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Rebecca Tushnet

Georgetown University Law Center, rlt26@law.georgetown.edu

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MORE THAN A FEELING: EMOTION AND THE FIRST AMENDMENT

*Rebecca Tushnet**

*New York Times Co. v. Sullivan*¹ remains a foundational case even as the First Amendment issues occupying the courts today have significantly changed. Modern speech regulations can take many forms; the “new school” Jack Balkin identifies has supplemented, rather than replaced, the “old school.”² But the old school has also undergone some renovations. Rather than governing the *New York Times*, many of today’s trickiest speech regulations target speakers who aren’t traditional publishers, which makes it easier to treat these regulations as fringe cases and to overlook some deep contradictions in current doctrines.

Here, I wish to examine one aspect of *Sullivan*, which is its requirement of a false factual statement, and the relationship of the falsity requirement to ideas about harm and emotion. Disparaging speech is usually harmful because it triggers negative emotions in the audience, causing other people to treat the victim differently. First Amendment law has generally been leery of government attempts to change the marketplace of emotions — except when it has not been. Scientific evidence indicates that emotion and rationality are not opposed, as the law often presumes, but rather inextricably linked. There is no judgment, whether moral or otherwise, without emotions to guide our choices. Judicial failure to grapple with this reality has produced some puzzles in the law.

Part I of this Symposium contribution will examine the intersection of private law, the First Amendment, and attempts to manipulate and control emotions. After *Sullivan*, statutes and common law rules that authorize one person to control too much of another person’s speech can violate the First Amendment. Another key aspect of *Sullivan* is that only false *factual* statements can defame, not mere derogatory opinions. Yet trademark law allows exactly the kind of control over nonfactual, emotional appeals that modern defamation law precludes. These two bodies of law thus stand in contrast, one constrained by the First Amendment to cover only facts and the other allowed to reach much further into the dark heart of emotional manipulation.

Part II turns to compelled speech, and again finds two contrasting regulations united by their emotional mechanisms, but divided by their constitutional fates. Courts have struck down mandatory smoking warnings in

* Professor, Georgetown Law. Thanks, as always, to Mark Tushnet.

¹ 376 U.S. 254 (1964).

² See *supra* [Professor Balkin] TAN 1-195.

visual form, but have approved mandatory abortion disclosures and ultrasound requirements that operate in the same emotional register. Regardless of whether the regulation involves a direct government mandate or private parties claiming competing rights to influence the audience's emotional state, then, current First Amendment law doesn't have a consistent account of the proper role of emotion in speech regulation.

Part III suggests that the contradictions of current doctrine could be ameliorated by less distrust of emotion and more acceptance that where information is being conveyed, emotion will regularly follow. Our focus then should not be on whether deployment of emotion is "manipulative," but whether it is part of a discriminatory or factually misleading regulation. When the government regulates speech, the regulation will generally have an emotional component because human thought is emotional. Objections to emotion-based regulations should not be based on the obviousness of that component. Rather, the acceptability of the government's aim should be the guide, especially when nongovernmental speakers are free to use emotional appeals to press their own cases. The government may be required to be neutral as between classes of private speakers, which *Sullivan* requires and which I will argue should be the case with respect to trademark law. It is not required to be neutered. When the government can otherwise constitutionally mandate disclosure, the fact that these disclosures have emotional resonance is not an independent constitutional barrier.

I. WHEN CAN PRIVATE PARTIES MANIPULATE EMOTIONS WITHOUT LIABILITY?

Among many other things, *Sullivan* stands for a key principle of modern First Amendment law: if the government creates a legal remedy that allows a private plaintiff to hold a defendant liable for its speech, there are constitutional limits on the scope of that remedy. Part II will take up more direct interventions by the government into the marketplace for speech. This Part considers instead how courts have reacted to legal regimes that empower certain classes of people to suppress others' speech. The overall marketplace of ideas is bounded and shaped by the allowable causes of action. A world in which people can't call each other nasty names will have a different mix of speech than one in which contumely is the price of freedom.

After *Sullivan*, the enforcement of private claims constitutes relevant government action to which First Amendment scrutiny can be directed. Alabama law allowed *Sullivan* to sue the *New York Times* for harming his reputation, just as trademark law allows trademark owners to sue alleged infringers and diluters. While the Court sharply limited Alabama's ability to authorize *Sullivan* to control the *Times*'s speech, trademark owners have enjoyed considerably more success in litigation. This Part argues that, while emotional, nonfactual speech is now free to cause harm without be-

ing deemed defamatory, trademark law regularly allows liability for the same kinds of speech.

A. Defamation Law (Herein of Facts and Nonfacts)

Under modern defamation law, only false factual statements are actionable. That means not just that true statements are protected, but also that *nonfalse* statements are protected: a claim with no truth value at all cannot be defamatory. This includes statements of pure opinion, unless they imply the existence of particular defamatory factual claims.

But why? Statements of opinion, mockery, and even obviously false parodies can harm a person, not just in her own mind but in the esteem of others, with real consequences. Consider President Ronald Reagan’s entirely nonfactual but devastating “there you go again,” which helped sum up an entire line of political criticism, or Tina Fey’s deconstruction of then-Governor Sarah Palin. Some theorists have claimed that only factual claims can affect reputation,³ but to say this is to redefine “reputation” as “that which can be changed only by factual claims.”

Likewise, many accounts of free speech rest on claims about the value of factual information, combined with claims about the danger that mistaken verdicts will chill truthful speech. If truthful information is important to allow audiences to form opinions about third parties, and if we need breathing room to induce speakers to provide that information, then we should err on the side of caution before suppressing factual claims.⁴ But this analysis fails to explain the role of nonfacts in communication. In order for an audience to have any interest in taking nonfacts into account in forming their judgments, the audience has to be potentially swayed by those nonfacts. If only truth matters, by contrast, then the audience loses nothing from the suppression of nonfacts. The only concern would be the risk of chill, which could be dealt with by erring on the side of deeming a statement to be factual. The constitutional requirement that the harm-causing speech be factually false (and therefore falsifiable), not just derogatory, substantially narrows the potential scope of laws that regulate speech.⁵ That is, the fact requirement protects speech from suppression by

³ See, e.g., Joseph H. King, *Defamation Claims Based on Parody and Other Fanciful Communications Not Intended to Be Understood as Fact*, 2008 UTAH L. REV. 875, 877 (asserting that reputational harm requires others to accept false information).

⁴ See Laura A. Heymann, *The Law of Reputation and the Interest of the Audience*, 52 B.C. L. REV. 1341, 1418–20 (2011); see also *id.* at 1424 (discussing risks posed to an audience’s decisionmaking by untrue information but not by true information).

⁵ See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 57 (1988) (holding that, when a jury decided that a *Hustler* “parody could not ‘reasonably be understood as describing actual facts about [Falwell] or actual events in which [he] participated,’” *id.* at 49 (second alteration in original), and thus Falwell couldn’t claim defamation, a claim for intentional infliction of emotional distress was also unavailable); *Films of Distinction, Inc. v. Allegro Film Prods., Inc.*, 12 F. Supp. 2d 1068, 1078–79, 1081 (C.D. Cal. 1998) (allowing infringement and dilution claims to proceed in a case involving a film’s use of a televi-

juries or judges unwilling to tolerate deviation from the majority opinion.⁶ The falsifiability rule also allows speakers to express their own moral and philosophical frameworks, including appeals to emotion.

In line with defamation law's rule that mere vitriol is not actionable unless it includes specific false facts, the *deliberate* infliction of emotional distress on specific targets is also regularly protected by the First Amendment.⁷ Likewise, the Court has struck down flagburning regulations designed to safeguard the emotional resonance of the American flag.⁸ So, according to defamation law, citizens are expected to have a certain kind of hardness. No matter whether plaintiffs are public or private figures, mere insults or aspersions cannot justify a defamation lawsuit, unless they are accompanied by specific stated or implied defamatory facts. Facts trigger emotions, but emotions can exist without facts, and any harm caused by nonfacts is just too bad for the victim. My enemies can use pathos to convince the rest of the world that I am a horrible person, even if that causes me tangible economic loss. (Or another kind of loss: recently the prosecution in a criminal case failed to prevent the defense from referring to the prosecution as "the government," presumably to trigger negative associations.⁹)

The upshot is that outrageousness is generally not enough to justify suppression of speech under the U.S. Constitution, with the exception of obscenity. This outcome is more surprising than we usually admit, as Professor Andrew Koppelman has pointed out:

sion network's trademark, but dismissing defamation claims because there were no "factual assertion[s]," *id.* at 1081).

⁶ See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19–20 (1990) (clarifying that statements that aren't falsifiable, including opinions, are entitled to full First Amendment protection).

⁷ See, e.g., *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) ("[S]peech [at a public place on a matter of public concern] cannot be restricted simply because it is upsetting or arouses contempt. 'If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.' Indeed, 'the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.'" (omission in original) (citation omitted) (first quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989), then quoting *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 574 (1995))); *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43, 43–44 (1977) (per curiam) (reversing an injunction against a Nazi march through a city populated by many Holocaust survivors).

⁸ See *Johnson*, 491 U.S. at 420 (holding that a state's interest in preserving the symbolic value of the flag couldn't justify criminalization).

⁹ See Motion in *Limine Two* at 1, *State v. Powell*, No. I-CR086639B (Cir. Crim. Ct. Williamson Cnty., Tenn. May 22, 2013) (motion to instruct defense counsel not to refer to the prosecution as "the Government" during trial because "[t]he State believes that such a reference is used in a derogatory way and is meant to make the State's attorneys seem oppressive and to inflame the jury"); Paul Alan Levy, *Is It Worse to Be Called "the Government" than "the State of Tennessee?"* [sic], CONSUMER L. & POL'Y BLOG (Oct. 30, 2013, 1:16 PM), <http://pubcit.typepad.com/clpblog/2013/10/is-it-worse-to-be-called-the-government-than-the-state-of-tennessee.html>, archived at <http://perma.cc/P6W7-NGT5> (reporting that the motion was denied).

Pornographers, Nazis, and other transgressors of the sacred . . . form a stable alliance with civil libertarians. This valorization of “sponsoring study-abroad sojourns in the land of fire and brimstone” is peculiar. Most “cultures do not train souls for the ironic contortionism that liberal subjectivity calls for.” Rather, most of the world’s population “cannot hear certain things without wanting to hit somebody.” Free speech is a distinctive cultural formation, and those who would maintain it had better know what it is that they are maintaining.¹⁰

Modern defamation law bars suppression of speech that makes its offended targets want to hit somebody. But what if the speech makes listeners want something else, like a new brand instead of a familiar one?

B. Trademark Law

This section considers two kinds of trademark claims — infringement and dilution. Infringement, at least in its core version, is when consumers are confused about the source or sponsorship of the defendant’s goods, and think they come from the plaintiff or are endorsed by the plaintiff. Dilution, at least in theory, is conduct that harms a trademark even in the absence of confusion, by “whittling away” its value in some mysterious way.¹¹ While dilution is more obviously based on concepts of emotional harm, courts have also accepted theories about emotional damage to brand value as a reason to find infringement.

Trademark law therefore presently authorizes the kind of private control over emotional meaning that defamation law’s limitation to facts precludes: the government provides a remedy as between two private parties when one interferes with the emotional valence of the other. A trademark owner can prevent other commercial actors from making its customers feel less respect for its trademark, even if the mechanism is purely emotional. This power can’t be justified by trademark-specific concepts of economic harm or property.

Trademark lawyers have embraced the concept that emotion and stories are much more effective than facts, where “effective” is defined as the ability to generate sales.¹² As a result, it’s easy for them to conclude that anything that affects a trademark’s emotional resonance ought to be within the scope of trademark law — after all, it could affect sales. As Professor Barton Beebe has written, trademark law has become a means of preserv-

¹⁰ Andrew Koppelman, *Veil of Ignorance: Tunnel Constructivism in Free Speech Theory*, 107 NW. U. L. REV. 647, 712 (2013) (citations omitted) (quoting JOHN DURHAM PETERS, *COURTING THE ABYSS: FREE SPEECH AND THE LIBERAL TRADITION* 14, 93 (2005)).

¹¹ See generally Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507 (2008) (arguing against the cognitive theory of trademark dilution).

¹² See Laura R. Bradford, *Emotion, Dilution, and the Trademark Consumer*, 23 BERKELEY TECH. L.J. 1227, 1260–77 (2008).

ing the creation of distinction, creating a modern sumptuary code.¹³ Courts routinely protect the aura of distinction and uniqueness claimed by a trademark owner.¹⁴ In *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*,¹⁵ for example, the influential Second Circuit enjoined a copyist of Levi's stitching, ostensibly on confusion grounds, because otherwise Levi's sales would be "affected adversely by . . . buyers' *ultimate* realization that the pattern is no longer exclusive."¹⁶ Other cases similarly have found infringement because trademark owners' prestige — and the prestige of their customers — was at stake.¹⁷ As one oft-cited case held, a copyist was infringing because some of its customers would buy its cheaper product "for the purpose of acquiring the prestige gained by displaying what many visitors at the customers' homes would regard as a prestigious article."¹⁸

In other words, trademark protection in the absence of consumer confusion at the point of sale is justified, at least in part, as a means of preserving the status of consumers of "true" luxury products, even if no one ever makes a mistaken purchase. The pain of lost distinction may well be a true psychic harm, but wounded pride or dignity would not be enough to sustain a defamation claim without a false statement of fact.¹⁹ When we allow trademark law to avoid the constraint of requiring a false factual

¹³ See generally Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809 (2010).

¹⁴ See *id.* at 851.

¹⁵ 799 F.2d 867 (2d Cir. 1986).

¹⁶ *Id.* at 875–76.

¹⁷ See, e.g., *Gen. Motors Corp. v. Keystone Auto. Indus., Inc.*, 453 F.3d 351, 358 (6th Cir. 2006) ("[T]he purchaser of an original may be harmed if the widespread existence of knockoffs decreases the original's value by making the previously scarce commonplace . . ."); *Hermès Int'l v. Lederer de Paris Fifth Ave., Inc.*, 219 F.3d 104, 108 (2d Cir. 2000) ("[T]he purchaser of an original [luxury good] is harmed by the widespread existence of knockoffs because the high value of originals, which derives in part from their scarcity, is lessened."); *Ill. High Sch. Ass'n v. GTE Vantage Inc.*, 99 F.3d 244, 247 (7th Cir. 1996) (stating that a "proliferation of borrowings" may deprive a mark "of [its] distinctiveness and prestige"); *Ferrari S.P.A. Esercizio Fabriche Automobili E Corse v. Roberts*, 944 F.2d 1235, 1237 (6th Cir. 1991) (protecting Ferrari's "image of exclusivity" and using harm to uniqueness to justify a finding of infringement); *Cartier, Inc. v. Deziner Wholesale, L.L.C.*, No. 98 Civ. 4947 (RLC), 2000 WL 347171, at *6 (S.D.N.Y. Apr. 3, 2000) ("[I]t is also likely that these sophisticated, brand conscious consumers will lose interest in the Cartier name as they see the number of inferior products in the market bearing the Cartier name grow."); *Gucci Am., Inc. v. Dart, Inc.*, 715 F. Supp. 566, 567 (S.D.N.Y. 1989) (finding that knockoff Gucci watches would harm Gucci by discouraging consumers of the authorized versions "from acquiring a genuine Gucci because the items have become too commonplace and no longer possess the prestige and status associated with them"). Not all of these are luxury brands, but apparently any popular brand now possesses the aura of exclusivity or "uniqueness."

¹⁸ *Mastercrafters Clock & Radio Co. v. Vacheron & Constantin-Le Coultre Watches, Inc.*, 221 F.2d 464, 466 (2d Cir. 1955). As Beebe notes, this rationale has been widely followed. Beebe, *supra* note 13, at 855.

¹⁹ Cf. Wendy J. Gordon, *The Concept of "Harm" in Copyright*, in *INTELLECTUAL PROPERTY AND THE COMMON LAW* 452 (Shyamkrishna Balganeshe ed., 2013) (arguing that subjective distress from others' copying, however strongly and powerfully felt, should not count as the kind of harm justifying a prohibition on copying).

claim, we are returning to the protection of the powerful against *lèse-majesté*.

Trademark dilution is another doctrine that allows trademark owners to control emotional meaning: dilution prevents commercial actors from interfering with the singular *meaning* of a mark even if no one is ever mistaken about any fact at all. In *Deere & Co. v. MTD Products, Inc.*,²⁰ the Second Circuit found that a lawn tractor ad actionably diluted John Deere's mark by featuring an animated Deere logo running away in terror from a small, yappy dog.²¹ In classic defamation terms, this is an obvious nonstarter. While the ad denigrates Deere, it's not in any way understandable as a factual claim. Why then has dilution not troubled courts otherwise steeped in *Sullivan*'s defendant-protective framework?

The most sophisticated description of the posited harm of dilution comes from Professor Laura Bradford. Bradford relies on research on the significance of emotions to decisionmaking, research that will reappear in Part II's discussion of tobacco disclosures. Notably, Bradford doesn't argue that the decisions resulting from trademark-mediated emotions are based in fact. As she explains, dilution can be understood as an attempt to exercise power over the most basic component of consumer preference: "'affect' or the automatic negative or positive response that a mark generates when viewed by a consumer."²² Trademarks work as shortcuts, lowering the amount of effort required to make a buying decision. Consumers readily transfer the pleasure they feel at making an *easy* decision (to choose the familiar brand) to their evaluation of the product and conclude that they have made a good decision.²³

Bradford contends that "[t]hose who use famous marks in ways inconsistent from the owner risk making the marks more costly to evaluate, and thus may cause consumers to automatically feel more negatively toward the original brand and affiliated products. . . . This, in a nutshell, is the

²⁰ 41 F.3d 39 (2d Cir. 1994).

²¹ *Id.* at 41 ("[T]he deer in [MTD's version of the logo] is animated and assumes various poses. Specifically, the MTD deer looks over its shoulder, jumps through the logo frame (which breaks into pieces and tumbles to the ground), hops to a pinging noise, and, as a two-dimensional cartoon, runs, in apparent fear, as it is pursued by the Yard-Man lawn tractor and a barking dog. [District Court] Judge McKenna described the dog as 'recognizable as a breed that is short in stature,' and in the commercial the fleeing deer appears to be even smaller than the dog. [MTD's advertising agency's] interoffice documents reflect that the animated deer in the commercial was intended to appear 'more playful and/or confused than distressed.'").

²² Bradford, *supra* note 12, at 1233–34.

²³ *Id.* at 1234; *see also* Joel B. Cohen et al., *The Nature and Role of Affect in Consumer Behavior*, in HANDBOOK OF CONSUMER PSYCHOLOGY 297, 325 (Curtis P. Haugtvedt et al. eds., 2008) ("[R]educing the effort involved in selecting an alternative (i.e., making a task less unpleasant) can increase the price respondents are willing to pay for that alternative. The transfer of task-related affect onto the valuation of alternatives underlies a growing body of research on the 'value-from-fit' hypothesis. According to this hypothesis, a fit between the manner in which a decision is made and the current orientation of the decision maker can produce pleasant task-related feelings of 'being right,' which can then be (mis)attributed to a chosen object, enhancing its perceived value." (citation omitted)).

harm caused by ‘blurring’ famous marks.”²⁴ Bradford is quite clear that trademark fame sustains itself in large part through familiarity, and that consumers are mistaken about their own preferences: Repeated exposure increases positive feelings regardless of a consumer’s factual evaluation of the product or brand. “Studies suggest that consumers are often unaware of the true source of the positive affect toward the brand, and misattribute it to the brand or product’s likeability, credibility, or suitability.”²⁵

Taking Bradford’s argument a step further, Professor Jerre Swann, a leading proponent of dilution protection, explicitly conflates emotion and information when he describes the qualities he believes brands should be able to control.²⁶ He describes strong brands as “upward ladders of attributes, functional and psychosocial consequences, and value satisfiers.”²⁷ They afford “emotional benefits,” along with “self-expressive, self-esteem and cultural values.”²⁸ Because emotion is the source of much trademark value, he concludes, other people shouldn’t be able to interfere with those positive emotions.²⁹

Yet making audiences think harder (in Bradford’s formulation) or forcing them to choose from a variety of competing meanings, “experiences,” and opinions even when they don’t want to (in Swann’s), is in other areas a First Amendment value, not a harm to be avoided.³⁰ Consider “Pepsi. The choice of a new generation.”³¹ It is nonactionable puffery, but it also positions Coke as uncool. If successful, it will change Coke’s relative status in brand hierarchies. This is the same kind of damage that trademark

²⁴ Bradford, *supra* note 12, at 1234 (footnote omitted).

²⁵ *Id.* at 1267–68.

²⁶ See Jerre B. Swann, *The Evolution of Dilution in the United States from 1927 to 2013*, 103 TRADEMARK REP. 721, 754–55 (2013) (“Successful trademarks are [thus] valuable [today] because of the information [and emotion] they convey.’ The ‘source and quality’ brands of Schechter’s day no longer provide the ‘added attributes and content that consumers now want, demand and need.’ Consumers today do not buy commodities, but ‘experiences . . . whose contents are largely image driven, intangible and symbolic.’” (alterations in original) (footnotes omitted)). Swann is referring to Frank I. Schechter’s classic *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813 (1927), which is often understood to set out the case for an American dilution cause of action to protect unique marks.

²⁷ Swann, *supra* note 26, at 754.

²⁸ *Id.*

²⁹ See *id.* at 773.

³⁰ Compare *Cohen v. California*, 403 U.S. 15, 26 (1971) (“[W]ords are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.”), with Bradford, *supra* note 12, at 1237 (“Typically interlopers that evoke famous marks in advertising subtly reveal to consumers alternative understandings such as that some segment of the public thinks the brand is pretentious, a bad value, or simply overexposed. Even if consumers process the new message only subconsciously, automatically, and involuntarily, as they do with much authorized brand advertising, a resulting increase in negative feelings about the dominant brand may well be welfare-enhancing and efficient.” (footnote omitted)).

³¹ E.g., GiraldiMedia, *Michael Jackson Pepsi Generation*, YOUTUBE (June 26, 2009), <http://www.youtube.com/watch?v=po0jY4WvC1c>.

dilution law makes actionable. Under the rationale of *Deere*, Pepsi's denigration of Coke seems dilutive, while under the head of defamation law it seems to be fully protected nonfact.³²

Courts have not been receptive to First Amendment defenses in dilution cases. During the post-game show of the 2010 Super Bowl, Hyundai ran a thirty-second commercial for its Sonata model.³³ The ad consisted of brief vignettes that show:

[P]olicemen eating caviar in a patrol car; large yachts parked beside modest homes; blue-collar workers eating lobster during their lunch break; a four-second scene of an inner-city basketball game played on a lavish marble court with a gold hoop; and a ten-second scene of the Sonata driving down a street lined with chandeliers and red-carpet crosswalks.³⁴

The inner-city basketball game scene included a one-second shot of a basketball decorated with a pattern resembling Louis Vuitton's toile LV monogram on a chestnut-brown background. The court granted summary judgment in Vuitton's favor on trademark dilution.³⁵



Hyundai's expressed motive was to contrast its offer of "luxury for all" with "the silliness of luxury-as-exclusivity" through "juxtaposing symbols of luxury with everyday life (for example, large yachts parked beside modest homes)."³⁶ But the court found this deliberate evocation of Vuitton's mark as one of the examples of "old" luxury to be dilutive.³⁷ The court then rejected a First Amendment defense (along with a statutory fair

³² One might make a distinction based on the idea that *Deere* involved images, not just words. But as with tobacco disclosures discussed in section II.A the word/image distinction doesn't justify a completely different rule. Another possible argument would be that Pepsi's braggadocio doesn't necessarily denigrate Coke — a sort of "of and concerning" requirement borrowed from defamation law and applied to trademark. But standard advertising law principles allow us to conclude that certain claims are implicitly comparative, and this would be one of them. See, e.g., *SmithKline Beecham Consumer Healthcare, L.P. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, Nos. 95 Civ. 7011 (HB), 95 Civ. 7688 (HB), 1995 WL 723378 (S.D.N.Y. Dec. 6, 1995) (order granting preliminary injunction) (finding that the statement that "[o]nly PEPCID AC has proven that it can prevent heartburn and acid indigestion" was a false exclusivity claim that necessarily targeted competitors). Coke's market leadership should easily allow it to claim that it has been identified as *not* the choice of a new generation.

³³ ZerCustoms, *2011 Hyundai Sonata Luxury 2010 Super Bowl Ad*, YOUTUBE (Feb. 3, 2010), <https://www.youtube.com/watch?v=O7I4v7NYHrY>.

³⁴ *Louis Vuitton Malletier, S.A. v. Hyundai Motor Am.*, No. 10 Civ. 1611 (PKC), 2012 WL 1022247, at *1 (S.D.N.Y. Mar. 22, 2012) (internal quotation marks omitted).

³⁵ *Id.*

³⁶ *Id.* at *2 (internal quotation mark omitted).

³⁷ *Id.* at *14, *19.

use defense) because Hyundai lacked an intent to parody, criticize, or comment on Vuitton specifically, as opposed to the genus of “luxury.”³⁸ The idea that Vuitton, as a luxury brand, could stand in for luxury brands generally, and be subject to commentary on luxury brands generally, was inherently offensive to Vuitton’s supposedly unique status.

To let Vuitton monopolize the *meaning* of its brand, not just its source signification, leads to discrimination against certain commercial speakers because of the cultural “side” on which they deploy their ads. Vuitton, like other advertisers, gets to use imagery and emotional appeals to enhance its brand reputation, but Hyundai doesn’t get to do the same to challenge that reputation. The Supreme Court said in a case about hate speech:

[A] State may choose to regulate price advertising in one industry but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection) is in its view greater there. But a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion.³⁹

But currently, trademark law prohibits commercial depictions of famous marks in a demeaning fashion. Vuitton and other holders of famous marks therefore get an insulation from emotional criticism that is unavailable to ordinary human beings.

One could argue that the economic injury targeted by dilution law matters. Following Bradford’s logic, emotional effects on consumers from multiple meanings for Vuitton’s mark could arguably someday lead to reduced sales for Vuitton.⁴⁰ Yet the economic-harm rationale has already been rejected as applied to other tort claims. The case law on intentional interference with economic advantage, for example, has assimilated the general First Amendment rule.⁴¹ The Supreme Court refused to allow Jer-

³⁸ *Id.* at *17–20.

³⁹ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388–89 (1992) (citations omitted).

⁴⁰ *Cf.* MICHAEL SERAZIO, *YOUR AD HERE* 108–10 (2013) (examining some brands’ shift away from the “disciplining of want and need on command,” *id.* at 110, toward a theory that holds that the existence of multiple meanings and consumer control is an indicator of brand adaptivity); ALEX WIPERFÜRTH, *BRAND HIJACK* 41 (2005) (“The hijacked brand manager’s key job is to keep the brand neutral — a blank canvas, so to speak — so that the market can fill it with meaning and enrich it with folklore.”); Detlev Zwick et al., *Putting Consumers to Work: ‘Co-Creation’ and New Marketing Govern-Mentality*, 8 J. CONSUMER CULTURE 163, 167 (2008) (“Behind this ‘surrender’ is advertising and marketing professionals’ increasingly widespread belief that the consumer masses have become unfortunately unmanageable . . .”). *But see* Paul J. Heald & Robert Brauneis, *The Myth of Buick Aspirin: An Empirical Study of Trademark Dilution by Product and Trade Names*, 32 CARDOZO L. REV. 2533 (2011) (disputing the harm story of dilution on empirical grounds); Tushnet, *supra* note 11 (same).

⁴¹ *See, e.g.*, *Nanavati v. Burdette Tomlin Mem’l Hosp.*, 857 F.2d 96, 109 (3d Cir. 1988) (“[T]he defenses applicable to defamation claims retain their full status for tortious interference claims if such tortious interference claims are based on verbal conduct.”); *Blatty v. N.Y. Times Co.*, 728 P.2d 1177, 1184–85 (Cal. 1986) (en banc) (stating that claims for interference with prospective economic advantage that have “as their gravamen the alleged injurious falsehood of a statement . . . must satisfy the requirements of the First Amendment,” *id.*; “[i]f these limitations applied only to actions denominated ‘defamation,’ they would furnish little if any protection to free-speech and free-press values: plaintiffs

ry Falwell to evade the law of defamation by suing *Hustler* for publishing an offensive cartoon about him under the label “intentional infliction of emotional distress.”⁴²

Under post-*Sullivan* defamation law, if a statement doesn’t make false factual claims, the fact that people might react to it by changing their opinion of the target is insufficient to justify liability, even when the result is economic harm. The slashing attacks found in caricatures are often unfair, but unfairness is not sufficient to allow one private party to suppress another’s speech, at least on topics of public interest.⁴³ Applying the lessons of defamation law, it can’t be enough to show that nonfalse use of a trademark resulted in economic injury, unless the regulation meets the constitutional standard for banning truthful commercial speech.⁴⁴

There is a deep irony here, as Professors Laura Bradford and Mark McKenna have noted.⁴⁵ Proponents of full First Amendment protection for commercial speech have repeatedly claimed that much commercial speech is nonfactual, and for that reason is not especially hardy or distinguishable from noncommercial speech.⁴⁶ The pro-advertising argument

suing press defendants might simply affix a label other than ‘defamation’ to their . . . claims,” *id.* at 1184).

⁴² *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 48, 50 (1988) (describing that Falwell, a prominent minister, was portrayed as stating that his “‘first time’ [having sex] was during a drunken incestuous rendezvous with his mother in an outhouse,” *id.* at 48, but holding that the First Amendment didn’t allow a damages award for this); *id.* at 55 (citing “our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience”); *see also* *Texas v. Johnson*, 491 U.S. 397, 415 (1989) (upholding the First Amendment right to burn the American flag to express contempt for American values); *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 974 (10th Cir. 1996) (holding that the free speech interest in mocking famous baseball players outweighed the publicity rights of the players).

⁴³ *See Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) (barring a claim for intentional infliction of emotional distress where the speech was in public and on a matter of public interest, albeit targeted at a private person); *Hustler*, 485 U.S. at 56.

⁴⁴ *See* *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564 (1980) (restrictions on truthful commercial speech are constitutional if they’re sufficiently tailored to a substantial government interest); Tushnet, *supra* note 11, at 554–57 (arguing that dilution law flunks the test for commercial speech regulations).

⁴⁵ *See* Bradford, *supra* note 12, at 1279 (“[P]roponents of dilution law cannot have it both ways. If ‘involuntary’ alteration of consumer preferences is wrong, then the positive feelings generated by persuasive advertising are at least as problematic as any negative ones stimulated through dilutive conduct. If persuasive advertising can be valuable even if consumers don’t understand how they use it, then perhaps the same might can [sic] be said for dilution by blurring. Because the law has no inherent interest in product preference per se, dilution regulations must stand or fall on whether they implicate societal interests in promoting competition by allowing effective communication about products and services.”); Mark P. McKenna, *The Rehnquist Court and the Groundwork for Greater First Amendment Scrutiny of Intellectual Property*, 21 WASH. U. J.L. & POL’Y 11, 26 n.63 (2006).

⁴⁶ *See, e.g.,* Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 635 (1990); *cf.* Yoav Hammer, *Expressions Which Preclude Rational Processing: The Case for Regulating Non-Informational Advertisements*, 27 WHITTIER L. REV. 435, 437 (2005) (“[M]odern advertisements hardly convey information or clear arguments. Instead, they focus on an attempt to create a positive emotion within the viewers. The messages come in mostly visual and non verbal form, and viewers are hardly aware of the fact that messages have been conveyed. These characteristics of mod-

also contends that advertising that simply makes people feel good about buying brand-name products is utility enhancing. This is why we lose something when aggressive regulation chills nonfactual commercial speech. But American regulators rarely try to suppress nonfactual commercial speech — adorable spokesbears and body spray-using boys surrounded by inexplicably attracted women are safe devices to build consumer interest and loyalty. Within this regime, trademark law creates systematic bias. If nonfalsifiable speech about someone else's trademark can be banned because it's used only to get attention, build image, or amuse consumers, the result is special positional advantages given to now-dominant brands.⁴⁷ This discrimination in favor of the already powerful is what makes trademark law, in its role as emotional regulator, constitutionally problematic.⁴⁸

II. WHEN CAN GOVERNMENT REQUIRE PRIVATE PARTIES TO CARRY EMOTIONAL MESSAGES?

A similar, but more explicit, conflict exists in compelled speech doctrine. Given the risks of suppressing too much speech, the government can't make derogatory nonfactual speech actionable as defamation. This leaves the field open to those who wish to persuade by mockery, patriotic or frightening imagery, and the like. Yet what happens when the government, rather than a private speaker, wishes to use emotion to persuade, perhaps to counteract private speech?

The previous Part evaluated regulations that have structural effects on the messages from private parties that are available to audiences. Here, I turn to direct government intervention. Because the topic of government speech is so broad and unwieldy, I will focus on compelled speech rather than on claims in government-sponsored ads, such as "this is your brain on drugs."

Commercial speech doctrine often allows the government to mandate specific disclosures where advertisers would rather stay silent about inconvenient facts. But courts have reached inconsistent results when they identify emotion as playing a prominent role in mandated disclosures. The

ern advertisements are the result of advertisers' conclusion on the basis of many psychological studies, that emotional and experiential advertisements, rather than informational ones, are much more successful in causing viewers to internalize the advertising messages.").

⁴⁷ Bradford, *supra* note 12, at 1284 ("Dilution regulation in practice treats advertising designed to appeal to affective biases differently depending on whether such communications come from an established producer or a market newcomer. Although other areas of the law offer precedent for excluding affectively biasing information in the interest of accurate decision-making, such rules are usually applied consistently to every party engaging in persuasion.").

⁴⁸ Cf. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) (holding that, by banning only racist fighting words, a city violated the First Amendment, and that "St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules").

D.C. Circuit struck down new visual tobacco warnings proposed by the FDA as too emotionally compromising, while other courts have upheld graphic abortion disclosures despite the same flaws. This Part explores the tensions in these cases, arguing that appeals to emotion are inextricable from appeals to reason, and are therefore not inherently illegitimate.

A. Visual Tobacco Warnings

As directed by Congress, in 2010, the FDA proposed enhanced warnings for tobacco packages, including graphic images of the effects of long-term tobacco use.⁴⁹ A sample of these images is provided in Illustration A. While the concept of graphic warnings survived a facial challenge in the Sixth Circuit,⁵⁰ the writing was on the wall when the court concluded that the “visual medium” is “inherently persuasive” and therefore “cannot be presumed neutral.”⁵¹

A district court indeed ruled that the specific images the FDA chose were unconstitutional on an as-applied challenge.⁵² The D.C. Circuit affirmed, over a dissent.⁵³ The main problem the *R.J. Reynolds* majority had was that the warnings were too emotional.⁵⁴ The graphic warnings were not “purely” factual because “they are primarily intended to evoke an emotional response, or, at most, shock the viewer into retaining the information in the text warning.”⁵⁵ The graphic warnings were designed “to shame and repulse smokers and denigrate smoking as an antisocial act,” making the message “ideological and not informational.”⁵⁶ The court of appeals

⁴⁹ Required Warnings for Cigarette Packages and Advertisements, 75 Fed. Reg. 69,524 (proposed Nov. 12, 2010); see also 15 U.S.C. § 1333(d) (2012) (requiring the FDA to visually “depict[] the negative health consequences of smoking”); 15 U.S.C. § 4402 (2012).

⁵⁰ See *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 518 (6th Cir. 2012).

⁵¹ *Id.* at 526.

⁵² Perhaps ironically, the D.C. district court judge who granted the preliminary injunction striking down the proposed disclosures was extremely distressed by the FDA’s attempt to evoke negative feelings about cigarettes, and not just convey emotionless information. *R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin.*, 823 F. Supp. 2d 36, 46 (D.D.C. 2011) (condemning “emotion-provoking images” and the “subjective vision of the horrors of tobacco addiction”), *vacated*, 696 F.3d 1205 (D.C. Cir. 2012). He was so outraged, in fact, that he used exclamation points several times to say as much. See *id.* at 48, 49 n.28, 51 n.32; see also *R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin.*, 845 F. Supp. 2d 266, 273 n.13 (D.D.C. 2012) (employing the exclamation point again in his grant of summary judgment against the FDA), *aff’d*, 696 F.3d 1205.

⁵³ *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1208 (D.C. Cir. 2012).

⁵⁴ See *id.* at 1217 (finding that the images were “unabashed attempts to evoke emotion (and perhaps embarrassment) and browbeat consumers into quitting”); see also *R.J. Reynolds*, 845 F. Supp. 2d at 272 (“[T]he graphic images here were neither designed to protect the consumer from confusion or deception, nor to increase consumer awareness of smoking risks; rather, they were crafted to evoke a strong emotional response calculated to provoke the viewer to quit or never start smoking.”); *Disc. Tobacco City*, 674 F.3d at 526 (Clay, J., dissenting in part) (“[T]here can be no doubt that the FDA’s choice of visual images is subjective, and that graphic, full-color images, because of the inherently persuasive character of the visual medium, cannot be presumed neutral.”).

⁵⁵ *R.J. Reynolds*, 696 F.3d at 1216 (internal quotation marks omitted).

⁵⁶ *Id.* at 1211.

reasoned that, while the government can mandate that commercial speakers make certain factual disclosures, the nonfactual nature of the images took them outside that rule.

The FDA defended the use of images by citing research showing that pictures are easier to remember than words, which meant that the images' health messages — smoking is bad for you — would be better received. The majority interpreted this as the FDA's desire to "shock" consumers, but it didn't reject the FDA's factual claims that memory is aided by emotional cues or that other alternatives had failed to make the risk message stick.⁵⁷ Nor did the majority accept the FDA's reliance on a "substantial body" of scientific literature showing that emotional responses "such as worry and disgust, 'reliably predict the likelihood that consumers will understand and appreciate the substance of the warnings.'"⁵⁸ The underlying problem in the *R.J. Reynolds* opinion is thus not its distrust of images, but the related and further-reaching distrust of emotion.⁵⁹ This attitude conflicts with decades of research on cognition and decisionmaking, which has shown that emotion, including general positive or negative feelings about a topic, is "vital to reasoned deliberation."⁶⁰

Under the majority's reasoning, however, the government is apparently not allowed to mandate a warning that works through an emotional mechanism. One immediate problem with that conclusion is that "purely" factual words also work that way. For example, research shows that price signals trigger negative emotional reactions that mitigate consumers' desires for the advertised products.⁶¹ Prices cause consumers to feel bad about buying, mitigating positive emotions triggered by desire for the product. Yet mandatory price disclosures have previously been upheld as acceptable regulations of commercial speech, obviously related to rational

⁵⁷ See *id.* at 1216. The dissent, by contrast, accepted the FDA's effectiveness-based justification for using emotional messages: "[T]he literature suggests that risk information is most readily communicated by messages that arouse emotional reactions, and that smokers who report greater negative emotional reactions in response to cigarette warnings are significantly more likely to have read and thought about the warnings . . ." *Id.* at 1225 (Rogers, J., dissenting) (quoting 21 C.F.R. § 1141 (2011)) (internal quotation marks omitted).

⁵⁸ *Id.* at 1216 (majority opinion).

⁵⁹ See Ellen P. Goodman, *Visual Gut Punch: Persuasion, Emotion, and the Constitutional Meaning of Graphic Disclosure*, 99 CORNELL L. REV. 513, 555–56 (2014) (contesting the ready equation between image and emotion). Courts are more likely to ignore the emotional components of words. The Sixth Circuit, for example, upheld large-text warnings taking up a significant amount of space on cigarette packages, despite the tobacco companies' argument that large warnings might deter smokers from buying the product "by making it appear unhealthy or otherwise unattractive." *Disc. Tobacco City*, 674 F.3d at 531 (Clay, J., dissenting in part). The court found this to be a legitimate purpose, even though smokers' reaction to a giant textual warning might not be perfectly calibrated to the factual content of that warning. The court even found that the statement "'WARNING: Tobacco smoke can harm your children.'" — written in what appears to be a child's handwriting — would constitute a factual and accurate image, and therefore would be subject only to rational basis review. *Id.* at 559 (majority opinion).

⁶⁰ Bradford, *supra* note 12, at 1251.

⁶¹ See Brian Knutson et al., *Neural Predictors of Purchases*, 53 NEURON 147, 153 (2007).

consumer decisionmaking.⁶² Likewise, other words can readily generate emotions — and the large-text warnings mandated for cigarette packs by Congress, and upheld as constitutional by the Sixth Circuit, may be particularly likely to do so.⁶³

Nonetheless, the *R.J. Reynolds* majority held that the graphic warnings were unacceptable because they didn't provide "purely factual and uncontroversial" information.⁶⁴ By contrast, the majority was confident that mandatory price-related disclosures "were both indisputably accurate and not subject to misinterpretation by consumers."⁶⁵ The majority constructed a false dichotomy between accurate statements and misinterpretation (which is connected to the false dichotomy between reason and emotion). There is no such thing as a disclosure that is not subject to misinterpretation by consumers, any more than there is any other ad claim that is not subject to misinterpretation.⁶⁶ People are just too variable in their attention, prior beliefs, and other cognitive resources; someone always ends up reading "this claim has not been evaluated by the Food and Drug Administration" as "this claim has been evaluated by the Food and Drug Administration."⁶⁷

The *R.J. Reynolds* majority further concluded that two of the images, a woman crying and a man wearing an "I QUIT" shirt, weren't even "accurate," since they didn't convey "information" about cigarettes.⁶⁸ "These inflammatory images and the provocatively-named [1-800-QUIT-NOW]

⁶² See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). Nor is this kind of nonrational response uncommon. For example, meat labeled "25% fat" tastes better than the same meat that is labeled "75% fat free." Irwin P. Levin & Gary J. Gaeth, *How Consumers Are Affected by the Framing of Attribute Information Before and After Consuming the Product*, 15 J. CONSUMER RES. 374, 376 (1988).

⁶³ See, e.g., Samuel Juni & Julie S. Gross, *Emotional and Persuasive Perception of Fonts*, 106 PERCEPTUAL & MOTOR SKILLS 35, 39 (2008) (finding that different fonts affected readers' interpretations of articles); Mareike Bayer et al., *Font Size Matters — Emotion and Attention in Cortical Responses to Written Words*, PLOS ONE 1 (May 9, 2012), <http://www.plosone.org/article/uri=info%3Adoi%2F10.1371%2Fjournal.pone.0036042&representation=PDF>, archived at <http://perma.cc/W6TS-EQWZ> (finding that larger text elicited a stronger emotional response).

⁶⁴ *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1216 (D.C. Cir. 2012) (quoting *Zauderer*, 471 U.S. at 651) (internal quotation marks omitted).

⁶⁵ *Id.*

⁶⁶ See Richard Craswell, "Compared to What?" *The Use of Control Ads in Deceptive Advertising Litigation*, 65 ANTITRUST L.J. 757, 772–75 (1997) (elaborating extensively on this point and explaining its relevance to advertising regulation); Cornelia Pechmann, *Do Consumers Overgeneralize One-Sided Comparative Price Claims, and Are More Stringent Regulations Needed?*, 33 J. MARKETING RES. 150, 157 (1996) (finding that disclosures could decrease the number of consumers who took away a false message from an ad, but also decreased the number of consumers who understood the ad's truthful message).

⁶⁷ See Paula Fitzgerald Bone & Karen Russo France, West Virginia University, Presentation at FDA Public Meeting on Assessing Consumer Perceptions of Health Claims: Policy Makers' Paradigms and Evidence from Consumer Interpretations of Dietary Supplement Labels (Nov. 17, 2005), archived at <http://perma.cc/E97R-5F92>.

⁶⁸ *R.J. Reynolds*, 696 F.3d at 1216 (internal quotation mark omitted).

hotline cannot rationally be viewed as pure attempts to convey information to consumers. They are unabashed attempts to evoke emotion (and perhaps embarrassment) and browbeat consumers into quitting.”⁶⁹ The court then concluded that the nonfactual, emotionally coercive nature of the warnings was unjustified because the FDA provided insufficient evidence that the browbeating would work.⁷⁰

By contrast, the dissent accepted the FDA’s use of emotional salience as an indicator of effectiveness in conveying information. “[F]actually accurate, emotive, and persuasive are not mutually exclusive descriptions”⁷¹ While comprehending the facts about smoking “is likely to provoke emotional reactions,”⁷² that’s a natural consequence of the reality that the facts are grim.⁷³

While the *R.J. Reynolds* dissent agreed with the FDA that consumers are currently misled about the nature and extent of the risks of smoking, secondhand smoke, and addiction, the majority concluded that “none of the proposed warnings purport to address the information gaps identified by the government.”⁷⁴ “For example, the image of a man smoking through a tracheotomy hole might be misinterpreted as suggesting that such a procedure is a common consequence of smoking — a more logical interpretation than FDA’s contention that it symbolizes ‘the addictive nature of cigarettes,’ which requires significant extrapolation on the part of the consumers.”⁷⁵

The *R.J. Reynolds* majority’s distrust of images and emotion as a method of conveying information is misplaced. Research on tobacco warning images shows that they can correct some consumers’ underestimation of the relevant risks,⁷⁶ and the majority didn’t question that research

⁶⁹ *Id.* at 1216–17.

⁷⁰ *Id.* at 1219. *But cf.* *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 564–65 (6th Cir. 2012) (holding that common sense supported the conclusion that some consumers would change their behavior in response to the new warnings, and the tobacco companies’ own argument that they needed to use color and graphics in advertising to communicate effectively with consumers supported the conclusion that the graphic warnings were reasonable: “[i]f color and graphics are necessary for Plaintiffs to effectively communicate and capture the audience’s attention, then warnings using color and graphics should more effectively convey risks than do purely textual warnings”).

⁷¹ *R.J. Reynolds*, 696 F.3d at 1230 (Rogers, J., dissenting).

⁷² *Id.* at 1231; *see also Disc. Tobacco City*, 674 F.3d at 569 (“Facts can disconcert, displease, provoke an emotional response, spark controversy, and even overwhelm reason, but that does not magically turn such facts into opinions.”).

⁷³ *See R.J. Reynolds*, 696 F.3d at 1231 (Rogers, J., dissenting).

⁷⁴ *Id.* at 1215 n.8 (majority opinion).

⁷⁵ *Id.* at 1216; *see also Disc. Tobacco City*, 674 F.3d at 530 (Clay, J., dissenting) (“[C]olor graphics cannot accurately convey all of the health risks associated with tobacco use. Although elements of the color graphics requirement may remain constant, the underlying message that they convey will vary with the interpretation and context of its viewer.”).

⁷⁶ *See, e.g.,* Christine Jolls, *Product Warnings, Debiasing, and Free Speech: The Case of Tobacco Regulation*, 169 J. INSTITUTIONAL & THEORETICAL ECON. 53, 64–67 (2013) (concluding that the images improved consumers’ factual perceptions of smoking risks, and were unlikely to cause overcor-

and just dismissed it as identifying a constitutionally illegitimate mechanism. Nor is the majority's contrast between multivalent images and pellucid words sustainable, given the notable ambiguity of many words.⁷⁷ The majority failed to consider the images in context, which made them factual and truthful. For example, the image accompanying the text "[c]igarettes are addictive" depicted a man smoking through a tracheotomy opening in his throat.⁷⁸ "Viewed with the accompanying text, this image conveys the tenacity of nicotine addiction: even after under undergoing [sic] surgery for cancer, one might be unable to abstain from smoking."⁷⁹ In fact, fifty percent of neck and head cancer patients continue to smoke — this image didn't depict an extreme or unusual situation.⁸⁰ Similarly, the dissent concluded, images of an autopsy effectively symbolized death, while images of a baby enveloped in smoke and of a woman crying depicted the significant harms of secondhand smoke.⁸¹

Professor Caroline Mala Corbin's careful analysis largely tracks that of the *Reynolds* dissent, with added support from social science evidence: provocative images of tobacco-caused harms are shocking but legitimate, since cigarettes really do cause death and suffering. As Corbin explains, using images honors the evidence that emotionally arousing images are

rection). Professor Christine Jolls sharply criticized judicial assertions about the unsuitability of images in conveying warning information. As she pointed out, "decades of empirical studies suggest that purely textual material may produce different beliefs about factual matters by virtue of details such as the choice of font; there is not a clear, pristine mapping from text statements to individuals' perceptions about matters of fact." *Id.* at 57 (citation omitted). At the same time, images are often superior to text alone in conveying information: "the poison symbol used on many products and the appearance of pictures and diagrams throughout a typical medical or scientific text provide ready examples." *Id.*

⁷⁷ See Goodman, *supra* note 59, at 566–67.

⁷⁸ *R.J. Reynolds*, 696 F.3d at 1231 (Rogers, J., dissenting).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 1232; see also *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 559 (6th Cir. 2012) ("People with the same illness can and often will suffer a variety of differing symptoms. But one wouldn't say that a list of symptoms characterizing a particular medical condition is nonfactual and opinion-based as a result. So too with graphic images."); Goodman, *supra* note 59, at 565 (criticizing the district court decision in *R.J. Reynolds* for "first imagin[ing] that the takeaway meaning for the consumer is 'autopsy' rather than 'death[.]'" then "imagin[ing] the consumer unable to associate the words and the picture"); Jolls, *supra* note 76, at 57 (criticizing the D.C. Circuit opinion along similar lines); Caroline Mala Corbin, *Compelled Disclosures* 32 (Apr. 30, 2013) (unpublished manuscript), *archived at* <http://perma.cc/Q9H-KE53> ("Even if the baby has been photoshopped to look more adorable, or the smoke digitally enhanced, these are details unrelated to the underlying argument.").

These judicial debates about the meaning and truth value of images echo philosophical debates over what constitutes objectivity in science. Historically, some scientists criticized images as inherently subjective, while other scientists contended that images were more accurate and objective than anything else could be. The latter camp was, in turn, split: Some argued that drawings could more correctly show the ideal example of a class, and that ideal types were more important than necessarily variable individuals. Others argued that only photographic images could reveal truth. From the perspective of each camp, the other concepts of truth are, or can be, misleading. At a minimum, however, the courts have not explained why the First Amendment mandates a choice of one of these epistemologies as the correct one.

better at conveying risk information than dry recitations of facts. Vivid images seem more personal, so that the viewer will imagine herself at risk rather than assuming herself immune. Relatedly, salient images are more likely to be noticed and comprehended than are current textual warnings.⁸² After Australia adopted similar graphic warnings, some Australians even reported that exposure to graphic warning labels made their cigarettes taste worse — a truly visceral effect.⁸³

However, Corbin considers one emotional pathway to be dangerous: mere association of smoking with negative affect, “the reverse process of what advertisers do when they link their product with something that triggers a positive emotional response”⁸⁴ hoping that the emotional response will be transferred from one to another. The leap from health harms to bad taste made by Australian smokers is not itself rational in the ordinary sense. Such “halo effects” are commonplace even with concededly factual claims. For example, consumers think that “organic,” “fair trade,” and ethically produced food is lower in calories.⁸⁵ As long as a negative image is truly connected to smoking, though, Corbin considers this reaction to be a legitimate transfer of affect, whereas *Clockwork Orange*-style aversive conditioning — exposing consumers to images of maggot-infested meat next to cigarettes, for example — would be illegitimate.⁸⁶ Corbin suggests that most of the FDA’s images were unproblematic in this regard, except perhaps for the woman “weeping uncontrollably,” which exploits cognitive shortcuts instead of relying on the merits.⁸⁷

Corbin’s reaction illustrates the difficulties of distinguishing shortcuts from the merits: she argues that the connection between the devastated woman and the warning that “[t]obacco smoke causes fatal lung disease in nonsmokers” may be too tenuous.⁸⁸ But is it really tenuous to think that

⁸² See Corbin, *supra* note 81, at 40; see also Goodman, *supra* note 59, at 559–63 (reviewing the evidence that emotions aid comprehension in the context of tobacco risks).

⁸³ Matt Siegel, *Labels Leave a Bad Taste*, N.Y. TIMES, July 11, 2013, at B1 (“Of course there was no reformulation of the product,” the Australian health minister, Tanya Plibersek, said in an interview. “It was just that people being confronted with the ugly packaging made the psychological leap to disgusting taste.”).

⁸⁴ Corbin, *supra* note 81, at 40–41.

⁸⁵ See, e.g., Jonathon P. Schuldt et al., *The “Fair Trade” Effect: Health Halos from Social Ethics Claims*, 3 SOC. PSYCHOL. & PERSONALITY SCI. 581, 585 (2012) (describing a study in which participants evaluating chocolate provided lower calorie judgments when it was described as “fair trade” or as the product of ethical employment practices; “a company’s ethical actions — which logically bear little upon the nutrient content of its products — can nevertheless influence perceivers’ nutrient and health-related inferences about food products”); Jonathon P. Schuldt & Norbert Schwarz, *The “Organic” Path to Obesity? Organic Claims Influence Calorie Judgments and Exercise Recommendations*, 5 JUDGMENT & DECISION MAKING 144, 147 (2010) (finding that Oreo cookies labeled “made with organic flour and sugar” receive lower calorie judgments than do regular Oreo cookies, even though the two products contain the same number of calories).

⁸⁶ See Corbin, *supra* note 81, at 41.

⁸⁷ *Id.*

⁸⁸ *Id.* (internal quotation marks omitted).

nonsmokers who contract fatal lung disease will be mourned? Or even that smokers who discover that an intimate has fatal lung disease will feel guilt? These extrapolations are fairly far from the entirely unrelated negative images (for example, the rotting meat) that we both agree would be unfair. It is these rational but not perfectly correlated associations that the government will most often want to make when it imposes disclosure requirements. Unlike private advertisers using sex and pleasure to sell products, government mandates aren't likely to associate completely unrelated things.

But private advertisers' willingness to sell products with positive imagery has to be considered as well in any full analysis of the constitutional issues. As noted in Part I, commercial sellers — including tobacco companies — routinely and even predominantly use images and nonfactual matter to make their products attractive. If imagery can distort rational judgment, *R.J. Reynolds* makes it impossible for the government to correct tobacco advertisers' own distortions with a countervailing emotional appeal at the very point where that emotion is likely to have an influence: the time a decision is made to smoke.

The government isn't operating on an empty, emotionless field. Instead, it is reacting to decades of careful image construction by tobacco companies. Cigarette manufacturers have long made their products taste better and seem safer using techniques that manipulate emotions through colors and other imagery.⁸⁹ Research, much of it from the tobacco companies themselves, demonstrates that packaging matters to perceptions of taste and other qualities: consumers believe that cigarettes in light-colored packages are less dangerous than other cigarettes,⁹⁰ while plain packaging that prevents most branding efforts diminishes cigarettes' appeal.⁹¹ As Corbin explains:

People are bombarded with images of happy people presumably puffing away with no ill effect. Because of the availability heuristic, people evaluate probability based on the examples that most easily come to mind Thanks to ubiquitous tobacco advertisements, the most available image of smokers is one of happy, active people, which will influence people's calculation of the risk of

⁸⁹ See Goodman, *supra* note 59, at 556 & n.263.

⁹⁰ See, e.g., David Hammond & Carla Parkinson, *The Impact of Cigarette Package Design on Perceptions of Risk*, 31 J. PUB. HEALTH 345, 346, 349 (2009); Melanie Wakefield et al., *The Cigarette Pack as Image: New Evidence from Tobacco Industry Documents*, 11 TOBACCO CONTROL i73, i76 (2002).

⁹¹ See, e.g., Crawford S. Moodie & Anne Marie Mackintosh, *Young Adult Women Smokers' Response to Using Plain Cigarette Packaging: A Naturalistic Approach*, BMJ OPEN (Mar. 18, 2013), <http://bmjopen.bmj.com/content/3/3/e002402>, archived at <http://perma.cc/BG75-JL5S> (reporting that plain cigarette packaging was associated with lower ratings of enjoyment and satisfaction of smoking than fully branded packaging, that study participants reported closer scrutiny and consideration of health warnings on plain packs, and that plain packaging was associated with decreased consumption and increased thoughts of quitting).

smoking. In addition, this one-sided presentation exacerbates what is known as optimism bias, which also distorts the evaluation of risk.⁹²

Given this context, the *R.J. Reynolds* majority gave unduly short shrift to the FDA's argument that previous efforts to combat tobacco ad campaigns had been "like bringing a butter knife to a gun fight."⁹³ The Sixth Circuit has also held, in *Discount Tobacco City & Lottery, Inc. v. United States*,⁹⁴ that the government can't constitutionally prevent tobacco manufacturers from using colors and images in the first place, at least not at such a high level of generality.⁹⁵ Mandatory plain packaging, a regulatory solution gaining international momentum, is thus constitutionally off limits in the United States. *R.J. Reynolds* and *Discount Tobacco City* amounted to a one-two punch leaving tobacco companies alone the ability to use emotion and imagery.⁹⁶

Subsequently, *R.J. Reynolds* was interpreted in a case about the appropriate remedies for the tobacco companies' multidecade fraud under the Racketeer Influence and Corrupt Organizations (RICO) Act, *United States v. Philip Morris USA, Inc.*⁹⁷ The U.S. District Court for the District of Columbia ordered the defendants to publish corrective statements, each beginning: "A Federal Court has ruled that the Defendant tobacco companies deliberately deceived the American public about the health effects of smoking, and has ordered those companies to make this statement. Here is the truth . . ."⁹⁸ The required statements were blunt with little of the complexity of ordinary legal discourse, such as: "It's not easy to quit. When you smoke, the nicotine actually changes the brain — that's why

⁹² Corbin, *supra* note 81, at 35–36 (footnotes omitted).

⁹³ *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1221 (D.C. Cir. 2012).

⁹⁴ 674 F.3d 509 (6th Cir. 2012).

⁹⁵ *See id.* at 548. The Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified in scattered sections of 5, 15, and 21 U.S.C.), mandated black text on a white background for any labeling or advertising, except in circumstances unlikely to reach juveniles. Striking this provision down, the Sixth Circuit quoted *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011): "[T]he State may not seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, nonmisleading advertisements that contain impressive endorsements or catchy jingles. That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers." *Disc. Tobacco City*, 674 F.3d at 546 (quoting *Sorrell*, 131 S. Ct. at 2671) (internal quotation marks omitted). The government's argument was that colorful advertising distracted potential users from the harms of tobacco use and created positive lifestyle associations that overrode risk information. *Id.* This was not a claim of deception. The mere fact that tobacco ads, like all ads, tried to create positive associations was insufficient to justify a blanket ban on images. *Id.* at 547. There could be nondeceptive color- or image-based ads, including ads intended to "reinforce" consumer preferences by simply showing the package. *Id.*

⁹⁶ The government can engage in emotional appeals in separate campaigns — at least if the court's holding condemning emotion doesn't extend to direct government speech, a complicated issue in itself — but it can't reach smokers on the pack, the most direct way of countering tobacco companies' own emotional appeals.

⁹⁷ 907 F. Supp. 2d 1 (D.D.C. 2012).

⁹⁸ *Id.* at 8.

quitting is so hard.”⁹⁹ The tobacco companies argued that the language was too emotional and punitive to survive *R.J. Reynolds*.¹⁰⁰

The district court disagreed. It was allowed to require “purely factual and uncontroversial disclosures.”¹⁰¹ The images in *R.J. Reynolds* were “‘not meant to be interpreted literally,’ which raised concerns that [they] ‘could be misinterpreted by consumers,’” and they were intended to evoke an emotional response, so they weren’t just “pure attempts to convey information.”¹⁰² By contrast, the required corrective statements contained no pictures and were purely factual, clear, and accurate.¹⁰³ The district court was bound by the *R.J. Reynolds* majority’s condemnation of emotion, and thus was required to conclude that clearly judgmental statements were somehow nonemotional.

Following *R.J. Reynolds*, mandatory warnings also needed to be “non-controversial” to receive relaxed constitutional scrutiny.¹⁰⁴ According to the district court, *R.J. Reynolds* found images controversial when they were “‘subject to misinterpretation’ and required ‘significant extrapolation on the part of consumers,’”¹⁰⁵ though neither of those statements really seems to be about controversiality. Unlike the images, the corrective statements at issue in *Philip Morris* were noncontroversial because they were “simple declarative sentences and basic, uncomplicated language.”¹⁰⁶ The defendants argued that the preamble was “controversial” because it intended to evoke an emotional response, calling it “unprecedented, self-denigrating language.”¹⁰⁷ Disagreeing, the *Philip Morris* court held that, given a nearly fifty-year record of deceptive claims and the established likelihood of future legal violations, the preamble provided “important and necessary context for the consumer to understand the accurate information that follows.”¹⁰⁸

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 15.

¹⁰¹ *Id.* at 21.

¹⁰² *Id.* at 14 (quoting *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1216–17 (D.C. Cir. 2012)).

¹⁰³ *Id.* at 15–16.

¹⁰⁴ *Id.* at 14. Understandably, the court found that controversy had to mean more than that the defendants “simply disagree with a particular proposition that has been decided against them.” *Id.* at 17–18.

¹⁰⁵ *Id.* at 18 (quoting *R.J. Reynolds*, 696 F.3d at 1216).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (quoting Defendants’ Reply to Pub. Health Intervenors’ Response to U.S. Submission of Proposed Corrective Statements & Expert Report at 3, *Philip Morris*, 907 F. Supp. 2d 1 (No. 5889)).

¹⁰⁸ *Id.* at 23. The tobacco companies also proposed alternate statements, whose content provides a useful example of the use of words to trigger attitudes that affect “factual” evaluations. Instead of the mandatory statement that secondhand smoke causes disease, they wanted to phrase the statement of fact “as merely a ‘conclusion’ held by either the Surgeon General or ‘public health officials,’” *id.* at 26 n.14, as if well-established fact “were a mere opinion held by public health officials, rather than representing a consensus held by the scientific community at large,” *id.* at 26. The court rejected this blatant attempt to play on consumer distrust of government.

Yet of course these required statements are likely to trigger emotional reactions; the actual facts are distressing. Without a fuller account of the role of emotion in judgment, the contortions into which the district court was forced in order to disavow and minimize these emotional realities are likely to be repeated elsewhere, further distorting First Amendment doctrine. There are better approaches to emotional appeals than that offered by the *R.J. Reynolds* majority, as I'll discuss in Part III.

B. Abortion Disclosures

While *R.J. Reynolds* invalidated visual tobacco warnings, courts have mainly upheld a different set of emotional interventions related to abortion. I depart from many critics of mandatory abortion-related disclosures in accepting the idea that emotional government appeals are legitimate. The real concerns — shared by critics of emotional appeals as well — relate to factual misleadingness, burdens on the practical ability to obtain an abortion, and misattribution of the government's message to doctors.

Many recent abortion regulations attempt to influence women's decisions by providing them information with a distinctly antiabortion flavor. Some of this information involves hotly contested or arguably false factual claims; some involves claims whose factual nature is disputable; and some involves information produced through technological means, such as the sound of the fetal heartbeat and the image of the fetus produced through mandatory sonograms (which can involve physical penetration of the woman's body). All this information is united by the goal of inducing women to reject abortion by making them *feel* that abortion is the wrong choice. And yet, unlike tobacco disclosures, courts have upheld these requirements.¹⁰⁹

For example, the Eighth Circuit upheld South Dakota's requirement that physicians provide their patients with a written statement informing women contemplating abortions that a "known medical risk[] of the [abortion] procedure" is an "[i]ncreased risk of suicide ideation and suicide,"¹¹⁰ even though the best available scientific studies suggest that abortion is "psychologically benign."¹¹¹ The majority concluded that this statement about increased risk didn't suggest a causal relationship between abortion and an increased risk of suicide, and was therefore not false or misleading because of the possibility of causation.¹¹² By any normal standard, the re-

¹⁰⁹ See, e.g., *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576 (5th Cir. 2012) (finding that the First Amendment provides no constraint if required disclosures are "truthful, nonmisleading, and relevant"); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 686 F.3d 889, 905 (8th Cir. 2012) (en banc).

¹¹⁰ *Rounds*, 686 F.3d at 894.

¹¹¹ Brenda Major, *Psychological Implications of Abortion — Highly Charged and Rife with Misleading Research*, 10 CANADIAN MED. ASS'N J. 1257, 1258 (2003) (internal quotation marks omitted).

¹¹² *Rounds*, 686 F.3d at 898–99.

quired disclosure is clearly misleading.¹¹³ Correlation may not be causation but reasonable listeners, using the ordinary rules of implicature, would undeniably receive the message that having an abortion caused the increased risk. It would have been just as “true” to mandate a disclosure that people who take Advil have an increased risk of headaches.

Another element of the law required physicians to give women a written statement indicating that abortion “will terminate the life of a whole, separate, unique, living human being.”¹¹⁴ An Eighth Circuit en banc majority concluded that this statement was truthful and nonmisleading, in light of the statutory definition of “human being,” even though it could also be “read to make a point in the debate about the ethics of abortion.”¹¹⁵ This is sleight of hand: the legislature may have defined “human being,” but the recipients aren’t being asked to read the specific definition. Instead, women seeking abortions have to hear this claim in the context of other statements designed to make abortion seem undesirable — and the claim itself includes so many adjectives that its very presentation testifies to the emotional appeal. The idea that an embryo or fetus is a “whole” and “separate” human being, despite not actually being separable from a pregnant woman, is at best a nonfactual claim. In my view, the claim is legitimate only to the extent that the government may legitimately express an antiabortion viewpoint, and to the extent that doctors are not required to endorse the government’s viewpoint, only to offer it.¹¹⁶

Another intervention, forcing pregnant women to view fetal images and hear fetal heartbeats, attempts to trigger emotional responses and therefore to induce women to reverse an initial decision to abort.¹¹⁷ While issues of physical intrusion and increased cost or delay should themselves justify rejection of such mandates on Fourteenth Amendment grounds, my focus here will be on the First Amendment arguments against them. Professor Carol Sanger has described mandatory ultrasounds as “harassment mas-

¹¹³ See, e.g., *Clorox Co. P.R. v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 35 (1st Cir. 2000) (“A claim is conveyed by necessary implication when, considering the advertisement in its entirety, the audience would recognize the claim as readily as if it had been explicitly stated.”); *Sterling Drug, Inc. v. Fed. Trade Comm’n*, 741 F.2d 1146, 1155–56 (9th Cir. 1984) (finding unevicenced claims misleading when surrounded by the trappings of scientific proof); cf. Richard J. Harris et al., *Memory for Implied Versus Directly Stated Advertising Claims*, 6 PSYCHOL. & MARKETING 87, 93–94 (1989) (finding that young adult consumers recall implied claims as if they had been stated directly).

¹¹⁴ *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 726 (8th Cir. 2008) (en banc) (emphasis omitted).

¹¹⁵ *Id.* at 735 (internal quotation marks omitted).

¹¹⁶ I should note that I support a reading of the Fourteenth Amendment that would prevent the government from disfavoring abortion, on equality grounds. But I don’t think the First Amendment bars the government from expressing its viewpoint any more than it should bar tobacco warnings.

¹¹⁷ See, e.g., Corbin, *supra* note 81, at 45–46 (pointing out that ultrasounds are magnified, and heartbeats amplified; “[a]s a result, women might conclude that the fetus is larger, stronger, and more developed than it actually is,” *id.* at 46, and the social meaning of heartbeats and ultrasounds — associated with and even metonymic for wanted babies — can contribute to that misleadingness); *id.* at 49 (“Just as the heartbeat is shorthand for alive, an ultrasound image is shorthand for a wanted baby.”).

querading as knowledge,”¹¹⁸ characterizing proponents’ motives as grounded in “hope . . . that the fetal image will overwhelm the decision to abort by triggering something like a primitive maternal instinct. . . . [The ultrasound requirement] is less an appeal to reason than an attempt to overpower it.”¹¹⁹ But at the same time, courts have viewed these requirements as purely factual disclosures.¹²⁰ Abortion opponents use the language of consumer protection.¹²¹ They hope that these mandated disclosures will turn a “confused customer” into a “mother,”¹²² even though the evidence that this disclosure works is minimal.¹²³

While courts have treated all these abortion requirements as “truthful” and “nonmisleading,” there is no way that they would satisfy the standard applied in the tobacco cases. Among other things, the *Reynolds* majority didn’t just require literal truth. The judges believed, based on their own review, that the images would be misleading. In other areas of the law, too, literal truth can still be deceptive and therefore unacceptable.¹²⁴ At the very minimum, a consistent approach would have required the government to prove that its mandated abortion disclosures were both nonmisleading and effective in deterring abortions. Perhaps it’s too much to hope that abortion jurisprudence will bear any relationship to the rest of First Amendment law. But the disconnect is especially blatant with respect to

¹¹⁸ Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 360 (2008).

¹¹⁹ *Id.* at 396–97.

¹²⁰ *See, e.g.*, *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 577–78 (5th Cir. 2012) (“To belabor the obvious and conceded point, the required disclosures of a sonogram, the fetal heartbeat, and their medical descriptions are the epitome of truthful, non-misleading information.”); *cf. Tex. Med. Providers Performing Abortion Servs. v. Lakey*, No. A-11-CA-486-SS, 2012 WL 373132, at *3 (W.D. Tex. Feb. 6, 2012) (“As this Court reads the [Fifth Circuit] panel’s opinion, an extended presentation, consisting of graphic images of aborted fetuses, and heartfelt testimonials about the horrors of abortion, would be ‘truthful, nonmisleading, and relevant.’”).

¹²¹ *See, e.g.*, Lauren Conley, *Sen. Kintner Proposes Abortion Clinic Changes*, KHAS (Mar. 2, 2014, 10:56 AM), archived at <http://perma.cc/KN2R-K4M2> (discussing a proposed bill requiring clinics to post signs stating that women can’t be coerced or forced into an abortion; the bill’s author compared disclosure to “signs in bars about fetal alcohol syndrome,” airplane safety lectures, and “all kinds of warnings that we put out there that we think people need to see during critical times”).

¹²² Corbin, *supra* note 81, at 48 (quoting Steven Ertelt, *Victory: Appeals Court Upholds Texas’ Ultrasound-Abortion Law*, LIFE NEWS.COM (Jan. 10, 2012, 12:17 PM), <http://www.lifenews.com/2012/01/10/victory-appeals-court-upholds-texas-ultrasound-abortion-law>, archived at <http://perma.cc/A3PQ-KU9T>).

¹²³ *See, e.g.*, Mary Gatter et al., *Relationship Between Ultrasound Viewing and Proceeding to Abortion*, 123 OBSTETRICS & GYNECOLOGY 81, 83–84 (2014) (study of over 15,000 women seeking abortion care finding minimal effects from viewing ultrasound images; 98.4% of pregnancies were terminated when women viewed ultrasound images, while 99.0% were terminated when they didn’t; viewing was not associated with continuing a pregnancy among the substantial majority of women with high decision certainty, but it was associated with continuing a pregnancy among the 7.4% of women with medium or low decision certainty).

¹²⁴ *See, e.g.*, *Am. Home Prods. Corp. v. Johnson & Johnson*, 577 F.2d 160, 165 (2d Cir. 1978) (holding that the literal truth can be misleading and therefore can be banned from commercial speech).

mandatory emotional appeals.¹²⁵ While the D.C. Circuit rejected evidence that disclosures improved smokers' risk knowledge because that evidence didn't show any effect on actual smoking behavior, the Supreme Court has not required actual evidence that mandatory disclosures affect abortion choices,¹²⁶ and that evidence doesn't seem to exist.

There is much scholarly criticism of mandatory ultrasounds and similar requirements on the ground that they attempt to manipulate women rather than respect them as autonomous decisionmakers.¹²⁷ I share this judgment as a policy matter and don't believe that there's any information deficit that needs to be addressed in abortion clinics. But there are two considerations worth bearing in mind: First, relying on the position that emotional appeals are off limits to the government could have broad and destructive effects if it were applied consistently across fields.¹²⁸ From military recruiting to imposing courtroom architecture that impresses on participants the seriousness of the judicial process, government regularly structures behavior through emotional appeals.

Second, and relatedly, the conclusion that mandatory abortion disclosures are not factual depends on empirical claims about what women who choose abortion know. As Professor Dan Kahan and his coauthors have explained, larger belief frameworks routinely affect factual assessments.¹²⁹ Thus, the legislative or administrative factfinding that underlies a disclo-

¹²⁵ Compare *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1218 n.13 (D.C. Cir. 2012) (“[W]e are skeptical that the government can assert a substantial interest in discouraging consumers from purchasing a lawful product, even one that has been conclusively linked to adverse health consequences.”), with *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 883 (1992) (plurality opinion) (holding that states may further the “legitimate goal of protecting the life of the unborn” through “legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion”).

¹²⁶ Compare *R.J. Reynolds*, 696 F.3d at 1219–20 (“FDA has not provided a shred of evidence . . . showing that the graphic warnings will ‘directly advance’ its interest in reducing the number of Americans who smoke. . . . [I]t is mere speculation to suggest that respondents who report increased thoughts about quitting smoking will actually follow through on their intentions. . . . The [Regulatory Impact Analysis] estimated the new warnings would reduce U.S. smoking rates by a mere 0.088%, a number the FDA concedes is ‘in general not statistically distinguishable from zero.’” (citation omitted)), with *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) (“While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.” (citation omitted)).

¹²⁷ See, e.g., Corbin, *supra* note 81, at 3.

¹²⁸ Corbin, for example, argues that, while emotional appeals are not off limits because they're emotional, it is unacceptably manipulative to intentionally take advantage of common heuristics. Corbin, *supra* note 81, at 2.

¹²⁹ See Dan M. Kahan et al., “*They Saw a Protest*”: *Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 854–55, 883 (2012) (experiment showed that factfinders tasked with distinguishing between protected “speech” and unprotected, dangerous “conduct,” *id.* at 854, varied in their judgments depending on whether they believed the protest they witnessed conformed to or conflicted with their own political views) (internal quotation marks omitted). See generally Dan M. Kahan, Essay, “*Ideology in*” or “*Cultural Cognition of*” *Judging: What Difference Does It Make?*, 92 MARQ. L. REV. 413 (2009) (discussing the role of cultural cognition in factual assessments).

sure regulation will appear solid to some people and vaporous to others. It's therefore not surprising that legal commentary that has considered both tobacco and abortion disclosures can find the former legitimate given the law's aim to convey facts through emotional means and the latter illegitimate given the law's emotional manipulateness.¹³⁰ But the people who favor abortion disclosures don't (just) see emotional manipulation as acceptable — they see themselves as supporting greater levels of understanding by the unfortunately ignorant women who are making choices in the absence of full knowledge.¹³¹ That is why the compelled disclosures make (purportedly) factual claims about risks and fetal heartbeats, rather than asserting that abortion is murder.

Above, I recounted Corbin's argument for using image-enabled heuristics to increase the salience of information on the risks of tobacco and to combat optimism bias. Consider in this light her argument against mandatory ultrasounds and similar measures: "[E]xposing women to images and sounds with pre-existing emotional connotations exploits affective priming. Because all the same information can be imparted without the auditory and visual embellishment, the heartbeat and ultrasound images and descriptions are added to provoke an emotional reaction."¹³² An ultrasound attempts to associate the fetus with a wanted child, "more like an advertisement of a coffee machine with a fetching woman," and even though the relationship between fetus and wanted child is closer than the coffee-sex connection, "the cognitive mechanism of transferring the emotions aroused by one onto the other is the same."¹³³ I have a hard time seeing why the association here is inherently more illegitimate than the association between smoking and a corpse on the autopsy table.¹³⁴

Corbin argues that mandatory abortion-disclosure laws are paternalistic because they presume that women are likely to regret decisions to have abortions.¹³⁵ But that's not standard paternalism, where the state decides what's good for you *even if you never agree*. Instead, the state's position is that a woman's future self is sufficiently likely to have a different perspective on the present decision — much like a current smoker and that smoker's future self. We may disagree about the likelihood that these regrets will materialize, but the two situations can't be separated on their

¹³⁰ See, e.g., Corbin, *supra* note 81, at 3. See generally Goodman, *supra* note 59 (while expressing more skepticism, presenting the issue in a way much more sympathetic to tobacco disclosures than to abortion disclosures).

¹³¹ See, e.g., Michael P. Vargo, *The Right to Informed Choice: A Defense of the Texas Sonogram Law*, 16 MICH. ST. U. J. MED. & L. 457, 459 (2012).

¹³² Corbin, *supra* note 81, at 55 (footnote omitted).

¹³³ *Id.*

¹³⁴ The claim of manipulateness is also somewhat diminished by Corbin's own citation of evidence that these mandates don't actually stop women from getting abortions. The heuristics triggered are apparently insufficient to change behavior, though the mandates may still cause considerable pain.

¹³⁵ Corbin, *supra* note 81, at 52.

logic, only on their facts.¹³⁶ And the state, absent the constraints of *Lochner v. New York*, often has a great deal of freedom to find facts. In both cases, the state is in essence trying to construct people who will believe today that certain decisions are the right ones, for their own future good as well as the good of others (the fetus and people who bear the costs of others' smoking).

Given this government aim, focusing on the emotionality of the government's appeal may divert us from the more basic question of whether the appeal ought to be allowed. In this vein, the reasoning behind one common analogy deployed against abortion disclosures demonstrates how our underlying concepts about which choices are rational affect our conclusions about acceptable emotional appeals. Critics of graphic abortion disclosures often make the point that graphic images of ordinary surgery aren't considered necessary for informed consent to surgery¹³⁷:

The fact that the average person would be disgusted and disturbed by a detailed description of heart surgery does not warrant requiring such a description as a condition of effective consent. On the contrary, most patients would likely rather not hear the description because it would only increase their anxiety about a procedure they know they must undergo.¹³⁸

Rationally, the argument goes, the fact that surgery is bloody and gross shouldn't deter someone who needs it.

But imagine a state with a substantial population of Jehovah's Witnesses and Christian Scientists. Would they agree that the only rational, necessary choice is surgery? Is society prepared to accept the existence of reasons to reject surgery that acknowledge its potential efficacy but value other considerations more? To press further: consider that in many cases, surgery is *not* the only option — there may be other possible treatments, or a patient nearing the end of her life may choose not to attempt to extend it through surgery given the costs in pain and recovery time. To the extent that graphic images make more salient the physical costs of surgery, they could be justified in such situations.

Many dry and nonsalient statements don't actually improve decisionmaking, since they aren't noticed or understood by the recipient. If

¹³⁶ One could argue that freedom from addiction is distinctively autonomy enhancing, in a way that freedom from abortion is not. See Corbin, *supra* note 81, at 54. But then, it's not the emotional appeal that matters, but rather the addiction — any measure would perhaps be justified to save people from addiction.

¹³⁷ See, e.g., Peter Ferony, Note, *Constitutional Law — From Goblins to Graveyards: The Problem of Paternalism in Compelled Perception*, 35 W. NEW ENG. L. REV. 205, 238 (2013) ("It would be absurd to force people who are going to need surgery anyway to hear the gruesome details of the upcoming procedure, just as it would be absurd to force people who attempt eating challenges to hear the gruesome details about morbid obesity. These conversations add nothing of substance to the decision, and only serve to scare the decision-maker.").

¹³⁸ Ian Vandewalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics*, 19 MICH. J. GENDER & L. 1, 20 (2012).

risk disclosure is necessary for informed consent in any but the most formalistic sense, then there's at least a case that it needs to be done in a graphic way. Just as an image of a crying woman concretizes and stands for the many costs of tobacco use, or the image of a fetus stands for a human life, surgical images are directly related to considerations that a patient could rationally take into account.

The surgical analogy doesn't seem to prove the point for which it is offered, although it may prove a somewhat different point also advanced by critics of mandatory abortion disclosures: such mandates discriminate in a constitutionally significant way between a choice made uniquely by women and other medical choices, and this discrimination is likely to reflect sexist assumptions about women's rational capacities. To the extent that the state is deploying emotional appeals in a biased way — and especially to the extent that it is forcing doctors to represent the state's emotional opinions as their own¹³⁹ — arguments against forced disclosures are still available even if general appeals to emotions are constitutional.

First Amendment arguments presently have more purchase in courts than do equality arguments, and the tactical reasons for making First Amendment claims against abortion restrictions are powerful. But so far, they haven't been very successful. That struggle should invite us to question whether the line between rationality and emotionality is capable of delivering the outcomes progressive scholars want.

III. THE APPROPRIATE SCOPE OF GOVERNMENTAL REGULATION OF EMOTION

So far I've supported (some) emotional appeals the courts have ruled off limits, and criticized emotional regulations the courts have allowed. I hope not to be a pure contrarian, however. This Part considers what lessons can be taken from this survey. Consistency may be unattainable, and total consistency undesirable, but we can do better than the directly conflicting principles featured in the existing cases.

A. *All Decisions Involve Emotion and Heuristics*

It is now well recognized that emotion is a crucial component of decisionmaking.¹⁴⁰ There is no weighing of alternatives, or judgment between them, without emotions guiding choices.¹⁴¹ If emotional appeals are ma-

¹³⁹ See, e.g., Corbin, *supra* note 81, at 54.

¹⁴⁰ See, e.g., Corbin, *supra* note 81, at 24–26 (reviewing the literature); Goodman, *supra* note 59, at 516–17.

¹⁴¹ See, e.g., ANTONIO R. DAMASIO, DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN 36–39 (1994); RICHARD A. POSNER, HOW JUDGES THINK 105–10 (2008); Terry A. Maroney, Essay, *The Persistent Cultural Script of Judicial Dispassion*, 99 CALIF. L. REV. 629, 642 (2011) (arguing that emotion “reveals reasons, motivates action in service of reasons, enables reason, and is educable”).

nipulative, then all appeals are manipulative. Some decisions don't look like they're emotionally influenced, often because the cultural definition of "emotional" decisions excludes those that make certain interactions flow smoothly.¹⁴² But that just means the emotion is invisible, not that it's absent.¹⁴³ The reality that emotions are inextricably intertwined with reason means that many of the conventional arguments for distinguishing legitimate and illegitimate government interventions into the marketplace for speech misdescribe the world, and therefore don't work.

Advertising provides the most obvious examples. People are regularly influenced by aspects of presentation that have no rational relationship to decisions. In one especially striking study, a photo of a smiling, attractive woman in the bottom right-hand corner of a loan offer produced an increased response rate for men equivalent to dropping the monthly interest rate by 200 basis points, or approximately 25% of the total rate — a substantial percentage.¹⁴⁴ The recipients didn't get any increased exposure to the woman by accepting the offer; even if they valued her smile at 200 basis points, taking the offer because of that smile was irrational.¹⁴⁵ More generally, because of the halo effect, consumers think products with one desirable attribute also have other, logically unrelated but also desirable attributes.¹⁴⁶ We're regularly influenced in ways we'd be embarrassed to admit, if we even acknowledged that we'd been influenced.

It gets worse: as noted in the discussion of prices in section I.B, all "factual" information triggers emotion. A store's announcement of a price cut induces consumers to feel they're getting a bargain, generating sales that wouldn't have taken place if the sale price had always been the price.¹⁴⁷ Information that one choice is the most popular leads other peo-

¹⁴² These perceptions of rationality regularly have a gendered component. See Corbin, *supra* note 81, at 25 n.161.

¹⁴³ Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389, 1459 (2013) ("Treating emotional appeals as forbidden allows them to proceed when unnoticed — as when judges embellish the facts in capital appeals or augment their own authority by treating legal texts as having obvious meanings — but not when such appeals are transparent" (footnote omitted)).

¹⁴⁴ Marianne Bertrand et al., *What's Advertising Content Worth? Evidence from a Consumer Credit Marketing Field Experiment*, 125 Q.J. ECON. 263, 280, 296 (2010).

¹⁴⁵ See *id.* at 280.

¹⁴⁶ See Schuldt et al., *supra* note 85, at 581.

¹⁴⁷ See *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1105–06 (9th Cir. 2013) ("[A] product's 'regular' or 'original' price matters; it provides important information about the product's worth and the prestige that ownership of that product conveys. Misinformation about a product's 'normal' price is, therefore, significant to many consumers in the same way as a false product label would be. That, of course, is why retailers like Kohl's have an incentive to advertise false 'sales.'" (footnote omitted) (citations omitted) (citing Dhruv Grewal & Larry D. Compeau, *Comparative Price Advertising: Informative or Deceptive?*, 11 J. PUB. POL'Y & MARKETING 52, 55 (1992) ("By creating an impression of savings, the presence of a higher reference price enhances subjects' perceived value and willingness to buy the product."); *id.* at 56 ("[E]mpirical studies indicate that as discount size increases, consumers' perceptions of value and their willingness to buy the product increase, while their intention to search for a lower price decreases."))).

ple to choose it as well.¹⁴⁸ Other, equally manipulable heuristics abound. Framing a decision as avoiding a loss produces different results than framing it as producing a gain.¹⁴⁹ Information and emotions can't be unlinked.

B. Can the Government Avoid Exploiting Emotion?

With respect to mediating private disputes, it's desirable for the government to refuse to allow liability when a defendant's nonfactual speech affects audiences' evaluation of the plaintiff. This is the rule of *Sullivan* and should be the rule in trademark law as well. In that sense, it is possible for the government to be hands off with respect to certain kinds of privately generated emotion, though emotion will necessarily remain one mechanism by which factually false claims can cause harm.

However, the government may also wish to require certain disclosures from commercial speakers, and here disconnection from emotion is impossible. Some have argued that the proper inquiry in evaluating required disclosures is whether the government intends to change behavior along its preferred lines, or merely to inform.¹⁵⁰ But the government will always have both purposes when it requires disclosure.¹⁵¹ *Zauderer v. Office of Disciplinary Counsel*,¹⁵² the classic commercial speech disclosure case, found a lawyer's failure to disclose that consumers would have to pay court costs even if they lost their cases to be deceptive because that liability would matter to a significant number of consumers.¹⁵³ If it would matter, it would change at least some behavior: that's what it means for information to be material.

¹⁴⁸ See, e.g., ROBERT B. CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* 88 (2007) (“[O]ne means we use to determine what is correct is to find out what other people think is correct. . . . The tendency to see an action as more appropriate when others are doing it normally works quite well.”); Matthew J. Salganik & Duncan J. Watts, *Leading the Herd Astray: An Experimental Study of Self-Fulfilling Prophecies in an Artificial Cultural Market*, 71 *SOC. PSYCHOL. Q.* 338 (2008) (examining how the popularity of songs in a “music market” influenced individuals’ consumption of music).

¹⁴⁹ See DAN ARIELY, *PREDICTABLY IRRATIONAL* 2–10 (2009); cf. Adam J. Levitin, *Priceless? The Social Costs of Credit Card Merchant Restraints*, 45 *HARV. J. ON LEGIS.* 1 (2008) (examining cognitive biases that promote the overuse of credit cards).

¹⁵⁰ See, e.g., Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 *U. PA. J. CONST. L.* 539, 574 (2012); cf. *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1236–37 (D.C. Cir. 2012) (criticizing the government for attempting to command consumers to stop smoking).

¹⁵¹ See Goodman, *supra* note 59, at 515 (“Any investigation of these issues must start with the recognition that government often seeks simultaneously to inform *and* to influence consumer purchases by mandating product disclosures.”); cf. *id.* at 546 (“Government labeling schemes will often use normative judgments to construct evaluative facts or to thrust facts into special prominence. . . . [T]he choice to highlight sugar on a front-of-pack label reflects a norm that sugar is special among ingredients. . . . What is considered ‘organic’ is built on judgments about animal husbandry and agricultural health. This evaluative fact is then embedded in a normative system that uses labels to promote the market for organic goods.” (footnote omitted)).

¹⁵² 471 U.S. 626 (1985).

¹⁵³ *Id.* at 651–53.

Nonetheless, one might take the position that the government can't mandate "any non-rational messages," at least when there are "less emotionally burdensome" alternatives, however that might be determined.¹⁵⁴ This argument relies on the idea that individual autonomy is harmed by compulsory emotional appeals, but not by purely factual disclosures.¹⁵⁵ But it's not clear why the emotion is doing the work in this claim, rather than the compulsion. Even forcing someone to sit through rational appeals involves an interaction that wouldn't have occurred in the absence of government intervention.

If the government does have a legitimate interest in having people become aware of certain information, then emotion has to enter into the calculation of how to deliver that information. Humans are, as Professor Dan Ariely says, predictably irrational. We are and will remain poor decisionmakers who rely on salience over statistics. Salience is produced by concrete, human examples that trigger emotional reactions. A purely rational statement is likely to make no impact, cognitively speaking. Because emotion and reason are inextricable, emotional appeals should be fair game for the government as well as for private parties, unless the emotion is tied to factual deception.¹⁵⁶

C. Mandatory Disclosure and Autonomy

Just because emotion is inevitable in communication, does the government therefore have complete freedom to appeal to our emotions when it can justify a mandatory disclosure? Many of the currently proposed limits on mandated speech turn out, on closer examination, to be unsatisfactory. I don't claim to solve the problem, but a focus on factual misleadingness would point us in the right direction. (I set aside here considerations such as the magnitude of the burden on speech — requiring each tobacco seller to sing a four-minute aria before handing over a pack would raise distinct concerns. So would mandating disclosure for noncommercial speakers, though that doesn't seem to have given courts upholding abortion-disclosure mandates much pause. Instead, my arguments relate to the distinction between emotional and "nonemotional" disclosure mandates, given that some mandatory disclosure is constitutionally acceptable.)

The basic problem with mandatory disclosures from the audience's perspective is that they can seem overbearing: lecturing, judging, even disparaging our choices. At worst, they exert the kind of pressure we might

¹⁵⁴ Ferony, *supra* note 137, at 226.

¹⁵⁵ *See id.* at 231.

¹⁵⁶ Admittedly, deceptiveness is a pretty big "unless," and anyone adhering to this rule would face serious challenges distinguishing deception from mere factual disagreement. But it's likely the best available distinction, and courts do claim expertise in identifying deceptiveness. *See, e.g., Corra v. Energizer Holdings, Inc.*, 962 F. Supp. 2d 1207, 1216 (E.D. Cal. 2013) (explaining that falsity or misleadingness is "the type of factual question that is routinely committed to the courts").

want to call interference with autonomy. However, compulsory disclosure isn't compulsory affirmation. As long as the citizen retains the ability to disagree with the government — to choose to smoke, to choose to have an abortion — she can exercise choice, albeit under constraint; and some constraint is part of the human condition.¹⁵⁷ We first have to identify exactly what kinds of hardness we expect from citizens before we determine that any given state message puts them under too much pressure. Insulating citizens from challenges to their opinions, for example, is probably not conducive to the ability to debate and judge that the First Amendment ordinarily honors. Thus, we might well want the government barred from lying to citizens, but not from conveying its nonfalse opinions.¹⁵⁸

Making sure consumers receive information that a commercial speaker doesn't want to give them is particularly important when the government's purpose is to promote fair marketplace transactions. (If abortion seems too distinctive, substitute cosmetic surgery in the general argument about autonomy.) The government isn't the only entity addressing the citizen. If she's vulnerable to emotional manipulation by the government, then she's probably vulnerable to other kinds of emotional manipulation.¹⁵⁹ Other entities are already selecting what messages they want her to hear and pressing them on her. Even accepting that deliberate appeals to emotion create autonomy problems, her autonomy is profoundly at risk already, and perhaps the government should step in to help her restore that autonomy. For example, researchers studying the halo effect have suggested that its existence could justify stronger regulation of apparently innocuous claims, since labeling chocolate "fair trade" might be inducing consumers to overeat.¹⁶⁰

Consider a hypothetical from Professor David Strauss:

Suppose that the government could manipulate people's minds directly, by irradiating them in a way that changed their desires. No one would say that

¹⁵⁷ See Goodman, *supra* note 59, at 548 ("It is hard to see how communicating with value, by itself, undermines consumer autonomy. In First Amendment cases, courts have scoffed at the notion that consumers are so fragile that they lose independent decision-making ability when faced with compelling narratives. False advertising law similarly trusts consumers to withstand persuasion and exercise choice in the swirl of tendentious speech." (footnote omitted)).

¹⁵⁸ Again, to the extent that state mandates have other effects, such as raising the costs of private speakers' speech and falsely making it seem as if other people endorse the government's view, those effects would also be relevant, particularly to undue burden analysis. See *supra* TAN 139.

¹⁵⁹ See, e.g., Corbin, *supra* note 81, at 27 (arguing that standard image advertising, which attempts to create positive associations by showing an advertised product in conjunction with something the audience already values, constitutes "intentional exploitation of a cognitive shortcut").

¹⁶⁰ See Schuldt et al., *supra* note 85, at 585–86 ("[E]thical or values-based claims (e.g. fair trade) frequently appear on poor nutrition foods. . . . To the extent that such claims encourage consumers to view poor nutrition foods as healthy, the government might seek to regulate their appearance on food packaging as they currently do for other types of claims.").

the power to ban an activity automatically included the ‘lesser’ power to irradiate people so that they no longer had the desire to engage in that activity.¹⁶¹

But could the government ban private parties from irradiating people, on the ground that this activity harmed the victims’ autonomy? Could it drug people to reverse the effects of that private irradiation? To the extent that the government argues that it is operating in an already emotion-saturated field such as that created by tobacco advertising, it becomes harder to identify illegitimate manipulation.

Corbin accepts that not all emotional appeals are wrongfully manipulative, even if emotion makes them more persuasive.¹⁶² Instead, she contends that government persuasion infringes autonomy “if the government’s goal represents one side of a controversial debate, or if the government’s means involve emotional appeals that take advantage of affect heuristics.”¹⁶³ Corbin looks to whether the government’s attempt to change citizens’ minds on “contested” questions fails to respect their autonomy:

So, for example, compelled factual information that attempts to persuade you to do something you agree is ultimately autonomy-enhancing and therefore in your best interests, such as eating nutritious foods, would not be troublesome. But the state’s persuasion becomes problematic when it takes sides on a controversial issue and presumes to know better than the individual what is best.¹⁶⁴

While potentially appealing as a policy matter, this standard (autonomy-enhancing and uncontroversial disclosures are acceptable) requires a much thicker account of autonomy than I expect courts could endorse or even agree on,¹⁶⁵ and would also put every disclosure at risk. First, in to-

¹⁶¹ David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 360 (1991). This scenario is not necessarily hypothetical. See, e.g., James Gorman, *Agency Initiative Will Focus on Advancing Deep Brain Stimulation*, N.Y. TIMES, Oct. 24, 2013, <http://www.nytimes.com/2013/10/25/science/pentagon-agency-to-spend-70-million-on-brain-research.html>, archived at <http://perma.cc/FT9L-TV22>.

¹⁶² See Corbin, *supra* note 81, at 24–26 (noting that because emotion is central to decisionmaking, autonomous, rational decisionmaking will still have an emotional component).

¹⁶³ *Id.* at 66.

¹⁶⁴ *Id.* at 23 (footnote omitted); see also Goodman, *supra* note 59, at 550 (“‘Uncontroversial’ should be given a distinct meaning, having to do with government motive. We should be skeptical of disclosures that, even if purely factual, are designed to advance a controversial ideology as opposed to a generally accepted norm.”).

¹⁶⁵ As Professor Ellen Goodman persuasively explains, autonomy is undertheorized at precisely the point of concern — what outside interferences not amounting to violence or fraud count as autonomy diminishing. See Goodman, *supra* note 59, at 556–59 (reviewing the literature). Professor Seana Shiffrin posits that a person is autonomous, and therefore not manipulated, when she reasons for herself. Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFF. 205, 213 (2000). But being offered new information or even emotional appeals does not itself preclude reasoning for oneself. It makes intuitive sense to distinguish between providing information and getting the audience drunk; both affect reasoning and both might be voluntarily accepted by the audience, but there does seem to be something distortive and unfair about getting one’s audience soused. The interesting question is whether any *communicative* intervention rises to the level of intoxication. See Goodman, *supra* note 59, at 557 (“[A] disclosure requirement that tries to get a consumer

day's politicized environment, everything is contested — from whether the oceans are rising to whether obesity is a public health problem or merely a series of individual decisions. In fact, two thoughtful defenders of the controversiality standard even disagree about whether “eat[] nutritious foods”¹⁶⁶ labeling mandates are controversial.¹⁶⁷ Sarah Palin has made political hay out of similar nutritional initiatives, rendering them “controversial.”¹⁶⁸ Before Professor Randy Barnett and a few like-minded souls successfully propounded the theory that a health care mandate was unjustified by the Commerce Clause, the argument was generally considered beyond the pale of the post-*Lochner* settlement.¹⁶⁹ The existence of global warming was widely accepted by the American public within recent memory; now it is “controversial,” having been caught up in the widening divide between Democratic and Republican worldviews. When Republicans like a dog less when they're told it's President Obama's dog, we're well beyond consensus.¹⁷⁰

The problem is magnified for those, like Professor Ellen Goodman, who want to expand the idea of “controversiality” to cover situations in which it's not the existence of facts, but their relevance, that is contested.¹⁷¹ As Professor Douglas Kysar has demonstrated, consumers' prefer-

to do something *by depriving him of the ability to reason for himself* would be autonomy reducing.” (second emphasis added)).

¹⁶⁶ Corbin, *supra* note 81, at 23.

¹⁶⁷ Compare Goodman, *supra* note 59, at 567 n.347 (concluding that mandatory labeling of “health[y]” foods would be unconstitutional because the categorization would be controversial (internal quotation marks omitted)), with Corbin, *supra* note 81, at 23 (noting that such labeling mandates “would not be troublesome”). It's worth noting that the FDA already regulates — though it does not mandate — the use of similar terms, such as low-fat and low-calorie, barring them on certain foods that don't meet other nutrition standards. See, e.g., *Bruton v. Gerber Prods. Co.*, 961 F. Supp. 2d 1062 (N.D. Cal. 2013). It appears that Goodman's controversiality standard would invalidate these existing regulations, and possibly multiple other FDA regulations whose justifications are at least as hotly disputed by manufacturers who'd prefer lower standards of proof.

¹⁶⁸ See Kate Andersen Brower, *Sarah Palin Stews over Government Food Rules*, BLOOMBERG BUSINESSWEEK (Nov. 18, 2010), http://www.businessweek.com/magazine/content/10_48/b4205044187091.htm, archived at <http://perma.cc/HE5W-F35M> (“The federal government has been issuing nutritional advice for more than a century and has been generating controversy almost since then. . . . Obama's nutrition efforts ‘really irritate small government conservatives,’ says Ross Baker, a political science professor at Rutgers University. ‘The Tea Party's message,’ he says, is ‘back off, people should be able to make mistakes even if it involves gorging themselves on too many nachos.’”).

¹⁶⁹ See generally Randy E. Barnett, Lecture, *No Small Feat: Who Won the Health Care Case (and Why Did So Many Law Professors Miss the Boat)?*, 65 FLA. L. REV. 1331 (2013).

¹⁷⁰ See Sasha Issenberg, *It All Comes Down to Race*, SLATE (June 1, 2012, 11:03 AM), http://www.slate.com/articles/news_and_politics/victory_lab/2012/06/racialization_michael_tesler_s_theory_that_all_political_positions_come_down_to_racial_bias_.html, archived at <http://perma.cc/9AH8-H646>.

¹⁷¹ Goodman, *supra* note 59, at 552–53. Goodman's examples of standards for assessing the presence of widely shared norms — obscenity and cruel and unusual punishment law, see *id.* at 554 n.252 — don't leave me with much hope; those fields of law don't seem like models of clarity, and the subject matter at issue for commercial disclosures is much broader and thus even more contestable.

ences are not stable and depend on what gets disclosed to them.¹⁷² Disclosure at the point of purchase makes conditions of production (whether a product was made with child or slave labor, whether it contains genetically modified organisms, and so on) more salient and removes “moral wriggle room.”¹⁷³ As a result, we face a choice between a vision of a marketplace in which “consumers satisfy their personal interests unimpeded by concern for the welfare of others” and one in which consumers behave in accordance with more “altruistic ideals” held by the norm entrepreneurs who focus on particular conditions of production.¹⁷⁴ These ideals may involve animal welfare, union labor, foreign production, or something else. Kysar concludes that neither set of behaviors reveals “true” preferences.¹⁷⁵ Rather, context and the ability to see how one’s choices affect others determine behavior, meaning that the choice of a disclosure regime is fundamentally normative.

Goodman’s own expectations about relevance reveal the instability of “controversiality” in this sense. She argues that requiring the disclosure of sugar content on a nutrition label, “so consumers can make informed choices and hopefully reduce sugar consumption,” is plainly on the uncontroversial side of the spectrum, by contrast to requiring country-of-origin disclosures, “so consumers can make informed choices, and hopefully move manufacturers to rely more heavily on domestic sugar.”¹⁷⁶ This assessment is not, so far as it appears, based on any actual evidence of shared norms. Though I’m not aware of direct comparative studies on point, “buy American” ideologies seem extremely popular with Americans,¹⁷⁷ while active attempts to reduce sugar consumption are not obviously so.¹⁷⁸

¹⁷² See Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 628 (2004).

¹⁷³ *Id.* at 630 (internal quotation marks omitted).

¹⁷⁴ *Id.* at 631–32.

¹⁷⁵ *Id.* at 632.

¹⁷⁶ Goodman, *supra* note 59, at 553.

¹⁷⁷ See, e.g., C. Min Han, *The Role of Consumer Patriotism in the Choice of Domestic Versus Foreign Products*, 28 J. ADVERTISING RES. 25 (1988); Oliver St. John, *Made in USA Makes Comeback as a Marketing Tool*, USA TODAY (Jan. 21, 2013, 10:11 PM), <http://www.usatoday.com/story/money/personalfinance/2013/01/21/made-in-usa-trend/1785539>, archived at <http://perma.cc/QZ8X-95TR> (“Over 80% of Americans are willing to pay more for Made-in-USA products, 93% of whom say it’s because they want to keep jobs in the USA, according to a survey released in November by Boston Consulting Group.”); cf. *Am. Meat Inst. v. U.S. Dep’t of Agric.*, No. 13-5281, 2014 WL 1257959, at *5 (D.C. Cir. Mar. 28, 2014) (upholding a country-of-origin disclosure mandate as “purely factual and non-controversial”), *vacated and en banc reh’g granted on other grounds*, No. 13-5281 (D.C. Cir. Apr. 4, 2014).

¹⁷⁸ In one experiment, for example, willingness to pay for sugar-free varieties of blueberry products varied a fair amount among groups of consumers, and for some products was actually negative. Wuyang Hu et al., *Consumer Acceptance and Willingness to Pay for Blueberry Products with Nonconventional Attributes*, 41 J. AGRIC. & APPLIED ECON. 47, 58 (2009) (“Consumers in general are not

“[G]ermaneness,” which Goodman poses as another limit on the controversiality standard,¹⁷⁹ seems equally manipulable if it’s used to rule country-of-origin labeling off limits. Why isn’t country of origin perfectly germane to *any* product decision, since it’s something consumers might reasonably care about? A broader definition of germaneness, however, might have promise as a limit — though it wouldn’t be much of a limit on required disclosures, excluding only the kind of *Clockwork Orange* classical conditioning mentioned in Part II above.¹⁸⁰ Overall, whether a position is controversial can and should be distinguished from whether the means of conveying the government’s position are illegitimate.

Even setting controversiality aside, the idea of autonomy-enhancing disclosures is complicated by the absence of a coherent theory of autonomy under pressure. Almost everyone would want to make decisions that are the best for themselves, all else being equal. We just disagree on what those decisions would be. Though Corbin equates them in her proposed formulation, something that is autonomy enhancing is not necessarily in a person’s best interests.¹⁸¹ If autonomy is not an overriding virtue for a person, for example, some autonomy-diminishing decisions — like making it harder for her to smoke, or to have an abortion — might well serve her best interests.¹⁸² Even Corbin’s example, government persuasion in the direction of eating nutritious foods, is not necessarily *both* autonomy-enhancing and in a person’s best interests. A hedonist might prefer a shorter, tastier life. Or government pressures to eat more nutritiously might lead a person to misallocate her resources, if those resources were sufficiently constrained.¹⁸³

attracted by the sugar-free feature for muffin mix. In fact, individuals with a college degree must be compensated by \$0.95 to make them choose a sugar-free package of blueberry dry muffin mix.”)

¹⁷⁹ Goodman, *supra* note 59, at 553.

¹⁸⁰ In addition, even if the disclosures were germane, their cost might have constitutional weight if the government required so many disclosures that the underlying commercial appeal became too expensive to carry out. *See id.* at 543; *see also* Int’l Dairy Foods Ass’n v. Amestoy, 92 F.3d 67, 74 (2d Cir. 1996) (raising the specter of an unending list of required disclosures that, while truthful, would still be unconstitutionally burdensome).

¹⁸¹ *See* Corbin, *supra* note 81, at 38 (suggesting that both truth/nonmisleadingness and an autonomy-enhancing effect are required for a mandatory disclosure to be constitutionally valid).

¹⁸² *Cf.* KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 161–63 (1984) (investigating the value orientations of pro-choice and anti-abortion activists and finding that the latter believe that the option of abortion, along with other options for women, harms women in traditional relationships by making it easier for men to avoid responsibility). As Professor Kristin Luker’s work indicates, this perspective is not just a question of people who get thrills from dangerous or harmful activities. They may perceive a variety of benefits from shared constraints on choice.

¹⁸³ *See* Lindsay McLaren, *Socioeconomic Status and Obesity*, 29 EPIDEMIOLOGIC REVS. 29, 35 (2007) (explaining that nutritious foods are more expensive); *cf.* African-American Organization Urges FDA to Stop Deceptive Marketing of “No rBST” Milk, PR NEWSWIRE, Dec. 14, 2006, <http://www.thefreelibrary.com/African-American+Organization+Urges+FDA+to+Stop+Deceptive+Marketing...-a0155882092>, archived at <http://perma.cc/DS7S-9AHR> (arguing that marketing some milk as hormone free deceptively encourages poor people to spend too much money on that milk).

D. Accommodating the Inevitability of Emotion

Because emotional components are inevitably a part of reasoning, identifying emotionality can't be the end of any inquiry into the acceptability of a government regulation. A doctrine that condemns emotional manipulations is particularly likely to block policy innovation, since the emotional valences of existing arrangements are harder to see.

Consider the recently popular governmental interventions aimed at “nudging” consumers to behave differently.¹⁸⁴ Nudges aim precisely to work through noncognitive, nonrational heuristics. For example, putting the healthy choices at eye height and hiding the unhealthy choices so that they're easy to overlook in the cafeteria are attempts to leverage a consumer's laziness, regardless of her present or future preferences, in the service of a broader policy goal.¹⁸⁵ This structuring of the perceptual environment doesn't address the consumer in her capacity as a person who exercises choice. Indeed, it presumes that she doesn't often do so.¹⁸⁶ Perhaps worse, the nudgers' tactic of making certain choices easier exploits exactly the kind of affect heuristic that worries people like Corbin and Goodman: easier decisions seem *better* because they're *easier*, despite the lack of logical connection between the two.¹⁸⁷ Compared to the effects of such nudges on autonomy, at least explicitly emotional appeals allow citizens to bring their “persuasion knowledge” to bear and fight off the appeals.¹⁸⁸

One might solve the nudging problem by treating nonverbal nudges as not “speech” and thus not subject to First Amendment scrutiny at all, and that position would decrease the number of situations in which nudging implicates compelled speech. But that seems like a cop-out, or at least a

¹⁸⁴ One can imagine various hypotheticals testing this point. Attempts to change the emotional makeup of the public, for example through various initiatives in schools promoting emotional intelligence and “character” education, may or may not be misguided. But it seems hard to argue that they should be unconstitutional, especially when the alternative is another form of public schooling that itself will elicit and shape certain kinds of emotional responses. Or suppose that, relying in part on evidence that the rich are less empathetic than other people, the legislature raises taxes on the most wealthy: is this motive constitutionally suspect?

¹⁸⁵ See generally RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 40–52 (2009) (describing self-control strategies and other similar nudges).

¹⁸⁶ See, e.g., Brian Wansink & Andrew S. Hanks, *Slim by Design: Serving Healthy Foods First in Buffet Lines Improves Overall Meal Selection*, PLOS ONE 4 (Oct. 23, 2013), <http://www.plosone.org/article/fetchObject.action?uri=info%3Adoi%2F10.1371%2Fjournal.pone.0077055&representation=PDF>, archived at <http://perma.cc/B2JS-9XS9> (finding that food order at buffet triggers different choices, and suggesting that people can be led to make healthier choices by presenting fruit first and thereby interrupting the cultural script that eggs, potatoes, and bacon should be eaten together).

¹⁸⁷ See *supra* note 23 and accompanying text.

¹⁸⁸ See, e.g., Cassi G. Matos, Note, *The Unbranding of Brands: Advocating for Source Disclosure in Corporate America*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1307, 1319–20 (2010) (internal quotation marks omitted) (discussing ways in which consumers resist persuasive messages).

solution in need of a robust defense of “speech” autonomy over other kinds of autonomy. Further, a number of the nudgers’ solutions, from red-yellow-green symbols on food¹⁸⁹ to presenting retirement savings options in specified ways¹⁹⁰ to putting pictures of eyes on websites to remind consumers that their privacy is at risk,¹⁹¹ would be speech even under a restrictive definition thereof.¹⁹² The problem of circumventing not just decisions, but citizens’ understandings that there was a decision to be made in the first place, would remain.

The nudgers point out that there is no such thing as a neutral default — all situations configure choices.¹⁹³ Though a decision can be framed as avoiding a loss or achieving a gain, there’s no choice but to use some frame or other.¹⁹⁴ And this need for framing is also true of abortion and tobacco disclosures. Even in the absence of topic-specific government mandates, what providers would tell consumers and patients would be profoundly shaped by law, particularly tort law. It’s no answer to say that tort law is neutral and that mandatory disclosures aren’t, because even if, counterfactually, there were such a thing as “the” law of tort, that would just return us to a level-of-generality problem: regulators make topic-specific rules because they’re convinced that the ordinarily good-enough general rules aren’t working in particular cases, but they can always appeal to the same ends as those of the general rule.

Ultimately, I can’t see why the government can’t express its preferences, even in emotional terms, as long as it isn’t deceptive about those preferences.¹⁹⁵ At least with respect to commercial speech, this should

¹⁸⁹ See, e.g., Bryan Thomas & Lawrence O. Gostin, *Tackling the Global NCD Crisis: Innovations in Law and Governance*, 41 J.L. MED. & ETHICS 16, 19–20 (2013).

¹⁹⁰ See Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1176 (2003).

¹⁹¹ See M. Ryan Calo, *Against Notice Skepticism in Privacy (and Elsewhere)*, 87 NOTRE DAME L. REV. 1027, 1039–40 (2012).

¹⁹² Of course, corporations are already shaping choices with the same techniques. Unfortunately, this strategy just gives them incentives to make the best possible arguments that regulations requiring them to present options in particular ways constitute compelled speech. See generally Lauren E. Willis, *When Nudges Fail: Slippery Defaults*, 80 U. CHI. L. REV. 1155 (2013) (discussing the many successful ways motivated businesses can defeat behavioral interventions with their own techniques and speech, including resort to the First Amendment).

¹⁹³ Sunstein & Thaler, *supra* note 190, at 1182 (“[T]here is no way to avoid effects on behavior and choices. The task for the committed libertarian is, in the midst of such effects, to preserve freedom of choice.”).

¹⁹⁴ See, e.g., Elizabeth F. Emens, *Framing Disability*, 2012 U. ILL. L. REV. 1383, 1437 (discussing different potential frames for messaging antismoking campaigns to avoid stigmatizing people with smoking-related disabilities).

¹⁹⁵ See Goodman, *supra* note 59, at 557–58 (discussing the autonomy-disrespecting effects of deception); David A. Strauss, *supra* note 161. Because these concepts are also important for identifying what the government can ban private parties from saying, not just what the government can mandate, it should be noted that deception can also occur when additional material, such as color and music, distracts the audience from comprehending or retaining disclosures. The FTC and FDA have long recognized this potentially deceptive tactic. See, e.g., Kraft, Inc., 114 F.T.C. 40, 61 (1991) (“Generally rec-

give the government significant freedom to require disclosures, even ones that concededly rely on emotional appeals to communicate information. As for private causes of action like defamation and trademark dilution, the inevitability of emotion provides support for the defamation rule: the law shouldn't intervene as between different emotional appeals unless there is an underlying factual falsity.

In both contexts, paying less attention to emotionality in itself would go hand in hand with increased emphasis on factual misleadingness, ideally backed by empirical research. The weak point of defamation doctrine is that it often approves assumptions about audience reaction, but that model need not be emulated. Lawyers already know how to ask people whether an ad communicates a claim to them. We already have empirical evidence that tobacco disclosures correct more in the way of risk misperception than they cause, despite the D.C. Circuit's fears.¹⁹⁶ Courts could focus on the practical burdens to choice imposed by abortion regulations, and in the case of disclosures, specifically ask whether disclosures, whether verbal or visual and whether literally true or literally nonfactual, communicate false statements of fact about risk, fetal pain, or something else. Because facts are so contestable, this approach would not have any prospect of ending disputes over legitimate speech regulations. But it would, I think, have the virtue of honesty.

ognized marketing principles suggest that, given the distracting visual and audio elements [of the television ad at issue] and the brief appearance of the complex superscript in the middle of the commercial, it is unlikely that the visual disclosure is effective as a corrective measure.”), *aff'd*, 970 F.2d 311 (7th Cir. 1992).

¹⁹⁶ See *supra* notes 74–76; see also, e.g., *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 565 (6th Cir. 2012) (“[A]pproximately 95 percent of youth smokers and 75 percent of adult smokers report that the pictorial warnings have been effective in providing them with important health information.” (internal quotation marks omitted)); *Required Warnings for Cigarette Packages and Advertisements*, 76 Fed. Reg. 36,628, 36,641 (June 22, 2011) (codified at 21 C.F.R. pt. 1141 (2012)) (“The overall body of scientific evidence indicates that health warnings that evoke strong emotional responses enhance an individual’s ability to process the warning information, leading to increased knowledge and thoughts about the harms of cigarettes and the extent to which the individual could personally experience a smoking-related disease.”); James F. Thrasher et al., *Cigarette Warning Label Policy Alternatives and Smoking-Related Health Disparities*, 43 AM. J. PREVENTIVE MED. 590, 598 (2012) (finding that adult smokers with low health literacy found image warnings more personally relevant and credible than text).

ILLUSTRATION A: U.S. FOOD AND DRUG ADMINISTRATION
CIGARETTE HEALTH WARNINGS¹⁹⁷



¹⁹⁷ The FDA provides high-resolution images of all of the agency's cigarette health warnings for download by the public. See *Overview: Cigarette Health Warnings*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/tobaccoproducts/labeling/ucm259214.htm>, (last updated May 15, 2013) archived at <http://perma.cc/9V5M-YGP3>.