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# Visual Gut Punch:
Persuasion, Emotion, and the Constitutional Meaning of Graphic Disclosure

Ellen P. Goodman*

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INTRODUCTION

The free speech implications of graphic and emotionally disturbing cigarette labels\(^1\) have split two federal appeals 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, 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 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.\(^9\)

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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 Discount 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.”).
An emerging consensus among researchers is that nudges are most effective when information is conveyed simply and at the point of consumer decision-making. With this in mind, nations are implementing graphic front-of-pack nutritional labels and are considering graphic warnings on high-fat foods. The future of product disclosures will not only be graphic, but almost certainly digital as well, with information delivered opportunistically through mobile devices. The future of product disclosure litigation is equally clear: it will grow.

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 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. The other narrative is that the graphic labels convert government from objective informer to ideological persuader, shouting its warning in order to manipulate consumer decisions. Resorting to legal doctrine that is by turns insufficient or 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 co-exist on a continuum.

This article explores the informational interests at stake when the government tries both to inform and influence consumers, and how its use of emotional imagery affects the

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10 See, e.g., Omri Ben-Shahar & Carl E. Schneider, The Failure of Mandated Disclosure, 159 U. Pa. L. Rev. 647, 652, 743 (2011) (“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 Nick Triggle, Food Labelling: Consistent System ‘to Start Next Year,’ BBC NEWS, Oct. 24, 2012, available at 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). See also Hawley, et al., infra note X.
13 See, e.g., 40 C.F.R. § 600.302–12 (2011) (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 http://consumerist.com/2013/07/10/big-meat-sues-usda-over-country-of-origin-labeling-requirement/.
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.

PART 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 restriction.\(^{15}\) That is, the government can no more easily compel a citizen to speak than it can muzzle her. It’s 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.\(^{16}\) 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 that the law seeks to protect in commercial speech cases: the informational interests of listeners rather than the liberty interests of speakers.\(^{17}\) To the extent that listeners benefit from having more information, compelled commercial speech may cut in favor of First Amendment interests, rather than against.

This section sets out the background of commercial speech law, then reviews the confused law on compelled commercial speech, concluding with an analysis of the constitutional values implicated in this corner of First Amendment law

\(^{15}\) See infra notes xx and accompanying text.
\(^{16}\) See infra notes xx and accompanying text.
\(^{17}\) See infra notes xx and accompanying text.
A. Commercial Speech Background

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

Significantly, the challenge to the ban came not from the regulated speakers, but from the potential “listeners” or consumers. 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. 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 both ends of a communication, "to its source and to its recipients both.”

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

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19 A number of justices appear ready to jettison the commercial speech distinction altogether. See Thompson v. Western States Medical Center, 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”). C.f. Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2665 (2011) (six member majority comparing state law restricting pharmaceutical advertising to content-based restrictions on noncommercial speech that is economically motivated).
20 425 U.S. 748 (1976); see also DANIEL A. FARBER, THE FIRST AMENDMENT 151 (2d. ed. 2003) (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”).
21 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).
22 425 U.S. at 749, 756.
24 Central Hudson, 447 U.S. at 563. See also Edenfield v. Fane, 507 U.S. 761, 766, (1993) (“First Amendment coverage of commercial speech is designed to safeguard” society’s “interest[t] in broad access to complete and
B. Zauderer and Compelled Commercial Disclosures

This distinctive emphasis on listener interests is particularly evident in the treatment of compelled commercial speech.\(^{25}\) Where ordinary, noncommercial speech is concerned, a government requirement to speak poses the very same First Amendment problem as a requirement to refrain from speaking.\(^{26}\) In both cases, there is a threat to the liberty interests of the speaker – interests that are best framed as the “freedom of mind.”\(^{27}\) 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.\(^{28}\) 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.\(^{29}\) 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. 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.\(^{30}\) Thus was born the 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 Boston 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 *Virginia Bd. of Pharmacy*, 425 U.S. at 764).


\(^{27}\) *Wooley*, 430 U.S. at 714 (quoting *Barnette*, 319 U.S. at 637); *Riley*, 487 U.S. at 797 (“[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’”) (quoting *Wooley*).

\(^{28}\) *Abood* v. Detroit Bd. of Educ., 431 U.S. 209, 234-35 (1977) (“in a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State.”).

\(^{29}\) *Zauderer*, 471 U.S. at 652, n. 14 (“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”).

\(^{30}\) 471 U.S. 626 (1985). *Zauderer* has been applied in Spirit Airlines, Inc. v. Dep’t of Transp., 687 F.3d 403 (D.C.Cir. 2012) (upholding requirement that airline advertisements list most prominently the final price, including taxes); New York State Rest. Ass’n v. New York City Bd. of Health, 556 F.3d 114, 131–134 (2d Cir. 2009) (applying *Zauderer* analysis to a regulation requiring posting of calorie counts in restaurants); Milavetz, Gallop & Milavetz, P.A. v. U.S., 559 U.S. 229 (2010) (law firm required to identify itself as a “debt relief agency” under *Zauderer*).
disparate treatment of commercial speech *restrictions* – usually in the form of advertising limits – and commercial speech *mandates* – usually in the form 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. The Court described the disclosure requirement as “purely factual and uncontroversial.” 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. Rather, it held that disclosure requirements which 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.”

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. 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.” By contrast, Ohio’s commercial speech mandate did not assault the regulated attorney’s conscience and trenched very little on his First Amendment interests. Indeed, the attorney’s interest “in not providing any particular factual information in his advertising [was] minimal.”

*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. Some have held that it applies only when the government is attempting to prevent consumer deception. Others have held that it may apply also when the government has broader informational goals. Courts have split on what kind of consumer deception counts, and whether the term should have its narrow technical

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31 *Zauderer*, 471 U.S. at 651.
32 *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 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. 447 U.S. at 566.
33 *Zauderer*, 471 U.S. at 651.
34 *Id.* (quoting *Barnette*, 319 U.S. at 642).
35 *Id.* at 651.
37 *Int’l Dairy*, 92 F.3d 67 (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).
38 See, e.g., *Sorrell*, 272 F.3d 104 , cert. denied, 536 U.S. 905 (2002) (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 (J. Leval dissenting) (disclosure of “information consumers reasonably desire” even if not necessary to dispel deception constitutional under *Zauderer*).
They also disagree on what the alternative to Zauderer review is: intermediate or strict scrutiny. Commentary on the use of Zauderer in the cigarette labeling cases has been similarly torn.

One of the problems is that Zauderer 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. But the law did not then, and does not today, 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. Central Hudson went on to say that commercial speech must at least “not be misleading” to qualify for constitutional protection. Ordinarily, corrective advertising or affirmative disclosures that prevent or correct deception simply do not raise First Amendment concerns.

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. More recent Supreme Court precedent has seemed to support this view, without squarely endorsing it.

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39 Compare Discount Tobacco, 674 F.3d at 562 (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, 696 F.3d at 1215-1216 (absence of any specifically misleading statements or omissions on cigarette labels and advertising means that Zauderer review is inappropriate).

40 Compare R.J. Reynolds, 845 F. Supp. 2d at 272 (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).

41 Compare Recent Case, D.C. Circuit Holds That FDA Rule Mandating Graphic Warning Images on Cigarette Packaging and Advertisements Violates First Amendment, 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.”) with Hardesty, supra note xx (arguing for strict scrutiny review outside the context of deceptive commercial speech).

42 Virginia State Bd. or Pharmacy, 425 U.S. at 771-772.

43 Central Hudson, 447 U.S. at 566; see also, e.g., In re R.M.J., 455 U.S. 191, 200 (1982) (“False, deceptive or misleading advertising remains subject to restraint.”). See also Zauderer, 471 U.S. at 638 (“[t]he Federal Government is free to prevent the dissemination of commercial speech that is false, deceptive, or misleading.”)


45 See R.J. Reynolds, 696 F.3d at 1213–17; Glickman, 521 U.S. at 490–91 (Souter, J. dissenting).

46 Compare Milavetz at 1340 (applying Zauderer to uphold federal disclosure requirements for law firm advertisements that are “inherently misleading”) with Ibanez v. Florida Dept. of Bus. And Prof. Reg., Bd. of Accountancy, 512 U.S. 136 (1994) (declining to apply Zauderer to state regulation of attorney advertising that was not misleading). See also Glickman at 491(Souter, J. dissenting) (“Zauderer carries no authority for a mandate unrelated to the interest in avoiding misleading or incomplete commercial messages.”).
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. 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. The exercise of individual autonomy is indeed one of the very objects of the First Amendment. In commercial speech law, the most important component of listener autonomy is the right to receive information, potently cast as a right against paternalistic state restrictions on speech.

Paternalism is an especially dirty word in First Amendment jurisprudence. 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. As Justice 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

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48 See e.g., Police Dep’t 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) (“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 Redish, Free Speech, supra note xx; THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970).
49 Paul Horwitz, The First Amendment’s Epistemological Problem, 87 WASH. L. REV. 445, 451 (2012) (describing an anti-paternalist 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 xx, at 579 (tracing the anti-paternalism impulse through Supreme Court free speech cases); David A. Strauss, Persuasion, Autonomy, and Freedom of Expression, 91 COLUM. L. REV. 334 (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 (1988) (contending that the commercial speech cases do not reflect anti-paternalism because the restrictions at issue seek the good of the collective, not the individual).
their own good.” Notably, the anti-paternalism 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. It can ban products or limit their distribution or tax them to inutility. But it must tread very lightly on controlling information that is circulated about them.

It was anti-paternalism that animated *Virginia Pharmacy* – the font of commercial speech protection and the first to foreground consumer autonomy. 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.” 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 “the 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.”

2. Interest in Truthful Information

If the furtherance of consumer autonomy justifies commercial speech protection, the same goal describes 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, and the government is free to regulate such communication to ensure “that the stream of commercial information flows cleanly as well as freely.”

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51 *Liquormart*, 517 U.S. at 503.
52 One explanation for the more stringent anti-paternalism 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, 601-602 (1996).
54 425 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 decisionmaking is evident in many commercial speech regulation cases. See e.g., Linmark Assoc., 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).
56 425 U.S. at 771.
57 Id. at 772.
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 taxonomy of the concept, has described as “descriptive autonomy.”\(^58\) Lies undermine autonomy and self-realization. To desist from lying is a “perfect duty” in Kant’s ethics, never to be overridden.\(^59\) 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.\(^60\) Given the effect of lies, the government enhances consumer autonomy by penalizing (commercial) deception.\(^61\)

The second autonomy-enhancing limit on commercial speech protection emerged in post-\textit{Virginia Pharmacy} cases. The Court endorsed government strategies to put more information into the marketplace, often as an alternative to paternalistic speech restrictions.\(^62\) In \textit{Central Hudson}, the Court struck down a state regulation banning promotional advertising by an electric utility in order (paternalistically) to reduce consumer energy demands.\(^63\) The state’s suppression of information impermissibly intruded on listener autonomy. However, the Court noted that it would have been permissible for the state to require “that the advertisements include information about the relative efficiency and expense of the offered service.”\(^64\) The government’s ability to inject itself into the information market is not limited to the state’s own advertising campaigns. It can also mandate that private parties provide information for the same purpose. Even Justice Stevens – one of the earliest and most stalwart exponents of the anti-paternalism principle in commercial speech cases – conceded in his concurrence in \textit{Rubin v. Coors}

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\item[58] Richard H. Fallon, Jr., \textit{Two Senses of Autonomy}, 46 STAN. L. REV. 875, 878 (1994) (descriptive autonomy refers to the actual condition of persons ... [It] is an ideal that can be promoted or protected, sometimes through paternalistic legislation.\text{"}. I am simplifying Fallon’s taxonomy, which actually breaks descriptive autonomy (and its obverse – ascriptive or formal autonomy) into positive and negative libertarian varieties.
\item[61] 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.”); \textit{Virginia State Bd. of Pharmacy}, 425 U.S. at 772 n.24 (“Since advertising is the \textit{sine qua non} of commercial profits, there is little likelihood of its being chilled by proper regulation and for[e]gone entirely.”). For criticism, see Martin H. Redish, \textit{The Value of Free Speech}, 130 U. PA. L. REV. 591, 633 (1982).
\item[62] See, \textit{e.g.}, \textit{Linmark Associates} (suggesting that the town could engage in its own counter-advertising campaign, including posting lawn signs to combat white flight), Bates, 433 U.S. 350 (government education of consumers about attorney advertising alternative to advertising restrictions); Peel v. Attorney Registration and Disciplinary Comm’n of Ill., 496 U.S. 91, 109 (1980) (attorney disclosure mandates alternative to advertising restrictions); Meese v. Keen, 481 U.S. 465 (1987) (required “propaganda” disclosures permissible and autonomy-enhancing).
\item[63] \textit{Central Hudson}, 447 U.S. 557.
\item[64] \textit{Id.}, at 571-72.
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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.* 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.” In fact, exploiting the power of anti-paternalism, 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. To the Court, the injunction was like a state statute that prohibited advertising on the assumption that citizens benefitted from “‘being kept in ignorance.”

The perspective on autonomy reflected in *Va. 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. 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” or “new paternalism” is built on this distinction. They start with the idea that consumer choice is necessarily structured by someone and there is no purely neutral choice architecture. When choice is structured well, it enhances both liberty and

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65 *Rubin,* 514 U.S. at 498 (Stevens, J., concurring in judgment) (striking down prohibition on bear label display of alcohol content).
67 Id., at 473-4.
68 Id. at 481 (quoting *Virginia Pharmacy,* 425 U.S. 748, 769-70 (1976).
69 *See* Gerald Dworkin, *Paternalism,* in *Morality and the Law* 107, 108 (R. 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. *See Carpenter,* supra note 23, at 615-16.
71 *Sunstein and Thaler,* *Libertarian Paternalism,* supra note 52, at 1182 ("there 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.").
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 anti-paternalism. The strongest anti-paternalist approach to commercial information would be to keep the government out of information markets entirely. This is what Richard Fallon calls an “ascriptive” or formal approach to autonomy. He distinguishes this from a “descriptive autonomy” approach which considers individuals as more or less autonomous depending on what information and choices they have. According to a libertarian version of formal autonomy theory, the law should treat individuals as rational decision-makers, fully capable of choosing what is best for them based on the information that free markets provide.

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. 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. These laws imagine an individual who is...

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72 Id., at 1163 (“we emphasize the possibility that in 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 1167 (“programs should be designed using a type of welfare analysis, one in which a serious attempt is made to measure the costs and benefits of outcomes … Second, some 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.”).

73 See, e.g., Redish, Tobacco Advertising, supra note 55, at 589 (“Any time government seeks to control the content of private communication, free speech concerns are implicated.”).

74 Richard H. Fallon Jr., Two Senses of Autonomy, 46 STAN. L. REV. 875, 878 (1994) (“ascriptive 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.

75 Id. (“descriptive autonomy refers to the actual condition of persons … [and] is an ideal that can be promoted or protected, sometimes through paternalistic legislation”).

76 Embedded in the anti-paternalistic response to interventions in commercial speech markets is a conception of the market supply of information as neutral. Justice 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. Liquormart, 517 U.S. at 518 (Thomas, J., concurring in part and concurring in judgment).


78 Stacey L. Dogan and 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, 82 (2012) (“According to the search costs theory, conflicting uses of a...
supremely capable when presented with truthful information, but inept and vulnerable when presented with false or misleading information. Commercial speech doctrine too rejects this formal view of autonomy, which is one reason the doctrine is under pressure.79

There is a persistent tension between formal and descriptive views of autonomy that very much inflect consideration of mandatory labels, like the cigarette warnings. It is the inclination towards formal autonomy that explains the final listener interest discussed below, and the dominance of descriptive autonomy in the relevant jurisprudence that explains its lack of vindication.

3. Interest in Not Being Spoken To

In an informal survey of law students discomfited by graphic cigarette warning labels, the principal reason they give is that they don’t like what they experience as government haranguing. This revulsion against state preaching, though possibly widespread, finds little expression in First Amendment jurisprudence. Notwithstanding the aspirations of liberal theory for state neutrality,80 the state is relatively unconstrained in its ability to say what it wants to the public.81

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 don’t want to hear or see. The First Amendment does not allow the state (with very limited exceptions, mainly involving cases of the “captive audience”), to restrict the content of private speech in order to protect sensitive members of the public from exposure to intrusive or unwelcome messages. In most cases, and especially where visual communication is at issue, audience members are expected to avert their eyes.82 Restrictions have been upheld for the sake of listener interests only in very limited contexts, such as when radio broadcasts invade the home.83

Whether, and to what extent, the First Amendment bars the state, by means of mandatory disclosure requirements, from forcing private entities to deliver its messages is the unsettled question discussed in this article. Some scholars have advocated a First Amendment doctrine, rooted in listener autonomy interests, protecting individuals from 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.”).

79 [cite to Justice Thomas’ position – Milevitz; Sorrell]
82 Snyder v. Phelps, 562 U.S. [cite] (2011) (funeral picketers shielded from liability for intentional infliction of emotional distress and intrusion upon seclusion); 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); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (passersby can avert their eyes from nudity on drive-in theater screens).
83 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).
government-mandated speech. In large part, they focus on state requirements that women view fetal sonograms before terminating their pregnancies. 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 process.” Her argument is predicated on the captivity of the listener who has no ability to avoid the government’s message without forsaking a constitutionally protected right of access to abortion. These calls have perhaps been influenced as much by the other constitutional interests of women seeing abortions as by listener autonomy interests. These listeners have 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 captivity.

There is a point at which state-mandated truthful and non-misleading commercial speech could impair listener interests. Part III locates this point on a spectrum of “controversialness” of the disclosure, which also distinguishes many product disclosures from an abortion-related disclosure. The next Part II introduces these issues through the graphic cigarette labels.

**PART II: NEW GRAPHIC CIGARETTE LABELS**

Cigarette labeling is both old-hat and innovative, and has raised in a pointed way the conflicting values that surround mandatory product disclosures. The federal government has required warning labels on cigarette since 1965, without challenge. Congress mandated new labels in 2009—a mandate that one appeals court upheld against a constitutional challenge and another struck down 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. This section will lay out the genesis of graphic cigarette labels and their tangle.

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85 See infra note xx.
86 Corbin, *supra* note xx at 980. See also id. at 898-990 distinguishing violations of the right against compelled listening with mandatory cigarette labels and even more extreme forms of mandatory “listening” for smokers.
87 See also Jacobs, *supra* note xx. Another important distinction is that the fetal sonogram mandates burden physicians, who are not commercial speakers.
88 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 “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.
89 Federal Cigarette Labeling and Advertising Act, 15 U.S.C.A. § 1331 et seq. (1965). 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. [cite to labeling history]
91 *Discount Tobacco*, 674 F.3d 509 (2012).
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 may have been wrong because smokers don’t need more information and will not be influenced by it. Congress' epistemic assumption was that consumers (especially children) do not “know” the risks of smoking.\(^{93}\) 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.”\(^{94}\) Congress responded by replacing the old labels with the four new ones still found on U.S. cigarette packages today.\(^{95}\) Twenty-five years later, Congress mandated new graphic labels for the same reason: the old labels were stale and uninformative. My goal is not to prove that consumers need additional information or that labels – whatever their form – can provide it effectively. I’m not recommending information policy, but examining the free speech implications of a policy choice.

\(^{93}\) See Final Rule, 76 F.R. at 36632 (finding that smokers grossly underestimate both the statistical risk and personal risk of smoking, and this is especially true among poorly educated and low income smokers) and 36633 (even when they are aware of risks, that knowledge may be too abstract to influence them at moment of purchase, especially for new smokers).

\(^{94}\) Federal Trade Commission, "Staff Report on the Cigarette Advertising Investigation," ch. 4 p.20, May 1981, available at [http://tobaccodocuments.org/ti/TIMN0036677](http://tobaccodocuments.org/ti/TIMN0036677). See also id. at pp 7-16 (finding that the old labels it found that the labels were “overexposed and worn out,” lacked novelty, were too abstract, and lacked personal relevance).

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.96 Warnings should be large and graphic, the Convention declared. They should occupy most of the cigarette package in order to impress especially upon potential smokers the health problems associated with smoking.97 The U.S. signed, but did not ratify the convention. To date, 176 countries have ratified or acceded to the Framework Convention98 and at least sixty have mandated graphic warnings on cigarette packages.99 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.100

B. Family Smoking Prevention and Tobacco Control Act

In 2009, Congress enacted the Family Smoking Prevention and Tobacco Control Act (the “Act”),101 the most significant overhaul of cigarette regulations since the federal government first started regulating cigarettes. The Act’s stated purpose was both to improve consumer information and to modify consumer behavior. 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.”102

97 Id. at 9–10.
100 These plain packaging requirements have kicked up litigation worldwide. Canada upheld its law against several claims, including a free speech claim. [cite]. Litigation in Australia and other jurisdictions has involved industry claims that the labeling requirements infringe their trademark rights to identify their products. See, e.g., JT Int’l SA v. Commonwealth, [2012] HCA 43, 2012 WL 4713976 (Australia’s High Court upholding its tobacco labeling law). Trademark-related actions have been lodged at the World Trade Organization, claiming that labeling laws (plain packaging in addition to graphic warning) constitute a trade barrier to tobacco products. [cite; Afilalo paper]. 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, available at http://www.guardian.co.uk/world/2013/may/28/ireland-plain-cigarette-packets.
102 Pub. L. No. 111-31, 123 Stat. 1776, 1782. 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.” Pub. L. No. 111-31, 123 Stat. at 1778.
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.\textsuperscript{103} 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 60 percent of the total warning area.\textsuperscript{104} 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.”\textsuperscript{105}

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.\textsuperscript{106} A sampling is below:

![Warning Images](image.png)

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.\textsuperscript{107} The measure of effectiveness was explicitly normative. The FDA focused on the “salience” of the warning in provoking cognitive and emotional response, and this was because research suggests that the more salient the communication, the more likely it is to promote behavior change.\textsuperscript{108} The agency concluded that the selected images proved most effective in “increas[ing] intentions to quit through evoked emotional response.”\textsuperscript{109} By “eliciting strong emotional and cognitive reactions,” the graphic warnings “enhance[d] recall and information processing, which helps to ensure that the warning is better processed, understood, and remembered.”\textsuperscript{110}

\textsuperscript{103} Pub. L. No. 111-31, §§ 201(a)(1), 204; Pub. L. No. 111-31, § 201(d), 123 Stat. at 1845 (requiring the FDA to visually “depict[] the negative health consequences of smoking”).
\textsuperscript{104} Pub. L. No. 111-31, § 201(a)(2). The graphic warnings were also required on printed advertisements.
\textsuperscript{105} Pub. L. No. 111-31, §§ 201(a)(1), 204.
\textsuperscript{106} Final Rule, 76 F.R. 36628.
\textsuperscript{107} Final Rule, 76 F.R. at 69534-37.
\textsuperscript{108} Final Rule, 76 F.R. at 36637-39.
\textsuperscript{109} Final Rule, 76 F.R. at 36639.
\textsuperscript{110} Final Rule, 76 F.R. at 36641.
C. Cigarette Label Litigation: 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” or “highly controversial” messages.\textsuperscript{111}

The first lawsuit was a Sixth Circuit facial challenge to the Act’s graphic warning requirement. In \textit{Discount Tobacco City & Lottery, Inc. v. U.S.},\textsuperscript{112} a split panel concluded that the requirement merited \textit{Zauderer}’s rational basis review because the textual warnings, whatever the accompanying images the FDA ultimately chose, were “factual and accurate.”\textsuperscript{113} Even if the graphics were emotionally provocative and included non-literal elements, their message was “purely factual and uncontroversial.”\textsuperscript{114}

In \textit{R.J. Reynolds Tobacco Co. v. FDA}, the D.C. Circuit faced an as-applied challenge to the adopted labels.\textsuperscript{115} In another split decision, the majority applied the \textit{Central Hudson} standard to strike down the labels.\textsuperscript{116} It ruled that \textit{Zauderer} did not apply because the labeling requirement advanced governmental interests other than preventing consumer deception.\textsuperscript{117} 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,”\textsuperscript{118} made them ineligible for deferential review.\textsuperscript{119} They could not be considered factual, objective, and noncontroversial because they “are primarily intended to evoke an emotional response, or, at most, shock the viewer into retaining the information in the text warning.”\textsuperscript{120} Although the court commented on a few of the contested images, it

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\item[111] \textit{Discount Tobacco}, 674 F.3d at 524–25.
\item[112] 674 F.3d 509 (2012).
\item[113] \textit{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).
\item[114] \textit{Id.} at 569 (6th Cir. 2012) (“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.”).
\item[115] 696 F.3d 1205 (D.C. Cir. 2012).
\item[116] In a dissent, Judge Rogers argued that the majority erred in failing to apply \textit{Zauderer}. She thought that “the government need show only that the targeted commercial speech presents the ‘possibility of deception’ or the ‘tendency to mislead.’” 696 F.3d at 1227 (Rogers, J., dissenting) (citing \textit{Milavetz}, 130 S. Ct. at 1340). 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. \textit{Id.} at 1230-31 (“[T]he emotive quality of the selected images does not necessarily undermine the warnings’ factual accuracy”) (footnotes omitted).
\item[117] 696 F.3d at 1213-4 (\textit{Zauderer} framework appropriate only if the government can show that, “absent a warning, there is a self-evident—or at least ‘potentially real’—danger than an advertisement will mislead consumers.”) (citations omitted).
\item[118] 696 F.3d at 1217.
\item[119] \textit{Id.}
\item[120] 696 F.3d at 1216.
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concluded with breathless generality that the “visual medium” is “inherently persuasive” and therefore “cannot be presumed neutral.”

Once the problem was framed as non-neutral speech, the government was handicapped by its public health agenda. *R.J. Reynolds* heavily cited FDA and Congressional statements that the goal of the warnings was to reduce tobacco use. 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. 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 had “not a shred of evidence” that the warnings would “directly cause[] a material decrease in smoking.” The Court vacated the FDA rule and remanded it back to the agency. The government did not appeal the adverse ruling, leaving the FDA to re-work its labels.

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 chance they will have of modifying smoker behavior and, therefore, the more likely they are to survive 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. We might think that, assuming no change in the product composition, the warning labels have reduced consumer autonomy by making them believe something that is not true. 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.

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121 674 F.3d at 526.
122 696 F.3d at 1209–11.
123 696 F.3d at 1219 (emphasis in original). It was the existence of the government’s interest in smoking cessation that disqualified the government for *Zauderer* review. It was the failure to sufficiently advance that interest, in part, that lost the case for the government 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 them with graphics.
126 Matt Siegel, “Labels Leave a Bad Taste,” *N.Y. TIMES*, B1 (July 11, 2013) (quoting health minister explaining “People being confronted with the ugly packaging made the psychological leap to disgusting taste.”)
127 I will argue that autonomy-reducing manipulation requires some intentionality so, unless the images were designed to inculcate this false belief, they would not actually be manipulative. See infra notes xx and accompanying text.
One might explain this odd result by pointing to the burden on the speaker: if labels justified in part by normative goals aren’t effective in changing behavior, then they burden the speaker for nothing. Although the regulated commercial entity has limited liberty interests, they are not zero. At some point, when the labels are large enough and the message disparaging enough, the burden on the speaker becomes “undue.” 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. 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. 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.

**PART III: PRODUCT DISCLOSURES AND CONSUMER AUTONOMY**

The cigarette labeling controversy surfaces fundamental questions about the communicative impact of mandatory product disclosure. First Amendment standard of review is the doctrinal expression of values that can be stated more generally. 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). In the absence of such information deficits, disclosure 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 Section and the next, I will use the cigarette labels to probe the distinct narratives about consumer autonomy and information deficits that the labels engender. This Section focuses on appropriate communications goals and the next on appropriate communications means.

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128 See Zauderer, 471 U.S. at 651 (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.”).

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

130 Commercial speech law, while not placing a heavy value on speaker liberty, places some value on it, so even autonomy-enhancing disclosures must not over-burden 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 will seem the burden on the speaker.
Objections to the labels begin with the claim that there is no meaningful information deficit either because there was no pre-existing deception and/or because people already know what the labels purport to say. The argument continues that whatever autonomy gains the labels might advance are undercut by the imposition of the government’s normative values about smoking. 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 or consumption. I also argue that the existence of explicitly normative goals, so long as they are uncontroversial and do not distort communications, are 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. Lower courts have sparred over whether deception-correction is the only context in which commercial disclosure mandates should be subject to lenient review. The R.J. Reynolds court held that it was. Discount Tobacco disagreed, but went on in any case to find that a history of tobacco industry deception qualified even in the absence of deception on cigarette packages.

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. 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.

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131 Compare Sorrell, 272 F.3d at 115 (“[T]he compelled disclosure at issue here was 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”) with Central Illinois, 827 F.2d at 1173 (“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 ideological [sic] opponents.”).

132 696 F.3d at 1214 (“Zauderer, Ibanez, and Milavetz thus establish that a disclosure requirement is only appropriate if the government shows that, absent a warning, there is a self-evident—or at least potentially real—danger that an advertisement will mislead consumers.”) (internal quotation marks omitted).


134 See supra notes xx and accompanying text.

135 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
Moreover, if lenient review were reserved for deception-correction, then many noncontroversial and longstanding disclosure mandates would come in for heightened First Amendment review. These include requirements that manufacturers disclose product origin, gas mileage, light bulb lumens and energy cost, textile content, and hazardous material. None of these was enacted to combat deception, but rather to supply consumers with information that various constituencies wanted them to have and/or to move consumption choices in a particular direction. 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 no deceptive ones. It would not apply, for example, even if a constitutional challenge had been (or were now belatedly to be) brought against the Surgeon General’s original cigarette labels, let alone the beefed up, and so far 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.

There is another view that Zauderer has substantially broader scope, and that deception-correction is not the exclusive consumer protection interest qualifying for rational basis review. 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.” Improving market efficiency could be subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely.” In re R.M.J., 455 U.S. at 203.

is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely.” In re R.M.J., 455 U.S. at 203.

136 Sorrell, 272 F.3d at 116.

142 See Post, supra note 51, at 560, 562 (citing SEC disclosure rules and credit disclosure rules). See id. at 584 (“commercial speech is routinely and pervasively compelled for reasons that have little to do with the prevention
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 position in upholding product disclosures that inform consumers who were not in danger of being deceived.144

A trio of Second Circuit cases show the pitfalls of this generous definition of information deficits. In Nat’l Elec. Mfrs. 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.”145 Another Second Circuit panel that included now Justice-Sotomayor affirmed a decision upholding a calorie disclosure mandate under rational basis review because it supplies “beneficial consumer information” and supplements “incomplete commercial messages.”146 In a third Second Circuit case, Judge Pierre Leval defined this generous approach to information deficits even more broadly. Dissenting from a decision that invalidated a state mandate to disclose the use of bovine growth hormones in dairy products, he argued that Zauderer extended to information that “interests consumers.”147

This expansive view of information deficits is especially appealing for advocates of ethical consumption. Douglas Kysar, in his original scholarship on the exercise of consumer “preferences for process,” argues that the law is insufficiently supportive of consumers who want to exercise preferences for ethically produced products.148 Consumers desiring

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144 See, e.g., Discount Tobacco, 674 F.3d at 556-57 (disclosures do not have to directly, significantly, or exclusively prevent consumer deception); Sorrell, 272 F.3d at 115 (2d Cir. 2001) (applying Zauderer where interest was “protecting human health and the environment from mercury poisoning”); Pharm. Care Mgmt. Ass’n v. Rowe, 429 F.3d 294, 310 & n.8 (1st Cir. 2005) (applying Zauderer where interest was “ensuring that [state’s] citizens receive the best and most cost-effective health care possible,” id. at 310, and noting “we have found no cases limiting Zauderer” to potentially deceptive advertising, id. at 310 n.8).

145 272 F.3d at 115 (2d Cir. 2001) (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.”). 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.”).


147 International Dairy Foods Ass’n v. Amestoy, 92 F.3d 67, 80–81 (2d Cir. 1996) (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).

148 Douglas A. Kysar, Preferences for Processes: the Process/Product Distinction and the Regulation of Consumer Choice, 118 Harv. L. Rev. 525, 623 (2004) (“Therefore, particularly 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
environmentally sustainable products, for example, might value knowing about product lifecycle environmental impact. Voluntary certification regimes in fair trade coffee and sustainably harvested wood reflect a growing market for ethical manufacturing processes, signified on the product label.

The problem is that the use of mandatory labels to support consumer preferences is not cost-free. They are expensive for manufacturers, they risk crowding out other messages on scarce labeling real estate, and they may be confusing for consumers. Once we have ventured beyond deceptive or misleading speech, there is no natural limit to what Justice Stevens called “beneficial consumer information.” 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.” That court did not limit disclosure mandates to deception-correction. 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.”

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

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150 [cite Maggie Chon; Fair Trade book]


152 Jon D. Hanson and 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 products.”); Omri Ben-Shahar & Carl E. Schneider, The Failure of Mandated Disclosure, 159 U. PA. L. REV. 647, 697-690 (2011) (describing reasons why mandatory disclosures fail to achieve their ends).

153 Liquormart, 517 U.S. at 501.

154 Amestoy, 92 F.3d at 74.

155 Id.
governmental concern,” which could relate to health and safety or to ethical considerations such as whether food contains genetically modified organisms.\textsuperscript{156}

We are left with the a continuum of information deficits, ranging from technical deception, moving through gaps in health and safety information, all the way to any information that interests consumers. It is not clear that the consumer autonomy interest is strongest at the deception-end of the spectrum. 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 interests 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 anti-deception/all other information deficits, unsatisfying.

\textbf{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 value, rather than fill a “purely factual” information deficit. This section 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 \textit{R.J. Reynolds} court subscribed to the narrow, deception-limited reading of information deficits. But even had the court accepted the broader definition, it would have found the cigarette labels problematic and required heightened scrutiny because the labels “browbeat consumers into quitting” smoking.\textsuperscript{157} The government made no secret that it was interested as much in changing consumer behavior as in informing consumers of risk.\textsuperscript{158} This normative goal, particularly given the emotional impact of the message, made every cigarette pack a “‘mini billboard’” for the government’s opinion.\textsuperscript{159} The labels “compel a product’s manufacturer to convey the state’s subjective – and perhaps even ideological – view” that consumers should not smoke.\textsuperscript{160} In this way, the court

\textsuperscript{156} Amy Harmon & Andrew Pollack, \textit{Dispute Over Labeling of Genetically Modified Food}, N.Y. TIMES, May 24, 2012, \url{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, \textit{Let’s Label ‘Em}, N.Y. TIMES, Sept. 15, 2012, \url{http://opinionator.blogs.nytimes.com/2012/09/15/g-m-o-s-labels-label-em/} (characterizing such proposals as “right-to-know law[s]”).

\textsuperscript{157} \textit{R.J. Reynolds}, 696 F.3d at 1217.

\textsuperscript{158} Final Rule, 76 F.R. at 36,633.

\textsuperscript{159} \textit{R.J. Reynolds}, 696 F.3d at 1212 (quoting government documents).

\textsuperscript{160} \textit{id.} at 1212; see also \textit{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.”).
suggested that the government’s public health agenda overshadowed and undermined its autonomy-maximizing informational agenda.

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. It is an ideal as to which the philosophical literature on the fact-value distinction counsels skepticism. Pragmatist critics, most notably Hilary Putnam, teach that belief frequently infuses both the composition and selection of facts. With respect to the composition of facts, there are “natural” facts that exist with little to no judgment involved. 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.” 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. 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 and/or 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 works 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. This evaluative fact is then embedded in a normative system that uses labels to promote the market for organic goods. Similarly, the decision to require

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161 See, e.g., Hilary Putnam, The Collapse of the Fact/Value Dichotomy and Other Essays (2002). See also, Richard Rorty, Philosophy and the Mirror of Nature 364 (1979) (questioning the fact/value distinction); R.W. Sleeper, The Necessity of Pragmatism 141 (1986) (same). In other contexts, this insight has been used to debunk the notion that there is such a thing as a neutral algorithm or unprocessed data. See Lisa Gittleman, ed., Raw Data Is an Oxymoron (2013).

162 Scholars use the term in different ways. Compare, e.g., William D. Araiza, Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation, 88 N.Y.U. L. Rev. 878, 896 (2013) (distinguishing “evaluative facts, which include an element of ideological precommitment” from “empirical facts” that 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, 88 (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 also Ronald Dworkin, Objectivity and Truth: You’d Better Believe It, 25 Phil. & Pub. Aff. 87, 127-28 (1996) (discussing “normative facts.”)

163 See Food, Agriculture, Conservation, and Trade Act of 1990, S. Rep. No. 101-357, at 2 (1990), 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.”).

gas mileage performance disclosures on cars was driven by a conservation agenda.\textsuperscript{165} Car stickers have recently been updated to include many other facts as the result of a law aimed at energy independence.\textsuperscript{166}

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. In his language classification system, the warning is directive. 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 effecting a change in behavior.\textsuperscript{167} 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. The tobacco industry has been at the leading edge of innovative marketing strategies.\textsuperscript{168} In some cases, the advertising was deceptive, but in the main, it was just seductive.

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.\textsuperscript{169} 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”\textsuperscript{170} – advocating a change in behavior through warning of risk. The normative strain in the warning strategy became more prominent in 2006 with policy goals.”).\textsuperscript{165} \textit{But c.f.} Secretary of Agriculture Dan Glickman, Press Release, U.S. Dep't of Agric., Release of Final National Organic Standards (Dec. 20, 2000), http://www.usda.gov/news/releases/2000/12/0426.htm (claiming that the organic designation was “a marketing tool” rather than “a value judgment about nutrition or quality.”).

\textsuperscript{166} See, e.g., 76 F.R. 39,478, 39,481 (July 6, 2011).


\textsuperscript{168} See, e.g., Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8341-8348 (1964) (early FTC report discussing the value of disclosing health hazards of smoking especially for children and youth).

\textsuperscript{169} See also Allan M. Brandt, \textit{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”); 29 Fed. Reg. 8324, 8357-58 (July 2, 1964) (detailing cigarette advertising campaigns “describing the satisfactions to be derived from smoking and ... associating smoking with individuals, groups, or ideas worth of emulation or likely to be emulated.”).

\textsuperscript{170} Peter M. Sandman, \textit{Precaution Advocacy}, PETER M. SANDMAN RISK COMMUNICATION WEBSITE (last updated May 16, 2013).
the shift in responsibility for administering the warnings from the Federal Trade Commission, and its focus on false advertising, to the Federal Drug Administration, and its focus on health.\footnote{171}

It is hard to see how communicating with value, without more, 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.\footnote{172} False advertising law similarly trusts consumers to withstand persuasion, and exercise choice in the swirl of tendentious speech.\footnote{173} 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.\footnote{174} The communicative content is independent of the designation of fact or value.\footnote{175}

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.\footnote{176} What is important is both the nature of the value and the balance of contestable value to uncontestable fact. To see this, recall Zauderer, which involved an attorney’s offer to represent women injured by a faulty medical device. In the actual case, the attorney was disciplined for violating the Ohio Code


\footnote{172 See Shalala, 164 F.3d at 655.

\footnote{173 15 U.S.C. § 45(n) (2006) (The FTC may only take action against activity that “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 3 (1983), appended to Cliffdale Assoc’s, Inc., 103 F.T.C. 110, 175 (1984); see also Novartis Corp. v. FTC, 223 F.3d 783, 786 (D.C. Cir. 2000) (citation omitted). See also id. at 181 (defining puffery as a form of opinion, not fact, that is not deceptive as a matter of law). See generally David A. Hoffman, The Best Puffery Article Ever, 91 IOWA L. REV. 1395, 1396 (2006).


\footnote{175 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. Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) (rejecting categorical distinction between opinions and facts in defamation claims). See also Gardner v. Martino, 563 F.3d 981, 987 (9th Cir. 2009) (the “threshold question” in a defamation claim is “whether a reasonable factfinder could conclude that the contested statement implies an assertion of objective fact.”); Obsidian Fin. Grp. LLC v. Cox, No. CV-11-57-HZ, 2011 WL 5999034 (D. Or. Nov. 30, 2011) (finding some statements of blogger actionable defamation even though they were hyperbolic, while other more factual statements were not because of context).

\footnote{176 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, 445–46 (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”).}
of Professional Practice because his advertised fee structure was deceptive.\textsuperscript{177} 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 to the same extent. Does the state’s motive matter? I argue that it does in the next section.

\textbf{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 \textit{Zauderer} progeny’s struggle to distinguish among consumer informational interests. The answer turns on the last of \textit{Zauderer}’s triad of adjectives, “noncontroversial,” which the case uses as a synonym for “purely factual” and “objective.”\textsuperscript{178} “Noncontroversial” 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.\textsuperscript{179} 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.

The compelled noncommercial speech cases clearly prohibit government from requiring communications in the noncommercial context.\textsuperscript{180} 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.”\textsuperscript{181} Many scholars have noted the problems raised by “mixed” speech aimed at public controversies while at the same time selling products.\textsuperscript{182} The mixed speech problem usually arises when government restricts the speech of commercial entities engaging in a matter of controversy – the regulated entity

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\item \textsuperscript{177} 471 U.S. 626, 634-35 (1985).
\item \textsuperscript{178} See also Milavetz, Gallop & Milavetz, P.A. v. U.S., 559 U.S. 229 (2010) [pincite].
\item \textsuperscript{179} Many mandated disclosures will require the commercial speaker to say something contrary to his interests and even, as in the case of the tobacco industry, to disparage his own product. This isn’t the kind of controversy that makes a disclosure ideological. Rather, it’s a controversy concerning the truth and relevance of the disclosure itself. \textit{See, e.g.}, Central Illinois Light Co. v. Citizen Utility 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 \textit{Zauderer} “does not suggest that companies can be made into involuntary solicitors for their ideological opponents.”).
\item \textsuperscript{180} See supra notes xx.
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has created mixed speech by engaging in public discourse.\textsuperscript{183} 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. The government then uses its power over commercial speech to inject its own perspective into discursive public controversies.\textsuperscript{184}

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 “18” on any game statutorily deemed “sexually explicit.”\textsuperscript{185} 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.”\textsuperscript{186} 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.

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 CTIA-Wireless Ass’n v. 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.\textsuperscript{187} The decision, upheld by the Ninth Circuit, found that the government was motivated by the controversial belief that cell phone radiation was dangerous. The controversy over the relevance of radiation to consumer purchases meant that the disclosure could not be “factual and uncontroversial.”\textsuperscript{188} This kind of intrusion into a public controversy, through the use of mandatory disclosures, is not just normative, but ideological.\textsuperscript{189} Where the government

\textsuperscript{183} See Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983) (“The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech.”).\textsuperscript{184} Whatever the state might say controversial issues on its own dime, it can say considerably more if it is able to use private resources, freed from the financial constraint of paying its own way.\textsuperscript{185} 469 F.3d 641, 651 (7th Cir. 2006).\textsuperscript{186} Id. at 652.\textsuperscript{187} CTIA--The Wireless Ass’n v. City & Cty. of San Francisco, 827 F. Supp. 2d 1054 (N.D. Cal. 2011), aff’d in part, vacated in part, and remanded, Nos. 11-17707, 11-17773, 2012 WL 3900689 (9th Cir. Sept. 10, 2012).\textsuperscript{188} 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.”).\textsuperscript{189} 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. John A. Robertson, Abortion and Technology: Sonograms, Fetal Pain, Viability, and Early Prenatal Diagnosis, 14 U. PA. J. CONST. L. 327, 347 (2011) (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
orders disclosures as a way to advance its side in a controversial matter, the disclosure mandate bears greater constitutional scrutiny.\(^{190}\)

A different view of the term “controversial” is that it concerns only the existence of the facts disclosed, rather than their normative content or relevance. In other words, uncontroversial is synonymous with factual. Dana Royal writes that a fact is uncontroverted if there is consensus evidence to support the existence of the fact.\(^{191}\) 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.”\(^ {192}\)

This equation of “uncontroverted” and factual is problematic from the consumer autonomy standpoint.\(^{193}\) 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 single most important health risk
3. Sugar content, with country of origin, so consumers can make informed choices, and hopefully get manufacturers to rely more heavily on domestic sugar.\(^ {194}\)

In Case 1, there is a norm at play, but the disclosure is uncontroversial because the norm is uncontested (good to reduce sugar). The government’s norms grow progressively more contested through Cases 2 and 3, and its insistence on disclosure 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 just ‘potential life,’ ... but ‘actual life’ with all the ideological and emotional force that word now comprises and exerts.”\(^ {190}\)

\(^{190}\) [using “ideology” differently than its use in the subsidized commercial speech cases, but similarly to USAID 2013 case]


\(^{192}\) Id. at 235, 236-237.

\(^{193}\) see supra. note x and accompanying text.

\(^{194}\) 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. § 70, et seq., and the Wool Products Labeling Act of 1939, 15 U.S.C. § 68, et seq. 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, was a selection of facts at a more general level.
to impose a germaneness requirement on the state.\textsuperscript{195} 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. In the subsidized speech area, courts have used germaneness as a limit on the state’s influence over private communications.\textsuperscript{196} Limiting \textit{Zauderer} review to instances 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. It is also uncontested that smoking is unhealthy and best avoided.\textsuperscript{197} Moreover, smokers themselves in large numbers wish that they could quit.\textsuperscript{198} 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. 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.\textsuperscript{199} 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 \textit{R.J. Reynolds} majority found that the disclosures were untrue.\textsuperscript{200} The reason was, in large part, because of the special indeterminacy of

\textsuperscript{195} 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) (2009).

\textsuperscript{196} \textit{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); \textit{Keller}, 496 U.S. at 16 (impermissible subsidized speech would entail funding “those activities having political or ideological coloration which are not reasonably related to the advancement of such goals.”); \textit{United Foods}, 533 U.S. at [pincite] (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.”).


\textsuperscript{198} 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., \textit{Quitting Smoking Among Adults—United States, 2001–2010}, 60 MORTALITY AND MORBIDITY WEEKLY REPORTS 44, 1513–1519 (Nov. 11, 2011).

\textsuperscript{199} [cite to cruel and unusual punishment and obscenity]

\textsuperscript{200} \textit{id.} at 1216–17 (“[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.”).
pictures and the power of emotions. The charge of controversy, then, was bound up with a view of the truthfulness of emotion and image. I examine this understanding below.

**PART 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 even if it has a normative goal for behavioral change. Now we turn to the question of means, and whether the form of the disclosure -- graphic and emotional -- makes a constitutional difference. According to one narrative, the answer is decidedly yes. This is because of what the *Discount Tobacco* dissent called the “inherently persuasive” character of the “visual medium”\(^{201}\) and/or because these particular images amounted to what *R.J. Reynolds* called “unabashed attempts to evoke emotion... and browbeat consumers into quitting.”\(^ {202}\) 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.\(^ {203}\)

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 that the reflexive equations of emotional and manipulative, graphic and non-factual are incorrect. 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 research, I will put to one side the points that consumers in all cases have bounded rationality,\(^ {204}\) particularly when they suffering from chemical addictions.\(^ {205}\) We can assume 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, best understood as communication without reason. Advertisers have long known that the most

\(^{201}\) *Discount Tobacco*, 674 F.3d at 528 (Clay, J. partially dissenting).

\(^{202}\) *R.J. Reynolds*, 696 F.3d. at 1217. See also \(^ {202}\) *Discount Tobacco*, 674 F.3d at 529 (Clay, J. partially dissenting)

\(^{203}\) (“it 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”).

\(^{204}\) *Discount Tobacco*, 674 F.3d at 569.


effective forms of communication activate emotions. Cigarette manufacturers in particular excel at making emotional connections between consumer and product. For just as long, advertisers have been accused of “manipulation.” There is widespread agreement that manipulation impairs autonomy. According to Joseph Raz’s influential work on autonomy, “to be author of one’s life, one’s choices must be free from coercion and manipulation by others.” If the state bypasses the consumer’s rational agency to advance the state’s own ends, this would be disrespecting autonomy and acting manipulatively.

But what exactly characterizes manipulation is surprisingly under-theorized. We can start from the influential view of Seana Shiffrin that a person is autonomous, and therefore not manipulated, when she reasons for herself. In the First Amendment context, David Strauss identified 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.” It follows from this that a disclosure requirement that tries to get a consumer to do something by depriving her of the ability to reason for herself would be autonomy-reducing. 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. The intentional inculcation of false beliefs shreds reason. When a speaker lies in order to get you to do something, he has

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208 See MICHAEL SCHUDSON, ADVERTISING: THE UNEASY PERSUASION. [other]


210 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.


212 Strauss, supra note xx 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.”).

213 Danny Scoccia, The Right to Autonomy and the Justification of Hard Paternalism in PATERNALISM THEORY AND PRACTICE 74, 77 (Christian Coons & Michael Weber, ed.) (2013) (“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.”)

214 At other points in his work, Strauss seems to embrace a broader definition of manipulation that is nearly indistinguishable from persuasion. Strauss 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.”)

215 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, “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.”).
Manipulated. On that, most everyone can agree. C. Edwin Baker, the towering First Amendment autonomy theorist, called “manipulative lies” an “attempt to undermine the integrity of the other person’s decision-making authority.” The operation of a lie—depriving the recipient of truthful information—moves the speech to the margins of what Jürgen Habermas called a “communicative act.” Drawing on the work 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.”

Manipulation akin to deception might also result from material omissions of relevant information or the source of information. Other examples would include subliminal messages designed to penetrate the mind without notice. 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. Suppose an employee breaks his leg (A) and then intentionally exploits his boss’ 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. He posits the ideal state of “feeling” as an appropriate emotional state.

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216 See, e.g., Fallon, supra note xx at 889 (manipulation is “a perversion of someone's thinking, deciding, or acting”); Raz, supra note xx at 377-78. (manipulation “perverts the way that person reaches decisions, forms preferences or adopts goals”); Claudia Mills, Politics and Manipulation, 21 SOC. THEORY & PRAC. 97, 97-112 (1995) (defining manipulation as using bad reasons to persuade).
218 1 J. HABERMAS, THE THEORY OF COMMUNICATIVE ACTION 85-95 (T. McCarthy trans. 1984) (distinguishing communicative action from forms of “strategic action” where the speech is designed to get someone to act, rather than merely to reach an understanding).
219 Id. See also THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1971)
220 See JOEL FEINBERG, HARM TO SELF12-16 (1986) (choices which come from ignorance are not fully autonomous choices).
222 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.”)
224 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.
reaction. A manipulator provokes an inappropriate emotional reaction by drawing the target away from “relevant information.”

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.

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Quarterly 155-164 (2003) (defining manipulation as “a kind of unfairness in setting up the terms of social exchange” involving especially a breach of trust).

225 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) (emotions grow out of individuals’ “perceptions of their circumstances-immediate, imagined, or remembered.”).

226 Id. at 52.
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."\(^{227}\) The textual warning labels had become "‘unnoticed and stale.’"\(^{228}\) By contrast, the graphic labels that had been adopted in Canada more than a decade before seemed to do a better job at delivering health information that would be absorbed by smokers and potential smokers.\(^{229}\) Whether or not the graphic warnings ultimately reduce smoking, they seem to increase awareness of its risks, especially among younger consumers\(^{230}\) and less literate consumers.\(^{231}\) Shock helps to overcome resistance and apathy.\(^{232}\)

For critics of the labels, the state bypassed the head by speaking to the heart and, by scaring, ceased to inform. Nat Stern argues that the images cannot be factual because of "the emotional appeal inherent" in the communication.\(^{233}\) 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.\(^{234}\) This concern is not borne out by the experimental literature, which shows that emotionally powerful warnings can simultaneously trigger fear and disgust while also working on a cognitive level.

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
In recent years, the topic has attracted fresh attention in other fields, including political science, law, and neuroscience. 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.”

On one theory, emotions spread without mediation, engage us immediately and holistically, often stimulating a visceral and unthinking response. An early model of visual and emotionally-laden 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). According to this affect-transfer model, the image transmits a value that is passively absorbed, without much interpretive activity by the viewer. As Rebecca

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237 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, Brian H. Bornstein & Amy Voss, Emotion and the Law: A Framework for Inquiry, 30(2) LAW & HUMAN BEHAVIOR 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).
238 Charles S. Carver, Negative Affects Deriving From the Behavioral Approach System, 4(1) EMOTION 3, 3 (2004) (describing the “increasing interest in theoretical links from neurobiological systems to motivation, emotion, personality, and psychopathology.”).
239 Blumenthal, supra note xx at n.4 (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)).
Tushnet has shown, judges frequently assume this model of communication in their discussion of visual images.243

Recent research in risk communication challenges this older model, demonstrating that emotional communication does not bypass the cognitive. Rather, the emotional provocation activates cognition – heart stimulating head – to more effectively communicate.244 A more complex model of emotional appeals is emerging whereby the provocation triggers both emotional and cognitive responses in an integrated fashion.245 For example, a communication may evoke a feeling of anxiety, which then prompts a quest for, and receptivity to, factual information.246 Contemporary theories of emotion, such as the hot cognition theory,247 affect-infusion model,248 and affect-as-information theory249 similarly suggest that emotional and intellectual processing are interlinked. So too, philosophical inquiries into the nature of emotions emphasize that they start with, and are directed by, cognition.250


245 Maria Miceli, Fiorella de Rosis & Isabella Poggica, Emotional and Non-emotional Persuasion, 20(10) APPLIED ART. INTELL. 849, 855-56 (2007) (arguing that emotional persuasion is not necessarily irrational persuasion); Leonie Huddy & Anna. H. Gunthorsdottir, The Persuasive Effects of Emotive Visual Imagery: Superficial Manipulation or the Product of Passionate Reason?, 21 POL. PSYCH. 745, 749 (2000), available at http://ms.cc.sunysb.edu/~lhuddy/HuddyGunth.pdf (“There is a 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”).

246 Huddy & Gunthorsdottir, supra note xx. See also Ted Brader, The Political Relevance of Emotions: “Reassessing” Revisited, 32(2) POL. PSYCH. 337, 339 (2011) (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).

247 In political psychology, the hot cognition theory posits that all sociopolitical concepts are affect-laden. See generally Milton Lodge & Charles S. Taber, The Automaticity of Affect for Political Leaders, Groups, and Issues: An Experimental Test of the Hot Cognition Hypothesis, 26(3) POL. PSYCH. 455, 456 (2005) (providing an overview of recent research in the hot cognition hypothesis).

248 Joseph P. Forgas, Mood and Judgment: The Affect Infusion Model (AIM), 117(1) PSYCH. BULLETIN 39, 39 (1995) (proposing an affect infusion model, whereby emotionally loaded information “exerts an influence on and is incorporated into the judgmental process, entering deliberations and eventually coloring the judgmental outcome”).

249 Gerald L. Clore & Maya Tamir, Affect as Embodied Information, 13(1) PSYCH. INQUIRY 37 (2007) (arguing that “when 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(3) J. PERS. & SOC. PSYCH. 513 (1983) (first introducing the affect-as-information theory suggesting that emotions provide information and affect how we process persuasive messages).

250 See, e.g., MARTHA C. NUSSBAUM, UPLIFTEALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS (2001), 4, 14 (emotions are built on “cognitive appraisal or evaluation”) (emphasis omitted)).
If emotional and the 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. 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.\textsuperscript{251} The emotional impact of the graphic cigarette warnings, rather than diluting or distorting health information, may deepen understanding of that information.\textsuperscript{252}

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 emotional/rational speech differences have failed, with courts granting both kinds of communication equal status.\textsuperscript{253} Martin Reddish has argued against differential treatment of emotional speech not only because of its equal status, but because the “emotional element” and “non-rational” forms of communication serve to develop the more rational forms.\textsuperscript{254} In other words, the emotions and the mind are co-dependent.

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 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. Answering the question requires content analysis that courts find difficult.\textsuperscript{255} Moreover, the inquiry is complicated by the dual meaning of the word “factual.” A fact is (1) a provable thing and (2) a true thing. If images are held to be factual only if they are provable, the indeterminacy of the visual image will undercut its facticity.

The \textit{R.J. Reynolds} court seems to have understood factual to mean provable, rather than true. The graphic labels could not be considered factual in large part because they were

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\bibitem{}\textsuperscript{252}Christine Jolls, \textit{Product Warnings, Debiasing, and Free Speech: The Case of Tobacco Regulation}, 169 J. OF INSTIT. & THEORET. ECON. 53, 58 (2013) (“there is sound empirical evidence ... that individuals’ risk perceptions attain greater factual accuracy with a text-image warning than with a text-only alternate.”).

\bibitem{}\textsuperscript{253}See, \textit{e.g.}, 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 the “emotive function” of speech “may often be the more important element of the overall message sought to be communicated.”); [Snyder v. Phelps]. \textit{See also}, Ellen P. Goodman, \textit{Peer Promotions and False Advertising Law} [cite] (showing that emotionally evocative “lifestyle” advertising is as protected as informational advertising). [cite Lowenstein].


\bibitem{}\textsuperscript{255}[cite to Tushnet; false advertising]
\end{thebibliography}
multivalent and did not stand for a single provable assertion. Different viewers are likely to read the images differently, finding meanings that diverge from the accompanying text. It is often the case that images communicate many meanings at once. As visual studies and psychology literatures have shown, image interpretation is variable and influenced by the viewer’s socioeconomic and cultural characteristics. 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.

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” with the text, “smoking can kill you.”

According to the R.J. Reynolds district court decision, this is not factual unless we think the government is claiming that smoking causes autopsies. 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’).” 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.

256 [cite]
258 See Jane McKenzie & Christine van Winkelen, Beyond Words: Visual Metaphors that can Demonstrate Comprehension of KM as a Paradoxical Activity System, 28 Systems Research & Behavioral Science 138, 141-42 (2010) (“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).
261 [FR at 3664]
262 R.J. Reynolds 245 F. Supp. 266, 273. See also R.J. Reynolds, 696 F.3d at 1217 (“While none of the images are patently false, they do not impart purely factual, accurate or uncontroversial information to consumers....”).
263 See Jolls, supra note x at 57.
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. In addition, this image was tested against other possible images paired with the same text.

The purpose was to study the effect of the graphic images on consumer attitudes, beliefs, perceptions, and intended behaviors. The study concluded that the chosen “man with chest staples” image scored highest among the alternatives, and against the control, on the combination of emotional, cognitive, and recall measures. The study did not ask respondents what message they took away from the graphics. 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. Whether they associated other meanings with the graphic is unknown.

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).” Others worried “that persons unfamiliar with an autopsy may not understand the image.” The FDA responded that, given the accompanying text, “viewers 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. In other words, the image was substantially true.

The meaning of factual as substantially true, rather than consisting of one provable thing, is the only meaning of factual that even textual warnings could satisfy. Consider the textual

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265 The model was built on the theory of salience that emotional and cognitive responses that make the message more salient will result in longer recall and ultimately 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.”).

266 FINAL RULE, 76 F.R. at 36655.

267 Id.

268 Id.

269 Accord, R.J. Reynolds at 1232 (Rodgers, 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.”).
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. Indeed, the tobacco industry claimed that the graphic images were untrue because they did not depict probabilities.\textsuperscript{270} A substantial truth standard forgives this elision, allowing for a (small) range of plural interpretations.\textsuperscript{271}

How courts consider the free speech consequences of graphic disclosures is important because graphic labels seem to communicate more effectively than textual ones. Research conducted on food labeling shows that graphics are more successful than text in conveying nutritional information especially to less educated populations.\textsuperscript{272} Color-coded “traffic light” systems that label food as red (”unhealthy”), green (”healthy”), or yellow (”so-so”) work than detailed text.\textsuperscript{273} 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.\textsuperscript{274} 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.

\textsuperscript{270} See \textit{Discount Tobacco}, 674 F.3d at 559-60 (discussing and rejecting industry arguments on probabilities). Because images are less susceptible to qualification, they more vulnerable to criticism that they have exaggerated risks. \textit{See, e.g.}, Cass R. Sunstein, \textit{Probability Neglect: Emotions, Worst Cases, and Law}, 112 Yale L.J. 61, 82 (2002) (“vivid 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.”).

\textsuperscript{271} See \textit{R.J. Reynolds} at 1231 (Rogers, J., dissenting) (the “relevant question [is] whether the images render the overall message conveyed by the warning labels nonfactual”) (emphasis in original).


\textsuperscript{273} Several recent studies have demonstrated informational effects of store food labeling system that uses color codes to communicate the relative healthiness of foods. \textit{See Hawley, supra} note 121 (reporting on study showing color codes easiest to understand); Anne M. Thorndike, et al., eds., \textit{A 2-Phase Labeling and Choice Architecture Intervention to Improve Healthy Food and Beverage Choices}, 102 American Journal of Public Health 527, 527–33 (2012) (reporting on study showing that color-coded food labels reduced unhealthy food sales and increased healthy food sales).

\textsuperscript{274} 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.
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 disclosures that have been in place for fifty years. 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. 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.

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. 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. Under that interpretation of the law, the old textual warnings – which have never been challenged – should also receive heightened scrutiny and probably fail. Many other mandated product disclosures (nutritional information, energy efficiency) would be similarly suspect. Indeed, new challenges have already begun, for example to country-of-origin labeling on meat.275

Disclosure requirements often will, like the cigarette labels, serve dual goals: to inform consumer choices and to influence them. This is particularly true in the case of warnings. As the Court and many commentators have noted, commercial speech law is designed to vindicate listener interests. Fidelity to these interests does not require courts to disentangle state goals to inform and influence, nor to disfavor a communication because it persuades. Persuasion, in the absence of manipulation, is not autonomy-reducing, even if emotionally charged. Communications research shows that emotions facilitate “knowing.” Emotional and cognitive processing is collaborative, not oppositional.

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,”

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275 See supra note x.
however delivered, is relevant to a consumer choice. The salience of many other messages (even if purely factual) will be a subject of heated public debate, such as ultrasound images of fetuses required to be disclosed to women before they receive abortions. 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. Listener interests and speaker burden, rather than arid classifications of speech, should be the focus of the constitutional analysis.