

Compelling Product Sellers to Transmit Government Public Health Messages

Stephen D. Sugarman[♦]

If you go to a gas station in California you should see a sign posted on or next to the pumps that says “Warning. This product contains chemicals known to the state of California to cause cancer and birth defects or other reproductive harm.”¹ Similarly worded signs, required by voter-passed Proposition 65,² are posted at a wide range of other California business establishments. But suppose, in addition, you were to find this sign at the gas station: “For a Healthier Environment, the State of California Wants you to Reduce Your Carbon Footprint. We are all better off if we take public transport more and drive less.”

For a Healthier Environment, the State of
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[♦] Roger J. Traynor Professor of Law, UC Berkeley. Many thanks for research help to Aram Boghosian.

¹ *Proposition 65 Frequently Asked Questions*, CALIFORNIA OFFICE OF THE ATTORNEY GENERAL, <https://oag.ca.gov/prop65/faqs-view-all> (last visited March 16, 2014).

² The Safe Drinking Water and Toxic Enforcement Act of 1986, amending the California Health and Safety Code. For a more detailed explanation of Proposition 65, see *Proposition 65*, OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT, <http://oehha.ca.gov/prop65/background/p65plain.html> (last visited Dec. 11, 2013).

California's Department of Public Health Message



Our children are
much healthier
if they eat more
fresh fruit and
less sugar
sweetened
beverages



Shop Kid-Smart*



Or suppose you go into a grocery store and in the produce section you see this sign: "California Department of Public Health Message: Our children are much healthier if they eat more fresh fruit and less sugar sweetened beverages. Shop Kid-Smart*"

Or perhaps where bottled water and other beverages are sold, you see this sign: "The Contra Costa County health department says: Our local tap water is safe and tasty and helps you avoid tooth decay."

The Contra Costa County health department says:



Our local tap water is safe
and tasty
and helps you avoid tooth
decay

As a final example, suppose you go into a gun shop and see a pamphlet that draws on the National Rifle Association's gun safety for children program,³ and on the cover you see this: "The California Department of Justice says: Teach your children that if they see a GUN, here is what they should do—STOP! Don't Touch. Leave the Area. Tell an Adult."

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Assume that all four of the messages I have imagined were required by the appropriate California governmental body. Notice that these laws do not require businesses to take positions with which they may or may not agree. Rather, they are examples of *government speech* that government would be requiring companies to post as a condition of obtaining their license to operate a business selling gasoline, food, beverages, and/or guns.

Note further that all of these public health messages convey *judgments* about how to make our society healthier. Drive less and take the bus or train more; eat more fresh fruit and drink less soda; drink tap water; do not let children handle guns. While all of them rest on factual foundations and would find strong support among public health leaders, they all contain contestable ideas. Some people think that rather than telling kids never to touch guns, children should instead be taught how to handle them safely from a very early age. Some people think that the convenience and pleasure they get from driving more than outweighs any tiny contribution

³ For details about the Eddie Eagle Gun Safe Program run by the NRA, see *Eddie Eagle*, NATIONAL RIFLE ASSOCIATION OF AMERICA, <http://eddieagle.nra.org/> (last visited Dec. 11, 2013).

they might be making to global warming. Some people think our local tap water tastes bad and that putting fluoride in it reflects a nanny state of the worst sort. Some people think that bribing kids with sodas is a good way to get them to consume calories as well as to eat other healthy foods.

I believe that there is no doubt that government is allowed to use billboards, time on television, or time in schools to convey these messages. This is classic government speech – the product of our democracy.⁴ We the citizens may collectively come to these judgments through our political system and seek to spread these messages to the public at large.⁵ Consumers, of course, are not actually required to act on these messages I have imagined. Standing alone, they are but recommendations. But they carry the imprimatur of the government and might help persuade people to change how they act. The requirements, such as they are, are imposed on businesses – making them use some of their space to post the government messages.

Can the government legally do this? Tobacco companies, business interests in general, some scholars,⁶ and even some judges⁷ argue that requiring gas stations, grocery stores, and gun companies to post these messages is unconstitutional because it violates the free speech rights of these businesses. They argue that such requirements are legally the same thing as requiring school children to stand up, put their hand over their heart or put their fingers to their forehead in a salute, and say the pledge of allegiance to the flag.⁸ I disagree.

I want to emphasize here my view that government's ability to force you to carry its message should not be limited to what are called facts – in the way that conventional product warnings are often phrased (for instance, that smoking causes lung cancer or the required California Proposition 65 warning about cancer and birth defects set out at the beginning of this article).

⁴ See generally MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW AND GOVERNMENT EXPRESSION IN AMERICA* (1983).

⁵ On distinguishing when it is government speech and when it is private speech, see *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995). See also *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

⁶ See Nat Stern, *Graphic Labels, Dire Warnings, and the Facile Assumption of Factual Content in Compelled Commercial Speech*, 29 J.L. & POL. (forthcoming 2014).

⁷ See, e.g., *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1221–22 (D.C. Cir. 2012); *CTIA-Wireless Ass'n v. City and Cnty. of S.F.*, 494 F. App'x 752 (9th Cir. 2012); *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 642–43 (6th Cir. 2010).

⁸ See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

While I think there is good reason to retreat to the position that the Supreme Court held until 1976 that the First Amendment simply does not apply to commercial speech,⁹ I do not rest my argument on such a claim. I will concede for these purposes that businesses have a constitutional right to advertise their products,¹⁰ so that the gas stations, grocery stores, and gun shops would have to be allowed to carry their own messages promoting the increased purchases of their products, despite government views to the contrary. For example, regarding my gas station example, the oil company could also put up a poster saying, “Driving is still a thrilling adventure. Fill up here.” Or, as in my gun warning example, the gun maker could have the gun shop include a notice with its guns saying: “Some people want to teach their little children how to use guns responsibly; to watch a video that might help you train your child like that, go to (and then include a You Tube link, for example).” Or, as in my grocery store examples, a sign could be put up simply saying “Drink Coca-Cola—the Pause That Refreshes”.

But I also think that businesses would, in turn, have to concede that posting the government messages that I envision would not physically block their ability to advertise their products on either the product packaging or elsewhere in the store. Therefore, their First Amendment claim here is not properly understood to be about being prevented from speaking. Rather, it relies on the so-called “compelled speech” doctrine.¹¹

When, for an understandable reason that is meant to promote the public interest, firms are required to post/disclose/warn about facts that are incontestable, even the strongest supporters of the free speech rights of business generally acknowledge that such required disclosures are allowable.¹² This seems to be the holding in *Zauderer*,¹³ in which the Supreme Court upheld a law aimed at protecting consumers from deception that required attorneys to disclose the difference between “costs” and “legal fees” in advertisements for contingent fee cases. More broadly,

⁹ See *Valentine v. Chrestensen*, 316 U.S. 52 (1942); Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 1 (1979).

¹⁰ See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976).

¹¹ See generally Jennifer Pomeranz, *Compelled Speech under the Commercial Speech Doctrine: The Case of Menu Label Laws*, 12 J. HEALTH CARE L. & POL'Y 159 (2009).

¹² See Brief for Appellees at 17, 21–22, *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012) (No. 11-5332).

¹³ See *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651–52 (1985).

it seems clear to me that businesses must concede the government's right to "compel" them to disclose the facts we see on the labels of packaged food, the facts we see on inserts that come with pharmaceutical drugs, and the facts we are increasingly seeing on menus and menu boards stating the calorie count of the food on offer.¹⁴

Yet they strongly object to having to carry messages that are understood to be a matter of opinion, especially when the opinion is aimed at discouraging the purchase of their product, as in my gas station example, my grocery store examples, and (perhaps) my gun example. So, the business community's lawyers are seeking to draw a hard line there, arguing that the government cannot required their clients to post appeals to emotion, opinion, "facts" that are not scientifically supportable and the like.¹⁵ I do not think the First Amendment line should be drawn in this manner.

Behind such line drawing is a vision of American capitalism in which government's role is to help create the ideal, well-informed consumer who then decides what is best for herself. I find this narrow perspective nonsensical in today's world of behavioral economics in which it is well understood that people do not make fully rational choices for themselves, and where it is equally well understood that advertising rests on the idea that consumer taste and preferences can be and are meant to be manipulated.¹⁶

Indeed, this fetish with informed consumers, in my view, is where the commercial free speech doctrine went off the rails at the outset – for example, in the cases involving governmental restrictions on price advertising by pharmacies¹⁷ and alcohol sellers.¹⁸ One can well argue that the regimes challenged in those cases had created objectionable anticompetitive environments in which existing goods and services providers had managed to protect themselves from competitors who wanted to advertise themselves as offering the same thing at a lower price. But, in my view, these matters should be dealt with by the Sherman

¹⁴See *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 134–37 (2d Cir. 2009) (upholding the New York City menu board labeling law against a First Amendment compelled speech challenge).

¹⁵Brief for Appellees, *supra* note 12, at 24–28, 31–33.

¹⁶See, e.g., Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630 (1999).

¹⁷See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.* 425 U.S. 748 (1976).

¹⁸See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

Antitrust Act¹⁹ and not by high-jacking the free speech clause in ways that would have made our nations' founders' heads spin. And if state or local government involvement with those regimes shielded these protectionist measures from anti-trust attack under current law,²⁰ then Congress should confront the problem head on and decide whether an amendment to the Sherman Act is required.

The economic libertarianism that now pervades the federal judiciary's use of the free speech clause, in my view, is especially out of place in the world of public health. Public health is about serving the population as a whole in order to keep it healthy, and not about getting every individual to make completely personal decisions about her own health.²¹ For example, to promote the public health of the population as a whole, government assures us clean drinking water and provides it in all sorts of forums – at home, at work, in public parks and buildings, etc. People are not generally left to purify their own drinking water (although they could and some do) and people pay for clean drinking water delivered at the faucet through general taxes or through water rates that typically do not depend in any precise way on how much they drink. Furthermore, government in most places adds fluoride to the water supply to help protect everyone against dental caries, even if people, if they chose to, could do this and pay for it on their own, for example via the toothpaste they use.

So, too, while some people are always going to believe that global warming is a myth, once a political majority (or, these days, perhaps a supermajority) decides otherwise, we as a society will undertake broad public health measures through government to try to combat climate change (or at least the rate of warming).

As part of these public health efforts, government will issue statements about the problems being addressed that constitute government speech. Of course, dissenters have free speech rights to say otherwise. But government may and does take a position.²²

With respect to tobacco products and ads for those products, the government has long taken a position about these items. After all, cigarettes (and other tobacco products) are probably the only products legally on the market that kill if used as directed. As a condition of being

¹⁹ Sherman Antitrust Act ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1–7 (2004)).

²⁰ See *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003 (2013) (discussing the so-called state action immunity defense to anti-trust complaints and recent disfavoring of this doctrine).

²¹ LAWRENCE O. GOSTIN, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* (2d ed. 2008).

²² See, e.g., *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 559 (2005).

allowed to sell cigarettes, the federal government has long required the inclusion of government speech; that is, the so-called Surgeon General's warning.²³ I want to emphasize here that it is ludicrous to think that the real purpose of the Surgeon General's text warnings has been to provide factual information in order to create informed consumers. The reason this text has been placed on cigarette ads and packages is that we as a society want to discourage people from smoking.

More recently, as I see it, Congress has decided that the appropriate message here should be a bit stronger. The actual text messages now required are easily justified as simply factual and the accompanying photos proposed by the FDA are also readily understood as administratively sensible ways of illustrating those text messages. After all, how better do you illustrate that smoking causes lung cancer than by showing a healthy lung next to a cancerous lung? Or how better do you illustrate that smoking kills than to show a body that is clearly dead (and not merely sleeping)? And so on. Hence, even on the analytical structure proposed by the tobacco industry lawyers, I think the new graphic pictures are constitutional.²⁴ But, as I have already argued, I oppose this way of looking at things.

So, for these purposes, I would concede that the goal of these new text messages and accompanying pictures is not simply to inform existing and would-be smokers so as to allow them to decide for themselves whether to smoke. The purpose of these messages is to strongly discourage smoking. Indeed, as I see it, the FDA has been given (or can be given) the complicated assignment of reaching out through words and pictures on cigarette packages to a series of different audiences with messages aimed at them about smoking. And I would acknowledge that each of these messages contains a judgment.

²³ Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1333 (2012).

²⁴ See *RJ Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir, 2012) (Rogers, J., dissenting).

Cigarettes and Graphic Warnings



First, government should be sending this sort of message to most current smokers: We know that a huge majority of you want to quit smoking and we realize that this is hard to do even if you have tried several times. But we want to urge you to keep trying, and we want you to know that we are there to help you find cessation programs and cessation products that are right for you. You can do it. Call us. The D graphic (perhaps with a small change in the text) might convey this message.

Second, government should be sending this sort of message to those millions of Americans who have quit smoking but are at risk of relapse: We appreciate that many of you will relapse one or more times before finally quitting altogether. So, in order to help you with your resolve not to take up smoking again, if you reach for packets of cigarettes we are trying to vividly remind you of all the terrible things that tobacco products do to you – fears of which probably helped you to quit in the first place. The F and H graphics might convey this message.

Third, government should be sending this sort of message to parents: We know that virtually all of you want your kids not to smoke, and you are right to take this stand. We have tried to help you get what you want by criminalizing the sale of cigarettes to your kids. But we know that, despite their denials, the tobacco companies have for years tried to lure your teens into smoking—something that has been proved in the RICO case against

them.²⁵ So, in order to try to help you further, we are trying to get the packs to look sufficiently yucky so that their allure to your young kids may be dampened down some. The A and I graphics might convey this message.

Fourth, government should be sending a message to those who are young adult smokers – the main target audience of the tobacco industry these days since it is an industry that needs new addicts in order to stay in business over the long haul: We understand that in some circles it is still cool to smoke and that some of you, especially women, smoke to restrict your weight. And frankly we understand how the hit of nicotine can be quite satisfying, at least for a while. But we want to try to bring home to you as best we can that if you move from being a social smoker to a regular smoker – from smoking fewer than ten cigarettes a day or maybe even smoking only on the weekend to smoking typically at least a pack or more day – you are going to become addicted in a way that will make it much harder than you probably now realize for you to quit later. So, listen up and try not to move on to a fully addicted state, and, if possible, try to stop altogether (and, women, be sure to stop before becoming pregnant). The C, B, and G graphics (again perhaps with a small change in the text) might convey this message.

Finally, fifth, for you long-time addicted smokers who have been unable to quit and probably will not ever quit, or who still get a kick out of the nicotine experience even after all these years, the government message should be: Carry out your habit in private. It is clear that second hand smoke is very dangerous to others. Think especially hard about smoking in the presence of loved ones, even in your own home, since you would surely later regret causing one of them to have a heart attack or get lung cancer because you blew too much smoke into the air they breathed. The E graphic (again perhaps with a small change in the text) might convey this message.

Of course, with many audiences to reach, there is bound to be overlap and some graphics could well be seen as helping to convey more than one message. The point, however, is that I am envisioning that Congress and the FDA should concede that these are the sorts of messages that they are wanting to convey through the new combined text and graphics—messages that tell people how the government wants them to act.

²⁵ See *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006).

In line with what I have already noted, it seems clear that government could convey those public health messages I have just outlined by purchasing advertising space on television, billboards or magazines, or by renting spaces in stores and posting the messages there. The legal question is whether it is equally valid for government to insist that the cigarette packages themselves carry these words and pictures as a condition on the right to sell cigarettes (or to require grocery stores, gas stations and gun shops to carry the messages set out at the start of this article as a condition of their license to do business). To me, the factual disclosures and the government opinion messages are both regulatory requirements that should in no way be seen as incompatible with the free speech clause.

We do not make adult smoking illegal primarily for practical reasons. We still have perhaps forty million adult smokers in the United States and we do not want to make them all criminals; plus, we have some compassion for those who have become hopelessly addicted. But there is nothing improper about trying to stigmatize smoking without criminalizing it. So, too, we do not want to make it a crime to drive, to drink sodas or to own a gun; however, government has the right to try to stigmatize driving versus using public transport, consuming sugar-sweetened beverages instead of consuming either tap water or fresh fruits, and having guns around where children might find them.

Of course, government need not adopt the particular messages I have proposed, and it is not as though business is helpless here. Tobacco companies (and other businesses whose products cause public health problems)²⁶ have the democratic process within which to work, something they do quite effectively. They can use their political muscle to try to block laws requiring them to carry messages like those I have discussed or to repeal those laws or regulations that are adopted that they do not like. But if public health advocates win the political battle, then government should be able to send its messages on the packages and in the stores.²⁷

Existing Supreme Court decisions in the realm of “compelled speech” do not hold otherwise. This compelled carrying of *government public*

²⁶ See Stephen D. Sugarman, *Performance-Based Regulation: Enterprise Responsibility for Reducing Death, Injury and Disease Caused by Consumer Products*, 34 J. OF HEALTH POL. POL'Y & L. 1035 (2009).

²⁷ See *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000) (“When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials could espouse some different or contrary position.”).

health messages in connection with the sale of consumer products is clearly very different from facts of the *Barnette* case, the leading case in the “compelled speech” line of cases.²⁸ There, school children were required to say the pledge of allegiance to the flag²⁹ where the whole point of the exercise was to indoctrinate children, to get them to both recite and believe it, and to be seen saying so. The Supreme Court agreed that forcing someone to speak could violate the First Amendment just as a prohibition on speaking can.³⁰ But messages like those I imagined at the start of this article and those I have envisioned for tobacco products would not be viewed as coming from the businesses whose packages and premises are carrying them.³¹ Rather, their labels and their words make clear (and need to make clear) that they are coming from government. Moreover, these words are not purely about politics or ideology, as was true in the pledge case. These words are about the public health risks caused by consumer products to which the government messages are attached.

Neither is the *Miami Herald*³² case to the contrary. There, a Florida law required newspapers to provide free space in the paper for politicians they attack in editorials (a provision justified on the ground that the press was becoming too powerful in determining which candidates were being elected).³³ In effect, the Florida “right of reply” law mandated the carrying of a substantial “letter-to-the-editor” from a political figure the paper had criticized. The Supreme Court also held this to be unconstitutional compelled speech.³⁴ Note, however, that the *Herald* was required by Florida law to carry, not the *government’s* message, but rather *third parties’ political* messages. Moreover, in the *Miami Herald* case we are talking about a newspaper whose identity is tied up with free speech (and freedom of the press), and the Court understandably feared that the Florida requirement would chill the press’ willingness to take political stands in the first place.³⁵ None of this can be said about the messages discussed here. As for the *PG&E*³⁶ case, in which the Court also invoked the compelled speech doctrine, there too a California agency was requiring the

²⁸ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

²⁹ *Id.* at 626.

³⁰ *Id.* at 642.

³¹ *Cf. PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

³² *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974).

³³ *Id.* at 247-49.

³⁴ *Id.* at 258.

³⁵ *Id.* at 257.

³⁶ *Pac. Gas & Electric v. Pub. Utils Comm’n of Cal.*, 475 U.S. 1 (1986).

public utility to insert with its bills a *political* message of some *third* party. So again, that case was not about government speech concerning public health.

Nor should the Supreme Court's decision in *Wooley v. Maynard*³⁷ be read to control my examples. There, the Court held that the state could not compel a driver to keep visible on his state license plate the New Hampshire motto: "live free or die."³⁸ The driver had objected to this ideological message (on both religious and free speech grounds) and covered it over.³⁹ He then was criminally prosecuted and convicted three times for defacing his license plate.⁴⁰

The license plate area is a notorious place for Americans to express their political views via bumper stickers and license plate borders on their cars. It is easy to see why a New Hampshire resident would not want to carry this ideological message that had nothing to do with driving. In effect, he was required to advertise a slogan he politically opposed as a pre-condition of his individual exercise of another fundamental right – the right to travel. As the Court put it: "A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts."⁴¹ While perhaps not quite as offensive as compelling children to speak and embrace the pledge of allegiance, I will accept that the singling out of noncommercial drivers (but not high public officials)⁴² as having to carry this political message amounts to impermissible compelled speech.

Perhaps requiring drivers to display on their license plates a very different hypothetical state motto – "drink tap water" – would also be vulnerable, although this is a public health message that is very different

³⁷ *Wooley v. Maynard*, 430 U.S. 705 (1977).

³⁸ *Id.* at 717.

³⁹ *Id.* at 705.

⁴⁰ *Id.*

⁴¹ *Id.* at 714.

⁴² Oddly, New Hampshire required the motto only on ordinary noncommercial vehicles. Its argument that this allowed police to easily distinguish commercial from noncommercial vehicles seemed preposterous as that distinction was already made clear by the license plate number and could easily be made clearer in other ways than by using the state motto. Moreover, it seemed bizarre that this expression of New Hampshire-style patriotism was not included in the official license plates of people like the Governor and state Supreme Court Justices, etc. From Footnote 1 of the Court's opinion: "License plates are issued without the state motto for trailers, agricultural vehicles, car dealers, antique automobiles, the Governor of New Hampshire, its Congressional Representatives, its Attorney General, Justices of the State Supreme Court, veterans, chaplains of the state legislature, sheriffs, and others." *See id.* at 707 n.1. Hence all New Hampshire had to do to honor the plaintiff's free speech claim was to issue to him the sort of plates it regularly issues to others.

from “live free or die.” But, in any event, that example is not parallel with respect to who is being compelled to carry the government message in all of my earlier examples. The entities being compelled are commercial sellers and the government message relates to their product, making at least the actual facts of *Wooley* easily distinguishable.

In contrast with *Barnett* and *Wooley*, in *Pittsburgh Press*,⁴³ the Supreme Court upheld a legal ban on carrying help-wanted ads that proposed a hiring that violated employment discrimination laws – for example, jobs for men only.⁴⁴ Shifting the facts from one of limiting speech to compelled speech, I argue that it would be equally legal to require newspapers to put at the top of their help-wanted job-listing page a notice like this: “The State Attorney General reminds you that under Pennsylvania law employers may not discriminate on the basis of race, gender, religion, and national origin, and urges you not to work for employers who do.” The newspaper could of course still campaign on its editorial page to overturn these laws if it opposes them. But this would be a required government message attached to the newspaper’s business side selling of help-wanted ads. That is altogether different from the political speech at issue in the *Miami Herald* case.

To repeat, in all my examples, quite unlike the pledge of allegiance case, businesses are not being compelled to adopt these messages as theirs. Rather, they are only being compelled to carry a governmental public health message on their product packaging or in their stores. As such, I think that the First Amendment is not implicated at all.⁴⁵

Rounding out the relevant Supreme Court decisions, a few words are offered here about some rather odd cases involving government-facilitated organized advertising on behalf of generic food products. If most food products are branded and brand advertising is employed to promote their sale, then so-called generic food producers (sellers of broccoli or strawberries, for example) can be seen to be at a competitive disadvantage. No individual seller of the generic product is likely to advertise because doing so would also benefit its competitors. But because of free-rider problems (each one would have an incentive not to participate but try to

⁴³ *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376 (1973).

⁴⁴ *Id.*

⁴⁵ See *Pleasant Grove City v. Summun*, 555 U.S. 460 (2009) (holding that, in regard to a local government’s decision about which permanent memorials it would display in a public park, “the Free Speech Clause restricts government regulation of private speech but does not regulate government speech”).

benefit from the spending by others) it is not easy for generic product sellers to organize to advertise together (not to mention that they might be concerned about anti-trust problems if they did so). To deal with this market failure, the government has in various ways helped to organize what are public-private organizations, which sellers of generic products, in effect, must join. Those organizations then collectively advertise and assess a share of the cost to the members. Often this will work to the mutual benefit of all (or at least most) of the members. Yet, some involuntary participants might disagree and think the collective advertising is not worth the money. Moreover, if some members later decide to brand their product (for example, Bill's Best Broccoli), the collective advertising arrangement may no longer be in their interest. They may now want only to pay to advertise their brand (or maybe they want to free ride on the old organization to increase general demand for broccoli and then to feature their brand with their ad money so as to capture a larger share of the larger market). Just when any collective advertising arrangement with assigned contributions should end is not easy to decide. Unhappy with not being allowed out of these sorts of arrangements, several food producers have sued claiming that the compelled funding of a message they opposed paying for was, in effect, compelled speech and violated their First Amendment rights.

Just as I asserted earlier in this article, I think there are competition issues here that should be solved by the Sherman Act with amendments if need be, and not by inserting the First Amendment into such battles. However, in the *United Foods* case, the Supreme Court found the relevant regime, involving involuntarily charges assigned to fresh mushroom handlers pursuant to the Mushroom Promotion, Research, and Consumer Information Act, to violate the First Amendment.⁴⁶ I am not convinced by the argument that an assessed charge whose proceeds are used for advertising should automatically be equated with compelled speech, but, in any event, *United Foods* is easily distinguished from the arguments I make here. In that case, the Court explicitly ignored the possible argument that the advertising at issue was "government speech" since the government had failed to make that argument in the court below.⁴⁷ And, sure enough, in *Johanns v. Livestock Mktg. Ass'n*,⁴⁸ a later case arising under the Beef

⁴⁶See *United States v. United Foods*, 533 U.S. 405 (2001).

⁴⁷*Id.* at 416-17.

⁴⁸*Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005).

Promotion and Research Act of 1985, the Court rejected the First Amendment claim brought by objecting beef producers who did not want to pay for generic beef advertising by concluding that, because of the large role the government was playing in the program, the message being funded was government speech and hence exempt from “compelled speech” challenge – just the sort of distinction I have been making here.⁴⁹

In sum, existing Supreme Court First Amendment doctrine can readily accommodate my way of looking at laws that require product sellers to carry government public health messages that express a view on how people should behave. Some lower federal courts, alas, seem to be taking the Supreme Court’s decisions in altogether the wrong direction. For example, in the 1990s, the State of Vermont, in effect, required food retailers to post a notice disclosing which, if any, of the milk it offered for sale came from cows that were treated with a synthetic growth hormone (rBST).⁵⁰ The FDA at the time had concluded that the milk from cows treated with rBST was no different from traditional milk, but nevertheless there had been considerable public concern about the use of this new technology.⁵¹ Surveys of Vermont citizens suggested that a good share of the public wished to know whether the milk it was being offered came from cows that were so treated.⁵² Yet, a divided federal Court of Appeals invoked the First Amendment and enjoined the operation of the Vermont law on the ground that consumer curiosity was an insufficient basis for compelling a disclosure that dairy farmers using the treatment did not want retailers to make.⁵³

So, too, in 2010 the City of San Francisco adopted an ordinance initially requiring labels on cell phones to disclose the specific amount of electronic radiation they emit, and then later amended the law requiring instead that cell phone sellers generally inform consumers that there might be a risk of harm from cell phone emissions and what consumers might do to reduce that possible risk.⁵⁴ But since any actual danger from cell phone radiation is thought to be scientifically speculative at this point, even if citizens might still well wish to know about this potential danger, both the initial

⁴⁹ *Id.* at 559.

⁵⁰ *Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67, 69 (1st Cir. 1996).

⁵¹ *Id.* at 70.

⁵² *Id.* at 75.

⁵³ *Id.* at 69.

⁵⁴ See 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 Dec. 11, 2013) (discussing the San Francisco case and settlement).

and amended versions were attacked in court.⁵⁵ After a temporary injunction against the ordinance was granted, the city decided to abandon the litigation and agreed not to enforce the law.⁵⁶ Again, industry was successful in using the compelled speech doctrine.

The Vermont and San Francisco decisions seem ironically inconsistent with the underlying idea of applying the First Amendment's free speech clause to commercial speech in the first place – that consumers have a right to receive information (for example, price information about pharmaceutical drugs in the path-breaking *Virginia Pharmacy* case).⁵⁷ In these Vermont and San Francisco decisions, where state or local government is responding to public demand for information, courts are stepping in and effectively precluding consumers from receiving the information that many would like to have. Although it is commonly said that the best way to deal with speech you disagree with is to encourage more speech, the judiciary here is behaving paternalistically (or, some might say, it is simply being hostile to regulation): sellers cannot be required to convey information when the alarm raised is of scientific dubiousness, and where as a result, in the court's view, a different branch of government might possibly be misleading the public (a matter normally left to the political judgment of the legislative and executive branches). Of course, Vermont and San Francisco could rent billboard space or send mailings to voters expressing the very concerns that motivated the invalidated laws and that would surely be legal. But it probably makes a substantial difference in terms of bringing home the government's message if government is unable to put the information right in front of consumers just as they are making product purchase decisions.

Returning then to the graphic images the FDA selected to be placed on cigarette packages, as noted above the industry has complained that these images (unlike the text) do not convey "facts" but rather are emotional appeals intentionally designed to get people not to smoke. And while one U.S. Court of Appeals upheld the general power of Congress and the FDA to require graphic images,⁵⁸ in 2012 the Court of Appeals for the District of Columbia (by a divided 2-1 vote) held the specific images selected by the FDA to be unconstitutional compelled speech.⁵⁹

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

⁵⁸ *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012).

⁵⁹ *RJ Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012).

At one point, the majority opinion says about the graphic images: “They are unabashed attempts to evoke emotion (and perhaps embarrassment) and browbeat consumers into quitting.”⁶⁰ This seems a fair appraisal. The next move of the Court was to apply the so-called *Central Hudson* test, adopted by the Supreme Court as a way to evaluate restrictions on commercial speech (not compelled speech).⁶¹ In doing so, the majority seemed to say that requiring the emotionally charged graphic images might be permissible after all if they were narrowly tailored to actually achieving the public purpose of reducing smoking. The majority conceded that many nations throughout the world required that cigarette packs carry such graphic warnings.⁶² But it found that there was no persuasive evidence in the record that those images actually make any significant difference in reducing smoking prevalence rates.⁶³ And, as a result of that finding, the Court concluded that the government could not force tobacco companies to carry messages (poorly) designed to reduce the sale of its products even if (following the majority’s reasoning) the companies had little to worry about in terms of lost sales.⁶⁴ Of course, the tobacco companies surely are worried about lost sales, and there is a certain irony here that had the images clearly been shown to work elsewhere in driving down smoking rates, it would seem that they might well have been upheld.⁶⁵ The FDA so far has chosen not to appeal the matter to the Supreme Court and instead is currently reconsidering whether there are other graphic images it might require that the Court of Appeals would approve. As I have argued throughout, I believe this is altogether the wrong way to look at this form of governmental regulation.

These three cases should be treated as instances of government requiring business owners to carry a *government* message on (or near) their product packaging as a condition of being allowed to sell the product. That is, what is being compelled is the carrying of government speech (and that should be made quite clear in the actual message if need be). Companies

⁶⁰ *Id.* at 1217.

⁶¹ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980).

⁶² *RJ Reynolds*, 696 F.3d at 1219.

⁶³ *Id.*

⁶⁴ *Id.* at 1221-22.

⁶⁵ Moreover, more recent research has found that the graphic warnings in Canada have actually had a very substantial impact in lowering smoking rates. Jidong Huang, Frank J Chaloupka, & Geoffrey T Fong, *Cigarette Graphic Warning Labels and Smoking Prevalence in Canada: A Critical Examination and Reformulation of the FDA Regulatory Impact Analysis*, TOBACCO CONTROL ONLINE (Nov. 11, 2013) http://tobaccocontrol.bmj.com/content/early/2013/11/11/tobaccocontrol-2013-051170.short?g=w_tobaccocontrol Ahead Tab.

are not compelled to say they believe that people should not smoke or that milk with rBST is different or that cell phones emit potentially dangerous radiation. As I see it, this sort of regulatory restriction does not involve the First Amendment at all so long as it does not preclude the product sellers from also conveying their message.

To be sure, the Fifth Amendment governs takings and regulatory takings that limit the extent to which government can use and control an individual's property for public purposes. But, in my view, that is where this constitutional battle should be fought – and not with the First Amendment.

So, for example, at the extreme, using up too much of a product's packaging or a store's square footage to carry the government's message could amount to a "taking" of property without compensation under the Fifth Amendment. Indeed, sometimes courts and commentators talk about these matters as government using what might otherwise be viewed as people's private property to serve as a "billboard" for the government's message, picking up a phrase used by the Supreme Court majority in the *Wooley* case.⁶⁶ Fair enough. But current legal doctrine in that area of constitutional law (the Fifth Amendment, not the First Amendment) would seem to readily allow the government to claim a substantial portion of one side of the cigarette package, or a modest space in the aisles of supermarkets, or pump areas of gas stations, or counters of gun shops or cell phone stores for its message without that amounting to a taking or a regulatory taking.⁶⁷

Notice that all of the government public health messages I have discussed have a close nexus to the product on offer and that the size and nature of the government message seem proportionately appropriate to the public health risk at stake.

Note too that government could tax these consumer products (a bit more than now) and use the proceeds to pay to condemn a space on the package or in the store where the government could then post its message. This is

⁶⁶ *Wooley v. Maynard*, 730 U.S. 705, 715 (1977) ("New Hampshire's statute in effect requires that appellees use their private property as a 'mobile billboard' for the State's ideological message or suffer a penalty, as Maynard already has. As a condition to driving an automobile, a virtual necessity for most Americans, the Maynards must display 'Live Free or Die' to hundreds of people each day.").

⁶⁷ The United States law on "regulatory takings" is well captured by *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104 (1978) and *Lingle v. Chevron, U.S.A., Inc.*, 544 U.S. 528 (2005). For a trio of recent takings/regulatory takings cases decided in 2013, see *Koontz v. St. Johns River*, 133 S. Ct. 2586 (2013); *Horne v. Dep't of Agric.*, 133 S. Ct. 2053 (2013); and *Ark. Game and Fish Comm'n v. United States*, 133 S. Ct. 511 (2012).

effectively the same thing as simply requiring the posting of the government message without any money changing hands.

In conclusion, while the government messages about public transport, healthy eating and drinking, and gun safety I imagined at the outset are not currently required to be displayed by businesses that sell the relevant products, they might well be in the future, and, if so, they could be useful weapons in the promotion of public health. Having to display a reasonably sized government message as a condition of being permitted to sell the product seems like a fair price for society to ask product makers and sellers to pay. So long as it is clear that the messages are coming from the government and not the product seller, courts should keep the First Amendment out of it.