

THERE IS NO CONSUMER ‘RIGHT TO KNOW’

Mandatory labels for GMO foods are unscientific, unnecessary, and unconstitutional.

BY JONATHAN H. ADLER

In late July, President Obama quietly signed a new law mandating product labels for foods containing ingredients produced with modern genetic engineering techniques—that is, “genetically modified organisms” (GMOs). Under the new law, the U.S. Department of Agriculture must develop standards for product symbols or electronic product codes that disclose the presence of GMO ingredients in foods.

Some consumer and environmental groups sought mandatory GMO labels because they oppose and wish to stigmatize GMO-containing foods. Industry groups recognized that special interest pressure would result in some sort of labeling requirement, so they pushed for relatively lax federal standards to combat more stringent requirements adopted at the state level. Vermont, for example, enacted a GMO labeling law in 2014 that requires the “clear and conspicuous” labeling of all food intended for human consumption “produced entirely or in part from genetic engineering.” Such state requirements are largely preempted by the new federal law. Moreover, larger food producers expect to have significant influence on the implementing regulations adopted by the Department of Agriculture.

Although supported by portions of the food industry, mandatory GMO content labels are unscientific, unnecessary, and likely unconstitutional. While the constitutional protection of

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commercial speech is less extensive than that provided to 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. Even where consumers may greatly desire the disclosure of certain information on a product label or disclaimer, the government may be constitutionally prohibited from acting. 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.

Governments at all levels frequently require the disclosure of potentially relevant information about goods or services offered

for sale. Many of these requirements protect consumers from harms of which they are unaware and the requirements 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. In just the last two years, courts have struggled with constitutional challenges to mandatory country-of-origin labels, mandatory GMO content labels, "conflict mineral" disclosures, and labels about the purported health risks posed by cell phones. These court battles reveal confusion and uncertainty about the extent to which the First Amendment protects and limits compelled commercial speech.

COMMERCIAL SPEECH

Commercial speech is generally defined as that speech which does no more than propose a commercial transaction or is related solely to the economic interests of the speaker and its audience. Under existing doctrine, commercial speech is protected speech, even if it is not as protected as core political speech. As the Court explained in *United States v. United Foods* (2001), "The fact that the speech is in aid of a commercial purpose does not deprive respondent of all First Amendment protection." One reason for this, as the Court noted in the 1976 decision *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, is that consumers have a "keen" interest in information about "who is producing and selling what product, for what reason, and at what price." Such information helps ensure that consumer decisions are "intelligent and well-informed." Insofar as accurate commercial information informs consumer decisions, it further serves to enhance market efficiency and maximize consumer welfare.

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." As Justice Harry Blackmun explained, if commercial information "is indis-

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pensable 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.” 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 decisionmaking in a democracy.”

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. 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? Or what if a corporation suggests that one reason to purchase its products or services is its commitment to “fair trade” or a particular vision of ecological sustainability? 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 imbued with political meaning, too. The choice of what products to buy and what labels to display is often politically motivated. Purchasing a product can be a political or ethical act. 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. As Northwestern University law professor 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.

In *Central Hudson Gas & Electric Corp. v. Public Service Commission* (1980), the Supreme Court established a four-part test for government restrictions on commercial speech. First, the speech must concern lawful activity and not be fraudulent or inherently misleading to qualify for protection. If the speech qualifies, courts next consider whether the government has asserted a “substantial” governmental interest, such as preventing consumer deception or protecting public health. If so, courts proceed to consider whether the regulation “directly advances” the government’s asserted interest and whether it is “more extensive than is necessary to serve that interest.” The government bears the burden of establishing that its regulation meets those requirements. Though more permissive than the tests the Court applies to restrictions on political and other core-protected speech, *Central Hudson* provides meaningful protection to commercial speech.

COMPELLED COMMERCIAL SPEECH

The First Amendment applies when the government seeks to compel speech just as much as when it seeks to restrict speech.

As the Court explained in *Turner Broadcasting System v. FCC* (1994), “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.” Forcing an individual to express views with which he or she disagrees 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.” 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, so compelling more speech does not always increase communication or understanding.

If commercial speech is subject to constitutional protection under *Central Hudson*, and constitutionally protected freedom of speech includes both commercial speech and an equal right not to speak, then it would seem that *Central Hudson* should apply equally to commercial speech restrictions and commercial speech compulsions. In particular, this simple formula would suggest that any regulation of commercial speech must serve a substantial state interest. The Supreme Court has never so held directly, however. Nonetheless, 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.

Nonetheless, 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. Much of the confusion regarding the proper test for compelled commercial speech stems from the Supreme Court’s decision in *Zauderer v. Office of Disciplinary Counsel* (1985), 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 are 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 that 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.”

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*. The U.S. Court of Appeals for the Second Circuit, for example, held

in *National Electrical Manufacturers Association v. Sorrell* (2001) that such a disclosure requirement “does not offend the important utilitarian and individual liberty interests that lie at the heart of the First Amendment.” 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.

As noted above, *Central Hudson* requires that the state 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, then 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. *Zauderer* is completely consistent with this understanding. It was undisputed in *Zauderer* that

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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. Further, 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 is inherently or deliberately misleading need not satisfy *Central Hudson*’s “substantial interest” requirement at all for, under *Central Hudson*, such speech is not protected. In many cases—perhaps even most cases—the means of requiring additional disclaimers or disclosures will 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 a substantial interest that could justify the regulation of commercial speech—in this case, energy conservation—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 will often constitute a less onerous burden than restrictions or outright prohibitions, particularly where the state’s interest is in protecting consumers from false or potentially

misleading communication or preventing consumers 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 time and again, where possible, the remedy for potentially misleading speech should be yet more speech. 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.

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. 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 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. This is not to say that all such requirements are wise or well-designed, just that they satisfy the substantial interest requirement.

When information is harmful / 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 him, 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.

Many consumers care deeply about product, process, or producer characteristics that have no direct, tangible effect on their physical or financial well-being. Such preferences undoubtedly affect the utility consumers derive from various products and services. 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 value preferences. The injury would not exist were the information not disclosed.

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It should also be noted that 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. 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." 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.

THE CONSUMER "RIGHT TO KNOW"

Many advocates of labeling and disclosure requirements assert that consumers have a "right to know" about various product or process characteristics. Yet not all disclosures can be justified under *Central Hudson*. 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. 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 right to know risks compromising other interests protected by the First Amendment.

There is a substantial governmental interest in protecting the uninformed or unwitting consumer against potential harms because such a consumer, by definition, cannot protect herself in the marketplace. The same cannot be said of the consumer who has strong preferences for given product characteristics and chooses to act accordingly. For the informed consumer, a regime that prohibits false and misleading speech, and otherwise allows producers to label and promote their products accordingly, is sufficient to enable the consumer to protect her own interests.

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 if such speech is to continue to receive meaningful First Amendment protection. 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 to serve as a basis for mandated disclosure facilitates government intrusion into what are essentially political debates concerning subjects that lie at the core of First Amendment interests.

Lack of limits / Consumers are potentially interested in a near-infinite range of product and process characteristics. 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 nutri-

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tional 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. Still 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.

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.

The lack of meaningful limits matters because 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. Mandating that a producer disclose one set of information may come at the expense of another set of information more valued by consumers. At the same time, the consumer's attention span and willingness to digest and consider product-related information is limited.

Lack of neutrality/ Compelled commercial speech about products and services is often not viewpoint neutral. This too is constitutionally problematic, as commercial speech—like all protected speech—must be regulated in a viewpoint and content-neutral manner.

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.

A government-mandated label operates as a *de facto* warning to consumers. It communicates to consumers that, of all a product's characteristics, *this one* matters. As a consequence, a mandatory label communicates a value and viewpoint-based message about what is important for consumers to consider.

So, when the government mandates that producers and sellers label foods that contain GMOs, it communicates to consumers that potential GMO content is something that should matter to them. Consumers may be unaware of the repeated studies and reports from the National Academies of Science indicating that GMOs pose no unique health risks, but they will see the label. The government's selection of this characteristic (out of all those it could select) communicates that the characteristic is particularly relevant to consumer welfare and is something 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.

Threat of stigma / 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 in question. Indeed, that is the point. Some information-based regulatory tools are explicitly designed to “shame” companies to change their behavior. A mandatory label for organic produce that says “Produced with animal feces” could be literally true, but would also stigmatize the products at issue. In such cases, the requirement to disclose becomes a requirement that a producer or seller potentially stigmatize its 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.” 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 competitors.

Consider again the case of GMOs. When a producer adorns its product with a “GMO-free” label, it is communicating to consumers that this is a product characteristic that should influence consumer choices. Such producers are seeking to encourage consumers to consider this as a relevant factor in the choice to buy the product. So, for example, Chipotle seeks to draw consumer attention to its proclamations that the lack of GMOs demonstrates the company's commitment to product quality (and perhaps draws consumer attention away from the chain's embarrassing record of food contamination).

When the government requires producers and sellers to display a “may contain GMOs” or “GMO” label, however, this 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. Indeed, this is one reason why anti-GMO organizations seek to impose mandatory labeling requirements. They seek to influence consumer behavior not by encouraging the adoption of a voluntary label, but by requiring other producers and sellers to engage in potentially stigmatizing speech.

The risk of stigma is much less where the government merely mandates the use of disclaimers about specific claims. 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

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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, once disclosed, 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.

Threat to political discourse / Commercial speech is generally treated as distinct from political speech, but the dividing lines are not always so clear. 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 that fact.

Political debate and discourse extend far beyond the ballot box and reach 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 Co. v. Public Utilities Commission* (1986), “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.” One way to address this concern could be 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 an already complex and occasionally uncertain doctrine—is simply to require such compulsions be justified with a substantial governmental interest. Such an 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.

WHO NEEDS MANDATORY LABELS?

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.

In practice, however, market pressures quite effectively induce the disclosure of information that consumers desire. 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. Firms use labels to attract customers, differentiate their products from those of their competitors, and promote the

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presence of potentially desirable product characteristics. Indeed, in competitive markets producers have an incentive to disclose any information that is likely to make their product more desirable to consumers.

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. This often creates a dynamic known as “unfolding” or “competitive disclosure” as firms face pressure to match the positive claims made by their competitors.

Producers and sellers voluntarily provide consumers with substantial information about the virtues of their products. 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 that fact, but competing firms are not shy about highlighting their commitment to such concerns.

Consumer preferences change over time, and competitive markets respond rapidly to such changes. 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. Some 20 or 30 years ago, consumers may not have cared about 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.

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. Religiously observant Jews demand food that is prepared in accordance with kosher laws. In response to this demand, many food producers submit their products to a rabbinical council for evaluation so that they can be kosher certified, and be eligible for a voluntary label. 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 because of their religious beliefs is even smaller—many large corporations participate in this process. (See “Kosher Certification as a Model of Private Regulation,” Fall 2013.)

GMO LABELING

There is a widespread scientific consensus that modern genetic engineering, in itself, poses no distinct risk to human health. 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 because of the genetic modification technique. Rather, as the FDA has explained, any risk will be the result of the specific modification made.

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. Consumers who wish to avoid GMOs may also do so by purchasing products that are labeled “USDA organic” because under federal regulations only foods that are made without GMO ingredients qualify for that label. (See “The USDA’s Meaningless ‘Organic’ Label,” Spring 2016.) Even before the adoption of federal GMO labels, private companies such as Campbell Soup had pledged to voluntarily label their products.

In sum, there is no scientific basis for imposing GMO labels as a consumer protection measure, as GMO content poses no threat to consumers. Further, those consumers who care about the GMO content of their foods are fully able to obtain products that meet their preferences. As a consequence, there is no substantial

interest that can justify the imposition of a mandatory labeling requirement. Worse, a mandatory GMO label poses the risk of stigmatizing such products and forces producers to embrace the contested notion that there is something special or noteworthy about GMO ingredients. For this reason, such label requirements are constitutionally suspect.

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. 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 of such things 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 federal government should have heeded such concerns before rushing to impose mandatory GMO labels. Such labels are unscientific, unnecessary, and—as the analysis above suggests—likely unconstitutional. R

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