

St. John's University School of Law

St. John's Law Scholarship Repository

Faculty Publications

2011

Biasing Brands

Jeremy N. Sheff

St. John's University School of Law

Follow this and additional works at: https://scholarship.law.stjohns.edu/faculty_publications



Part of the [Consumer Protection Law Commons](#), and the [Intellectual Property Law Commons](#)

Recommended Citation

Sheff, Jeremy N., "Biasing Brands" (2011). *Faculty Publications*. 37.

https://scholarship.law.stjohns.edu/faculty_publications/37

This Article is brought to you for free and open access by St. John's Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

BIASING BRANDS

*Jeremy N. Sheff**

ABSTRACT

The dominant search-costs model of trademark law posits that consumers choose products to satisfy their preferences by analytically mapping those preferences to product information that trademarks efficiently provide. This Article tests these descriptive claims against empirical and theoretical research in marketing and consumer psychology, particularly the concept of “brand equity”: the value to a firm or its customers of a brand and of the firm’s efforts to build and maintain that brand.

Internally complex brand equity models, juxtaposed with empirical findings in related psychology and marketing research, challenge the descriptive accuracy of the search-costs model. In particular, branding efforts can influence consumer decision-making not only by informing and persuading consumers, but also by altering the way consumers evaluate product information and consumption experiences. In a word, branding can bias consumers.

The phenomenon of brand bias suggests that the search-costs model is incomplete and that trademark protection can only reliably promote economic efficiency in a legal environment where complementary regulations, such as those prevalent in food and drug law, mitigate the opportunities for producers to extract rents by manipulating consumer psychology. The Article concludes by situating trademark law in this broader web of consumer protection law.

* Assistant Professor of Law, St. John’s University School of Law. This Article benefited from comments at the 2009 Intellectual Property Scholars Roundtable (Drake Law School), the 9th Annual Intellectual Property Scholars Conference (Cardozo Law School), the Brooklyn Law School Intellectual Property Colloquium, and the Faculty Colloquium at St. John’s University School of Law. Particular thanks for comments on earlier drafts from Professors Shahar Dillbary, Dan Hunter, Paul Kirgis, Mark Lemley, Irina Manta, Jeff Govern, Rebecca Tushnet, and Fred Yen. All errors are the author’s alone.

TABLE OF CONTENTS

Introduction.....	1247
I. Search Costs and Brand Equity.....	1254
A. Unpacking “Search Costs”.....	1254
B. Brand Equity: An Alternative Model.....	1259
1. Qualitative, Psychology-Based Brand Equity Analysis.....	1262
2. Quantitative, Finance-Based Brand Equity Analysis .	1264
3. Bridging the Gap: Quantitative Research Tying the Sources of Brand Equity (Consumer Psychology) to Its Outcomes (Economic Performance).....	1265
4. A Note on Methodological Issues.....	1268
II. Informing, Persuading, and Biasing: Brands in Consumer Decision-making.....	1271
A. Informing and Persuading: Brand Associations, Perceived Quality, and Subjective vs. Objective Consumer Beliefs.....	1272
1. Brand Associations: Persuasive Advertising and Subjective Attributes.....	1272
2. Perceived Quality: Objective Attributes, Subjective Beliefs.....	1276
B. The Biasing Brand: Brand Awareness, Brand Loyalty, and Subjective Responses to Objective Data.....	1277
1. Brand Awareness and the Power of Exposure.....	1278
a. The Rational Actor Model: Familiarity as Quality Signal.....	1281
b. The Behavioralist Model: Brand Awareness as Bounded Rationality.....	1284
2. Brand Loyalty and the Power of Inertia.....	1287
III. Brand Bias, Opportunistic Producers, and the Costs of Consumer Markets.....	1295
A. The Dangers of Brand Bias and the Complicity of Trademark Doctrine.....	1295
B. Counteracting Brand Bias: Market Solutions and Legal Interventions.....	1301
1. Debiasing Through Competition: When to Trust the Market.....	1301
2. Debiasing through Law: The Food and Drug Example.....	1304
C. From Efficiency to Distribution: The Descriptive and the Normative.....	1311
Conclusion.....	1313

Be thou familiar, but by no means vulgar;
 Those friends thou hast, and their adoption tried,
 Grapple them to thy soul with hoops of steel.

—William Shakespeare¹

INTRODUCTION

In June of 2006, Miralus Healthcare launched a multi-million dollar television advertising campaign. The company's ten-second advertisement,² which ran repeatedly in syndicated programming, late-night television, and basic cable,³ featured video of a young woman rubbing Miralus's product—a glue-stick-like applicator—against her forehead, while a female narrator urgently read the following script in voiceover:

HeadOn: Apply directly to the forehead.

HeadOn: Apply directly to the forehead.

HeadOn: Apply directly to the forehead.

HeadOn is available without a prescription at retailers nationwide.

Obviously, this advertisement did not provide any information to viewers as to the precise purpose or function of the HeadOn product. Nor was that its intent. Miralus's marketing department had conducted focus group testing of various advertisements and learned that maximizing repetition led to the greatest consumer recall of the ad, and as Dan Charron, Miralus's Vice President of Sales and Marketing explained: "It's all about recall. It's all about recall."⁴

This deliberately uninformative marketing strategy was likely rendered even more attractive by the questionable properties of the HeadOn product itself. Miralus intended to sell HeadOn as a topical headache remedy, but the product contained only trace amounts of its claimed effective ingredients,⁵ none of which had been found in any

¹ WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK* act I, sc. 3.

² Television Advertisement: Miralus Healthcare (June 2006), available at <http://www.youtube.com/watch?v=Is3icfcbmbs>.

³ Theresa Howard, *Headache Commercial Hits Parody Circuit, Well, HeadOn*, USA TODAY, July 31, 2006, at 1B.

⁴ Mya Frazier, *This Ad Will Give You a Headache, But It Sells: HeadOn Sales Are Up 234% Even Though Its Spots Annoy Viewers*, ADVERTISING AGE, Sept. 24, 2007, at 3. The printed quotation does not indicate whether Mr. Charron intended any irony.

⁵ James Randi, *Head On into Quackery* (July 28, 2006), <http://www.randi.org/jr/2006-07/072806academic.html#i15> (noting that the concentrations of effective ingredients in HeadOn were one part per trillion and one part per million), cited in Randy A. Salas & Bill Ward, *Hooey or True-y?*, MINNEAPOLIS STAR-TRIB., Feb. 3, 2008, at 1E.

published study to alleviate headaches.⁶ As a result, in March of 2006, the National Advertising Division of the Council of Better Business Bureaus cautioned Miralus against claiming that HeadOn provided headache relief, under threat of referral to the Food and Drug Administration.⁷ Miralus's repetitive but uninformative ad campaign followed soon thereafter.

The HeadOn ad was quickly derided in the national press as "mind-numbing,"⁸ "bizarre,"⁹ and "the most annoying commercial on television,"¹⁰ but Miralus's Charron was unapologetic: "We're just trying to build a brand by getting people to remember it."¹¹ And people did remember: While the ad spawned a host of parodies on late-night comedy shows and the Internet,¹² it also generated a huge boost in Miralus's revenues. Sales of HeadOn grew by 234% from 2005 to 2006, and their torrid growth pace continued at least through the first six months of 2007; meanwhile, spinoff products generated millions of dollars in additional revenue for the company.¹³ Medical experts argued consistently and repeatedly on the broadcast networks and in major daily newspapers that any perceived headache relief delivered by HeadOn was due to the placebo effect,¹⁴ but millions of tubes of the

⁶ Suz Redfearn, *Head Rub*, WASH. POST, Sept. 26, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/25/AR2006092500934.html>.

⁷ Council of Better Bus. Bureaus, Nat'l Adver. Div., *Miralus Healthcare, HeadOn® Headache Relief*, Case # 4465 (Mar. 28, 2006); see also Consumer Union, *Headache Drug Lacks Evidence*, CONSUMER REP., Sept. 1, 2007, available at http://www.consumerreports.org/health/prescription-drugs/headon-9-07/overview/0709_headache_ov_1.htm; Ivan J. Wasserman, *Legal Affairs: Homeo-what-ic?*, ELECTRONIC RETAILER MAG., July 2006, http://www.electronicretailermag.com/0706_la.

⁸ Seth Stevenson, *Head Case: The Mesmerizing Ad for Headache Gel*, SLATE, July 24, 2006, <http://www.slate.com/id/2146382>.

⁹ Howard, *supra* note 3.

¹⁰ *Nightly News* (NBC television broadcast July 27, 2006), available at <http://www.youtube.com/watch?v=PybKYHP5r60>.

¹¹ Frazier, *supra* note 4.

¹² *Id.* ("Jay Leno has spoofed HeadOn on 'The Tonight Show' three times . . . 'Saturday Night Live' has referenced the ad, as has 'The Daily Show with Jon Stewart.'"). Amateur parodies are still available on YouTube. See, e.g., *My Vision of the Head-on Ad*, YOUTUBE, <http://www.youtube.com/watch?v=gv9NK7132hM> (last visited Feb. 24, 2011); *HeadOn Parody*, YOUTUBE, <http://www.youtube.com/watch?v=gKr8OsT6ApI> (last visited Feb. 24, 2011); *Rock On!*, YOUTUBE, <http://www.youtube.com/watch?v=jLBrswIju1Y> (last visited Feb. 24, 2011).

¹³ Frazier, *supra* note 4 (recounting the sales history of HeadOn, and noting that Miralus's follow-on product, ActivOn, had logged \$5.5 million in sales). Despite this impressive growth rate, it is unclear whether Miralus ever turned a profit. The company was still not profitable in late 2007. See *id.* In any event, as of this writing Miralus remains in business, hawking HeadOn and various spinoff homeopathic products such as RenewIn (a line of joint care and energy pills), and PreferOn (a scar treatment cream). *Products*, MIRALUS, <http://www.miralus.com/products.php> (last visited Mar. 4, 2011).

¹⁴ See, e.g., Redfearn, *supra* note 6 (noting that the placebo effect occurs 30-40% of the time with headache remedies); Brian Dakss, *Doctor: 'Head On' No Headache Cure*, Aug. 2, 2006, <http://www.cbsnews.com/stories/2006/08/02/earlyshow/health/main1859588.shtml>; *Does Hyped*

product were nevertheless purchased by consumers at prices between five and eight dollars per unit.¹⁵

The HeadOn example, in which a branded product objectively does not perform its intended function, is marketed to the public by simply repeating the brand name without disclosing the function of the underlying product, and yet generates millions of dollars in revenues for its manufacturer, represents more than the latest confirmation of a phrase attributed to P.T. Barnum.¹⁶ It also has serious implications for the legal regulation of consumer markets—and particularly for the theoretical underpinnings of our system of trademark law. The project of this Article is to analyze the features of consumer psychology and behavior that make episodes like the HeadOn phenomenon possible, and to discuss resulting challenges posed to conventional trademark law theory.

* * *

For decades, trademark law theory has been dominated by the economic analysis of the Chicago School.¹⁷ Even those commentators who offer a contrasting theoretical perspective admit that the influence and acceptance of the Chicago School's approach is "nearly total" in American trademark law.¹⁸ The economic justification for trademark protection, as described in the models of Chicago School commentators, is twofold. First, giving individual producers an exclusive right to access the consumer goodwill that attaches to a particular word or symbol is said to provide those producers with an incentive to produce products of a high and consistent quality.¹⁹ This argument is over a

Headache Remedy 'Head On' Work?, ABC NEWS (Dec. 2, 2006), <http://abcnews.go.com/print?id=2695490>.

¹⁵ Frazier, *supra* note 4 (noting that HeadOn generated \$6.5 million in sales in 2006, excluding sales at Wal-Mart, one of the product's biggest retailers); Stevenson, *supra* note 8 (noting that HeadOn was on sale at Wal-Mart for \$5.24); Consumer Union, *supra* note 7 (stating that HeadOn "costs about \$8 in pharmacies").

¹⁶ ORIGINAL BROADWAY CAST, *There Is a Sucker Born Ev'ry Minute*, on BARNUM (Sony Records 2002) (1980) ("There is a sucker born ev'ry minute/Each time the second hand sweeps to the top/Like dandelions up they pop,/Their ears so big, their eyes so wide./And though I feed 'em bonafide baloney/With no truth in it/Why you can bet I'll find some rube to buy my corn./'Cause there's a sure-as-shooting sucker born a minute./And I'm referrin' to the minute you were born.").

¹⁷ The definitive statement of this economic model of trademark law is William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J. L. & ECON. 265 (1987). A more theoretically rich, but less mathematically and doctrinally rigorous, treatment is Nicholas S. Economides, *The Economics of Trademarks*, 78 TRADEMARK REP. 523 (1988).

¹⁸ Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 624 (2004).

¹⁹ Landes & Posner, *supra* note 17, at 269-70.

century old at least,²⁰ and whether or not it is persuasive,²¹ it is not the aim of the present Article to take it up.

Second—and more importantly for present purposes—it is argued that trademark protection lowers consumer search costs, thereby facilitating welfare-increasing transactions. Most products will have some features or qualities that will be relevant to the consumer's decision whether or not to purchase, but that cannot be measured without either engaging in costly information gathering or, if this is not possible, consuming the product. Because the seller who manufactured the product typically has more information about such unobservable product qualities than potential buyers have, it will be more efficient for sellers to provide that information to buyers than for buyers to attempt to seek out the information themselves—if buyers were even capable of obtaining the information. Trademarks allow a convenient and efficient means of executing this information transfer, allowing producers to quickly and inexpensively convey a wealth of information about the unobservable qualities of their products to consumers in order to inform their decision whether or not to purchase. Because sellers can convey this information through a trademark at a lower cost than the cost to consumers of acquiring such information for themselves, trademarks are said to lower consumer search costs—a type of transactions cost—thereby facilitating welfare-increasing voluntary transactions and increasing aggregate social welfare.²²

The proposition that the function of trademarks is to inform consumers is at the heart of the dominant theoretical model of trademark law. In this view, the consumer's mind runs a kind of matching algorithm, testing the consumer's own preferences against all sources of information—whether derived from the consumer's own search or from the informational content of a trademark—about the available purchase options, in order to determine which purchase option

²⁰ See, e.g., Emily Fogg-Meade, *The Place of Advertising in Modern Business*, 9 J. POL. ECON. 218, 234 (1901) (“There is such a lack of co-operation and mutual confidence in the field of consumption goods that the ordinary consumer has no redress against the adulteration of foods and unsanitary goods except the inadequate force of legislation. . . . To a certain extent advertising offers a remedy. In order to make the public familiar with goods, brands, stamps, distinctive methods of wrapping and packing have been devised, by which the consumer will at once recognize the advertised article. . . . The consumer obtains better goods in that he knows what he is purchasing.”).

²¹ See Glynn S. Lunney, *Trademark Monopolies*, 48 EMORY L.J. 367, 440-62 (1999) (arguing that the free-rider problem targeted by this justification for trademark protection is minor, and is subject to countervailing concerns of abuse of market power).

²² Landes & Posner, *supra* note 17, at 275-80 (outlining the formal economic model of trademark protection, centered on the tradeoff between consumer search costs and the informative content of trademarks, the cost of which is borne by producers). This argument actually provides much of the foundation for the first argument in favor of trademark protection—that it incentivizes the production of consistent, high-quality products.

is most likely to satisfy his preferences.²³ And on its face, this second justification for trademark protection is attractive. Producers will *obviously* have better information about the qualities of their products and services than prospective purchasers. Consumers will *obviously* rely on information about those qualities in deciding whether to make a purchase, and in deciding which product or service to select from a range of options. As modern consumers, we can all think of numerous examples of trademarks that bring to our minds particular information about the attributes of the associated product that would be relevant to our decision to make a purchase. Such information would be difficult or impossible to obtain without consuming the product: the taste of a soft drink, the reliability of a car, or the safety and efficacy of a drug. In short, the search-costs rationale has great intuitive appeal.

The project of this Article is to question that intuition. Its subject is the model of consumer decision-making underlying what I will refer to as the “search-costs model” of trademarks.²⁴ Despite its intuitive

²³ See Economides, *supra* note 17, at 525-26 (describing products as having both quality features—of which all consumers desire the highest amount possible—and variety features—for which different consumers might harbor different preferences depending on their subjective tastes; and further describing the consumer’s choice task as the selection of a product with the most desirable features, whether those features are directly observable or must be inferred from other information such as a trademark).

²⁴ The term “search-costs model” is used advisedly, in part to reflect the fact that the economic model of trademarks upon which current theory rests is somewhat outmoded in light of developments in the Chicago School of economics research, as distinguished from the law-and-economics program that first grew out of that body of study a generation ago. For example, the prominent University of Chicago economist Gary S. Becker was awarded a Nobel Prize in 1992 in part for his work on human capital, a concept which he and others have deployed in order to analyze choice behaviors that seem to reflect unstable individual preferences. Press Release, Royal Swedish Acad. of Scis., The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 1992 (Oct. 13, 1992), available at http://nobelprize.org/nobel_prizes/economics/laureates/1992/press.html. See generally GARY S. BECKER, ACCOUNTING FOR TASTES (1996) (collecting research by Becker and others on the concepts of personal and social capital and their application to analysis of behavior, especially of choice). This work, among other bodies of economic research in the Chicago School, was still quite new or even nonexistent when the currently dominant economic models of trademark protection were originally developed.

The increasing sophistication of economic tools that could be applied to trademark theory has been noted by legal scholars, see, e.g., Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1687-97 (1999), but very few legal scholars have actually applied them. For a notable recent exception, see J. Shahr Dillbary, *Famous Trademarks and the Rational Basis for Protecting “Irrational Beliefs,”* 14 GEO. MASON L. REV. 605 (2007) (bringing contemporary economic analysis of brands and advertising to bear on the question of the value of well-known trademarks).

This Article, unlike Dillbary’s, is not intended to bring law-and-economics analysis of trademarks up to speed with the current thinking of the economists who first formulated it (or their disciples). Rather, this Article purports to apply a different body of extra-legal scholarship—marketing and psychology research—to the dominant law-and-economics model as it is typically invoked in discussions of the theory of trademark protection. This is not to say that the Article ignores responses to its arguments that might be found in more current economic

appeal, this model does not describe actual consumer decision-making very well. It is unlikely that any modern consumer can, on reflection, honestly characterize their myriad and varied purchasing decisions as a series of calculations to determine likelihood of preference-satisfaction based on a synthesis of product information conveyed by a trademark with product information obtained independently. Many, if not most, consumer transactions—from purchasing a pack of gum at a drugstore checkout, to ordering a beer at a bar, to pre-ordering the latest tech gadget online—are considerably less systematic and analytical than the search-costs model can account for. Two questions therefore arise: First, is a more descriptively accurate model of consumer decision-making available; and second, does that model, if it exists, provide the same normative support for the current system of legal protection for trademarks?

With respect to the first question, there is an entire field of academic and professional study devoted to analyzing, predicting, and influencing the consumer decision-making process: marketing. The marketing literature has developed tools for analyzing consumer decision-making, and particularly for analyzing the effect of trademarks (and of the related construct, brands) on that decision-making. In particular, marketing researchers have directed considerable attention to the question of what makes consumers willing to pay more for a branded product than for an equivalent unbranded product—the question of “brand equity.” Academic development of the concept of brand equity has given rise to a model of consumer decision-making that shares some overlap with the search-costs model, but also contradicts it in important ways.

This Article proposes to identify these contradictions and discuss their implications for the search-costs model’s normative claims regarding the legal protection of trademarks—the second question identified above. Trademarks have multiple effects on consumers, each of which has different normative implications. First, and consistent with the search-costs model, trademarks *inform* consumers: They provide consumers with objective information about the products and services to which they are affixed. Second, trademarks *persuade* consumers: Marketing efforts can generate or change consumer preferences to align with whatever qualities—including subjective

research—quite the opposite. See, e.g., *infra* Parts II & III.B.1. However, the project of this Article is not to extend the dominance of trademark theory by Chicago School economic analysis, but to critique that mode of analysis. As such, it is in keeping with the critical posture of other recent forays into the marketing and consumer psychology literatures by trademark law commentators. See, e.g., Mark P. McKenna, *Testing Modern Trademark Law’s Theory of Harm*, 95 IOWA L. REV. 63 (2009); Thomas R. Lee, Glenn L. Christensen & Eric DeRosia, *Trademarks, Consumer Psychology, and the Sophisticated Consumer*, 57 EMORY L.J. 575 (2008).

qualities—are perceived to be offered by a marked product. The persuasive function of trademarks and advertising has long been a subject of intense debate in the economic and legal academic literatures. However, there are plausible arguments that the persuasive function of trademarks can be incorporated into the search-costs model, and these arguments do not lend themselves to empirical evaluation. That being the case, this Article merely notes the existence of the debate without attempting to resolve it.²⁵

Rather, this Article will focus on a third, under-appreciated effect of trademarks: their ability to *bias* consumers. By “bias,” I mean that trademarks, supported by marketing activities (a combination this Article will refer to as a “brand”²⁶), can give rise to consumer beliefs about objective product qualities that are objectively mistaken, and yet resistant to correction by exposure of the consumer to objective evidence. I refer to this phenomenon as “brand bias,” and I situate it as an example of the type of boundedly rational decision-making behavior that undergirds the behavioralist critique of neoclassical law and economics models (such as the search-costs model).

The behavioralist critique does not so much invalidate traditional economic models of behavior (such as the search-costs model) as it requires their qualification. Specifically, it raises the possibility that strategic actors can compromise the efficiencies of a system (such as the trademark system) by manipulating the divergence between rational and boundedly rational behavior. As the Miralus example above illustrates, and as the rest of this Article will further show, marketing techniques can be and are in fact deployed strategically by brand owners to manipulate brand bias in welfare-reducing ways. Moreover, this

²⁵ See *infra* Part II.A; cf. Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020 (2005) (exploring the shifting reliance on informative and persuasive functions of trademarks in discourse about the proper scope of trademark law).

²⁶ It should be noted that this definition of “brand” is not necessarily coextensive with the legal concept of a “trademark,” nor with the various definitions of “brand” extant in the marketing literature. Some marketing studies present definitions of “brand” that strongly resemble the legal definition of a trademark. Compare, e.g., DAVID A. AAKER, *MANAGING BRAND EQUITY: CAPITALIZING ON THE VALUE OF A BRAND NAME* 7 (1991) (“A brand is a distinguishing name and/or symbol (such as a logo, trademark, or package design) intended to identify the goods or services of either one seller or a group of sellers, and to differentiate those goods or services from those of competitors.”), with Lanham Act § 45, 15 U.S.C. § 1127 (2009) (“The term ‘trademark’ includes any word, name, symbol, or device, or any combination thereof . . . used by a person . . . to identify and distinguish his or her goods . . . from those manufactured or sold by others and to indicate the source of the goods . . .”). However, many marketing discussions of brands define the concept broadly to include consumers’ mental images and emotional associations with the identifier itself, the mix of marketing activities (including pricing) deployed to support the identifier, or other more nebulous concepts. Lisa Wood, *Brands and Brand Equity: Definition and Management*, 38 MGMT. DECISION 662, 664-65 (2000).

strategic behavior is enabled by the very trademark protection that the search-costs model purports to justify in the name of efficiency.

For this reason, trademark law may, in some circumstances, demand support from complementary legal regimes—consumer protection regimes—in order to minimize the ability of strategic actors (like Miralus in the example above) to compromise the efficiencies of the trademark system. Whether such legal intervention is desirable depends on a comparison of the costs of strategic manipulation of brand bias with the costs of the intervention in question. To a considerable extent, such consumer protection regimes already exist. This Article will focus on one prominent example—food and drug law—as an illustration of the types of interventions available and as a tool to explore the dynamics of the relationship between trademark law and consumer protection law.

This Article proceeds as follows. Part I will describe the search-costs model of trademark protection and the marketing concept of brand equity. Part II will draw out distinctions in the descriptive claims of each model, informed by related research in economics, marketing, and psychology. The resulting analysis suggests that the search-costs model is descriptively inaccurate, or at least incomplete, and that the biasing power of brands requires qualification of the model's normative claims (particularly the claim that our system of trademark protection categorically increases social welfare). Finally, Part III identifies the key policy implications of these descriptive improvements on the search-costs model—that trademark protection demands, and has in fact generated, complementary regulation to prevent producers from using the powerful tool they have in trademark rights to extract rents by manipulating consumer psychology—and illustrates this point with examples from food and drug law. The Article concludes by discussing the normative implications of this reorientation of trademark law theory.

I. SEARCH COSTS AND BRAND EQUITY

A. *Unpacking "Search Costs"*

A classic statement of the search-costs rationale for trademark protection was offered two decades ago by Professor Nicholas Economides:

From an economic standpoint, the argument for trademarks is simple. In many markets, sellers have much better information as to the unobservable features of a commodity for sale than the buyers. This is known as information asymmetry. Unobservable features, valued by the consumer, may be crucial determinants of the total value of the good.... [I]f there is a way to identify the

unobservable qualities, the consumer's choice becomes clear The economic role of the trademark is to help the consumer identify the unobservable features of the trademarked product. This information is not provided to the consumer in an analytic form, such as an indication of size or a listing of ingredients, but rather in summary form, through a symbol which the consumer identifies with a specific combination of features. Information in analytic form is a complement to, rather than a substitute for, trademarks.²⁷

Of course, as noted in Landes & Posner's seminal paper on the economics of trademark law, "[t]o perform its economizing function a trademark . . . must not be duplicated," and therefore "the benefits of trademarks in lowering consumer search costs presuppose legal protection of trademarks."²⁸ Where such protection is present, we expect that producers will assume the costs of disseminating information about the unobservable qualities of their products through promotion of their trademarks, with the understanding that consumers will associate that information with the products bearing the producer's trademark, and the investment in promoting those trademarks will thus redound to the producer's benefit. In this way, information about the unobservable qualities of products will be made available to consumers at a lower cost than if the consumers were compelled to seek out that information for themselves every time they wished to make a purchase.

This shift of information costs from a party with a higher cost structure (consumers) to a party with a lower cost structure (producers) promotes economic efficiency and thereby facilitates welfare-increasing transactions. To illustrate with an example,²⁹ consider the market for soft drinks. A particular consumer may be willing to pay as much as three dollars³⁰ for a soft drink with a particular flavor, and a particular manufacturer may be willing to manufacture and sell a soft drink with that flavor for two dollars. If all parties had perfect information about the qualities of the manufacturer's product, we would expect our hypothetical consumer and manufacturer to be able to strike a bargain to exchange the beverage for between two and three dollars—leaving

²⁷ Economides, *supra* note 17, at 526-27.

²⁸ Landes & Posner, *supra* note 17, at 269, 270.

²⁹ This example assumes a basic familiarity with the application of the tools of welfare economics to the analysis of legal problems. An overview of the approach can be found in Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 977-99 (2001).

³⁰ Dollars are used here as a convenient unit of measure for the more complex (and theoretically broader) welfare-economics concept of "utility." *Id.* at 979-80 (defining utility as a measure of well-being that "incorporates in a positive way everything that an individual might value—goods and services that the individual can consume, social and environmental amenities, personally held notions of fulfillment, sympathetic feelings for others, and so forth . . . [, and] reflects in a negative way harms to his or her person and property, costs and inconveniences, and anything else that the individual might find distasteful").

neither of them worse off and one or both of them better off than before. Assuming perfect competition with free entry among manufacturers, and further assuming our manufacturer is at no comparative advantage or disadvantage to other manufacturers in producing soft drinks with the desired flavor, we would expect our manufacturer to sell the beverage to our consumer for the manufacturer's reserve price of two dollars.³¹ Comparing the state of the parties before and after the transaction, we can see that the consumer has moved from having two dollars in cash to having a beverage she values at three dollars, while the manufacturer has moved from having a beverage representing two dollars of value to having two dollars in cash. On an aggregate basis, then, our buyer and seller have moved from having the equivalent of four dollars to having the equivalent of five dollars—a net social benefit of one dollar. The transaction has therefore increased social welfare.

But now suppose that the consumer lacks information about the flavor of the various soft drinks available to her for purchase, and that in order to determine whether a particular soft drink has the desired flavor she would have to engage in a search for information about her various purchase options—either by purchasing samples, or seeking out persons with specialized knowledge of the manufacture and retail sale of soft drinks, or through some other means—at a cost to the consumer of two dollars.³² Given these costs to the consumer of determining whether our manufacturer's soft drink will be satisfactory, the total cost of that soft drink to the consumer will be at least four dollars (two dollars in search costs plus the manufacturer's two dollar reserve price). Of course, this total cost exceeds the consumer's subjective valuation of the soft drink (three dollars), and she will therefore be unwilling to purchase the manufacturer's product. Thus, where search costs are high, transactions that would otherwise be welfare-increasing will not take place, leaving society worse off than it would be in the absence of search costs.

Next, let us suppose that instead of the consumer engaging in her own search to determine whether a particular soft drink is likely to satisfy her flavor preferences, the manufacturer launches an advertising

³¹ Because of our assumption of perfect competition, we would expect the manufacturer's reserve price to be equivalent to the marginal cost of the last-produced unit of the beverage, such cost to include a reasonable return to the producer.

³² Of course, if the consumer is unable to gather relevant information about the product without consuming it, then multiplying the cost of the product by the probability that it will fail to satisfy the consumer's preferences would be a plausible way to express the consumer's search costs. See *id.* at 979 & n.33 (describing the calculation of "expected utility" in welfare economics analysis of decision-making in conditions of uncertainty). Given more than one or two purchase options and a more than trivial probability of dissatisfaction with any one option, this measure of search costs could be expected to easily exceed the consumer's subjective valuation of a satisfactory product.

campaign to inform the public of the flavor characteristics of soft drinks sold under the manufacturer's brand name—for argument's sake, assume the brand name is "COCA-COLA." Suppose further that the cost of this advertising campaign, combined with the cost of labeling the manufacturer's products with the COCA-COLA trademark, works out to fifty cents per unit. Now, assuming the consumer has seen the advertisements and remembers them, she need not engage in her own costly search to determine whether a particular soft drink will satisfy her flavor preference. So long as the law ensures that the COCA-COLA trademark is applied only to this particular manufacturer's products, the consumer can rely on the information conveyed to her by that trademark (through her memory of the associated advertising campaign) when she encounters it on a particular product for sale. Of course, the manufacturer will now have a higher reserve price of \$2.50 (to recover the increased cost of its marketing efforts), but this is still less than the consumer's valuation of the product (\$3.00), and therefore a welfare-increasing bargain can still be struck. Thus, by shifting the burden of informing the consumer about the flavor characteristics of the soft drink from the consumer (who has relatively high search costs) to the producer (who, on a per-unit basis, has relatively lower marketing costs), trademarks facilitate welfare-increasing transactions and thereby increase aggregate social welfare.³³

This soft drink example offers a pat explanation for a common feature of consumer markets: the brand premium. Note that our manufacturer's reserve price for the product absent a supporting marketing effort is lower than its reserve price for a physically equivalent branded product, due to the increased cost of producing and marketing the latter product. As discussed further below, typically branded products sell at some premium over equivalent unbranded products.³⁴ While on its face, a price disparity among products that are physically identical might suggest an inefficient market, the search-costs model provides a handy explanation for the disparity. Under the

³³ Obviously this specific example can be expanded to account for various types of product information and various means of generating that information. Instead of flavor information, a trademark could serve to convey information to consumers about other objective product characteristics—price, color, texture, durability, composition, etc.—or subjective characteristics—value, stylishness, social cachet, trendiness, luxury, etc. Moreover, this information need not be implanted in the consumer's memory by advertising; a consumer's memory of the attributes of products bearing a particular trademark could just as easily be based on past personal experience with products bearing the mark; word-of-mouth or recommendations from family, friends, or acquaintances; professional independent reviews and publications; Internet crowd-sourced review sites and message boards; and the like. However, the advertising mechanism is of special interest for purposes of this Article for reasons that will become apparent below.

³⁴ See *infra* Part I.B.

assumptions set forth in our example, we can understand this premium for the branded product as nothing more than a pass-through of marketing costs from the manufacturer to the consumer. This pass-through of marketing costs should not alter the model's conclusion that trademark protection increases aggregate social welfare—quite the opposite. In the context of our soft drink example, the consumer is essentially paying the manufacturer fifty cents for information that would otherwise have cost her two dollars to obtain on her own. Absent the ability to pass this cost on to the consumer, our manufacturer would not be willing to complete the transaction at the price it would have been willing to accept for an equivalent product unsupported by marketing activities, because after subtracting out the costs of such activities it would incur a loss of fifty cents on the sale. Thus, the brand premium, under the search-costs model, represents the portion of information costs borne by the manufacturer but passed on to the consumer as part of the purchase price.³⁵

This last feature of the search-costs model warrants serious scrutiny. The model implies that any brand premium should be understood to represent the information value of the manufacturer's

³⁵ The search-costs model explains disparities in brand premia within a single product market as reflective of the quantum of information conveyed by a mark: the "stronger" a mark is, the more information it conveys, and therefore the more the consumer will be willing to pay the producer for a product bearing the mark. Landes & Posner, *supra* note 17, at 277-79. This explanation will be scrutinized in Part II, *infra*, but a brief discussion is warranted here.

Assuming perfect competition among manufacturers, we would expect the maximum brand premium in any given market to approach the cost to the most efficient marketer of disseminating all the information needed for the marginal consumer to make her purchase decision—with the supramarginal consumer either foregoing the purchase or gathering additional information on her own. As such, under the assumption of perfect competition, the search-costs model implies that the optimal level of product information will be supplied at the lowest possible cost to society. Cf. Landes & Posner, *supra* note 17, at 278-79 ("Firms with strong trademarks . . . will command higher prices for their brands not because of any market power but because the search costs associated with their brand are lower.").

Where a manufacturer enjoys market power, in contrast, we would expect the brand premium charged by that manufacturer to approach the cost to the marginal consumer of acquiring on her own the information conveyed by the trademark. This would not necessarily result in any welfare losses beyond the deadweight losses typically associated with the supra-competitive prices charged by a firm with market power; it could merely represent a transfer of surplus value from the consumer to the producer. Although the search-costs model essentially dismisses this feature of the monopoly case as of little relevance, *see id.* at 274-75, 277 & n.26, others have warned strongly about its potential for abuse through producer actions (such as persuasive advertising) that seek to create market power through branding. *See generally* Lunney, *supra* note 21. A similar argument features in the present discussion, but at a more fundamental level. The question posed in this Article is not whether the proportion of a brand's value attributable to the brand's persuasive effects is best understood as created or transferred, but rather whether a model of consumer decision-making that characterizes information—whether objective or subjective—as the source of that value is descriptively accurate. *See infra* Part II.

trademark.³⁶ This conclusion assumes a number of empirical propositions about the nature of consumer decision-making, without reference to any actual empirical evidence. In essence, the model posits that the reason consumers will pay more for branded Product A than for the equivalent unbranded Product B is that the trademark on Product A conveys information that the consumer will evaluate against her preferences. In the absence of the trademark (as will be the case for Product B), she would have to obtain such information independently, leading her to value the two products differently. These empirical claims will be the focus of the remainder of this Article. As will become clear, the marketing and psychology literatures have arrived at somewhat different conclusions concerning the nature of consumer decision-making than those offered by the economic analysis underlying the search-costs model. The descriptive differences between these approaches imply different normative conclusions concerning the brand premium and, by extension, the system of trademark protection.

B. *Brand Equity: An Alternative Model*

While law and economics theorists have constructed an elegant model to explain why seemingly equivalent products might be priced differently based on nothing more than their trademark, the marketing literature has attempted to generate some empirical data on the question in the hopes of developing tools for managers to enhance firm performance. In this pursuit, marketing researchers have developed the concept of “brand equity.” An early discussion of brand equity explains the concept as follows:

We define brand equity as the “added value” with which a given brand endows a product. A product is something that offers a functional benefit (e.g., a toothpaste, a life insurance policy, or a car). A brand is a name, symbol, design, or mark that enhances the value of a product beyond its functional purpose. Depending on which perspective is considered, the brand can have added value to the firm, the trade, or the consumer.³⁷

This seemingly simple definition incorporates a number of concepts, which must be parsed for the present analysis.

³⁶ This is not to deny that one product might sell at a premium to a competing product due to its superior qualities and that those qualities might be communicated to consumers through a trademark. Rather, the brand premium as conceptualized here reflects the difference in price between two *identical* products—one supported by an information-bearing trademark and one without any trademark.

³⁷ Peter H. Farquhar, *Managing Brand Equity*, 1 *MARKETING RES.* 24, 24-25 (1989) (internal citations omitted).

First, the construct of brand equity posits that the value of a branded product can be divided into two components: the value of the functionality of the product, and the value of the brand. One way of conceptualizing brand equity, then, is as the total value of a branded product less the value of an equivalent, unbranded product.³⁸ It should be clear that this conception of brand equity in the marketing literature is not inconsistent with the search-costs model, in which the brand premium represents the value of the information conveyed by a trademark, as distinct from the value of the underlying product.

Second, brand equity can be conceptualized from the perspective of either the firm that owns the brand or the consumer who encounters it in the marketplace.³⁹ The adoption of one perspective or another will usually depend on the purpose of the analysis. Examining *firm-based brand equity* can be useful in calculating the value of a brand as an intangible asset for purposes of financial reporting, tracking the impact of marketing changes on firm performance, or analyzing major transactions such as mergers and acquisitions.⁴⁰ Examining *consumer-*

³⁸ See Benjamin Kartono & Vithala R. Rao, Brand Equity Measurement: A Comparative Review and a Normative Guide 23 (Dec. 28, 2008) (unpublished manuscript), available at <http://ssrn.com/abstract=1401149> ("Brand equity is the incremental value that a brand name endows upon a product as a result of the firm's marketing efforts, and this value can be viewed from the perspective of the consumer or the firm."). While this definition of brand equity is typical, the literature is not monolithic. For a list of definitions of brand equity in the marketing literature, see KEVIN LANE KELLER, STRATEGIC BRAND MANAGEMENT: BUILDING, MEASURING, AND MANAGING BRAND EQUITY 43 figs.1-12 (2d ed. 2003). A discussion of some of these definitions and the differences between them can be found in Wood, *supra* note 26, at 662-63.

Beyond its effect on the value of a branded product, marketers generally acknowledge that brand equity can also give the brand owner additional competitive advantages that are not captured by this definition. These could include, for example, the ability to license or extend a brand into new markets, increased bargaining power over firms in the distribution channel, and decreased prospective marketing costs arising from consumers' baseline awareness of the brand. Kartono & Rao, *supra*, at 1 (citing PHILIP KOTLER, MARKETING MANAGEMENT: MILLENNIUM EDITION (2000)). As such, brand equity can be conceived of as a form of capital, though a full discussion of this aspect of brand equity is not of primary importance to the present discussion. Cf. Landes & Posner, *supra* note 17, at 277 ("A more elaborate model would explicitly consider trademarks as a part of the firm's capital and [the cost of producing information to be associated with a trademark] as gross investment in that capital."). Indeed, insofar as a more complete model would imply that producers who have already built up capital in the form of brand equity will face lower prospective costs of capturing the types of economic rents discussed *infra* in Part III, such a broader analysis would likely only strengthen the conclusions drawn herein.

³⁹ The reference in Farquhar, *supra* note 37, to the value of a brand to "the trade" simply refers to the situation in which a brand may have value to an intermediary in the distribution chain; i.e., a purchaser who is not the ultimate consumer. A recent addition to the literature also proposes to assess brand equity from the employee perspective, in order to better account for the contributions of employee interactions with customers to brand equity. See generally Ceridwyn King & Debra Grace, *Employee Based Brand Equity: A Third Perspective*, 30 SERVICES MARKETING Q. 122 (2009).

⁴⁰ Kevin Lane Keller, *Conceptualizing, Measuring, and Managing Customer-Based Brand Equity*, 57 J. MARKETING 1, 1 (1993) ("There have been two general motivations for studying brand equity. One is a financially based motivation to estimate the value of a brand more

based brand equity, in contrast, is helpful in identifying mechanisms by which consumers attribute higher value to a branded than to an unbranded product, so as to better assess consumer responses to marketing activities and better target those activities to maximize the value of the brand to its owner.⁴¹ Of course, there is a strong relationship between firm-based and consumer-based brand equity, the former largely representing an aggregation of the latter.⁴²

Third, this purposive selection of perspectives also extends to the methodological tools of brand equity analysis. Some research focuses strictly on identifying the economic or financial value of a brand; some focuses on the psychological or behavioral response of consumers to a brand. Although either approach can be found in both firm-based and consumer-based analyses, unsurprisingly psychological approaches tend to dominate in studies of consumer-based brand equity, while financial and economic approaches tend to be more common in studies of firm-based brand equity. Moreover, psychological analyses tend to be qualitative in nature,⁴³ while economic and financial analyses unsurprisingly tend to be quantitative.

precisely for accounting purposes (in terms of asset valuation for the balance sheet) or for merger, acquisition, or divestiture purposes.”). See generally Vijay Mahajan, Vithala R. Rao & Rajendra K. Srivastava, *An Approach to Assess the Importance of Brand Equity in Acquisition Decisions*, 11 J. PRODUCT INNOVATION MGMT. 221 (1994) (proposing a methodology for assessing firm-based brand equity for the purpose of evaluating potential merger transactions); Carol J. Simon & Mary W. Sullivan, *The Measurement and Determinants of Brand Equity: A Financial Approach*, 12 MARKETING SCI. 28 (1993) (proposing a method to measure firm-based brand equity in order to assess the determinants of the brand’s value and the effect of marketing changes on firm performance).

⁴¹ AAKER, *supra* note 26, at 32 (describing the objectives of the author’s investigation of brand equity, including “help[ing] managers see more clearly how brand equity provides value . . . [and] to discuss how brand equity should be . . . created, maintained, and protected”); KELLER, *supra* note 38, at 1-2 (“A second reason for studying brand equity arises from a strategy-based motivation to improve marketing productivity [M]arketers need a more thorough understanding of consumer behavior as a basis for making better strategic decisions about target market definition and product positioning, as well as better tactical decisions about specific marketing mix actions.”).

⁴² Simon & Sullivan, *supra* note 40, at 29 & n.2 (defining brand equity from the firm perspective as “the incremental cash flows which accrue to branded products over and above the cash flows which would result from the sale of unbranded products” and noting that “[t]he incremental cash flows are based on the value consumers place on branded products and on cost savings brand equity generates through competitive advantages”); see also Benjamin Kartono & Vithala R. Rao, *Linking Consumer-Based Brand Equity to Market Performance: An Integrated Approach to Brand Equity Management* (Nov. 2005) (unpublished manuscript), available at <http://www.zibs.com/techreports/Linking%20CBE%20Market%20Performance.pdf> (developing and testing an econometric model to capture the correlation between consumer-based brand equity and firm-based brand equity); V. Srinivasan, Chan Su Park & Dae Ryun Chang, *An Approach to the Measurement, Analysis, and Prediction of Brand Equity and Its Sources*, 51 MGMT. SCI. 1433 (2005) (proposing a model to link disaggregated consumer-level measurement of brand equity with aggregate financial firm-based measures).

⁴³ By “qualitative” I do not mean to suggest that such research is not empirical. As discussed *infra* in Part II.D, much of the psychology-informed literature on brand equity is empirical,

1. Qualitative, Psychology-Based Brand Equity Analysis

Much early brand equity research was qualitative in nature, seeking to conceptualize the various elements of consumer psychology and behavior that allow a brand to acquire and retain value. Perhaps the seminal work in this regard is David Aaker's *Managing Brand Equity*, an exposition of brand equity designed to assist managers in maximizing the value of their brands.⁴⁴ "Since its inception, Aaker's brand equity model has been broadly accepted and employed by many researchers."⁴⁵ Aaker breaks down brand equity into five elements, the first four of which represent features of consumer psychology:

*Brand Awareness.*⁴⁶ Aaker defines brand awareness as "the ability of a potential buyer to recognize or recall that a brand is a member of a certain product category," and distinguishes between three levels of brand awareness: *brand recognition* (the ability to identify a brand that one has heard of before when provided a list of brands in a product class), *brand recall* (the ability to provide a brand name when asked to name brands in a product class), and *top-of-mind awareness* (the status ascribed to the first brand a consumer names for a given product category).⁴⁷

*Brand Associations.*⁴⁸ This construct encompasses "anything 'linked' in memory to a brand."⁴⁹ This could include such disparate associations as the physical qualities of a product sold under the brand, intangible associations such as brand symbols or market segments, abstract and subjective concepts such as emotions or personality and lifestyle images evoked by the brand, or personal associations such as memories of using the branded product or service.⁵⁰ The total network of brand associations is labeled *brand image* in Aaker's framework, and a brand's image relative to its universe of competitors constitutes its *brand position*, a key function of which is to differentiate the brand from others so as to insulate it from competition.⁵¹

although some of it admittedly cannot be fairly characterized that way. See *infra* note 78 and accompanying text.

⁴⁴ AAKER, *supra* note 26.

⁴⁵ Kartono & Rao, *supra* note 38, at 10.

⁴⁶ AAKER, *supra* note 26, at 19, 56-77.

⁴⁷ *Id.* at 61-62; accord Keller, *supra* note 40, at 12 (discussing tools for measuring the various levels of brand awareness).

⁴⁸ AAKER, *supra* note 26, at 20-21, 104-80.

⁴⁹ *Id.* at 109.

⁵⁰ *Id.*

⁵¹ *Id.* at 109-12.

*Perceived Quality.*⁵² This construct “can be defined as the customer’s perception of the overall quality or superiority of a product or service with respect to its intended purpose, relative to alternatives.”⁵³ It is, in essence, a particular kind of brand association,⁵⁴ but is notable for its emphasis on subjective quality assessments by consumers rather than objective measures of product quality. This distinction is due in part to the varied tastes and needs of consumers, and in part to the possibility that subjective assessments of quality may be inconsistent with objective measurements of quality but still guide consumer choices.⁵⁵

*Brand Loyalty.*⁵⁶ Brand loyalty is defined as “a measure of the attachment that a customer has to a brand. It reflects how likely a customer will be to switch to another brand, especially when that brand makes a change, either in price or in product features.”⁵⁷

*Other Proprietary Brand Assets.*⁵⁸ This element of brand equity is something of a catch-all for contributors to brand value that do not depend on consumer responses to the brand. Examples might include intellectual property rights (such as trademark rights in brand symbols or patents on an underlying product) and distributorship relationships that “inhibit or prevent competitors from eroding a customer base and loyalty.”⁵⁹

Qualitative brand equity research after Aaker tends to conflate some of his categories, parse them into finer categories, or supplement them with firm-based constructs.⁶⁰

⁵² *Id.* at 19, 78-103.

⁵³ *Id.* at 85.

⁵⁴ *Compare id.* at 87 (noting that perceived quality is a key element of the brand’s positioning and differentiation from other brands), with discussion, *supra* note 51 and accompanying text.

⁵⁵ AAKER, *supra* note 26, at 85 (noting that perceived quality differs from actual or objective quality, partly because it is defined in terms of perception, and partly because even purportedly objective quality measures must make value judgments about the relative importance of attributes or features, and those judgments may not coincide with the priorities of all consumers).

⁵⁶ *Id.* at 19, 34-55.

⁵⁷ *Id.* at 39.

⁵⁸ *Id.* at 21.

⁵⁹ *Id.*

⁶⁰ Aaker himself subsequently expanded his list of brand equity elements to incorporate firm-based measures such as market share, price, and distribution networks. DAVID AAKER, BUILDING STRONG BRANDS (1996). Kevin Lane Keller, the first marketing researcher to posit consumer-based brand equity as a discrete construct, has proposed even more elaborate models of the concept. In one early article, Keller divides brand associations into three subcategories: brand attributes—comprising either physical features of the product or non-product-related attributes such as “images” and “personality attributes” associated with the brand—brand benefits—consumer beliefs about what the product can do for them—and brand attitudes—overall positive or negative evaluations of a brand. Keller, *supra* note 40, at 3-8. Keller’s early model combined this more structured view of brand associations with the separate concept of brand awareness (itself divided into brand recall and brand recognition) into a single construct defined as “brand knowledge.” *Id.* at 2-8. Keller later revised his consumer-based brand equity model to reflect a

2. Quantitative, Finance-Based Brand Equity Analysis

Early efforts to take quantitative measurements of brand equity generally aimed at the firm level. “Brand equity research from a firm’s perspective typically assesses brand performance in terms of earnings-related measures like revenue, market share, and price premium.”⁶¹ Despite various alternatives in the extant literature, “[t]here is presently no standard methodology for [firm-level] financial brand valuation, and firms rely on their own in-house estimation methods or various methods

hierarchical and cumulative construction of the brand’s value in the mind of the consumer: brand awareness leads to brand associations, which then generate brand attitudes, which in turn lead to brand attachment (a measure of brand loyalty that accounts for the strength of the consumer’s devotion to the brand), and ultimately to “brand activity”: a measure of the ways consumers use the brand out in the world, by either talking about it, using the products and services associated with it, or seeking it out. KELLER, *supra* note 38, at 392-93. For a more detailed discussion of Keller’s revised customer-based brand equity framework, see *id.* at 59-103.

In a similar vein, a recent study by Girish Punj and Clayton Hillyer purports to evaluate, through analysis of consumer surveys, the relationships between various components of brand equity and to establish that each plays a role in the cognitive processes of consumers facing purchase decisions. Girish N. Punj & Clayton L. Hillyer, *A Cognitive Model of Customer-Based Brand Equity for Frequently Purchased Products: Conceptual Framework and Empirical Results*, 14 J. CONSUMER PSYCHOL. 124 (2004).

⁶¹ Kartono & Rao, *supra* note 38, at 28. An early example developed by the consultancy firm the Interbrand Group attempts to predict future revenues attributable to a brand’s value by formulating a brand-earnings multiplier from various subjective measures of brand strength and then applying the multiplier to historical earnings. See Laurel Wentz & Geoffrey Martin, *How Experts Value Brands*, ADVERTISING AGE, Jan. 16, 1989, at 24; see also Jeffrey A. Dubin, *The Demand for Branded and Unbranded Products: An Econometric Method for Valuing Intangible Assets*, in STUDIES IN CONSUMER DEMAND: ECONOMETRIC METHODS APPLIED TO MARKET DATA, ch. 4 (1998) (elaborating a similar method in an econometric model). Other revenue-based measures have been derived from comparing prices of products bearing the brand in question to similar private label products (i.e., store or house brands). E.g., Kusum L. Ailawadi, Donald R. Lehmann, & Scott A. Neslin, *Revenue Premium as an Outcome Measure of Brand Equity*, 67 J. MARKETING 1 (2003). Another method seeks to derive the brand’s value to the firm by extrapolating from the firm’s total market capitalization, subtracting out the value of tangible assets and adjusting for various firm- and industry-specific factors that correlate to intangible assets other than the brand. Simon & Sullivan, *supra* note 40, at 31-41. This method is derived from a mainstay of financial analysis: Tobin’s Q, defined as the ratio of the market value of a firm to the replacement cost of the firm’s tangible assets. *Id.* at 32 (citing James Tobin, *A General Equilibrium Approach to Monetary Theory*, 1 J. MONEY CREDIT & BANKING 15 (1969)); James Tobin, *Monetary Policies and the Economy: The Transmission Mechanism*, 37 S. ECON. J. 421-31 (1978). Yet another method defines the brand’s value in terms of its replacement cost—that is, the cost in marketing expenditures of establishing the brand discounted by the probability that an attempt to establish the brand from scratch would fail. Simon & Sullivan, *supra* note 40, at 30 (“The . . . technique estimates brand replacement cost, the cost of establishing a product with a new brand name. For example, if it costs \$100 million to launch a new product and the probability of success is 25%, then the expected cost of establishing a comparable brand name is \$400 million.”).

provided by consultants to estimate this value.”⁶² Fortunately for present purposes, analysis of brand value at the firm level sheds little if any light on the search-costs model of trademark law, and so the lack of consensus on the issue should not complicate assessment of that model.

Another, newer stream of research seeks to measure brand equity quantitatively from the consumer point of view—a far more useful approach for present purposes. This literature typically seeks to quantify brand equity as the economic value assigned by consumers to a branded product less the economic value of the objective attributes of the product. Such values are derived from various data sources, such as consumer surveys;⁶³ Nielsen data on consumer product barcode scanning, demographic information, and advertising exposures;⁶⁴ or controlled experiments designed to simulate relevant aspects of the marketplace.⁶⁵ As with firm-based measures, some researchers attempting to isolate the portion of consumer utility attributable to the brand itself (as opposed to the objective qualities of the underlying product) compare consumer responses to branded products with their responses to private labels or store brands.⁶⁶ These studies generate results that can be expressed in dollar amounts; in utilities; or in ratios that express the value of a studied brand relative either to another studied brand, to a private label, or to a hypothetical unbranded product with similar objective qualities.

3. Bridging the Gap: Quantitative Research Tying the Sources of Brand Equity (Consumer Psychology) to Its Outcomes (Economic Performance)

For purposes of the present Article, it should be apparent that neither the qualitative research discussed in Part I.B.1, nor the quantitative research discussed in Part I.B.2, are sufficient to provide an empirical test of the search-costs model. The qualitative research provides insight into how consumers make decisions with respect to

⁶² Kartono & Rao, *supra* note 38, at 24; *see also* Dubin, *supra* note 61, at 79-85 (describing various approaches to measuring brand equity, both at the firm level and at the consumer level).

⁶³ Compare Raj Sethuraman, *Measuring National Brands' Equity over Store Brands*, 1 REV. MARKETING SCI., art. 2 (2003), available at <http://www.bepress.com/romsjournal/vol1/iss1/art2>, with Ailawadi et al., *supra* note 61.

⁶⁴ Wagner A. Kamakura & Gary J. Russell, *Measuring Brand Value with Scanner Data*, 10 INT'L J. RES. MARKETING 9 (1993).

⁶⁵ Joffre Swait et al., *The Equalization Price: A Measure of Consumer-Perceived Brand Equity*, 10 INT'L J. RES. MARKETING 23 (1993). Unlike other studies discussed in this subpart, this study does not attempt to control for objective product attributes but rather incorporates them into the measurement of consumer utility targeted by the model and tested by the experiment.

⁶⁶ Sethuraman, *supra* note 63.

branded products, but provides no information about the economic effects of those consumer decision-making processes. Conversely, the quantitative research can provide quantification of the value of brands relative to unbranded products or relative to one another, but does not directly address the features of consumer decision-making that result in that differential valuation. As discussed above,⁶⁷ the search-costs model posits not only that a branded product will sell at a premium to an equivalent unbranded product (or to an equivalent product bearing a “weaker” brand), but that the reason for that premium is that the brand conveys valuable information about the product that consumers would have to expend greater resources searching for in the absence of the brand.

Although neither stream of brand equity research alone is sufficient to test these positive claims of the search-costs model, some recent studies have been attempting to seal the breach by tying the qualitative constructs of psychology-informed brand equity models to the quantitative results of economics-informed brand equity research. These studies attempt to parse out the portion of the economic value of the brand attributable to each of the various psychological constructs of qualitative brand equity models. One early example found a correlation between the consumer psychology construct of brand attitude (an overall reaction to a brand as “good” or “bad”) and stock market returns in the computer industry.⁶⁸ Another more recent study constructed an econometric model of the relationship between two constructs of consumer-based brand equity—perceived quality and customer satisfaction (a proxy for brand loyalty)—in the auto industry, relying on commercial consumer ratings data and reported financial and accounting results to extrapolate the effects of each construct on firm market outcomes such as market share and elasticity of demand.⁶⁹ The results of the study imply that in the auto industry, perceived quality correlates with greater increases in firm revenue and in the firm’s revenue premium than does satisfaction.⁷⁰

Recently, two groups of authors conducted studies to directly investigate the relationship between the components of consumer-based brand equity and outcome measures of firm-based brand equity. The first study conducted a survey of business travelers to elicit their views of various luxury hotel chains in order to gather data on the content and strength of each of David Aaker’s original psychological constructs of

⁶⁷ See *supra* notes 29-35 and accompanying text.

⁶⁸ David A. Aaker & Robert Jacobson, *The Value Relevance of Brand Attitude in High-Technology Markets*, 38 J. MARKETING RES. 485 (2001). On the relationship between “brand attitude” and the elements of brand equity discussed above, see *id.* at 486 n.3.

⁶⁹ Kartono & Rao, *supra* note 42, at 27-32.

⁷⁰ *Id.* at 32 & tbl.8.

brand equity.⁷¹ The authors then attempted to find correlations between their survey data and revenue data for the hotel brands tested. The authors found significant correlations between higher revenues and positive results for each of the four brand equity constructs, but the correlation for brand awareness and brand associations was approximately twice as strong as the correlation for perceived quality, with brand loyalty falling somewhere in between.⁷² In the second study, the authors similarly sought to determine the correlation between components of consumer-based brand equity, consumer purchase intentions, and firm-based outcome measures such as market share and revenue in the cellular telephone market in South Korea.⁷³ These authors similarly found brand awareness to be the strongest contributor to a consumer's decision to purchase a branded product over an equivalent unbranded product, with consumer perceptions about the products' physical and non-physical attributes also contributing, but more weakly.⁷⁴ The study also found, informally, a rough correlation between customer loyalty and market share.⁷⁵

Perhaps the most important result to emerge from these studies, at least for purposes of this Article, is that the relative contribution of each brand equity construct *is not stable across different product and service categories*.⁷⁶ For some categories, such as consumer goods, awareness may be a more important driver of the consumer's willingness to purchase or pay a premium for a branded product versus an unbranded one. For other categories, such as cars or luxury hotels, perceived quality or subjective brand attributes may be more important drivers of consumer choice. This variability strongly suggests that the search-costs model's generalizing framework obscures important and internally complex effects of brands. In particular, it suggests that consumers use different cognitive strategies to guide their decision-making in different

⁷¹ Hong-bumm Kim, Woo Gon Kim & Jeong A. An, *The Effect of Consumer-Based Brand Equity on Firms' Financial Performance*, 20 J. CONSUMER MARKETING 335 (2003). Interestingly, factor analysis failed to produce an interpretation of the survey data in which both the brand equity construct generally and the brand awareness construct in particular could significantly account for variances in the survey responses, *id.* at 343 & tbl.V, suggesting a failure of construct validity with respect to Aaker's brand equity constructs as applied to the data generated by the study's survey. However, nonparametric correlation analysis nevertheless found that survey data reflecting high levels of brand awareness were strongly correlated to superior financial performance of the brand, *id.* at 344 & tbl.VI. This odd disparity may reflect methodological problems with the study's survey construction, discussed further in Part II.D, *infra*.

⁷² *Id.* at 344 & tbl.VI.

⁷³ Srinivasan et al., *supra* note 42.

⁷⁴ *Id.* at 1445-46 & tbl.7.

⁷⁵ *Id.* at 1445-46 & tbl.6.

⁷⁶ See *supra* notes 68-75 and accompanying text.

contexts.⁷⁷ Empirical research in psychology and consumer behavior can shed light on these effects, but before examining these points further a brief methodological critique of the brand equity literature is in order.

4. A Note on Methodological Issues

It must be admitted that as social science research goes, the marketing literature described in this subpart invites serious methodological criticism. First, some of the models developed in this stream of research are directed to professional rather than academic audiences, and as such they sometimes rely less on data than on anecdote.⁷⁸ As a result, they may be influenced by the researchers' biases or preconceptions, their analysis may rely on cherry-picked examples, and their conclusions may be difficult to generalize. Second, to the extent the models or the conclusions being drawn from them are based on data, that data is often the result of consumer surveys rather than actual behavior in the marketplace.⁷⁹ Because what consumers say is often significantly different than what they do, the reliability of this data is somewhat suspect, particularly where the data is invoked to make predictions about future consumer behavior with respect to a brand.⁸⁰ Third and finally, to the extent that consumer survey responses can be trusted as reliable indicators of consumer beliefs, mental processes, and behavior, the qualitative research methods underlying many of the findings discussed above, by their very nature, do not allow for the types of quantitative analysis and conclusions typically associated with economic decision-making by firms (or, for that matter, by policymakers).

With respect to this last objection, three responses are in order. First, as should be apparent from Parts I.B.2 and I.B.3 *supra*, the

⁷⁷ For example, higher-stakes decisions may invite more deliberative thought, while in lower-stakes decisions we rely on heuristics channeled by brands. I have previously argued that this feature of consumer decision-making justifies the inclusion of consumer sophistication as a factor in the likelihood of confusion test for determining trademark infringement. Jeremy N. Sheff, *The (Boundedly) Rational Basis of Trademark Liability*, 15 TEX. INTELL. PROP. L.J. 331, 370-71 (2007).

⁷⁸ Compare AAKER, *supra* note 26, at 277-87 (setting forth the sources for Aaker's model of brand equity, many of which are news accounts and only a minority of which represent empirical research, let alone peer-reviewed empirical research), with Keller, *supra* note 40, at 19-22 (setting forth references for Keller's original model of consumer-based brand equity, most of which are peer-reviewed empirical studies in marketing or psychology).

⁷⁹ See, e.g., Punj & Hillyer, *supra* note 60, at 127 (describing consumer surveys used to test the authors' conceptual model of consumer-based brand equity).

⁸⁰ Mark P. McKenna, *Testing Modern Trademark Law's Theory of Harm*, 95 IOWA L. REV. 63, 93-94 & nn.111-15 (2009) (citing sources).

qualitative models of brand equity have been developed alongside quantitative empirical research seeking to measure brand equity in economically meaningful terms. Second, the qualitative methodologies employed by marketing researchers are a mainstay of social sciences such as psychology and sociology, and most marketing researchers rely on methodological tools that are widely accepted within qualitative social science disciplines to identify and ameliorate bias.⁸¹ Third, the largest and most successful companies apply the results of qualitative research into brand equity to manage their branding and marketing decisions. For example, Procter & Gamble (P&G)—a pioneer and continuing leader in branding⁸²—uses Keller’s qualitative model of brand equity assessment as the basis for continuous monitoring of P&G’s billion-dollar brands, constructing consumer surveys to capture consumers’ qualitative evaluations of both P&G’s brands and the brands of its competitors.⁸³ This last point similarly provides something of a response to the first objection to the potential for bias and cherry-picking in qualitative marketing research, at least as regards the weight to be accorded the critique. Obviously successful firms’ reliance on qualitative brand equity research does not necessarily establish the rigor or robustness of that research,⁸⁴ but it may tend to weaken the argument that the research is unreliable to the extent that firms that rely on it outperform firms that do not.

With respect to the objection to using consumer survey responses for purposes of describing or predicting actual consumer behavior in the marketplace, rebuttal is not as easy. To some extent the acceptance of the conclusions of marketing researchers by successful firms offers some response. Another response lies in the largely corroborative findings of non-survey-based experimental research in psychology and

⁸¹ On the potential for bias in qualitative behavioral research and the methodological tools developed to avoid it, see generally Philip M. Podsakoff et al., *Common Method Biases in Behavioral Research: A Critical Review of the Literature and Recommended Remedies*, 88 J. APPLIED PSYCHOL. 879 (2003). Modern qualitative research in marketing is aware of these issues, and that awareness is reflected in reported results. See, e.g., Punj & Hillyer, *supra* note 60, at 128 (describing statistical tests for conceptual validity applied to the authors’ study, with results leading to qualifications of the study’s conclusions).

⁸² AAKER, *supra* note 26, at 1-7.

⁸³ See generally Randle D. Raggio & Robert P. Leone, Producing a Measure of Brand Equity by Decomposing Brand-Benefit Beliefs into Brand and Attribute Sources (Mar. 6, 2006) (unpublished manuscript), available at <http://ssrn.com/abstract=889566> (noting P&G’s use of Keller’s framework in its global equity tracking system, and proposing a streamlined system for capturing strongly correlated data at lower cost).

⁸⁴ See, e.g., Joel S. Dubow & Nancy M Childs, *New Coke, Mixture Perception, and the Flavor Balance Hypothesis*, 43 J. BUS. RES. 147, 153 (1998) (“Although negative research results are normally disappointing, they remain an important element in the epistemology of marketing. Just because a hypothesis has not been proven, or even tested, does not mean that marketers will not act on it.”).

behavioral economics, some of which is reviewed in the notes of this Part and the text and notes of the next Part. But perhaps the best response for the purposes of this Article is the one offered by Professor Mark McKenna in his review of the marketing literature with respect to brand extensions, to wit: This literature is “the best available evidence regarding the empirically-oriented claims offered in support of modern trademark protection.”⁸⁵ To the extent that the search-costs model makes positive claims about the way consumers actually behave in the marketplace, testing those claims against the available data must be considered preferable to simply assuming the claims to be empirically true, provided that the data’s limitations are kept in mind.

One final (and crucial) methodological critique that could be leveled generally against the qualitative models of brand equity and specifically against the studies, described in Part I.B.3 above, that attempt to quantify the economic value of each psychological construct in those models, is that such studies are useful only to the extent that the constructs that they purport to investigate are informative and well-defined with respect to the data on which they rely and the phenomena they purport to describe. Unfortunately, it does not take much reflection to arrive at the conclusion that these constructs are necessarily confounded. Someone who has associations with a brand, or is loyal to it, or has a sense of its quality, is clearly aware of the brand.⁸⁶ Similar overlap can be expected among several of these elements however they might be formulated, making the task of untangling their separate contributions to economic value difficult.

One possible response to this critique is to follow Professor Kevin Lane Keller in viewing the qualitative, psychology-based brand equity constructs as cumulative rather than distinct, each building sequentially on the others.⁸⁷ For example, one can imagine that a consumer would have some awareness of a brand without being able to articulate any objective or subjective attributes of the brand, or that one would have associations with a brand but lack sufficient experience with the brand to develop brand loyalty, though it is difficult to imagine the reverse in either case. With this understanding, there remain at least two reasons to value the findings of the studies that attempt to measure the relative

⁸⁵ McKenna, *supra* note 80, at 46.

⁸⁶ Indeed, in one of the studies in question the authors condition their coding of a survey respondent as “aware” of a brand on the respondent’s ability to provide subjective attribute judgments about the brand. Srinivasan et al., *supra* note 42, at 1444. In another, the authors supplement their construct of “brand image”—conceived of as the strength and positivity of desirable subjective, emotional, attitudinal, or otherwise intangible qualities represented by a brand, and thus as a close relative of brand associations—by including in it survey responses regarding the brand’s familiarity. Kim et al., *supra* note 71, at 340, 349.

⁸⁷ See *supra* note 60.

contribution of each brand equity construct to the economic performance of a brand. First, rather than attempting to parse out the *independent* contributions of each brand equity construct to the economic value of a brand, perhaps these studies can best be used to provide some guidance on the *relative marginal* contributions of each construct to that value. While the studies do not appear to have been designed with this distinction in mind, their results, combined with other research, may be helpful in drawing such inferences. Second, as discussed further in the next Part, there is support to be found in other more methodologically rigorous empirical literatures for taking such lessons from the brand equity studies despite their obvious methodological flaws.

II. INFORMING, PERSUADING, AND BIASING: BRANDS IN CONSUMER DECISION-MAKING

From the discussion in the previous Part, it should be clear that the search-costs model's description of the price of a product has strong affinities to the concept of brand equity. In both cases, there is a conceptual division between the economic value of the brand (the brand premium) and the economic value of the product to which it is affixed. While the brand equity literature conceives of the brand premium as value created by producers' marketing activities, the economics literature sees it as representing information costs that have been shifted from consumers to producers, who then pass this cost through to consumers as part of the total price of the branded good.⁸⁸

The emergence of a brand premium from both models of consumer behavior might lead one to conclude that there is no serious inconsistency between the theoretically-derived descriptive claims of the search-costs model and the empirically-derived descriptive claims of the brand equity literature; they could simply be different sets of labels applied to the same phenomena. But this surface similarity masks important differences. The search-costs model posits that consumers are willing to pay a brand premium because the brand provides them with information that enables them to evaluate the product against their own preferences—information that consumers would otherwise have to search for at a cost that would exceed the amount of the premium. The marketing literature, in contrast, suggests a more complex set of motivations for the consumer's willingness to pay the brand premium.

⁸⁸ Landes & Posner, *supra* note 17, at 275-80; *see also* Tülin Erdem & Joffre Swait, *Brand Equity as a Signaling Phenomenon*, 7 J. CONSUMER PSYCHOL. 131, 132-33 (1998) (comparing the brand equity and information economics understandings of brand value).

In particular, it teaches that determinants of brand value are variable and highly dependent on commercial context: Some of a brand's economic value—and in some markets perhaps the largest contribution to its value—lies not in the information it conveys about the underlying product, but in the consumer's psychological responses to the brand itself. This Part draws out this distinction by reference to empirical research bearing on each of the elements of brand equity described in the previous Part.

A. *Informing and Persuading: Brand Associations, Perceived Quality, and Subjective vs. Objective Consumer Beliefs*

Certainly, trademarks can and do provide consumers with information about the products and services to which they are affixed. The brand equity construct of brand associations includes both subjective and objective product features—the latter sometimes referred to as product attribute associations. With respect to such objective associations, there would again appear to be no conflict whatsoever between the brand equity literature and the search-costs model. While brand equity research holds that consumers will associate a brand with certain information about the associated product's qualities, the search-costs model holds that this association is the essence of the brand's function.

Of course, the marketing literature also makes clear that objective product attributes are not the only types of brand associations that contribute to brand equity. Subjective, emotional, and abstract conceptual associations may also play an important role. The distinction between these two types of associations has traditionally been the focus of most disagreements over public policy regarding the creation and maintenance of brands, but as will be shown, these disagreements do not bear on the descriptive accuracy of the dominant model of brands in legal thought.

1. Brand Associations: Persuasive Advertising and Subjective Attributes

The fact that subjective associations can influence purchase decisions has long been a subject of academic interest. For decades at least, commentators have decried “persuasive” (as contrasted with “informative”) advertising: advertising that shapes rather than responds to consumer preferences by conjuring up emotionally charged and objectively unfalsifiable impressions or “images” associated with the

brand. These images, it is argued, cause consumers to base purchase decisions on “spurious” or objectively baseless differentiations between advertised and unadvertised products, allowing the advertiser to charge supra-competitive prices for its products (i.e., prices higher than the objective qualities of the product would warrant) and thereby to cause a net loss of social welfare.⁸⁹ This understanding of persuasive advertising suggests that the brand premium does not represent the value of information conveyed by the trademark as the search-costs model posits, but rather that it represents a mere transfer of wealth from consumers to producers who provide nothing of value in return. In other words, there is an argument to be made that where it is generated by persuasive—as opposed to informative—advertising, the brand premium is a form of economic rent, and that expenditures on such advertising should accordingly be classified as rent-seeking.⁹⁰

Economists in the Chicago School have formulated two responses to this argument, both of which can be summarized by the Latin aphorism, *de gustibus non est disputandum*. As explained by Professors George Stigler and Gary Becker in an article that takes this maxim as its title, the phrase is susceptible of two interpretations.⁹¹ One interpretation—the one championed by Stigler and Becker—is that all people have identical and unchanging tastes.⁹² They deploy this

⁸⁹ For examples of such arguments in the legal academic literature, see, Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165, 1168-75 (1948); Lunney, *supra* note 21, at 420 n.248 (citing Brown, *supra*). For a recent review of such arguments in the legal and economics literatures, see Dillbary, *supra* note 24, at 610-12. Cf. William S. Comanor & Thomas A. Wilson, *The Effect of Advertising on Competition: A Survey*, 17 J. ECON. LIT. 453 (1979) (reviewing research on the effects of advertising on competition).

⁹⁰ See, e.g., Lunney, *supra* note 21, at 437 (“When we move beyond narrowly tailored protection for marks serving an important informational role . . . protection renders direct competition both more expensive and more difficult, [and therefore] it will tend to increase the market power, prices, and rents associated with popular brands. The inefficiencies associated with such protection will increase correspondingly, as deadweight costs and rent-seeking are directly proportional to the market power and rents available.”).

⁹¹ George J. Stigler & Gary S. Becker, *De Gustibus Non Est Disputandum*, 67 AM. ECON. REV. 76, 76 (1977), reprinted in BECKER, *supra* note 24, at 24.

⁹² In some iterations of this idea, advertising becomes a factor, along with the underlying advertised good and stocks of “personal capital,” to household production of abstract “commodities” that are the ultimate objects of choice. *Id.*; see also Beebe, *supra* note 25, at 2054-55 (critiquing this view as applied to trademarks). In other models, persuasive advertisements (or more often the images they create) are separate and complementary “products” vis-à-vis the goods advertised—products for which consumers may have distinct positive or negative preferences. See, e.g., Gary S. Becker & Kevin M. Murphy, *A Simple Theory of Advertising as a Good or Bad*, 108 Q. J. ECON. 941 (1993), reprinted in BECKER, *supra* note 24, at 203 (developing a mathematical model of the welfare economics of advertising which treats advertisements as separate and complementary “products” in utility functions); Dillbary, *supra* note 24 (arguing, with a supporting mathematical model, that what appear to be irrational “snobbish” preferences for status goods are better understood as rational preferences for a combination of the underlying physical good and the separate complementary goods represented

interpretation as an assumption for purposes of constructing mathematical models of behavior that, whatever their usefulness,⁹³ are not particularly relevant to the present discussion, largely because they reflect the normative assumptions of the other, more traditional interpretation of the *de gustibus* maxim.⁹⁴

That traditional interpretation is a standard analytical tool of welfare economics: the use of subjective individual preferences as the measure of utility. As Stigler and Becker put it in characterizing this view, “desires themselves are *data*.”⁹⁵ Thus, if a consumer harbors a sincere preference for goods associated in his mind with subjective images that a brand owner has cultivated through advertising and other marketing techniques, and is willing to pay a premium for such goods, then the image (however generated) is a legitimate component of the brand’s economic value.⁹⁶ Moreover, it is irrelevant to this analysis *why* the individual harbors such a subjective preference—even if he is in the extreme minority, or has what one might consider poor taste, or has been persuaded by others to hold an idiosyncratic preference.

In short, this approach responds to the possibility of uninformative advertising influencing consumer choice not as a challenge to the descriptive accuracy of the search-costs model (and thus not as a critique of its conclusion that trademarks increase aggregate social welfare), but rather as a subject of purely normative interest. The normative position of the welfare economist in this debate is that of the classical liberal or the modern libertarian: No one (and especially not the state) has a better claim to judge what is in the consumer’s best

by the information value of the trademark and the intangible images associated with that trademark); Economides, *supra* note 17, at 535.

⁹³ See generally Tyler Cowen, *Are All Tastes Constant And Identical? A Critique of Stigler and Becker*, 11 J. ECON. BEHAV. & ORG. 127 (1989) (critiquing Stigler & Becker’s models).

⁹⁴ See Gary S. Becker, *Preferences and Values*, in BECKER, *supra* note 24, at 3-4 (“This book retains the assumption that individuals behave so as to maximize utility while extending the definition of individual preferences to include personal habits and addictions, . . . advertising, . . . and other neglected behavior.”); *id.* at 6 (“[Stigler & Becker’s] assumption that extended preferences are stable was intended not as a philosophical or methodological ‘law,’ but as a productive way to analyze and explain behavior.”).

⁹⁵ Stigler & Becker, *supra* note 91, at 76.

⁹⁶ Economides, *supra* note 17, at 535 (“I believe that perception advertising provides consumers with products (mental images) that they value, and which would have been scarce in its absence. It is not a direct waste. Some resources are wasted, however, in the effort to tie in the desired image with the advertised product.”). This is in keeping with most modern welfare economics analysis, which disavows any value judgments about how individuals derive subjective utility. See, e.g., Kaplow & Shavell, *supra* note 29, at 979-85 (defining utility as a measure of well-being that “incorporates in a positive way everything that an individual might value—goods and services that the individual can consume, social and environmental amenities, personally held notions of fulfillment, sympathetic feelings for others, and so forth . . . [and] reflects in a negative way harms to his or her person and property, costs and inconveniences, and anything else that the individual might find distasteful,” explicitly accounting for individuals’ subjective tastes).

interest than the consumer himself, regardless of how he comes to understand that interest.⁹⁷ The competing normative position—which sees the autonomous consumer as a fiction and the government as unavoidably linked with the market⁹⁸—is tarred with the brush of paternalism.⁹⁹

The argument of this Article does not require choosing one of these irreconcilable normative positions,¹⁰⁰ because the brand equity literature and the search-costs model are on the same side of the debate. Both conceive of subjective images, like objective product features, as bona fide preferences of the consumer that represent legitimate sources of positive economic value. As discussed above, the brand equity construct of brand associations can be divided up into subcategories, including product attributes (information about the objective qualities of the product) and non-product attributes (including consumers' mental images about subjective qualities of the product, such as value, prestige, personality, etc.).¹⁰¹ These latter associations are considered an

⁹⁷ Kaplow & Shavell, *supra* note 29, at 1339-50 (arguing against most policies that would purport to substitute the preferences of an analyst or policymaker for the subjective preferences of an individual, even when the individual's preferences are based on incomplete information or are objectionable in some way). *But see id.* at 1330-34 (recognizing some instances in which policy or legal intervention may be necessary to adjust subjective preferences, for example where those preferences are based on incomplete information or cognitive limitations).

⁹⁸ JOHN KENNETH GALBRAITH, *THE AFFLUENT SOCIETY* 127-28 (Mariner Books 1998) (1958) (“[T]he institutions of modern advertising and salesmanship . . . cannot be reconciled with the notion of independently determined desires for their central function is to create desires—to bring into being wants that previously did not exist [O]utlays for the manufacturing of demand for the product . . . must be integrated with the theory of consumer demand. They are too big to be ignored. But such integration means recognizing that wants are dependent on production. It accords to the producer the function both of making the goods and of making the desires for them.”). *See generally* JOHN KENNETH GALBRAITH, *THE NEW INDUSTRIAL STATE* (1967) (arguing that in the modern economy powerful firms, organized labor, and government are of necessity both partners and competitors in the “planning” of economic activity, including consumer demand).

⁹⁹ As Professor Ralph Brown put it with characteristic wit and irony over sixty years ago:

If, as is undeniably the case, consumers will pay more for an advertised brand than for its unheralded duplicate, then consumers must get more satisfaction out of the advertised brand. The nature of the satisfaction is of concern only to the moralist. Though this argument can easily be pushed to absurdity—suppose it was to the interest of the advertisers to consume half the national product in persuasion?—it seems plausible if it is based on the dogma of consumer autonomy. Then anyone who questions the untrammelled use of influence by the seller and its uncoerced acceptance by the buyer is at best a Puritan, at worst a Fascist.

Brown, *supra* note 89, at 1181; *see also* Lemley, *supra* note 24, at 1693 (“My preference for Diet Coke over Diet Pepsi or any other cola drink may be an irrational one, induced by childhood memories of teaching the world to sing or some similar promotional effort. But in a free market economy, perhaps the choice should be mine to make, for good or ill.”).

¹⁰⁰ *Cf.* Douglas A. Kysar, *The Expectations of Consumers*, 103 COLUM. L. REV. 1700, 1756 (2003) (“[B]ecause Becker and Stigler’s model is essentially nonfalsifiable, sympathizers of the Galbraithian viewpoint are unlikely to find it persuasive.”).

¹⁰¹ *See supra* notes 56-60 and accompanying text.

important contributor to brand equity, and the brand equity literature has been at pains to analyze them empirically—without ever casting doubt on their relevance to consumer decision-making or the appropriateness of that relevance. This normative agreement is fortuitous insofar as it allows for direct comparison of the empirically oriented claims of the search-costs model and the brand equity literature.

2. Perceived Quality: Objective Attributes, Subjective Beliefs

Moving from the brand equity element of brand associations to the element of perceived quality, the brand equity literature and the search-costs model again appear to be largely coherent. Indeed, perceived quality is largely conceptualized as a subset or derivative of consumer brand associations. There is a qualification, however: The brand equity construct of *perceived* quality explicitly contemplates that consumers' subjective assessments of the quality of a branded product may deviate from available and legitimate *objective* measures of the product's quality.¹⁰² This qualification could be understood as posing a challenge to the search-costs model. After all, a trademark cannot fairly be said to be lowering information costs in circumstances where the information it conveys is inaccurate,¹⁰³ and a disparity between consumers' subjective interpretation of a mark's quality message and the objective quality of the product to which the mark is affixed can be understood as precisely such a circumstance.¹⁰⁴

This is a somewhat different challenge to the search-costs model than the challenge posed by persuasive advertising. With purely subjective images, the question whether a consumer's preference for such images is entitled to respect is not susceptible to empirical analysis. Rather, the only relevant question is a purely normative one: whether the consumer's subjective preferences should be accepted or whether someone else's (also subjective) preferences should be substituted therefor.¹⁰⁵ With respect to perceived quality (and, for that matter, any other product attribute for which a consumer's subjective evaluation may diverge from an available objective measure), the situation is somewhat different. In such a case, the disparity between a

¹⁰² See *supra* notes 52-55 and accompanying text.

¹⁰³ Ellen R. Jordan & Paul H. Rubin, *An Economic Analysis of the Law of False Advertising*, 8 J. LEG. STUD. 527, 532 (1979) ("If consumers are misled by advertising and choose a product because of a falsehood, they have suffered an injury and resources have been misallocated.").

¹⁰⁴ See Erdem & Swait, *supra* note 88, at 139 & n.2.

¹⁰⁵ See *supra* notes 97-99 and accompanying text. "Someone else" here might be understood to include the consumer himself as observed at a time prior to exposure to persuasive content, a hypothetical reasonable person, or a policymaker.

subjective measure and an objective one demands justification from a model that derives its calculations of economic value from the subjective rather than the objective measure.

To illustrate this distinction with an example, imagine that I have a subjective preference for low-fat foods, and am willing to pay a premium for them over higher-fat alternatives. I might routinely buy a particular brand of snack food—for example, LIGHTBITES—because advertisements for LIGHTBITES as well as the name itself lead me to believe that products bearing this mark have a low fat content. Now imagine that, in fact, the fat content of the product in question is much higher than its advertisements led me to believe—or that it becomes so over time due to a change in manufacturing. The difference between the disparities under discussion in this subpart and the purely subjective preferences discussed in the last subpart is analogous to the difference between my mistaken belief that LIGHTBITES has a low fat content and the basic fact that I prefer low-fat foods. The preference itself, so long as it is sincerely held, is not susceptible to empirical falsification. The belief that the product in question satisfies my preference is.

Thus, brand equity's tolerance of a divergence between subjective beliefs about a product's qualities and the product's actual qualities poses a challenge to the search-costs model that cannot be answered with the normative assumption that subjective preference-satisfaction is the best measure of utility. If I pay a premium for a product that I believe will satisfy my preferences when in fact it does not, and my preferences are the most appropriate measure of utility, then at least from an objective standpoint I have not received the economic benefit that would allow one to conclude, as in the soft-drink example described in Part I, that my purchase of the product increases aggregate economic welfare. Depending on the degree of the disparity between my belief about the product's objective qualities and the truth about those qualities, a single such transaction, standing alone, may still increase social welfare, it may have no net effect, or it may decrease social welfare. And depending on the prevalence of such disparities in the marketplace (and on my ability to discover and guard against them), trademark protection may promote, or may impede, aggregate economic efficiency. On this latter point, the effects of brand awareness and brand loyalty are important considerations.

B. *The Biasing Brand: Brand Awareness,
Brand Loyalty, and Subjective Responses to
Objective Data*

Brands can influence our beliefs, preferences, and behavior even in spite of ourselves. Our subjective beliefs about objectively knowable

things are often shaped by irrelevant facts and are often stubbornly resistant to relevant ones. Key to this dynamic is the phenomenon of familiarity—the simple fact that one has encountered something before. As discussed below, we tend to respond to a sense of familiarity differently than we respond to other types of information, and these differences bear on the types of behaviors that the trademark system purports to regulate. Put simply, consumers are more likely to choose, and less likely to stop choosing, a brand with which they are familiar as compared to a brand with which they are unfamiliar.

Two features of this fundamental psychological preference for the familiar are of particular relevance to the current discussion. First, a sense of familiarity need not be supported by any other information about the familiar brand or the product underlying it to influence choice—to the contrary, a sense of familiarity can actually lead individuals to form otherwise groundless beliefs concerning objective product attributes of a familiar brand. Second, this type of familiarity-driven response can often be resistant to new information about the brand, even where that information contradicts previously held beliefs. The first of these features of familiarity-based preferences is related to the brand equity construct of brand awareness, while the second is related to brand loyalty.

1. Brand Awareness and the Power of Exposure

Brand awareness contributes to brand equity precisely because consumers tend to prefer the familiar.¹⁰⁶ This preference holds even absent other information about the underlying products and even if the familiar brand is considerably more expensive than alternatives.¹⁰⁷ “Especially for low-involvement products like soap, chewing gum, paper towels, sugar, disposable pens, or facial tissues, familiarity can sometimes drive the buying decision. In the absence of motivation to engage in attribute evaluation, familiarity may be enough.”¹⁰⁸ The role

¹⁰⁶ AAKER, *supra* note 26, at 64.

¹⁰⁷ See *infra* notes 108-10 and sources cited therein; see also Wayne D. Hoyer & Steven P. Brown, *Effects of Brand Awareness on Choice for a Common, Repeat-Purchase Product*, 17 J. CONSUMER RES. 141, 142-45 (1990) (demonstrating experimentally in the peanut butter product category that consumers who were aware of a brand without ever having purchased it overwhelmingly chose the familiar brand over unfamiliar ones); Emma K. Macdonald & Byron M. Sharp, *Brand Awareness Effects on Consumer Decisionmaking for a Common, Repeat Purchase Product: A Replication*, 48 J. BUS. RES. 5 (2000) (replicating the Hoyer & Brown result with respect to familiar-brand preference in the soft drink category, while also extending the finding to experienced consumers and finding that the preference for the familiar over the unfamiliar is only moderately sensitive to price).

¹⁰⁸ *Id.* at 64-65.

of familiarity in building positive affective responses (i.e., “liking”) and structuring choice tasks is well-documented not only in consumer psychology literature,¹⁰⁹ but in cognitive psychology studies as well.¹¹⁰ Importantly, these effects of familiarity and liking can be cultivated by mere repetition of a brand name,¹¹¹ such as the repetition of the

¹⁰⁹ See, e.g., Prakash Nedungadi, *Recall and Consumer Consideration Sets: Influencing Choice Without Altering Brand Evaluations*, 17 J. CONSUMER RES. 263 (1990) (demonstrating that priming consumers with a brand prior to a choice task can increase the probability that the primed brand will be selected, even without influencing the consumer’s level of liking the brand); see also Tim Ambler et al., *Saliency and Choice: Neural Correlates of Shopping Decisions*, 21 PSYCHOL. & MARKETING 247, 253-54 (2004) (discussing experimental results showing significant correlation between brand familiarity and selection of the brand, and quicker decision-making when faced with a familiar brand than with unfamiliar brands); Arch G. Woodside & Elizabeth J. Wilson, *Effects of Consumer Awareness of Brand Advertising on Preference*, 25 J. ADVERTISING RES. 41 (1985) (finding significant differences in purchase likelihood among brands depending on how quickly the consumer was able to recall them when given a product category).

¹¹⁰ Some of the discussion herein recapitulates the author’s prior research on the implications of familiarity, recognition, and choosing by liking for trademark law. Sheff, *supra* note 77, at 358-65. That earlier work attempted to give a descriptive account of existing doctrine rather than the normative analysis of its theoretical foundations set forth in the present Article. Other legal commentators have begun to take notice of these features of consumer psychology as well. See, e.g., Mark A. Lemley & Mark P. McKenna, *Owning Mark(et)s*, 109 MICH. L. REV. 137, 160-65 (2010).

On the role of recognition and familiarity in preference formation, see GERD GIGERENZER, PETER M. TODD & THE ABC RESEARCH GROUP, *SIMPLE HEURISTICS THAT MAKE US SMART* 41 (1999) (noting that test subjects tend to prefer recognized options to unrecognized ones in choice tasks); Shane Frederick, *Automated Choice Heuristics*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* at 548, 550-53 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002) [hereinafter *PSYCHOLOGY OF INTUITIVE JUDGMENT*] (noting that increasing test subjects’ familiarity with a stimulus increases their positive affective response to the stimulus); Daniel G. Goldstein & Gerd Gigerenzer, *Models of Ecological Rationality: The Recognition Heuristic*, 109 PSYCHOL. REV. 75 (2002) (providing a theoretical explanation for the preference for recognized items). *But cf.* Benjamin E. Hilbig, Edgar Erdfelder & Rüdiger F. Pohl, *One-Reason Decision Making Unveiled: A Measurement Model of the Recognition Heuristic*, 36 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY & COGNITION 123 (2010) (arguing that recognition alone is only likely to serve as the exclusive determinant of choice where the decisionmaker has no further information about the recognized stimulus, and that where further knowledge is present it is likely to be evaluated as part of the choice task).

On choosing by liking, see, for example, Frederick, *supra*, at 550 (describing the use of an affect heuristic—an intuitive sense of liking or disliking—as a means of generating choices without deliberate reasoning). See generally Paul Slovic et al., *The Affect Heuristic*, in *PSYCHOLOGY OF INTUITIVE JUDGMENT*, *supra*, at 397 (describing the affect heuristic and the empirical data from which it is inferred); R.B. Zajonc, *Feeling and Thinking: Preferences Need No Inferences*, 35 AM. PSYCHOLOGIST 151, 155 (1980) (“Quite often ‘I decided in favor of X’ is no more than ‘I liked X.’ . . . We buy the cars we ‘like,’ choose the jobs and houses that we find ‘attractive,’ and then justify those choices by various reasons . . .”).

¹¹¹ Robert F. Bornstein, *Exposure and Affect: Overview and Meta-Analysis of Research, 1968–1987*, 106 PSYCHOL. BULL. 265 (1989) (reviewing studies that document the “mere exposure effect”); Nedungadi, *supra* note 109; Slovic et al., *supra* note 110, at 400 (“[W]hen objects are presented to an individual repeatedly, the ‘mere exposure’ is capable of creating a positive attitude or preference for these objects.”). Importantly, marketing researchers have shown that brand repetition can increase choice probability not only for new brands about which the consumer lacks other information, but also for known brands in mature product categories,

“HeadOn” brand name in the Miralus ad discussed in the introduction to this Article.

Moreover, brand awareness affects more than mere preference: A simple sense of familiarity can generate subjective consumer beliefs about objective facts that have no logical relationship to the sense of familiarity. For example, a sense of familiarity—even an *unconscious* sense of familiarity based on nothing more than incidental exposure to a brand name—often gives rise to an affective (i.e., emotional) sense of liking.¹¹² This positive effect can cause consumers to perceive a familiar brand as more beneficial, and less risky, than unfamiliar alternatives.¹¹³ Repetition of exposure—such as through repetitive but uninformative advertising—enhances this “mere exposure effect.”¹¹⁴ Familiarity deriving from exposure to advertisements can cause consumers to seek out, or at least consider, the familiar brand as an option when shopping in the brand’s product category—making ultimate purchase of the brand much more likely.¹¹⁵ Perhaps most importantly, consumers tend to believe that products bearing familiar brands are superior to unbranded equivalents in overall quality and other relevant objective product attributes, particularly attributes that are not readily apparent from pre-purchase inspection.¹¹⁶ In short,

primarily by increasing the likelihood that the brand will generate top-of-mind awareness. See generally Giles D’Souza & Ram C. Rao, *Can Repeating an Advertisement More Frequently than the Competition Affect Brand Preference in a Mature Market?*, 59 J. MARKETING 32 (1995).

I have provided a fuller exposition of research documenting the “mere exposure effect”—the ability of mere repetition to increase positive affect and subjective judgments of credibility—in the context of political campaigns. See Jeremy N. Sheff, *The Myth of the Level Playing Field: Knowledge, Affect, and Repetition in Public Debate*, 75 MO. L. REV. 143, 157-61 (2010).

¹¹² See generally Jochim Hansen & Michaela Wänke, *Liking What’s Familiar: The Importance of Unconscious Familiarity in the Mere-Exposure Effect*, 27 SOC. COGNITION 161 (2009) (demonstrating that mere exposure to brand names increases liking for the names independently of conscious recognition of the exposure); Chris Janiszewski, *Preattentive Mere Exposure Effects*, 20 J. CONSUMER RES. 376 (1993) (same). But see Aric Rindfleisch & J. Jeffrey Inman, *Explaining the Familiarity-Liking Relationship: Mere Exposure, Information Availability, or Social Desirability?*, 9 MARKETING LETTERS 5 (1998) (arguing, based on an experiment that employed some admittedly transparent manipulations of test subjects, that mere exposure is less likely to lead to the familiarity-liking relationship than other mechanisms, such as social conformity pressures).

¹¹³ See Slovic et al., *supra* note 110, at 400-01, 410-13.

¹¹⁴ See *supra* note 111 and sources cited therein.

¹¹⁵ See generally Stewart Shapiro, Deborah J. MacInnis & Susan E. Heckler, *The Effects of Incidental Ad Exposure on the Formation of Consideration Sets*, 24 J. CONSUMER RES. 94 (1997). This effect obtains even if the brand was unknown prior to exposure, though the effect is larger for exposure that “primes” consumers with already familiar brands. See generally Sarah L. Coates, Laurie T. Butler & Dianne C. Berry, *Implicit Memory and Consumer Choice: The Mediating Role of Brand Familiarity*, 20 APPLIED COGNITIVE PSYCHOL. 1101 (2006).

¹¹⁶ Srinii S. Srinivasan & Brian D. Till, *Evaluation of Search, Experience and Credence Attributes: Role of Brand Name and Product Trial*, 11 J. PROD. & BRAND MGMT. 417, 422-24 (2002) (finding that consumers believe that national-label brands of fruit cocktail and facial

consumers respond to marketing efforts that make no product attribute claims as if they *had* made such claims.¹¹⁷

Unlike the mere sense of familiarity that generates them, or even the subjective images underlying the debate over persuasive advertising, these types of subjective beliefs about objectively measurable product attributes are unquestionably relevant to consumer choice tasks. This feature of consumer psychology helps explain why uninformative but repetitive marketing tactics such as the HeadOn advertisement can generate a return for the producers who deploy them. By doing nothing more than repeating its brand name, a producer can invoke the machinery of consumer psychology to implant product attribute beliefs that the producer never explicitly claims. These beliefs can lead the consumer to seek out, to prefer, to purchase, and even to pay a premium for the producer's products.

As opposed to preferences for specific objective product features or for subjective product images, preferences for familiar brands over unfamiliar ones require some explanation in order to be incorporated into the search-costs model, if indeed they can be incorporated at all. Two approaches to this problem are extant in the literature. One argues that preferences for the familiar are rational approaches to the problem of drawing inferences about quality; the other argues that such preferences are evidence of boundedly rational consumer decision-making. The former approach, while theoretically elegant and consistent with the neoclassical roots of the search-costs model, turns out not to pass empirical scrutiny. The latter approach, while more consistent with observed consumer behavior, undermines the categorical theoretical conclusions of the search-costs model, and requires that the model's conclusions regarding the welfare effects of trademark protection be significantly qualified.

a. The Rational Actor Model: Familiarity as Quality Signal

The fact that a brand is familiar to consumers because it advertises, some argue, *is* rationally related to the brand's quality, by a certain logic. Because advertising is expensive, the fact that a firm advertises is thought to signal to consumers that the firm can afford the expense, which in turn signals both that the firm believes that its product will

tissues are tastier and softer, respectively, than generic counterparts prior to actually trying either product).

¹¹⁷ Another, related strain of research demonstrates that consumers are likely to infer product attribute claims from unrelated, or even uninformative, claims made in advertisements. See Katya Assaf, *Magical Thinking in Trademark Law 10-12* (May 13, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1606907> (reviewing the literature).

satisfy consumers enough to induce repeat purchases and that the firm is efficient enough to recover its sunk advertising costs from profits on such repeat purchases.¹¹⁸ In short, advertising—even if it provides no direct information—is argued to act as a kind of satisfaction guarantee. This “money-burning” theory of advertising posits that any conspicuous and unrecoverable expenditure by a producer can be understood as signaling high quality to consumers.¹¹⁹ While this understanding of advertising has been qualified in important ways since its first formulation¹²⁰ and has been hypothesized to result at least in part from different (albeit related) mechanisms from the chain of reasoning described herein,¹²¹ signaling theory in general appears to offer the only argument that purely uninformative, non-persuasive advertising could be consistent with the search-costs model.

Even some Chicago School economists find the claim that uninformative advertising signals product quality hard to square with their experience.¹²² More generally, empirical support for the boldest claim of signaling theory—the prediction that higher advertising expenditures will correlate with objectively higher quality—is, even in

¹¹⁸ Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615, 629-33 (1981); Phillip Nelson, *Advertising as Information*, 82 J. POL. ECON. 729, 731-34 (1974). See generally Paul Milgrom & John Roberts, *Price and Advertising Signals of Product Quality*, 94 J. POL. ECON. 796 (1986) (developing a mathematical model to describe the quality-signaling functions of both prices and advertising levels); Richard E. Kihlstrom & Michael H. Riordan, *Advertising as a Signal*, 92 J. POL. ECON. 427 (1984) (same, for advertising alone); see also Lemley, *supra* note 24, at 1690 & n.14 (acknowledging the signaling literature).

¹¹⁹ Milgrom & Roberts, *supra* note 118, at 799-800 (noting that the signaling analysis of advertising “applies to any observable expenditure that does not directly provide information or otherwise improve demand or costs. A shop in a high-rent location or highly visible corporate social responsibility activities are obvious examples.”).

¹²⁰ See, e.g., Kyle Bagwell, *The Economic Analysis of Advertising*, in 3 HANDBOOK OF INDUS. ORG. 1701, 1791 (Mark Armstrong & Robert H. Porter eds., 2007) (“[N]o systematic correlation between advertising and quality is expected, since the relationship reflects market circumstances and the simultaneous use of price and advertising as signals of quality.”); Milgrom & Roberts, *supra* note 118, at 814-20 (noting the dependence of advertising’s usefulness as a signal on other factors such as cost structure and price signals); Hao Zhao, *Raising Awareness and Signaling Quality to Uninformed Consumers: A Price-Advertising Model*, 19 MARKETING SCI. 390 (2000) (noting that pure money-burning advertising is not necessarily rational or welfare-increasing where advertising not only conveys indirect signals but also conveys direct information).

¹²¹ See Bagwell, *supra* note 120, at 1779-85 (describing other potential signaling functions of advertising such as reminding prior consumers of their positive experiences with the brand and allowing producers to target their outreach to consumers expected to react favorably to the producers’ products).

¹²² See, e.g., Becker & Murphy, *supra* note 92, at 944 (“We do not believe that the intensive advertising for Miller beer, Chevrolet cars, or Marlboro cigarettes, to take a few examples, is signaling exceptionally high product quality Moreover, the pure signaling interpretation implies that companies should advertise how much they spend on advertising, yet almost no companies do that.”). But see Klein & Leffler, *supra* note 118, at 631 (arguing that advertisements pointing out that the firm has advertised in the past—“as seen on TV”-type messages—allow consumers to infer the magnitude of cumulative advertising expenses).

the view of one prominent signaling theorist, lacking.¹²³ Rather, correlations between advertising and quality are found only in particular limited circumstances—such as where the advertising in question conveys direct product information such as objective quality rankings,¹²⁴ or where the product category is mature enough that consumers can be expected to already have significant independent information on product attributes, and production costs can be expected to be relatively low.¹²⁵ Obviously neither of these circumstances addresses the soundness of signaling theory as a categorical description of purely uninformative advertising directed at uncertain consumers.

Despite the absence of any systematic correlation between advertising levels and product quality, there is empirical evidence to support one of signaling theory's subsidiary claims. As one would expect given the psychological effects of familiarity, consumers *perceive* relatively high advertising costs as indicative of relatively high quality, at least up to a point.¹²⁶ In other words, the search for empirical validation of signaling theory's boldest claim instead establishes facts key to this Article's inquiry into consumer decision-making: first, that the preference for the familiar not only can, but *does* generate a divergence between subjective and objective quality measures, and second, that this divergence is not consistent in all commercial

¹²³ Compare Bagwell, *supra* note 120, at 1774-91 (reviewing and elaborating on the theoretical literature in signaling, including the author's own contributions), *with id.* at 1746-48 (reviewing the empirical literature on correlations between advertising and quality and concluding that there is no "systematic positive relationship between advertising and product quality"). See also, e.g., Herbert J. Rotfeld & Kim B. Rotzoll, *Advertising and Product Quality: Are Heavily Advertised Products Better?*, 10 J. CONSUMER AFFAIRS 33, 46 (1976) ("Do heavily advertised products tend to be of higher quality? On the basis of this study the answer would have to be a qualified 'possibly.'"); Gerard J. Tellis & Claes Fornell, *The Relationship Between Advertising and Product Quality over the Product Life Cycle: A Contingency Theory*, 25 J. MARKETING RES. 64, 64 (1988) (noting the inconsistency of the empirical evidence on the correlation of advertising levels and quality).

¹²⁴ See generally, e.g., Erdem & Swait, *supra* note 88 (proposing signaling theory as an explanation of brand equity, through a model that views effective "signals" as dependent on clear and credible product claims); cf. Robert B. Archibald, Clyde A. Haulman & Carlisle E. Moody, Jr., *Quality, Price, Advertising, and Published Quality Ratings*, 9 J. CONSUMER RES. 351-52 (1983) (finding a correlation between advertising levels and objective quality in the running shoe category but only after objective quality rankings are published and "are used extensively in advertising and in some cases on packaging, [so that] there is an incentive for advertisers to align their advertising strategies with the ratings").

¹²⁵ See generally, e.g., Tellis & Fornell, *supra* note 123 (finding a higher correlation between advertising levels and quality at later stages of the product life cycle).

¹²⁶ See generally, e.g., Amna Kirmani, *The Effect of Perceived Advertising Costs on Brand Perceptions*, 17 J. CONSUMER RES. 160 (1990); see also Bagwell, *supra* note 120, at 1747-48 (summarizing similar research by Kirmani and others); cf. *supra* note 110 and sources cited therein.

contexts.¹²⁷ Moreover, this evidence suggests an alternative explanation for consumers' tendency to ascribe superior objective attributes to familiar brands: Consumers do not approach decision tasks the way the search-costs model assumes they do.

b. The Behavioralist Model: Brand Awareness as Bounded Rationality

Rather than reflecting a rational evaluation of objective information, consumer decision-making bears all the hallmarks of bounded rationality. That is, it reflects our reliance on heuristics, or intuitive cognitive short-cuts, that cause decisions to deviate in predictable ways from decisions guided by fully rational—but more cognitively taxing—thought processes.¹²⁸ Cognitive psychologists have cited the mere exposure effect and the related preference for the familiar as among the heuristics we rely on in an effort to avoid undue cognitive effort in making decisions.¹²⁹

Brand awareness thus may be framed in terms of the behavioralist critique of the neoclassical law and economics championed by the Chicago School and reflected in the search-costs model.¹³⁰ However, the mere fact that observed decision-making depends on heuristics and

¹²⁷ Bagwell, *supra* note 120, at 1748 (“[T]he empirical research described here . . . indicates clearly that no single view of advertising is valid in all circumstances. This in itself is progress, and especially so when compared to the absolutist tone adopted in many of the initial discussions of advertising.”). Given that even a consumer perception of a correlation between advertising and quality would provide even low-quality producers an incentive to advertise, it makes sense that there would have to be limits to the effectiveness of such a signaling strategy, but it seems that the precise nature of those limits is highly context-specific.

¹²⁸ The concept of bounded rationality finds its roots in the work of Herbert A. Simon on “satisficing”—decision-making strategies that attempt to approach optimal results as closely as possible with the minimum possible cognitive effort. *See generally, e.g.*, HERBERT A. SIMON, *MODELS OF MAN* (1957); Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q. J. ECON. 99 (1955) [hereinafter Simon, *Rational Choice*]. The concept was further developed through the heuristics-and-biases research program in cognitive psychology and behavioral economics, *see generally, e.g.*, Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449 (2003), which gained currency in legal scholarship over the past two decades as a response to perceived shortcomings of the law-and-economics movement. *See generally, e.g.*, John D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630 (1999); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051 (2000).

¹²⁹ *See supra* notes 110-11 and sources cited therein; *see also* GERD GIGERENZER, *GUT FEELINGS: THE INTELLIGENCE OF THE UNCONSCIOUS* 126 (2007) (“Why do firms invest in this type of advertisement? The answer is to increase brand-name recognition, important because of consumers’ reliance on the recognition heuristic.”).

¹³⁰ For a summary of this line of critiques, *see generally* Korobkin & Ulen, *supra* note 128.

biases¹³¹ that cause it to diverge from fully rational decision-making does not necessarily imply that models that assume rational behavior (such as the search-costs model) are unreliable. As Professor Richard Epstein has forcefully argued, the assumption of rational behavior—while clearly false¹³²—may be a sufficiently close approximation of actual behavior that it can support useful and tractable models for purposes of informing policy.¹³³ And Professor Epstein's position finds some support in the cognitive psychology literature, in which the "fast-and-frugal" strain of heuristics and biases research argues that reliance on heuristics and biases is so widespread precisely because, in the words of Professor Herbert Simon,¹³⁴ it "satisfices": It provides a cognitively cheap and acceptably close approximation of more rigorous (and rational) decision-making processes.¹³⁵

Professor Oren Bar-Gill, a leading behavioralist, has acknowledged as much in responding to defenders of neoclassical law and economics: "The question is not whether individuals make mistakes. Sure they do. The question is whether these mistakes merit legal intervention."¹³⁶ This question, in turn, requires an analysis of: (1) the magnitude and direction of the discrepancies between rational behavior and actual behavior; (2) the extent to which strategic actors are able to exploit such discrepancies in welfare-reducing ways; and (3) the costs of attempting to thwart such strategic behavior through legal intervention.¹³⁷

By and large, defenders of the search-costs model do not rely on the proposition that branding-induced divergences of subjective and objective product attribute measures are in fact trivially small. Rather,

¹³¹ See generally Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3* (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982).

¹³² Richard A. Epstein, *Second-Order Rationality*, in *BEHAVIORAL PUBLIC FINANCE 355, 357* (Edward J. McCaffery & Joel Slemrod eds., 2006) ("The implicit cognitive assumptions that underlie this [neoclassical law-and-economics] model are vulnerable on the simplest and most powerful of grounds: they are false.").

¹³³ See generally *id.* Extending his position further, Professor Epstein argues that individual learning and market forces can be expected to minimize the divergence of actual behavior from assumed behavior over time and that the social costs and dubious efficacy of government intervention counsel for a strong presumption against behavioralist-economics-informed legal reforms. See generally Richard A. Epstein, *Behavioral Economics: Human Errors and Market Corrections*, 73 U. CHI. L. REV. 111 (2006); Richard A. Epstein, *The Neoclassical Economics of Consumer Contracts*, 92 MINN. L. REV. 803 (2008) [hereinafter Epstein, *Neoclassical Economics*].

¹³⁴ See generally Simon, *Rational Choice*, *supra* note 128.

¹³⁵ Gerd Gigerenzer & Daniel G. Goldstein, *Reasoning the Fast and Frugal Way: Models of Bounded Rationality*, 103 PSYCHOL. REV. 650 (1996).

¹³⁶ Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749, 749 (2008).

¹³⁷ See Bar-Gill, *supra* note 136, at 111 (describing a series of steps for determining whether "imperfect rationality" warrants government intervention in a particular market).

the model's defenders rely on the second step of the analysis described above. They posit that consumer learning will correct any such divergences in ways that would defeat attempted strategic behavior by brand owners:

[T]rademarks have a self-enforcing feature To see this, consider what happens when a brand's quality is inconsistent. Because consumers will learn that the trademark does not enable them to relate their past to future consumption experiences, the branded product will be like a good without a trademark. The trademark will not lower search costs, so consumers will be unwilling to pay more for the branded than for the unbranded good. As a result, the firm will not earn a sufficient return on its trademark promotional expenditures to justify making them. A similar argument shows that a firm with a valuable trademark would be reluctant to lower the quality of its brand because it would suffer a capital loss on its investment in the trademark.¹³⁸

It should be clear that, in this line of argument, supporters of the search-costs model are making an empirical rather than a normative claim. In response to the possibility that brands could cause consumers to believe objectively false information about product quality, the model's supporters assume additional facts. Specifically, they assume that consumers will, over time at least, respond to a divergence between subjective and objective measures of a product's objectively measurable qualities by reorienting their subjective assessments in the direction of objective reality: Subjective assessments will become more accurate with experience and learning. Indeed, the theoretical models of signaling theory all rest on similar—and similarly untested—assumptions.¹³⁹ Thus, unlike the purely normative question underlying

¹³⁸ Landes & Posner, *supra* note 17, at 270. *But see* J. Shahar Dillbary, *Trademarks as a Media for False Advertising*, 31 CARDOZO L. REV. 327, 339 (2009) ("A seller may pass-off its own product, not as someone else's, but as possessing attributes that it does not have . . . [and] consumers rarely have the means and resources to detect the fraud.").

¹³⁹ *See, e.g.*, Bagwell, *supra* note 120, at 1787 (setting forth assumptions of the author's theoretical signaling model, including that "[c]onsumers observe [price] and [advertising] but not [quality], form a belief [as to quality,] and then demand a quantity[; that a]fter any consumption experience . . . consumers observe the [actual] quality[; and that] a consumer would never knowingly purchase a low-quality product"); Klein & Leffler, *supra* note 118, at 620 ("If producers are to have an incentive to produce high quality products . . . consumers must somehow reward high quality production and punish low quality production. We assume . . . [i]f a consumer receives a product of a quality at least as high as implicitly contracted for, he will continue to purchase [from the product's seller]. On the other hand, if quality is less than contracted for, all consumers cease to purchase from the particular sampled 'cheating' firm."); Nelson, *supra* note 118, at 730-31 ("The major control that consumers have over the market for [unobservable] qualities is whether they repeat the purchase of a brand or not. This power is sufficient to authenticate any statement [by the producer concerning such qualities]." (internal citation omitted)); Milgrom & Roberts, *supra* note 118, at 798-99 ("Nelson . . . argued that, because a high-quality product is more likely to attract repeat purchases, an initial sale is, *ceteris*

the debate over persuasive advertising, the search-costs model's response to the problem of the objectively mistaken consumer is susceptible to challenge by contradictory empirical evidence.

To some extent, the assumption that consumers update their assessments of objectively measurable product attributes to conform to new data is supported by the brand equity literature, which provides some evidence for a potential collapse of brand equity if a brand owner repeatedly, consistently, and egregiously fails to maintain levels of product quality consistent with consumer expectations.¹⁴⁰ However, this acceptance is subject to an important qualification: the countervailing effects of brand loyalty. As will be seen, the assumption that consumers respond to new information that is inconsistent with their previously-held beliefs by modifying their beliefs to comport with the new information—an important component of the descriptive claims undergirding the search-costs model—is intuitively attractive, psychologically comforting, and very often wrong.

2. Brand Loyalty and the Power of Inertia

The brand equity construct of brand loyalty challenges the assumption that consumers respond to objective evidence inconsistent with their beliefs by adjusting those beliefs to comport with the new information. As Aaker explains:

In many situations it is difficult to get rid of customers—to get them to move to a competitor. You literally have to work at it The fact is that customers do not like to change; you almost have to beat some of them off with a baseball bat Changing brands requires effort, especially if the decision involves substantial investment or risk. Further, positive attitudes toward an incumbent brand are likely to develop which will not only justify but enhance prior decisions. People do not like to admit that they were wrong—it is much easier to rationalize prior decisions. In truth an enormous inertia exists in consumer choice. The familiar is comfortable and reassuring.¹⁴¹

paribus, more valuable to a high-quality producer This relationship would then provide the basis for the correlation of quality with the net benefits of signaling that is needed In this paper we offer a modeling based on the repeat sales”)

¹⁴⁰ See, e.g., Aaker, *supra* note 26, at 78-85 (documenting the destruction of the value of the Schlitz brand as a result of a series of production changes that generated results in conflict with consumer's expectations of beer quality).

¹⁴¹ *Id.* at 49.

Because of the preference for the familiar and the risk involved in abandoning a familiar brand for an unfamiliar one,¹⁴² brand loyalty tends to be rather stable. This stability can be seen in market shares: One study that followed a broad range of consumer products over a sixty-year period found that the market leader was almost never dislodged.¹⁴³ As Aaker notes, “[i]n some mature-product classes the only way to become the leading brand is to have been born that way.”¹⁴⁴

A supporter of the search-costs model might well argue that this stability is the product of rational consumer behavior in response to the problem of risky choice in an environment of incomplete information. If a rational consumer is unsure about a product’s attributes, expected utility theory—which is built on the same neoclassical economics foundation that informs the search-costs model—would predict that she will discount the value of that product in proportion to the degree of her uncertainty.¹⁴⁵ This principle of choice under conditions of uncertainty is reflected in such timeworn common-sense maxims as “a bird in the hand is worth two in the bush” and “the devil you know is better than the devil you don’t.” In keeping with this folk wisdom, expected utility theory predicts that an unfamiliar potential substitute product will have to offer steep discounts to successfully compete for consumer dollars with an equivalent or even an inferior familiar product.¹⁴⁶

¹⁴² *Id.* at 44 (“If the current system works, even if there are problems, there is always the risk that a new system will be worse. A consumer . . . may be reluctant, even when unhappy, to try unknowns.”).

¹⁴³ *Id.* at 70 & tbl.3-4 (citing Thomas S. Wurster, *The Leading Brands: 1925-1985*, in BOSTON CONSULTING GROUP, PERSPECTIVES (1987)); see also *id.* at 49 (noting that General Motors made objectively inferior cars for roughly two decades without experiencing what should have been a catastrophic loss of market share).

¹⁴⁴ *Id.*; see also Gilles Laurent, Jean-Noel Kapferer & Francoise Roussel, *The Underlying Structure of Brand Awareness Scores*, 14 *MARKETING SCI.* G170, G177 (1995) (noting the barriers that existing brands with strong brand awareness pose to establishing awareness of a new brand in the existing brands’ product category).

¹⁴⁵ For the classic exposition of the principles and tools of expected utility theory, see generally JOHN VON NEUMANN & OSKAR MORGENSTERN, *THEORY OF GAMES AND ECONOMIC BEHAVIOR* 1-45 (3d ed. 1953). For a modern summary, see Hanson & Kysar, *supra* note 128, at 640-43.

¹⁴⁶ This point can perhaps best be demonstrated with an example. Assume a consumer is accustomed to purchasing a particular brand of product for \$120 per unit, and that the closest substitute is an unfamiliar product that sells for \$100 per unit. Under certain conditions, the consumer would rationally continue to purchase the familiar product even if the unfamiliar one is objectively superior along the dimensions the consumer values. To see how this might be the case, suppose that the consumer believes that consuming the familiar product will generate \$125 in utility with certainty and that consuming the unfamiliar product has a 60% probability of generating \$150 in utility but a 40% chance of generating only \$30 in utility. Under these circumstances, purchasing the familiar product is the consumer’s best option. To see why, note that the expected value of the unfamiliar product is the probability of each outcome multiplied by the value to the consumer of that outcome, here: $(0.6 \times \$150) + (0.4 \times \$30) = \$90 + \$12 = \$102$. Thus, even though the consumer believes that it is more likely than not that the unfamiliar product is superior to the familiar product, her uncertainty in that belief would lead her to

This explanation for brand loyalty is admittedly consistent with the search-costs model—but only because both depend on the same assumptions about consumer behavior. One such assumption is that consumers approach the calculation of expected utility in conditions of uncertainty rationally, by reference to absolute values, and with a reasonable degree of accuracy. Yet another is the factual assumption discussed above,¹⁴⁷ that consumers modify their subjective beliefs to accurately reflect new information. But empirical study of human decision-making under conditions of uncertainty suggests that both of these assumptions are wrong, and they are wrong for similar reasons.

First, the assumption that most individuals approach risky choice tasks as rational and roughly accurate utility-maximizers is contradicted by empirical research. The body of research conducted under the aegis of “prospect theory” has established various predictable biases—regular departures from the rational-behavior predictions of expected utility theory—in such choice tasks.¹⁴⁸ For example, individuals’ attitudes toward risky prospects are strongly influenced by their frame of reference: In general, people are far more eager to avoid losses than they are to acquire gains,¹⁴⁹ and they evaluate risks of gain and loss not in absolute terms, but in relative terms, by reference to their current position at the time of choice.¹⁵⁰ In the consumer context, these tendencies lead consumers considering whether to switch from a

rationally calculate the net benefit to her of purchasing the unfamiliar product at only \$2 (\$102 less the \$100 purchase price), while the net benefit of purchasing the familiar product would be \$5 (\$125 less the \$120 purchase price). This will be true even if the unfamiliar product actually does have qualities that the consumer would value at \$150—that is, even if it is objectively superior to the familiar product. And note that it is also true despite the fact that the unfamiliar product is not only objectively superior to the familiar one, but is offered for sale at a significantly lower price. All else being equal, in order to induce the consumer to switch, the manufacturer of the unfamiliar product would have to price its product at no more than \$97 (\$102 - \$5), even if its product is objectively superior to its competitor’s \$120 product. Alternatively, the manufacturer of the unfamiliar product might seek to reduce the consumer’s uncertainty, for example through informative advertising, if this were a cost-effective way of altering the consumer’s expected value calculation under the circumstances.

¹⁴⁷ See *supra* notes 138-39 and accompanying text.

¹⁴⁸ An important collection of research in prospect theory, including its seminal texts and more recent applications, is CHOICES, VALUES, & FRAMES (Daniel Kahneman & Amos Tversky eds., 2000) [hereinafter CHOICES]. Again, this research owes its genesis to the insights of Herbert Simon, who pointed out the unreasonable demands expected utility theory made of the cognitive capacities of the human organism. See Simon, *Rational Choice*, *supra* note 128, at 101 (“Because of the psychological limits of the organism (particularly with respect to computational and predictive ability), actual human rationality-striving can at best be an extremely crude and simplified approximation to the kind of global rationality that is implied, for example, by game-theoretical models.”). See generally *supra* note 128 and sources cited therein.

¹⁴⁹ Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, in CHOICES, *supra* note 148, at 17, 22-23.

¹⁵⁰ See generally Ian Bateman et al., *A Test of the Theory of Reference-Dependent Preferences*, in CHOICES, *supra* note 148, at 180.

familiar brand to an unfamiliar one to underweight the prospect that the unfamiliar brand will be as good as or better than the familiar one and overweight the prospect that the unfamiliar brand will be inferior to the familiar brand.¹⁵¹ More colloquially, even if a bird in the hand were rationally worth two in the bush, the typical consumer might subjectively value it at three or four.¹⁵²

Second and most importantly, the central assumption of the search-costs model and of signaling theory—that consumers will change their subjective beliefs and preferences to accurately reflect newly learned objective facts—is not a fair description of actual consumer behavior and cognition.¹⁵³ To the contrary, across a wide range of experience (including consumer experience), individuals have been shown to do precisely the opposite: We try to interpret new evidence as being consistent with our pre-existing beliefs. Where this fails, we often discount the new evidence as not credible or not important, minimizing shifts in our overall preferences and choice behaviors.¹⁵⁴ Where the

¹⁵¹ See generally Bruce G.S. Hardie, Eric J. Johnson & Peter S. Fader, *Modeling Loss Aversion and Reference Dependence Effects on Brand Choice*, 12 *MARKETING SCI.* 378 (1993) (building and empirically validating a model of interbrand choice in the orange juice market, demonstrating reference effects with respect to the last brand purchased, and finding loss aversion to be quite strong with respect to quality and less strong but still relevant with respect to price). Cf. Gal Zauberan, *The Intertemporal Dynamics of Consumer Lock-In*, 30 *J. CONSUMER RES.* 405 (2003) (modeling brand loyalty as a consequence of another boundedly rational feature of consumer psychology: the underweighting of temporally remote future events and consumer unawareness of this underweighting, which leads consumers to underestimate potential future switching costs when making brand choices in the present).

¹⁵² This bias obtains even where the consumer has not actually purchased the brand, but merely has been primed with an opportunity to purchase the brand—the acquisition of a coupon. See generally Sankar Sen & Eric J. Johnson, *Mere Possession Effects Without Possession in Consumer Choice*, 24 *J. CONSUMER RES.* 105 (1997) (reviewing empirical research on consumer bias in favor of previously purchased brands and extending the findings to a coupon experiment).

¹⁵³ Stephen J. Hoch & John Deighton, *Managing What Consumers Learn from Experience*, 53 *J. MARKETING* 1, 1 (1989) (“Learning from self-generated experience with a product or service is not a simple process of discovering objective truth. It is, to a greater or lesser extent, open to influence and the consumer’s confidence in the objectivity of such learning can be illusory.”). For a review of the literature similar to the one that follows, see Assaf, *supra* note 117. Professor Assaf uses this empirical evidence to argue for an understanding of brands as “totemic” or “sacred” as those concepts are understood in anthropology, while my review of the literature applies the same evidence within the more traditional economic model of trademarks, though our normative conclusions regarding trademark policy share some common points. Compare *id.* at 55-64, with *infra* Part III.

¹⁵⁴ See Hanson & Kysar, *supra* note 128, at 646-54. See generally Rohini Ahluwalia, *Examination of Psychological Processes Underlying Resistance to Persuasion*, 27 *J. CONSUMER RES.* 217 (2000) (examining the psychological processes that generate this behavior, including biased assessment of attitude-inconsistent information, decreased weighting in evaluative processes of attributes to which such information is relevant, and resistance to “spillover” inferences as to other attributes); Kari Edwards & Edward E. Smith, *A Disconfirmation Bias in the Evaluation of Arguments*, 71 *J. PERSONALITY & SOCIAL PSYCHOL.* 5 (1996) (same, but focusing on the tendency to spend more time and effort attempting to refute arguments incompatible with prior beliefs than compatible arguments); William Samuelson & Richard

pre-existing belief is based on a decision that we have already made (such as the decision to purchase a particular brand), this confirmation bias is particularly strong.¹⁵⁵ This behavior has been observed in the context of political beliefs,¹⁵⁶ scientific beliefs,¹⁵⁷ and, most relevant for present purposes, consumer beliefs.¹⁵⁸

Experimental studies consistently show that consumer familiarity with a brand positively influences their assessment of that brand *during consumption*. Generally, we are not able to distinguish among comparable competing products in blind trials, but we (erroneously) fancy ourselves connoisseurs where brand labels are available to guide our evaluation.¹⁵⁹ Where a brand label is visible during sampling, we

Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7 (1988) (reviewing various examples of decision-making that favors prior decisions and theories to explain the phenomenon).

¹⁵⁵ See, e.g., Joel B. Cohen & Michael J. Houston, *Cognitive Consequences of Brand Loyalty*, 9 J. MARKETING RES. 97, 99 (1972) (“[T]he control group found only trivial differences between Colgate and Crest in [a variety of product attributes]. Those loyal to one or the other, however, saw rather substantial differences, always in the direction that would justify their choices.”); Hoch & Deighton, *supra* note 153, at 6 (“Consumers tend to avoid situations in which they might receive unfavorable feedback about chosen alternatives and favorable feedback about rejected alternatives; instead they often attempt to ‘confirm a good buy.’” (citing Dieter Frey & Marita Rosch, *Information Seeking After Decisions: The Roles of Novelty of Information and Decision Reversibility*, 10 PERSONALITY & SOC. PSYCHOL. BULL. 91 (1984))); cf. ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* 71-74, 91-95 (2000) (arguing that extraction of a small commitment up front allows a manipulator to extract significant concessions going forward due to the subject’s desire to act in a manner consistent with past choices).

¹⁵⁶ See generally, e.g., Edwards & Smith, *supra* note 154 (finding a bias in favor of prior beliefs on a variety of arguments regarding issues of public policy); Charles G. Lord, Lee Ross & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979) (finding views on deterrent effects of capital punishment insensitive to empirical evidence); Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions* (Apr. 22, 2009) (unpublished manuscript), available at <http://www-personal.umich.edu/~bnyhan/nyhan-reifler.pdf> (finding that voters tend to try to fit new information into their preexisting ideological views and not only discount information inconsistent with those views but actually rebel against such information, hewing to their original views even more strongly than before encountering the new information).

¹⁵⁷ See generally Jonathan J. Koehler, *The Influence of Prior Beliefs on Scientific Judgments of Evidence Quality*, 56 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 28 (1993).

¹⁵⁸ See, e.g., William Boulding, Ajay Kalra & Richard Staelin, *The Quality Double Whammy*, 18 MARKETING SCI. 463 (1999) (finding that pre-existing consumer beliefs about service quality continue to influence quality judgments following direct experience of the service, both because consumers consider quality cumulatively and because prior beliefs influence perceptions of the direct experience).

¹⁵⁹ See generally, e.g., Ralph I. Allison & Kenneth P. Uhl, *Influence of Beer Brand Identification on Taste Perception*, 1 J. MARKETING RES. 36 (1964) (taste tests of beer by regular beer drinkers). *But see* Joandrea Hoegg & Joseph W. Alba, *Taste Perception: More than Meets the Tongue*, 33 J. CONSUMER RES. 490 (2007) (finding that consumers in blind tests are able to distinguish somewhat between premium and store-brand orange juice by taste); G.A. Mauser, *Allison & Uhl Revisited: The Effects of Taste and Brand Name on Perceptions and Preferences*, 6 ADVANCES IN CONSUMER RES. 161, 162-65 (1979) (finding the Allison & Uhl results to be less clear in a repeated experiment). The use of taste tests for purposes of comparative advertising in

tend to prefer the products bearing familiar labels to others—even if the actual products are identical or, worse, if the familiar label has been deceptively applied to an objectively inferior product.¹⁶⁰ Importantly, this phenomenon is not limited to overall preference or even to subjective images. Familiarity actually influences our experience of objective product attributes during or after consumption: When we are familiar with the label on the package, beer has more body and aroma, tissues feel softer, toothpaste leaves our breath fresher and our teeth whiter.¹⁶¹

This effect of familiarity on product evaluation applies not only to familiarity with the brand, but to familiarity with *factual claims regarding the branded product's attributes*. When a marketer makes a factual claim in advertising, that claim is more likely to be believed and the attribute more likely to be favorably evaluated *after* product trial than it would be absent the advertising.¹⁶² Mere repetition of such claims increases belief in their truth and makes them even more resistant to disconfirmation—indeed, efforts at disconfirmation can

the cola industry has provided some of the clearest examples of the effects of brand labels on evaluation of product trials. Different cola brands are essentially indistinguishable in a blind taste test. J.W. Bowles, Jr. & N.H. Pronko, *Identification of Cola Beverages: II. A Further Study*, 32 J. APPLIED PSYCHOL. 559, 564 (1948) (“Within the limits of the present experiment, the findings permit the generalization that when subjects are asked to discriminate and identify Cola drinks, they might do just as well by drawing the names of those beverages out of a hat.”). But labeling the products being sampled convinces consumers otherwise: A Coke drinker will express a clear preference for Pepsi when poured out of a Coke bottle. Mary E. Woolfolk, William Castellan & Charles I. Brooks, *Pepsi Versus Coke: Labels, Not Tastes, Prevail*, 52 PSYCHOL. REP. 185, 186 (1983).

¹⁶⁰ Hoyer & Brown, *supra* note 107, at 146-48 (finding consumers preferred generic peanut butter that had been rated consistently lower in a blind taste test when it was served out of a jar bearing a national brand label); accord Joandrea Hoegg & Joseph W. Alba, *Taste Perception: More than Meets the Tongue*, 33 J. CONSUMER RES. 490, 496-97 (2007) (finding that consumers prefer the taste of orange juice labeled with a national brand two-to-one over juice labeled with a store-brand, even though both labels were applied to the same national-brand juice).

¹⁶¹ Allison & Uhl, *supra* note 158, at 38-39 (finding labels influenced consumer perceptions of some, though not all, specific characteristics of beer); Srinivasan & Till, *supra* note 116, at 421-25 (finding similar results for certain characteristics of fruit cocktail and facial tissue); cf. Cohen & Houston, *supra* note 155, at 98-99 (finding that regular purchasers of two national brands of toothpaste rated their preferred brand higher on a variety of attributes than alternative brands, while regular purchasers of other brands rated the two national brands as equivalent on those attributes).

¹⁶² See generally Ryan S. Elder & Aradhna Krishna, *The Effects of Advertising Copy on Sensory Thoughts and Perceived Taste*, 36 J. CONSUMER RES. 748, 749-53 (2010); Stephen J. Hoch & Young-Won Ha, *Consumer Learning: Advertising and the Ambiguity of Product Experience*, 13 J. CONSUMER RES. 221 (1986). But see Jerry C. Olson & Philip A. Dover, *Cognitive Effects of Deceptive Advertising*, 15 J. MARKETING RES. 29, 31-37 (1978) (finding that advertising claiming that a bitter coffee brand was not bitter was believed by consumers prior to product trial, and that although product trial dispelled the belief, consumers exposed to the ad retained a stronger intention to purchase the coffee than consumers who had not seen the ad).

actually *entrench* such mistaken beliefs.¹⁶³ The expectations created by pre-consumption product attribute claims can be powerful enough to reverse the preferences observed in comparative product trials.¹⁶⁴ And just as familiarity biases our evaluation of our own sensory experiences, it similarly biases our evaluation of other potentially disconfirmatory product information such as media publicity and third-party evaluations.¹⁶⁵

In short, branding *biases* consumers. It leads us to hold subjective beliefs as to objectively knowable facts that may diverge from objective data and yet be resistant to influence by exposure to such data, and it influences our preferences and choice behaviors accordingly. This phenomenon, which I will refer to as “brand bias,” has been observed across a range of consumer experience levels,¹⁶⁶ across diverse regularly purchased consumer product categories,¹⁶⁷ and even across cultures.¹⁶⁸ Indeed, brand bias appears to be hard-wired into our brains: We use different neurons to make sense out of the experience of drinking from a cup labeled “Coke” than we do drinking the same liquid from an unlabeled cup.¹⁶⁹ But brand bias operates below the level of

¹⁶³ See Sheff, *supra* note 111, at 161-62, and sources cited therein (reviewing the cognitive psychology literature on this “illusory truth effect” in the context of analyzing political campaign communications).

¹⁶⁴ Leonard Lee, Shane Frederick & Dan Ariely, *Try It, You’ll Like It: The Influence of Expectation, Consumption, and Revelation on Preferences for Beer*, 17 *PSYCHOL. SCI.* 1054 (2006).

¹⁶⁵ See generally Rohini Ahluwalia, Robert E. Burnkrant & H. Rao Unnava, *Consumer Response to Negative Publicity: The Moderating Role of Commitment*, 37 *J. MARKETING RES.* 203 (2000); J. Edward Russo, Victoria Husted Medvec & Margaret G. Meloy, *The Distortion of Information During Decisions*, 66 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 102 (1996). Importantly, producers can create a counteracting pull on such disconfirmatory third-party messages by post-consumption advertising that influences consumers to remember the sensory experience of past consumption more positively than they actually experienced it, further reducing the influence of direct experience on beliefs and preferences. See generally Kathryn A. Braun, *Postexperience Advertising Effects on Consumer Memory*, 25 *J. CONSUMER RES.* 319 (1999).

¹⁶⁶ Compare, e.g., Allison & Uhl, *supra* note 157 (experienced beer drinkers), with Hoyer & Brown, *supra* note 107 (subjects had never purchased peanut butter for themselves).

¹⁶⁷ See generally, e.g., Allison & Uhl, *supra* note 157 (beer); Hoyer & Brown, *supra* note 107 (peanut butter); Siew Meng Leong, *Consumer Decision Making for Common, Repeat-Purchase Products: A Dual Replication*, 2 *J. CONSUMER PSYCHOL.* 193 (1993) (laundry detergent and shampoo); Macdonald & Sharp, *supra* note 107 (soft drinks); Srinivasan & Till, *supra* note 116 (fruit cocktail and facial tissue); Woolfolk, Castellan & Brooks, *supra* note 159 (cola).

¹⁶⁸ See generally, e.g., Macdonald & Sharp, *supra* note 107 (Australian test population); Leong, *supra* note 167 (Singaporean test population).

¹⁶⁹ Samuel M. McClure et al., *Neural Correlates of Behavioral Preference for Culturally Familiar Drinks*, 44 *NEURON* 379, 383 (2004) (“When judgments are based solely on sensory information [i.e., in a blind taste test], relative activity in the [ventromedial prefrontal cortex, or VMPFC,] predicts people’s preferences. [However,] brand knowledge . . . biases preference decisions and recruits the hippocampus, [dorsolateral prefrontal cortex or] DLPFC, and midbrain.”); Michael Koenigs & Daniel Tranel, *Prefrontal Cortex Damage Abolishes Brand-Cued Changes in Cola Preference*, 3 *SOC. COGNITIVE & AFFECTIVE NEUROSCIENCE* 1, 3-4

awareness. Even if we are told we have the tendency to let prior information influence our assessment of new experience, we appear to be unable to detect ourselves doing so.¹⁷⁰ In other words, brand bias is not only pervasive, it is something we are simply not equipped to correct for ourselves. As a result, brand beliefs, preferences, and choices are “sticky” to an extent that the search-costs model cannot account for.

Some important caveats are in order. Of course, direct experience can and does generate changed attitudes and beliefs that affect consumer loyalty and choice behaviors going forward—particularly where such experience is starkly inconsistent with expectations.¹⁷¹ Rather than a deterministic law of cognition, brand bias can best be understood as a kind of friction or drag on the movement of consumer beliefs and preferences in response to new information.¹⁷² The magnitude of this resistance is not constant; it depends on a variety of variables. Some of these variables derive from the nature of the product: Is it an inexpensive, low-involvement, frequently purchased product with few relevant attributes, or is it a more complex, expensive, durable product?¹⁷³ Are the relevant attributes of the product susceptible to definitive measurement through consumption, or are they more ambiguous or difficult for a non-expert to assess?¹⁷⁴ Other variables may depend on the choice environment, particularly the time pressure under which choices are made and the attention paid by consumers to the choice task.¹⁷⁵ In the final analysis, brand bias is only one of many factors playing a role in the complex phenomena of consumer choice.

The complexity of consumer choice, as demonstrated by the empirical evidence discussed in this Part, helps to explain why the

(2008) (showing that individuals with damage to the VMPFC do not show similar bias in response to brand labels and confirming McClure et al.'s conclusion that “normal brand preference is the product of factors unrelated to the taste of the soft drink”).

¹⁷⁰ J. Edward Russo, Kurt A. Carlson & Margaret G. Meloy, *Choosing an Inferior Alternative*, 17 PSYCHOL. SCI. 899, 901-03 (2006).

¹⁷¹ See generally, e.g., Vikas Mittal, William T. Ross, Jr. & Patrick M. Baldasare, *The Asymmetric Impact of Negative and Positive Attribute-Level Performance on Overall Satisfaction and Repurchase Intentions*, 62 J. MARKETING 33 (1998); see also, e.g., Olson & Dover, *supra* note 162, at 31-37.

¹⁷² Especially illustrative of this point is Jerry C. Olson & Philip A. Dover, *Disconfirmation of Consumer Expectations Through Product Trial*, 64 J. APPLIED PSYCHOL. 179, 184-86 (1979).

¹⁷³ See, e.g., Gilbert A. Churchill, Jr. & Carol Surprenant, *An Investigation into the Determinants of Customer Satisfaction*, 19 J. MARKETING RES. 491, 502-03 (1982).

¹⁷⁴ See generally Young-Won Ha & Stephen J. Hoch, *Ambiguity, Processing Strategy, and Advertising-Evidence Interactions*, 16 J. CONSUMER RES. 354 (1989); Srinivasan & Till, *supra* note 116.

¹⁷⁵ See generally, e.g., Tilmann Betsch et al., *When Prior Knowledge Overrides New Evidence: Adaptive Use of Decision Strategies and the Role of Behavioral Routines*, 58 SWISS J. PSYCHOL. 151 (1990); see also Elder & Krishna, *supra* note 162, at 753-55; Sheff, *supra* note 77, at 370-71.

various elements of brand equity do not appear to make consistent contributions to brand value across product categories or between products and services.¹⁷⁶ Although the effects of brands on consumer choice are not strictly rational or deterministic, they are not susceptible to theoretical determination either. To the contrary, the degree to which a consumer's decision-making will diverge from the predictions of theoretical models premised on rational behavior is an intensely context-dependent question, which can only be determined empirically.¹⁷⁷ This empirical contingency of brand bias suggests a more complex role for law than the search-costs model can conceive of. The next Part will illustrate how the law manages this complexity.

III. BRAND BIAS, OPPORTUNISTIC PRODUCERS, AND THE COSTS OF CONSUMER MARKETS

A. *The Dangers of Brand Bias and the Complicity of Trademark Doctrine*

Brand bias gives producers a strong incentive to cultivate familiarity with their brands (and with favorable attribute claims regarding their brands) in the minds of consumers, both upon the launch of a product (to generate awareness-based preference) and over time (to maintain awareness and cultivate loyalty). The most obvious means to generate familiarity is advertising—even uninformative advertising. Of course, cultivation of familiarity could go hand-in-hand with other elements of brand equity—making high-quality products to increase perceived quality, or disseminating truthful, informative (or even persuasive) advertising to strengthen accurate brand associations, for example. The familiarity-based incentive to advertise does not imply that familiarizing advertising will *always* deceive or otherwise lead to results inconsistent with the search-costs model's predictions—as the empirical signaling literature makes plain.¹⁷⁸ Indeed, our preference for and deference to the familiar are so powerful precisely because familiarity so often correlates to the objective facts that we infer from it.¹⁷⁹

¹⁷⁶ See *supra* notes 68-76 and accompanying text.

¹⁷⁷ See Bar-Gill, *supra* note 136, at 754-65.

¹⁷⁸ See *supra* notes 118-27 and accompanying text.

¹⁷⁹ GIGERENZER, *supra* note 129, at 128-29 (“Relying on brand-name recognition is reasonable when firms first increase product quality, and increased quality subsequently increases name recognition, by word of mouth or the media.”); Barebara Kiviat, *Why We Buy the Products We Buy*, TIME, Aug. 27, 2007, at 50 (“A flurry of new research is shedding light on people’s tendency—when presented with a known object and an unknown one—to assign more value to

But the fact that consumers appear to have trouble learning from experiences in which familiarity does not serve as a good predictor of experience opens the door to strategic behavior by brand owners. There is no *a priori* reason why familiarity-based responses and evidence-based responses to a brand *must* be consistent—again, the signaling literature demonstrates that sometimes they are not.¹⁸⁰ And because familiarity-based beliefs and preferences are resistant to disconfirmation by objective evidence, any divergence between the two can be exploited by strategic brand owners in a kind of psychological arbitrage.¹⁸¹ To take the most straightforward scenario, a brand owner might deploy purely noninformative advertising to generate consumer beliefs based on a sense of familiarity, even if those beliefs were inconsistent with the qualities of the brand owner's product.¹⁸² More perniciously, the brand owner might assert a false attribute claim in advertising for his products, generating similar results.¹⁸³ In either case, the advertising could influence the consumer's interpretation of all subsequently encountered information about the branded product (including the experience of consumption itself),¹⁸⁴ causing her to more favorably evaluate the product than she would have otherwise and potentially leading her to make purchase decisions she would not have made were she basing her decisions on a simple mapping of available information to her own preferences. In other words, mere exposure of a consumer to a brand, or mere assertion of an unsupported attribute claim, can act as a foot in the door to the consumer's mind, invoking brand bias and inducing behavior that a rational consumer would avoid.

Brand owners know this, and indeed much of marketing research is devoted to the task of managing consumer knowledge and learning so as

the thing they've heard of, even if they don't know anything else about it. It's easy to imagine the evolutionary roots of a go-with-what-you-know principle—avoiding poisonous plants, say"); see Goldstein & Gigerenzer, *supra* note 110, at 78 (discussing the "ecological rationality" criterion for application of the recognition heuristic).

¹⁸⁰ See *supra* notes 118-27 and accompanying text.

¹⁸¹ See generally Hoch & Deighton, *supra* note 153 (discussing techniques marketers can use to limit and manipulate what consumers learn about products from direct experience); cf. Matthew G. Nagler, *Rather Bait Than Switch: Deceptive Advertising with Bounded Consumer Rationality*, 51 J. PUB. ECON. 359 (1993) (demonstrating theoretically that bounded rationality among consumers gives producers an incentive to advertise deceptively).

¹⁸² See *supra* notes 153-61 and accompanying text; see also Gigerenzer, *supra* note 129, at 128-29 ("Non-informative advertisement, however, shortcuts this process. Firms spend huge sums of money to directly increase the recognition of their brand name in the media In this case, the correlation between quality and media presence might be nil Firms that spend their money on buying space in your recognition memory already know this. . . . Taken to the extreme, being recognized becomes the goal in itself."). On the effects of branding on the experience of consuming cola beverages, see *supra* notes 159, 169 and sources cited therein.

¹⁸³ See *supra* notes 162-64 and accompanying text.

¹⁸⁴ See *supra* notes 161-65 and accompanying text.

to maximize value for brand owners.¹⁸⁵ Brand bias thus makes at least some advertising and other marketing efforts appear less like producers' assumption of consumers' costs of gathering needed information—as the search-costs model posits—and more like an exercise in rent-seeking.¹⁸⁶ Where such efforts are neither informative nor persuasive, they would not seem to generate any value for consumers. Yet these efforts can, under certain circumstances, increase brand equity by inducing consumers to buy more of the producer's products or pay more for those products than they otherwise would. Such brand-building efforts, rather than increasing social welfare (as would at least arguably be the case for informative and persuasive activities), serve only to transfer surplus value from consumers to producers—that is, to generate economic rents.¹⁸⁷ Efforts to induce such transfers, in turn, waste resources and decrease social welfare.¹⁸⁸ The HeadOn campaign discussed in the Introduction to this Article—in which mere repetition of a brand name in advertising generated multimillion-dollar sales of a placebo to treat a condition for which numerous inexpensive and more efficacious treatments were readily available¹⁸⁹—is a prime example of the successful use of such a strategy.

Herein lies the challenge of brand bias to the search-costs model. Trademarks do reduce one kind of transactions cost—search costs—but as a byproduct they create another kind of transactions cost—brand bias. The conclusion that trademark protection is welfare-increasing is only tenable in commercial contexts where the net effect of such protection on transactions costs is negative: where the welfare-increasing effects of lowered search costs outweigh the welfare-decreasing effects of brand bias.¹⁹⁰ But the model provides no tools to

¹⁸⁵ See generally Hoch & Deighton, *supra* note 153.

¹⁸⁶ See CIALDINI, *supra* note 155, at 9-11 (“[M]ost of us know very little about our automatic behavior patterns [T]hey make us terribly vulnerable to anyone who *does* know how they work We too have profiteers who mimic trigger features for our own brand of automatic responding [E]ach such principle [of automated response] is a detectable and ready weapon . . . of automatic influence.”).

¹⁸⁷ See generally Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224 (1967) (pointing out that resources expended by producers to capture surplus economic value from consumers through an ability to charge supracompetitive prices will constitute a significant loss of social welfare, beyond the mere loss of surplus attributable to the deadweight loss of the supracompetitive price).

¹⁸⁸ See, e.g., Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974) (arguing that competition over economic rents results in welfare losses in the amount of the value of the rents themselves); cf. Economides, *supra* note 17, at 535 (conceding that although persuasive advertising is not completely wasteful, waste is involved in tying the persuasive images to the advertised product in the minds of consumers).

¹⁸⁹ See *supra* notes 2-15 and accompanying text.

¹⁹⁰ Whether the persuasive effects of branding should be considered welfare-increasing or welfare-decreasing is, as discussed above, a normative question on which reasonable minds may

determine whether that condition will be satisfied in a given trademark case because it assumes that brand bias does not exist.¹⁹¹ And trademark doctrine, heavily informed by the search-costs model, reflects similar assumptions.

For example, the law of secondary meaning—the key test for establishing trademark rights in a mark that is not inherently distinctive¹⁹²—largely reflects the search-costs model's assumptions. For purposes of establishing secondary meaning, more advertising is generally better.¹⁹³ Furthermore, although most thoughtful courts generally look for some indication that heavy advertising has actually caused consumers to associate the mark with a particular product,¹⁹⁴ they typically cite the benefits of such associations without discussing their costs.¹⁹⁵ This influence of the search-costs model's assumptions extends beyond the criteria for establishing trademark rights. The heavy

differ. *See supra* Part II.A.1. Taking the view most favorable to the search-costs model, this Article assumes that persuasion increases welfare.

¹⁹¹ *See supra* notes 138-39 and accompanying text.

¹⁹² *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 769 (1992) (“The general rule regarding distinctiveness is clear: an identifying mark is distinctive and capable of being protected if it either (1) is inherently distinctive or (2) has acquired distinctiveness through secondary meaning.” (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 13 (1995))).

¹⁹³ 2 MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION 15:51 (“The logical inference goes thus: The seller spent a large amount of money on advertising. The larger the amount spent, the greater the exposure of buyers to this symbol as a trademark: The greater the exposure, the greater the likelihood that buyers will associate this symbol with one seller in a trademark sense.”); *id.* at n.1 (collecting cases).

¹⁹⁴ *See, e.g.,* *Platinum Home Mortg. Corp. v. Platinum Fin. Group, Inc.*, 149 F.3d 722, 729 (7th Cir. 1998) (“Evidence of advertising and sales is entirely circumstantial, and that evidence does not necessarily indicate that consumers associate a mark with a particular source, particularly when the advertisements and promotions do not specifically emphasize the mark.”); *Co-Rect Prods., Inc. v. Marvy! Adver. Photography, Inc.*, 780 F.2d 1324, 1332 (8th Cir. 1985) (“Although it is true that advertising is a relevant factor in determining whether a mark has acquired a secondary meaning, it is the effect of such advertising that is important, not its extent. To be effective in this respect, the advertising must cause the public to equate the mark with the source of the product.” (internal citation omitted)). Indeed, some courts in the early days of the modern advertising era demonstrated a fairly sophisticated view of the psychological effects of marketing. *See, e.g.,* *Northam Warren Corp. v. Universal Cosmetic Co.*, 18 F.2d 774, 775 (7th Cir. 1927) (“While the human mind drops and forgets much that it hears and sees, yet it holds fast to some word, place, name, sign, or symbol contained in an advertisement, through which some human need has been supplied, and that recollection is carried by the people into times and places far removed from the times and places of the publication The spread of an advertisement among people is like ever-spreading ripples from a pebble thrown into still water. The ripples go out and out in an ever-increasing circle from a common center, long after the pebble is lost to sight, and, although the ripples become fainter and fainter, the originating center can always be found, until the water's surface is again at rest.”).

¹⁹⁵ *See, e.g.,* *Northam Warren*, 18 F.2d at 775 (“Throwing pebbles into water is child's play, but knowledge of a trade-mark, through advertising and as carried by the people, is an important, valuable business asset, gained at much expense. It is a right which the one who creates it may say not be obstructed or confused by unfair methods or practices of competitors, so long as it continues to carry force, although the force may be far-spent and the recollection of the origin dimmed.”).

advertiser not only wins himself protection; he also has a stronger case for infringement or dilution, insofar as advertising is probative of mark strength¹⁹⁶ and fame.¹⁹⁷

Similarly, most of the likelihood-of-confusion tests used by the circuit courts of appeals to decide trademark infringement cases include a factor addressing the degree of care exercised by consumers in making their purchase decisions.¹⁹⁸ It seems likely that this factor would correlate inversely with the tendency of consumers to rely on awareness and loyalty in making purchase decisions,¹⁹⁹ and thus that courts could use this factor to identify potentially inefficient trademark uses. But in fact, courts do precisely the opposite. Low degrees of consumer care, rather than suggesting a high likelihood of brand bias and thus a weaker argument for trademark enforcement, are held to indicate a high likelihood of consumer confusion and thus weigh *in favor* of a mark owner's claim of infringement.²⁰⁰

A similar dynamic is evident with respect to another likelihood-of-confusion factor: product quality. Some circuits also allow for a comparison of the quality of the brand owner's products to the quality of the accused maker's products.²⁰¹ Again, such an inquiry might give courts an opportunity to decline trademark enforcement in instances where the brand premium enjoyed by the brand owner exceeds any reasonable measure of the marginal economic value of the information provided by the brand. But again, courts do the opposite: Similarity in the quality of the plaintiff's and defendant's products is held to *increase*

¹⁹⁶ See, e.g., *Century 21 Real Estate Corp. v. Sandlin*, 846 F.2d 1175, 1179 (9th Cir. 1988) ("Marks may be strengthened by extensive advertising . . ."); cf. *Bose Corp. v. QSC Audio Products, Inc.*, 293 F.3d 1367, 1371 (Fed. Cir. 2002) (advertising is relevant to the "fame" factor in the likelihood of confusion analysis conducted in registration proceedings).

¹⁹⁷ 15 U.S.C. § 1125(c)(2)(i) (2006) (listing magnitude of advertising as a factor in determining whether a mark has the requisite fame to support a dilution claim).

¹⁹⁸ *Bos. Athletic Ass'n v. Sullivan*, 867 F.2d 22, 29 (1st Cir. 1989) (classes of prospective purchasers); *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961) (sophistication of buyers); *Interpace Corp. v. Lapp, Inc.*, 721 F.2d 460, 463 (3d Cir. 1983) (price of the goods and other factors indicative of expected consumer care and attention at point-of-sale); *Shakespeare Co. v. Silstar Corp. of Am.*, 110 F.3d 234, 242 (4th Cir. 1997) (sophistication of buyers); *Oreck Corp. v. U.S. Floor Sys., Inc.*, 803 F.2d 166, 170 (5th Cir. 1986) (degree of care exercised by potential purchasers); *Frisch's Rests., Inc. v. Elby's Big Boy*, 670 F.2d 642, 648 (6th Cir. 1982) (likely degree of purchaser care); *SquirtCo v. Seven-Up Co.*, 628 F.2d 1086, 1091 (8th Cir. 1980) (degree of purchaser care in light of the kind, cost, and conditions of purchase of the product); *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979) (type of goods and the degree of care likely to be exercised by the purchaser); *Amoco Oil Co. v. Rainbow Snow*, 748 F.2d 556, 558 n.5 (10th Cir. 1984) (likely degree of purchaser care).

¹⁹⁹ See *supra* notes 173-74 and accompanying text.

²⁰⁰ See, e.g., *W.W.W. Pharm. Co. v. Gillette Co.*, 984 F.2d 567, 575-576 (2d Cir. 1993) ("Generally, purchasers of small items . . . are considered casual purchasers prone to impulse buying . . . [,] while r]etailers are assumed to be more sophisticated buyers and thus less prone to confusion." (internal citations omitted)).

²⁰¹ *Polaroid*, 287 F.2d at 495; *Shakespeare*, 110 F.3d at 242.

the likelihood of confusion and thus provide an argument in favor of liability.²⁰² In sum, the features of trademark doctrine that might be used to identify and ameliorate brand bias instead reflect the assumption that brand bias is either nonexistent or irrelevant.

The foregoing discussion suggests that judges in ordinary trademark infringement cases have tools at their disposal to seek out and guard against brand bias. Potential examples might include a reduced reliance on advertising as evidence, a heightened burden of persuasion on trademark plaintiffs in low-involvement purchase contexts, or a stinginess with remedies where the quality of the defendant's product is indistinguishable from that of the plaintiff's product. To be sure, a sensitivity to these issues would be a welcome innovation in trademark doctrine. However, the fact that trademark doctrine conspicuously ignores brand bias does not mean that it is always wrong to do so. Case-by-case analysis to seek out and correct brand bias would be costly and might in many cases be counterproductive.²⁰³ Just as the legal tests discussed above could be used to identify rent-seeking by brand owners cultivating brand bias, they are also helpful in identifying those aspects of human cognition that allow trademark protection to lower search costs in the first place, and whether one or the other effect dominates in a particular instance is an empirical question.²⁰⁴ In such a factually complex situation, there is a strong argument that administrative costs and errors on the margins could overwhelm any efficiency gains that might be generated by tasking courts with identifying and ameliorating brand bias on a case-by-case basis.²⁰⁵ Thus, despite the fact that trademark protection both increases and decreases transactions costs (through brand bias and lowered search costs, respectively), case-by-case adjudication, which itself creates

²⁰² See, e.g., *Morningside Group Ltd. v. Morningside Capital Group, L.L.C.*, 182 F.3d 133, 142 (2d Cir. 1999) ("Products of equal quality may tend to create confusion as to source because of that very similarity of quality." (citation omitted)).

²⁰³ See *supra* notes 130-37 and sources cited therein.

²⁰⁴ I have previously argued that the various tests for trademark liability reflect exactly such a concern. Sheff, *supra* note 77; see also Steven A. Sloman, *Two Systems of Reasoning*, in *PSYCHOLOGY OF INTUITIVE JUDGMENT*, *supra* note 110, at 378, 380 ("Consumer choices are often between products that conjure up strong associations due to effective advertising or market longevity and products whose value can be justified analytically. Choosing between brand names, with which we have had long experience, and generic products, which sometimes have identical ingredients and a lower price, has this character.").

²⁰⁵ Robert G. Bone, *Enforcement Costs and Trademark Puzzles*, 90 VA. L. REV. 2099, 2102, 2123-25 (2004); cf. Lillian R. BeVier, *Competitor Suits for False Advertising Under Section 43(a) of the Lanham Act: A Puzzle in the Law of Deception*, 78 VA. L. REV. 1, 15 (1992). The prevalence of all-or-nothing injunctive relief in trademark cases only increases the costs of such judicial error. 5 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 30.1.

significant enforcement costs, may be ill-suited to identify and ameliorate such bias.²⁰⁶

This deficiency in trademark law does not imply that brand bias must simply be tolerated. Rather, it suggests that weapons against brand bias, if they are deemed necessary, should be sought outside of trademark doctrine, in mechanisms that can effectively mitigate such bias (and potentially supplement or supplant the search-costs-lowering function of brands) without themselves generating unduly high enforcement costs. Given the imprecision of regimes that apply indiscriminately to all commercial activities (such as trademark law) and the high social costs that would result from attempting to improve their precision on a case-by-case basis, we would expect the most effective weapons against brand bias to be pitched at an intermediate level—targeting particular industries where the costs of brand bias outweigh the benefits of lowered search costs from branding. And in fact, various bodies of law appear to be directed to precisely this end.

B. *Counteracting Brand Bias: Market Solutions and Legal Interventions*

1. *Debiasing Through Competition: When to Trust the Market*

The first and most obvious weapon against brand bias is competition. The success of a brand-bias marketing strategy in generating a net economic gain for the producer who deploys it is far from assured. As noted above, the relative degree of influence on a given consumer's decisions of the informative, persuasive, and biasing effects of brands (represented by the various elements of brand equity) is not constant across all areas of consumer experience.²⁰⁷ Thus, we would surmise that in some industries, market forces alone will

²⁰⁶ It is worth noting that Professors Dan Burk and Mark Lemley have argued that in the context of patent law, case-by-case adjudication is the best way to achieve industry-specific tailoring of the scope of patent rights, in the form of rules of decision that have differential impact on particular industries operating under the same statutory framework. *See generally* DAN L. BURK & MARK A. LEMLEY, *THE PATENT CRISIS AND HOW THE COURTS CAN SOLVE IT* (2009). It is doubtful whether such an approach could be equally effective in trademark law, where inefficiencies result from strategic producer exploitation of consumers' bounded rationality rather than from strategic behavior of firms exploiting the legal system as a means to hobble their competitors. Rather, the dynamic seen in patent law is the type of cautionary tale typically invoked in opposition to interventions targeting the effects of bounded rationality. *Cf., e.g.*, Epstein, *Neoclassical Economics*, *supra* note 133, at 807 ("[P]owerful political forces, with excellent private knowledge, often turn regulation to their own parochial ends by creating barriers to entry that block or hamper the emergence of strong competitive markets.").

²⁰⁷ *See supra* notes 68-76, 173-75 and accompanying text.

minimize divergences between objective and subjective measures of relevant product attributes by rewarding producers whose products objectively meet the subjective expectations created by their marketing and punishing producers who attempt to profit from brand bias.²⁰⁸ In such markets, legal intervention will simply generate administrative costs without providing significant benefits and should be avoided. In other markets, however, producers who leverage brand bias through marketing activities could find themselves not only thriving, but also at a competitive advantage to other producers who make costly investments in an effort to inform consumers or provide higher quality.²⁰⁹ In this circumstance, some form of intervention will be needed to avoid market failure.²¹⁰

As the previous Parts made clear, whether brand bias outweighs the benefits of lower search costs in a particular market is an empirical question, and generalizations should be made with great care.²¹¹ Despite this caveat, one promising generalization has been identified in economic analyses of false advertising law: The need for legal intervention is greater where relevant product characteristics are difficult for consumers to unambiguously measure.

[T]he characteristics of goods and services form a continuum, from those in which it is very easy to detect the truth or falsity of

²⁰⁸ See *supra* note 125 and accompanying text.

²⁰⁹ See *supra* notes 180-89 and accompanying text; see also George Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 495 (1970) ("Consider a market in which goods are sold honestly or dishonestly; quality may be represented, or it may be misrepresented. The purchaser's problem, of course, is to identify quality. The presence of people in the market who are willing to offer inferior goods tends to drive the market out of existence—as in the case of our automobile 'lemons.' It is this possibility that represents the major costs of dishonesty—for dishonest dealings tend to drive honest dealings out of the market.").

²¹⁰ Between these two extremes, there is likely a broad gray area in which brand bias eats away at the informational and persuasive value of trademarks, without overwhelming it. In such markets, balancing the benefits of trademark protection and complementary legal intervention against the combined costs of brand bias and enforcement of the complementary regime becomes much more complicated and uncertain. This subpart will focus on the less complex scenario in which brand bias overwhelms search-cost reduction, as this scenario provides the most obvious—albeit not the exclusive—argument for legal intervention.

²¹¹ See, e.g., Bar-Gill, *supra* note 136, at 767 ("[F]or any given product some consumers will overestimate the value of the product while others will underestimate the value of the product. But the existence of both overestimators and underestimators does not mean that the average estimate is unbiased; and neither does it mean that the average bias is sufficiently close to zero that it can be safely ignored. It is an empirical question. The evidence suggests that, at least in some cases, the average estimate is biased and consumers suffer from a systematic misperception in an identified direction."). Professor Bar-Gill has documented, in a series of articles, substantial evidence of persistent consumer misperceptions and strategic producer manipulation of those misperceptions in the consumer credit industry. See generally *id.* at 775-80 (credit cards); Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373 (2004) (same); Oren Bar-Gill, *The Law, Economics and Psychology of Subprime Mortgage Contracts*, 94 CORNELL L. REV. 1073 (2009) (subprime mortgages).

advertising claims (search goods: the truth of the claim can be ascertained before purchase) through experience goods (where the truth of the claim can be detected only after purchase and use) through credence goods (where the validity of advertisements may never be determined [because credence characteristics are defined as those ascertainable only by experts, or only after an extended time, if at all]). As we move along this continuum from search to credence characteristics, misrepresentation becomes relatively more profitable, since detection by consumers becomes more expensive [I]t is in the case of credence characteristics that self-protection becomes most difficult and in which some legal remedy would seem most important.²¹²

This framework provides a useful tool to identify targets for intervention against brand bias. In recent work, Professor J. Shahar Dillbary has argued that consumer reliance on trademarks for information about credence qualities can lead to the type of opportunistic behavior by sellers discussed in the previous subpart—that trademarks can serve as false advertising.²¹³ While his insights are important and valuable, because Dillbary works within the search-costs tradition and accepts its descriptive assumptions about consumer decision-making, he limits his inquiry to accurate consumer beliefs about credence qualities that are rendered inaccurate by a producer that changes its product but retains its brand name.²¹⁴ The research reviewed in Part II above shows that Dillbary's inquiry is too narrow: Brand bias is inherent in branding; it causes consumers to form inferences about credence and experience qualities based on nothing but familiarity. Moreover, it causes experience characteristics to behave somewhat like credence characteristics.²¹⁵ Thus, in markets where credence and experience characteristics dominate and marketing is prevalent, we would expect brand bias to be playing a significant role and generating incentives for opportunistic behavior by producers.

With these criteria in mind, two industries that we would predict to be heavily influenced by brand bias (and thus to attract both intense marketing efforts and the interest of regulators) are the food and drug industries. Not only are these industries dominated by experience and

²¹² Jordan & Rubin, *supra* note 103, at 531. On the distinction between search, experience, and credence characteristics, see generally Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J. L. & ECON. 67 (1973); Phillip Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON. 311 (1970).

²¹³ See generally J. Shahar Dillbary, *Getting the Word Out: The Informational Function of Trademarks*, 4041 ARIZ. ST. L.J. 991, 1023-29 (2009); Dillbary, *supra* note 138. Cf. Darby & Karni, *supra* note 212, at 68-71 (demonstrating the welfare losses from seller deception regarding credence goods).

²¹⁴ Dillbary, *Getting the Word Out*, *supra* note 213, at 1023-29; Dillbary, *supra* note 138, at 339-42.

²¹⁵ See *supra* Part II.B. See generally Srinivasan & Till, *supra* note 116.

credence characteristics, the magnitude of potential welfare losses to consumers (and thus of potential rents to producers) resulting from brand bias is quite high. It is therefore unsurprising that these product categories are simultaneously overrun with consumer marketing²¹⁶ (such as the HeadOn example) and subject to some of the most voluminous and diverse regulations of any consumer market. Examination of these regulations thus illustrates how brand bias might be exploited by strategic producers, how it might be addressed by non-trademark-based legal intervention, and how successful such efforts are likely to be at maximizing aggregate social welfare.

2. Debiasing Through Law: The Food and Drug Example

As discussed above, once divergences from rational behavior are identified in a particular market, the decision to intervene in the market with regulation should depend on both the extent to which strategic actors are able to exploit such discrepancies in welfare-reducing ways and the social costs of the contemplated legal intervention.²¹⁷ On the first point, the history of food and drug markets leaves little question that strategic actors can and do exploit brand bias through their marketing and production tactics. By the turn of the twentieth century, American industry had generated such a talent for debasing and adulterating food products that it took the U.S. Department of Agriculture several years and over 1500 pages to document the extent of

²¹⁶ A U.S. Department of Agriculture study calculated total advertising expenditures in the food and alcohol industries to be \$11 billion in 1997—nearly 16% of all mass-media advertising expenditures that year. Of this, \$7 billion was spent by food manufacturers. Anthony E. Gallo, *Food Advertising in the United States*, in U.S. DEP'T OF AGRICULTURE, *AMERICA'S EATING HABITS: CHANGES AND CONSEQUENCES* 173, 174-75 (1999). Recent proprietary reports reveal those figures to be roughly the same as recently as 2009. Press Release, Kantar Media, Kantar Media Reports U.S. Advertising Expenditures Declined 12.3 Percent in 2009 (Mar. 17, 2010), available at <http://www.businesswire.com/news/home/20100317005458/en/Kantar-Media-Reports-U.S.-Advertising-Expenditures-Declined>.

In the pharmaceutical industry, a recent study estimated that the industry spent \$57.5 billion on all marketing activities in 2004, more than it did on research and development—a claim at odds with the industry trade group's public statements. Marc-André Gagnon & Joel Lexchin, *The Cost of Pushing Pills: A New Estimate of Pharmaceutical Promotion Expenditures in the United States*, 5 PLOS MED. 29, 31 (2008). Of this amount, approximately \$4 billion represents direct-to-consumer advertising expenditures, according to a widely cited media intelligence firm. *Id.*; accord Julie M. Donohue et al., *A Decade of Direct-to-Consumer Advertising of Prescription Drugs*, 357 NEW ENG. J. MED. 673, 676 (2007) (reporting that the industry spent \$4.237 billion on direct-to consumer marketing of prescription drugs in 2005, an inflation-adjusted increase of 330% since a decade earlier).

²¹⁷ See *supra* notes 136-37 and accompanying text.

the problem.²¹⁸ In the same period, the poor state of medical knowledge contributed to the spread of quacks and hucksters hawking ineffective or positively harmful patent medicines and snake-oil cures.²¹⁹ Clearly some intervention was warranted, and progressive-era legislation such as the Food and Drug Act of 1906²²⁰ targeted these abuses, laying a foundation²²¹ on which successive generations have built, both with novel strategies in manufacture and marketing and with renewed efforts at intervention.²²²

The next step in the analysis—evaluating the costs of legal intervention—invites an examination of the wide variety of food and drug regulations. These regulatory efforts can be broadly divided into two categories: regulation of markets and regulation of marketing. By regulation of markets, I mean to refer to interventions that purport to limit the types of goods that may legally be brought to market. In the food and drug context, these regulations may be of an *ex ante* variety—for example, the requirement that a drug be approved by the Food and Drug Administration (FDA) prior to being introduced commercially²²³ or the compelled intermediation of experts, such as the state-licensed medical profession.²²⁴ Or regulations might be of an *ex post* variety—for example, promulgating standards of identity for food products²²⁵ and subjecting nonconforming producers to corrective remedies through

²¹⁸ U.S. DEP'T OF AGRICULTURE, BUREAU OF CHEMISTRY, FOOD AND FOOD ADULTERANTS (BULLETIN 13) (1897-1902). See generally C.C. Reiger, *The Struggle for Federal Food and Drugs Legislation*, 1 J. L. & CONTEMP. PROBS. 3 (1933) (documenting the process of exposition, education, and mobilization that generated the Food and Drugs Act of 1906). Britain, the first industrialized society, had generated a similar catalog some decades earlier. FREDRICK ACCUM, A TREATISE ON ADULTERATIONS OF FOOD AND CULINARY POISONS (2d ed. 1820). In contrast to the bureaucratic stoicism of Wiley's reports, the frontpiece of Accum's treatise is illustrated with a shrouded human skull sitting atop an urn entwined with serpents; the urn is inscribed with the scriptural quotation: "There is DEATH in the Pot." 2 Kings 4:40.

²¹⁹ See generally SAMUEL HOPKINS ADAMS, THE GREAT AMERICAN FRAUD: ARTICLES ON THE NOSTRUM EVIL AND QUACKERY, IN TWO SERIES, REPRINTED FROM COLLIER'S WEEKLY (1907).

²²⁰ Federal Food & Drugs Act of 1906 (Wiley Act), Pub. L. 59-384, 34 Stat. 768 (1906).

²²¹ Of course, the federal statute had been preceded by a number of similar efforts at the state level. Reiger, *supra* note 218, at 5 ("By 1906 practically all the states had pure food laws.")

²²² The struggle continues to the present day and will likely never cease. See, e.g., FTC v. QT, Inc., 512 F.3d 858 (7th Cir. 2008) (upholding injunctive and disgorgement remedies granted to the Commission against the manufacturer of the "Q-Ray Ionized Bracelet," marketed as a pain remedy).

²²³ 21 U.S.C. § 355 (2006).

²²⁴ Intermediation need not be legally mandated to arise as a solution to the problem of brand bias. In various industries, private entrepreneurs provide third-party certification services regarding credence and experience qualities. Elise Golan et al., *Economics of Food Labeling*, 24 J. CONSUMER POL'Y 117, 130-36 (2001). See generally Timothy J. Feddersen & Thomas W. Gilligan, *Saints and Markets: Activists and the Supply of Credence Goods*, 10 J. ECON. & MGMT. STRATEGY 149 (2001) (modeling activism to induce corporate responsibility as this type of private credence-quality verification).

²²⁵ 21 U.S.C. § 341; 21 C.F.R. Parts 130-169.

public enforcement²²⁶ or private tort regimes.²²⁷ By regulation of marketing, I refer to interventions that purport to control the flow of information regarding products that are permitted in the marketplace. Examples include compulsory labeling laws,²²⁸ mandatory disclaimers,²²⁹ pre-market review of prescription drug trademarks,²³⁰ false advertising law (including corrective advertising remedies),²³¹ and *ad hoc* advertising restrictions or bans.²³² Again, enforcement may be *ex ante* or *ex post*,²³³ public or private.²³⁴

²²⁶ 21 U.S.C. §§ 331-337 (public enforcement regime, including civil, criminal, and forfeiture penalties).

²²⁷ The extent to which the federal Food Drug and Cosmetic Act's public enforcement regime preempts private state-law causes of action regarding regulated drugs is a subject of ongoing debate and dispute. *See generally, e.g.*, David A. Kessler & David C. Vladeck, *A Critical Examination of the FDA's Efforts to Preempt Failure-to-Warn Claims*, 96 GEO. L.J. 461 (2008); *see also* *Holk v. Snapple Beverage Corp.*, 575 F.3d 329 (3d Cir. 2009) (reversing dismissal of a putative New Jersey consumer fraud class action where dismissal was based on the argument that FDA policy regarding the term "all natural" preempted the state-law claim); *Von Koenig v. Snapple Beverage Corp.*, 713 F. Supp. 2d 1066 (E.D. Cal. 2010) (denying a motion to dismiss a putative California consumer fraud class action on the same grounds).

²²⁸ *See, e.g.*, Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (codified as amended in scattered sections of 21 U.S.C.).

²²⁹ *See, e.g.*, 21 C.F.R. § 101.93 (source of the (in)famous "These statements have not been evaluated by the FDA" disclaimer for dietary supplements).

²³⁰ FDA, GUIDANCE FOR INDUSTRY: CONTENTS OF A COMPLETE SUBMISSION FOR THE EVALUATION OF PROPRIETARY NAMES (2010), *available at* <http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/ucm075068.pdf>.

²³¹ 15 U.S.C. § 1125(a)(1)(B) (creating a private right of action against false or misleading statements in advertising and promotion). *See generally* Richard S. Cornfeld, *A New Approach to an Old Remedy: Corrective Advertising and the Federal Trade Commission*, 61 IOWA L. REV. 693 (1975) (discussing the history of the corrective advertising remedy and proposing its revival); Letter from Thomas Abrams, Dir., Div. of Drug Mktg., Adver., & Comm'ns, FDA, to Reinhard Franzen, President & Chief Exec. Officer, Bayer Healthcare Pharmaceuticals, Inc. (Oct. 3, 2008), *available at* <http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2008/ucm1048110.htm> (warning letter regarding allegedly misleading advertisements for Bayer's branded contraceptive drug "Yaz," demanding corrective advertising under threat of enforcement action).

²³² *See, e.g.*, 21 U.S.C. § 353b (giving the administration the right to review television advertisements for prescription drugs and to recommend—and in limited circumstances require—changes prior to the advertisement being disseminated). Outright bans typically target products or services that are believed to generate high social costs (i.e., vices) and as a result often invite—but survive—First Amendment scrutiny. *See, e.g.*, *Coyote Publ'g Inc. v. Miller*, 598 F.3d 592 (9th Cir. 2010) (rejecting First Amendment challenge to Nevada brothel advertising restrictions); *Educ. Media Co. v. Swecker*, 602 F.3d 583 (4th Cir. 2010) (rejecting First Amendment challenge to Virginia restrictions on alcohol advertising to college students); *Capital Broad. Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971) (rejecting First Amendment challenge to electronic media advertising ban provision of the federal Public Health Cigarette Smoking Act of 1969).

²³³ *Compare* 21 U.S.C. § 353b (allowing government intervention prior to dissemination of an advertisement), *with* 15 U.S.C. §§ 45, 1125(a)(1)(B) (providing remedies against already-disseminated false or misleading advertisements).

²³⁴ *Compare* 15 U.S.C. § 1125(a)(1)(B) (creating a private right of action against false or misleading statements in advertising and promotion), *with* 15 U.S.C. § 45 (giving the Federal Trade Commission authority to take action against "unfair or deceptive act[s] or practice[s]" in commerce).

Without undertaking a detailed exposition of the entire field of food and drug law, we can use these examples to illustrate the costs and benefits of legal intervention in a market where consumer knowledge is derived largely from advertising by self-interested and potentially strategic producers. Take, for example, mandatory disclosure regimes. Such regimes are among the least controversial approaches to mitigating cognitive bias, largely because of their relatively low social cost.²³⁵ In the food and drug context, perhaps the most successful such regime is the Nutritional Labeling and Education Act (NLEA), which is responsible for the standardized “Nutrition Facts” chart affixed to nearly all branded food products sold at retail.²³⁶ The available evidence suggests that standardized nutritional information labeling has had a salutary effect on consumer search costs and decision-making, and even on the quality of products subject to the labeling regime.²³⁷

However, the success of a mandatory disclosure regime in ameliorating brand bias is not guaranteed; to the contrary, it depends vitally on the design and content of the disclosures, on the mix of information beyond the disclosures that is available to consumers, and on the nature of the market itself.²³⁸ In the fast-food context, for example, the effects of compulsory calorie disclosures on consumer

²³⁵ See Bar-Gill, *supra* note 136, at 793-802; Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,”* 151 U. PA. L. REV. 1211, 1230-37 (2003); Epstein, *Neoclassical Economics, supra* note 133, at 807 (“It is possible to take some simple steps that will reduce the rate of error, such as requiring standardized disclosures, without imposing heavy burdens on regulated parties.”).

²³⁶ Nutritional Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (codified as amended in scattered sections of 21 U.S.C.).

²³⁷ See generally, e.g., Dillbary, *Getting the Word Out, supra* note 213, at 1011-13 (noting that passage of the NLEA appears to have disproportionately burdened producers of unhealthier foods who benefited from consumer misinformation prior to passage); Dubow & Childs, *supra* note 84, at 149 (“[The FDA] believes its recently required new label format, which displays fat and sodium levels in an easily compared manner, drove immense amounts of fat and sodium out of products as companies surreptitiously reformulated to improve their label numbers.”); Jayachandran N. Variyam & John Cawley, *Nutrition Labels & Obesity* (Nat’l Bureau of Econ. Research, Working Paper No. W11956, 2006) (finding that the NLEA’s benefits in terms of better informed consumer decision-making greatly outweigh the costs of its implementation).

²³⁸ See generally Jason M Szanyi, *Brain Food: Bringing Psychological Insights to Bear on Modern Nutrition Labeling Efforts*, 65 FOOD & DRUG L.J. 159 (2010) (discussing shortcomings of various labeling regimes from a cognitive psychology perspective). Most recently, this feature of disclosure regimes has been the subject of spirited debate between behavioralist and neoclassical commentators on the Truth in Lending Act (TILA). Compare generally Epstein, *Neoclassical Economics, supra* note 133 (arguing that TILA is likely sufficient to ameliorate any tractable errors in consumer cognition and that the costs of any more onerous regimes would likely outweigh their benefits), with Bar-Gill, *supra* note 136 (arguing that TILA’s disclosure regime should be modified so as to be more comprehensive and standardized); Jeff Sovern, *Preventing Future Economic Crises Through Consumer Protection Law or How the Truth in Lending Act Failed the Subprime Borrowers*, 71 OHIO ST. L.J. 761 (2010) (arguing that TILA’s poorly-designed disclosures fail to promote informed consumer decisions regarding mortgage loans).

decision-making are ambiguous at best.²³⁹ For prescription drugs, the evidence suggests that the effectiveness of mandatory disclosures in conveying accurate information to consumers is highly sensitive to the specific form and content of the disclosures, inviting strategic behavior by sophisticated producers.²⁴⁰ And in the dietary supplement market, formulaic mandatory disclaimers in advertisements appear to entrench, rather than dispel, erroneous consumer beliefs.²⁴¹ In short, the effectiveness, to say nothing of the cost-effectiveness, of something so seemingly straightforward as a mandatory disclosure regime is a complex empirical question.

Moving beyond mere disclosure regimes to more complex regulation of marketing, consider the regime addressing direct-to-consumer (DTC) advertising of prescription drugs. As the earlier discussion explains (and as the HeadOn example illustrates), producers need not make explicit claims to generate consumer beliefs favorable to the producers' sales efforts; all they need is to expend resources to familiarize consumers with their brand name.²⁴² In the early 2000s, applicable law allowed prescription drug makers to omit information about a drug's indications and side-effects in so-called "reminder advertisements" while still referencing the drug's brand name (on the assumption that consumers could and would get further information elsewhere, such as from doctors or from product claims made in other advertisements).²⁴³ In this regulatory environment, drug makers not only frequently deployed reminder advertising, but sometimes tried to pair it with other forms of advertising that would provide indirect

²³⁹ Compare Mary T. Bassett et al., *Purchasing Behavior and Calorie Information at Fast-Food Chains in New York City*, 98 AM. J. PUB. HEALTH 1457 (2008) (finding that the presence of calorie information on menus at Subway chain restaurants led consumers to purchase marginally lower-calorie options), with Brian Elbel et al., *Calorie Labeling And Food Choices: A First Look At The Effects On Low-Income People In New York City*, 28 HEALTH AFFAIRS w1110 (2009), available at <http://content.healthaffairs.org/cgi/content/full/28/6/w1110> (finding that even though some low-income customers of fast food restaurants said that new legally mandated calorie disclosures influenced their decisions, their actual purchases were indistinguishable from purchases by comparable consumers without calorie information).

²⁴⁰ See generally, e.g., Joel Davis, *The Effect of Qualifying Language on Perceptions of Drug Appeal, Drug Experience, and Estimates of Side-Effect Incidence in DTC Advertising*, 12 J. HEALTH COMM. 607 (2007).

²⁴¹ Karen Russo France & Paula Fitzgerald Bone, *Policy Makers' Paradigms and Evidence from Consumer Interpretations of Dietary Supplement Labels*, 39 J. CONSUMER AFFAIRS 27 (2005) (finding, based on an experimental study, that the FDA's disclosure regime for dietary supplements does not lead to informed consumer behavior and in fact mainly serves to reinforce pre-existing attitudes and beliefs in potentially misleading ways).

²⁴² *Supra* notes 2-16 and accompanying text; Part II.B.1.

²⁴³ FOOD & DRUG ADMIN., GUIDANCE FOR INDUSTRY: CONSUMER-DIRECTED BROADCAST ADVERTISEMENTS (Aug. 1999, updated April 18, 2002), available at <http://www.fda.gov/RegulatoryInformation/Guidances/ucm125039.htm>; see also 21 C.F.R. § 200.200 (defining "reminder advertisements" exempt from the rigorous disclosure requirements for DTC advertisements that include product claims).

suggestions about the indications of the branded drug without disclosing its risks.²⁴⁴ Indeed, only when congressional attention raised the possibility of even stricter controls on DTC advertising²⁴⁵ did the pharmaceutical industry collectively adopt voluntary restrictions on reminder ads.²⁴⁶ And even under these self-imposed restrictions, producers continue to find subtle ways of ensuring that consumers internalize favorable attribute claims while unfavorable attributes are downplayed.²⁴⁷ In sum, the history of DTC advertising demonstrates the complex enforcement problems that can mitigate the effectiveness and increase the cost of a regulatory regime that attempts to provide more flexibility than standardized disclosure mandates.

Where more muscular interventions are felt to be needed, intervention in *markets* might thus seem to be the more reliable option for mitigating or avoiding the harms to consumers resulting from brand bias. That is, even if it is hopeless to try to regulate strategic marketing efforts by producers, the bias-prone consumer cannot be injured by the disparity between expected and actual product performance if there is no product to buy. The only consumer injury under such a regime would be in the form of opportunity costs arising from the absence of excluded products from the market.²⁴⁸ Moreover, conspicuous intervention in a market can have secondary effects similar to intervention in marketing—for example, the fact that a drug has

²⁴⁴ See generally Francis B. Palumbo & C. Daniel Mullins, *The Development of Direct-to-Consumer Prescription Drug Advertising Regulation*, 57 FOOD & DRUG L.J. 423, 430-41 (2002) (noting that the FDA had begun stepping up enforcement against such circumvention of disclosure requirements); Tamar V. Terzian, Note, *Direct-to-Consumer Prescription Drug Advertising*, 25 AM. J. L. & MED. 149 (1999); Letter from Joan Henkin, Consumer Prot. Analyst, FDA, to Mary Jane Nehring, Dir., Worldwide Regulatory Affairs, Schering Corp. (Aug. 18, 2000), available at <http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/EnforcementActivitiesbyFDA/WarningLettersandNoticeofViolationLetterstoPharmaceuticalCompanies/UCM166052.pdf> (FDA warning letter regarding Schering-Plough's particularly transparent use of such a tactic in print advertising for allergy drug Claritin).

²⁴⁵ See, e.g., Jennifer Corbett Dooren, *Drug Industry Creates Voluntary Ad Guidelines*, WALL ST. J., Aug. 3, 2005, at D4 (“Responding to increased criticism from Congress, the pharmaceutical industry announced a set of voluntary guidelines . . . [that] call on companies to eliminate ‘reminder’ ads that typically carry little discussion of the risks and benefits of products.”).

²⁴⁶ PHARMA GUIDING PRINCIPLES: DIRECT TO CONSUMER ADVERTISEMENTS ABOUT PRESCRIPTION MEDICINES, Principle No. 10 (Nov. 2005).

²⁴⁷ Ziad F. Gellad & Kenneth W. Lyles, *Direct-to-Consumer Advertising of Pharmaceuticals*, 120 AM. J. MED. 475, 477 (2007) (“[M]ost broadcast advertisements give consumers more time to absorb facts about benefits than those about risks, and risks are presented at a higher grade level (9th grade) as compared with benefits (6th grade). Similarly, an analysis of prescription drug websites found that the homepage often disproportionately emphasizes benefits at the expense of risks.” (footnote omitted)).

²⁴⁸ One libertarian think tank has made it a priority to draw attention to these opportunity costs, arguing that they are insufficiently accounted for in current policy. Daniel B. Klein & Alexander Tabarrok, FDAREVIEW.ORG, A PROJECT OF THE INDEP. INST., <http://www.fda-review.org> (last visited Feb. 24, 2011).

survived FDA scrutiny may provide consumers with useful information regarding the drug's credence characteristics.²⁴⁹

Of course, this purported effectiveness of market intervention comes at a steep price. Regulation of markets is orders of magnitude more costly than regulation of marketing—to the taxpayer, to the target of regulation, and (to the extent pass-through is possible) to consumers of the regulatory targets' products—and *ex ante* regulation (which holds out the hope of preventing harm to consumers before it occurs) is more costly than *ex post* regulation.²⁵⁰ Perhaps more troublingly, all this expense does not guarantee that consumers will be protected from the harms that flow from brand bias. Adequate consumer protection requires effective administration and enforcement of market interventions.²⁵¹ Of course, total administrative effectiveness is more of a utopian aspiration than a realistic standard. Recent withdrawals of

²⁴⁹ Oliver Bonroy & Christos Constantatos, *On the Use of Labels in Credence Goods Markets*, 33 J. REGUL. ECON. 237, 248 n.26 (2008) (“[FDA’s] alleged tendency of not approving a new drug until being certain about its effects . . . has the advantage of creating a sort of credible label: once a new drug is approved, consumers must be certain that it represents a superior product, even with respect to any long term health effects.”).

²⁵⁰ A widely cited study estimated the fully capitalized cost of bringing a single new drug to market through the FDA approval process at \$802 million. See generally Joseph A. DiMasi et al., *The Price of Innovation: New Estimates of Drug Development Costs*, 22 J. HEALTH ECON. 151 (2003). This is nearly the total amount in user fees the FDA expected to collect in Fiscal Year 2010—a year for which the agency’s entire budget request was \$3.25 billion. U.S. FOOD & DRUG ADMIN., SUMMARY OF THE FDA’S FY 2010 BUDGET, available at <http://www.fda.gov/AboutFDA/ReportsManualsForms/Reports/BudgetReports/ucm153154.htm>. However, it should be noted that some commentators treat the \$802 million figure with some skepticism. Indeed, one recent critique suggests that the figure may be inflated by as much as a factor of 20. See Donald W. Light & Rebecca Warburton, *Demythologizing the High Costs of Pharmaceutical Research*, BIOSOCIETIES ADVANCE ONLINE PUBLICATION (Feb. 7, 2011), <http://www.palgrave-journals.com/biosoc/journal/vaop/ncurrent/pdf/biosoc201040a.pdf>. By contrast, the total estimated cost to the entire food industry of complying with the Nutrition Labeling and Education Act was \$2.3 billion, and the estimated cost to the government of implementing it only \$163 million. Regulatory Impact Analysis of the Final Rules to Amend the Food Labeling Regulations, 58 Fed. Reg. 2927, 2935 (Jan. 6, 1993).

²⁵¹ Of course, the effectiveness of enforcement is a key qualification: intermediators such as government agencies and professional experts may lack competence or they may have conflicts of interest that prevent them from acting in consumers’ best interests. On the competence issue, see, for example, Jeanne Lenzer, *FDA Is Incapable of Protecting US “Against Another Vioxx,”* 329 BRITISH MED. J. 1253, 1253 (2004) (discussing accusations that the approval of Vioxx represented a failure of regulatory design and execution at FDA); and Barbara Mintzes et al., *How Does Direct-to-Consumer Advertising (DTCA) Affect Prescribing? A Survey in Primary Care Environments with and Without Legal DTCA*, 169 J. DE L’ASSOCIATION MÉDICALE CANADIENNE 405, 412 (2003) (finding that DTCA makes physicians more likely to prescribe drugs about which they are ambivalent). On the conflict-of-interest issue, see generally, for example, Thomas Bodenheimer, *Uneasy Alliance: Clinical Investigators and the Pharmaceutical Industry*, 342 NEW ENG. J. MED. 1539, 1539-43 (2000) (discussing potential conflicts of interest created by pharmaceutical industry funding of FDA clinical trials); and Ashley Wazana, *Physicians and the Pharmaceutical Industry: Is a Gift Ever Just a Gift?*, 283 JAMA 373, 373-80 (2000) (documenting the influence of the pharmaceutical industry over physicians’ prescription practices and other professional behavior).

highly advertised drugs such as Vioxx²⁵²—whose fatal side effects failed to spur FDA action in either premarket or postmarket review—make this abundantly clear. Moreover, for so long as such regulatory failure goes undiscovered, the secondary effects of intervention in markets (i.e., its tendency to lead consumers to view approved products more favorably) may perversely *increase* the injuries resulting from brand bias. In short, intervention in markets is beset with the same problems as intervention in marketing, with the distinction that the stakes are far, far higher.

As this subpart illustrates, industry-specific legal intervention to ameliorate brand bias, attractive as it might seem, must be scrutinized closely. To be sure, it is an affront to efficiency and to consumer autonomy for producers to deceptively market their wares to consumers, even if the deception consists merely in taking advantage of brand bias. But attempting to stamp out strategic producer behavior through regulation merely adds a new set of tradeoffs—between the costs (to industry, consumers, and government) and benefits (to consumers and honest producers) of government intervention—to the tradeoff between the costs (brand bias) and benefits (lowered search costs) of trademark protection. Once again, determining whether a particular intervention, on balance, will increase or decrease aggregate social welfare, even if we assume no changes to the trademark regime, is an intensely empirical question.

C. *From Efficiency to Distribution: The Descriptive and the Normative*

At this point, we reach the limits of theory. Elegant as it is, the search-costs model is helpless to tell us whether trademark protection *in a given industry* promotes economic efficiency, because it fails to account for brand bias. For this reason, the model is similarly helpless to determine whether brand bias in a particular market is significant enough to warrant government intervention, let alone what type of interventions will tend toward maximum efficiency. Making these determinations requires empirical study that is sensitive to the nature of consumer cognition and the idiosyncrasies of particular markets.

²⁵² See generally Richard Horton, *Vioxx, the Implosion of Merck, and Aftershocks at the FDA*, 364 LANCET 1995 (2004). See also Ronald M. Green, *Direct-to-Consumer Advertising and Pharmaceutical Ethics: The Case of Vioxx*, 35 HOFSTRA L. REV. 749, 752 (2006) (“In 2000, Merck spent \$160.8 million on DTC advertising, the largest amount spent on DTC for any drug that year . . .”).

“The problem, of course, is that in many cases policymakers have little information with which to perform a meaningful cost-benefit analysis.”²⁵³ In food and drug markets, the empirical debate has been joined, as it has in the consumer finance markets,²⁵⁴ but other consumer markets fail to attract such rigorous, industry-specific empirical research. Where we nevertheless make assertions about the efficiency of such markets, we are likely guilty of confusing the descriptive with the normative. Absent sufficient empirical grounding, any argument that branding in a particular consumer market makes society better off, or that government intervention in a consumer market where branding is prevalent makes society worse off, cannot be understood as an argument about efficiency. Rather, any such argument based on theory alone merely uses the language of *efficiency* to mask an underlying argument about *distribution*: an irreducibly normative claim as to which segment of society should bear the transactions costs inherent in consumer markets.²⁵⁵ As the food and drug example demonstrates, we might go to great lengths to ensure that the transactions costs of consumer markets do not manifest themselves in the form of mothers unknowingly poisoning their infant children with the latest branded patent medicine,²⁵⁶ and yet tolerate imposition of considerable costs on credulous consumers of heavily marketed homeopathic cures for the common cold.²⁵⁷ How much more might we be willing to burden borrowers who failed to read their loan documents,²⁵⁸ to say nothing of

²⁵³ Bar-Gill, *supra* note 136, at 793.

²⁵⁴ See *supra* note 238 and sources cited therein.

²⁵⁵ Cf. generally Beebe, *supra* note 25 (noting that arguments concerning consumer competencies in the face of branding are deployed inconsistently by courts, commentators, and litigants in order to advance their substantive agenda regarding the scope of trademark law).

²⁵⁶ See, e.g., John S. Haller, Jr., *Opium Usage in Nineteenth Century Therapeutics*, 65 BULL. N.Y. ACAD. MED. 591, 600 (1989) (discussing the popular children’s remedy “Mrs. Winslow’s Soothing Syrup,” a clandestine opiate regularly administered to infants, with ghastly results); see also BEE WILSON, SWINDLED: THE DARK HISTORY OF FOOD FRAUD, FROM POISONED CANDY TO COUNTERFEIT COFFEE 154-63 (2008) (discussing New York City’s “swill milk scandal” of the mid-nineteenth century, in which the premature deaths of thousands of infants was attributed to adulterated milk); Peter Temin, *Government Actions in Times of Crisis: Lessons from the History of Drug Regulation*, 18 J. SOC. HIST. 433, 436-37 (1985) (discussing how the birth of babies without hands or feet as a result of exposure to the unapproved drug thalidomide spurred strengthening of the FDA’s regulatory authority).

²⁵⁷ Compare U.S. FOOD & DRUG ADMIN., COMPLIANCE POLICY GUIDE § 400.400, *Conditions Under Which Homeopathic Drugs May Be Marketed* (May 31, 1988, revised March 1995), available at <http://www.fda.gov/ICECI/ComplianceManuals/CompliancePolicyGuidanceManual/ucm074360.htm> (outlining broadly permissive policy with respect to marketing of homeopathic remedies), with Letter from Deborah M. Autor to William J. Hemelt (June 16, 2009), available at <http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/ucm166909.htm> (threatening the manufacturer of the branded homeopathic cold remedy Zicam with enforcement action after receiving 130 reports that the product caused anosmia).

²⁵⁸ See *supra* note 238 and sources cited therein.

ordinary shoppers at the grocery store and the pharmacy who base their purchase decisions on the latest ad campaign?

Drawing distinctions between these markets, determining whether any of them require legal intervention to guard against brand bias, and determining what, if any, legal intervention can provide a benefit to consumers that outweighs its costs to society, are not tasks the search-costs model is even interested in, let alone equipped to perform. In its incompleteness, the search-costs model reflects little more than a normative commitment to the proposition that producers should be free to allocate transactions costs in consumer markets as they see fit, to the extent that they are able. Of course, reflexive resort to intrusive consumer protection regimes suffers from the inverse problem: It assumes that all transactions costs in consumer markets should be allocated by the government, preferably to be imposed on producers (with or without the recognition that producers are likely to pass such costs through to their customers or manipulate them to erect barriers to competitive entry). Either of these categorical positions may reflect ideological or intuitive beliefs regarding the parties best able to allocate or bear transactions costs, but absent empirical support neither of them can guide us to efficiency in our consumer markets.

This leaves us with a choice: We can admit that much of our thinking about the appropriate scope of trademark law and consumer protection law is normative—that is, distributional and ultimately political—in nature, or we can use the empirical evidence available to us—and develop further evidence as needed—to escape such normative debates and inform the quest for efficiency in consumer markets. To the extent we can agree on the normative appeal of efficiency even if we disagree about distribution, the latter course would seem to be preferable. The brand equity literature reviewed in Part I of this Article provides an imperfect beginning to this endeavor, while the related empirical research reviewed in Part II of this Article provides guidance for continuing it in the future. Moving forward, it will be important to keep in mind the complementary relationship between trademark law and consumer protection law described in this Part and to view these two bodies of law as partners rather than competitors in the project of improving our consumer markets.

CONCLUSION

The goal of this Article has been to question the broad acceptance of the search-costs model of trademark protection and its conclusion that such protection increases aggregate social welfare. The lens for this inquiry has been the concept of brand equity: the incremental value

that a brand imparts to a product and the mechanisms by which it does so. Research in marketing, psychology, and economics suggests that the model's categorical conclusion is unsound, but that it may be tenable in certain factual contexts where informational and persuasive content of trademarks dominates. In other contexts, however, the psychological effects of trademarks may give rise to a divergence between objective evidence and subjective consumer beliefs and preferences—a phenomenon I have labeled brand bias. In such situations, strategic behavior by sellers can generate welfare losses, which may overwhelm trademark protection's positive welfare effects.

Distinguishing between trademark uses that present a net increase versus a net decrease in social welfare is a complex empirical task, in which at least three sources of transactions costs—search costs, brand bias, and the costs of government intervention—must be weighed and balanced on an industry-by-industry basis. While trademark doctrine lacks the tools to effectively strike this balance, complementary bodies of law appear to be directed at minimizing the potential for opportunistic deployment of brand bias by producers while lowering, or at least not raising, consumer search costs. This Article discussed and critiqued various approaches to such complementary regulation in the context of food and drug law, a potent example where marketing, regulation, and empirical research on both are widespread. In other industries, however, empirical evidence may be insufficiently developed to allow for an effective balancing of costs and benefits.

The lesson of this Article is that such a dearth of empirical evidence undermines the efficiency-based arguments of the search-costs model, reducing them to normative arguments about the appropriate distribution of transactions costs. With a more sophisticated understanding of consumer cognition and behavior and corresponding refinements to the search-costs model, we might avoid normative impasses generated by such modes of argumentation and instead engage in empirically-informed debate over the appropriate scope of trademark and consumer protection law at the industry level. Such debate holds the greatest promise of moving us toward the efficiency that the search-costs model promises but currently lacks the tools to deliver.