

# COMPELLED COMMERCIAL SPEECH AND THE CONSUMER “RIGHT TO KNOW”

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*Compelled commercial speech, including mandatory labeling and the disclosure of factually true information, should not be seen as a separate category of speech under the First Amendment. Rather, compelled commercial speech should be understood as a type of commercial speech and be subject to the same level of protection as commercial speech generally. Accordingly, commercial speech compulsions, such as mandatory disclosures and labeling requirements, must be supported by a substantial government interest under the Central Hudson framework. The assertion of a consumer “right to know” does not constitute such an interest and cannot, by itself, justify compelled commercial speech within this framework. Allowing such a justification for compelled commercial speech would eviscerate any meaningful First Amendment protection against compelled commercial speech and threaten core First Amendment values. Such protection against speech compulsions will neither inhibit government efforts to protect consumers nor prevent consumers from obtaining information they desire about products and services. A dynamic market discovery process, with only limited and targeted government interventions, is a more effective way to serve the consumer interest in obtaining more complete information about goods and services. Most existing compelled disclosure requirements are consistent with this approach to compelled commercial speech, but some new and proposed disclosure requirements—including those for genetically modified organisms—are likely to violate the First Amendment.*

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## INTRODUCTION

A new type of salmon may soon appear on supermarket shelves, though it may not be labeled as such.<sup>1</sup> This salmon has been genetically engineered to grow more quickly in captivity than typical farm-raised salmon.<sup>2</sup> Although developed in a lab, and containing genetic material from multiple species, the “AquAdvantage” salmon will not bear a government-mandated label.<sup>3</sup> The Food and Drug Administration (“FDA”) has determined that there is “no biologically relevant difference” between AquAdvantage salmon and other farmed Atlantic salmon and therefore concluded they are just as safe to eat.<sup>4</sup> Under FDA policy, this leaves no basis to mandate disclosure.<sup>5</sup>

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1. See Brendan Borrell, *Why Won't the Government Let You Eat Superfish?*, BLOOMBERG BUSINESSWEEK (May 22, 2014), <http://www.bloomberg.com/bw/articles/2014-05-22/aquadvantage-gm-salmon-are-slow-to-win-fda-approval#p3>.

2. *Id.*; see also Alison L Van Eenennaam & William M. Muir, *Transgenic Salmon: A Final Leap to the Grocery Shelf?*, 29 NATURE BIOTECHNOLOGY 706, 706 (2011).

3. The AquAdvantage Salmon contains “a gene encoding Chinook salmon growth hormone under the control of an antifreeze protein promoter and terminator from ocean pout.” See Van Eenennaam & Muir, *supra* note 2, at 706.

4. See FOOD & DRUG ADMIN., VETERINARY MEDICINE ADVISORY COMMITTEE BRIEFING PACKET AQUADVANTAGE SALMON 61–62 (2010),

Mandated labels for the AquAdvantage salmon may not just be against FDA policy—they could run afoul of the First Amendment as well. Product labels are commercial speech subject to First Amendment protection.<sup>6</sup> While the constitutional protection of commercial speech is less extensive than what is provided for core political speech, there are limits to what the government may compel producers and sellers to disclose directly to consumers.

The government's ability to force the disclosure of potentially valuable information at the point of sale is substantial, but it is not without limits.<sup>7</sup> Even where consumers may greatly desire the disclosure of certain information on a product label or disclaimer, the government may be unable to act. The government may compel speech about products or services offered for sale where it has a sufficient governmental interest, but this requires more than consumer curiosity.<sup>8</sup>

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<http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/VeterinaryMedicineAdvisoryCommittee/UCM224762.pdf>; *see also* Lars Noah, *Whatever Happened to the "Frankenfish"?: The FDA's Foot-Dragging on Transgenic Salmon*, 65 ME. L. REV. 605 (2013) (discussing FDA review process for the "AquAdvantage" salmon).

5. *See* FOOD & DRUG ADMIN., AQUADVANTAGE SALMON: ENVIRONMENTAL ASSESSMENT DRAFT 2–3 (2012), <http://www.fda.gov/downloads/AnimalVeterinary/DevelopmentApprovalProcess/GeneticEngineering/GeneticallyEngineeredAnimals/UCM333102.pdf> (concluding that the salmon are safe for consumption and that environmental, social, economic, and cultural effects do not need to be considered because AquAdvantage would only produce the salmon outside of the United States; identifies limited risk of salmon escaping); FOOD & DRUG ADMIN., BACKGROUND DOCUMENT: PUBLIC HEARING ON THE LABELING OF FOOD MADE FROM THE AQUADVANTAGE SALMON 4 (2010), <http://www.fda.gov/AdvisoryCommittees/CommitteesMeetingMaterials/VeterinaryMedicineAdvisoryCommittee/ucm222635.htm> ("FDA cannot require labeling based solely on differences in the production process if the resulting products are not materially different due solely to the production process"); *see also* Lindsey Layton, *FDA Rules Won't Require Labeling of Genetically Modified Salmon*, WASH. POST (Sept. 18, 2010, 11:20 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/18/AR2010091803520.html> ("The FDA says it cannot require a label on the genetically modified food once it determines that the altered fish is not "materially" different from other salmon—something agencies have said is true."). Although the FDA claims it lacks the authority to mandate labels for genetically modified salmon, some in Congress have sought to force the development of such labels through the use of appropriations riders. *See* Lydia Wheeler, *Advocates Win Labels for GMO 'Frankenfish'*, HILL (Dec. 16, 2015, 9:11 AM), <http://thehill.com/regulation/pending-regs/263417-spending-bill-directs-fda-to-finalize-guidelines-for-labeling-gmo>.

6. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976) ("[S]peech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another. Speech likewise is protected even though it is carried in a form that is 'sold' for profit . . ." (citation omitted)); *see also* Rubin v. Coors Brewing Co., 514 U.S. 476, 476–77 (1995) (subjecting regulation of product labels to First Amendment scrutiny).

7. *See, e.g.*, United States v. United Foods, Inc., 533 U.S. 405, 410 (2001) (holding the First Amendment may bar the government from forcing companies to support commercial speech to which they object).

8. *See infra* Part IV.

Governments at all levels frequently require the disclosure of potentially relevant information about goods or services offered for sale.<sup>9</sup> Many disclosure requirements protect consumers from harms of which they are unaware and are relatively uncontroversial. In recent years, however, governments have imposed broader disclosure requirements extending beyond product characteristics to production processes, product history, and even information about the producer or service provider. Such disclosure requirements, often predicated on an alleged “consumer right to know,” have prompted legal challenges.<sup>10</sup> In just the last two years, courts have struggled with constitutional challenges to mandatory country-of-origin labels,<sup>11</sup> mandatory genetically modified organism (“GMO”) content labels,<sup>12</sup> conflict mineral disclosures,<sup>13</sup> and labels about the purported health risks posed by cell phones.<sup>14</sup> This has revealed confusion and uncertainty about the extent to which the First Amendment protects and limits compelled commercial speech.

This Article explores the question of compelled commercial speech in light of the Supreme Court’s existing First Amendment doctrine. The Court has said relatively little about the constitutional limits of mandatory labeling requirements, particularly where such requirements impose an obligation to disclose factually true information. Such limits are nonetheless discernible within the Court’s commercial speech jurisprudence and may yield some counterintuitive results in specific applications. While most existing labeling and disclosure requirements appear to conform to the limits implicit in the Court’s decisions, there is information about companies and products that consumers may wish to know that companies cannot be compelled to disclose in the context of commercial speech consistent with current doctrine.<sup>15</sup> While the government retains substantial authority to protect consumers and advance other interests through regulation of

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9. See Brian E. Roe et al., *The Economics of Voluntary Versus Mandatory Labels*, 6 ANN. REV. RESOURCE ECON. 407, 409 (2014) (“[P]roduct labeling is an increasingly popular tool of regulators.”).

10. See Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 868 (2015) [hereinafter Post, *Compelled Commercial Speech*] (noting “the growing number of circuit court decisions that have used the specific doctrine of ‘compelled commercial speech’ to strike down mandatory commercial disclosures”).

11. See *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 746 F.3d 1065 (D.C. Cir. 2014), *aff’d en banc* 760 F.3d 18, 27 (D.C. Cir. 2014) (upholding mandatory country-of-origin labels for meat products as against First Amendment challenge).

12. See *Grocery Mfrs. Ass’n v. Sorrell*, 102 F. Supp. 3d (D. Vt. 2015) (upholding mandatory genetically engineered content labels as against First Amendment challenge).

13. See *Nat’l Ass’n of Mfrs. v. SEC*, 748 F.3d 359 (D.C. Cir. 2014) (holding mandatory “conflict mineral” disclosure violates First Amendment rights of regulated firms), *aff’d on reh’g*, 800 F.3d 518 (D.C. Cir. 2015).

14. See *CTIA—The Wireless Ass’n v. City of Berkeley*, No. C-15-2529 CMC, 2016 WL 324283 (N.D. Cal. Jan. 27, 2016) (holding that local ordinance requiring disclosure of alleged radio frequency risks posed by cellular telephones did not violate First Amendment).

15. The First Amendment does not impose equivalent requirements on disclosures to government agencies charged with administering related regulatory programs. See *infra* Section VII.C.

the commercial marketplace, there are meaningful, if not overly constraining, limits to the government's ability to force private producers and sellers to endorse a government-mandated message.

Part I of this Article describes the current state of commercial speech doctrine. Under the still-extant *Central Hudson* test, commercial speech receives somewhat less constitutional protection than core political speech, but it receives protection nonetheless.<sup>16</sup> Part II turns to the question of compelled speech and the Court's repeated insistence that speech compulsions receive the same level of constitutional scrutiny as speech restrictions.

Part III integrates the doctrines from Parts I and II, outlines a compelled commercial speech doctrine that accounts for existing precedent, and explains how limited protection against the compulsion of commercial speech can be squared with commercial speech doctrine more generally. It explains how to reconcile decisions concerning commercial disclosure of factual information about products and services, such as *Zauderer v. Office of Disciplinary Counsel*,<sup>17</sup> with the larger body of the Court's commercial speech jurisprudence.<sup>18</sup>

It is commonly argued that there is a consumer "right to know" key facts about commercially available products beyond product content.<sup>19</sup> Consumers care about the goods they buy—they want to know who produced the goods they

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16. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980); see also *infra* Part I.

17. 471 U.S. 626 (1985).

18. Circuit courts have adopted conflicting opinions on the application of *Zauderer*. See *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 524 (D.C. Cir. 2015) (noting the "flux and uncertainty" of the First Amendment doctrine in relation to commercial speech and the conflict between the circuits regarding the reach of *Zauderer*"); see, e.g., *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 23–28 (D.C. Cir. 2014); *Dwyer v. Cappell*, 762 F.3d 275, 283–85 (3d Cir. 2014); *Disc. Tobacco City & Lottery Inc. v. United States*, 674 F.3d 509, 551–69 (6th Cir. 2012); *Ent. Software Ass'n v. Blagojevich*, 469 F.3d 641, 651–53 (7th Cir. 2006); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 308–10, 316 (1st Cir. 2005); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113–16 (2d Cir. 2001); cf. Post, *Compelled Commercial Speech*, *supra* note 10, at 881 (discussing the "tension between *Zauderer* and *Central Hudson*").

19. See, e.g., Leo Hickman, *Consumers Should Have the Right to Know if They Are Eating GM Food*, *GUARDIAN* (Apr. 19, 2013), <http://www.theguardian.com/environment/blog/2013/apr/19/gm-food-labelling-consumers> ("Consumers should have the right to know what's in the food they eat—and know how it was produced."); Roger Johnson, *Consumers Have a Right to Know Where Their Food Comes From*, *HILL*, (Aug. 5, 2014, 11:00 AM), <http://thehill.com/blogs/congress-blog/education/214268-consumers-have-a-right-to-know-where-their-food-comes-from> (supporting country of origin labels); see also Steve Keane, *Can a Consumer's Right to Know Survive the WTO?: The Case of Food Labeling*, 16 *TRANSNAT'L L. & CONTEMP. PROBS.* 291, 292 n.3 (2006) (citing examples of groups urging a "consumer right to know"); see generally Frederick H. Degnan, *The Food Label and the Right-to-Know*, 52 *FOOD & DRUG L.J.* 49 (1997); Shannon M. Roesler, *The Nature of the Environmental Right to Know*, 39 *ECOL. L.Q.* 989 (2012).

purchase and how those goods were produced.<sup>20</sup> In some cases, consumers care more about the identity of the producer or how a product was produced than about the product itself, whether for ethical, ideological, spiritual, or aesthetic reasons.<sup>21</sup> It is unquestionable that such preferences are real, but the consumer desire for information relevant to such preferences is not, in itself, a sufficiently substantial interest to justify compelling speech by others.

The idea of a consumer right to know may be appealing, but such an idea cannot, alone, justify compelled commercial speech. As Part IV explains, undifferentiated consumer interest or curiosity is more than sufficient to justify government speech but is not enough to justify mandatory labeling or other compelled commercial speech. Such a justification for compelled commercial speech would eviscerate any First Amendment protection against compelled commercial speech and, given the realities of today's consumer marketplace, threaten core First Amendment values.

One potential concern with acknowledging such constraints on the government's ability to compel labeling or disclosure is that consumers will be left unaware about important product and service characteristics that are vital to them. As Part V explains, such concerns are overstated. Rejecting a consumer right to know does not entail leaving consumers in the dark about potentially relevant product and service characteristics. There is a long history of voluntary disclosure and labeling systems developed in response to consumer demands, including demands based upon religious, ideological, and other interests.<sup>22</sup>

Robust protection of commercial speech, and limitations on compelled commercial speech, will enhance consumer autonomy and facilitate broader discourse over the political and normative judgments often implicit in personal consumption choices. The government's interest in "transparent and efficient markets" is best served if the government refrains from regulating commercial speech when it is unable to articulate a substantial interest for doing so.<sup>23</sup> A dynamic market discovery process is a more effective way to fulfill such a value than mandates based upon a purported consumer right to know.

Part VI applies the framework in this Article to three contemporary compelled speech controversies: (1) mandatory GMO labeling; (2) mandatory nanotechnology labeling; and (3) country-of-origin labeling. Constitutional

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20. See, e.g., Douglas B. Holt et al., *How Global Brands Compete*, 82 HARV. BUS. REV. 68, 69–72 (2004) (noting that consumers look to brand identification to determine product quality, social responsibility of the manufacturer, and the cultural ideals associated with the product).

21. See Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 556 (2004); see also LIZABETH COHEN, *A CONSUMER'S REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA* 18–23 (2003); Craig J. Thompson, *Understanding Consumption as Political and Moral Practice*, 11 J. CONSUMER CULTURE 139, 141 (2011).

22. See *infra* Part V.

23. Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Associations in United Foods, Zauderer, and Abood*, 40 VAL. U. L. REV. 555, 562, 585 (2006) [hereinafter Post, *Transparent and Efficient*].

protection for compelled commercial speech makes some proposed disclosure requirements easier to justify than others, but the results may not always be intuitive. Part VII then looks at government interventions, short of compelling commercial speech, that could facilitate greater market transparency and consumer choice.

### I. COMMERCIAL SPEECH

Commercial speech is generally defined as speech which does no more than propose a commercial transaction or an “expression related solely to the economic interests of the speaker and its audience.”<sup>24</sup> In 1975, the Supreme Court, in *Bigelow v. Virginia*, first held that commercial speech, such as a paid advertisement in a newspaper or a product label, “is not stripped of First Amendment protection merely because it appears in that form.”<sup>25</sup> The following year, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the Court reaffirmed that commercial speech is protected even if it does no more than propose a commercial transaction.<sup>26</sup> Though the justices have differed on the scope of such protection ever since, the Court has repeatedly reaffirmed its commitment to the constitutional protection of commercial speech.<sup>27</sup> As the Court explained in *United States v. United Foods*, “[t]he fact that the speech is in aid of a commercial purpose does not deprive respondent of all First Amendment protection.”<sup>28</sup> If anything, the degree of protection the Court has offered commercial speech has increased in recent years.<sup>29</sup>

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24. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561 (1980); *see also* *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (defining commercial speech as “speech which does no more than propose a commercial transaction”). While the definition of what constitutes commercial speech may appear to be straightforward, “[t]he boundaries of the category are . . . quite blurred.” *See* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 5 (2000). Nonetheless, the Court has repeatedly noted a “‘common sense’ distinction between speech proposing a commercial transaction . . . and other varieties of speech.” *See* *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455–56 (1978); *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 637 (1985) (quoting *Ohralik*, 436 U.S. at 455–56).

25. *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975). The *Bigelow* Court had noted the value of commercial speech in earlier cases. *Id.* (citing *Pittsburgh Press v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 388 (1973) (“[T]he exchange of information is as important in the commercial realm as in any other.”)).

26. 425 U.S. 748, 761 (1976).

27. *See, e.g.*, *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653, 2659 (2011); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249–50 (2010); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 565–71 (2001); *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 195–96 (1999); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995); *Cent. Hudson*, 447 U.S. at 571; *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977) (holding state prohibition on attorney advertising violates First Amendment).

28. 533 U.S. 405, 410 (2001).

29. *See, e.g.*, Micah L. Berman, *Manipulative Marketing and the First Amendment*, 193 GEO. L.J. 497, 500 (2015) (noting the Court’s “review of commercial speech restrictions has gradually become more and more stringent over time”); Post,

The Court and commentators have offered various reasons for extending First Amendment protection to commercial speech.<sup>30</sup> To some, commercial speech falls within the ambit of the First Amendment not because it serves the interest of the speaker, but because it serves listeners and society at large.<sup>31</sup> Robert Post, for example, has argued that the value of commercial speech is the “informational function” it provides.<sup>32</sup> Martin Redish extends this argument, noting that the free flow of commercial information is necessary if an individual is to “achieve the maximum degree of material satisfaction permitted by [their] resources.”<sup>33</sup> As the Court noted in *Virginia State Board*, consumers have a “keen” interest in information about “who is producing and selling what product, for what reason, and at what price,” and such information helps ensure that consumer decisions are “intelligent and well-informed.”<sup>34</sup> Insofar as accurate commercial information

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*Transparent and Efficient*, *supra* note 23, at 558 n.15 (noting “the Court has continued to apply the [*Central Hudson*] test with increasing severity”). This is not a new development. See Rodney A. Smolla, *Afterword: Free the Fortune 500! The Debate over Corporate Speech and the First Amendment*, 54 CASE W. RES. L. REV. 1277, 1292 (2004) (“Examination of actual case decisions demonstrates that the trajectory of modern commercial speech law has been an accelerating rise of protection for advertising.”).

30. See, e.g., Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 652–53 (1990); Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 67 (2007) [hereinafter Redish, *Commercial Speech*]; Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 429 (1971) [hereinafter Redish, *The First Amendment in the Marketplace*]; Rodney Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777, 780 (1993); Daniel E. Troy, *Advertising: Not “Low Value” Speech*, 16 YALE J. ON REG. 85, 88 (1999). Others, of course, have criticized the Court’s decision to shelter commercial speech under the First Amendment umbrella. See, e.g., C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 3 (1976); Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 5–6 (1979); see also C. Edwin Baker, *Paternalism, Politics, and Citizen Freedom: The Commercial Speech Quandary in Nike*, 54 CASE W. RES. L. REV. 1161, 1162 (2004) (noting that “our strongest advocates of free speech . . . consistently rejected granting any protection to commercial speech”) (citation omitted).

31. See, e.g., *First Nat’l Bank of Bos. v. Belotti*, 435 U.S. 765, 783 (1978) (“A commercial advertisement is constitutionally protected not so much because it pertains to the seller’s business as because it furthers the societal interest in the free flow of commercial information.”) (internal citation omitted).

32. See Post, *Transparent and Efficient*, *supra* note 23, at 4 (“Commercial speech differs from public discourse because it is constitutionally valued merely for the information it disseminates, rather than for being itself a valuable way of participating in democratic self-determination.”); see also Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372, 393 (1979).

33. Redish, *The First Amendment in the Marketplace*, *supra* note 30, at 433. In more recent work, Redish goes further and suggests that most arguments in favor of limiting commercial speech embody a form of viewpoint discriminations. See Redish, *Commercial Speech*, *supra* note 30, at 67.

34. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 762–63 (1976).



informs consumer decisions, it further serves to enhance market efficiency and maximize consumer welfare.<sup>35</sup>

Commercial speech is not only about questions of price and quality, however. As the Court also noted in *Virginia State Board*, advertisements and other commercial speech may also “be of general public interest.”<sup>36</sup> As Justice Blackmun explained, if commercial information “is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered.”<sup>37</sup> Knowledge about the prices and characteristics of various goods and services informs policy preferences. In this way, even commercial speech that is not directly imbued with normative or political content helps to “enlighten public decision-making in a democracy.”<sup>38</sup>

Much commercial speech is imbued with political or other normative content, making it particularly difficult to exclude advertising and other forms of commercial speech from constitutional protection.<sup>39</sup> If a major automaker airs a television advertisement for one of its vehicles in which a consumer criticizes the federal government’s decision to bail out the automaker’s competitors, is this not also political speech?<sup>40</sup> Or what if a corporation suggests that one reason to

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35. *Id.* at 764–65 (noting that “the free flow of commercial information” is “indispensable to the proper allocation of resources in a free enterprise system”).

36. *Id.* at 764; *see also* *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (“The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth.”).

37. *Va. State Bd.*, 425 U.S. at 765.

38. *Id.*

39. As the Supreme Court has noted, most speech performs a “dual communicative function.” *Cohen v. California*, 403 U.S. 15, 26 (1971); *see also* *Troy*, *supra* note 30, at 85.

40. *See* Paul Bedard, *Ford TV Ad Slams Obama Auto Bailouts*, U.S. NEWS (Sept. 16, 2011, 9:00 AM), <http://www.usnews.com/news/blogs/washington-whispers/2011/09/16/ford-tv-ad-slams-obama-auto-bailouts>. In this ad, which was one of a series featuring actual Ford customers explaining their decision to purchase Ford vehicles, “Chris” says:

I wasn't going to buy another car that was bailed out by our government. I was going to buy from a manufacturer that's standing on their own: win, lose, or draw. That's what America is about is taking the chance to succeed and understanding when you fail that you gotta' pick yourself up and go back to work. Ford is that company for me.

*Id.* The ad was subsequently pulled due to controversy over its political content. *See* Jonathan Oosting, *Report: Ford Pulls Bailout Ad After Criticism from Press, Questions from White House*, MLIVE (Sept. 27, 2011, 11:24 AM), [http://www.mlive.com/auto/index.ssf/2011/09/report\\_ford\\_pulls\\_bailout\\_ad\\_a.html](http://www.mlive.com/auto/index.ssf/2011/09/report_ford_pulls_bailout_ad_a.html). In 2012, some consumers also saw politics in a Chrysler Superbowl ad featuring Clint Eastwood. *See* Carla Marinucci, *Eastwood 'Halftime in America' Ad Inspires Debate*, S.F. CHRON. (Jan. 30, 2013, 9:30 AM), <http://www.sfgate.com/politics/article/Eastwood-halftime-in-America-ad-inspires-debate-3229986.php#ixzz1m0KAR5ui>; Jeremy W. Peters

purchase its products or services is its commitment to “fair trade” or a particular vision of ecological sustainability?<sup>41</sup> Such appeals necessarily rely upon the communication of implicit political and moral messages that extend well beyond the specific attributes of a given product or service. For many consumers, consumption decisions are also imbued with political meaning. The choice of what products to buy and what labels to display is often politically or ethically motivated.<sup>42</sup> Just consider the individual who buys a Toyota Prius or insists upon shopping at a particular “socially responsible” store. Such choices may reflect personal preferences, but they also have an expressive component, much like other forms of protected speech.<sup>43</sup> As Martin Redish notes, “speech concerning commercial products and services can facilitate private self-government in much the same way that political speech fosters collective self-government,” and both forms of self-government foster the values of democracy.<sup>44</sup> Commercial speech, and the dialogue it facilitates between consumers and producers, also has a

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& Jim Rutenberg, *Republicans See Politics in Chrysler Super Bowl Ad*, N.Y. TIMES, Feb. 7, 2012, at A13.

41. See, e.g., Andrew Adam Newman, *This Wake-Up Cup is Fair-Trade Certified*, N.Y. TIMES, Sept. 28, 2012, at B3 (describing Green Mountain Coffee’s advertising campaign focusing on their fair-trade coffee); see also *Food With Integrity*, CHIPOTLE MEXICAN GRILLE, <http://chipotle.com/food-with-integrity> (last visited Mar. 2, 2016) (Chipotle’s marketing campaign claiming that “with every burrito we roll or bowl we fill, we’re working to cultivate a better world.”). Perhaps ironically, it appears that Chipotle spent more time burnishing its progressive image than actually ensuring that its food was safe to eat. See Susan Berfeld, *Inside Chipotle’s Contamination Crisis*, BLOOMBERG BUSINESSWEEK (Dec. 22, 2015), <http://www.bloomberg.com/features/2015-chipotle-food-safety-crisis/> (discussing food poisoning outbreaks at Chipotle). See also *infra* note 171 and accompanying text.

42. See, e.g., Lauren Copeland, *Value Change and Political Action: Postmaterialism, Political Consumerism, and Political Participation*, 42 AM. POL. RES. 257 (2014) (discussing the rise of “political consumerism” as a form of political participation); Russell J. Dalton, *Citizenship Norms and the Expansion of Political Participation*, 56 POL. STUDS. 76, 91 (2008); Benjamin J. Newman & Brandon L. Bartels, *Politics at the Checkout Line: Explaining Political Consumerism in the United States*, 64 POL. RES. Q. 803 (2011); Michael Schudson, *Citizens, Consumers, and the Good Society*, 611 ANNALS AM. ACAD. POL. & SOC. SCI. 236, 239 (2007) (noting consumer choices may be “political in even the most elevated understandings of the term”); Deitlind Stolle et al., *Politics in the Supermarket: Political Consumerism as a Form of Political Participation*, 26 INT’L POL. SCI. REV. 245 (2005) (noting consumer choices as political); see also *infra* note 172.

43. See, e.g., Marius K. Luedicke et al., *Consumer Identity Work as Moral Protagonism: How Myth and Ideology Animate a Brand-Mediated Moral Conflict*, 36 J. CONSUMER RES. 1016 (2010); Dhavan V. Shah et al., *Political Consumerism: How Communication and Consumption Orientations Drive ‘Lifestyle Politics,’* 611 ANNALS AM. ACAD. POL. & SOC. SCI. 217, 217 (2007) (discussing “consumer behaviors that are shaped by a desire to express and support political and ethical perspectives”); Craig J. Thompson et al., *Emotional Branding and the Strategic Value of the Doppelgänger Brand Image*, 70 J. MKTG. 50, 63 (2006) (noting research indicating “consumers’ most valued brands are those whose symbolic meanings play an important role in their self-conceptions”); Craig J. Thompson & Zeynep Arsel, *The Starbucks Brandscape and Consumers’ (Anticorporate) Experiences of Globalization*, 31 J. CONSUMER RES. 631 (2004).

44. See Redish, *Commercial Speech*, *supra* note 30, at 81.

dramatic effect on the broader culture.<sup>45</sup> As a consequence, it can be difficult to separate commercial speech from other forms of protected expression.

In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the Supreme Court established a four-part test for government restrictions on commercial speech. First, in order to qualify for protection, the speech must concern lawful activity and not be fraudulent or inherently misleading.<sup>46</sup> Second, courts consider whether the government has asserted a “substantial” governmental interest, such as preventing consumer deception or protecting public health.<sup>47</sup> Third, if so, courts consider whether the regulation “directly advances” the government’s asserted interest and, fourth, whether it is “more extensive than is necessary to serve that interest.”<sup>48</sup> The government bears the burden of establishing that its regulation meets these requirements.<sup>49</sup> Though more permissive than those tests the Court applies to political and other core-protected speech, *Central Hudson* is “significantly stricter than the rational basis test.”<sup>50</sup>

While the Court continues to apply the *Central Hudson* test, several justices have signaled their disagreement with it.<sup>51</sup> In recent years the Court has applied *Central Hudson* without reaffirming its vitality, often suggesting that commercial speech should receive greater protection than the *Central Hudson* test provides.<sup>52</sup> Where government regulation does not appear to be viewpoint-neutral or risks constraining speech on matters of public concern, the alleged commercial context of such speech has not mattered. As a consequence, *Central Hudson* provides a floor, not a ceiling, for commercial speech protection.

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45. See Jack M. Balkin, *Cultural Democracy and the First Amendment*, 109 Nw. L. REV. (forthcoming 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2676027](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2676027).

46. 447 U.S. 557, 566 (1980).

47. *Id.*

48. *Id.* at 570.

49. See *id.* at 564.

50. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002).

51. See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 517–28 (1996) (Scalia, J., concurring; Thomas, J., concurring); see also *Thompson*, 535 U.S. at 367–68 (2002); *United States v. United Foods, Inc.*, 533 U.S. 405, 409–10 (2001) (noting “criticism” of *Central Hudson* test by multiple justices); Post, *Transparent and Efficient*, *supra* note 23, at 558 n.15 (“More than a majority of the justices have at one time or another indicated their dissatisfaction with the test.”); David C. Vladeck, *Lessons from a Story Untold: Nike v. Kasky Reconsidered*, 54 CASE W. RES. L. REV. 1049, 1052 (2004) (“Since *44 Liquormart*, the Court has made it clear that it would be willing to revisit the doctrine should the appropriate case come along.”).

52. See, e.g., *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667–68 (2011). Although the Court in *Sorrell* applied traditional *Central Hudson* scrutiny, it suggested a willingness to subject government regulation of commercial speech to more exacting scrutiny. *Id.*; see also Tamara R. Piety, “A Necessary Cost of Freedom”? *The Incoherence of Sorrell v. IMS*, 64 ALA. L. REV. 1, 4 (2012) (noting the stringency of Court’s review of restrictions on commercial speech); Dayna B. Royal, *Resolving the Compelled-Commercial Speech Conundrum*, 19 VA. J. SOC. POL’Y & LAW 205, 215 (2011) (noting dicta indicating “a willingness to increase protection for commercial speech”).

## II. COMPELLED SPEECH

The First Amendment applies equally when the government seeks to compel speech just as much as when it seeks to restrict speech.<sup>53</sup> The right to speak and the right not to speak are “complementary.”<sup>54</sup> Because the First Amendment, at its core, protects the “voluntary” expression of ideas, it “necessarily” protects “a concomitant freedom not to speak publicly.”<sup>55</sup> As the Court explained in *Turner Broadcasting System v. FCC*, “At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence.”<sup>56</sup> Forcing an individual to express views with which they disagree can pose just as great a threat to the free expression of thoughts and ideas as limitations on speech. Laws that compel speech “pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.”<sup>57</sup> Namely, the time and resources spent communicating a government-mandated message cannot be devoted to the communication of the speaker’s preferred message. At the same time, the ability of listeners to hear—let alone process and actively consider—information and other messages is limited,<sup>58</sup> so compelling more speech does not always increase communication or understanding.

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53. *United Foods*, 533 U.S. at 410 (“Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views.”); see also *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 796–97 (1988).

54. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (“The right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’”). As the Court in *Harper & Row Publishers* stated:

[F]reedom of thought and expression “includes both the right to speak freely and the right to refrain from speaking at all.” . . . “The essential thrust of the First Amendment is to prohibit improper restraints on the voluntary public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom not to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.”

*Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985) (internal citations omitted).

55. *Harper & Row*, 471 U.S. at 559 (quoting *Estate of Hemingway v. Random House, Inc.*, 244 N.E.2d 250, 255 (1968)).

56. 512 U.S. 622, 641 (1994).

57. *Id.*

58. See generally *Too Much Information*, *ECONOMIST* (June 30, 2011), <http://www.economist.com/node/18895468> (discussing “information overload”); see also David Weil et al., *The Effectiveness of Regulatory Disclosure Policies*, 25 *J. POL’Y ANALYSIS & MGMT.* 155, 158, 161 (2006) (noting that listeners have “limited time and cognitive energy” and that “[a]cquiring and processing new information can be costly”).

The Supreme Court's decisions recognizing limitations on the government's ability to compel speech predate the protection of commercial speech by several decades. In 1943 the Court struck down a state requirement that school children salute the flag and recite the pledge of allegiance in public schools.<sup>59</sup> The First Amendment, the Court explained, protects individuals from "being compelled to affirm their belief in any governmentally prescribed position or view."<sup>60</sup> On the same grounds, the Court held that New Hampshire could not require all car owners to display the state's motto, "Live Free or Die," on their license plates.<sup>61</sup> As the Court famously explained in *Barnette*, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."<sup>62</sup>

Though recognizing that the state may be able to mandate access to private property for those with dissenting views,<sup>63</sup> the Court has struck down regulations forcing companies to distribute the views of groups or organizations with which they disagree. In *Pacific Gas & Electric Company v. Public Utilities Commission of California*, the Court struck down a requirement that a public utility distribute materials prepared by an external group along with its billing statement.<sup>64</sup> Although the utility distributed its own newsletter in this fashion, the Court held that the utility could not be required to enclose additional materials espousing positions with which it disagreed. It was immaterial that the entity in question was a corporation, and a publically regulated utility at that. As Justice Powell explained, "Were the government freely able to compel corporate speakers to propound political messages with which they disagree, this protection would be empty, for the government could require speakers to affirm in one breath that which they deny in the next."<sup>65</sup> Nor did it matter that the regulation applied to communication accompanying a request for payment for services rendered.

Just as individuals cannot be compelled to speak messages or espouse points of view, the First Amendment protects individuals from laws that would require them to associate with those who espouse objectionable messages or subsidize directly other speech with which they disagree.<sup>66</sup> Yet the First

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59. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

60. *PruneYard Shopping Ctr. v. Robbins*, 447 U.S. 74, 88 (1980).

61. *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

62. *Barnette*, 319 U.S. at 642.

63. *See PruneYard Shopping Ctr.*, 447 U.S. at 88 (holding that state laws permitting individuals to exercise free speech and petition at a privately owned shopping center did not violate the shopping center owner's rights under the First Amendment).

64. 475 U.S. 1, 20–21 (1986) (distinguishing this regulation from requirements that publicly held corporations distribute materials prepared by minority shareholder groups to shareholders).

65. *Id.* at 16.

66. *See, e.g., Keller v. State Bar of Cal.*, 496 U.S. 1, 17 (1990) (holding that the State Bar Association violated the lawyer's First Amendment rights by collecting dues and using them to support political campaigns); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 241–42 (1977) (holding that public sector union employees can be compelled to pay union dues but could not be compelled to subsidize the ideological expression of the union association).

Amendment does not prevent the government from using tax dollars to promote or subsidize government-approved messages.<sup>67</sup> Such speech, provided it is clearly paid for and delivered on behalf of the government, does not raise equivalent First Amendment concerns. It is one thing for the government to speak its own message,<sup>68</sup> but it is quite another to compel a private individual to mouth the government's words.

### III. COMPELLED COMMERCIAL SPEECH

Constitutionally protected freedom of speech includes both commercial speech and an equal right not to speak. This simple formula would suggest that the *Central Hudson* test applies equally to speech limitations and compulsions and, in particular, that any regulation of commercial speech must serve a substantial state interest. All of the Supreme Court's decisions in cases evaluating compelled commercial speech are consistent with such an approach, as are most federal statutes and regulations that require disclosure to consumers or other forms of compelled commercial speech.<sup>69</sup> Yet some courts and commentators have suggested that compelled commercial speech, and the compelled disclosure of factual information in particular, should be subject to less demanding scrutiny.<sup>70</sup> The constitutional protection of commercial speech is itself justified, in large part, on the value of "the free flow of commercial information" to consumers.<sup>71</sup> This suggests to some that mandated disclosures may not raise the same degree of First Amendment concerns as other regulation of commercial speech.<sup>72</sup> This view is mistaken.

Much of the confusion regarding the proper test for compelled commercial speech stems from the Supreme Court's decision in *Zauderer v. Office*

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There is some question whether *Abood's* approval of mandatory union dues for public sector employees has retained its vitality. See *Harris v. Quinn*, 134 S. Ct. 2618 (2014); see also *Friedrichs v. Cal. Teachers Ass'n*, 192 L. Ed. 2d 975 (U.S. 2016) (per curiam) (affirming a U.S. Court of Appeals for the Ninth Circuit decision recognizing the sustained validity of *Abood* in a 4-4 decision).

67. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560-61 (2005) (holding the generic advertising of beef by the government, which was funded by beef producers, was considered "government speech" and therefore not susceptible to a First Amendment compelled-subsidy challenge).

68. See *infra* Section VII.C.

69. It should be noted that disclosure of information to the government is not compelled commercial speech and is not, as a general matter, subject to First Amendment limitations. If the government decides to disclose such information to the public, such disclosure is government speech and is not subject to First Amendment limitations.

70. See, e.g., *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 20 (D.C. Cir., 2014) ("We now hold that *Zauderer* in fact does reach beyond problems of deception, sufficiently to encompass the disclosure mandates at issue here.").

71. See, e.g., *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 646 (1985).

72. See, e.g., *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 376 (2002) (describing a labeling requirement as "far less restrictive" than a prohibition on advertising); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 565 (1980) (characterizing disclosure requirements as less restrictive than limitations on speech).

of *Disciplinary Counsel*,<sup>73</sup> in which the Court upheld a requirement that attorneys who advertise contingent-fee rates must disclose that clients could be liable for court costs if their suits were unsuccessful. Failure to disclose this information could mislead some consumers into thinking that a contingent-fee arrangement protected them against any financial risk of a failed lawsuit when, in fact, they could still be financially liable for court costs. In upholding the disclosure requirement, the Court explained a requirement that a seller or service provider disclose factual information will be upheld so long as the requirement is not unduly burdensome and the requirement is “reasonably related to the State’s interest in preventing deception of consumers.”<sup>74</sup> Further, the Court stated that the “constitutionally protected interest in *not* providing any particular factual information in advertising is minimal.”<sup>75</sup>

Some courts and commentators have read *Zauderer* to establish that the compelled disclosure of factual information is subject to a lesser degree of scrutiny than is provided by *Central Hudson*.<sup>76</sup> The U.S. Court of Appeals for the Second Circuit, for example, held in *National Electrical Manufacturers Association v. Sorrell* that such a disclosure requirement “does not offend the important utilitarian and individual liberty interests that lie at the heart of the First Amendment.”<sup>77</sup> Such analyses make the mistake of reading *Zauderer* as providing an alternative test for compelled commercial speech, as opposed to a relatively straightforward application of the *Central Hudson* framework—an application suggested by *Central Hudson* itself.<sup>78</sup>

Under *Central Hudson*, the state must assert a “substantial interest,” such as protecting consumers from unwitting harm, in order to justify regulation of commercial speech. Once this interest has been established, however, courts may conclude that certain forms of speech regulation, such as mandated disclosures of supplemental disclaimers, are less burdensome than restrictions or prohibitions on speech.<sup>79</sup> *Zauderer* is completely consistent with this understanding, and expressly relied upon *Central Hudson* to reach its holding.<sup>80</sup> It was undisputed in *Zauderer* that the disclosure requirement served the substantial state interest in preventing consumer deception and protecting consumers from unwitting harm—specifically the undisclosed potential for financial liability for court costs.<sup>81</sup> As the Court held

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73. 471 U.S. at 655–56.

74. *Id.* at 651.

75. *Id.* (emphasis in original).

76. See, e.g., *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 28–30 (Rogers, J., concurring); Post, *Transparent and Efficient*, *supra* note 23, at 560 (*Zauderer* “advanced an extraordinarily lenient test for the review of compelled commercial speech.”).

77. *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 114–15 (2d Cir. 2001).

78. *Zauderer* itself suggests as much. See *Zauderer*, 471 U.S. at 647 (“[R]estrictions on the use of visual media of expression in advertising must survive scrutiny under the *Central Hudson* test.”).

79. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564 (1980) (noting that requiring “limited supplementation” will often constitute a “narrower”—and therefore more permissible—regulation of commercial speech than a prohibition).

80. *Zauderer*, 471 U.S. at 647.

81. *Id.* at 653 (“The State’s position that it is deceptive to employ advertising that refers to contingent-fee arrangements without mentioning the client’s liability for costs

more recently in *Milavetz, Gallop & Milavetz, P.A. v. United States*, the “essential features of the rule at issue in *Zauderer*” required disclosures “intended to combat the problem of inherently misleading commercial advertisements;” only entailed “an accurate statement” about the nature of what was being advertised; and did not prevent those regulated from “conveying any additional information” about the services they provide.<sup>82</sup>

*Zauderer*, properly understood, is but an application of the underlying *Central Hudson* framework to a specific context—one that *Central Hudson* expressly contemplated.<sup>83</sup> Preventing consumers from being misled by advertising or other commercial speech is unquestionably a “substantial” state interest under *Central Hudson*. Indeed, limits on speech that are inherently or deliberately misleading need not satisfy *Central Hudson*’s “substantial interest” requirement at all for, under *Central Hudson*, such speech is not protected.<sup>84</sup> In most cases, the means of requiring additional disclaimers or disclosures should serve the government’s interest in a more narrowly tailored fashion than other regulatory alternatives. The Court made this very point in *Central Hudson*. After concluding that the government had identified energy conservation as a substantial interest that could justify the regulation of commercial speech, the Court declared that a mandatory disclosure or qualifying statement would be a less intrusive means of satisfying the government’s interest than a speech restriction. Nowhere in *Central Hudson*, however, did the Court suggest that such a speech requirement could be justified absent the identification of a substantial interest.

Mandatory disclosures and other types of compelled commercial speech often constitute a less onerous burden than restrictions or outright prohibitions, particularly where the state’s interest is in protecting consumers from potentially misleading communication or from suffering unwitting harms. Where commercial speech is potentially misleading or even unclear, a requirement of curative counter-speech will typically be preferable to a limitation on speech. As the Court has noted, where possible, the remedy for potentially misleading speech should be more speech.<sup>85</sup> Thus, requirements that producers or vendors qualify claims about products in advertisements and labels are more permissible than limitations or prohibitions on label or ad claims.

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is reasonable enough to support a requirement that information regarding the client’s liability for costs be disclosed.”).

82. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 230–31 (2010).

83. *See Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 27–28 (D.C. Cir. 2014) (suggesting *Zauderer* can be seen as “an application of *Central Hudson*”).

84. *Cent. Hudson*, 447 U.S. at 563 (“The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity.”) (citations omitted).

85. *See, e.g., Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation*, 512 U.S. 136, 142 (1994) (“[D]isclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information.”); *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“[I]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”).



Mandated disclosures may represent a lesser intrusion on protected interests than direct limitations on speech for several reasons. Insofar as First Amendment protection of commercial speech is grounded in the consumer interest in having information upon which to base consumption or other choices, mandated disclosure or other compelled commercial speech requirements may increase the amount of information available to consumers.<sup>86</sup> But, increasing the volume of information may not always serve the constitutional interest in the “free flow” of information. Consumers will often benefit from an increase in available information about products and services, but not always. Due to the problem of “information overload,” there can be “too much” information as well as too little.<sup>87</sup> The optimal level of information will rarely be complete information.<sup>88</sup> Still, mandating curative disclosure or a disclaimer is more consistent with First Amendment values than prohibiting speech outright.<sup>89</sup>

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86. See Post, *Compelled Commercial Speech*, *supra* note 10, at 877 (“Regulations that force a speaker to disgorge *more* information to an audience do not contradict the constitutional purpose of commercial speech doctrine. They may even enhance it.”).

87. See, e.g., Svetlana E. Bialkova et al., *Standing Out in the Crowd: The Effect of Information Clutter on Consumer Attention for Front-of-Pack Nutrition Labels*, 41 FOOD POL’Y 65, 69 (2013) (recognizing that increases in information can reduce consumer attention and discernment); Elise Golan et al., *Economics of Food Labeling*, 24 J. CONSUMER POL’Y 117, 139 (2001) (noting that increased disclosure requirements can result in less consumer understanding); Lewis A. Grossman, *FDA and the Rise of the Empowered Consumer*, 66 ADMIN. L. REV. 627, 631 (2014) (“A surfeit of information can overwhelm consumers, leading them to attend to it selectively or to ignore it altogether.”); Jayson Lusk & Stephan Marette, *Can Labeling and Information Policies Harm Consumers?*, 10 J. AGRIC. & FOOD INDUS. ORG. 1, 1 (2012) (excessive information can reduce consumer welfare); Wesley A. Magat et al., *Consumer Processing of Hazard Warning Information*, 1 J. RISK & UNCERTAINTY 201, 204 (1988) (“Manufacturers of consumer products are also concerned with the possibility of information overload because regulatory agencies are requiring them to include more and more information on labels, a practice they fear will make the labels less effective as a communication instrument.”); Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 WASH. U. L.Q. 417 (2003) (observing that fewer disclosures may better serve consumers due to risk of information overload); Yvette Salaïna & Karine Flores, *Information Quality: Meeting the Needs of the Consumer*, 21 INT’L J. INFO. MGMT. 21, 23 (2001) (noting that excessive information can impose costs on consumers); Mario F. Teisl & Brian Roe, *The Economics of Labeling: An Overview of Issues for Health and Environmental Disclosure*, 27 AGRIC. & RESOURCE ECON. REV. 141, 148 (1998) (“[S]imply increasing the amount of information on a label may actually make any given amount of information harder to extract.”); Weil et al., *supra* note 58, at 158 (noting consumers have “limited time and cognitive energy”).

88. See Cass R. Sunstein, *Informing America: Risk, Disclosure, and the First Amendment*, 20 FLA. ST. L. REV. 653, 656 (1993) (noting the “optimal level” of information “is not complete information”); see generally OMRI BEN-SHAHAR & CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE* 94–106 (2014) (explaining why mandating disclosure of additional information does not necessarily enhance consumer welfare).

89. See *Ibanez*, 512 U.S. at 142.

Second, mandated disclosure, particularly if it takes the form of a warning or disclaimer to commercial speech, leaves the speaker in greater control of her own message. Even if potential liability for court costs must be disclosed, as in *Zauderer*, the lawyer still gets to tell potential clients that she will take their cases on a contingent-fee basis. She is simply required to augment her original message with additional information. If the speaker objects to the mandated disclosure, the speaker retains the ability to remain silent by opting for another message. A conditional disclaimer of this sort is dependent on a commercial speaker choosing to communicate a potentially misleading message, and leaves open a near infinite number of alternative messages for the speaker to make.<sup>90</sup>

Preventing producers or sellers of goods or services from misleading or confusing consumers is a substantial interest. As noted above, under the terms of *Central Hudson*, if a commercial message is fraudulent or inherently misleading, it is not subject to any First Amendment protection.<sup>91</sup> On this basis, the state and federal governments mandate a wide range of disclaimers that qualify the promotional or other statements made in various industries. Much as attorneys in Ohio must disclose the potential financial liabilities a plaintiff may incur in contingent-fee litigation, those who manage and sell various financial services must explain or qualify information they present to potential consumers. For example, a mutual fund that displays a graph of its prior performance must disclose that past performance is not a reliable indication of future performance.<sup>92</sup> Makers of nutritional supplements who make claims about the potential benefits of their products must add disclaimers if their claims have not been approved by the FDA.<sup>93</sup> The justification for mandatory curative disclosures in these situations is the same as that for regulations defining terms of art or specifying how producers or sellers may make certain types of claims in commercial messages.<sup>94</sup> For instance, federal regulations define the permissible meaning of terms like “fresh,”<sup>95</sup> “natural flavor,”<sup>96</sup> “organic,”<sup>97</sup> and “zero calorie.”<sup>98</sup>

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90. See *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985) (“[I]n virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser’s interests than do flat prohibitions on speech, ‘[warnings] or [disclaimers] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.’”) (quoting *In re R. M. J.*, 455 U.S. 191, 201(1982)).

91. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563–64 (1980).

92. See 17 C.F.R. § 230.482(b)(3)(i) (2015); see also *Invest Wisely: Advice From Your Securities Industry Regulators*, SEC. & EXCH. COMM’N, <http://www.sec.gov/investor/pubs/inws.htm> (last visited Mar. 2, 2016).

93. See 21 C.F.R. § 101.93 (c) (2015).

94. See Rebecca Tushnet, *It Depends on the What the Meaning of “False” Is: Falsity and Misleadingness in Commercial Speech Doctrine*, 41 LOYOLA L.A. L. REV. 227, 240 (2007) [hereinafter Tushnet, *It Depends*] (noting that “[r]egulation-by-definition is common”).

95. See 21 C.F.R. § 101.95(a) (2015) (“The term ‘fresh,’ when used on the label or in labeling of a food in a manner that suggests or implies that the food is unprocessed, means that the food is in its raw state and has not been frozen or subjected to any form of thermal processing or any other form of preservation.”).

The state's substantial interest in protecting consumers from unwitting harm sometimes overlaps with its interest in preventing consumer confusion. That is, the state has a substantial interest in protecting consumers from harms or liabilities that could result from the purchase or consumption of a good or service that poses a threat to an uninformed consumer. For instance, the state has a substantial interest in requiring producers and sellers of food products to disclose any potential risks their products may pose to consumers because consumers may be unaware of such risks otherwise. On this basis, the state may require food manufacturers to list ingredients and disclose the presence of common allergens, such as nuts.<sup>99</sup> In such cases, the state is mandating disclosure to prevent an uninformed consumer from becoming sick (or worse). Whether such disclosures are wise or necessary in any given instance is a policy question the First Amendment leaves to the political process. The point is that the state has a substantial interest in protecting uninformed consumers from the various harms to which they could be exposed due to information asymmetries. These asymmetries, if left uncorrected, could result in consumer illness or significant financial loss.

Many, if not most, federal mandatory labeling requirements can be justified in these terms. Nutritional content mandates, for example, are readily supported by the state's interest in protecting consumers from unwitting harm.<sup>100</sup> Individuals with special dietary requirements—such as those who need to avoid particular substances or limit their calorie, fat, or carbohydrate consumption—could be adversely affected were such information not disclosed on the product

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96. See 21 C.F.R. § 101.22(a)(3) (2015) (“The term natural flavor or natural flavoring means the essential oil, oleoresin, essence or extractive, protein hydrolysate, distillate, or any product of roasting, heating or enzymolysis, which contains the flavoring constituents derived from a spice, fruit or fruit juice, vegetable or vegetable juice, edible yeast, herb, bark, bud, root, leaf or similar plant material, meat, seafood, poultry, eggs, dairy products, or fermentation products thereof, whose significant function in food is flavoring rather than nutritional.”). Despite this regulatory standard, there is substantial controversy over the limits and lack of clarity concerning what the term “natural” signifies on product labels. See, e.g., Efthimios Parasidis et al., *Addressing Consumer Confusion Surrounding “Natural” Food Claims*, 41 AM. J.L. & MED. 357 (2015).

97. See 7 C.F.R. § 205.301 (2015) (describing acceptable terms for product labels based upon product composition).

98. See 21 C.F.R. § 101.60(b) (2015). That there are government-approved definitions does not mean that such regulations eliminate consumer confusion, however. Under existing regulations, manufacturers may label as “zero calorie” products that have “less than 5 calories per reference amount customarily consumed and per labeled serving.” As a consequence, a 20oz. bottle of a Diet Mountain Dew has ten calories, even though PepsiCo labels 12 oz cans as having zero calories. See *The Facts About Your Favorite Beverages: Diet Mtn Dew*, PEPSICO, [http://www.pepsicobeveragefacts.com/Home/product?formula=44316\\*03\\*01-01&form=RTD&size=12](http://www.pepsicobeveragefacts.com/Home/product?formula=44316*03*01-01&form=RTD&size=12) (last visited Mar. 21, 2016).

99. See 27 C.F.R. § 5.32a(a) (2015); see generally Scott H. Sicherer et al., *US Prevalence of Self-Reported Peanut, Tree Nut, and Sesame Allergy: 11-Year Follow-Up*, 125 J. ALLERGY & CLINICAL IMMUNOLOGY 1322, 1326 (2010) (“[M]ore than 1% of the population or more than 3 million Americans report peanut allergies, [tree nut] allergies, or both, representing a significant health burden.”).

100. See 21 C.F.R. § 101.9(a) (2015) (“Nutrition information relating to food shall be provided for all products intended for human consumption and offered for sale.”).

label. The same rationale could apply to requirements that automobile or appliance makers disclose the amount of energy their products consume, as such requirements inform consumers about the financial costs of owning and operating such products.<sup>101</sup> In this way, labeling requirements inform consumers about how specific purchasing decisions will affect their material interests.<sup>102</sup>

The same justification would not justify mandated disclosure of information about which consumers have ethical or religious concerns, but not because such concerns are unserious or somehow illegitimate. When a diabetic eats something with more or less sugar than she was aware of, health complications can result, whether or not she ever becomes aware of the food's content. There is a potential for unwitting harm. When an ethical vegetarian consumes a food that, unbeknownst to her, contains an animal product, there is no harm without disclosure. The harm, insofar as it occurs, comes from the information that is conveyed. Further, the harm experienced, while real, is the sort that is generally not accepted as a basis for limiting speech. Preventing a listener from becoming upset is not a substantial state interest for First Amendment purposes.<sup>103</sup>

Many people have strong “preferences for processes,”<sup>104</sup> and care deeply about product, process, or producer characteristics that have no direct, tangible effect on their physical or financial well-being.<sup>105</sup> Such preferences are legitimate and affect the utility consumers derive from various products and services.<sup>106</sup> Without question, the disappointment in learning that a product did not conform to one's own preferences can reduce a consumer's utility. Yet, no matter how substantial such preferences may be, they are not—and indeed cannot be—a substantial state interest sufficient to justify the regulation of speech. Any harm the individual suffers comes from the knowledge that a product's contents or the manner in which it was produced did not conform to the individual's subjective

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101. See 16 C.F.R. § 259.2 (2015) (requiring automobile advertisers to disclose fuel economy based on certain standards to avoid consumer confusion); 16 C.F.R. § 305.1, 305.3, 305.5, 305.11 (2015) (requiring all consumer appliances to carry a label describing water use, energy consumption, energy efficiency, energy cost—determined based on standards established for appliances from refrigerators to lamps); 49 C.F.R. 575.401(a) (2014) (“The purpose of this section is to aid potential purchasers in the selection of new passenger cars and light trucks by providing them with information about vehicles' performance in terms of fuel economy, greenhouse gas (GHG), and other air pollutant emissions.”).

102. It is also possible that such disclosure requirements could be justified by other asserted state interests, such as an interest in energy conservation. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 568 (1980) (holding that energy conservation is a substantial state interest).

103. See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2670 (2011) (“Speech remains protected even when it may . . . ‘inflict great pain.’”) (quoting *Snyder v. Phelps*, 131 S. Ct. 1207 (2011)).

104. See generally Kysar, *supra* note 21, at 529.

105. See *supra* notes 41–42 and accompanying text.

106. See Howard Beales et al., *The Efficient Regulation of Consumer Information*, 24 J.L. & ECON. 491, 502 (1981) (“Increases in the efficiency of purchase decisions made are equivalent to increases in real income . . .”).

value preferences.<sup>107</sup> The injury would not exist were the information not disclosed.<sup>108</sup>

Most existing federal labeling or disclaimer requirements would appear to conform to *Central Hudson*'s strictures. Some proposed mandatory labels, such as those disclosing the use of genetic modification techniques or potentially controversial production processes, might not.<sup>109</sup> Some other types of disclosures, like country of origin labeling or environmental ratings, may stand or fall on the purported justification for such requirements.<sup>110</sup> Because compelled commercial speech is subject to First Amendment scrutiny, the state must identify a sufficient interest for any such requirements.

Preventing consumer confusion or protecting consumers from unwitting harm are not the only potential substantial interests that could justify compelled commercial speech. Courts have also upheld disclosure or compelled speech requirements where the speech or message was part of a broader regulatory scheme of which the compelled disclosure or communication was merely one element.<sup>111</sup> The Supreme Court has used this basis to uphold compelled contributions to agricultural marketing programs,<sup>112</sup> and lower courts have upheld labeling requirements designed to facilitate compliance with other state regulations. In *National Electrical Manufacturers Association v. Sorrell*, for example, the U.S. Court of Appeals for the Second Circuit upheld a state's labeling requirement for light bulbs containing mercury.<sup>113</sup> The court held that this law facilitated the state's efforts to reduce mercury pollution and to ensure the proper disposal and recycling of mercury-containing products by ensuring that consumers were informed of the need to dispose of such products in an environmentally safe manner. The purpose of the requirement was to provide consumers with the

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107. Insofar as an individual's preferences are grounded in religious conviction, there may be "spiritual" harm from consuming a product that was not made in accordance with one's religious preferences. However, the protection of such interests is clearly beyond the scope of the government's legitimate interests. Indeed, laws designed to protect such interests could run afoul of the First Amendment prohibition on the establishment of religion. *See, e.g., Commack Self-Serv. Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 418–24 (2d Cir. 2002).

108. More broadly, the First Amendment does not generally recognize the desire to prevent individuals from being offended or scandalized as a sufficient governmental interest to justify speech restrictions.

109. *See* Thomas A Hemphill & Syagnik Banerjee, *Genetically Modified Organisms and the U.S. Retail Food Labeling Controversy: Consumer Perceptions, Regulation, and Public Policy*, 120 BUS. & SOC. REV. 435, 436 (2015); *see also infra* Section VI.A.

110. *See* *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 51–52 (D.C. Cir., 2014); *see also infra* Section VI.C.

111. *See* *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 476–77 (1997) (upholding compelled assessments on fruit tree growers to support advertising as part of a larger regulatory marketing scheme). *But cf.* *United States v. United Foods, Inc.*, 533 U.S. 405, 415–17 (2001) (invalidating compelled assessments imposed independent of a broader regulatory scheme).

112. *Glickman*, 521 U.S. at 476–77.

113. 272 F.3d 104, 116 (2d Cir. 2001).

information necessary to fulfill the government's purpose.<sup>114</sup> In *Central Hudson*, the Supreme Court also recognized encouraging energy consumption as a substantial interest.<sup>115</sup>

Where mandatory labels are permissible, not just any label will do. There must also be a sufficiently close relationship between the government's interest, such as a specific health or safety threat, and the label.<sup>116</sup> Under *Central Hudson*, any mandated disclosure must "directly advance" the government's asserted interest and not be "more extensive than is necessary to serve that interest."<sup>117</sup> The precise limits of these prongs of the *Central Hudson* test lie beyond the scope of this Article, yet as already noted, simple disclosure requirements that focus on ensuring consumers have specific types of information generally satisfy these requirements, provided that a substantial government interest has been identified.

#### IV. THE CONSUMER "RIGHT TO KNOW"

If commercial speech concerns lawful activity and is not fraudulent or inherently misleading, the government must proffer a substantial interest before it may regulate such speech by imposing limitations or mandating additional disclosures or other statements. This creates problems for mandatory labeling or disclosure requirements premised upon a generic consumer right to know information that could influence consumer decisions. There is nothing inherently misleading about failing to disclose every bit of information a consumer might find to be of interest. Infinite disclosure is neither possible nor desirable.<sup>118</sup> Consumers may desire all sorts of information about how products were produced or who produced them. Yet this, by itself, does not constitute a substantial government interest. Further, allowing the imposition of labeling requirements or other disclosures at the point of sale based on nothing more than an asserted consumer

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114. On the importance of government motivation generally in First Amendment analysis, see Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996).

115. 447 U.S. 557, 568 (1980).

116. In *R.J. Reynolds Tobacco Co. v. F.D.A.*, for example, a divided panel of the U.S. Court of Appeals for the D.C. Circuit concluded that the FDA failed to put forward "substantial evidence" that graphic warning labels on cigarette packages "directly advanced" the government's interest in reducing the harms to public health from smoking. 696 F.3d 1205, 1219 (D.C. Cir. 2012). The U.S. Court of Appeals for the Sixth Circuit reached a different conclusion in *Disc. Tobacco City & Lottery Inc. v. United States*, 674 F.3d 509, 535–37 (6th Cir. 2012). The FDA subsequently announced it would conduct additional research to identify what sort of mandatory warning label would best serve the agency's interests. See Katy Bachman, *Feds Abandon Graphic Cigarette Warning Labels [Updated]*, ADWEEK (Mar. 20, 2013, 12:33 PM), <http://www.adweek.com/news/advertising-branding/feds-abandon-graphic-cigarette-warning-labels-148059>.

117. *Central Hudson*, 447 U.S. at 570; see also *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2668 (2011) (noting the need for a "fit between the legislature's ends and the means chosen to accomplish those ends," so as to ensure "the State's interests are proportional to the resulting burdens placed on speech" (internal quotation omitted)).

118. See *supra* notes 87–88 and accompanying text.

right to know risks compromising other interests protected by the First Amendment.

As noted above, there is a substantial governmental interest in mandating the disclosure of information to prevent harm to the otherwise uninformed consumer. Mandatory product labels typically provide unwitting consumers with information necessary for them to protect themselves from otherwise unknown product characteristics (as well as to identify and contact the producer). For example, forcing candy makers to disclose the presence of peanuts protects those with allergies. Nutritional content labels protect those with particular dietary needs. Product safety labels can protect those who might be unaware of the danger a specific product may pose, and so on. In such cases, the failure to label can leave otherwise uninformed consumers exposed to risks. Protecting consumers from unwitting harm is a substantial interest comparable to the government's interest in protecting consumers from fraud or deception.

There is a substantial governmental interest in protecting the uninformed or unwitting consumer because such a consumer, by definition, cannot protect herself in the marketplace. The same cannot be said of the consumer who is aware of the risks and feels strongly enough to act accordingly.<sup>119</sup> For the informed consumer, a regime that prohibits false and misleading speech, and otherwise enables producers to label and promote their products accordingly, is sufficient to enable the consumer to protect her own interests.<sup>120</sup>

Insofar as any government has an inherent interest in the safety and physical well-being of its citizens, such safety is a substantial governmental interest. Similarly, in a market-oriented society, the government has a substantial interest in ensuring that all economic transactions are consensual. For this reason, the government also has a substantial interest in preventing fraud and the exploitation of unwitting consumers by unscrupulous sellers. Yet there is no clearly substantial interest in preventing consumers from being upset when they discover something they do not like about a product or service. Such concerns may be real, but they do not implicate the same type of governmental interest, particularly in the First Amendment context.

The claim that consumers have a right to know whatever they believe is important about a product or the manner in which it was produced cannot be justified as a substantial government interest. As noted above, such preferences are real, as many consumers do prefer to purchase goods or services that conform to their ethical, political, or spiritual beliefs. Aligning their purchasing decisions with their subjective value preferences maximizes their utility. But forcing others to validate such preferences is not a substantial government interest. Forcing commercial actors to speak upon this basis threatens core First Amendment interests.<sup>121</sup>

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119. See *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 804 (1988) ("[I]t is safer to assume that the people are smart enough to get the information they need than to assume that the government is wise or impartial enough to make the judgment for them.").

120. See *infra* Part V.

121. See *infra* Section IV.B.

There are at least four reasons why the assertion of a consumer right to know, unconnected to a more substantial governmental interest, cannot be sufficient to compel commercial speech. First, the consumer right to know is a rationale without discernible limits. If such an interest is a substantial interest then there is, quite literally, no end to the disclosures that can be mandated. Second, insofar as most calls for disclosure on the basis of a consumer right to know are based upon subjective, normative claims, mandating disclosure is not viewpoint-neutral. Compelling commercial speech on this basis can effectively force producers and sellers to give voices to perspectives and premises that they do not share, including politically charged messages about what forms of production or economic organization are morally, or otherwise, superior. Third, mandating such disclosures can effectively force producers and sellers to give voice to a politically determined set of values and to stigmatize their own, otherwise legal products and production methods. Finally, allowing an alleged consumer right to know facilitates government intrusion into what are essentially political debates concerning subjects that lie at the core of First Amendment interests.

#### A. *Lack of Limits*

Consumers are potentially interested in a near-infinite range of product and process characteristics.<sup>122</sup> Some might want to know what is in a product; others might want to know how and by whom it was made. Consider something as simple as a chicken breast. Some consumers may want to know the nutritional content, and others may care how the chicken breast was handled or treated—e.g., whether it was ever frozen or injected with saline. Some care about how the producer treated the chickens—e.g., whether they were caged or free range, whether antibiotics were administered—and others care more about the treatment of the workers. Some care where the chicken was raised or processed—e.g., whether it was locally or domestically produced—while others would like to know more specifics about the packaging, and the extent to which it could be recycled. Still others may care about the company that raised the chicken, whether it is a locally owned farm, a co-op, or a large corporation, while others may care to know more about the company from which it would be purchased. Others may be interested in the environmental impact of raising the chicken—whether there were water pollution concerns or the production was carbon neutral—while others may like to know what the producer and seller might do with their profits, whether portions will be given to charity or invested in environmental initiatives. Some may want to know the political opinions of the company's executives or their pattern of political contributions. Others may wish to know whether a firm funds politically active trade associations and public interest groups, supports or opposes same-sex marriage, and so on.<sup>123</sup>

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122. See J. Howard Beales, *Modification and Consumer Information: Modern Biotechnology and the Regulation of Information*, 55 FOOD & DRUG L.J. 105, 109 (2000) [hereinafter Beales, *Modification*] (“It is impossible to list all the things that might matter to everyone.”).

123. An episode of the cult television program, *Portlandia*, took this notion to a potentially absurd extreme by suggesting that some consumers might like to meet the



Consumers are potentially interested in all of the above criteria, and more. Any of these could be justified by a generic appeal to a consumer's alleged right to know. Not only are there consumers who want such information now, there are also consumers who would come to value such information once it was disclosed on a regular basis. Consumer preferences for information are not wholly independent of what is disclosed, as disclosure can increase the salience of the information disclosed. If a company is required to disclose certain types of information at the point of sale, this may influence not only consumer decisions, but also the ordering of a consumer's preferences for information.

If a generic consumer right to know were sufficient to compel commercial speech, every potential labeling or disclosure mandate would satisfy this requirement. The simple existence of such a mandate—the adoption of legislation or promulgation of a regulation—is itself evidence that some number of consumers are interested in such information. Otherwise, such a requirement would never be adopted in the first place. Therefore, any requirement enacted into law or promulgated by an agency would necessarily satisfy the standard of consumer interest, and there would be no inherent limit to the sorts of information government could compel individuals and companies to disclose.

Some may argue that labels should only be required where there is sufficient consumer interest above some identifiable threshold. Yet, as discussed below,<sup>124</sup> the stronger the consumer interest in particular information, the more likely such information will be voluntarily disclosed in the marketplace. Mandatory disclosure is most necessary in those instances in which voluntary disclosure is not forthcoming—i.e., in those instances in which the information is least in demand.<sup>125</sup> Other than political demand, the state lacks a value-neutral basis upon which to identify when a consumer right to know is sufficient to justify mandated disclosure and when it is not.

While the range of potential messages or disclosures that could be justified under a flexible right to know standard is unlimited, the same cannot be said of the opportunities a producer or seller has to communicate with potential customers. Time and space are limited. A seller has only so much time to communicate the virtues of her product to a potential customer. A product label or advertisement can only hold so much information.<sup>126</sup> Mandating that a producer disclose one set of information may come at the expense of another set of

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animal they would consume before ordering it at a restaurant. *See Portlandia: Farm* (IFC television broadcast Jan. 21, 2011).

124. *See infra* Part V.

125. This point highlights the risk of stigma identified below. The reason for mandating disclosure of characteristics not presently demanded by consumers is often to make such information more salient in consumer decisions. *See infra* Section IV.C.

126. Product manufacturers and retailers may have the ability to place more detailed product information on company websites, and provide a link or QR code for interested consumers. Campbell's, for instance, includes extensive information on product content at [www.whatsinmyfood.com](http://www.whatsinmyfood.com). Among other things, the site details whether specific products are made with genetically modified ingredients and the purposes that various additives serve. Providing disclosure on a website, however, does not have the same effect as mandatory disclosure at the point of sale or on the product label.

information more valued by consumers. Further, as discussed above, the consumer's attention span and willingness to digest and consider product-related information is limited.<sup>127</sup>

Government mandated disclosures or disclaimers compete for scarce space with the producer's own message. The more the government requires a seller or producer to say or disclose, the less ability the seller or producer has to communicate a message of its own. This means that even if compelled commercial speech does not implicitly endorse a particular ideological or moral perspective, it still implicates First Amendment concerns. As the Court noted in *Pacific Gas & Electric*, one "danger" of compelled speech is that the regulated entity will have "to alter its own message as a consequence of the government's coercive action."<sup>128</sup> This, itself, is a basis for "First Amendment solicitude, because the message itself is protected . . ."<sup>129</sup> At the extreme, the costs of mandated disclosures "may be no different in practice" than prohibiting the voluntary disclosure of other information.<sup>130</sup>

If a lawyer who advertises contingent-fee litigation must also warn potential clients they may be liable for court costs, that lawyer may avoid making the disclaimer by choosing another message. A straight labeling or disclosure requirement does not give the seller or producer the same choice and has a greater effect on their ability to determine what messages they communicate to consumers, while also threatening to crowd out those messages which consumers most depend. In this way, open-ended authority for the government to mandate disclosures would actually threaten the free and efficient flow of commercial information.

### ***B. Lack of Neutrality***

Compelled commercial speech about products and services is often not viewpoint neutral. This too is constitutionally problematic. Even wholly unprotected forms of speech must be regulated in a viewpoint and content-neutral manner.<sup>131</sup> The same is true of commercial speech.<sup>132</sup>

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127. See Weil et al., *supra* note 58, at 158 ("Because of limited time and cognitive energy, information users acting rationally to advance their various, usually self-interested, ends may not seek out all of the information necessary to make optimal decisions."); see also *supra* notes 87–88 and accompanying text.

128. *Pac. Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 16 (1986); see also Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1280 (2014) ("[C]ompelled speech might actually chill speech.").

129. *Pac. Gas & Elec. Co.*, 475 U.S. at 16.

130. See J. Howard Beales III, *Health Related Claims, the Market for Information, and the First Amendment*, 21 HEALTH MATRIX 7, 15 (2011) [hereinafter Beales, *Health Related Claims*].

131. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); see also Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777, 788 (1993) ("The *R.A.V.* decision stands for the proposition that even when the government is regulating a class of speech that normally receives little or no First Amendment protection, the First Amendment's strict neutrality standards, which render presumptively unconstitutional discrimination based on content or viewpoint, still apply with full force.").

When the government requires a seller or producer to disclose specific information about a product or service, the requirement itself communicates a message. The selection of what information to disclose implicitly confirms that this information is (or should be) considered relevant to the intended audience. Mandated nutrition and ingredient labels communicate that there are reasons why at least some consumers *should* care about the nutritional content and ingredients of foods. Where disclosures are based upon a potential health risk, the government interest is clear: Some consumers risk getting sick if they are not aware of what they eat. Eliminating that information asymmetry directly advances the government's interest in protecting public health. Where such an interest is lacking, however, the basis for the label is to communicate that this specific characteristic or property is what individuals *should* care about.

Without a risk of tangible harm to consumers or a threat to some other tangible government interest, the basis for requiring disclosure is that particular information is relevant to those who have a certain set of subjective value preferences. Such preferences, in turn, are based upon individuals' moral, political, ideological, and spiritual commitments. To identify a particular product characteristic as relevant is to validate the subjective value perspective that identifies this characteristic as important. A mandate that a producer disclose how a product was produced, and whether it meets given labor or environmental standards, is to necessarily presume that meeting such standards is preferable to not meeting such standards—and that there is something wrong with those who do not comply. While the government may impose such requirements directly—mandating that producers meet specified environmental or labor standards in the process of manufacturing goods—the First Amendment does not allow the government to force individuals to echo the government's preference for such policies. That the government may itself choose sides in such debates, and use government speech to preach the virtues of “fair” labor conditions or ecological sustainability, does not authorize it to force private individuals to sing from the same hymnal. In the same vein, the government may adopt laws or regulations influenced by the religious beliefs of the public, but it cannot require individuals to espouse those beliefs with their own speech, commercial or otherwise.

A government mandated label is almost inevitably a warning to a consumer that highlights the need to consider particular product characteristics and to elevate such characteristics above others, which could just as well have been of consumer concern.<sup>133</sup> This is particularly true given the heuristic devices individuals use to process information.<sup>134</sup> Consumers rarely have the time or

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132. See, e.g., *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2663–64 (2011) (noting that “commercial speech is no exception” to requirement of heightened scrutiny when regulation of speech is not content-neutral or viewpoint neutral).

133. See Tushnet, *It Depends*, *supra* note 94, at 240.

134. See generally Shelly Chaiken, *Heuristic Versus Systematic Information Processing and the Use of Source Versus Message Cues in Persuasion*, 39 J. PERSONALITY & SOC. PSYCHOL. 752 (1980); Benedetto De Martino et al., *Frames, Biases, and Rational Decision-Making in the Human Brain*, 313 SCI. 684 (2006); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1130

interest to become experts about every potential product characteristic. Highlighting a particular characteristic in itself communicates important information, and when that information is not about an objectively important product characteristic, it communicates a value and viewpoint-based message about what is important for consumers to consider. Moreover, by forcing a private party to deliver the government's message, the state is able to further "manipulate discourse" by creating the illusion that a particular concern is "more widespread than it really is" and by taking advantage of a private speaker's credibility or trustworthiness.<sup>135</sup>

To take an example discussed in more detail below,<sup>136</sup> were the government to require food producers to label foods that might contain GMOs, or other products of modern biotechnological techniques, it would communicate to consumers that potential GMO content is something they *should* care about, even though the federal government and relevant scientific authorities maintain the use of GMOs in food production does not alter the content of the resulting food product or raise any distinct or unique health or safety concerns. That the government selected this particular characteristic communicates that it is especially relevant to consumer welfare and is a characteristic that consumers should consider when deciding whether to purchase a product. The producer is required to give voice to the idea that a product that may contain GMOs is meaningfully different—normatively if not physically—than a product that does not, even if the producer does not agree with the message. In imposing the labeling requirement, the government adopts a specific viewpoint and then forces the producer to express it.

### C. Threat of Stigma

Depending on the content of the compelled commercial speech, it may act as a warning to consumers. The requirement to disclose becomes a requirement that a producer or seller potentially stigmatize their own product—to say to consumers "think about it before you buy this product because of the following fact or characteristic about which you were previously unaware."<sup>137</sup> Such a requirement effectively forces a producer or seller to testify against its own product and implicitly endorse the notion that the disclosure of a given fact should be relevant to a consumer's decision about whether to purchase the product. Such requirements may be used to pursue ideological agendas or to place burdens upon

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(1974). On the effect of cognitive biases on decision-making more generally, see BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000).

135. See Corbin, *supra* note 128, at 1295, 1297.

136. See *infra* Section VI.A.

137. See Lars Noah, *Genetic Modification and Food Irradiation: Are Those Strictly on a Need-to-Know Basis?*, 118 PENN ST. L. REV. 759, 787 (2014) [hereinafter Noah, *Genetic Modification*] ("Demands for disclosure premised on a 'right to know' of things that an expert regulatory agency has judged to be immaterial represent nothing more than efforts to stifle feared technologies by stigmatizing the resulting products in the marketplace.").

competitors.<sup>138</sup> Whatever the purpose, the imposition of a label can have a stigmatizing effect.<sup>139</sup>

Consider again the case of GMOs.<sup>140</sup> When a producer adorns their product with a “GMO free” label, they are communicating to consumers that this is a product characteristic that they believe should influence consumer choices.<sup>141</sup> Such producers are seeking to encourage consumers to consider this as a relevant factor in the choice to buy the product, and are doing so not by adopting their own label or voluntary disclosure, but by requiring other producers and sellers to engage in potentially stigmatizing speech.<sup>142</sup>

By the same token, when a product has a “may contain GMOs” or “GMO” label, such a disclosure communicates that this is a factor consumers should consider, and may even suggest to some consumers that there is something “wrong” or unsafe about products bearing such a label.<sup>143</sup> Indeed, this is one reason why anti-GMO organizations seek to impose mandatory labeling requirements.<sup>144</sup>

Just because a label or disclosure contains factually true information does not mean that it is value-free or neutral. Such labels often have the intent and effect of suggesting that consumers should think twice before purchasing the product.

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138. See, e.g., Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CALIF. L. REV. 83, 121–25 (1989) (arguing that the passage of the federal Margarine Tax Act of 1886 was an early example of a lobbying effort to benefit the dairy industry and destroy the competing product of margarine). Insofar as the creation of a negative stigma is part of the government’s motive in adopting a compelled speech requirement, that should also be part of the First Amendment analysis. See generally Kagan, *supra* note 114, at 413.

139. As Lars Noah notes, the adoption of mandatory labels for irradiated foods had a stigmatizing effect, discouraging the use of a technology and compromising public health. See Noah, *Genetic Modification*, *supra* note 137, at 781–84.

140. See *infra* Section VI.A.

141. See Tushnet, *It Depends*, *supra* note 94, at 244–45 (“Labeling may encourage otherwise uninterested consumers to think, mistakenly, that rBST involves health risks—they may reason that there would be no label if it didn’t make a difference.”).

142. See generally Pam Scholder Ellen & Paula Fitzgerald Bone, *Stained by the Label? Stigma and the Case of Genetically Modified Foods*, 27 J. PUB. POL’Y & MARKETING 69 (2008) (exploring the stigmatizing effects of labeling genetically modified foods); Editorial, *Label Without A Cause*, 32 NATURE BIOTECHNOLOGY 1169 (2014) (“Labels are veiled attempts to stigmatize GM food and its producers, based on an ideological repugnance for genetic engineering.”).

143. The federal government acknowledged this point in seeking to distinguish the country-of-origin labels at issue in *American Meat Institute*, from the rBST labels Vermont sought to impose on milk producers and retailers in *International Dairy Foods Association v. Amestoy*. See Brief for Federal Appellees at 31, *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 746 F.3d 1065 (D.C. Cir. 2014) (No. 13-5281), 2014 WL 1494240, at \*31 (noting such disclosure could be viewed by consumers “as a concession that the treatment might affect the quality of the milk”).

144. Other supporters of mandatory labeling requirements, such as large national producers, may have other purposes, such as creating a uniform national standard and preempting variable state standards, or imposing rules that create a competitive advantage or suppress competition.

Indeed, that is the point. Some information-based regulatory tools are explicitly designed to “shame” companies to change their behavior.<sup>145</sup> A mandatory label for organic produce that says “Produced with Animal Feces” could be literally true, but would also stigmatize the products at issue.<sup>146</sup>

It is one thing when a seller is required to qualify a claim that it has chosen to make—e.g., to acknowledge that an implied health benefit is unproven or unverified, or disclose that a “free” product offer may still obligate the purchaser to pay processing charges—but quite another to require a disclosure or warning absent such concerns. Mandatory disclosure of characteristics that some consumers might perceive as undesirable is particularly likely to pose a risk of stigmatizing a product when the disclosure is not justified by the need to prevent consumer deception, clarify or qualify other product claims, or otherwise protect unwitting consumers.

#### *D. Threat to Political Discourse*

Some types of compelled disclosure or communication are, for all practical purposes, requirements that commercial actors communicate value-laden messages about inherently political questions, such as how products should be made, animals should be treated, and so on. A requirement that sellers disclose whether the workers who made a given product are unionized or whether a product is sourced from countries with “acceptable” political regimes is infused with political content. That the message accompanies a commercial communication, such as an advertisement or product label, does not change this fact.<sup>147</sup>

Much of what consumers may wish to know about products or services or the companies that provide such products or services touches on political concerns and core First Amendment interests. As discussed earlier, many consumers view marketplace decisions as an extension of their political identities and make purchasing and consumption decisions based upon political criteria.<sup>148</sup> Those who

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145. See, e.g., J. CLARENCE DAVIES, WOODROW WILSON INT’L CTR. FOR SCHOLARS, PROJECT ON EMERGING TECHS., EPA AND NANOTECHNOLOGY: OVERSIGHT FOR THE 21ST CENTURY 34 (2007), [http://www.nanotechproject.org/file\\_download/files/Nano&EPA\\_PEN9.pdf](http://www.nanotechproject.org/file_download/files/Nano&EPA_PEN9.pdf) (discussing value of “public shame” to “discourage bad behavior” in context of mandatory disclosure laws).

146. As the popular food chain Chipotle has acknowledged, its decision to source more ingredients from local and organic sources “make it more difficult to keep quality consistent, and present additional risk of food-borne illnesses.” See Timothy B. Lee, *Local and Organic Food Has Extra Safety Risks. Just Ask Chipotle*, VOX (Dec. 21, 2015, 7:40 PM), <http://www.vox.com/2015/12/21/10641516/local-organic-chipotle-risk>. On the potential of contamination in organic produce, see Avik Mukherjee et al., *Preharvest Evaluation of Coliforms, Escherichia Coli, Salmonella, and Escherichia Coli O157:H7 in Organic and Conventional Produce Grown by Minnesota Farmers*, 67 J. FOOD PROTECTION 894 (2004) (reporting measurably higher levels of fecal contamination in some organic produce); Stephanie Strom, *Private Analysis Shows a Sharp Increase in the Number of Organic Food Recalls*, N.Y. TIMES, Aug. 20, 2015, at B3 (noting increase in organic food recalls due to contamination).

147. See *supra* notes 39–41 and accompanying text.

148. See *supra* notes 42–43 and accompanying text.

care about reproductive rights may have an interest in knowing whether certain companies donate money to anti-abortion causes. On some college campuses, activists organized boycotts of Domino's pizza because of the founder's support for anti-abortion organizations.<sup>149</sup>

Consumer desire for such information would not authorize a government requirement that companies disclose the politically sensitive donations of their executives on the products they sell.<sup>150</sup> Supporters of same-sex marriage likewise sought to boycott Chick-fil-A because the company's CEO expressed his opposition to their cause.<sup>151</sup> There was also an attempt to boycott Target because it donated to a gubernatorial candidate who opposed gay rights, even though Target's donation was motivated by company management's interest in other issues.<sup>152</sup> That such boycotts are permissible does not mean the government can force private firms to disclose the relevant information in advertisements or on product labels, no matter how much some consumers desire such information.

Political debate and discourse extends far beyond the ballot box and reaches into commercial marketplaces. Allowing the government to compel commercial speech solely because a given political coalition or constituency seeks such disclosure risks impressing private actors into the service of inherently political causes. As the Court explained in *Pacific Gas & Electric*, "Were the government freely able to compel corporate speakers to propound political messages with which they disagree, this protection would be empty, for the government could require speakers to affirm in one breath that which they deny in the next."<sup>153</sup> One way to address this concern is for the courts to apply greater scrutiny when they conclude that a given compelled speech requirement is sufficiently political. However, a cleaner and easier approach—and one that demands less of a complex and occasionally uncertain doctrine—is simply to require such compulsions be justified with a substantial governmental interest. This approach is consistent with the Court's commercial speech jurisprudence, and provides ample leeway for those disclosure requirements that are needed to safeguard consumers and facilitate other important governmental interests.

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149. See, e.g., *Domino's, Tower of Pizza Leans Right*, 19 OFF OUR BACKS, Apr. 1989, at 7. (report of picketing and boycotts from feminist journal); Siobhan Stiglitz, *New Student Choice Group Calls for Domino's Boycott*, COLUM. DAILY SPECTATOR, Nov. 2, 1989, at 1.

150. Requiring publicly traded corporations disclose such information to shareholders might raise a different set of issues that lie beyond the scope of this Article.

151. See Kim Severson, *A Chicken Chain's Corporate Ethos Is Questioned by Gay Rights Advocates*, N.Y. TIMES, Jan. 30, 2011, at A16 (describing how Chick-fil-A supports anti-gay organizations; causing college students to try to get Chick-fil-A restaurants removed from campuses).

152. See Andrea Chang, *Target, Gay Rights Supporters at Odds Over How to Settle Dispute*, L.A. TIMES (Apr. 8, 2011), <http://articles.latimes.com/2011/apr/08/business/la-fi-target-gay-20110409/2>. Perhaps ironically, Target was also the subject of a boycott by the National Organization for Marriage due to its support for same-sex marriage. See James Michael Nichols, *National Organization for Marriage Announces Target Boycott*, HUFFINGTON POST (Aug. 8, 2014), [http://www.huffingtonpost.com/2014/08/08/nom-target-boycott\\_n\\_5661994.html](http://www.huffingtonpost.com/2014/08/08/nom-target-boycott_n_5661994.html).

153. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 16 (1986).

## V. MARKETS WITHOUT MANDATORY DISCLOSURE

Arguments that government regulations should require the disclosure of particular information about products or services rest on the premise that such information will not be disclosed—or will not be disclosed sufficiently—absent such a government requirement. This is the basis upon which it is asserted that the government has a *substantial* interest in mandating disclosure or otherwise compelling speech: Were it not for the requirement, the information would not be disclosed or otherwise communicated. After all, if the information or message at issue were already freely communicated without government compulsion, there would be no need for the government to act. In such a circumstance, it would be hard to argue the government has any interest at all, let alone a substantial one.

If information that could benefit consumers is not disclosed, however, the government may have an interest in ensuring disclosure to correct for a potential market failure.<sup>154</sup> The lack of disclosure, it may be argued, results in information asymmetries that place consumers at the mercy of unscrupulous producers and sellers.<sup>155</sup> Curing such information asymmetries and ensuring consumers have access to information that could benefit them and prevent a market failure are government interests.<sup>156</sup> This may be true if the information in question is not communicated at all, or if it is not disclosed or communicated to the optimal extent.

Note that where the information disclosure is necessary to prevent harm to uninformed consumers, such arguments do not assume that no such information is disclosed, only that some number of uninformed consumers will remain. The residual risk to an uninformed consumer provides the government with a substantial interest sufficient to justify regulation under *Central Hudson* even if there is some voluntary disclosure in the marketplace. There is room to debate

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154. See Sunstein, *supra* note 88, at 655 (“When information is lacking, there may well be a conventional case of market failure under economic criteria.”); see also Beales et al., *supra* note 106, at 503–09 (discussing information market failures).

155. See Weil et al., *supra* note 58, at 156 (noting information asymmetry as justification for government intervention). For the classic discussion of the problem of information asymmetry as a source of market failure, see George A. Akerloff, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970); see also Sanford J. Grossman & Joseph E. Stiglitz, *On the Impossibility of Informationally Efficient Markets*, 70 AM. ECON. REV. 393 (1980). It is worth noting that the “market for lemons” hypothesized by Akerlof should only arise under a specific set of narrow conditions. Among other things, if producers are able to communicate quality and other product information to consumers, the market failure disappears. See Paul H. Rubin, *The Economics of Regulating Deception*, 10 CATO J. 667, 674–75 (1991); see also Pauline M. Ippolito, *Consumer Protection Economics: A Selective Survey*, in *EMPIRICAL APPROACHES TO CONSUMER PROTECTION ECONOMICS* 1, 7 (Pauline M. Ippolito & David T. Scheffman eds., 1986).

156. See Golan et al., *supra* note 87, at 127 (“Labeling decisions may enhance economic efficiency by helping consumers target expenditures toward products they most want.”); Teisl & Roe, *supra* note 87, at 141 (“Simply stated, labeling policies can circumvent these market inefficiencies by making the information initially held by the firm also available to the consumer.”).



whether imposing a certain quantum of costs on producers in order to implement a disclosure requirement is worth achieving a certain degree of consumer protection, but that is a debate for policymakers. If government-mandated disclosure would protect consumers from unwitting harm, the government has satisfied the substantial interest requirement of *Central Hudson*. The more difficult case to make is that the government retains a substantial interest in compelling information disclosure to satisfy consumer curiosity or meet the demands of an alleged consumer right to know, absent any additional claimed government interest.

Manufacturers have substantial economic incentives to provide consumers with information about their products, as well as to discover what product or process attributes consumers will find appealing.<sup>157</sup> Firms use labels to attract customers, to differentiate their products from those of their competitors, and to promote the presence of potentially desirable product characteristics.<sup>158</sup> Indeed, in competitive markets producers have an incentive to disclose any information that is likely to make their product more desirable to consumers.<sup>159</sup>

In competitive markets, the failure to disclose information desired by consumers can be costly. Consumers generally assume that firms highlight the positive attributes of their products. As a result, the failure to disclose positive information creates a negative inference, particularly where competitors highlight the attribute in question.<sup>160</sup> This often creates a dynamic known as “unfolding” or “competitive disclosure,” as firms face pressure to match the positive claims made by their competitors.<sup>161</sup>

If all products in a given market share a negative characteristic, however, competitive disclosure will only occur if producers of potential substitutes draw attention to these product attributes.<sup>162</sup> This situation is likely to occur with product categories in which there is a certain degree of uniformity or a basic characteristic that all must share. It is unlikely that any egg producer is going to advertise or voluntarily disclose the cholesterol content of eggs.<sup>163</sup> Where products

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157. See Beales et al., *supra* note 106, at 502 (“[S]ellers have a substantial economic incentive to disseminate information to consumers.”); Beales, *Health Related Claims*, *supra* note 130, at 9–10 (2011) (“Absent regulatory barriers, sellers will tell consumers about product attributes that consumers desire.”).

158. See Golan et al., *supra* note 87, at 119, 127; see also Beales et al., *supra* note 106, at 502.

159. Producers have this incentive so long as the costs of identifying and disclosing the information are less than the value of the information to consumers. In other words, producers retain such incentive so long as additional disclosure is efficient. See Beales et al., *supra* note 106, at 502–03.

160. See Golan et al., *supra* note 87, at 128.

161. See Pauline M. Ippolito & Alan D. Mathios, *The Regulation of Science-Based Claims in Advertising*, 13 J. CONSUMER POL’Y 413, 427–28 (1990).

162. See Golan et al., *supra* note 87, at 129.

163. Though, this creates an incentive for other firms to create a competing substitute without this negative feature and promote this attribute, as has occurred with egg substitutes. At the same time, it also creates an incentive to support government restrictions on product claims so as to reduce competition in that space.

differ within a given category, comparative marketing is common. If only some products in a given category contain certain ingredients, and this information is relevant to consumers, manufacturers have adequate incentive to disclose this information, on the product label or otherwise. Examples of such voluntary disclosures and comparative claims are common. The ability to make positive health claims about their products provides food producers with an incentive to improve the healthfulness of their products.<sup>164</sup> Such claims can also justify price differentials.<sup>165</sup>

Producers and sellers voluntarily provide consumers with substantial information about the virtues of their products.<sup>166</sup> Some food producers voluntarily disclose information that may appeal to some consumers. Some inform potential consumers about their commitment to humane treatment of animals, while others trumpet their refusal to use particular chemicals or production processes, or their commitment to particular charities. Firms that do not ensure that their products are manufactured in accordance with human rights or social justice concerns may not voluntarily disclose this fact, but competing firms are not shy about highlighting their commitment to such concerns. This can be seen by the proliferation of “fair trade” products and similar efforts to distinguish products on normative grounds.<sup>167</sup> Voluntary labeling by some firms raises the salience of the relevant product or process characteristics and may alter consumer or producer behavior as a result.

Consumers who care about specific product attributes also have a strong incentive to search out products that satisfy their preferences. Consumers who care about animal welfare, for example, have every incentive to seek out those products that satisfy this preference. If a preference is strongly held, consumers are likely to invest time and effort to satisfy that preference—seeking out undisclosed or veiled information or identifying proxies for the product or service characteristics that they desire.<sup>168</sup> Consumers do not seek out such information when the cost of

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164. See Ippolito & Mathios, *supra* note 161, at 419.

165. See Beales, *Modification*, *supra* note 122, at 111 (“If there are enough consumers willing to pay to avoid a particular process, or obtain a process they prefer, manufacturers have every incentive to provide those products.”).

166. See Paul Milgrom, *What the Seller Won’t Tell You: Persuasion and Disclosure in Markets*, 22 J. ECON. PERSP. 115, 116 (2008) (“In modern economies, sellers routinely supply helpful information about their products.”).

167. See Raluca Dragusanu et al., *The Economics of Fair Trade*, 28 J. ECON. PERSP. 217, 222 (2014); Corrine Gendron et al., *The Institutionalization of Fair Trade: More than Just a Degraded Form of Social Action*, 86 J. BUS. ETHICS 63 (2009); Jens Hainmueller et al., *Consumer Demand for the Fair Trade Label: Evidence from a Multi-Store Field Experiment*, 97 REV. ECON. & STAT. 242, 243 (2015); Geoff Moore, *The Fair Trade Movement: Parameters, Issues and Future Research*, 53 J. BUS. ETHICS 73, 74–75 (2004).

168. For example, a consumer who wishes to purchase food products that do not contain the products of genetic engineering may opt to purchase foods with an organic label, as such foods will also satisfy the consumer’s specific preference. See Jim Chen, *Food and Superfood: Organic Labeling and the Triumph of Gay Science Over Dismal and Natural Science in Agricultural Policy*, 48 IDAHO L. REV. 213, 214–17 (2012) (discussing how organic label has become a de facto “GMO-free” label). Similarly, consumers who desire

obtaining the information is greater than the value of the information to the consumer, which indicates the information is costly to obtain or the preference is not particularly strong.

Consumer preferences change over time, and competitive markets respond rapidly to such changes.<sup>169</sup> Producer decisions about how to advertise or promote their products contribute to this change, as producers discover latent consumer preferences and contribute to the evolution of such preferences.<sup>170</sup> Twenty or thirty years ago, consumers may not have cared how farm animals were treated or whether certain products were derived from genetically engineered seeds. The decision of a trendy food outlet to highlight both characteristics not only positions that firm vis-à-vis its competitors, it also contributes to a broader civic dialogue about what product characteristics should be important.<sup>171</sup> So, for example, when the popular restaurant chain Chipotle elected to eschew genetically modified ingredients and source products from “ethical” sources, and promoted that fact, it prompted broader public and political debate about the merits of its choices.<sup>172</sup>

Even if only a substantial minority of consumers desire information about how certain types of products are produced, or about specific producer characteristics, it is likely that more firms will begin to label their products accordingly. Producers can do this in an unobtrusive way, or take other steps to communicate with interested consumers. Consider the development of kosher food labeling. Observant Jews demand food that is prepared in accordance with kosher

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products that meet particular quality or other standards use kosher certification as a proxy for their concerns. See Eliyahu Safran, *You Don't Have to Be Jewish to Buy Kosher*, ORTHODOX UNION (June 7, 2012), <http://www.ou.org/life/inspiration/you-dont-have-be-jewish-buy-kosher-products-eliyahu-safran/>.

169. Beales, *Health Related Claims*, *supra* note 130, at 29 (“Markets respond rapidly to changes in preferences and changes in circumstances.”). The relative speed with which markets respond to such changes is particularly notable when compared to the relative speed (or lack thereof) with which government entities and regulatory strictures change. *Id.*

170. See Milgrom, *supra* note 166, at 118 (“An interesting and rarely emphasized benefit of competition is that competition can be helpful to buyers who are so poorly informed about a product that they do not even know which product attributes they should care about and what questions to ask.”).

171. As Douglas Kysar notes, “when producers make process information available to consumers for use in their purchasing decisions, the transactions implicate the speech interests of both producers and consumers—and not merely as speaker and listener, but as speakers both.” Kysar, *supra* note 21, at 610.

172. Chipotle offers explanations for its decisions on its website. See *Food With Integrity*, CHIPOTLE, <http://www.chipotle.com/food-with-integrity> (last visited Mar. 21, 2016). These decisions have prompted debate and pointed responses. See *Chipotle: Food with Hypocrisy*, CHUBBY CHIPOTLE, <http://www.chubbychipotle.com/> (last visited Mar. 21, 2016). This debate intensified after foodborne illness outbreaks at multiple Chipotle locations. See Timothy B. Lee, *Was Chipotle too Busy Avoiding the Fake Dangers of GMOs to Focus on Actual Food Safety?*, VOX (Dec. 21, 2015), <http://www.vox.com/business-and-finance/2015/12/12/9910642/chipotle-gmo-e-coli>; see also Berfeld, *supra* note 41.

laws.<sup>173</sup> In response to this demand, many food producers submit their products to a rabbinical council for evaluation so that they can be certified kosher, and be eligible for a voluntary label.<sup>174</sup> Even though the demand for kosher foods is only a small part of the market—and the percentage of consumers who must eat kosher food due to their religious beliefs is even smaller—many large corporations participate in this process.<sup>175</sup>

Voluntary disclosure of product or process characteristics has a long history. One prominent early example is the National Consumers League (“NCL”) “White Label” campaign in the early twentieth century.<sup>176</sup> As part of this campaign, the NCL certified products based upon the labor conditions. Sellers of certified products, including the prominent retailer Wanamaker, promoted their participation in the campaign in an effort to gain competitive advantage. Intentionally or not, such efforts also promoted the underlying cause and helped shape consumer preferences.<sup>177</sup>

The development of organic labeling is also instructive. A nontrivial portion of consumers had a preference for organic products, prompting many producers to identify their products as organic.<sup>178</sup> This drew consumers away from

173. See SUE FISHKOFF, *KOSHER NATION* 10–15 (2010); Gerald F. Masoudi, *Kosher Food Regulation and the Religion Clauses of the First Amendment*, 60 U. CHI. L. REV. 667, 667 (1993).

174. See Timothy D. Lytton, *Kosher Certification as a Model of Private Regulation*, 36 REG. 24, 24–25 (2013); see also Benjamin N. Gutman, *Ethical Eating: Applying the Kosher Food Regulatory Regime to Organic Food*, 108 YALE L.J. 2351, 2376 (1999).

175. See Masoudi, *supra* note 173, at 667 (noting that only ten percent of Jews “regularly follow kosher requirements” and yet over 6,000 firms produce kosher products).

176. See BUREAU OF INT’L LABOR AFFAIRS, U.S. DEP’T OF LABOR, *BY THE SWEAT AND TOIL OF CHILDREN* (VOLUME IV): CONSUMER LABELS AND CHILD LABOR 7–9 (1997) [hereinafter *SWEAT AND TOIL*]; Kathryn Kish Sklar, *The Consumers’ White Label Campaign of the National Consumers’ League, 1898–1918*, in *GETTING AND SPENDING: EUROPEAN AND AMERICAN CONSUMER SOCIETIES IN THE TWENTIETH CENTURY* 17, 17–18 (Susan Strasser et al. eds., 1998); Kathryn Kish Sklar, *Two Political Cultures in the Progressive Era: The National Consumers’ League and the American Association for Labor Legislation*, in *U.S. HISTORY AS WOMEN’S HISTORY: NEW FEMINIST ESSAYS* 33, 41 (Linda K. Kerber et al. eds., 1995). For a more general discussion on the National Consumers’ League, see LONDON R.Y. STORRS, *CIVILIZING CAPITALISM: THE NATIONAL CONSUMERS’ LEAGUE, WOMEN’S ACTIVISM, AND LABOR STANDARDS IN THE NEW DEAL ERA* (2000).

177. These promotions also likely contributed to popular support for various labor reforms enacted during this period. See Michele Micheletti, *Consumer Choice as Political Participation*, 105 STATSVEITENSKAPLIG TIDSKRIFT 218, 220 (2002) (noting the White Label campaign was “highly successful as an instrument of labor reform” in the early 1900s); see *SWEAT AND TOIL*, *supra* note 176, at 9 (noting NCL ended the White Label campaign after states began adopting laws with even higher standards for child labor and working conditions).

178. See Ram Bezawada & Koen Pauwels, *What Is Special About Marketing Organic Products? How Organic Assortment, Price, and Promotions Drive Retailer Performance*, 77 J. MARKETING 31, 31 (2012); Gary D. Thompson, *Consumer Demand for Organic Foods: What We Know and What We Need to Know*, 80 AM. J. AGRIC. ECON. 1113, 1113 (1998).

“conventional” products toward those with the desired characteristics, even though certified organic products may have been more expensive.<sup>179</sup> Over time, the organic share of the market grew. Federal agencies facilitated this process not by mandating labels, but by issuing labeling guidelines to ensure that label terms would be commonly understood. The promulgation of such definitions may have actually enhanced the value of organic labels, as it may have buttressed consumer confidence by making such labels more trustworthy and reliable.<sup>180</sup> Federal agencies or private third-party organizations could play a similar role to facilitate voluntary labeling of other product or process characteristics important to consumers, just as they have in the past. There are already a handful of third-party entities offering or promoting various environment-related certification and private labeling schemes.<sup>181</sup>

Some fear that the absence of official labeling requirements or government standards defining what label terms mean will undermine consumer confidence.<sup>182</sup> This is a reasonable concern. If consumers lack confidence in a label and cannot be sure it provides accurate or relevant information, they are unlikely to pay it much heed. This is true whether the label is mandatory or voluntary. As discussed below, the adoption of regulatory definitions and standards by regulatory agencies can address this concern by clarifying what relevant terms mean.<sup>183</sup> Standardizing terminology in this way can give consumers greater confidence in labels and other disclosures without inhibiting market efficiency or consumer choice.

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179. Meike Janssen & Ulrich Hamm, *Product Labelling in the Market for Organic Food: Consumer Preferences and Willingness-to-Pay for Different Certification Logos*, 25 *FOOD QUALITY & PREFERENCE* 9, 16 (2012).

180. Some argue that the adoption of a federal organic product label had negative effects on this portion of the market by encouraging standardization, reducing product differentiation within the organic market, and privileging a definition of what constitutes “organic” that was preferred by larger food companies. See Michelle T. Friedland, *You Call that Organic?--The USDAs Misleading Food Regulations*, 13 *N.Y.U. ENVTL. L.J.* 379 (2005); see also Kimberly Kindy & Lyndsey Layton, *Integrity of Federal 'Organic' Label Questioned*, *WASH. POST* (July 3, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/02/AR2009070203365.html>. Some pro-organic organizations consider USDA certified organic products to be merely “grade B” organic products. See Media Advisory, Organic Consumers Ass’n, “USDA Organic” Is “Grade B” Organic (Oct. 1, 2002), [http://www.organicconsumers.org/old\\_articles/organic/1002\\_organic.php](http://www.organicconsumers.org/old_articles/organic/1002_organic.php). The critiques are policy objections to this form of governmental intervention, however, and do not raise particularly significant First Amendment concerns.

181. See generally Tracey M. Roberts, *The Rise of Rule Four Institutions: Voluntary Standards, Certification and Labeling Systems*, 40 *ECOL. L.Q.* 107 (2013).

182. See Kim Mannemar Sonderskov & Carsten Daugbjerg, *Eco-Labeling, the State and Consumer Confidence* 3, 15 60th Political Studies Association Annual Conference (Mar. 29–Apr. 1, 2010) (“[T]he extent to which eco-labels increase green consumption is highly dependent on their trustworthiness . . . . The [study’s] results suggest that governments who wish to promote green consumerism should engage heavily in eco-labeling. Apparently, consumers are more likely to trust labeling schemes where the state plays an active and visible role.”), <http://orgprints.org/17151/1/17151.pdf>.

183. See *infra* Section VII.B.

The argument that a consumer right to know about particular product or process characteristics is a substantial government interest is ultimately grounded in a presumption that such information will only be available to consumers if the government mandates disclosure. The history of voluntary disclosure in competitive markets strongly suggests otherwise. If consumers truly desire information about the products and services they seek to buy, that information will be available. If they do not, there is only more reason to question whether the government has a substantial interest in disclosure. Again, however, forcing disclosure to protect unwitting consumers from risks or to facilitate independent regulatory goals may be a substantial interest, even if satisfying an asserted right to know is not.

## VI. APPLICATIONS

Most existing labeling and disclosure requirements satisfy the requirements of *Central Hudson*. Of particular relevance to this Article, most existing disclosure requirements imposed under federal law are justified by a substantial state interest, such as the protection of unwitting consumers or the facilitation of a nonspeech-related regulatory program. This is true of most food content regulations and securities disclosures, among other things. Insofar as recent federal disclosure requirements—such as a requirement for graphic warnings of the dangers of smoking on cigarette packs<sup>184</sup> or calorie labeling on menus<sup>185</sup>—raise constitutional issues, it is under the third and fourth prongs of *Central Hudson*, as each is clearly based upon a substantial interest.

As mandatory labeling and disclosure requirements have become more popular, policymakers have proposed a wider range of such policies. Some of these raise more difficult constitutional questions, because it is unclear whether such policies can be justified by a substantial state interest, independent of an alleged consumer right to know. This Article now turns to consider three such examples: (1) labels for products containing or derived from engineered organisms; (2) labels for products containing nanomaterial; and (3) country-of-origin labels.

### A. *Genetically Modified Organism Labeling*

Scientists have developed advanced techniques to genetically modify plants and other organisms. Since the introduction of the first genetically engineered food product in 1994, over 150 genetically engineered crops have been approved for use in the United States, including numerous types of corn, alfalfa, soy, and cotton.<sup>186</sup> Many policymakers and activist organizations argue that consumers have a right to know whether food products contain, or were

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

185. See *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114 (2d Cir. 2009).

186. See COUNCIL FOR AGRIC., SCI. & TECH., *THE POTENTIAL IMPACTS OF MANDATORY LABELING FOR GENETICALLY ENGINEERED FOOD IN THE UNITED STATES* 2–3 (2014); Jorge Fernandez-Cornejo et al., *Genetically Engineered Crops in the United States*, ECON. RES. REP. NO. 162 (2014).

manufactured with, ingredients that were produced with these modern genetic engineering techniques.<sup>187</sup> As of April 2014, over two dozen states had considered legislation to require labeling of GMO or GMO-derived products.<sup>188</sup> While several state-level ballot initiatives failed,<sup>189</sup> a few state legislatures have enacted mandatory labeling requirements.<sup>190</sup> Some of these requirements, however, are not due to take effect unless other states enact equivalent measures.<sup>191</sup>

There is a widespread scientific consensus that modern genetic engineering, in itself, poses no distinct risk to human health.<sup>192</sup> The U.S. National

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187. See, e.g., Carey Gillam, *Consumer Groups Demand GMO Labeling, Question Food Safety*, REUTERS (Mar. 27, 2012), <http://www.reuters.com/article/us-usa-food-idUSBRE82Q10820120327>; Georgina Gustin, *Push to Label Genetically Modified Food Gains Traction*, ST. LOUIS POST-DISP. (Mar. 3, 2012), [http://www.stltoday.com/business/local/push-to-label-genetically-modified-food-gains-traction/article\\_397471e6-625a-11e1-a317-001a4bcf6878.html](http://www.stltoday.com/business/local/push-to-label-genetically-modified-food-gains-traction/article_397471e6-625a-11e1-a317-001a4bcf6878.html); Amy Harmon & Andrew Pollack, *Battle Brewing over Labeling of Genetically Modified Food*, N.Y. TIMES, May 25, 2012, at A1; see also Hemphill & Banerjee, *supra* note 109, at 438; Noah, *Genetic Modification*, *supra* note 137, at 767. For a sampling of organizations and groups calling for mandatory GMO labeling, see *GE Food Labeling*, CTR. FOR FOOD SAFETY, <http://www.centerforfoodsafety.org/issues/976/ge-food-labeling/> (last visited Feb. 21, 2016); *Consumer Labels*, FOOD & WATER WATCH, <http://www.foodandwaterwatch.org/food/consumer-labels/> (last visited Feb. 21, 2016) (activist website urging viewers that consumers have a general right to know that they should "protect"); JUST LABEL IT!, <http://www.justlabelit.org/> (last visited Feb. 21, 2016) (a project of Organic Voices Action Fund); LABEL GMOS, [www.labelgmoss.org](http://www.labelgmoss.org) (last visited Feb. 21, 2016) (a California grassroots campaign that urges legislation to mandate labels on genetically modified foods based on consumers' right to know); VERMONT RIGHT TO KNOW GMOS, <http://www.vtrighttoknowgmoss.org/> (last visited Feb. 21, 2016) (Vermont campaign in support of mandatory GMO labels).

188. See COUNCIL FOR AGRIC., SCI. & TECH., *supra* note 186, at 3.

189. See Andrew Pollack, *After Loss, the Fight to Label Modified Food Continues*, N.Y. TIMES, Nov. 8, 2012, at B4.

190. See *State Labeling Legislation Map*, CTR. FOR FOOD SAFETY, [http://salsa3.salsalabs.com/o/1881/p/salsa/web/common/public/content?content\\_item\\_KEY=13981](http://salsa3.salsalabs.com/o/1881/p/salsa/web/common/public/content?content_item_KEY=13981) (last visited Mar. 5, 2016) (listing states that have passed mandatory labeling legislation).

191. See Ariana Bunjung Cha, *New Twist on the GMO Debate: 'Are They Natural?'*, WASH. POST, Oct. 20, 2013, at A3.

192. As the American Association for the Advancement of Science Board of Directors stated:

The World Health Organization, the American Medical Association, the U.S. National Academy of Sciences, the British Royal Society, and every other respected organization that has examined the evidence has come to the same conclusion: consuming foods containing ingredients derived from [genetically modified] crops is no riskier than consuming the same foods containing ingredients from crop plants modified by conventional plant improvement techniques.

Academy of Sciences, for instance, has repeatedly reaffirmed that genetic engineering presents no unique or distinct hazards from traditional forms of crossbreeding, or even from the introduction of unmodified organisms.<sup>193</sup> The National Institutes of Health<sup>194</sup> and American Medical Association<sup>195</sup> have reached the same conclusion. Decades of research have failed to identify any specific human health risks posed by the use of modern genetic engineering techniques. For this reason, the FDA does not view foods produced with genetically modified ingredients to be materially different from foods containing ingredients produced with conventional techniques.<sup>196</sup>

The broad scientific consensus that genetic engineering, in itself, does not create any unique, or even identifiable, risk for human health means that a mandatory label or disclosure requirement for the use of such techniques cannot be justified on the grounds that it is protecting unwitting consumers from harm. If a GMO ingredient poses a risk to consumers, it is not due to the genetic modification technique. Rather, as the FDA has explained, any risk will be the result of the specific modification made.<sup>197</sup> For this reason, the FDA focuses on the

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STATEMENT], [http://www.aaas.org/sites/default/files/AAAS\\_GM\\_statement.pdf](http://www.aaas.org/sites/default/files/AAAS_GM_statement.pdf). The consensus also extends to animal health. *Id.*

193. See, e.g., COMM. ON IDENTIFYING & ASSESSING UNINTENDED EFFECTS OF GENETICALLY ENGINEERED FOODS ON HUMAN HEALTH, NAT'L ACAD. OF SCIS., SAFETY OF GENETICALLY ENGINEERED FOODS: APPROACHES TO ASSESSING UNINTENDED HEALTH EFFECTS (2004); COMM. ON GENETICALLY MODIFIED PEST-PROTECTED PLANTS, NAT'L RES. COUNCIL, GENETICALLY MODIFIED PEST-PROTECTED PLANTS (2000); COMM. ON SCI. EVALUATION OF THE INTRODUCTION OF GENETICALLY MODIFIED MICROORGANISMS AND PLANTS INTO THE ENV'T, NAT'L RES. COUNCIL, FIELD TESTING GENETICALLY MODIFIED ORGANISMS: FRAMEWORK FOR DECISIONS 14 (1989) (“[N]o conceptual distinction exists between genetic modification of plants and microorganisms by classical methods or by molecular techniques that modify DNA and transfer genes.”); COMM. ON THE INTRODUCTION OF GENETICALLY ENGINEERED ORGANISMS INTO THE ENV'T, NAT'L ACAD. OF SCIS., INTRODUCTION OF RECOMBINANT DNA-ENGINEERED ORGANISMS INTO THE ENVIRONMENT: KEY ISSUES 6 (1987) (“There is no evidence that unique hazards exist either in the use of R-DNA techniques or in the transfer of genes between unrelated organisms.”).

194. See NAT'L INSTS. OF HEALTH, 1992 NATIONAL BIOTECHNOLOGY POLICY BOARD REPORT 2 (1992) (“The risks associated with biotechnology are not unique, and tend to be associated with particular products and their applications, not with the production process or the technology per se.”).

195. See COUNCIL ON SCI. & PUB. HEALTH, AM. MED. ASS'N, LABELING OF BIOENGINEERED FOODS (2012), <http://factsaboutgmos.org/sites/default/files/AMA%20Report.pdf>.

196. See U.S. Food & Drug Admin., Statement of Policy: Foods Derived from New Plant Varieties, 57 Fed. Reg. 22984, 22991 (May 29, 1992). For a legal challenge to this policy statement that was rejected, see *All. for Bio-Integrity v. Shalala*, 116 F. Supp. 2d 166 (D.D.C. 2000).

197. The FDA provides the following example:

[I]f a tomato has had a peanut protein introduced into it and there is insufficient information to demonstrate that the introduced protein could not cause an allergic reaction in a susceptible population, a label declaration would be required to alert consumers who are allergic to peanuts so they could avoid that tomato.



characteristics of specific ingredients—such as the potential to cause an allergic reaction or other effect—rather than on the means with which they were produced.

Given that the use of GMO ingredients, in itself, does not pose any health risk to consumers, mandatory GMO labels could actually “mislead and falsely alarm consumers,” according to the American Association for the Advancement of Science.<sup>198</sup> The existence of a label disclosing GMO content, in itself, suggests that this is a product characteristic that consumers *should* care about. Consequently, such labels are likely to “stigmatize” GMO-containing products.<sup>199</sup>

Even though the use of genetic modification techniques may not pose any identifiable risks to human health, some consumers would prefer to purchase products that were not developed with these technologies. In response, many producers have sought to label their products in order to capitalize on this sentiment. As discussed below, existing FDA rules might make the voluntary disclosure of such information unduly difficult. Nonetheless, many producers have found ways to inform consumers that they do not use GMO ingredients. Chipotle is one prominent example of a company that aggressively promotes its refusal to use GMO ingredients in its food.<sup>200</sup> Consumers who wish to avoid GMOs may also do so by purchasing products that are labeled as “organic.” Under the USDA’s current regulations, only foods that are not made with GMO ingredients may be labeled as organic. Therefore, organic labeling serves as a de facto nationally certified GMO-free label.<sup>201</sup> Some companies are also considering the voluntary labeling of GMO content. Campbell Soup, for example, announced in January 2016 that it would begin to place GMO-content labels on its products.<sup>202</sup>

The first legal battle over GMO labeling involved dairy products. In 1994, Vermont adopted a law mandating disclosure labels for milk and milk products offered for retail sale if the product came from dairy cows that had been injected with recombinant bovine somatotropin (“rBST” or “rBGH”).<sup>203</sup> Bovine somatotropin (“BST”) is a naturally occurring growth hormone that affects the amount of milk dairy cows produce. rBST is produced in a lab through recombinant DNA techniques and increases milk production when injected into cows. According to the FDA, the use of rBST affects the dairy cows, but has no effect on the chemical composition of the milk produced, and raises no human

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Statement of Policy, 57 Fed. Reg. at 22991.

198. See AAAS STATEMENT, *supra* note 192.

199. See Hemphill & Banerjee, *supra* note 109, at 443; Ellen & Bone, *supra* note 142, at 69; see also Noah, *Genetic Modification*, *supra* note 137, at 787.

200. See *supra* note 170 and accompanying text.

201. See Chen, *supra* note 168, at 217.

202. See Stephanie Strom, *Campbell Labels Will Disclose G.M.O. Ingredients*, N.Y. TIMES, Jan. 7, 2016, at B1. In the same announcement, Campbell announced that it would also call for the nationwide imposition of a mandatory GMO-content label.

203. VT. STAT. ANN. tit. 6, § 2754 (1995) (“If rBST has been used in the production of milk or a milk product for retail sale in this state, the retail milk or milk product shall be labeled as such.”).

health or safety concerns.<sup>204</sup> Use of rBST on dairy cows results in no measurable increase in milk BST levels, although it does increase the incidence of mastitis in cows. The FDA even declared that any suggestion that milk from non-rBST-treated cows is better for human consumption would be “false and misleading.”<sup>205</sup> Lacking any definitive scientific basis for claiming the labeling law protected human health or safety, Vermont justified its law on the grounds that the public had a right to know whether given milk products had come from cows treated with rBST. The state argued that Vermont consumers would benefit from knowing which milk products came from cows treated with rBST and would alter their buying habits accordingly.

Dairy manufacturers successfully challenged Vermont’s labeling requirement in federal court.<sup>206</sup> In *International Dairy Foods Association v. Amestoy*, the U.S. Court of Appeals for the Second Circuit found that Vermont’s labeling requirement violated dairy manufacturers’ First Amendment rights. Applying the *Central Hudson* analysis, the Court found that Vermont did not have a substantial interest in compelling dairy manufacturers to adopt mandatory rBST labels.<sup>207</sup> Vermont cited no evidence that milk from rBST-treated cows posed any risk to public health, and did not claim that health or safety concerns motivated adoption of the labeling requirement. Indeed, as the court noted, it was “undisputed that the dairy products derived from herds treated with rBST are indistinguishable from products derived from untreated herds.”<sup>208</sup> Rather, Vermont adopted the standard due to “strong consumer interest and the public’s ‘right to know.’”<sup>209</sup> This, the court held, was insufficient.

The Second Circuit pointedly (and correctly) rejected the argument that consumer interest or an alleged right to know about how a product was made constituted a sufficiently substantial government interest to justify compelling commercial speech.<sup>210</sup> In the court’s words, “consumer curiosity alone is not a strong enough state interest to sustain the compulsion of even an accurate, factual statement.”<sup>211</sup> While the court accepted that some consumers may wish to know which milk products came from rBST-treated or rBST-free cows, in the absence of some health or safety-related concern, this interest was not sufficient to impose a requirement on producers.<sup>212</sup>

As the court noted, there is a virtually infinite array of characteristics about any given product or the process through which it was made that may interest consumers. Thus, if consumer interest alone were sufficient to authorize a

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204. See U.S. Food & Drug Admin., Interim Guidance on the Voluntary Labeling of Milk and Milk Products From Cows That Have Not Been Treated With Recombinant Bovine Somatotropin, 59 Fed. Reg. 6279-04, 6279-80 (Feb. 10, 1994).

205. *Id.* at 6280.

206. *Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67 (2d Cir. 1995).

207. *Id.* at 73-74.

208. *Id.* at 69.

209. *Int’l Dairy Foods Ass’n v. Amestoy*, 898 F. Supp. 246, 249 (D. Vt. 1995).

210. See *Int’l Dairy Foods Ass’n*, 92 F.3d at 73 n.1 (“[M]ere consumer concern is not, in itself, a substantial interest.”).

211. *Id.* at 74.

212. *Id.*

labeling requirement, the court observed, “there is no end to the information that states could require manufacturers to disclose about their production methods.”<sup>213</sup> A consumer interest standard would empower governments to force producers to stigmatize their own products. Yet the court reported that it could find no case in which a federal court had upheld a regulation “requiring a product’s manufacturers to publish the functional equivalent of a warning about a production method that has no discernible impact on a final product.”<sup>214</sup> If the First Amendment freedom to speak includes a “concomitant freedom not to speak publicly,”<sup>215</sup> and if the Amendment’s protection extends to commercial speech, the court found that an undifferentiated consumer interest would not be enough.

In 2014, Vermont enacted another GMO labeling law, leading to another legal challenge.<sup>216</sup> Vermont’s Act 120 requires the “clear and conspicuous” labeling of all food intended for human consumption “produced entirely or in part from genetic engineering.”<sup>217</sup> In enacting this requirement, the Vermont legislature declared that such foods “potentially pose risks to health, safety, agriculture, and the environment,” citing an alleged “lack of consensus regarding the validity of the research and science surrounding the safety of genetically engineered foods.” For this reason, the Vermont legislature declared, a mandatory label would provide consumers with “information they can use to make decisions about what products they would prefer to purchase” and would “prevent inadvertent consumer deception, prevent potential risks to human health, protect religious practices, and protect the environment.”<sup>218</sup>

One question this raises is whether the mere assertion of a substantial state interest, without meaningful support from the relevant scientific research or administrative bodies, should be enough to satisfy *Central Hudson*. While this precise question is beyond the scope of this paper, it should be noted that under any form of heightened scrutiny, it is not sufficient for the government to merely assert an interest, and courts will generally scrutinize the alleged basis for such an interest if it is challenged.

### ***B. Nanotechnology Labeling***

Genetic modification is not the only new technology to prompt calls for mandatory labels. Some analysts and activist groups have also called for the adoption of mandatory labels for products containing nanoscale particles (or “nanoparticles”), nanomaterials, or other forms of nanotechnology.<sup>219</sup>

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213. *Id.*

214. *Id.* at 73.

215. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985) (quoting *Estate of Hemingway v. Random House, Inc.*, 244 N.E.2d 250, 255 (N.Y. 1968)).

216. *See Grocery Mfrs. Ass’n v. Sorrell*, 102 F. Supp. 3d 583 (D. Vt. 2015).

217. VT. STAT. ANN. tit. 9 § 3043 (2016).

218. *See* 2014 Vt. Acts & Resolves No. 120 (codified as amended VT. STAT. ANN. tit. 9 § 3041 (2016)).

219. *See, e.g., Developments in Nanotechnology, Hearing Before the Subcomm. on Commerce, Sci. & Tech.*, 109th Cong. 2 (2006) (Statement of J. Clarence Davies, Woodrow Wilson International Center for Scholars, Washington, D.C.); JENNIFER SASS, NAT. RES. DEF. COUNCIL, NANOTECHNOLOGY’S INVISIBLE THREAT: SMALL SCIENCE, BIG

“Nanotechnology” generally refers to processes and products that contain materials that are 100 nanometers (nm) or smaller.<sup>220</sup> For reference, there are one billion nanometers in a meter. “Nanomaterials” are materials with at least one dimension that is less than 100 nm, and “nanoparticles” have at least two dimensions that are 100 nm or smaller.<sup>221</sup> Nanotechnology is currently used in a range of applications from cosmetics and cleaning products to computer chips and medical procedures.

Calls for nanotechnology content labels are based upon concerns that nanoscale materials may pose unique or distinct risks to human health and the environment.<sup>222</sup> Such concerns are based upon evidence that extremely small particles often exhibit distinct characteristics from their larger counterparts.<sup>223</sup> For example, substances that are typically inert may exhibit highly reactive properties at the nanoscale. These differences make nanotechnology a powerful tool but can also be the source of unique and unanticipated risks.<sup>224</sup> In some cases, the inclusion of nanomaterials may have health or safety consequences.<sup>225</sup> Thus, what makes nanotechnology useful is also what could make it dangerous.

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CONSEQUENCES 9 (2007), <http://www.nrdc.org/health/science/nano/nano.pdf>; Andre Nel et al., *Toxic Potential of Materials at the Nanolevel*, 311 SCI. 622, 622 (2006).

220. See generally *Nan'o-tech-nol'o-gy n.*, 1 NATURE NANOTECHNOLOGY 8–10 (2006). A more formal definition of nanotechnology is “the design characterization, production and application of structures, devices and systems by controlled manipulation of size and shape at the nanometer scale . . . that produces structures, devices and systems with at least one novel or superior characteristic or property.” See Kimberly A. Gray, *Five Myths about Nanotechnology in the Current Public Policy Debate: A Science and Engineering Perspective*, in THE NANOTECHNOLOGY CHALLENGE: CREATING LEGAL INSTITUTIONS FOR UNCERTAIN RISKS 22–23 (David A. Dana ed., 2012).

221. See Gray, *supra* note 220, at 15.

222. For an extended discussion of the relevant legal and policy considerations for the labeling of products produced with or containing nanotechnology, see Jonathan H. Adler, *Labeling the Little Things*, in THE NANOTECHNOLOGY CHALLENGE: CREATING LEGAL INSTITUTIONS FOR UNCERTAIN RISKS 203–44 (David A. Dana ed., 2012).

223. See Gray, *supra* note 220, at 46 (noting that nanoscale materials “develop entirely new properties and behave uniquely relative to the same atoms packaged as bulk materials”).

224. See Albert C. Lin, *Size Matters; Regulating Nanotechnology*, 31 HARV. ENVTL. L. REV. 349, 358 (2007) (observing that what makes nanomaterials useful and attractive to manufacturers—“their small size, chemical composition, surface structure, solubility, shape, and aggregative tendencies”—may also make them more dangerous).

225. See *Guidance for Industry: Safety of Nanomaterials in Cosmetic Products*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/cosmetics/guidanceregulation/guidancedocuments/ucm300886.htm> (last visited Mar. 4, 2016) (“The application of nanotechnology may result in product attributes that differ from those of conventionally-manufactured products, and thus may merit particular examination.”); *Investigation of Potential Toxic Effects of Engineered Nanoparticles and Biologic Microparticles in Blood and Their Biomarker Applications*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/biologicsbloodvaccines/scienceresearch/biologicsresearchareas/ucm127045.htm> (last visited Mar. 4, 2016) (“Several studies, however, are raising safety concerns by showing toxic effects of fullerenes and CNTs. Therefore, one part of our research is focused on determining the mechanism of toxicity in

If mandatory labels for GMO content are constitutionally problematic, as discussed above, does this mean that a nanotechnology labeling requirement would be similarly suspect? Not necessarily. The primary argument against a generic “contains GMOs” label is that, in the absence of evidence of a potential health risk from the use of GMOs, the government lacks a substantial interest in compelling disclosure. As the Second Circuit concluded in *Amestoy*, it is hard to justify such a label without a public-health or safety justification.<sup>226</sup>

Whereas the FDA has concluded that milk from rBST-treated cows was no different from other milk, products containing nanoscale materials are physically different from other products. Although nanosilver and silver are both made from silver atoms, they are not the same.<sup>227</sup> Whereas the treatment of cows with rBST or the use of GMO wheat in a loaf of bread may not have any effect on the unwitting consumer, the inclusion of nanomaterials could change the properties of a product and the risks it presents. Put another way, although there is little evidence that the inclusion of GMOs has any effect on the safety of the resulting product, the same *cannot* be said of nanomaterials. In some cases there is evidence that nanomaterials could pose direct health or safety risks.<sup>228</sup> In others, there is no way to know—at least not yet. Either way, there are reasons to suspect that the use of nanomaterials could, in itself, pose different risks to consumers than the use of conventional materials, and such concerns could provide the basis for a substantial governmental interest in informing consumers about those potential risks.

Where there is scientific evidence that the inclusion of nanoscale materials could pose a health or safety risk, it should be relatively easy to impose a product or material-specific labeling requirement without raising First Amendment problems. Such labels would differ little from the myriad labels that already exist concerning potential allergens or other product contents that might harm the uninformed consumer. There is nothing special about a new technology that shields it from government disclosure requirements if the government can identify some health risk or other substantial interest in compelling disclosure.

This does not mean that any and all potential nanomaterial content labels would be constitutional. A requirement that manufacturers disclose specific types of nanoparticles believed to pose a potential risk would be easier to defend than a

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these studies, by evaluating whether these nanomaterials are toxic to blood vessels and blood cells.”).

226. See Nat’l Elec. Mfrs. Ass’n v. Sorrell, 272 F.3d 104, 115 n.6 (2001) (noting the *Amestoy* decision “was expressly limited to cases in which a state disclosure requirement is supported by no interest other than the gratification of ‘consumer curiosity’”).

227. See Swiss Fed. Labs. for Materials Sci. & Tech. (EMPA), *Nanosilver: A New Name – Well-Known Effects*, SCIENCEDAILY (Jan. 31, 2011), <http://www.sciencedaily.com/releases/2011/01/110131133005.htm> (“Because of their minute size[,] nanoparticles have different properties than those of larger particles of the same material.”).

228. See OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP’T OF LABOR, *Nanotechnology: Health Effects and Workplace Assessments and Controls*, [http://www.osha.gov/dsg/nanotechnology/nanotech\\_healtheffects.html](http://www.osha.gov/dsg/nanotechnology/nanotech_healtheffects.html) (last visited Mar. 5, 2016).

generic “contains nanoscale particles” label applied across a wide range of products, without regard for the types of nanomaterial content.<sup>229</sup> Where health and safety risks are hypothesized, but not demonstrated, a labeling rule might be more vulnerable to challenge, but still supportable given evidence that the presence of nanomaterials can itself be the source of risks or consequences to which consumers were not previously exposed. Such a “precautionary” approach to disclosure—requiring disclosure on the basis of potential but unverified risks—may be justified where there is scientific evidence that certain types of risks could be anticipated, even if they have yet to be established. The use of nanomaterials in consumer products would seem to present such a case.

### C. Country-of-Origin Labeling

For over a century, the federal government has imposed country-of-origin labeling (“COOL”) requirements on various imported products. These are among the oldest disclosure requirements in federal law. Some states also impose COOL requirements of their own.<sup>230</sup> As COOL requirements have become more stringent, costly, and explicit, however, they have provoked legal challenges. In *American Meat Institute v. U.S. Department of Agriculture*, the U.S. Court of Appeals for the D.C. Circuit, sitting *en banc*, split on the constitutionality of COOL requirements for meat.<sup>231</sup> Although the *en banc* court upheld the rules against a First Amendment challenge, the judges split on the rationale, and two judges dissented.<sup>232</sup>

The first COOL requirements date from the 1890s.<sup>233</sup> Originally imposed in the Tariff Acts of 1890, 1894, and 1897, COOL requirements were adopted as part of the nation’s customs and tariff laws.<sup>234</sup> Identifying a given product’s country of origin helped ensure that it was subject to the proper tariffs or

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229. See Lin, *supra* note 224, at 395; see also Adler, *supra* note 222, at 207.

230. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-03-780, COUNTRY-OF-ORIGIN LABELING: OPPORTUNITIES FOR USDA AND INDUSTRY TO IMPLEMENT CHALLENGING ASPECTS OF THE NEW LAW 44 (2003).

231. See *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 746 F.3d 1065 (D.C. Cir. 2014), *aff’d en banc* 760 F.3d 18 (D.C. Cir. 2014).

232. *Am. Meat Inst.*, 760 F.3d at 35–54. Judge Kavanaugh concurred in the judgment. Judges Henderson and Brown dissented. Subsequent to this decision, a World Trade Organization compliance panel ruled that the COOL requirements were discriminatory. See Appellate Body Report, *United States—Certain Country of Origin Labeling (COOL) Requirements*, WTO Doc. WT/DS384/RW, WT/DS386/RW (adopted May 18, 2015); Panel Report, *United States—Certain Country of Origin Labeling (COOL) Requirements*, WTO Doc. WT/DS384/RW, WT/DS386/RW (adopted Oct. 20, 2014); see also *Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518, 520 n.6 (D.C. Cir. 2015) (noting WTO ruling and potential sanctions). In response, Congress revised the relevant statutory requirements and the COOL requirements for beef, and pork cuts were removed. See *Removal of Mandatory Country of Origin Labeling Requirements for Beef and Pork Muscle Cuts, Ground Beef, and Ground Pork*, 81 Fed. Reg. 10755 (Mar. 2, 2016) (to be codified at 7 C.F.R. pt. 65).

233. Peter Chang, *Country of Origin Labeling: History and Public Choice Theory*, 64 *FOOD & DRUG L.J.* 693, 693–94 (2009).

234. *Id.* at 694–95.

preferential treatment when imported. COOL requirements also helped reinforce the federal government's preference for domestically produced products.<sup>235</sup> By identifying the source country of imported products, COOL could encourage consumers to purchase domestic alternatives. The purpose of such requirements was "to mark the good so that, at the time of purchase, the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will."<sup>236</sup>

Although one purpose of COOL requirements was to influence consumer behavior, they did not always require that all products bear country-of-origin information at the point of sale. Rather, they required that such markings be placed upon the containers in which goods were imported.<sup>237</sup> The early COOL laws also gave the Secretary of the Treasury wide discretion to exempt products from the requirements.<sup>238</sup>

In the 1970s, the U.S. Department of Agriculture ("USDA") began to impose COOL requirements on imported meat and poultry.<sup>239</sup> Just as early COOL requirements were integrated into tariff laws, they were also integrated into regulations governing food safety requirements and helped ensure that imported meat and poultry satisfied relevant federal laws. They only applied to meat and poultry products as imported. That is, meat or poultry imported into the United States and subsequently processed before retail sale would not have to bear a label specifying country-of-origin.<sup>240</sup> Consequently, these COOL requirements facilitated the enforcement of other federal regulations and played "a relatively minor role in the delivery of information to the consumer."<sup>241</sup>

Domestic meat producers pushed for more stringent COOL requirements in response to an increase in meat imports in the 1980s and 1990s.<sup>242</sup> Interestingly, the USDA was cool to the proposed COOL requirements.<sup>243</sup> Nonetheless, such requirements were enacted as part of the 2002 Farm Bill and Food, Conservation, and Energy Act of 2008. Unlike the trade law COOL requirements, the provisions adopted in 2008 applied to retailers of covered commodities—including meat, fish, peanuts, and produce—and required COOL "at the final point of sale . . . to consumers."<sup>244</sup> Whereas the trade law COOL requirements arguably facilitated the enforcement and implementation of trade regulations and tariffs, including

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235. See Chang, *supra* note 233, at 695 ("COOL, at least in its historical form (and perhaps even today), is better understood as one in an array of disparate treatment measures carried out by the U.S. government.").

236. *Id.* at 697 (quoting *United States v. Friedlaender & Co, Inc.*, 27 C.C.P.A. 297, 302 (C.C.P.A. 1940)).

237. This is still the case. See 19 U.S.C. § 1304 (2012).

238. See Chang, *supra* note 233, at 697.

239. See 9 C.F.R. § 327.14 (1970).

240. Chang, *supra* note 233, at 699.

241. *Id.* ("COOL in an inspection regime thus implicates a considerably different purpose than in a consumer-oriented regime.").

242. *Id.* at 699–700.

243. *Id.* at 700. (explaining that the USDA raised concerns about the cost to implement, comply with, and enforce the requirements).

244. 7 U.S.C. § 1638 (2012).

country-of-origin requirements, the USDA COOL requirements were focused on informing consumers of the countries from which their foods were imported.

One provision of the 2008 COOL statute obligated retailers to provide consumers with country-of-origin information for meat based upon where the animal was born, raised, and slaughtered.<sup>245</sup> USDA regulations implementing this provision promulgated in 2013 required retailers to specify the country-of-origin for each step in production.<sup>246</sup> That is, point-of-sale disclosures would have to identify the country or countries in which the meat in question was born, raised, and slaughtered.<sup>247</sup> Meat processors objected to the rule, raising First Amendment objections. The U.S. Court of Appeals for the D.C. Circuit ultimately rejected their claims<sup>248</sup> (although the requirements were subsequently lifted after they were challenged before the World Trade Organization).<sup>249</sup>

Insofar as the USDA COOL requirements were intended to merely inform otherwise unaware consumers about the geographic origin of meat products, and perhaps stigmatize those products from foreign countries, they might seem to face First Amendment problems. Yet, given the history of COOL requirements of one sort or another, it might seem odd if such labels failed to survive First Amendment scrutiny.<sup>250</sup> As with many other proposed labeling or disclosure requirements, COOL must serve a substantial state interest. The question is whether they serve an interest beyond an asserted consumer right to know. If the only purpose of a COOL requirement is to satisfy consumer curiosity or inform consumers that might otherwise have had little concern about the national origin of meat products, it should face constitutional difficulty.

In challenging the constitutionality of the COOL requirements, the American Meat Institute charged that there was no basis for such requirements other than satisfying “consumers’ idle curiosity” or, worse, stigmatizing foreign meat products.<sup>251</sup> The U.S. Court of Appeals for the D.C. Circuit, sitting *en banc*,

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245. *Id.* § 1638a.

246. *See* U.S. Dep’t of Agric., Mandatory Country of Origin Labeling, 78 Fed. Reg. 31,367-01 (May 24, 2013). These regulations were adopted, in part, as a response to a World Trade Organization Appellate Body ruling against prior regulations adopted by USDA to implement the 2008 Act. *See* APPELLATE BODY REPORT, WORLD TRADE ORG., UNITED STATES—CERTAIN COUNTRY OF ORIGIN LABELING (COOL) REQUIREMENTS (June 29, 2012).

247. One consequence of this rule is that it effectively required meat packers to make changes to some production processes, such as “commingling” in which some meat products, such as ground beef, could contain meat from multiple animals that may have come from more than one country. *See* *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 746 F.3d 1065, 1068–70 (D.C. Cir. 2014). The added costs resulting from this requirement are likely what caused the American Meat Institute, which represents meat processors, to file suit against the rule. As of 2015, the American Meat Institute is now the “North American Meat Institute.” *See* *North American Meat Institute*, NAMI, <http://www.meatinstitute.org> (last visited Mar. 4, 2016).

248. *See* *Am. Meat Inst.*, 760 F.3d at 27.

249. *See* *infra* note 233.

250. *See id.* at 30 (Kavanaugh, J., concurring in the judgment) (noting that for many, the question whether COOL requirements are permissible “probably answers itself”).

251. *Id.* at 23.



disagreed, concluding that “several aspects of the government’s interest in country-of-origin-labeling for food combine to make the interest substantial,” including the “context and long history of country-of-origin disclosures,” “demonstrated consumer interest in such labels for food products,” and “the individual health concerns and market impacts that can arise in the event of a food-borne illness outbreak.”<sup>252</sup>

Reliance upon purported consumer interest in knowing about the country of origin of given products, without more, would be insufficient to justify such labels. Members of Congress appealed to this interest in urging the imposition of COOL requirements so that consumers could make “informed choices.”<sup>253</sup> Yet as discussed above, such a claim can be made about any potential labeling or disclosure requirement.<sup>254</sup> For its part, the USDA vacillated on its justification and, perhaps tellingly, never claimed that there was a market failure preventing the disclosure of country-of-origin information sought by consumers.<sup>255</sup> As some products would not be labeled absent the federal mandate, this is likely because there is little evidence that consumers are particularly interested in such information, and little evidence that COOL labeling has a significant effect on consumer behavior.<sup>256</sup>

Of those interests identified by the *en banc* D.C. Circuit, the “historical pedigree” of COOL requirements would seem to be the most significant, particularly given the longstanding use of such requirements as a component of trade policy.<sup>257</sup> As the Supreme Court has held, “a universal and long-established tradition” of imposing particular requirements may create “a strong presumption” that such measures are constitutional, even under the First Amendment.<sup>258</sup> If the

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252. *Id.*

253. *Id.* at 24.

254. *See supra* Part IV; *see also Am. Meat Inst.*, 760 F.3d at 31–32 (Kavanaugh, J., concurring) (“[I]t is plainly not enough for the Government to say simply that it has a substantial interest in giving consumers information. After all, that would be true of any and all disclosure requirements.”).

255. As observers noted, the USDA had quite a difficult time identifying the precise interests that would justify the COOL requirements. *See* Rebecca Tushnet, *COOL Story: Country of Origin Labeling and the First Amendment*, 70 *FOOD & DRUG L.J.* 25, 35 (2015) [hereinafter Tushnet, *COOL Story*] (“[T]he government’s litigation position was so contorted as to be unbelievable.”).

256. *See* Mykel R. Taylor & Glynn T. Tonsor, *Revealed Demand for Country-of-Origin Labeling of Meat in the United States*, 38 *J. AGRIC. & RES. ECON.* 235, 245 (2013); *see also* Tushnet, *COOL Story*, *supra* note 255, at 33 (“[T]he evidence that mandatory cool affects purchasees is not strong.”).

257. *See Am. Meat Inst.*, 760 F.3d at 24 (noting “the ‘time-tested consensus’ that consumers want to know the geographical origin of potential purchases”); Tushnet, *COOL Story*, *supra* note 255, at 25 (“COOL mandates’ extensive historical pedigree, dating back to 1890, took them out of the ‘idle curiosity’ category.”). In reaching this conclusion, the court relied upon *Burson v. Freeman*, in which a divided Supreme Court held that “long history, a substantial consensus, and simple common sense” were sufficient interests to justify a ban on electioneering near polling places. 504 U.S. 191, 211 (1992).

258. *See* *Republican Party of Minn. v. White*, 536 U.S. 765, 785 (2002); *see also Am. Meat Inst.*, 760 F.3d at 31 (Kavanaugh, J., concurring) (internal citations omitted).

Court has been willing to cite such a presumption to justify restrictions subject to strict scrutiny, it would seem to satisfy the lesser scrutiny of *Central Hudson*. Still, tradition and longstanding government practice are generally not enough, by themselves, to justify restrictions upon speech.

Insofar as a COOL requirement facilitates the implementation and enforcement of relevant trade rules and restrictions—and is thus “fundamentally economic policy”<sup>259</sup>—it would seem they readily satisfy *Central Hudson*. As noted earlier, the Supreme Court upheld compelled contributions to an agricultural promotion program in *Glickman* because the requirement was part of a larger regulatory scheme that had purposes beyond the regulation or control of commercial speech.<sup>260</sup> Facilitating a regulatory program in this way is a substantial interest under *Central Hudson*. This is likely the case even if the purpose of the requirement is to discourage the purchase of foreign goods solely because they are foreign. While the economic case against trade restrictions or protectionist measures may be quite strong as an economic matter, the federal government has near-plenary authority to restrict the importation of goods from overseas and it has long been recognized that the federal government has an interest in supporting and protecting domestic industry.<sup>261</sup>

## VII. ALTERNATIVES TO COMPELLED COMMERCIAL SPEECH

Subjecting governmental requirements that producers and sellers disclose information about their products and services to the intermediate scrutiny of *Central Hudson* is unlikely to prevent agencies and regulators from safeguarding public health or market efficiency. *Central Hudson* merely requires that compelled commercial speech be justified by a substantial government interest. Protecting unwitting consumers from potential harm and curing potentially misleading speech both satisfy this requirement. Moreover, as discussed above, dynamic markets do a very good (although admittedly not perfect) job at encouraging the disclosure of information that consumers consider to be relevant to their purchasing decisions.<sup>262</sup> Even if one takes a less sanguine view of market dynamics than that presented in Part V, governments retain ample means to ensure that consumers obtain adequate information about the products and services they buy and are protected from fraud and unscrupulous corporate behavior.

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259. See Tushnet, *COOL Story*, *supra* note 255, at 25 (“Mandatory COOL is fundamentally economic policy.”).

260. See *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997) (upholding compelled assessments on fruit tree growers to support advertising as part of larger regulatory marketing scheme); *cf.* *United States v. United Foods*, 533 U.S. 405 (2000) (invalidating compelled assessments imposed independent of broader regulatory scheme).

261. Put another way, free trade may be good policy, but it is not constitutionally required. Or, to paraphrase Justice Kennedy’s opinion in *Sorrell*, the Founders enacted a First Amendment—they did not enact Herbert Spencer’s *Social Statics*. See *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2665 (2011) (“The Constitution ‘does not enact Mr. Herbert Spencer’s *Social Statics*.’ . . . It does enact the First Amendment.”) (citation omitted).

262. See *supra* Part VI.

Insofar as policymakers are concerned that given markets do not generate sufficient disclosure or adequately highlight relevant characteristics about products and services, there are steps, short of compelling commercial speech, that can be taken to address such concerns. First, policymakers can identify and eliminate existing market interventions that hamper the free flow of relevant information in product and service markets; they can seek to have government “first, do no harm.”<sup>263</sup> Second, as already noted, government agencies can promulgate regulatory definitions of vague or ambiguous terms so as to reduce consumer confusion and prevent potentially misleading product claims. Third, if these first two steps are insufficient, the government retains the ability to engage in government speech to inform consumers about relevant product and service characteristics, and to encourage or influence consumer behavior. Each of these is discussed briefly.

#### A. *First Do No Harm*

In many contexts, the government’s best first step is to remove or reduce barriers to greater private provision of information within the marketplace. Not all information is equally valuable and one of the most important questions to answer is which information is most important to which consumers. A relatively free and unobstructed marketplace facilitates the discovery of this knowledge and encourages producers to respond to concerns. Restraints on information disclosure, on the other hand, inhibit competition, in addition to limiting consumer choice.<sup>264</sup> When various government agencies discourage firms from making process-related or other normative claims about their products, it may inhibit welfare-maximizing disclosures. The same principles that constrain the imposition of mandatory product labels also limit government restrictions on voluntary labeling efforts.

This point is illustrated by *International Dairy Foods Association v. Boggs* in which the U.S. Court of Appeals for the Sixth Circuit struck down state regulations that inhibited the ability of dairy processors to distinguish their products from those of their competitors through voluntary disclosures.<sup>265</sup> In *Boggs*, the Sixth Circuit struck down regulations adopted by the state of Ohio barring dairy processors from labeling milk as “rbST-Free,” but upheld the state’s ability to require disclaimers for some rbST-related product claims designed to prevent consumer confusion, subject to First Amendment constraints.<sup>266</sup> Although the FDA does not believe there is any material difference between milk produced from cows treated with rbST and that from nontreated cows,<sup>267</sup> some producers and consumers are not convinced. Whether due to precautionary concerns about the potential of as-yet-undetected risks or other reasons, such as a concern for animal welfare,<sup>268</sup> some consumers prefer to purchase milk produced by cows that

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263. HIPPOCRATES, *THE HISTORY OF EPIDEMICS IN SEVEN BOOKS* 10 (Samuel Farr trans., 1780).

264. See Beales et al., *supra* note 106, at 514.

265. 622 F.3d 628 (6th Cir. 2010).

266. *Id.* at 650.

267. See *supra* notes 201–02.

268. There is a higher rate of infection in cows treated with rbST due to the increased milk production resulting from such treatment. See *Recombinant Bovine Growth*

are not treated with rbST.<sup>269</sup> In response, some producers (including members of the Organic Trade Association) sought to label their milk products as “rbST-free” or to otherwise indicate that their milk did not come from rbST-treated cows.<sup>270</sup>

Conventional dairy producers were not enamored with the new “rbST-free” labels. Consequently, the Ohio Department of Agriculture adopted rules governing the voluntary labeling of milk products. These rules barred the use of “rbST-free” or equivalent composition claims on milk labels. In addition, the rules required that any production claims about milk, such as “this milk is from cows not treated with rbST,” be accompanied with a prominent disclaimer noting that the FDA has determined that there is no significant difference between milk from cows administered rbST and those that were not.<sup>271</sup> The rules were influenced by, and largely followed, the 1994 FDA guidance on milk labeling.<sup>272</sup>

The state defended its rules as reasonable measures to prevent false and misleading product claims about milk. The Sixth Circuit disagreed, concluding the ban on rbST-related composition claims was more extensive than necessary to serve the state’s interest in preventing false or misleading speech.<sup>273</sup> The court concluded that there was a sufficient difference in milk from rbST-treated and nontreated cows to reject the state’s claim that an “rbST-free” label is inherently misleading, and held that any potential consumer confusion could be alleviated by accompanying the claim with an appropriate disclaimer.<sup>274</sup> In short, any problem with the label was better cured with additional speech than with a limitation on speech. The court also concluded that the mandatory disclaimer for production claims was reasonably related to the state’s interest in preventing false or misleading claims, but that some of the specific requirements—e.g., that the disclaimer appear in the same label panel—were more extensive than necessary.

The Sixth Circuit’s decision is entirely consistent with *Amestoy* and the analysis here.<sup>275</sup> Both *Boggs* and *Amestoy* affirm that product labels receive First Amendment protection, and that the state’s ability to control the content of such labels is limited. Consumers may or may not prefer milk from cows that were administered rbST, and producers should be free to use their labels to identify their products as potentially desirable to consumers with particular preferences, but should not be forced to do so without a more compelling justification than simple consumer preference. The government’s role is to ensure that whatever

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*Hormone*, AM. CANCER SOC’Y, <http://www.cancer.org/cancer/cancercauses/othercarcinogens/athome/recombinant-bovine-growth-hormone> (last visited Mar. 4, 2016).

269. In some cases, this preference may be based on concerns for animal welfare.

*See id.*

270. *See Int’l Dairy Foods Ass’n*, 622 F.3d at 633.

271. *Id.* at 634.

272. *See* U.S. Food & Drug Admin., Interim Guidance on the Voluntary Labeling of Milk and Milk Products From Cows That Have Not Been Treated With Recombinant Bovine Somatotropin, 59 Fed. Reg. 28 (Feb. 10, 1994), <http://www.gpo.gov/fdsys/pkg/FR-1994-02-10/html/94-3214.htm>.

273. *Int’l Dairy Foods Ass’n*, 622 F.3d at 639–40.

274. *Id.* at 639.

275. *See Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996).

information is disclosed is truthful and not misleading, not to mandate disclosure of product characteristics important to some consumers but not others.

*Boggs* also illustrates that labeling mandates are not always necessary for consumers to obtain desired information about how given food products are produced. Just because a government agency does not mandate disclosure of a particular fact—such as whether milk came from rbST-treated cows or a fish filet came from an AquAdvantage salmon—does not mean the information will not be disclosed. In a competitive market, producers have every incentive to differentiate their products in accordance with consumer preferences. And insofar as some consumers prefer a particular type of milk or salmon, producers of products with the relevant characteristics will inform consumers of these facts. So long as the failure to disclose a product characteristic will not cause harm to the uninformed consumer, the government should stay its hand.

### ***B. Government Standards***

Limiting the government's ability to compel the disclosure of factually true information about products and services does not bar the government from setting standards or otherwise intervening in the commercial marketplace to ensure that consumers understand the content of marketplace messages. One way for the government to do this is to issue rules clarifying the meaning of potentially vague or ambiguous terms that may be used to describe products.<sup>276</sup> Providing clear, fixed standards for potentially contested terms makes it easier for consumers to understand what is, and is not, being communicated by product labels and commercial disclosures, thereby reducing the likelihood that consumers are misled or deceived.<sup>277</sup>

Federal agencies have already promulgated regulations defining what it means for a product to contain or be "free" of particular ingredients, or what it means for something to be "fresh," as opposed to frozen.<sup>278</sup> The government can also set standards for voluntary labels or disclosures, as the government has with organic labeling.<sup>279</sup> Voluntary standards enable consumers to be sure that products that have particular marks or disclosures meet a given standard, but do not compel speech or otherwise raise First Amendment concerns. In such instances, the government is not compelling speech. Rather, it is ensuring that commercial speech about applicable products and services is not misleading.

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276. See *supra* note 181 and accompanying text; see also Tushnet, *It Depends*, *supra* note 94, at 238–48 (discussing government standard setting for the use of terms and labels).

277. See Tushnet, *It Depends*, *supra* note 94, at 249; see also Justin Hughes, *Champagne, Feta, and Bourbon: The Spirited Debate about Geographical Indications*, 58 HASTINGS L.J. 299, 336–37 (2006).

278. See, e.g., FOOD SAFETY & INSPECTION SERV., U.S. DEP'T OF AGRIC., *Meat and Poultry Labeling Terms*, <http://www.fsis.usda.gov/wps/portal/food-safety-education/get-answers/food-safety-fact-sheets/food-labeling/meat-and-poultry-labeling-terms/meat-and-poultry-labeling-terms> (last visited Mar. 5, 2016).

279. See *supra* notes 174–79 and accompanying text.

In any given context, there may be substantial room to debate whether it is advisable to adopt a set of rules clarifying and defining the meaning of specific terms or phrases as a policy matter. One potential downside of adopting clarifying rules is that such requirements could lock a definition in place, and discourage more dynamic competition in regard to the relevant product characteristics. Some have raised concerns that this has been the result of federal standards for “organic” foods, which were set at a level stringent enough to satisfy some producers, but not others, and constrained the broader environmental and ethical debate about how food should or should not be produced.<sup>280</sup> So long as any government regulatory standard leaves ample room for firms to identify their products and communicate with consumers, such regulations should not raise serious First Amendment concerns.

### *C. Government Speech*

Though the First Amendment precludes basing mandatory labeling requirements on consumer curiosity or the desire of a particular interest group to force disclosure about product or process characteristics, it does not preclude all government efforts to facilitate the disclosure of information that consumers may find valuable or interesting. As the Court noted in *Sorrell v. IMS Health, Inc.*, if the state disagrees with the messages or conduct of private firms, “the State can express that view through its own speech.”<sup>281</sup> The government must be able to point to a substantial state interest before compelling commercial speech—and may need to identify an even greater interest before compelling speech on some moral or political questions—but the government does not face the same burden when requiring producers or sellers to disclose information to the government as part of an otherwise acceptable regulatory program.

The burden of being forced to tell consumers how a product was made at the point of sale is wholly different than that of providing the government with general information about production processes, safety measures, environmental impacts, and the like. The latter disclosures do not implicate the same First Amendment interests, because they do not infringe upon a producer’s ability to define its own message or reorient the flow of information concurrent with an economic transaction. Government disclosure of this same information, such as on a government website, is government speech, and is similarly not subject to equivalent constitutional constraints.<sup>282</sup>

The Supreme Court has made explicitly clear that the government may give voice to messages and communicate information when the government could not compel private parties to carry the same message. The First Amendment is not implicated where “the government sets the overall message to be communicated and approves every word that is disseminated,” even if the costs of such speech are

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280. See Friedland, *supra* note 180.

281. 131 S. Ct. 2653, 2671 (2011).

282. Government disclosure of information collected pursuant to the implementation of various regulatory programs may implicate other interests, such as the protection of intellectual property. To the extent such interests are implicated, they raise different questions than compelling commercial speech.

disproportionately borne by particular groups.<sup>283</sup> While, under *United Foods*, producers may have a First Amendment right against being compelled to fund a private commercial message with which they disagree, under *Johanns* they have no such right against being required to fund the government's dissemination of the same message.<sup>284</sup> Under *Johanns*, there is no "First Amendment right not to fund government speech."<sup>285</sup>

Because governments may require companies to report information to regulatory agencies and because the disclosure of such information by the government does not implicate protected First Amendment interests, informational programs such as the Toxics Release Inventory do not raise First Amendment concerns. Under the Emergency Planning and Community Right-to-Know Act,<sup>286</sup> companies are required to report on the release or transfer of certain chemicals to government officials. This information is compiled by the U.S. Environmental Protection Agency and made available to the public in an online database.<sup>287</sup> Information-disclosure programs can serve many of the same purposes as labeling or other programs, without compelling commercial speech. The public disclosure of this information provides information to consumers and local communities and gives companies an incentive to reduce their use and release of covered chemicals so that they have less to report.<sup>288</sup> Yet the information is disclosed to the public by the government. Individual companies are not required to incorporate these disclosures into their communications with their customers.

Potentially difficult First Amendment issues are raised, however, if the government seeks to make a private party carry the government's message, such as through a government-mandated label. Requiring a private company to use its product as a de facto "billboard" for the government's message may not constitute compelled commercial speech, but it does implicate First Amendment interests.<sup>289</sup> The motto on a license plate may be government speech—the license plate belongs to the state, and not the owner of the vehicle—but the Supreme Court nonetheless found that the First Amendment protected a car owner's desire to cover over the state's message.<sup>290</sup> For this reason, declaring mandatory labels to be government

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283. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 562 (2005).

284. *Id.* at 550; see also Robert Post, *Compelled Subsidization of Speech: Johannis v. Livestock Marketing Association*, 2005 SUP. CT. REV. 195, 200 [hereinafter Post, *Compelled Subsidization*].

285. *Johanns*, 544 U.S. at 562.

286. 42 U.S.C. §§ 11001–11050 (2012).

287. See *Toxics Release Inventory (TRI) Resources*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/tri/tridata/index.html> (last visited Mar. 4, 2016).

288. Whether a reduction in "releases" as defined for purposes of TRI improves protection of public health or the environment is a separate question. As the EPA notes, release data is not the same as exposure data. The volume of substances released does not necessarily correlate with the magnitude of risk to the public. See U.S. ENVTL. PROT. AGENCY, *FACTORS TO CONSIDER WHEN USING TOXIC RELEASE INVENTORY DATA* (2015), [http://www.epa.gov/sites/production/files/2015-06/documents/factors\\_to\\_consider\\_6.15.15\\_final.pdf](http://www.epa.gov/sites/production/files/2015-06/documents/factors_to_consider_6.15.15_final.pdf).

289. See Post, *Compelled Subsidization*, *supra* note 284, at 209–10.

290. *Wooley v. Maynard*, 430 U.S. 705 (1977).

speech, and not the compelled commercial speech of the producer or seller, does not eliminate First Amendment concerns.<sup>291</sup>

### CONCLUSION

Consumers may want to know all sorts of things about how products are made, or who made them, but we typically let the market provide such information. Some consumers care about whether their clothes were made by unionized workers or poor children in developing nations. Some want to know whether their food is organic, kosher, or produced humanely. Still others may care whether a company's executives support particular politicians or specific policies.<sup>292</sup> In all such cases, so long as there is no material difference in the product that could adversely affect the consumer, we leave the disclosure to the private marketplace.

Protecting compelled commercial speech as commercial speech under *Central Hudson* does not pose a threat to the free flow of information in the marketplace. To the contrary, constraining undue government interference in the marketplace ensures the broadest space for the discovery and disclosure of information that consumers are most concerned about, while also ensuring that the government retains the ability to protect consumers from unscrupulous producers and sellers.

The analysis contained here has focused on the threshold question of what may justify government policies that compel commercial speech. Other questions remain, including determining when particular disclosures are unduly burdensome or disproportionate to the government's interest, as well as determining the precise contours of commercial speech, as opposed to political speech or professional speech—the latter of which may be subject to extensive government regulation.<sup>293</sup>

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291. Insofar as disclosure labels are characterized as government speech, they could raise interesting takings issues as well. There is only a limited amount of space on a product package, and requiring the package to carry the government's message, in a particular format covering a specified amount of space, could be seen as a taking of private property subject to the Fifth Amendment, as the government warning would physically occupy a portion of the product package or label. This would certainly be the case if the government required a private landowner to erect a billboard displaying a government-dictated message. It is not immediately clear why the same principle would not also apply to a product package. *Cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982) (holding that the placement of crossover cable wires on five-story apartment building constitutes a "taking").

292. See, e.g., Kevin Sack, *A Whole Foods Squabble*, N.Y. TIMES (Aug. 23, 2009), <http://query.nytimes.com/gst/fullpage.html?res=9902EEDD123FF930A1575BC0A96F9C8B63> (discussing boycott of Whole Foods due to comments of CEO John Mackey about health care reform); Stephen Moore, Commentary, *The Conscience of a Capitalist*, WALL ST. J. (Oct. 3, 2009, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748704471504574447114058870676> (Whole Foods CEO John Mackey responds to backlash over his op-ed about the Affordable Care Act).

293. See generally ROBERT POST, *DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* (2012) (discussing the First



These questions, and many others, have been highlighted by recent controversies over “conflict mineral” disclosures<sup>294</sup> and compelled speech in the context of abortion and family-planning services.<sup>295</sup> Ensuring that compelled commercial speech does not escape meaningful constitutional scrutiny reduces the risk that government may seek to evade First Amendment protections through clever categorization of communicative messages.

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Amendment’s protection of a marketplace of ideas and the importance of expert knowledge).

294. See Nat’l Ass’n of Mfrs. v. SEC, 800 F.3d 518 (D.C. Cir. 2015).

295. See B. Jessie Hill, *Casey Meets the Crisis Pregnancy Centers*, 43 J.L. MED. & ETHICS 59 (2015).