administration, with its focus on health.[215]

It is hard to see how communicating with value, by itself, undermines consumer autonomy. In First Amendment cases, courts have scoffed at the notion that consumers are so fragile that they lose independent decision-making ability when faced with compelling narratives.[216] False advertising law similarly trusts consumers to withstand persuasion and exercise choice in the swirl of tendentious speech.[217]

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211 ROBERT N. PROCTOR, GOLDEN HOLOCAUST: ORIGINS OF THE CIGARETTE CATASTROPHE AND THE CASE FOR ABOLITION 58, 59–60 (2011) ("[I]t is probably fair to say that the [tobacco] industry *invented* much of modern marketing."); *see also* Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8341–48 (1964) (codified at 16 C.F.R. ch. 1, subch. D, pt. 408 (2013)) [hereinafter Unfair or Deceptive Advertising] (detailing cigarette advertising campaigns that described "the satisfactions to be derived from smoking" and the "association of smoking with individuals, groups, or ideas worthy of emulation or likely to be emulated"); ALLAN M. BRANDT, THE CIGARETTE CENTURY: THE RISE, FALL, AND DEADLY PERSISTENCE OF THE PRODUCT THAT DEFINED AMERICA 32 (2007) ("[Cigarette companies] anticipated central elements of twentieth-century marketing, not only of the cigarette, but of numerous other goods in a burgeoning consumer culture. Novelty and innovation became characteristic elements of cigarette marketing.").

212 *See* Unfair or Deceptive Advertising, *supra* note 211, at 8341–42 (describing various tobacco advertising slogans).

213 *See, e.g.*, *id.* at 8357–58 (describing early efforts by the FTC to disclose health hazards of smoking especially for children and youth).

214 Peter M. Sandman, *Precaution Advocacy (High Hazard, Low Outrage)*, THE PETER SANDMAN RISK COMMUNICATION WEBSITE, http://www.psandman.com/index-PA.htm (last visited Jan. 21, 2014).

215 FDA Authority Over Tobacco Products, 21 U.S.C. § 387a (2012).

216 *See* Pearson v. Shalala, 164 F.3d 650, 655 (D.C. Cir. 1999).

217 15 U.S.C. § 45(n) (2012) (permitting the FTC to take action against activity only when it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition"). An act or practice is deceptive only if there is a representation or omission of information that is likely to materially mislead a reasonable consumer—that is, to mislead in a way that "affect[s] the consumer's conduct or decision with regard to a product or service." FED. TRADE COMM'N, DECEPTION POLICY STATEMENT ON DECEPTION (1983), *appended to* Cliffdale Assocs., Inc., 103 F.T.C. 110, 175 (1984); *see also id.* at 179 (asserting that the FTC will not pursue cases involving obviously exaggerated advertisements); Novartis Corp. v. FTC, 223 F.3d 783, 786 (D.C. Cir. 2000) (following the FTC's

This law recognizes that opinion and fact are inextricably bound. Advertisers may be liable for opinion that conveys materially false information or they may be free from liability for facts so laced with opinion that they convey nothing material at all.[218] The communicative content is independent of the designation of fact or value.[219]

While value may be inextricable from fact, that does not mean that the kind and strength of value is irrelevant to First Amendment considerations. Government motive is a central consideration in First Amendment law.[220] What is important is both the nature of the value and the balance of contestable value with uncontestable fact. To see this, recall *Zauderer*, which involved an attorney's offer to represent women injured by a faulty medical device.[221] In the actual case, the attorney was disciplined for violating the Ohio Code of Professional Practice because his advertised fee structure was deceptive.[222] Suppose instead that the state had passed a law mandating the same disclosure for a different reason: to reduce the number of women who would sue for the faulty medical device. What if, alongside the desire to inform consumers, the state was acting to change their behavior? Consumers are informed to the same extent and can exercise choice

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guidelines that a "deceptive" claim be material and likely to mislead a reasonable consumer). *See generally* David A. Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. 1395, 1447–48 (2006) (arguing for expanded liability for puffery).

218 *Compare* McNeil-P.C.C., Inc. v. Bristol-Myers Squibb Co., 938 F.2d 1544, 1548–49 (2d Cir. 1991) (holding as actionable under the Lanham Act an advertisement that is "either literally false or . . . though literally true, is likely to mislead and confuse consumers"), *with* Pizza Hut, Inc. v. Papa John's Int'l, Inc., 227 F.3d 489, 496 (5th Cir. 2000) (finding "a general claim of superiority over a comparable product that is so vague, it would be understood as a mere expression of opinion" not actionable under the Lanham Act (citations omitted) (internal quotation marks omitted)).

219 The recognition that facts, opinion, and hyperbole often mingle in truthful communications runs through defamation law as well. The Supreme Court has resisted making categorical distinctions among these categories of speech, insisting instead on a contextual analysis of the communication. *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 18–20 (1990) (rejecting categorical distinction between opinions and facts in defamation claims); *see also* Gardner v. Martino, 563 F.3d 981, 987 (9th Cir. 2009) (stating that the "threshold question" in a defamation claim is "whether a reasonable factfinder could conclude that the contested statement implies an assertion of objective fact" (internal quotation marks omitted)); Obsidian Fin. Grp., LLC v. Cox, 812 F. Supp. 2d 1220, 1233–38 (D. Or. 2011) (finding some statements of blogger actionable defamation even though they were hyperbolic, while other more factual statements were not because of context).

220 Several scholars have theorized an influence-checking function of the First Amendment. *See, e.g.*, Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 425–27 (1996) (First Amendment doctrine reads as if it had been constructed to "ferret out improper [governmental] motive"); Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 145 (2010) (a principal conception of the First Amendment is as "a negative check on government tyranny" over "private ordering").

221 Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 630–31 (1985).

222 *Id.* at 634–35.

to the same extent. Does the state's motive matter? I argue that it does in the next subpart.

C. State Motive, Controversy, and Ideology

I have suggested that a normative agenda, although unavoidable, may so destabilize an informative agenda that more searching scrutiny of mandated disclosures is warranted. When? This is the question at the heart of the *Zauderer* progeny's struggle to distinguish among consumer informational interests.[223] The answer turns on the terms "uncontroversial" and "purely factual" from *Zauderer*.[224] "Uncontroversial" should be given a distinct meaning, having to do with government motive. We should be skeptical of disclosures that, even if purely factual, are designed to advance a controversial ideology as opposed to a generally accepted norm.[225] The theory here again has to do with listener interests, although not strictly with autonomy interests. Rather, it is a broader set of interests in a public discourse free of state compulsion.[226]

The compelled noncommercial speech cases clearly prohibit the government from requiring communications in the noncommercial context.[227] Commercial speech is different, Robert Post has persuasively argued, because it does not contribute to "public discourse" and is not essential to the formation of publics.[228] Many scholars have noted the problems raised by "mixed" speech aimed at public contro-

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223 *See id.* at 651 ("[T]he extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides.").

224 *Id.*

225 Many mandated disclosures will require the commercial speaker to say something contrary to the speaker's interests and even, as in the case of the tobacco industry, to disparage the speaker's own product. This is not the kind of controversy that makes a disclosure ideological. Rather, it is a controversy concerning the truth and relevance of the disclosure itself. *See, e.g.*, Cent. Ill. Light Co. v. Citizen Util. Bd., 827 F.2d 1169, 1173 (7th Cir. 1987) (striking down a regulation requiring public utilities to disseminate the conflicting views of citizens' boards, opining that *Zauderer* "does not suggest that companies can be made into involuntary solicitors for their ideological opponents").

226 *See id.* (holding that "[t]he compelled distribution by the utilities to their customers of messages created by CUB, and the forced assistance by the utilities in soliciting funds for that opponent, are themselves violations of the First Amendment").

227 *See Zauderer*, 471 U.S. at 637 ("'[C]ommercial speech' is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded 'noncommercial speech.'" (quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983))). The Supreme Court has struck down laws that compel speech in noncommercial contexts. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 717 (holding that the State of New Hampshire could not require appellees with noncommercial vehicles to display the state motto upon their vehicle license plates).

228 *See* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1 (2000). Post has more recently noted with some alarm the Court's retreat from the commercial-speech distinction and its nascent focus on the liberty interests of commercial speakers. *See* Post, *supra* note 170, at 555.

versies while at the same time selling products.[229] The mixed speech problem usually arises when government restricts the speech of commercial entities speaking on a matter of controversy—the regulated entity has created mixed speech by engaging in public discourse.[230] In the compelled commercial speech context, the problem emerges in another way. Depending on the message compelled, the government itself may be the one *creating* mixed speech.[231] The government then uses its power over commercial speech to inject its own perspective into discursive public controversies.[232]

Disclosure as ideology takes its purest form where the facts disclosed are themselves evaluative facts embodying a contested norm. This theory helps to explain *Entertainment Software Ass'n v. Blagojevich*, in which the Seventh Circuit held unconstitutional a state law that required video game retailers to affix a four-square-inch sticker reading "18" on any game statutorily deemed "sexually explicit."[233] The court, in declining to apply *Zauderer*, found that the required disclosure was not "purely factual" but "opinion-based" because it forced inclusion of "a subjective and highly controversial message—that the game's content is sexually explicit."[234] The problem here was not simply that the state was being normative. It is that the disclosed term—"sexually explicit"—embodies contested subjective judgments, and about First Amendment protected activities no less. The normative interest in media exposure overwhelmed any informative interest in labeling because the controversial norms constituted the "facts" to be disclosed.[235]

The disclosure becomes ideological not only when the contested norms *constitute* the facts to be disclosed but also when there is substantial controversy about the salience of the disclosed facts. In

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229 *See, e.g.*, Ronald K.L. Collins & David M. Skover, Foreword, *The Landmark Free-Speech Case that Wasn't: The* Nike v. Kasky *Story*, 54 CASE W. RES. L. REV. 965, 1031 (2004) (discussing the gray area between corporations' political statements and commercial statements); Rebecca Tushnet, *Fighting Freestyle: The First Amendment, Fairness, and Corporate Reputation*, 50 B.C. L. REV. 1457, 1465–68 (2009) (explaining the difficult divide between commercial and political speech as it relates to *Nike*).

230 *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67–68 (1983) ("The mailings constitute commercial speech notwithstanding the fact that they contain discussions of important public issues such as venereal disease and family planning.").

231 *See, e.g.*, Royal, *supra* note 29, at 229–30 (stating that in *Johans v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005), the beef program that forced beef producers to fund advertisements that suggested beef was a generic product was constitutional because it was government speech).

232 *See Bolger*, 463 U.S. at 70–73 (holding that the government's interests in and reasons for the statute, including protecting mail recipients from offensive matter and helping parents control how their children discover information about topics like birth control, were unconstitutional).

233 469 F.3d 641, 652 (7th Cir. 2006).

234 *Id.*

235 *See id.* at 651–52.

CTIA—The Wireless Ass'n v. City & County of San Francisco, the district court declined to apply *Zauderer* and enjoined a city mandate that cell phone providers disclose the effective radiation of phones, along with a graphic of a device releasing radiation.[236] The decision, upheld by the Ninth Circuit, found that the government was motivated by the controversial belief that cell phone radiation was dangerous.[237] The controversy over the relevance of radiation to consumer purchases meant that the disclosure could not be factual and uncontroversial.[238] This kind of intrusion into a public controversy through the use of mandatory disclosures is not just normative but ideological.[239] Where the government orders disclosures as a way to advance its side in a controversial matter, the disclosure mandate bears greater constitutional scrutiny.[240]

A different view of the term "controversial" is that it concerns only the existence of the facts disclosed, not their normative content or relevance. In other words, "uncontroversial" is synonymous with "factual."[241] Dayna Royal writes that a fact is uncontroverted if there is consensus evidence to support the existence of the fact.[242] *Zauderer*'s lenient review, she argues, should apply to compelled disclosure of "uncontroverted factual information," and "[t]he question of whether the fact is controverted . . . asks whether there is disagreement over the fact's truth, not whether there is disagreement over disclosing the fact."[243]

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236 827 F. Supp. 2d 1054 (N.D. Cal. 2011), *aff'd in part, vacated in part, and remanded*, 494 F. App'x 752 (9th Cir. 2012).

237 *Id.* at 1062.

238 *Id.* at 1063 ("[T]he image conveys a message that is neither factual nor uncontroversial, for cell phones have not been proven dangerous. The [images] are too much opinion and too little fact.").

239 This is the case when the state requires doctors performing abortions to "disclose" sonograms to the pregnant patients, although this instance has the added dimension of a captive audience. Robertson, *supra* note 9, at 347 (noting that state sonogram laws "are motivated by a sentiment that if women are reminded that the fetus can be seen on ultrasound . . . they may hesitate in going forward with the abortion because of their 'natural' maternal feelings"); Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 377 (2008) ("[T]he ultrasound is meant to establish or simply to reinforce the state's position that the fetus is not just 'potential life,' . . . but 'actual life,' with all the ideological and emotional force that word now comprises and exerts.").

240 *See* Robertson, *supra* note 9, at 354 (explaining that some states, such as Texas and Oklahoma, require physicians to provide additional information to women seeking abortions than other states do and that in these cases "the government will have to satisfy a scrutiny stricter than that of undue burden").

241 *See* Royal, *supra* note 29, at 242 ("If instead of requiring a disclosure of uncontroverted facts, a regulation compels disclosure of controverted facts, the regulation falls into Category 2. . . . [This is] because this category compels messages that are not clearly facts.").

242 *See id.* at 237.

243 *Id.* at 236–37.

This equation of "uncontroversial" and factual is problematic from the consumer-autonomy standpoint. Consider these disclosure mandates, all of which involve uncontroverted facts:

(1) Sugar content on nutritional label, so consumers can make informed choices and hopefully reduce sugar consumption.
(2) Sugar content on front of package, so consumers can make informed choices, hopefully reduce sugar consumption, and make that their nutritional priority because of contested belief that sugar consumption is the single most important nutritional risk.
(3) Sugar content, with country of origin, so consumers can make informed choices, and hopefully move manufacturers to rely more heavily on domestic sugar.[244]

In Case 1, there is a norm at play, but the disclosure is uncontroversial because the norm is uncontested (it is good to reduce sugar). The government's norms grow progressively more contested through Cases 2 and 3, and its insistence on disclosure becomes less defensible from a consumer-autonomy standpoint. Somewhere along this continuum, the normative agenda overwhelms the informative agenda and more searching scrutiny would be warranted. The work that "noncontroversial" does in the advancement of consumer-autonomy interests is to impose a germaneness requirement on the state.[245] Compelled-speech cases, like subsidized-speech cases, feature the state as a participant in information markets, using its regulatory or spending power to get private parties to speak.[246] In the subsidized-speech area, courts have used germaneness as a limit on the state's influence over private communications.[247] Limiting *Zauderer* review to instances

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244 This would be distinct from other country-of-origin labeling mandates in that it would not apply across the board to a product. *See, e.g.*, The Textile Fiber Products Identification Act, 15 U.S.C. § 70b (2012) (stating that "an imported textile fiber product" must be labeled with "the name of the country where processed or manufactured"); The Wool Products Labeling Act of 1939, 15 U.S.C. § 68b (2012) (stating that a wool product is misbranded if it is not labeled with "the name of the country where processed or manufactured"). Rather, it would apply to a particular ingredient only, thus highlighting the fact selectivity. Of course the selection of furs and textiles, and not metal and rubber, involved a selection of facts at a more general level.

245 Germaneness worries are ameliorated to some extent at the federal level by delegated authority. The FDA, for example, issues labeling requirements only for "material" statements and avoids warnings with respect to mild or idiosyncratic responses. 21 U.S.C. § 321(n) (2012).

246 Financing a public-sector union would inadvertently give the impression that an employee supported public-sector unions. This financial support is similar to actually voicing support for public-sector unions. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 211 (1977) (discussing the constitutionality of legislation in Michigan that required "every employee represented by a union—even though not a union member" to pay the union even if the employee did not support unions).

247 *See* United States v. United Foods, 533 U.S. 405, 415 (2001) (striking down a subsidized speech law because "the expression respondent is required to support is not germane to a purpose related to an association independent from the speech itself"); Keller v.

in which the mandated disclosure is of uncontroversial relevance to consumer purchases would serve the same purpose.

Health risks are indisputably germane to tobacco use.[248] It is also uncontested that smoking is unhealthy and best avoided.[249] Moreover, smokers themselves in large numbers wish that they could quit.[250] By mandating cigarette labels, at least in their textual form, the state neither used contested norms to create facts nor took a side in a controversy about the relevance of these facts.[251] Similarly uncontroversial disclosures might include "seatbelts save lives" or "conserving energy saves money." By contrast, "conserving energy reduces the risks of climate change" would be controversial. Whether it should be or not, the concept of man-made climate change is currently an evaluative fact. What's more, the choice to include that fact in any product disclosure would be controverted as tendentious and irrelevant to consumer purchases. A usable definition of "controversial" would have to be worked out, as courts have worked out other standards based on assessments of social consensus.[252] Undoubtedly, it would have to include a substantiality component that controlled for outlying opinions, as even a proposition such as "smoking kills" has its detractors.

The question of whether a disclosure is controversial or not arises only after we have determined that it is at least true. The *R.J. Reynolds*

State Bar of Cal., 496 U.S. 1, 15 (1990) (holding impermissible State Bar's use of government-mandated funds for "activities having political or ideological coloration which are not reasonably related to the advancement" of the legal profession); *Abood*, 431 U.S. at 235 (holding union could not spend members' funds on ideological speech "not germane to" the duties giving rise to the necessity of the organization).

248 *See* U.S. DEP'T OF HEALTH AND HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING: A REPORT OF THE SURGEON GENERAL (2004), *available at* http://www.cdc.gov/tobacco/data_statistics/sgr/2004/pdfs/chapter1.pdf.

249 *See id.* (discussing causal relationships between smoking and various health problems).

250 In 2010, the National Health Interview Surveys compiled by the CDC indicated that 68.8% of adult smokers reported they wanted to quit smoking, while 52.4% said they had attempted to quit within the past year. Ann Malarcher et al., *Quitting Smoking Among Adults—United States, 2001–2010*, 60 MORBIDITY & MORTALITY WKLY. REP. 1513, 1516 (Nov. 11, 2011).

251 *See* 15 U.S.C. § 1333 (2012) (explaining cigarette labeling requirements mandated by the U.S. government).

252 For instance, in order to establish guidelines for defining "obscenity," the Supreme Court replaced several competing definitions, including Justice Potter Stewart's famously amorphous articulation of the concept, with a new standard based on, among other factors, "contemporary community standards." Miller v. California, 413 U.S. 15, 24 (1973). Likewise, the phrase "cruel and unusual punishment" resists any easy definition. As the Court has noted, "the words of the [Eighth] Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 100–01 (1958).

majority found that the disclosures were untrue.[253] This was due in large part to the special indeterminacy of pictures and the power of emotions.[254] The charge of controversy, then, was bound up with a view of the truthfulness of emotion and image. I examine this understanding below.

IV
Emotions, Truth, and Cognitive Bypass

The previous Parts have dealt with the "ends" of a disclosure mandate, arguing that commercial disclosure may be autonomy enhancing even where the state is not combatting deception and has a normative goal for behavioral change. Now we turn to the question of means, asking whether the form of the disclosure—graphic and emotional—makes a constitutional difference. According to one narrative, the answer is decidedly yes.[255] This is because of what the *Discount Tobacco* dissent called the "inherently persuasive" character of the "visual medium"[256] and perhaps because these particular images amounted to what the *R.J. Reynolds* court called "unabashed attempts to evoke emotion . . . and browbeat consumers into quitting."[257] According to the other narrative, best articulated by the *Discount Tobacco* majority, the depiction of facts in a visual medium does "not magically turn such facts into opinions," and facts and emotions are not at odds.[258]

Each narrative is rooted in contestable assumptions about facticity, emotions, and the nature of manipulation. My purpose here is not to prove that one or the other set of assumptions is correct but to show that reflexively equating the emotional and manipulative with the graphic and nonfactual is wrong. The questions of whether emotionally powerful disclosures bypass cognitive functions and whether graphic images can be understood for their factual propositions are empirical ones. In addressing these questions, with reference to the

253 R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1216–17 (D.C. Cir. 2012) ("[M]any of the images chosen by FDA could be misinterpreted by consumers. . . . While none of these images are patently false, they certainly do not impart purely factual, accurate, or uncontroversial information to consumers.").

254 *See id.* at 1216 (noting that the images could be misinterpreted and that they were "primarily intended to evoke an emotional response").

255 *See* Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 525–26 (6th Cir. 2012) (Clay, J., partially dissenting) (discussing several cases that have distinguished the constitutional treatment of textual messages from visual messages).

256 *Id.* at 526.

257 *R.J. Reynolds*, 696 F.3d at 1217; *see also Disc. Tobacco*, 674 F.3d at 529 (Clay, J., partially dissenting) ("[I]t is less clearly permissible for the government to simply frighten consumers or to otherwise attempt to flagrantly manipulate the emotions of consumers as it seeks to do here.").

258 *Disc. Tobacco*, 674 F.3d at 569.

research, I will put to one side the helpful points that consumers in all cases have bounded rationality,[259] particularly when they suffer from chemical addictions.[260] We can simply posit a background of perfect rationality and autonomous choice against which the powerful disclosures act.

A. Manipulation and Rational Communication

Graphic and emotional communications, like any other speech, can be manipulative and are best understood as communication without reason.[261] Advertisers know that the most effective forms of communication activate emotions.[262] Cigarette manufacturers in particular have long excelled at making emotional connections between consumer and product.[263] For just as long, they have been accused of "manipulation."[264] There is widespread agreement that manipulation impairs autonomy.[265] According to Joseph Raz's influential work, to be the author of one's life, one's choices "must be free from coercion and manipulation by others."[266] If the state bypasses the consumer's rational agency to advance the state's own ends, this would be disrespecting autonomy and acting manipulatively.[267]

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259 *See, e.g.*, Hanson & Kysar, *supra* note 182, at 1439 (discussing bounded rationality and manipulation).

260 *See* Sylvia A. Law, *Addiction, Autonomy, and Advertising*, 77 IOWA L. REV. 909, 946–47 (1992) (defining addiction for First Amendment purposes); *c.f.* Christine Jolls, *Product Warnings, Debiasing, and Free Speech: The Case of Tobacco Regulation*, 169 J. INSTITUTIONAL & THEORETICAL ECON. 53, 69 (2013) (discussing that smokers "have factual misperceptions about the risk of death from a smoking-related illness").

261 *See* Hanson & Kysar, *supra* note 182, at 1442–50 (discussing the role of atmospherics and visual displays in marketing and its effect on consumer behavior).

262 *See* STUART EWEN, CAPTAINS OF CONSCIOUSNESS: ADVERTISING AND THE SOCIAL ROOTS OF THE CONSUMER CULTURE (1976); WILLIAM LEISS ET AL., SOCIAL COMMUNICATION IN ADVERTISING: PERSONS, PRODUCTS & IMAGES OF WELL-BEING (2d ed. 1990); TAMARA R. PIETY, BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA 108–20 (2012) (examining various marketing techniques that she views as manipulating and enlarging consumer appetites).

263 *See, e.g.*, ROBERT SOBEL, THEY SATISFY: THE CIGARETTE IN AMERICAN LIFE 128–31 (1978) (describing tobacco advertising techniques); Michael E. Starr, *The Marlboro Man: Cigarette Smoking and Masculinity in America*, J. OF POPULAR CULTURE, Spring 1984, at 45–56 (discussing the image of the smoker and cigarettes cultivated by popular culture and advertisers throughout American history).

264 *See* MICHAEL SCHUDSON, ADVERTISING, THE UNEASY PERSUASION 110 (1984).

265 *See, e.g.*, PIETY, *supra* note 262, at 112–14 (discussing examples of marketers manipulating consumers to act in predicable ways without their awareness of the marketers' influence).

266 JOSEPH RAZ, THE MORALITY OF FREEDOM 372–73 (1980).

267 I want to set aside the arguments that even this kind of manipulation might not be paternalistic in the context of an addictive substance like tobacco because the addicted consumer is incapable of exercising rational choice.

But what exactly characterizes manipulation is surprisingly undertheorized.[268] Seana Shiffrin's influential view is that one is autonomous, and therefore not manipulated, when one reasons for oneself.[269] In the First Amendment context, David Strauss identifies the harm of government speech restrictions as "a denial of [listener] autonomy in the sense that they interfere with a person's control over her own reasoning processes."[270] It follows from this that a *disclosure* requirement that tries to get a consumer to do something by depriving him of the ability to reason for himself would be autonomy reducing.[271] What kind of communication would this be?

Strauss, like other theorists, equates manipulation with lying, suggesting that manipulative speech is that which causes a false belief.[272] The intentional inculcation of false beliefs shreds reason.[273] When a speaker lies in order to get you to do something, she has manipulated. On that, most everyone can agree.[274] C. Edwin Baker, the towering First Amendment autonomy theorist, called "manipulative lies" an "attempt to undermine the integrity of the other person's decisionmaking authority."[275] The operation of a lie—depriving the recipient of truthful information—moves the speech to the margins of what Jorgen Habermas called a "communicative act."[276] Drawing on the work

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268 *Cf.* RAZ, *supra* note 266, at 377–78 (discussing briefly the concept of manipulation and drawing distinctions between coercion and manipulation).

269 *See* Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFF. 205, 220 (2000).

270 Strauss, *supra* note 59, at 354; *see also id.* at 355 ("The persuasion principle . . . prohibits the government from deliberately denying information to people for the purpose of influencing their behavior.").

271 Danny Scoccia, *The Right to Autonomy and the Justification of Hard Paternalism*, *in* PATERNALISM THEORY AND PRACTICE 74, 77 (Christian Coons & Michael Weber eds., 2013) (noting that "autonomy enhancement" is an intervention "when others are about to make substantially 'impaired' . . . choices, to remove the impairment so that their choices will be more autonomous").

272 At other points in his work, Strauss seems to embrace a broader definition of manipulation that is nearly indistinguishable from persuasion. *See* Strauss, *supra* note 59, at 362 ("Every speaker who tries to gain an advantage by using his or her superior resources (including intellectual and rhetorical abilities as well as material resources), instead of just offering the arguments for what they are worth on the merits, is engaged in a form of manipulation.").

273 *See also* Jeremy Waldron, *Autonomy and Perfectionism in Raz's* Morality of Freedom, 62 S. CAL. L. REV. 1097, 1118–19 (1989) (criticizing Raz for saying so little about manipulation and concluding that "in the end[,] Raz will want to settle for a fairly modest idea of manipulation which involves something as simple as the inculcation of false beliefs").

274 *See, e.g.*, RAZ, *supra* note 266, at 377–78 (manipulation "perverts the way that person reaches decisions, forms preferences or adopts goals"); Fallon, *supra* note 69, at 889 (manipulation is "a perversion of someone's thinking, deciding, or acting"); Claudia Mills, *Politics and Manipulation*, 21 SOC. THEORY & PRAC. 97, 97–112 (1995) (defining manipulation as using bad reasons to persuade).

275 C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 256 (2011).

276 1 J. HABERMAS, THE THEORY OF COMMUNICATIVE ACTION 85–95 (Thomas McCarthy trans., 1984) (distinguishing communicative action from forms of "strategic action" where

of Thomas Emerson, Baker distinguished lies from autonomy-respecting persuasion because the latter "operate[s] through the mind of the other and thereby gives the other at least the theoretical possibility of rejecting the message or giving it her own chosen significance."[277]

Manipulation akin to deception might also result from material omissions of relevant information[278] or the source of information.[279] Other examples would include subliminal messages designed to penetrate the mind without notice.[280] In all these cases, the source of persuasion is intentionally concealed.

Speech may be manipulative because of the way that it plays on emotion, even if it does not create false belief. If the concept of manipulation were limited to inculcating a false belief, then there would be no difference between manipulation and deception.[281] Suppose an employee breaks his leg (A) and then intentionally exploits his boss's sympathy in order to take long lunches (B). The employee has not created false belief, but he may have manipulated by exploiting sympathy for A to gain permissiveness for B. He has in a sense created a false emotion around B. Robert Noggle addresses this situation by defining manipulation not only as the creation of false belief but as the "leading astray" from ideal states of feeling.[282] He asserts that the subject has an ideal state of "feeling" when having an appropriate

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the speech is designed to get someone to act, rather than merely to reach an understanding).

277 Baker, *supra* note 275, at 258; *see also* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970).

278 *See* JOEL FEINBERG, 3 MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF 12–16 (1986) (asserting that choices which come from ignorance are not fully autonomous choices).

279 Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 108–12 (2006) (identifying forms of deceptive communications).

280 Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L. J. 713, 749 (1997) ("Subliminal ads . . . bypass the viewer's conscious mind entirely and lodge in the subconscious as fully formed and conclusory thoughts. They are, therefore, inconsistent with the goal of rational consumer choice and should be condemned as an unfair consumer practice." By contrast, "[a]ssociational advertising may fuel consumer desires that are every bit as irrational as those induced by subliminal messages. Nonetheless, those ads do not inevitably prevent the operation of the consumers' critical facilities. If the consumers choose to set those facilities aside—or, perhaps more accurately, if they choose to value psychological attributes of the product as well as, and perhaps more highly than, its physical characteristics—this is a decision that market advocates must respect.").

281 Robert Noggle, *Manipulative Actions: A Conceptual and Moral Analysis*, 33 AM. PHIL. Q. 43, 43–55 (1996).

282 *Id.* at 46 (defining manipulation as inducing a violation of certain "ideals" about how beliefs, desires, and emotions should relate to reality); *see also* Patricia Greenspan, *The Problem with Manipulation*, 40 AM. PHIL. Q. 155, 157 (2003) (defining manipulation as "a kind of unfairness in setting up the terms of social exchange" involving especially a breach of trust).

emotional reaction.[283] A manipulator provokes an inappropriate emotional reaction by drawing the target away from "relevant information."[284]

Under either a narrow view of manipulation as deception or a broader view embracing more subtle forms of direction, we are left to consider the nature of reality and therefore what information is faithful and relevant to that reality. Where a speaker seeks to inculcate true beliefs and support rational decision making on the basis of relevant feeling, the speech will not be manipulative. When it comes to the cigarette labels and other forms of graphic disclosure, the right question is not whether the speaker intentionally activates emotional responses but whether the speaker intentionally uses emotions to distort or bypass rational choice.

B. Emotionality and Cognitive Bypass

There is no question that the graphic cigarette labels were developed to provoke emotional response in order to "enhance the effective communication of the health warning message."[285] The textual warning labels had become "unnoticed and stale."[286] By contrast, the graphic labels that had been adopted in Canada more than a decade before seemed to do a better job of delivering health information that would be absorbed by smokers and potential smokers.[287] Whether or not the graphic warnings ultimately reduce smoking, they seem to increase awareness of its risks, especially among younger consumers[288]

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283 This conception of "appropriate" emotions assumes that emotions are the byproducts of appraisals of reality. *See* Phoebe C. Ellsworth & Klaus R. Scherer, *Appraisal Processes in Emotion*, *in* HANDBOOK OF AFFECTIVE SCIENCES 572, 572 (Richard J. Davidson et al. eds., 2003) ("[E]motions arise from [people's] perceptions of their circumstances—immediate, imagined, or remembered.").

284 *See* Noggle, *supra* note 281, at 52.

285 Final Rule, *supra* note 1, at 36,641.

286 R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1224 (D.C. Cir. 2012) (Rogers, J., dissenting) (citations omitted) (internal quotation marks omitted).

287 Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 565 (6th Cir. 2012) (citations omitted) (internal quotation marks omitted) ("Surveys in Canada . . . show that approximately 95 percent of youth smokers and 75 percent of adult smokers report that the pictorial warnings have been effective in providing them with important health information. And Canadian smokers were more likely to report cigarette packages as a source of information about health risks of smoking than smokers in the United States or other countries with only textual warnings." (citations omitted) (internal quotaition marks omitted)).

288 PUBLIC HEALTH RESEARCH CONSORTIUM, EVALUATING THE IMPACT OF PICTURE HEALTH WARNINGS ON CIGARETTE PACKETS 3 (2010).

and less literate consumers.[289] Shock helps to overcome resistance and apathy.[290]

For critics of the labels, the state bypassed the head by speaking to the heart and, by scaring, ceased to inform.[291] Nat Stern argues that the images cannot be factual because of "the emotional appeal inherent" in the communication.[292] If indeed there is a graphic alchemy at work, converting facts to fiction, then a disclosure justified by consumer-autonomy interests might actually reduce autonomy by leading listeners astray into irrational or emotionally inappropriate reactions.[293] This concern is not borne out by the experimental literature, which shows that emotionally powerful warnings can trigger fear and disgust while simultaneously working on a cognitive level.[294]

Social scientists, particularly in the fields of social and cognitive psychology, have been studying the interaction of cognition and emotion (also described as "affect") since the 1950s.[295] In recent years, the topic has attracted fresh attention in other fields, including politi-

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289 James F. Thrasher et al., *Cigarette Warning Label Policy Alternatives and Smoking-Related Health Disparities*, 43 AM. J. PREVENTIVE MED. 590, 595, 597–98 (2012) (reporting on experiment exposing nearly one thousand adult smokers to FDA graphic labels and finding that pictorial-warning labels were rated as more personally relevant, effective, and credible than text-only labels among participants with low health literacy).

290 *See* Final Rule, *supra* note 1, at 36,641 ("The overall body of scientific evidence indicates that health warnings that evoke strong emotional responses enhance an individual's ability to process the warning information, leading to increased knowledge and thoughts about the harms of cigarettes and the extent to which the individual could personally experience a smoking-related disease. Increased knowledge and thoughts about the negative consequences of smoking, in turn, are reasonably likely to result in more informed and healthier behaviors, such as trying to quit smoking or deciding not to start."). *But c.f.* George Loewenstein & Ted O'Donoghue, *We Can Do this the Easy Way or the Hard Way: Negative Emotions, Self-Regulation, and the Law*, 73 U. CHI. L. REV. 183, 190, 200–01 (2006) (critiquing regulatory strategies that use fear appeals because they impose "psychic costs" on consumers without necessarily changing behavior, thereby making people worse off).

291 Nat Stern & Mark J. Stern, *Advancing an Adaptive Standard of Strict Scrutiny for Content-Based Commercial Speech Regulation*, 47 U. RICH. L. REV 1171, 1194–95 (2013) (describing the images used on cigarette cartons as evoking emotions, including fright, instead of stating a fact).

292 *Id.* For Stern, any kind of persuasion is "propaganda" that undermines consumer autonomy and the emotionality of the message is what changes it from "this is what smoking does" to "do not smoke." *Id.* at 1195, 1199.

293 This is the concern expressed by the dissenting judge in *Discount Tobacco* that emotional appeals "subsumes rationale [sic] decision-making." Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 529 (Clay, J., partially dissenting) (citing the government's argument).

294 *See, e.g.*, Leonie Huddy & Anna. H. Gunnthorsdottir, *The Persuasive Effects of Emotive Visual Imagery: Superficial Manipulation or the Product of Passionate Reason?*, 21 POL. PSYCHOL. 745, 748 (2000) (citing research demonstrating that affect and cognition are closely interwoven).

295 *See, e.g.*, Daniel Katz & Ezra Stotland, *A Preliminary Statement to a Theory of Attitude Structure and Change*, *in* 3 PSYCHOLOGY: A STUDY OF A SCIENCE 423, 423–24 (Sigmund Koch ed., 1959) (outlining a functional approach to how attitudes affect individuals).

cal science,[296] law,[297] and neuroscience.[298] As Jeremy Blumenthal has written, there is no experimental consensus on "the nature and phenomenology of emotions, as well as about the processes by which emotion affects, influences, interacts with, controls, or is subject to, more 'rational' cognitive processes."[299]

On one theory, emotions spread without mediation engage us immediately and holistically, and often stimulate a visceral and unthinking response.[300] An early model of visual and emotional communication posited that individuals simply transfer emotions from an emotionally laden visual (such as a flower) to an emotionally neutral object (such as a bar of soap).[301] According to this affect-transfer model, the image transmits a value that is passively absorbed, without much interpretive activity by the viewer.[302] As Rebecca Tushnet has shown, judges frequently assume this model of communication in their discussion of visual images.[303]

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296 *See, e.g.*, W. RUSSELL NEUMAN ET AL., THE AFFECT EFFECT: DYNAMICS OF EMOTION IN POLITICAL THINKING AND BEHAVIOR 1 (W. Russell Neuman et al. eds., 2007) (citing "a resurgent interest in the way emotion interacts with thinking about politics"); Ted Brader, *The Political Relevance of Emotions: "Reassessing" Revisited*, 32 POL. PSYCHOL. 337, 337 (2011) (citing to current theories of assessing emotions and "[a] surge in research on emotions in political psychology"); Linda M. Isbell et al., *Affect and Politics: Effects on Judgment, Processing, and Information Seeking*, *in* FEELING POLITICS: EMOTION IN POLITICAL INFORMATION PROCESSING 57, 85 (David P. Redlawsk ed., 2006) (describing how "affect influences judgment, information processing, and information seeking in different ways" depending on mood and level of situational awareness).

297 *See, e.g.*, Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997, 1998 (2010) ("Law and emotions scholarship has reached a critical moment in its trajectory."); Richard L. Wiener et al., *Emotion and the Law: A Framework for Inquiry*, 30 LAW & HUM. BEHAV. 231, 231 (2006) ("Although the study of affect and motivation in information processing models has captured the attention of many who think about social cognition, judgment, and decision making, the impact of this thinking has only begun to make its way into research and theory in legal psychology." (citations omitted)).

298 Charles S. Carver, *Negative Affects Deriving from the Behavioral Approach System*, 4 EMOTION 3, 3 (2004) (describing the "increasing interest in theoretical links from neurobiological systems to motivation, emotion, personality, and psychopathology").

299 Jeremy A. Blumenthal, *Emotional Paternalism*, 35 FLA. ST. U. L. REV. 1, 3 n.4 (2007) (citing HANDBOOK OF AFFECTIVE SCIENCES (Richard J. Davidson et al. eds., 2003); THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS (Paul Ekman & Richard J. Davidson eds., 1994)).

300 *See, e.g.*, Brader, *supra* note 296, at 340–41 (arguing that anxiety may trigger reconsideration of past choices); Huddy & Gunnthorsdottir, *supra* note 294, at 748 (arguing an affective symbol can influence emotions, acting as a source of persuasion independent of rationality).

301 *See* Linda M. Scott, *Images in Advertising: The Need for a Theory of Visual Rhetoric*, 21 J. CONSUMER RES. 252, 256–57 (1994) (discussing theories and studies concerning visual communications); *see also* Huddy & Gunnthorsdottir, *supra* note 294, at 747–48 (providing an overview of the affect-transfer and information processing paradigms).

302 *See* Scott, *supra* note 301, at 256 (explaining that images used in advertisements act "to produce an attachment to the brand in a manner that is automatic, affective, or unconscious (or all of these at once)").

303 *See* Rebecca Tushnet, *Worth A Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 690–91, 694 (2012) (explaining that judges distinguish images from words in

More recent research in risk communication challenges this older model, demonstrating that emotional communication does not bypass the cognitive.[304] Rather, the emotional provocation activates cognition—heart stimulating head—to more effectively communicate.[305] A more complex model of emotional appeals is emerging whereby the provocation triggers both emotional and cognitive responses in an integrated fashion.[306] For example, a communication may evoke a feeling of anxiety, which then prompts a quest for, and receptivity to, factual information.[307] Contemporary theories of emotion such as hot cognition theory,[308] the affect-infusion model,[309] and affect-as-information theory[310] similarly suggest that emotional and intellectual processing are interlinked. The same insight animates re-

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part on the assumption that individuals are more subconsciously affected by images); *see also* Neal R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1, 15 (1997) (describing law's treatment of emotions as visceral and unmediated).

304 Huddy & Gunnthorsdottir, *supra* note 296, at 749 ("There is growing acknowledgment among psychologists and researchers of political behavior . . . that reactions to an emotive symbol may not be as superficial or devoid of cognition as once thought.").

305 *See, e.g.*, Julie A. Edell & Marian Chapman Burke, *The Power of Feelings in Understanding Advertising Effects*, 14 J. OF CONS. RES. 421, 431 (1987) (finding that affect can influence cognition); Francine Rosselli et al., *Processing Rational and Emotional Messages: The Cognitive and Affective Mediation of Persuasion*, 31 J. EXPERIMENTAL SOC. PSYCHOL. 163, 183–84 (1995) (discussing experimental findings that emotionally based communication is mediated by cognitive and emotional responses).

306 *See* Maria Miceli et al., *Emotional and Non-Emotional Persuasion*, 20 APPLIED ARTIFICAL INTELLIGENCE 849, 855–56 (2006) (arguing that emotional persuasion is not necessarily irrational persuasion).

307 Huddy & Gunnthorsdottir, *supra* note 296, at 749; *see also* Brader, *supra* note 296, 339 & n.2 (citing numerous studies showing the existence of "an exogenous, and at times interactive, effect of anxiety and other emotions" that contrast with the affect transfer hypothesis).

308 In political psychology, the hot cognition theory posits "that all sociopolitical concepts are affect laden." Milton Lodge & Charles S. Taber, *The Automaticity of Affect for Political Leaders, Groups, and Issues: An Experimental Test of the Hot Cognition Hypothesis*, 26 POL. PSYCHOL. 455, 456 (2005) (providing an overview of recent research on the hot cognition hypothesis).

309 Joseph P. Forgas, *Mood and Judgment: The Affect Infusion Model (AIM)*, 117 PSYCHOL. BULL. 39, 39 (1995) (proposing an affect infusion model "whereby affectively loaded information exerts an influence on and becomes incorporated into the judgmental process, entering into the [individual's] deliberations and eventually coloring the judgmental outcome").

310 Gerald L. Clore & Maya Tamir, *Affect as Embodied Information*, 13 PSYCHOL. INQUIRY 37, 37 (2002) ("[W]hen affect enters into judgments and decisions, it does so directly through the information embodied in affective feelings and only indirectly by activating positive or negative thoughts."); Norbert Schwarz & Gerald L. Clore, *Mood, Misattribution, and Judgments of Well-Being: Informative and Directive Functions of Affective States*, 45 J. PERSONALITY & SOC. PSYCHOL. 513, 513, 520 (1983) (introducing the affect-as-information theory, suggesting that emotions provide information and affect how individuals process life satisfaction).

cent philosophical inquiries into the nature of emotions and their dependence on cognition.[311]

If emotional and cognitive pathways crisscross, then the mere fact that the speaker has used an emotional provocation does not mean that he has led the target away from true beliefs or relevant information, or otherwise subverted the target's rational agency. It is equally likely that the emotional provocation has sharpened the cognitive profile of true and relevant facts.[312] Experimental findings in tobacco-risk-communication research support a "dual-process" theory whereby emotional image and text together increase the salience of warnings about the effects of smoking.[313] The emotional impact of the graphic cigarette warnings, rather than diluting or distorting health information, may deepen understanding of that information.[314]

The contrary notion—that there is a stark difference between rational and emotional communication—is at odds with First Amendment protections. Arguments for restrictions on speech grounded on differences between emotional and rational speech have failed, with courts granting both kinds of communication equal status.[315] Martin Redish has argued against differential treatment of emotional speech not only because of its equal status but also because the "emotional element" and "'non-rational' forms of communication" serve to develop the more rational forms.[316] In other words, the emotions and the mind are codependent.

C. Graphic Communication and Truth

Whether an image hijacks or supports consumer decision making depends ultimately on its relationship to the truth. In the language of

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311 *See, e.g.*, MARTHA C. NUSSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS 4 (2001) (arguing that emotions are built on "cognitive appraisal or evaluation" (emphasis omitted)).

312 *See* Huddy & Gunnthorsdottir, *supra* note 296, at 749 (citing research finding that anxiety may motivate an individual to search for additional factual information).

313 Lydia F. Emery et al., *Affective and Cognitive Mediators of the Impact of Cigarette Warning Labels*, NICOTINE & TOBACCO RES., Aug. 2013, at 5.

314 Jolls, *supra* note 260, at 58 ("[T]here is sound empirical evidence . . . that individuals' risk perceptions attain greater factual accuracy with a text-image warning than with a text-only alternate.").

315 *See, e.g.*, Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011) ("Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain."); Cohen v. California, 403 U.S. 15, 26 (1971) (noting that "words are often chosen as much for their emotive as their cognitive force" and that the "emotive function" of speech "may often be the more important element of the overall message sought to be communicated"); *see also* Ellen P. Goodman, *Peer Promotions and False Advertising Law*, 58 S.C. L. Rev. 683, 691 (2007) (showing that emotionally evocative "lifestyle" advertising is as protected as informational advertising).

316 Redish, *supra* note 57, at 628.

Zauderer, this is the question of whether graphic communication can be "purely factual." This is by far the most difficult question posed by the cigarette labels.[317] Answering the question requires content analysis that courts find difficult.[318] Moreover, the inquiry is complicated by the dual meaning of the word "factual" that emerges from the tobacco labeling experiment. A fact can be (1) a provable thing or (2) a substantially true thing (or both). If images are held to be factual *only* if they are provable, the indeterminacy of the visual image will undercut its facticity.[319]

The *R.J. Reynolds* court seems to have understood factual to mean provable rather than true.[320] The graphic labels could not be considered factual in large part because they were multivalent and did not stand for a single provable assertion.[321] Different viewers are likely to read the images differently, finding meanings that diverge from the accompanying text.[322] It is often the case that images communicate many meanings at once.[323] As visual studies and psychology literatures have shown, image interpretation is variable and influenced by the viewer's socioeconomic and cultural characteristics.[324] The indeterminacy of images means that it is difficult to isolate a single set of facts that can be proved or disproved. It is for this reason that images are rarely sanctioned as "false" in false advertising law.[325]

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317 Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).

318 For instance, when it comes to false advertising, "the difficulty of pinning down an image's meaning in order to determine whether that image makes a false claim has . . . led courts to state, rather than explain, their conclusions." Rebecca Tushnet, *Looking at the Lanham Act: Images in Trademark and Advertising Law*, 48 HOUS. L. REV. 861, 917 (2011).

319 *See Zauderer*, 471 U.S. at 651 (reiterating that misleading and false commercial speech may be restricted by the state or federal government); *see also* R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1216–17 (D.C. Cir. 2012) (finding graphic images on cigarette packaging could be misinterpreted and therefore could not impart factual and accurate information to consumers).

320 *R.J. Reynolds*, 696 F.3d at 1217 ("While none of these images are patently false, they certainly do not impart purely factual, accurate, or uncontroversial information.").

321 *See id.* at 1216–17 (finding the graphic images used on cigarette packaging did not convey a clear message, the lack of which could result in consumer misinterpretation).

322 *See* Tushnet, *supra* note 318, at 865 (describing images as "protean").

323 *See* Jane McKenzie & Christine van Winkelen, *Beyond Words: Visual Metaphors that Can Demonstrate Comprehension of KM as a Paradoxical Activity System*, 28 SYS. RES. & BEHAV. SCI. 138, 141–42 (2011) ("Visual imagery produces meaning in different ways to language. Unlike words, visual objects do not have a unified stable meaning in the mind of the viewer; meaning is created fluidly in movement and dialogue between the image, the author, the view and the circumstances of perception." (citations omitted)).

324 *See, e.g.*, TERENCE WRIGHT, VISUAL IMPACT: CULTURE AND THE MEANING OF IMAGES 35–37 (2008) (discussing how cultural knowledge can be needed to achieve a basic perception of an image).

325 *See* Linda J. Demaine, *Seeing Is Deceiving: The Tacit Deregulation of Deceptive Advertising*, 54 ARIZ. L. REV. 719 (2012) (arguing that courts have left visual imagery largely unregulated in modern advertising law).

If an image, to be factual, must make a unitary and provable assertion, it will usually fail. This is what we see in a judicial assessment of the image called "man with chest staples" accompanied by the text, "smoking can kill you."[326]

According to the *R.J. Reynolds* district court decision, this is not factual unless we think the government is claiming that smoking causes autopsies.[327] Christine Jolls criticizes the lower court's depiction of the consumer as "relentlessly literal and logical (smoking must cause autopsies if the image depicts an autopsy)."[328] In its search for a unitary and provable message, the court first imagines that the takeaway meaning for the consumer is "autopsy" rather than "death." Then it imagines the consumer unable to associate the words and the picture.[329]

This is a rather limited, and unsupported, understanding of visual processing. The FDA contracted for the largest ever study (18,000 participants) of reactions to graphic warnings in order to test the impact of this image on a wide range of consumers against a test group that viewed the textual warning only.[330] In addition, this image was tested against other possible images paired with the same text.

326 *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1217 (finding that while images approved by the Final Rule, including the "man with chest staples," were not "patently false, they certainty [did] not impart purely factual, accurate, or uncontroversial information to consumers").

327 R.J. Reynolds Tobacco Co. v. FDA, 845 F. Supp. 2d 266, 273 (D.D.C. 2012); *see also R.J. Reynolds*, 696 F.3d at 1217 ("While none of these images are patently false, they certainly do not impart purely factual, accurate, or uncontroversial information to consumers . . . .").

328 *See* Jolls, *supra* note 260, at 57 (internal quotation marks omitted).

329 *See R.J. Reynolds*, 845 F. Supp. 2d at 273.

330 *See* JAMES NONNEMAKER ET AL., EXPERIMENTAL STUDY OF GRAPHIC CIGARETTE WARNING LABELS, FINAL RESULTS REPORT 3–26 (2010), *available at* http://www.regulations.gov/contentStreamer?objectId=0900006480bad0e1&disposition=attachment&contentType=pdf.

The purpose was to study the effect of the graphic images on consumer attitudes, beliefs, perceptions, and intended behaviors.[331] The study concluded that the chosen "man with chest staples" image scored highest among the alternatives, and against the control, on a combination of emotional, cognitive, and recall measures.[332] The study did not ask respondents what message they took away from the graphics.[333] What it assessed was recall of the text message that "smoking can kill you," providing an account of at least one meaning that consumers associated with the graphic.[334] Whether they associated other meanings with the graphic is unknown.[335]

Some commentators were concerned that the pictured body gave a false impression of *health* because it did not "look worse (*e.g.*, paler, weaker, thinner, like he had suffered more)."[336] Others worried "that persons unfamiliar with an autopsy may not understand the image."[337] The FDA responded that, given the accompanying text, "[v]iewers will understand that the image shows someone who has died from a smoking-related cause" and that not all smoking-related diseases ravage the visible body.[338] In other words, the image was substantially true.[339]

The meaning of factual as being substantially true rather than one provable thing is the only meaning of factual that even textual warnings could satisfy.[340] Consider the textual warning "smoking causes heart disease." This is only true some of the time. The declarative statement might lead consumers to believe that it is true all of the time or more of the time than is the case.[341] Indeed, the tobacco industry claimed that the graphic images were untrue because they

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331 The model was built on the theory that increasing the salience of a message by provoking emotional and cognitive responses will result in longer recall and behavioral change. *Id.* at 1–2 ("Eliciting strong emotional and cognitive reactions to the graphic cigarette warning label enhances recall and processing of the health warning, which helps ensure that the warning is better processed, understood, and remembered. . . . As attitudes and beliefs change, they eventually lead to changes in intentions to quit/start smoking and then later to lower smoking initiation and successful cessation.").

332 *Id.* at 3–26.

333 *Id.* at 1–3.

334 *Id.* at 1-1 to 1-3.

335 *Id.* at 1-3.

336 Final Rule, *supra* note 1, at 36,655.

337 *Id.*

338 *Id.*

339 *Id.*; *accord* R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1232 (D.C. Cir. 2012) (Rogers, J., dissenting) ("An autopsy scar is merely one way of communicating that the man in the image is dead; viewed in connection with the textual warning, the image conveys the message that smoking can result in death.").

340 *See* Final Rule, *supra* note 1, at 36,631 (describing *likely* health consequences caused by cigarette smoking).

341 *See R.J. Reynolds*, 696 F.3d at 1216 ("[M]any of the images chosen by the FDA could be misinterpreted by consumers.").

did not depict probabilities.[342] A substantial truth standard forgives this elision, allowing for a (small) range of plural interpretations.[343]

How courts consider the free speech consequences of graphic disclosures is important because graphic labels seem to communicate more effectively than textual ones.[344] Research conducted on food labeling shows that graphics are more successful than text in conveying nutritional information, especially to less educated populations.[345] Color-coded "traffic light" systems that label food as red ("unhealthy"), green ("healthy"), or yellow ("so-so") work better than detailed text.[346] Even though a color code is neither especially emotional nor figurative, it does raise the same questions as the tobacco labels about substantial truth and multivalent meanings.[347] An understanding of factual that insists on single provable assertions and that is hostile to the use of complex emotional-cognitive pathways will leave little room for more effective forms of communication.

CONCLUSION

The graphic tobacco labels push buttons that no American disclosure mandate has ever approached. They pose the question of how emotionally charged images change the free speech implications of

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342 *See* Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 559–60 (6th Cir. 2012) (discussing and rejecting industry arguments on probabilities). Because images are less susceptible to qualification, they are more vulnerable to criticism that they have exaggerated risks. *See, e.g.*, Cass R. Sunstein, Essay, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61, 82 (2002) ("[V]ivid images and concrete pictures of disaster can 'crowd out' other kinds of thoughts, including the crucial thought that the probability of disaster is very small.").

343 For such an approach, see *R.J. Reynolds*, 696 F.3d at 1231 (Rogers, J., dissenting) ("[T]he relevant question [is] . . . whether the images render the *overall* message conveyed by the warning labels nonfactual." (emphasis in original)).

344 Final Rule, *supra* note 1, at 36,631–32.

345 *See generally* Lucas, *supra* note 9, at 256–57 (discussing studies of the effectiveness of graphic warnings on food labels); *see also* INST. OF MED., FRONT-OF-PACKAGE NUTRITION RATING SYSTEMS AND SYMBOLS: PROMOTING HEALTHIER CHOICES 67–68 (Ellen A. Wartella et al. eds., 2012) (reviewing studies examining front-of-package labeling systems); Kristy L. Hawley et al., *The Science on Front-of-Package Food Labels*, 16 PUB. HEALTH NUTRITION 430, 432 (2012) (discussing effect on consumers of graphic expression of percentage daily value).

346 Several recent studies have demonstrated the informational effects of a store food-labeling system that uses color codes to communicate the relative healthiness of foods. *See* Hawley et al., *supra* note 345, at 433–34 (reporting on study showing color codes easiest to understand); Anne M. Thorndike et al., *A 2-Phase Labeling and Choice Architecture Intervention to Improve Healthy Food and Beverage Choices*, 102 AM. J. OF PUB. HEALTH 527, 531–32 (2012) (reporting on study showing that color-coded food labels reduced unhealthy food sales and increased healthy food sales).

347 Were the government to adopt mandatory labels of this sort, it would probably fall into the category of "controversial" addressed above. The determination of "health" is so multivalent, it is hard to imagine a consensus on the designation.

disclosures that have been in place for fifty years.[348] The D.C. Circuit, in *R.J. Reynolds*, decided that the images made a world of difference, exposing a normativity and subjectivity at odds with factual communication.[349] There is little scholarship on compelled commercial speech, much less on the communicative impact of particular forms of disclosure. This gap in the theory is evident in the doctrine. The first constitutional challenge to graphic labels has resulted in new doctrine that misconceives visual and emotional processing and overstates distinctions between the normative and informative, the emotional and the cognitive.[350]

Faced with the difficult First Amendment questions that graphic disclosures present, two circuit courts diverged on questions of facticity and deception, emotions and persuasion. *R.J. Reynolds* had the final word, concluding that the new warnings were not entitled to rational basis review on two independent grounds: a) that they did not correct otherwise deceptive advertising, and b) that they were not "purely factual" in large part because of emotional, indefinite, and persuasive messages.[351] Although the labels had been chosen for their *communicative* impact, they were judged under more searching scrutiny for their impact on consumer behavior—a secondary goal that the government could not show it had achieved.[352] Under that interpretation of the law, the old textual warnings—which have never been challenged—should also receive heightened scrutiny and would probably fail. Many other mandated product disclosures (nutritional information, energy efficiency) would be similarly suspect.[353] Indeed, new challenges are already underway, for example to country-of-origin labeling on meat.[354]

Disclosure requirements often will, like the cigarette labels, serve dual goals: to inform consumer choices and to influence them.[355] This is particularly true in the case of warnings.[356] As the Court and many commentators have noted, commercial speech law is designed

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348 *Compare* Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 518 (6th Cir. 2012) (upholding statutory labeling requirement on facial challenge), *with R.J. Reynolds*, 696 F.3d at 1221–22 (striking down labels adopted by Food and Drug Administration).

349 *R.J. Reynolds*, 696 F.3d at 1216.

350 *See id.* at 1219.

351 *Id.* at 1216.

352 *Id.* at 1219–21.

353 *See, e.g.*, Nat'l Elec. Mfg. Ass'n v. Sorrell, 272 F.3d 104, 116 (applying rational basis review to a state law requiring light bulb manufacturers to disclose mercury content).

354 *See* Am. Meat Inst. v. U.S. Dep't of Agric., No. 13-CV-1033 (KBJ), 2013 WL 4830778 (D.D.C. Sept. 11, 2013).

355 *See* Ben-Shahar & Schneider, *supra* note 10, at 649–50.

356 *See, e.g.*, Final Rule, *supra* note 1, at 36,631–32 ("On the basis of the available scientific evidence, the IOM concluded that larger, graphic warnings would promote greater public knowledge of the health risks of using tobacco and would help reduce consumption.").

to vindicate listener interests.[357] Fidelity to these interests does not require courts to disentangle state goals to inform and influence or to disfavor a communication because it persuades.[358] Persuasion, in the absence of manipulation, is not autonomy reducing, even if it is emotionally charged. Communications research shows that emotions facilitate "knowing." Emotional and cognitive processing is collaborative, not oppositional.[359]

While the cigarette labels should have been treated more deferentially, dangers do lurk in the compelled commercial speech area. Disputes about what is factual and objective communication can obscure the more important question of when mandated disclosures subvert listener interests. The listener interests that commercial speech law protects include interests in a public discourse free from undue state interference. When the state uses its regulatory powers over commercial speech to build an ideological platform, those listener interests are compromised. It is uncontroversial that the message "smoking kills," however delivered, is relevant to a consumer choice. The salience of many other messages (even if purely factual) will be subject to heated public debate. I argue that this distinction, far more than emotionality or normativity, has constitutional meaning.

Another danger in compelled commercial speech that the cigarette labels might pose—but that could not be seen for the focus on emotionality—is that the mandated disclosure is unduly burdensome for the speaker.[360] Listener interests and speaker burden, rather than arid classifications of speech, should be the focus of the constitutional analysis.

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357 *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762–65 (1976) (detailing various consumer interests in free flow of commercial information).

358 *See* Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 535 (6th Cir. 2012).

359 *See* Rosselli et al., *supra* note 305, at 184.

360 *See* Zauderer v. Office of Disciplinary Counsel, 417 U.S. 626, 651 (1985).