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Should Food Businesses Be Able to Use
the First Amendment to Resist Providing
Consumers with Government-Mandated
Public Health Messages?

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Should Food Businesses Be Able to Use the First Amendment to Resist Providing Consumers with Government-Mandated Public Health Messages?

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I. INTRODUCTION

Enterprises are now regularly arguing that the First Amendment gives them the right to refuse to post messages that government has mandated. Food businesses are in the lead in making these “right to be silent” claims with respect to notices required to be placed in stores, on product packaging, on menus, and the like. And some of these claims are succeeding.

In this essay, I offer four arguments. First, the U.S. Supreme Court has unwisely applied the “free speech” clause to commercial disputes that are better handled by “competition” law. Second, even if we are stuck with applying the First Amendment to affirmative commercial speech, it should not apply to claims of “compelled speech.” Third, even if we are stuck with applying the First Amendment to commercial “compelled speech” settings, the standard of review should be “rational basis” and the “compelled speech” claims made so far by food businesses should be, or should have been, rejected. Fourth, if conservative federal judges continue to use the First Amendment to strike down regulations they don’t like by invoking the “compelled speech” doctrine, public health messages required by government should be clearly designated as “government speech” by those imposing the requirement so as to take these measures outside of the First Amendment altogether.

In short, the regular political process, not the judiciary, should control which messages food and beverage sellers should deliver to their (potential) customers.

II. BACKGROUND: HOW DID WE GET HERE?

A. Origins of the “compelled speech” doctrine

During World War II a group of children (on instruction from their parents who were Jehovah’s Witnesses) refused (on religious grounds) to recite the Pledge of Allegiance at school. Their dispute with public school officials reached the U.S. Supreme Court. In its *Barnette* decision, the Court sided with the children on the ground that the Free Speech clause of the First Amendment (not the Free Exercise of Religion clause) protects the right to remain silent as well as the right to speak, and to make children swear their allegiance to the flag was compelling them to speak in a way that they had a right to refuse.¹ So the “compelled speech” doctrine was born.

Notice that this case involved political speech, and that captive children (who were compelled to attend school) were meant to be coerced into saying something that they were in turn meant to embrace as their

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own ideological belief (through repetition, through joining in making the Pledge along with others, and through general public school teachings about the immorality of lying).²

B. How Businesses Won First Amendment Rights to Speak (i.e., to Advertise)

Before 1976, American free speech law did not apply to commercial speech. Like several other sorts of speech, commercial speech was held by the U.S. Supreme Court to be outside First Amendment protection.³ That year, however, thanks to Ralph Nader and his team, in the *Virginia State Board of Pharmacy* case, the Court changed course (unwisely in my view) and concluded that pharmacies have a constitutional right to advertise the prices of the medicines they sell, an action which had been made illegal in Virginia.⁴ Later, the Court extended this reasoning to give lawyers the right to advertise, to give liquor stores the right to advertise, and so on. Nader, one can appreciate, wanted consumers to be able to easily learn about lower prices and the like.

In my view, these cases are really about competition law, in which one part of the business community is complaining that its competitors had conspired (with the help of government) to control the market. From this perspective, the complaining parties should have sought their remedy through the Sherman Act. However, the Supreme Court's earlier decision in the *Parker* case⁵ had held that the involvement of government or quasi-governmental actors in restricting competition shielded the regime from the Sherman Act, which was the situation facing competitors in the *Virginia Pharmacy* case (as well as in the subsequent cases involving legal fees and liquor sales). As a result, the Sherman Act was not available to the complaining businesses.

The appropriate strategy for the objectors, in my view, should have been either to convince the Supreme Court to limit *Parker* or to convince Congress to change the law. Indeed, just this term the Court has itself sensibly cut back on *Parker* immunity.⁶ But instead, in *Virginia Pharmacy* the Supreme Court abandoned its longstanding position on commercial speech by embracing the right to advertise as a First Amendment right.

To be sure, later on, in the *Central Hudson* case,⁷ the Court concluded that free speech rights in the commercial speech arena are not as strong as in the political or artistic speech arenas, which means that government justifications for restricting commercial speech are supposedly more easily defended. Yet several members of the current Court want to eliminate this distinction. Furthermore, the difference in the level of judicial scrutiny may be more theoretical than real as the Court and lower federal courts these days are striking down regulations under this so-called reduced scrutiny standard by applying the constitutional tests in ways that make commercial speech, in practice, virtually as protected as core political and artistic speech.⁸

C. How Businesses Won First Amendment Rights Not to Speak

The central justification the Supreme Court has given for applying the free speech clause to commercial speech is the right of consumers to receive truthful information (like price, but not only price) about the products and services that providers seek to convey to them via advertising.⁹ That, after all, was Nader's argument on behalf of the consumers whose interests he sought to further.

With this justification in mind, I find it highly ironic that the Supreme Court and lower courts are now using the "compelled speech" concept (drawing on *Barnette*) to keep consumers from getting information that many of them clearly want to have (and which regulators have tried to assure that they can obtain).

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The Supreme Court initially went off the rails, in my view, in the way it approached government-created generic food marketing programs (which have existed for some time for products like beef, mushrooms, berries, and the like). These sorts of products tend to be sold in bulk and on an unbranded basis. This meant that the growers/producers of these sorts of foods, say, like broccoli, were unlikely to pay for any advertising of their products on their own because of “free rider” problems—other broccoli growers would equally benefit from such ads without paying for them. But this left these generic product providers as a group at a commercial disadvantage as compared with packaged-food providers who regularly engage in brand advertising. To help contend with this well-understood “market failure,” the federal government facilitated the creation of a number of cooperative organizations that would advertise, say, berries in ways that would (as a general matter) benefit all berry providers, and then appropriately charge all berry growers or distributors for their share of the cost of the marketing campaign (thereby eliminating the free rider issue).

In due course, some involuntary members of these organizations started branding their products and sought to advertise separately, which of course they could do. But they also wanted to get out from paying towards the generic ad campaigns (whether or not they would continue to benefit from such generic ads were they to continue being paid for by others).

Once again, in my view, this is a commercial dispute that should have been dealt with, if at all, by legislative changes in the relevant cooperative marketing program. Maybe members could be freed from some or all of their payment obligations if they engaged in brand advertising of their products at a specified level or higher. Maybe it was time for certain of these cooperative marketing organizations to be disbanded.

But instead, at least at the outset, in the *United Foods* case involving mushroom handlers, the Supreme Court jumped in with the First Amendment.¹⁰ I find this decision dangerous and wrong-headed in two respects. First, the Court equated paying for speech (i.e., for advertising) via the mandatory assessment scheme with speech itself. This allegedly followed from the Court’s earlier decision in *Buckley v. Valeo*.¹¹ That case, in my view, misguidedly struck down various Congressionally-adopted limits on expenditures in political campaigns on the ground that they violated the First Amendment. The Court got to that result by aggressively equating spending on speech with speech itself—an equivalence that the First Amendment surely did not necessarily mandate. But even accepting *Buckley* as the law, notice how voluntary spending on politics is then, in the *United Foods* case, aggressively equated with the funding of cooperative advertising of food products—again a step that the First Amendment did not require.

Second, and even more troublesome, the Court then freed the complaining parties from having to participate in the compulsory regime on “compelled speech” grounds. Not only does this step in the argument completely fly in the face of the underlying justification for including commercial speech as protected by the First Amendment—the benefit of providing information to consumers—the Court’s analysis also suggests that it would be unconstitutional for government to tax gasoline and use the revenues to promote taking public transportation as part of the battle against global climate change. That is, following *United Foods*, people forced to pay the tax (or perhaps the gasoline stations that impose and collect the tax) could complain that paying for speech is speech, and that they should not be compelled to pay for speech they don’t endorse because it cuts against their commercial interest—having more people ride the bus or the train instead of driving. I would find that outcome bizarre, and I think that most First Amendment scholars would agree with me.

Fortunately, later on, in the *Livestock Marketing Association* case,¹² the Court seems to have backed off this line of analysis. That dispute concerned a largely identical, cooperative advertising organization that promoted

the sale of beef. Noting that the government was centrally involved in the program, the Court this time upheld the program by terming the relevant ads “government speech” and hence simply outside the reach of the First Amendment. I will return to this distinction at the end.

III. ISSUES NOW IN DISPUTE: SOME FOOD COMPANIES DON'T WANT TO PROVIDE PEOPLE WITH PUBLIC HEALTH MESSAGES THAT LEGISLATURES AND AGENCIES HAVE MANDATED, AND SOME FEDERAL COURTS ARE SIDING WITH THEM AND AGAINST CONSUMERS BY INVOKING THE “COMPELLED SPEECH” DOCTRINE.

A. The Best Example of Industry Success—The Vermont Milk Case

The most distressing decision, in my view, was made in the Vermont milk case. A synthetic growth hormone (rBST) was developed that has been used to treat many dairy herds. The FDA investigated rBST and concluded that the milk from cows that were so treated was no different from traditional milk. Nevertheless, many consumers in Vermont did not want to drink rBST-related milk, and surveys showed that lots of people wanted to know whether milk was rBST-related or not. In response, the Vermont legislature passed a law, in effect, requiring that milk retailers post a notice in that section of the grocery store disclosing which of the cartons contained milk from rBST-treated cows.

The Second Circuit (albeit in a panel divided two to one), in the *International Dairy Foods Association* case,¹³ deemed that, in light of the FDA finding, consumer interest in information here was a “mere curiosity” and struck down the Vermont law on “compelled speech” grounds. But to many consumers this was more than just being curious about what they would be drinking. They did not want to drink milk connected to this synthetic hormone and absent disclosure these consumers would not know how to make their milk selection. Some consumers were being extra-cautious about imagined, but not yet discovered, health risks from the rBST hormone; others had economic or ideological objections to this sort of scientific tinkering with the world of ranching and farming and wished to show their disapproval through their purchasing decisions (favoring local dairy farmers who did not treat their cows with rBST). But the Court decided that the retailers (and the milk suppliers) had a constitutional right to keep these customers in the dark.

In my view, regardless of what the mainstream scientific findings are, if these voters can get the appropriate legislative or executive body to pass a law or adopt a regulation that will give them information they want about the content of food they will eat, then I say that disclosure requirement should be upheld. If, on policy grounds, requiring this message seems silly, unduly costly, or potentially misleading, it seems to me that the industry’s relief should be sought in the political process and not the courts.

IV. FAILED “COMPELLED SPEECH” CLAIMS—THE NEW YORK CITY MENU LABELING CASE AND THE BEEF COUNTRY OF ORIGIN CASE

Two other important food cases have gone the other way. But it should be clear that those involved what both the Second Circuit and the D.C. Circuit saw to be the required disclosure of uncontroversial facts.

When New York City required chain restaurants to post calorie counts on their menu boards (or menus), this measure was attacked, among other things, on “compelled speech” grounds. The complaining restaurant

chains argued that the U.S. Supreme Court's decision in the *Zauderer* case¹⁴ (involving a personal injury lawyer advertising about legal fees) implied that disclosures could be compelled from providers of commercial goods and services *only* when the disclosure was designed to prevent deception. The same position was repeated in the more recent attack by beef importers on the required disclosure of the country-of-origin of their products. Both courts rejected this narrow vision of the "compelled speech" doctrine and upheld the relevant disclosures in the *New York State Restaurant Association*¹⁵ and *American Meat Institute*¹⁶ cases.

The beef case was decided en banc by 11 D.C. Circuit judges (with the vote nine to two), overturning a two to one decision by the Circuit's panel, which originally decided in favor of the complaining businesses. The majority clearly held that preventing deception is not the only basis on which government can compel disclosures from business. Quoting from *Zauderer* the majority restated "Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." By contrast the opinion argues that the government interest requiring county-of-origin disclosure is "substantial."

What was rather tricky about the case is that the beef importers had already taken the U.S. before the World Trade Organization (WTO) claiming that this regime was an illegal "buy American" trade barrier and won. Hence, the government had to justify the disclosure on other grounds. The opinion points to: "the context and long history of country-of-origin disclosures to enable consumers to choose American-made products; the demonstrated consumer interest in extending country-of-origin labeling to food products; and the individual health concerns and market impacts that can arise in the event of a food-borne illness outbreak." The first two points seem to come down to: consumers want to buy-American and may be enabled to do so. The third seems to be somewhat grasping at the idea that tracing the source of tainted meat could be harder for imports, so there is actually a safety reason to buy-American. To me, this comes down to "some consumers want to know the geographic source of their meat and they got Congress to mandate its disclosure" and that is enough to uphold the law (although the real politics of this law, of course, reflects the political power of the domestic meat industry).

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A. Food Cases on the Horizon—Required GMO Disclosures and Required Disclosure of the Routine Feeding of Animals with Antibiotics

Scientific developments, together with an expansive reading of patent law, have allowed for the development of patented genetically modified organisms (GMOs). These have become especially commercially successful for corn and soybeans. Some people oppose this development, and the EU, for example, has applied the "precautionary principle" to largely bar such crops.¹⁷ Having lost that battle in the U.S., some Americans nonetheless are campaigning to require sellers to disclose whether their products contain GMOs on the ground that some consumers are eager to avoid purchasing such items. Consumers are already supposed to be able to achieve that result by restricting their purchases to "organic" foods, but not everyone knows that. Moreover, some people don't want to pay the extra cost of organic food to gain other supposed benefits of organic food beyond the absence of GMOs. As with the objection to rBST, the dairy-herd synthetic growth hormone, the objection to GMOs seems a combined fear of not-yet-discovered long term health risks plus economic and ideological objections to the sort of industrial farming that GMOs facilitate and promote.

In a similar vein, many Americans are opposed to the routine feeding of antibiotics to farm animals. This is to be distinguished from the clinical application of antibiotics on an animal-by-animal basis under the supervision of a veterinarian when the animals are ill. Farmers include antibiotics in animal feed to ward off illness in the first place and to increase the likelihood that the animals will not be sick when sent to slaughter

(and have to be singled out for disposal when discovered). But many doctors and scientists are concerned that this practice inevitably promotes the development of antibiotic-resistant bacteria. Worse, it is feared that these bacteria will be resistant to the use of certain antibiotics in humans, thereby making sick people vulnerable to disease and death who otherwise could be cured (especially at a time when new antibiotics that overcome such bacteria are not being developed at a rapid pace as in the past). Moreover, as with GMOs, other people object to the routine inclusion of antibiotics in animal feed on the ground that this practice is only economically engaged in when combined with a factory method of animal-raising that the objectors oppose on animal welfare and other grounds.

This article is not the place to pursue these disputes further, apart from saying that legislation requiring disclosures of these sorts is looming on the horizon. Vermont has again taken the lead and adopted a GMO disclosure law scheduled to go into effect in 2016.¹⁸ Earlier-adopted Maine and Connecticut laws, awaiting the support of other states, may also go into effect. Other, locally-promoted GMO-disclosure regimes have been vigorously battled at the voting booth. The same goes for laws that would require disclosing whether meat and poultry had been routinely fed with antibiotics. Unsurprisingly, the Vermont GMO disclosure law has already been challenged in court.¹⁹

B. A Troubling Case Outside of the Food Area—The SF Cell Phone Radiation Case

A few years ago, San Francisco passed a cell phone ordinance that would have required mobile phone retailers to post next to the phones on display the amount of radiation they emit. While the majority scientific view has been that this radiation is not dangerous, it turns out that a) phones emit very different amounts, b) the FCC has imposed a maximum limit, just to be safe I suppose, and c) many people, including some scientists have a different view of the risk and believe that this radiation is either clearly dangerous or at least sufficiently potentially dangerous that buying a low radiation phone is a wise idea (as is never holding it up to one's ear).

A federal district court in San Francisco struck this ordinance down under the “compelled speech” doctrine, concerned among other things that the public might be misled about non-existent dangers.²⁰ As with the Vermont milk case, relating to synthetic growth hormones, the San Francisco ordinance concerned a matter that was controversial. But the facts at issue under both laws were not: How much radiation did the cell phone emit? Were the cows given rBST?

Again, I would have thought that the original justification for including commercial speech within the First Amendment—providing information to consumers—would have more appropriately applied than the “compelled speech” doctrine. In short, the cell phone decision seems inconsistent with the *American Meat Institute* country-of-origin case.

To be sure, Judge Kavanaugh (one of the conservative DC Circuit judges) in his concurring opinion in the meat country-of-origin case made clear that in his view “consumer interest” alone was an insufficient reason for government to compel disclosures. Yet, surely the safety-justifications for the San Francisco cell phone ordinance were as strong as the safety concerns behind the meat country-of-origin disclosure requirement. For his part Kavanaugh seems to retreat to the very longstanding nature of country-of-origin disclosure requirements for other non-American-made products. But, if patriotism towards American producers is more than a mere “consumer interest,” then surely patriotism towards traditional local Vermont dairy farmers who were not treating their herds with rBST should have also sufficed.

To be sure, when disclosures are required, it might be that some consumers might be misled into thinking that rBST is dangerous when the scientific consensus is otherwise and others might be misled into assuming that cell phones with higher radiation emissions are more dangerous than existing evidence supports. But the traditional First Amendment answer to these concerns is that potentially misleading speech should be dealt with by more speech. Milk from herds treated with rBST could include statements to the effect that the FDA says this milk is exactly the same as traditional milk; and cell phones with higher radiation levels could contain statements to the effect that their radiation levels are well within the FCC approved level.

V. HOW SHOULD COURTS ANALYZE THESE CASES?

In the *American Meat Institute* case, the D.C. Circuit concluded that the government justifications for the country-of-origin disclosures were “substantial” and by no means meant merely to satisfy consumers’ “idle curiosity” (which is how the Vermont growth hormone case was doctrinally characterized). This allowed the court to conclude that, in its view, the required disclosure satisfies the *Central Hudson* test without having to decide whether that test is properly applicable to “compelled speech” cases as well as to affirmative speech (advertising) cases.²¹

Central Hudson asks whether the restriction on speech significantly furthers an important governmental interest in a sensibly tailored manner. To me, this is the wrong test for “compelled speech” cases. Applied seriously, it turns courts into the equivalent of the Office of Information and Regulatory Affairs (OIRA)—the office within the federal Office of Management and Budget (OMB) that applies tough cost-benefit analysis to regulations proposed by federal agencies under its jurisdiction.²² OIRA was created by Congress and may or may not be a good way to force the executive to check on the actions of its own agencies. But this is a within-the-executive-branch function.

Judicial review of this sort is another matter—and an invitation to a return to the *Lochner* era, when the Supreme Court used the “contract” clause of the constitution, for example, to substitute its judgments about economic regulation over that of the legislative branches.²³

It seems to me that, with respect to required public health measures in the commercial arena, it should suffice that government has a good and not a frivolous reason for the disclosure requirement. This is largely the same as asking whether there is a “rational basis” for the legal rule. This is the position that the Second Circuit appears to have taken in a case involving required disclosures on light bulbs that was decided subsequently to the Vermont milk case: *NEMA v. Sorrell* (demanding only “a rational connection between the purpose of a commercial disclosure requirement and the means employed to realize that purpose”).²⁴ It is also the position recently taken by the California Supreme Court in dealing with “compelled speech” claims under the state constitution’s free speech provision (“the statute, which requires factual disclosures in a commercial setting, is subject to rational basis review and satisfies that standard because the compelled disclosures are reasonably related to the Legislature’s legitimate objective”).²⁵

VI. A WAY AROUND THE “COMPELLED SPEECH” DOCTRINE—MAKE CLEAR THAT THE MANDATED PUBLIC HEALTH MESSAGES ARE “GOVERNMENT SPEECH”

The majority in the *American Meat Institute* case limited its analysis to situations in which government requires food sellers to provide information that is “factual and uncontroversial.” But suppose the words that the law asks the retailer to convey are better understood as recommendations for healthy living. For example, suppose the message is “smoking cigarettes is bad for you, because if you smoke you will very likely become very ill.” Or, even stronger, suppose the message is “try to stop smoking; we can help you if you call this smoking cessation hotline.” Or with respect to food, suppose the message is “children should eat more fresh fruits and vegetables and less sweet things like sugar-sweetened beverages.”

Government clearly has the right to convey information and opinions that industry may not like consumers hearing and seeing. Government could send voters these sorts of messages through the mail or electronic media; it could pay to put up billboards containing these messages or it could post such signs on city property.

In addition, in my view, as a condition of operating a business in the jurisdiction, government should be able to require businesses to carry such messages in their stores and/or on their product packages. But I think that for these sorts of messages, it should be made clear that they are coming from the government—in the way that the tobacco warnings are traditionally said to come from the U.S. Surgeon General.

If the disclosure makes clear that the speech is coming from government, then consumers have no basis for concluding that the message is coming from the retailer or product maker. They are only the messengers. By doing that, the speech is no longer *Barnette*-like compelled speech but rather it becomes “government speech” and that takes it outside the First Amendment (as the Supreme Court made clear in the *Livestock Marketing Association* case mentioned earlier).²⁶

Government’s ability to require sellers to convey government speech as a condition of doing business should be limited only by the “takings” clause of the Fifth Amendment.

Here are some examples that I think are just fine: “The city water department assures you that our local tap water is cheap, safe, and tasty. You need not buy bottled water.” “The state department of health urges you to feed your kids in a healthy way. Buy lots of fruits and veggies and save sugary products like sodas for special occasions.” In short, my position is that government agencies should be able to require markets to post moderate-sized signs of this sort inside their stores, near the relevant products.

In this vein three San Francisco supervisors recently proposed an ordinance that, among other things, would require commercial advertisers of sugar sweetened beverages with more than 25 calories per 12 ounces to attach this warning: “Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco.” The ordinance would require that these messages take up at least 20 percent of the advertisement.²⁷

Courts should not interfere with government actions like these by using the First Amendment of all things to protect business from such regulation. I thought we abandoned that sort of judicial interference with the legislative and regulatory process in the 1930s. To treat these sorts of public health messages that business is asked to convey like requiring school children to say the Pledge of Allegiance loses sight of what the First Amendment is supposed to be about.²⁸

ENDNOTES

1. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
2. See Vincent Blasi & Seana V. Shiffirin, *The Story of West Virginia State Board of Education v. Barnette: The Pledge of Allegiance and the Freedom of Thought*, FIRST AMENDMENT STORIES, 99 (2012). A second case in this line of authority is *Wooley v. Maynard*, 430 U.S. 705 (1977), in which the Supreme Court held that New Hampshire could not force an objecting car owner to keep visible on his car's government-issued license plate the state motto: "live free or die." Again, notice the clearly political/ideological nature of the message and its lack of any special connection of this message to car ownership. Nonetheless, I am not fully convinced that *Wooley* was correctly decided. After all, today at least we would say that other New Hampshire drivers (and even out of state drivers) would hardly conclude that the car's owner was personally embracing the message of the state motto. Indeed, he is clearly free to attach a bumper sticker next to the license plate proclaiming the opposite, say, "better red than dead." Rather puzzling in my view, New Hampshire license plates were issued without the state motto to the Governor, members of Congress, Justices of the State Supreme Court, veterans and others. If the reason for those exceptions was that the appropriate patriotism of these people was presumptively assumed, while others had to demonstrate theirs by this display on their license plates, then I see a closer resemblance to *Barnette* as well as to the loyalty oath cases of that era, such as *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).
3. *Valentine v. Chrestensen*, 316 U.S. 52 (1942).
4. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). For a precursor to this case, see *Bigelow v. Virginia*, 421 U.S. 809 (1975), which upheld a newspaper's right—in the face of a statutory ban—to carry an advertisement for an organization that referred women to abortion services. Given the special constitutional protection given to the right to an abortion, I put aside here the delicate matter of situations in which free speech claims and abortion rights claims appear to clash. For more on that, see e.g., Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 BOSTON U. L. REV. 939 (2009) and Caroline Mala Corbin, *Compelled Disclosures*, 65 ALABAMA L. REV. 1277 (2014)..
5. *Parker v. Brown*, 317 U.S. 341 (1943).
6. *North Carolina State Board of Dental Examiners v. FTC*, 574 U.S. ____ (2015).
7. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).
8. See Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOYOLA L.A. L. REV. 67, 67-68 (2007) .
9. See generally, Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State*, 79 CAL. L. REV. 1229 (1991).
10. *United States v. United Foods*, 533 U.S. 405 (2001).

11. 424 U.S. 1 (1976).
12. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005).
13. *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67 (2nd Cir. 1996).
14. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985).
15. *N.Y. State Rest. Ass'n v. N.Y. City Bd. Of Health*, 556 F.3d 114 (2nd Cir. 2009).
16. *American Meat Institute v. USDA*, 760 F.3d 18 (D.C. Cir. 2014).
17. DAVID VOGEL, *THE POLITICS OF PRECAUTION: REGULATING HEALTH, SAFETY, AND ENVIRONMENTAL RISKS IN EUROPE AND THE UNITED STATES* (Princeton, 2012).
18. Dana Ford and Lorenzo Ferrigno, *Vermont governor signs GMO food labeling into law*, CNN (May 8, 2014) http://www.cnn.com/2014/05/08/health/vermont-gmo-labeling/index.html?hpt=he_c2 (last visited March 29, 2015).
19. See *GMA v. Sorrell* no. 5:14-CV-117 (D.Vt. filed June 12, 2014).
20. CTIA – The Wireless Ass'n v. City and County of S.F., 827 F. Supp.2d 1054 (N.D. Cal. 2011). Chloe Albanesius, *San Francisco Drops Fight for Cell Phone Radiation Labeling Law*, PC Magazine (May 8, 2013) <http://www.pcmag.com/article2/0,2817,2418719,00.asp> (last visited March 29, 2015).
21. The *American Meat Institute* decision (being an en banc decision of the Circuit) also serves to reject the very aggressive use of the *Central Hudson* test by a Circuit panel in an earlier decision involving a successful challenge to FDA's proposed graphic warnings that were to be included on packages of cigarettes. *R.J. Reynolds Tobacco Co. v. Food & Drug Administration*, 696 F.3d 1205 (D.C. Cir. 2012).
22. <https://www.whitehouse.gov/omb/oira/about> (last visited March 29, 2015).
23. *Lochner v. New York*, 198 U.S. 45 (1905).
24. 272 F.3d 104 (2nd Cir. 2001).
25. *Beeman v. Anthem Prescription Management*, 58 Cal. 4th 319, 335 (2013).
26. See also, *Rust v. Sullivan*, 500 U.S. 173 (1991) (which is one of those especially complex cases involving abortion rights), and *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), both of which embrace the "government speech is outside of the First Amendment" doctrine. Perhaps the New Hampshire "live free or die" license plate case should have been treated as a government speech case (see note 2, *supra*). This issue is currently before the Supreme Court in the case of *Walker v. Texas Division, Sons of Confederate Veterans, Inc.* involving a somewhat

different matter of state-issued specialty license plates (argued March 23, 2015), SCOTUS blog, <http://www.scotusblog.com/case-files/cases/walker-v-texas-division-sons-of-confederate-veterans-inc/> (last visited March 29, 2015).

27. <http://xpress.sfsu.edu/xpressmagazine/2015/03/22/sf-supervisors-limit-ads-for-sugary-drinks/> (last visited April 2, 2015).
28. Very different from the examples and discussion presented here, in my view, are cases like *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) and *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1(1986). In both of those cases the Supreme Court struck down rules that required regulated parties to carry political messages of third parties. Hence, among other things, those cases are not about government speech.

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