ARE THERE FIRST AMENDMENT "VACUUMS?": THE CASE OF THE FREE SPEECH CHALLENGE TO TOBACCO PACKAGE LABELING REQUIREMENTS

*R. George Wright**

I. MUST EVERY APPARENT FREE SPEECH CASE HAVE A MEANINGFUL ANSWER UNDER THE FREE SPEECH CLAUSE?

The litigation[1] challenging the recently adopted federal statute[2] and FDA rules[3] seeking to regulate tobacco package labeling focuses on freedom of speech. There is, no doubt, an obvious, literal sense in which these tobacco-labeling cases raise various free speech issues, evoke and debate free speech tests, and are judicially resolved on free speech grounds.

This article, however, raises an unusual but revealing question about what we might call the "legal space" that is apparently controlled by free speech law. In particular, this article asks whether an apparent free speech law case could, upon closer examination, ever turn out to not really involve a *genuine* free speech law case.

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* Lawrence A. Jegen III Professor of Law, Indiana University Robert H. McKinney School of Law. J.D., Indiana University School of Law; Ph.D., Indiana University. The author's thanks are hereby extended to Samantha Everett.

[1] *See, e.g.*, Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 520, 569 (6th Cir. 2012) (holding that the Family Smoking Prevention and Tobacco Control Act was rationally related to a legitimate government interest, thus not in violation of the First Amendment), *reh'g and reh'g en banc denied*, 2012 U.S. App. LEXIS 11820 (6th Cir. May 31, 2012); R.J. Reynolds Tobacco Co. v. FDA, 823 F. Supp. 2d 36, 39 (D.D.C. 2011) (requesting a preliminary injunction), *vacated*, 696 F.3d 1205, at *1221–22 (D.C. Cir. 2012), *aff'g*, 845 F. Supp. 2d 266 (D.D.C. 2012); *see* R.J. Reynolds Tobacco Co. v. FDA, 845 F. Supp. 2d 266, 269–72 (D.D.C. 2012) (adjudicating the case on the merits). For some useful background to the current cases, see Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001). For comparative purposes, see J.T.I. MacDonald Corp. v. Attorney Gen. of Canada [2007], 2 S.C.R. 610 (Can.) (concluding that the Canadian Tobacco Act was unconstitutional).

[2] *See* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 201, 123 Stat. 1776, 1842–45 (2009) (amending particular sections of the Federal Cigarette Labeling and Advertising Act); Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1333 (2006 & Supp. III).

[3] *See* Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628 (June 22, 2011) (to be codified at 21 C.F.R. pt. 1141).

Certainly, in most free speech cases, we expect to encounter typical sorts of indeterminacies[4] and incommensurabilities.[5] This article asks whether there could also be what we might, by analogy, call something like gaps, cavities, faults, voids, lacunae, or vacua within the conceptual space of free speech law.

The idea would be roughly this: to begin with, a case that is located within a free speech "vacuum" might, contrary to initial appearances, not coherently implicate the distinctive basic reasons for according constitutional protection to speech in the first place. By consensus, the most fundamental of such reasons typically include one or more of the following: promoting the search for truth of one sort or another; furthering the value of self-realization or self-fulfillment in one sense or another; and promoting something like democratic self-government, perhaps including the civic virtue of tolerance and the maintenance of popular constraints on the exercise of political power.[6] Setting aside possible complications and qualifications, if none of the basic reasons for distinctively protecting speech are coherently or meaningfully at stake in a given case, we could say that the most basic of the various presuppositions or prerequisites of free speech jurisprudence is in that case not met.

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[4] The idea of legal indeterminacy suggests, roughly, that at least some cases are not amenable to any more or less unique or distinctively proper judicial resolution, even on the faultless use of our best available judicial methods. Ken Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283, 283 (1989). For some background discussion, see Lewis A. Kornhauser, *No Best Answer?*, 146 U. PA. L. REV. 1599 (1998); Matthew H. Kramer, *When Is There Not One Right Answer?*, 53 AM. J. JURIS. 49 (2008); Kress, *supra*, at 283; Frederick Schauer, *Commensurability and Its Constitutional Consequences*, 45 HASTINGS L.J. 785 (1994); Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CALIF. L. REV. 1441 (1990).

[5] Generally, the idea of legal incommensurability refers, roughly, to the rational incomparability, or the "unweighability" on any common measuring scale, of the two or more competing values or interests at stake. Schauer, *supra* note 4, at 785.

[6] For discussions of these and related values or purposes underlying free speech law, see, for example, LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986); THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 3 (1966); JOHN STUART MILL, ON LIBERTY 19–66 (Currin V. Shields ed., 1956) (1859); MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS (1984); FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982); STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE (1990); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1977); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521; Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989); William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1 (1995); Brian C. Murchison, *Speech and the Self-Realization Value*, 33 HARV. C.R.–C.L. L. REV. 443 (1998); Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U.L. REV. 1137 (1983); Steven D. Smith, *Skepticism, Tolerance, and Truth in the Theory of Free Expression*, 60 S. CAL. L. REV. 651 (1986).

Of course, the fact that no basic purpose of protecting freedom of speech is significantly implicated in a given case would most typically indicate not that we have entered a void or "vacuum" within the space of free speech law, but instead merely that the purported speaker should simply lose the free speech case on the merits. For example, literal or symbolic speech that does not intend to, and does not in fact, convey any cognizable message to any possible audience might well simply not count as speech for constitutional purposes.[7] And we would presumably say in such cases that the purported speaker has merely lost the entirely genuine free speech case on the merits.[8]

Yet what if a particular case involved not only the absence of any sufficient, meaningful, coherent promotion of any of the distinctive basic purposes for constitutionally protecting speech, but the corresponding absence, on the other side of the case, of any sufficiently meaningful, coherent, distinctive, promotion of any legitimate or otherwise sufficient governmental interest, to be promoted through regulating the speech in question? We could, in some sense, still label the case as a free speech case, lost on the merits by whichever side bore the decisive burden of proof.[9]

But more substantively, we could in such a case rightly sense something like a free speech law "vacuum." The case would present not so much, say, a standard problem of free speech law indeterminacy, as of the absence of any sufficiently meaningful, non-self-contradictory, cogent reasons, based in free speech and regulatory law,[10] for deciding the case in any particular way, or for

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[7] For Supreme Court cases imposing somewhat different requirements on the idea of "speech" for constitutional purposes, see Texas v. Johnson, 491 U.S. 397, 404 (1989), which found that "speech" for constitutional purposes required "[a]n intent to convey a particularized message" as well as a "great" likelihood "that the message would be understood" by its audience, and Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 569 (1995), which did not require a "particularized message" or a "succinctly articulable message." For additional context and further discussion, see R. George Wright, *What Counts as "Speech" in the First Place?: Determining the Scope of the Free Speech Clause*, 37 PEPP. L. REV. 1217 (2010).

[8] See *supra* note 7.

[9] *See infra* notes 102–03 and accompanying text.

[10] Of course, a case that presents a free speech law "vacuum" may also involve one or more other constitutional or non-constitutional issues, cogently present in the case, and on the basis of which the case could be independently decided. A free speech "vacuum" case might, for example, present issues of equal protection, procedural due process, an alleged constitutional "taking," the freedom of religion, or some statutory issue sufficient to properly judicially resolve the case. *See, e.g.*, FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2320 (2012) (deciding the case on procedural due process grounds and leaving the underlying First Amendment question regarding the Federal Communication Commission's ban on certain "indecent" material during particular viewing hours unresolved).

deciding the case on free speech and regulatory grounds at all.

Or we could say that a free speech law "vacuum" case presents not so much a standard problem of the incommensurability[11] of values and interests, but an absence of any sufficient such interests, bearing favorably or unfavorably upon freedom of speech, on both sides of the case. In a sense, the commensurability in such a "vacuum" case might be all too easy: there would be zero to negligible coherent free speech interests on either side of the case, along with zero to negligible coherent governmental interests sufficiently and distinctively furthered by regulating the actual or purported speech in question.[12]

What this amounts to is the possibility that what appears to be a meaningful free speech law case might actually, on closer inspection, fail to sufficiently exhibit the jurisprudentially necessary presuppositions of a genuine free speech law case. The mere presence of speech,[13] and of some sort of binding government regulation, may well not exhaust the prerequisites or presuppositions of a meaningful free speech law case to be appropriately decided one way or another on the free speech merits.

This possibility of a "vacuum" within the "general space" of free speech law, where the presuppositions of free speech case law are not sufficiently met, should not surprise us. Consider, by analogy, the idea of justice as analyzed by the philosopher David Hume.

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[11] *See supra* notes 4–5 and accompanying text.

[12] The phrase "zero to negligible," even in light of our "vacuum" metaphor, is intended to suggest that the values or interests at stake in the case actually fall below the magnitude that should properly be considered the minimum judicially cognizable level.

As it turns out, the "vacuum" metaphor is still appropriate. A constitutional vacuum for our purposes does not require the absolute absence of any level of coherently pursued interests, any more than a physical vacuum in nature amounts to the absence of any constituents, or of any activity. Even the vacuum of space, it turns out, is not entirely empty. *See* FRANK CLOSE, THE VOID 99 (2007) ("[F]ar from a vacuum being empty, it is always seething with activity."); *id.* at 126 ("[T]he void is actually filled with an infinite sea of [transient virtual and real] particles together with quantum fluctuations.") (also available as FRANK CLOSE, NOTHING: A VERY SHORT INTRODUCTION (2009)); JOHN GRIBBIN, SCHRÖDINGER'S KITTENS AND THE SEARCH FOR REALITY: SOLVING THE QUANTUM MYSTERIES 123 (1st Am. ed. 1995) ("'Nothing at all' is actually best pictured as a seething maelstrom of activity in which all kinds of particles are flickering in and out of existence."); *see also* JOHN GRIBBIN, IN SEARCH OF SCHRÖDINGER'S CAT: QUANTUM PHYSICS AND REALITY 201 (1984) ("According to our best theories of particle behavior, the vacuum is a seething mass of virtual particles in its own right, even when there are no 'real' particles present."). On the experimental front, see Geoff Brumfiel, *Moving Mirrors Make Light From Nothing*, NATURE (June 3, 2011), http://www.nature.com/news/2011/110603/full/news.2011.346.html ("Quantum theory predicts that a vacuum is actually a writhing foam of particles flitting in and out of existence."). Philosophically expanded upon, see Derek Parfit, *Why Anything? Why This?,* 20 LONDON REV. BOOKS 24, 24–27 (1998).

[13] *See supra* note 7.

Questions of justice might superficially seem to always and everywhere be proper or "in order." But Hume sensibly argues that the idea of justice or injustice in distribution actually involves certain presuppositions which may not always be met.[14] For Hume, the idea of justice or injustice is meaningless in the absence of what might be called "moderate scarcity."[15] As Hume argues, "if every man had a tender regard for another, or if nature supplied abundantly all our wants and desires, that [] jealousy of interest, which justice supposes, could no longer have place."[16] Or, at the other end of the scale of presuppositions of justice, consider hypothetical circumstances, such as people's separation in time or space, such that they could not relevantly affect each other.[17] Here also, the presuppositions of justice or injustice might not be sufficiently met.

We might still imagine, in every apparent free speech law case, that even if there is not always a uniquely right answer[18] under the Free Speech Clause,[19] there must still be at least some practically useful set of fully justified coherent theories and resulting outcomes under the Free Speech Clause. We shall briefly explore this unfortunately overly optimistic claim below in the context of the new regulations of tobacco package labeling.[20]

For the moment, though, we should reinforce, by a more exotic

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[14] *See* DAVID HUME, POLITICAL ESSAYS [hereinafter POLITICAL ESSAYS] 36–37 (Charles W. Hendel ed., 1953) (1739) (derived from DAVID HUME, A TREATISE OF HUMAN NATURE 488 (L.A. Selby-Bigge ed., 2d ed. 1978) (1739)).

[15] POLITICAL ESSAYS, *supra* note 14, at 37–38.

[16] *Id.* at 37.

[17] Remoteness of people from one another in time and space would eliminate "jealousy of interest, which justice supposes." *Id.*

[18] The legal philosopher Ronald Dworkin has long been associated with the idea that there exists some overall uniquely right or best legal outcome, typically if not invariably, even in "hard" jurisprudential cases. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 239, 266 (1986). *See generally* RONALD DWORKIN, A MATTER OF PRINCIPLE 119–45 (1985) (discussing whether there is a right answer in jurisprudentially hard cases and contrasting opposing viewpoints); Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975); Ronald Dworkin, *No Right Answer?*, [hereinafter Dworkin, *No Right Answer?*] 53 N.Y.U. L. REV. 1 (1978) (same). For a relevant introduction, see BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 94–96 (1996). For further discussion and critique, see, for example, RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 197–203 (1990), Matthew H. Kramer, *When Is There Not One Right Answer?*, 53 AM. J. JURIS. 49 (2008), David Lyons, *Moral Limits of Dworkin's Theory of Law and Legal Interpretation*, 90 B.U. L. REV. 595 (2010); Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269 (1997).

[19] Note that Professor Dworkin does not claim that there will always be a uniquely best legal answer under whichever theory of the case one or more litigants or the court happens to think appropriate; in our cases, the Free Speech Clause. Dworkin, *No Right Answer?*, *supra* note 18, at 2–3.

[20] *See supra* Part II.

though more demonstrable analogy, the idea that it is entirely possible that there may not always be answers, knowable or unknowable, or "facts of the matter" in all the cases where our common sense suggests there should be.[21] Consider an analogy from physics. To begin with, consider an ordinary basketball in the course of a shot. Generally, a basketball shot either goes through the hoop, or it does not. There is, in any given such case, a determinate fact of the matter.

Not all objects, however, are in this respect like basketballs and basketball hoops. In particular, in the quantum realm, our common sense ideas of the scope and realm of causation, of the paths of objects or their determinate trajectories, and more generally of the common sense describability of phenomena, are surprisingly limited in their coherent applicability.[22] Not every apparently quite sensible question about quantum phenomena turns out to have a coherent answer.[23]

In this realm, our common sense categories do not govern or apply.[24] A grammatically well-formed statement or question about, say, causation may turn out to be genuinely meaningless. This is not most basically a matter of our ignorance of key pieces of information.[25] Thus,

> in quantum mechanics, . . . events really [do] occur at random [and not from some unknown specific cause]. No cause is at work to make an excited atom decay at a given moment. There are, of course, laws governing the whole process, but they only express the probability of the event taking place at one time rather than another.[26]

Similarly, we cannot meaningfully ask about the "'path' or [the] 'trajectory'" that an electron takes; the question turns out to have "no definable meaning,"[27] apparently quite apart from any possible jostling or other disturbing of the electron in measuring it.[28] We

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[21] *See supra* note 18 (providing discussion and critique of Dworkin's legal theories).

[22] ROLAND OMNES, QUANTUM PHILOSOPHY: UNDERSTANDING AND INTERPRETING CONTEMPORARY SCIENCE 150 (Arturo Sangalli trans., 1999) (explaining that while key pieces of information in classical physics can be determined to arrive at an answer, such predictability is absent in the randomness of quantum mechanics).

[23] *Id.* at 164.

[24] *Id.*

[25] *Id.* at 150 (stating that because there is also an "ignorance of hidden details" in problems of classical physics for which answers can be determined, such an ignorance cannot be basis of the meaninglessness in the quantum realm).

[26] *Id.*

[27] PETER GIBBINS, PARTICLES AND PARADOXES: THE LIMITS OF QUANTUM LOGIC 52 (1987).

[28] *See id.* at 52–53. *See also* P.C.W. DAVIES & J.R. BROWN, THE GHOST IN THE ATOM: A

may indeed have a mental image of an electron, rather like a basketball, taking some discrete route from Point A to a distant Point B.[29] But our mental images, intuitions, analogies, and our common sense may in this context profoundly mislead us.[30]

The point of this analogy is not that quantum physics generally tracks what can be sensibly asked of free speech law, even in most typically hard cases. The point is instead to suggest that in some apparently ordinary, if contested, free speech cases, our mental images, intuitions, analogies, and common sense may overstate what the underlying logic of free speech law, under the circumstances, can deliver.

II. THE CURRENT TOBACCO LABELING REGULATIONS: IS A DISTINCTIVE AND COHERENT FREE SPEECH ANALYSIS AND RESOLUTION REALLY POSSIBLE?

Even at a glance, the current tobacco package labeling regulation cases[31] may strike us as doctrinally complex. Complexity[32] by itself, however, hardly rules out the possibility of a distinctive, coherent, and genuinely meaningful free speech analysis and resolution. The complexity of, say, some of the free speech law of electoral campaign funding,[33] as measured merely by the page length of some Supreme Court opinions,[34] does not by itself rule out a meaningful resolution of such cases on free speech grounds.

While the current tobacco package labeling cases are complex in the number, subtlety, and interactivity and mutual dependence of

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DISCUSSION OF THE MYSTERIES OF QUANTUM PHYSICS 7 (1986); TONY HEY & PATRICK WALTERS, THE NEW QUANTUM UNIVERSE 164 (2003) ("According to quantum mechanics, until we make a measurement, the direction of polarization of the photon is not just unknown, but really indeterminate."); JOHN POLKINGHORNE, QUANTUM THEORY: A VERY SHORT INTRODUCTION 56 (2002); ALASTAIR RAE, QUANTUM PHYSICS: ILLUSION OR REALITY? 127 (2d ed. 2012) (articulating the possibility that "randomness and indeterminacy are intrinsic properties of the physical universe"). For explicitly philosophical treatments, see George Darby, *Quantum Mechanics and Metaphysical Indeterminacy*, 88 AUSTRALASIAN J. PHIL. 227 (2010); Bradford Skow, *Deep Metaphysical Indeterminacy*, 60 PHIL. Q. 851 (2010).

[29] MICHAEL G. RAYMER, THE SILICON WEB: PHYSICS FOR THE INTERNET AGE 310 (2009), *available at* http://thesiliconweb.net/SiliconWeb_Contents_files/Sec%209.1-9.2.pdf.

[30] *Id.* at 301.

[31] *See* cases cited *supra* note 1.

[32] For background, see R. George Wright, *The Illusion of Simplicity: An Explanation of Why the Law Can't Just Be Less Complex*, 27 FLA. ST. U. L. REV. 715 (2000).

[33] *See*, *e.g.*, Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 913 (2010) (overruling McConnell v. Fed. Elec. Comm'n, 540 U.S. 93 (2003)).

[34] *Citizens United* is listed as occupying 108 Westlaw pages; the *McConnell* case that it overruled is listed at 174 Westlaw pages. *Citizens United*, 130 S. Ct. at 876; *McConnell*, 540 U.S. at 93.

some of the issues raised,[35] these sorts of complexities are not, by themselves, the heart of the possible free speech law vacuum problem.

Another important element is that the issues in the current tobacco package labeling cases are not only deeply and multi-facetedly empirical,[36] but involve highly speculative, indirect, multi-linked, and easily contestable attempts to answer questions of present and future social science facts, focusing in particular on vexed questions of causation,[37] alternative causes and causal accounts, and the degrees and directions of likely future effects, if any, of a proposed regulation, when that regulation is taken in isolation, and when it is compared to hypothetical alternative regulations.[38]

Worse, though, federal regulation of tobacco packaging labels already has a long and complex history,[39] largely of continually more or less incrementally tightened regulation. This means that by now, the easy cases, the most basic regulatory issues, and the proverbial low-hanging policy fruit have been confronted, while recurrently, the continuing effectiveness of prior regulations and

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

[36] For a useful discussion of the problems of largely empirical approaches to public policy alternatives, see JIM MANZI, UNCONTROLLED: THE SURPRISING PAYOFF OF TRIAL-AND-ERROR FOR BUSINESS, POLITICS, AND SOCIETY (2012).

[37] For a short treatment of some possible difficulties associated with issues of causation in social science, and with the magnitude and directions of their effects, see Jim Manzi, *What Social Science Knows—and Doesn't—Know*, CITY J., Summer 2010, at 14, 17.

[38] *See* ALLAN M. BRANDT, THE CIGARETTE CENTURY: THE RISE, FALL, AND DEADLY PERSISTENCE OF THE PRODUCT THAT DEFINED AMERICA 267 (2007).

[39] For book-length treatments of the American historical experience, see *id.* at 257, 267, which notes the apparent ineffectiveness of prior cigarette label warning regimes in significantly reducing smoking. *See also* MARTHA A. DERTHICK, UP IN SMOKE: FROM LEGISLATION TO LITIGATION IN TOBACCO POLITICS 15–16 (2002) (recounting some of the complex history of the federal excise tax, tobacco price support, and subsidy regimes); DAVID KESSLER, A QUESTION OF INTENT: A GREAT AMERICAN BATTLE WITH A DEADLY INDUSTRY 293 (2001) (decades-old battle over the use of color and of black and white text); RICHARD KLUGER, ASHES TO ASHES: AMERICA'S HUNDRED-YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS 283 (1997) ("[T]obacco industry lawyers strongly suspected by mid-1964 . . . that a federally mandated warning on a hazardous product already commonly known to be one was unlikely to hurt its sales and likely to help shield its makers from liability claims."); *id.* at 550, 552 (discussing the 1985 political negotiations over federal excise taxes on cigarettes); *id.* at 303–04, 491 (discussing the ineffectiveness of prior cigarette pack health warning regimes); ROBERT N. PROCTOR, GOLDEN HOLOCAUST: ORIGINS OF THE CIGARETTE CATASTROPHE AND THE CASE FOR ABOLITION 550–51 (2011) (recommending, among other policies, dramatically increased cigarette taxes, on the grounds that tobacco has a price elasticity of demand of about 0.4, suggesting that a ten percent price rise results in a four percent decrease in tobacco consumption, and recommending as well the abolition of tobacco price supports and subsidies, along with a prohibition of all cigarette advertising and a regime of "large, graphic, and disgusting" cigarette warning labels).

their assumptions are called into question by all sides.[40] Against this background of multiple contested and largely irresolvable disputes, the new regulations involve, in some respects, what can be thought of as further incremental change.[41] It seems unlikely, at this point, that the bottom-line effects of these incremental changes, by themselves, will be large and stable. The most basic general risks of smoking are no longer central to the regulatory or constitutional issues.[42] Though in some respects ignorant of various risk considerations, most people at this point have some basic awareness of the most common or severe general health risks.[43]

And even worse yet, historical and contemporary tobacco regulatory policy in general has been, and remains, replete with unprincipled compromises, deep and obvious policy ambivalences, and evident practical policy contradictions of various sorts, if not sheer policy hypocrisies, well beyond the sorts of horse-trading we see in more typical regulatory contexts.[44] The federal and state governments clearly have not attempted, single-mindedly, to more or less eradicate tobacco consumption, or to maximize the financial cost of tobacco to consumers.[45] Rather, tobacco growers have been

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[40] *See, e.g.*, BRANDT, *supra* note 38, at 257, 267; KLUGER, *supra* note 39, at 283, 303–04, 491; Meg Riordan, *Tobacco Warning Labels: Evidence of Effectiveness,* CAMPAIGN FOR TOBACCO-FREE KIDS, http://www.tobaccofreekids.org/research/factsheets/pdf/0325.pdf (last visited Jan. 25, 2013).

[41] Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36670–71 (June 22, 2011) (to be codified at 21 C.F.R. pt. 1141).

[42] *See* David Hammond et al., *Effectiveness of Cigarette Warning Labels in Informing Smokers About the Risks of Smoking: Findings from the International Tobacco Control (ITC) Four Country Study*, TOBACCO CONTROL, at iii19 (2006).

[43] *See* Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,697 (arguing not that most adult Americans are unaware of the most serious tobacco health risks, but that some such risks are underestimated, or are underestimated at the personal, as opposed to broadly statistical, level, or that the causal linkages between tobacco and various other diseases and effects are less well known among the adult public); KLUGER, *supra* note 39, at 283. For discussion of public awareness of basic tobacco health risks, along with various dimensions of ignorance or underestimation, see, for example, Hammond et al., *supra* note 42, at iii19.

[44] *See* DERTHICK, *supra* note 39, at 50–52 (explaining the various degrees of effort surgeons general have put into cigarette bans).

[45] The final sentence of Kluger's book concludes that governments have policy options available to do substantially more to reduce tobacco consumption, "without shutting down [the] grim business." KLUGER, supra note 39, at 767. *See also* Naphtali Offen et al., *Forcing the Navy to Sell Cigarettes on Ships: How the Tobacco Industry and Politicians Torpedoed Navy Tobacco Control*, 101 AM. J. PUB. HEALTH 404, 408 (2011) (explaining the effects of a congressional mandate to sell cigarettes on Navy ships, rather than prohibiting cigarettes on ships); Matthew B. Stanbrook, Editorial, *The Federal Government's Senseless Policy Change on Tobacco Warning Labels*, CAN. MED. ASS'N J., Nov. 8, 2010, 1939, 1939 (condemning a then-current Canadian government policy shift from "larger and more graphic warning labels" and "a prominently displayed toll-free number for a quit-smoking line" to a "focus on fighting contraband cigarettes"). At some point, the tax rates on items such as cigarettes may

subsidized,[46] and the continuing and anticipated stream of tobacco excise tax revenues[47] and lawsuit settlement funds[48] dependent upon future tobacco sales,[49] importantly blur the nature and constitutional import of the government interests genuinely at stake in any particular regulation.[50]

As it turns out, the effectiveness of the new tobacco packaging labeling regulations, however broadly if vaguely and indirectly supported by national and international research,[51] is already conceded by its official proponents to likely be remarkably modest.[52] In particular, even the FDA's own calculations suggest that the number of smokers likely to be persuaded not to smoke or to quit smoking by the operation of the new rules, given the uncertainties underlying such a calculation, must be classified as statistically

become high enough to incentivize distinct increases in smuggling and untaxed sales. For analysis of more recent Canadian tobacco policy developments, see, for example, Carly Weeks, *'The Problem Is Not Solved': Canada's Warning Labels Rank Fourth in the World, But Researchers Now Urge Plain Packaging As Well*, GLOBE AND MAIL (CAN.), Nov. 14, 2012, at L10.

[46] *See* DERTHICK, *supra* note 39, at 16–17; PROCTOR, *supra* note 39, at 551.

[47] *See* DERTHICK, *supra* note 39, at 16; KLUGER, *supra* note 39, at 552; PROCTOR, *supra* note 39, at 550.

[48] *See, e.g.*, BRANDT, *supra* note 38, at 432–36 (discussing the 1988 Master Settlement Agreement between tobacco companies and states).

[49] *See id.* at 435.

[50] For discussion of some elements of potentially increased policy coherence, see Joshua S. Yang & Thomas E. Novotny, *Policy Coherence in US Tobacco Control: Beyond FDA Regulation*, 6 PLOS MED., May 2009, at 1, 3–4. The authors make the case that tobacco control should be a primary element of domestic public health policy in the United States. *Id.* at 3. Among their recommendations are ideas for policy improvements in areas such as product and industry regulation, public education, and foreign policy treatment of tobacco products as "exceptional goods." *Id.* at 3–4.

[51] *See* Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36,748–53 (June 22, 2011) (to be codified at 21 C.F.R. pt. 1141); David Hammond, *Health Warning Messages on Tobacco Products: A Review*, 20 TOBACCO CONTROL 327, 334 (2011) ("[T]he impact of health warnings depends upon their [size, color, and] design."); Sven Schneider et al., *Does the Effect Go Up In Smoke? A Randomized Controlled Trial of Pictorial Warnings on Cigarette Packaging*, 86 PATIENT EDUC. & COUNSELING 77, 77 (2012) ("Pictorial warnings were associated with a significantly higher motivation to quit [and] . . . with higher fear intensity."); James F. Thrasher, et al., *Estimating the Impact of Pictorial Health Warnings and "Plain" Cigarette Packaging: Evidence From Experimental Auctions Among Adult Smokers in the United States*, 102 HEALTH POL'Y 41, 41 (2011) (finding the experimental auction "[r]esults suggest that prominent health warnings with graphic pictures will reduce demand for cigarettes"); *see also* Jeremy Kees, et al., *Understanding How Graphic Pictorial Warnings Work on Cigarette Packaging*, 29 J. PUB. POL'Y & MARKETING 265, 272 (2010) ("[T]he findings show that more graphic depictions of health consequences had increasingly stronger effects on evoked fear and intentions to quit smoking.").

[52] *See, e.g.*, R.J. Reynolds Tobacco Co. v. FDA, R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1220 (D.C. Cir. 2012) (Rogers, C.J., dissenting). (noting that the proponent had presented minimal evidence to support the claims).

insignificant.[53]

Now, we might wish to say that reducing the number of smokers by even some small number, leading eventually to, proportionately, fewer cases of any serious and otherwise long-avoided illness, is sufficient to justify the regulations under any free speech challenge.[54] Still, it is not easy to constitutionally characterize the weight of one or more government interests where the relevant effect of the particular policy at issue is, by concession, likely to not statistically differ from zero,[55] especially where the precise nature of the overall government interest is multi-dimensionally blurred.[56]

How some of these disturbing complications play out in constitutional free speech terms is briefly considered below, in light of the emerging constitutionally-focused case law.

III. THE EMERGING CASE LAW: MORE QUESTIONS THAN ANSWERS

The FDA's Final Regulations[57] have already been litigated on free speech theories.[58] The developing case law has neither clarified the

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[53] *Id.*; *see* Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,712, 36,721.

[54] *See, e.g.*, Lawrence O. Gostin, *Corporate Speech and the Constitution: The Deregulation of Tobacco Advertising*, 92 AM. J. PUB. HEALTH 352, 354–55 (2002) (outlining the damage caused by cigarette smoking).

[55] *See* Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,712. The FDA's most recently revised calculation in this regard anticipates a decrease in the smoking rate of 0.088 percent, a figure recognized as not statistically different from zero. *See id.* at 36,721; R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, **pin**; R.J. Reynolds Tobacco Co. v. FDA, 845 F. Supp. 2d 266, 270 n.7 (D.D.C. 2012); R.J. Reynolds Tobacco Co. v. FDA, 823 F. Supp. 2d 36, 41 n.10 (D.D.C. 2011), *vacated*, 696 F.3d 1205, at *1221–22 (D.C. Cir. 2012), *aff'g*, 845 F. Supp. 2d 266 (D.D.C. 2012). For some further hints at the possibly limited effect, especially over time, of the new regulations, see, for example, Hammond, *supra* note 51, at 331 (noting the difficulty of attributing any decline in smoking to changes in package label requirements, given, typically, the more or less simultaneous adoption of "other tobacco control measures, including changes in price/taxation, mass media campaigns and smoke-free legislation"). For a sense of the investment community that mandated changes in cigarette warning labels may not have a significant effect on profitability, see Judy E. Hong et al., *New Cigarette Warning Labels Not Likely To Be a Game-Changer*, AMERICAS: TOBACCO (The Goldman Sachs Group), Nov. 12, 2010 at 1, 1; Nik Modi et al., *Do Cigarette Warning Labels Matter?*, PICTURE OF THE WEEK (UBS Investment Research), Nov. 11, 2010, at 1, 1, *available at* http://tobaccolabels.ca/healt/usa-2010-do-cigarette-warning-labels-matter-analyt. Note, for whatever direction it may constitutionally cut, that as the United States moves to required warnings that cover the top fifty percent of the cigarette package, Canada is moving from a fifty percent of the package rule to a seventy-five percent of the package rule. *See Imperial Tobacco Court Challenge: Package Warnings Too Big*, HUFFINGTON POST (Can.), Apr. 25, 2012.

[56] *See supra* notes 44–50 and accompanying text.

[57] *See* Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. at 36,628.

[58] *See* cases cited *supra* note 1.

significance of the various complications briefly cited above,[59] nor resolved any significant free speech issue without simultaneously raising more free speech issues than the case law persuasively addresses.

Importantly, the District Court for the District of Columbia initially confronted a number of the free speech issues in the context of a motion for preliminary injunction against the Final Rules.[60] The court granted the relief in question.[61]

The FDA regulations at issue were correctly said to impose, among a number of other requirements, "the [rotating] display of nine new textual[62] warnings—along with certain graphic [color] images such as diseased lungs and a cadaver bearing chest staples on an autopsy table—on the top 50% of the front and back panels of every cigarette package."[63]

On the free speech issues, the court noted that while governmentally compelled private party speech—as distinguished from speech by the government itself[64]—is presumptively

[59] *See supra* Part II.

[60] *See R.J. Reynolds*, 823 F. Supp. 2d at 39.

[61] *Id.*

[62] For the concern that textual warnings, by themselves, may well be of less value for consumers with limited English language reading skills, see Jaron Browne et al., *Worth More Than a Thousand Words: Picture-Based Tobacco Warning Labels and Language Rights in the U.S.*, CENTER FOR TOBACCO CONTROL RES. & EDUC. 3–17 (Jan. 1, 2007), http://escholarship.org/uc/item/1170r0xx.

[63] *R.J. Reynolds*, 823 F. Supp. 2d at 39.

[64] For a recent, arguably somewhat analogous case concluding that a notice legally required to be visibly posted constituted government speech, subject to only minimal free speech scrutiny, as opposed to governmentally compelled speech by private parties, whether compelled commercial speech or compelled non-commercial speech, see National Ass'n of Mfrs. V. NLRB, No. 11-1629, 2012 U.S. Dist LEXIS 27290, at *70–74 (D.D.C. Mar. 2, 2012). In our own cases, the health messages are clearly mandated in detail, but neither paid for, nor somehow acknowledged, by the government. For a sense of some of the factors thought to be involved in this important distinction between government speech and either compelled private commercial speech or compelled private non-commercial speech, see Pleasant Grove City v. Summum, 555 U.S. 460, 470–72 (2009); Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 557–59 (2005).

For further complications, see Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 792–93 (4th Cir. 2004), which adopted a general multi-factor test for such cases, Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U.L. REV. 605, 618–19 (2008), which recognized the possibility of mixed government and private speech cases, as arguably in our own cases, but granting the current absence of Supreme Court recognition of this possibility. This kind of "mixed" speech should of course be distinguished from speech that is "mixed" in the sense of somehow combining commercial and noncommercial elements. *See, e.g.*, Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 474–75 (1989) (treating mixed commercial and non-commercial speech as commercial and therefore not fully protected). *See generally R.J. Reynolds Tobacco Co.*, 823 F. Supp. 2d at 36 (using descriptive language but leaving unclear whether a finding of government speech, or even of mixed public and private speech, could in our own cases raise a viable constitutional

unconstitutional,[65] there are exceptions to this presumption.[66] In particular, "[i]n the arena of compelled commercial speech . . . narrow exceptions do allow the Government to require certain disclosures to protect consumers from 'confusion or deception.'"[67] This exception, involving reduced constitutional scrutiny,[68] requires that the mandated disclosures be of only "'purely factual and uncontroversial information,'"[69] as distinguished—at least arguably—from emotional[70] advocacy, provocation, endorsement, or calculated steering of consumers toward one particular governmentally preferred course of consumer conduct.[71]

At this point, it is fair to say that the opinion in *R.J. Reynolds* has released a plague of unresolved analytical questions, even without asking the most basic questions about the nature and value of tobacco advertising speech.[72] Merely for example, why could we not say that the mandated cigarette warning labels, authored in detail but not acknowledged by the government, amount just as much to minimally regulated government speech as to the somewhat more strongly protected compelled private party commercial speech?[73] Could we not say that a graphic, if not revolting or gruesome, emotion-targeted visual of, say, terminal lung disease is in one sense "controversial," but in another, equally reasonable sense, an "uncontroversial"[74] depiction of matters of fact now largely uncontested between the parties? Some ways of making a factual point could indeed be seen as inflammatory. But what if the point apparently must, given the relevant regulatory history, be made in an inflammatory fashion in order to even potentially have any real impact on smoking choice and behavior?

Takings Clause issue).

[65] *R.J. Reynolds Tobacco Co.*, 823 F. Supp. 2d at 45.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.* (quoting Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985) (attorney advertising regulation)). *See also In re* R.M.J., 455 U.S. 191, 201 (1982).

[70] *See generally* R. George Wright, *An Emotion-Based Approach to Freedom of Speech*, 34 LOY. U. CHI. L.J. 429 (2003) (explaining the often-valuable role of emotion in the free speech context). But for obvious ambivalence on the part of the Court toward any distinctive value of the emotional element of speech, compare Cohen v. California, 403 U.S. 15, 25–26 (1971) (emphasizing the potentially distinctive communicative value of emotion), with FCC v. Pacifica Found., 438 U.S. 726, 746–48 (1978) (minimizing such value, in stark contrast to Cohen, for First Amendment purposes).

[71] *R.J. Reynolds Tobacco Co.*, 823 F. Supp. 2d at 45–46.

[72] R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1222–23 (D.C. Cir. 2012) (Rogers, C.J., dissenting).

[73] *See supra* note 64 and accompanying text.

[74] *See supra* note 69 and accompanying text.

More broadly, could not even a dry and rather abstract presentation of fact be claimed to be somehow potentially misleading, and inevitably non-neutral, with an intended and predictable tendency to steer private party decisions in a particular governmentally preferred direction?[75] Is the court's "information" versus "advocacy" distinction really tenable in practice?

Equally importantly, is it clear that a required message such as an autopsy photo[76] or even a textual message such as: "WARNING: Smoking can kill you"[77] should count as more or less unmixed commercial speech, as distinguished from non-commercial speech, regardless of who is doing the speaking? Does either message propose a commercial transaction?[78] Is either message directed solely at the economic interests, as perhaps distinct from the health interests, of the audience?[79] Or do we really need a new and improved definition of commercial, as opposed to non-commercial, speech?[80]

These considerations illustrate the complexities and ambivalences of tobacco policy in general. The largely incremental nature of the changes in tobacco labeling regulations, in the context of various other tobacco policy changes, also makes it exceptionally difficult to specify the real government interest in the new labeling requirements in particular, or the constitutional weight of that interest, or the degree to which that interest—or interests—is likely to be achieved by the new labeling regulations.[81]

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[75] For background and a case example of an at least arguably "mixed" sort, see R. George Wright, *Free Speech and the Mandated Disclosure of Information*, 25 U. RICH. L. REV. 475, 481–84 (1991), which critiqued the Court's decision in the charitable donation compelled disclosure case of Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781 (1988)).

[76] *R.J. Reynolds Tobacco Co.*, 823 F. Supp. 2d at 41–42.

[77] *Id.* at 40.

[78] *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 762 (1976).

[79] *See* Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 561–62 (1980). For a more recent, multi-factor, contextualized approach to determining what should count as commercial speech, see Jordan v. Jewel Food Stores, Inc., No. 10 C 340, 2012 U.S. Dist. LEXIS 18664, at *8–9 (D. Ill. Feb. 15, 2012). *See also* Greater Balt. Ctr. v. Mayor of Balt., 683 F.3d 539, 548, 554 (4th Cir. 2012) (holding, by majority, that mandatory disclosure by means of a posted on-premises sign that a free but limited service pregnancy center does not provide or refer for abortions does not amount to a regulation of distinctly commercial speech). Note also that the cigarette package warnings at issue do not seem to involve a classic mixture or intertwining of both commercial and non-commercial messages. *See, e.g.*, Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 474–75 (1989) (treating mixed commercial and non-commercial speech as commercial and therefore not fully protected).

[80] *See supra* notes 78–79 and accompanying text.

[81] *See supra* Part II. The FDA does not seem to place any weight on a possible claim that the government has some sort of meaningful expressive or symbolic interest in promulgating and enforcing the regulations, above and beyond the health interests widely discussed.

The court in *R.J. Reynolds*, however, simply bypassed most of the complications by declaring that "under any scenario the Rule hardly appears to be narrowly tailored to achieve the government's purpose."[82] Whether a rigorous narrow tailoring requirement or a genuinely compelling government interest should indeed be required in this context is, again, doubtful.[83] But beyond this, there lies the sheer arbitrariness and indeterminacy of the "narrow tailoring" requirement itself.[84] A judge could always suggest, for example, as a narrower and less speech-burdensome alternative, a dramatically expanded or revamped federal tobacco education program.[85] The actual effectiveness of such a judicially endorsed alternative approach, by comparison with a regulation struck down as insufficiently narrowly tailored, might be anybody's guess.[86] But at some point, more or less discretionary judicial findings of narrow tailoring, or the absence of narrow tailoring, threaten in this respect the meaningful rule of law.[87]

In any event, the district court in *R.J. Reynolds* later reaffirmed its course in its decision granting the plaintiff tobacco companies' motion for summary judgment on the merits.[88] Within weeks, however, a majority of a panel of the Sixth Circuit Court of Appeals had, in contrast, chosen to apply to the new labeling regulations only minimum scrutiny, rather than even a standard commercial speech regulatory test,[89] to what it viewed as indeed compelled speech, but crucially as compelled mere commercial speech.[90] On

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[82] *R.J. Reynolds Tobacco Co.*, 823 F. Supp. 2d at 48.

[83] *See supra* notes 54–58 and accompanying text.

[84] For discussion and examples in commercial and non-commercial speech contexts, respectively, see R. George Wright, *Electoral Lies and the Broader Problems of Strict Scrutiny*, 64 FLA. L. REV. 759 (2012); R. George Wright, *The Openness of the Commercial Free Speech Test and the Value of Self-Realization* [hereinafter Wright, *Openness*], 88 U. DET. MERCY L. REV. 17 (2010).

[85] For a possible prototype of a less speech-restrictive alternative means of discouraging smoking, whether actually effective, alone or in combination, or not, see Katy Bachman, *Fear Factor: Feds Launch New Anti-Smoking Campaign*, ADWEEK (Mar. 16, 2012, 10:12 AM), http://www.adweek.com/news/advertising-branding/fear-factor-feds-launch-new-anti-smoking-campaign-138975 (discussing the twelve-week multi-media federal anti-smoking ad campaign).

[86] *See supra* notes 36–38, 51–53 and accompanying text.

[87] For broad discussion, see TOM BINGHAM, THE RULE OF LAW (2010); BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004).

[88] R.J. Reynolds Tobacco Co. v. United States FDA, 845 F. Supp. 2d 266, 268 (D.D.C. 2012).

[89] Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 518, 561–69 (6th Cir. 2012). *See, e.g.*, Thompson v. W. States Med. Ctr., 535 U.S. 357, 367 (2002); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980).

[90] For the laxer, minimum scrutiny compelled commercial speech test, as distinct from compelled not commercial speech, see, for example, Zauderer v. Office of Disciplinary

this basis, the Sixth Circuit panel upheld the tobacco labeling regulations as against a free speech challenge.[91] The majority of the Sixth Circuit panel thus disagreed in certain respects with the district court in *R.J. Reynolds*, but without, it is fair to say, more deeply engaging most of the underlying issues.[92]

IV. A VERY BRIEF CONCLUSION

On the merits of the current tobacco labeling regulations, courts may choose to take any of a number of forking paths. Any substantive approach to tobacco labeling regulation, under the established law will, however, typically involve a remarkable degree of arbitrariness and sheer speculation, if not internal inconsistency, in seeking to apply and to properly limit the basic logic of freedom of speech.[93]

Returning to the underlying free speech law concerns, it is difficult, especially in light of all the complications we have considered, to reasonably specify the nature and weight of the actual speech interest, if any, of the manufacturers and sellers of cigarettes under the new labeling regulations.[94] If we assume that the speech interests of the manufacturers and sellers would be manifested as commercial speech, we would, as a preliminary matter, have to assess the value of commercial advertising speech, in general, as a category.[95] Assuming that we would want to extend free speech protection of some distinctive sort to at least some commercial advertising, we would then have to assess the free speech value of the commercial advertising of tobacco products and

Counsel, 471 U.S. 626, 638 (1985). The apparently non-paternalistic theory is that mandating particular commercial speech, in order to discourage the possibility of consumer confusion or deception, does not also prevent the commercial speaker from elsewhere conveying its own message. Of course, this theory, too, can be contested in application. *See also* Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1339, 1341 (2010). For discussion from the government's perspective, see Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36,628, 36694–97 (June 22, 2011) (to be codified at 21 C.F.R. pt. 1141).

[91] *See Disc. Tobacco City & Lottery*, 674 F.3d at 561–69.

[92] *Id.*

[93] For the basic logic of the purposes or values underlying free speech law, see *supra* note 6.

[94] *See supra* note 72 and accompanying text.

[95] *See, e.g.*, R. GEORGE WRIGHT, SELLING WORDS: FREE SPEECH IN A COMMERCIAL CULTURE 12–77 (1997) (examining the constitutional interest present in commercial speech); R. George Wright, *Freedom and Culture: Why We Should Not Buy Commercial Speech*, 72 DENV. U.L. REV. 137 (1994) (same).

cigarettes specifically.[96] Here, we would have to somehow factor in not only all of the relevant complications noted in Part III, but matters such as the commercial free speech implications of any degrees of psychological or physiological "addiction" on the part of some past, current, or future cigarette consumers.[97]

More generally though, we would have to assess how any relevant desire to speak, on the part of the tobacco sellers, fits in with the recognized free speech values and purposes.[98] These values, briefly, would again include something like the search for truth, self-realization, and democratic self-government.[99] In the most typically litigated cases, tobacco advertising generally does not aim to discover or promulgate truths in the relevant sense, nor does it typically seek, as commercial speech, to contribute to the democratic self-governance process.[100]

Whether tobacco advertising typically contributes to the free speech value of self-realization, however, is deeply, and probably inescapably, contested.[101] If we think of self-realization as, roughly, the pursuit of some higher and better, more fully developed self, we are unlikely to find most tobacco advertising to be worthy of distinctive protection under the Free Speech Clause. If, on the other hand, we think of self-realization as adults choosing, on a reasonably well-informed and "un-addicted" basis, whether to smoke or not, at least in private, then more persons may perceive a self-realization value underlying the First Amendment protection of most tobacco advertising.

Overall, it seems possible for a reasonable person to find the underlying free speech value of tobacco labels, as affected by the current regulations, to be negligible. And a similarly reasonable person could also find, on the other side of the case, that the reasonably demonstrable and un-conflicted interests of the government in the new labeling regulations, by themselves, could also be classified as constitutionally negligible. We have suggested

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[96] *See, e.g.*, WRIGHT, SELLING WORDS, *supra* note 95, at 12–78 (assessing the free speech value of commercial advertising).

[97] *See id.*

[98] *See supra* note 6 and accompanying text.

[99] *See supra* note 6 and accompanying text.

[100] *See, e.g.*, R.J. Reynolds Tobacco Co. v. FDA, 823 F. Supp. 2d 36, 50 (D.D.C. 2011) (discussing the damage in terms of money to redesign packaging, not the harm to the democratic process or the search for truth), *vacated*, 696 F.3d 1205, at *1221–22 (D.C. Cir. 2012), *aff'g*, 845 F. Supp. 2d 266 (D.D.C. 2012).

[101] *See generally* Wright, *Openness*, *supra* note 84, at 34 ("The overall relationship between strong or weak First Amendment protection for purely commercial speech and the value of self-realization can at the very least be quite reasonably contested.").

above that if one were to find constitutional negligibility on both sides of an apparent free speech law case, the most realistic analysis would end in recognizing what we have called a free speech law "vacuum."

Of course, another reasonable person might have some degree of sympathy under the circumstances with the conclusion of "negligibility" of the relevant interests on both sides of the case, but ultimately conclude that one or both of the parties' interests actually exceeded the category of the negligible. We would, for purposes of our free speech "vacuum" thesis, simply invite such a person to modestly adjust the findings and interests at stake, in a kind of thought experiment, to see whether the idea of a free speech "vacuum" begins to take hold.

If we do find a free speech "vacuum" in any particular case, the case can still presumably be decided on other grounds, constitutional or non-constitutional in status. If need be, cases can be decided on the basis of a reasonable placement of the burden of proof: whichever side bears the burden of making a persuasive case under the Free Speech Clause would lose.[102] But even here, there are complications. The placement of the burden of proof may, under current law, depend upon a prior substantive judicial determination as to whether a constitutionally fundamental right or interest is at stake, or not.[103] Of complications, there is apparently no end.

[102] *See*, *e.g.*, INS v. Chadha, 462 U.S. 919, 942 (1983) (discussing burdens with respect to a case questioning Congress's powers under Article I); Fairbank v. United States, 181 U.S. 283, 285 (1901) (creating a presumption of constitutionality when Congress acts under Article I).

[103] *See, e.g.*, Republican Party of Minn. v. White, 416 F.3d 738, 749 (8th Cir. 2005) (placing the burden of passing a strict scrutiny test on the state) (citing United States v. Playboy Entm't Grp., 529 U.S. 803, 806 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions")).