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CATCHING SIGHT OF CREDENCE ATTRIBUTES: COMPELLING PRODUCTION METHOD DISCLOSURES ON EGGS

Aurora Paulsen *

INTRODUCTION

Production methods on modern farms hardly resemble those of even half a century ago, but most consumers would not know it. Even more, consumers may not understand how new production methods alter food quality. To correct misperceptions concerning modern egg production, several citizens' groups, Compassion Over Killing, the Animal Legal Defense Fund, and the Penn Law Animal Law Project, filed a petition with the United States Food and Drug Administration ("FDA") asking that it require producers to label shell eggs – eggs sold while still in their shells – with information about methods of production.[1]

According to the petition, information about whether eggs are produced humanely is important to many consumers. Although words and images on egg cartons are often deliberately reminiscent of the small farms of previous generations, which presumably granted chickens freedom of movement and time outside, most egg-laying hens are raised under intensive confinement,[2] unable to take more

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[1] Petition by Compassion Over Killing, Inc. et al., to Dep't of Agric., Food Safety & Inspection Serv., *Citizen's Petition to Change the Labeling Requirements for Eggs Sold in the United States*, (Dec. 2010) [*hereinafter* Compassion Over Killing, Inc. et al.], *available at* www.fsis.usda.gov/PDF/Petition_Compassion_OverKilling_123010.pdf.

[2] *Id.*

than a few steps in tiny wire cages and lacking access to the outdoors and natural light.[3] Thus, the current labels on eggs often mislead consumers.

The petition also asserts that, in addition to being produced in a manner inconsistent with product labeling, eggs from caged hens contain lower nutrient levels than eggs from free-range hens, and are more likely to carry *Salmonella* than eggs from hens that were not raised in cages.[4] To remedy consumer confusion, the citizens' groups urged the FDA to adopt a three-tiered disclosure system: Free-Range Eggs, Cage-Free Eggs, and Eggs from Caged Hens.[5] Such disclosures on eggs are essential, because consumers pay premiums to purchase eggs produced using added-quality production methods, such as free range or cage free production, but they may not actually be getting

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[3] *See Factory Egg Production*, FARM SANCTUARY, http://www.farmsanctuary.org/issues/factoryfarming/eggs/ (last visited Nov. 22, 2011).

[4] *Id.* at 25 (citing S. Van Horrebeke et al., *Determination of the Within and Between Flock Prevalence and Identification of Risk Factors for Salmonella Infections in Laying Hen Flocks Housed in Conventional and Alternative Systems*, 94 PREVENTATIVE VETERINARY MED. 94 (2010) (finding that caged laying hens are twenty times more likely to transmit *Salmonella* than cage-free hens)); *id.* at 27 (citing Heather D. Karsten, et al., *Vitamins A, E and Fatty Acid Composition of the Eggs of Caged Hens and Pastured Hens*, 25 RENEWABLE AGRIC. & FOOD SYS. 45 (2010) (reporting that eggs from pastured hens had higher concentrations of omega-3 fat and vitamins A and E than eggs from caged hens)).

[5] *Id.* at 6. The petition recommends the following definitions:

> (1) The labels on egg containers containing eggs that are laid by hens that are not confined to cages, and are given readily and easily available access to outdoor pastures which all hens can access at once, with living vegetation and accessible overhead cover, for the period of their lives during which they produce eggs, excluding actual transport or during the provision of veterinary care by a licensed veterinarian though not for a period to exceed ten (10) days shall bear the designation 'Free-Range Eggs.' (2) The labels on egg containers containing eggs that are laid by hens that are not confined to cages but kept in a barn or other enclosed structure in which they are permitted to move freely for the period of their lives during which they produce eggs, excluding actual transport or during the provision of veterinary care by a licensed veterinarian though not for a period to exceed ten (10) days shall bear the designation 'Cage-Free Eggs.' (3) The labels on egg containers containing eggs that are laid by hens that are confined to a cage for any period of their lives during which they produce eggs, excluding actual transport or during the provision of veterinary care by a licensed veterinarian though not for a period to exceed ten (10) days, shall bear the designation 'Eggs From Caged Hens.'

Id. at 6–7.

higher quality eggs.[6]

The transmission of commercial information that occurs through labels may be viewed through an economic lens. Part I of this Comment provides background on the economics of food selection. Part II outlines labeling requirements applying to eggs, federal policy on labeling production method information, and the qualitative effects production methods have on eggs. Part III provides background on the economics of information, and maintains that disclosing production methods on eggs remedies a current information asymmetry between egg producers and egg consumers. The three-tiered disclosure system this Comment advocates requires the compulsion of commercial speech, which has First Amendment implications, so Part IV discusses First Amendment doctrine on compelled commercial speech. Part V asserts that mandating production method disclosures on egg cartons is reasonably related to governmental interests in preventing consumer deception and in allowing consumers to distinguish between material aspects of foods, and is therefore permissible. This Comment concludes that a three-tiered system would help prevent deception of egg consumers, and that such a system of disclosures is likely to be constitutional.

I. BACKGROUND ON THE ECONOMICS OF FOOD SELECTION

Food selection is among the most basic of human activities, and many consumers feel strongly about the food products they select. As rational self-maximizers, consumers select food products based on the expected utility of those products, considering many qualities when calculating the utility of foods.[7] Consumers' food preferences may be influenced by, among other things, religious ideals, ethical standards, the view that political beliefs are exercised by "voting with one's purse," and personal risk assessments, such as those associated with novel foods or foods produced by unconventional techniques. Like other economic choices, purchasing decisions are made in the margins, so relatively small differences between food products are often significant to consumers when they are calculating utility. If their perceptions of qualities are incorrect, consumers miscalculate the utility of the foods they select.[8]

The optimal level of food quality is met when both producers

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[6] *See infra* pt. II.

[7] Julie A. Caswell & Eliza M. Mojduszka, *Using Information Labeling to Influence the Market for Quality in Food Products*, 78 AM. J. AGRIC. ECON. 1248, 1248 (1996) [hereinafter Caswell & Mojduszka, *Information Labeling*].

[8] *Id.*

and consumers have perfect information about a food's attributes, transaction costs are low, and market prices fully reflect all externalities.[9] If any of these characteristics is absent, market inefficiencies occur. For example, when information asymmetry exists, high-quality products may be undersupplied, because consumers will not pay for an attribute that may or may not be present.[10] Thus, the overall level of quality may be lower than in a world of perfect information and, eventually, markets for the high-quality good may not exist.[11] In this way, market performance depends on the efficacy of quality signaling.[12]

To align food purchases with their preferences, consumers compare foods based on a number of attributes. Economists have divided product attributes into three categories: search attributes, experience attributes, and credence attributes.[13] These categories of attributes result from differing levels of information symmetry between producers and consumers.

Consumers can evaluate a product's search attributes, such as the color or size of fish or the ripeness of vegetables, prior to purchase.[14] Advertising for search attributes is usually accurate because consumers can perceive a food's characteristics and evaluate the ad's claims.[15] Thus, consumers' purchasing decisions directly incentivize producers to provide the range of search attributes that consumers prefer.[16] Because the market for search attributes

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[9] *Id.* at 1249. Examples of externalities caused by food production are damage to soil caused by overuse of land for growing crops and pesticide runoff entering waterways.

[10] Julie A. Caswell & Eliza M. Mojduszka, *A Test of Nutritional Quality Signaling in Food Markets Prior to Implementation of Mandatory Labeling*, 82 AM. J. AGRIC. ECON. 298, 298-99 (2000) [hereinafter Caswell & Mojduszka, *Nutritional Quality*].

[11] *Id.* at 298.

[12] *Id.* at 298–99.

[13] *See*, e.g., Caswell & Mojduszka, *Information Labeling*, *supra* note 7, at 1249; Julie A. Caswell & Daniel I. Padberg, *Toward a More Comprehensive Theory of Food Labels*, 74 AM. J. AGRIC. ECON. 460, 460–61 (1992); Christopher Chen, *Food and Drug Administration Food Standards of Identity: Consumer Protection Through the Regulation of Information*, 47 FOOD & DRUG L.J. 186–87 (1992); John M. Church, *A Market Solution to Green Marketing: Some Lessons from the Economics of Information*, 79 MINN. L. REV. 245, 273–76 (1994).

[14] *See* Church, *supra* note 13, at 273 (asserting that "[c]onsumers determine 'search' qualities before making a purchase.").

[15] *Id.* at 274.

[16] Caswell & Mojduszka, *Information Labeling*, *supra* note 7, at 1249.

functions well, government regulation in this area is relatively rare.[17]

Unlike search attributes, experience attributes, such as a food's taste and cooking properties, are not available to consumers prior to purchase.[18] Consumers are only able to evaluate experience attributes when they use a product.[19] Because these attributes are not available to consumers before they select a product, a moral hazard arises: producers may be motivated to substitute a lower quality experience attribute in the interest of profit, knowing that purchase will occur before discovery of the substitute.[20] This moral hazard is particularly problematic with products that are purchased infrequently, such as cars. However, the information problem can be mitigated with products purchased repeatedly, such as foods.[21] For example, a consumer who has been tricked into buying a food that tastes bad will simply avoid that product in the future. Eventually, consumer preference drives a disfavored product from the market;[22] therefore, the government becomes involved with regulating foods' experience attributes only infrequently.[23]

Like experience attributes, credence attributes are not available to consumers prior to purchase.[24] Unlike experience attributes, however, credence attributes are often difficult or even impossible to evaluate through purchase and consumption.[25] Examples of credence attributes include nutritional contents and methods of food production, such as information about pesticide application or safety precautions used in producing the food.[26] Because products with the credence attribute may be, or may seem to be, physically identical to products that do not have the credence attribute, producers face the moral hazard of substituting a product with lower qualities for a product with added credence attributes. After substitution, producers may set a price that reflects the higher quality product, because they know that it is very difficult for

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[17] *Id.* An exception is the regulation of consumer fraud, including regulations set forth in the Fair Packaging and Labeling Act of 1966. 15 U.S.C. §§ 1451–1461 (2006).

[18] *See* Chen, *supra* note 13, at 188.

[19] *Id.* at 187.

[20] *Id.* at 188.

[21] *Id.*

[22] *Id.* at 188–89.

[23] Caswell & Mojduszka, *Information Labeling*, *supra* note 7, at 1250.

[24] *See* Chen, *supra* note 13, at 189.

[25] *Id.*

[26] *See* Caswell & Mojduszka, *Information Labeling*, *supra* note 7, at 1250 (arguing that food safety is often a credence attribute because consumers may be unable to link a food with the illness it caused).

consumers to tell the difference. Information asymmetries for these qualities are so pronounced that "economic models of quality hit a dead end when they come to discussion of credence attributes."[27] To remedy information asymmetries surrounding credence attributes, consumers often rely on reputable systems of certification.[28] Thus, the government may elect to play a role in certification by regulating or requiring labels about credence attributes.[29]

II. BACKGROUND ON LABELING EGG CARTONS

The Food and Drug Administration ("FDA") oversees the labeling of most foods, including shell eggs. One responsibility of this oversight is ensuring that the labeling on egg cartons is truthful and does not mislead consumers. Nevertheless, despite FDA oversight, egg cartons are still routinely labeled in ways that confuse consumers and deprive them of the capacity to select eggs with high quality attributes, such as superior nutrient contents or a decreased risk of transmitting *Salmonella*.

A. Oversight of Labeling on Egg Cartons

Under the Federal Food, Drug, and Cosmetic Act of 1938 ("FDCA")[30] and the Nutrition Labeling and Education Act of 1990 ("NLEA"),[31] which amended the FDCA, most foods are subject to certain labeling requirements.[32] In addition, Congress adopted the Fair Packaging and Labeling Act ("FPLA")[33] in 1966 to prevent deceptive trade practices and ensure that the public receives accurate information about the values of consumer commodities.[34] According

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[27] *Id.*

[28] *Id.* at 1251.

[29] *Id.* One notable example is federal oversight of the National Organic Program. The National Organic Program is governed by the Organic Foods Production Act of 1990 and its enacting regulations. 7 U.S.C. § 6503 (2006); 7 C.F.R. § 205 (2006).

[30] Pub. L. No. 101–717, 52 Stat. 1040 (1938) (codified in scattered sections of 21 U.S.C.).

[31] Pub. L. No. 101–535, 104 Stat. 2353 (1990) (codified as amended in scattered sections of 21 U.S.C.). The regulations supporting the NLEA can be found at 21 C.F.R. § 101.9 (2006).

[32] *See* PATRICIA CURTIS, GUIDE TO FOOD LAWS AND REGULATIONS: FOOD LABELING 85 (2005).

[33] 15 U.S.C. §§ 1451–1461 (2006).

[34] *See* NEAL D. FORTIN, FOOD REGULATION: LAW, SCIENCE, POLICY, AND PRACTICE 50 (2009) (asserting that the FPLA was passed to "prevent unfair and

to the Congressional declaration of policy that introduces the Act, "[i]nformed consumers are essential to the fair and efficient functioning of a free market economy," and "[p]ackages and their labels should enable consumers to obtain accurate information as to the quantity of the contents and should facilitate value comparisons."[35] The FDA ensures that producers are in compliance with the FDCA, the NLEA, and the FPLA.[36]

Section 403 of the FDCA[37] provides the FDA[38] with the authority to oversee the labeling on shell eggs.[39] Primarily, section 403 prohibits misleading labeling and requires that voluntary labeling be truthful.[40] The FDCA also requires producers to label information such as a food's contents and net weight, ingredients, and identity, as well as the name of the manufacturer.[41] Under section 321(n) of the FDCA, the FDA can require the disclosure of two types of information: facts that are "material" to the "consequences" of a food's use, and facts that are "material" in light of a producer's own representations about a food.[42]

B. Food Labeling Policy

The federal government rarely mandates the labeling of production method information. One exception is the requirement that food products produced abroad be labeled with their country of origin.[43] This requirement serves to provide information for

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deceptive trade practices, and to provide consumers with accurate information regarding the quantity and value of products").

[35] 15 U.S.C. §§ 1451–1461.

[36] *Guidance for Industry: A Food Labeling Guide*, U.S. DEP'T OF HEALTH & HUMAN SERVS., FOOD & DRUG ADMIN., *available at* http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/FoodLabelingGuide/default.htm.

[37] 21 U.S.C. § 401 (2006).

[38] Fred H. Degnan, *Biotechnology and the Food Label*, *in* LABELING GENETICALLY MODIFIED FOOD: THE PHILOSOPHICAL AND LEGAL DEBATE 18–19 (Paul Weirich ed., 2007).

[39] *See* FORTIN, *supra* note 34, at 90 (stating that "[t]he FDA labeling requirements apply to all foods except meat, poultry, and egg products"); *see also* CURTIS, *supra* note 32, at 108 (stating, "The Food and Drug Administration . . . is responsible for ensuring that foods sold in the United States are safe, wholesome, and properly labeled. This applies to foods produced domestically, as well as foods from foreign countries.").

[40] Degnan, *supra* note 38, at 18.

[41] *See* 21 U.S.C. §§ 343(e), (g), (i).

[42] *Id.* § 321(n).

[43] *See* 19 U.S.C. § 1304(a) (2006).

consumers who are concerned about food safety in other countries. Another exception is the requirement that producers label foods that have been irradiated,[44] which is a process that involves treating the food with ionized radiation to kill bacteria and other microorganisms, and to keep foods from spoiling for longer periods of time.[45]

In explaining its decision to mandate the labeling of irradiated foods, the FDA stated in 1986 that it considered "whether consumers view such information as important and whether the omission of label information may mislead a consumer."[46] However, in 2007 the FDA explained that "[i]n the past, FDA policies on irradiation labeling have focused on the fact that the food has been processed . . . . In recent years, FDA policies on the labeling of foods have focused on the results of the processing of the food rather than the processing itself."[47] Nevertheless, the FDA still requires producers to label irradiated foods.[48] Besides these exceptions, the federal government rarely mandates the labeling of production method information.

Unlike irradiation, the presence of genetically modified ("GM") ingredients need not be reported.[49] Currently, more than 70%

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[44] *See* Ionizing Radiation for Treatment of Food, 21 C.F.R. § 179.26(c) (2008). Food products that have been irradiated must be labeled with a radiation warning statement identifying the product as either "[t]reated with irradiation" or "[t]reated by irradiation." *Id.* at 179.26(c)(2).

[45] *See Irradiation: A Safe Measure for Safer Iceberg Lettuce and Spinach*, U.S. FOOD & DRUG ADMIN., 2 (Aug. 22, 2008), *available at* http://www.fda.gov/downloads/ForConsumers/ConsumerUpdates/UCM143389.pdf . The FDA has determined that irradiating foods is safe for consumers, and, as one example, that irradiated iceberg lettuce and spinach "retain their nutrient value[s] and are safe to eat." *Id.*

[46] Irradiation in the Production, Processing and Handling of Food, 51 Fed. Reg. 13,376, 13,388 (April 18, 1986) (to be codified at 21 C.F.R. pt. 179).

[47] Irradiation in the Production, Processing, and Handling of Food, 72 Fed. Reg. 16,291, 16,295 (proposed April 4, 2007) (to be codified at 21 C.F.R. pt. 179). Notably, the FDA's 2007 statement observed that its policies had changed, not that its earlier interpretation was impermissible.

[48] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-309R, FEDERAL OVERSIGHT OF FOOD IRRADIATION 2 (2010). The U.S. Government Accountability Office ("GAO"), however, observed in 2010 that the FDA does not require a product's ingredient list to disclose that an ingredient, rather than the whole food, has been irradiated, and stated that "FDA officials told us that they do not collect information on how irradiated foods are labeled and marketed." GAO, *Food Irradiation: FDA Could Improve Its Documentation and Communication of Key Decisions on Food Irradiation Petitions*, GAO-10-309R (Feb. 16, 2010), *available at* http://www.gao.gov/products/GAO-10-309R.

[49] Statement of Policy: Foods Derived From New Plant Varieties, 57 Fed. Reg. 22,984, 22,991 (May 29, 1992).

of processed foods contain GM ingredients.[50] Although it was initially cautious about labeling GM food products, the FDA eventually adopted its "substantial equivalence" doctrine, which asserts that an altered food will not be labeled if it is substantially equivalent to its non-altered counterpart.[51] As the FDA opined in 1992, "Federal government regulatory oversight should focus on the characteristics and risks of the biotechnology product – not the process by which it is created."[52]

Furthermore, unless the product complies with organic standards, which prohibit GM ingredients and foods, it is very difficult for producers to adopt labeling that advertises an absence of GM ingredients, because the FDA has imposed strict limitations on the voluntary labeling of non-GM foods.[53] For example, the FDA has stated that claims such as "not genetically modified" and "GMO free" are misleading, and that such voluntary claims need to be substantiated, which is expensive for a producer.[54] The FDA's decision not to mandate the labeling of GM food products has been upheld.[55]

As with GM foods, the FDA does not require producers to label products from animals treated with artificial hormones.[56] Two-

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[50] Robert Streiffer & Alan Rubel, *Genetically Engineered Animals and the Ethics of Food Labeling*, *in* LABELING GENETICALLY MODIFIED FOOD 66 (Paul Weirich ed., 2008).

[51] Exercise of Federal Oversight Within Scope of Statutory Authority: Planned Introductions of Biotechnology Products Into the Environment, 57 Fed. Reg. 6753, 6760 (Feb. 27, 1992).

[52] *Id.* at 6753.

[53] *See* Neil D. Hamilton, *The Law of Food: Eight Questions Shaping America's Food Policy*, STATE & LOCAL FOOD POLICY PROJECT, 5 (Nov. 11, 2002), http://www.statefoodpolicy.org/docs/policy.pdf.

[54] *Voluntary Labeling Indicating Whether Foods Have or Have Not Been Developed Using Bioengineering*, U.S. FOOD & DRUG ADMIN. (Jan. 2001), http://www.fda.gov/food/guidancecomplianceregulatoryinformation/guidancedocuments/foodlabelingnutrition/ucm059098.htm.

[55] *See, e.g.*, *Alliance for Biointegrity v. Shalala*, 116 F. Supp. 2d 166, 179 (D.D.C. 2000). Not all nations follow the American model, however: the EU requires that producers label GM food products and food products with GM ingredients. *See* Margaret Rosso Grossman, *European Community Legislation for Traceability and Labeling of Genetically Modified Crops, Food, and Feed, in* LABELING GENETICALLY MODIFIED FOOD 45–46 (Paul Weirich ed. 2008).

[56] *See* DANIELE NIERENBERG, HAPPIER MEALS: RETHINKING THE GLOBAL MEAT INDUSTRY 50 (Lisa Mastny ed. 2005), *available at* http://www.universityofcalifornia.edu/sustainability/documents/worldwatch_happmeals.pdf.

thirds of beef cattle are treated with artificial hormones,[57] and up to one-third of American dairy cows are treated with the artificial bovine growth hormone rbST (also known as rBGH) to increase milk production.[58]

Producers are not required to label milk from cows that have been treated with rbST.[59] Many groups, including organizations such as the Institute for Responsible Technology, allege that human consumption of milk from cows treated with rbST leads to an increased risk of several types of human cancers.[60] In addition, treating cows with rbST causes cows to develop mastitis, sores, and a number of other ailments.[61]

In 1994, the FDA stated that, absent disclaimers asserting that milk from cows treated with rbST is substantially equivalent to milk from untreated cows, labels asserting that milk is rbST-free "may imply that milk from untreated cows is safer or of higher quality than milk from treated cows,"[62] and may thus be misleading. Following the FDA's guidance, the Second Circuit denied Vermont the right to require the labeling of milk from rbST-treated cows in 1996.[63] In

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[57] *Id.*

[58] Loren Tauer, *The Impact of Recombinant Bovine Somatotropin on Dairy Farm Profits: A Switching Regression Analysis*, 8 J. OF AGROBIOTECHNOLOGY MGMT. & ECON. 33, 33 (2005), *available at* http://www.agbioforum.org/v8n1/v8n1a05-tauer.pdf (stating that "[r]bST was not available in 1993, but one third of these farmers used rbST in 1994").

[59] *See* C. Ford Runge & Lee Ann Jackson, *Negative Labeling of Genetically Modified Organisms (GMOs): The Experience of rBST*, 3 J. OF AGROBIOTECHNOLOGY MGMT. & ECON. 58, 61 (2000), *available at* http://www.agbioforum.org/v3n1/v3n1a09-runge.pdf (discussing voluntary labeling of products from animals treated with rbST).

[60] *See* Samuel Epstein et al., *Petition Seeking the Withdrawal of the New Animal Drug Application Approval for Posilac - Recombinant Bovine Growth Hormone (rBGH)*, U.S. FOOD & DRUG ADMIN. (May 11, 2007), http://www.fda.gov/ohrms/dockets/dockets/07p0059/07p-0059-sup0001-02-vol1.pdf.

[61] STEVEN P. MCGIFFEN, BIOTECHNOLOGY: CORPORATE POWER VERSUS THE PUBLIC INTEREST 56 (2005). The EU banned the addition of artificial hormones in 1988. NIERENBERG, *supra* note 56, at 50.

[62] Interim Guidance on the Voluntary Labeling of Milk and Milk Products From Cows That Have Not Been Treated With Recombinant Bovine Somatotropin, 59 Fed. Reg. 6279-04, 6280 (Feb. 10, 1994).

[63] Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 72 (2d Cir. 1996). The dissent asserted that although the FDA did not find rbST to pose health risks to humans, "there are many possible reasons why a government agency might fail to find health risks, including inadequate time and budget for testing, insufficient advancement of scientific techniques, insufficiently large sampling populations, pressures from industry, and simple human error." *Id.* at 76–77. The dissent

2010, the Sixth Circuit held that the Ohio Department of Agriculture could mandate that milk producers who advertised their nonuse of artificial growth hormones include a disclaimer on their products, stating, "The FDA has determined that no significant difference has been shown between milk derived from rbST-supplemented and non-rbST-supplemented cows."[64] The FDA had previously issued a Guidance determining that milk producers could voluntarily label their products with statements such as "from cows not treated with rbST."[65] However, the agency cautioned that such labels had the potential to be "false and misleading" and should be placed in proper context because consumers may mistakenly believe that milk from untreated cows is of a higher quality or is safer.[66]

As it has done for GM foods and products from animals treated with artificial growth hormones, the FDA has determined that producers need not label products from animals given sub-therapeutic antibiotics. Sub-therapeutic antibiotics are antibiotics given below the level used to treat disease in order to promote rapid growth.[67] The Government Accountability Office concluded that in 2002 livestock animals were treated with thirteen million pounds of antibiotics; a government study found that 80 to 90% of the antibiotics given to livestock are used for weight gain and lower mortality.[68] Experts contend that such widespread use of sub-therapeutic antibiotics in animals destined for human consumption increases the risk of antibiotic resistance in humans, and that antibiotic resistant pathogens have already transferred from animals to humans.[69] Resistance to antibiotics increases hospital costs by an estimated four billion dollars per year.[70]

Furthermore, despite a growing interest in the treatment of farm animals and the difficulty in ascertaining animal husbandry

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concluded that finding the potential harm from recombinant technology not to be real was "alarming and dangerous," and "extraordinarily unrealistic" at a minimum. *Id.* at 77.

[64] Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 634 (6th Cir. 2010).

[65] *Id.* at 633.

[66] *Id.*

[67] *See Low Level Use of Antibiotics in Livestock and Poultry*, FOOD MKTG. INST., http://fmi.org/docs/media/bg/ antibiotics.pdf (last visited Oct. 27, 2011).

[68] *See* Jayson L. Lusk et al., *Consumer Demand for a Ban on Antibiotic Drug Use in Pork Production*, 88 AMER. J. AGR. ECON. 1015, 1015 (2006).

[69] *See id.*

[70] *Id.* The EU banned the use of antibiotics as growth promoters in 2006. William D. McBride et al., *Subtherapeutic Antibiotics and Productivity in U.S. Hog Production*, 30 REV. AGRIC. ECON. 270, 271 (2008), *available at* http://ddr.nal.usda.gov/bitstream/10113/36676/1/IND44059456.pdf.

practices, the federal government does not require producers to label food products with any information about animal welfare standards.[71]

As these examples suggest, the FDA has declined to mandate the labeling of production method information even in instances where evidence suggests that the production method may have bearing on human health and safety. If it decides that an unconventional food is substantially equivalent to its conventional counterpart, the FDA chills some voluntary labeling.

C. Production Methods Impact Material Aspects of Egg Qualities

In 2008, there were 280 million laying hens,[72] most of which lived in cages so small that they were unable to spread their wings.[73] In the U.S., the average amount of space a laying hen is allotted in a battery cage is between 48 and 54 square inches, but laying hens need 72 square inches to stand comfortably.[74] Hens in battery cages are unable to take more than a few steps, and they have no access to fresh air, natural light, or the outdoors.[75] As reported by an egg industry group, United Egg Producers, 95% of eggs are produced using such battery cage systems.[76]

Studies have shown that information about whether eggs are produced humanely is important to many consumers. For example, according to a 2000 Zogby International poll, 86% of respondents found it unacceptable to confine hens in battery cages.[77] Similarly, a

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[71] *See The Truth Behind the Labels: Farm Animal Welfare Standards and Labeling Practices*, FARM SANCTUARY, http://www.farmsanctuary.org/issues/campaigns/truth_behind_labeling.html (last visited Nov. 22, 2011) (noting that animal producers and food retailers have come up with labeling systems to appeal to consumer interest, but not identifying any similar federal labeling systems).

[72] *Farm Animal Statistics: Slaughter Totals*, THE HUMANE SOC'Y OF THE U.S., http://www.humanesociety.org/news/resources/research/stats_slaughter_totals.html (last modified Nov. 7, 2011).

[73] *The Welfare of Hens in Battery Cages*, FARM SANCTUARY, http://www.farmsanctuary.org/issues/factoryfarming/eggs/ (last visited Nov. 22, 2011).

[74] Joy Mench, PhD, *Welfare Problems of Laying Hens*, UNITED POULTRY CONCERNS, http://www.upc-online.org/fall2001/well-being_conference_review.html#layer (last visited Nov. 22, 2011).

[75] *See Factory Egg Production*, *supra* note 3.

[76] PROMAR INT'L, IMPACTS OF BANNING CAGE EGG PRODUCTION IN THE UNITED STATES 2 (Aug. 2009), *available at* http://www.unitedegg.org/information/pdf/Promar_Study.pdf.

[77] *Poll: U.S. Citizens Support Humane Treatment for Egg-Laying Hens*, CNN.COM (Sept. 20, 2000, 8:52 AM), http://archives.cnn.com/2000/FOOD/news/

2007 study funded by Oklahoma State University reported that 95% of participants said they agreed with the statement "[i]t is important to me that animals on farms are well cared for."[78]

Such restrictive confinement of hens leads to eggs that jeopardize human health. For example, all scientific studies in the last five years have found that caged hens are more likely to transmit *Salmonella*.[79] Recently, a study reported in *Preventative Veterinary Medicine* found that caged laying hens are twenty times more likely to transmit *Salmonella* than cage-free hens.[80] Eggs may be infected with *Salmonella Enteritis* when they pass through infected hens' oviducts[81] or are exposed to *Salmonella* through the pores of the shell after being laid.[82] The Food Safety and Inspection Service reports that *Salmonella* causes an estimated 1.3 million illnesses, 15,000 hospitalizations, and 500 deaths annually, and that eggs have been found to be the source of approximately 80% of *Salmonella* infections with a known source.[83]

Furthermore, eggs from caged hens contain lower nutrient levels than eggs from hens that were not raised in cages.[84] For example, a recent study published in *Renewable Agriculture and Food Systems* reported that eggs from pastured hens had higher concentrations of omega-3 fat and vitamins A and E than eggs from

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09/20/food.hens.reut/index.html.

[78] Jayson L. Lusk et al., *Consumer Preferences for Farm Animal Welfare: Results of a Nationwide Telephone Survey*, 14 (Dep't of Agric. Econ. Okla. Univ., Working Paper), *available at* http://asp.okstate.edu/baileynorwood/Bailey/Research/InitialReporttoAFB.pdf.

[79] *Food Safety and Cage Egg Production*, THE HUMANE SOC'Y OF THE U.S., 2 (May 2001), http://www.humanesociety.org/assets/pdfs/farm/report_food_safety_eggs.pdf.

[80] Compassion Over Killing, Inc. et al., *supra* note 1, at 25 (citing S. Van Horrebeke et al., *Determination of the Within and Between Flock Prevalence and Identification of Risk Factors for Salmonella Infections in Laying Hen Flocks Housed in Conventional and Alternative Systems*, 94 PREVENTATIVE VETERINARY MED. 94 (2010)).

[81] *See* Karen Davis, *The Battery Hen: Her Life Is Not For The Birds,* UNITED POULTRY CONCERNS, http://www.upc-online.org/batthen.html (last visited Oct. 27, 2011).

[82] *See Fact Sheet: Egg Products Preparation*, U.S. DEP'T OF AGRIC., FOOD SAFETY & INSPECTION SERV., http://www.fsis.usda.gov/factsheets/focus_on_shell_eggs/index.asp#3 (last modified April 20, 2011).

[83] *Draft Risk Assessments for Salmonella Enteritidis in Shell Eggs and Salmonella spp. in Liquid Egg Products*, U.S. DEP'T OF AGRIC., FOOD SAFETY & INSPECTION SERV., http://www.fsis.usda.gov/oppde/rdad/frpubs/04-034n/introduction.pdf (last visited Nov. 22, 2011).

[84] Compassion Over Killing, Inc. et al., *supra* note 1, at 25–28.

caged hens.[85]

III. CORRECTING THE INFORMATION ASYMMETRY

When a product is consistently misrepresented, the government may ban the product or improve signaling about the product's qualities.[86] Improvements to quality signaling are usually preferable because banning a product restricts both consumers and producers.[87] To improve quality signaling, a government may require a producer to disclose truthful information, prohibit a producer from providing misleading information by controlling voluntary disclosures, provide public information about the product's quality, or grant subsidies for the private provision of information.[88] Such remedies turn experience or credence attributes into search attributes, because they permit consumers to evaluate a product's qualities before purchase.[89] For example, the federal government requires producers to disclose information about nutrient contents so consumers know a food's fat content before buying that food. However, neither having the government provide public information nor pay private companies to provide public information is ideal because these options are expensive. Thus, many government interventions take the form of mandating disclosures or regulating voluntary disclosures.[90]

Although voluntary labeling systems may appear to be the easiest solution to information asymmetries, there are problems with

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[85] *Id.* at 27 (citing Heather D. Karsten et al., *Vitamins A, E and Fatty Acid Composition of the Eggs of Caged Hens and Pastured Hens*, 25 RENEWABLE AGRIC. & FOOD SYS. 45 (2010)).

[86] *See* Caswell & Mojduszka, *Information Labeling*, *supra* note 7, at 1251 (discussing bans and informational remedies as ways of addressing imperfect information).

[87] *See id.* (stating that "[e]conomists have argued that if the government has the choice between banning a risky product or activity and providing information about the risks involved, it should choose information provision").

[88] *Id.*

[89] *Id.* at 1251–52.

[90] To facilitate consumer education, many regulatory agencies require producers and manufacturers to disclose product information. *See, e.g.*, 15 U.S.C. § 1333 (2006) (requiring Surgeon General's warnings on tobacco products); 21 C.F.R. § 101.9 (2006) (requiring nutritional labeling on food products); 21 C.F.R. § 201.10 (requiring the listing of ingredient information on prescription drugs); 21 C.F.R. § 740.1 (requiring warning statements on some cosmetic products). Also, as discussed *supra* Part II(B), the FDA mandates disclosure of use of irradiation, and it determines whether claims such as "GMO free" or "rbST free" are misleading.

foregoing federal labeling mandates. Studies indicate that voluntary systems of labeling production method information on food products do not remedy information asymmetries. For example, prior to the implementation of the Nutrition Labeling and Education Act in 1990, producers provided information about nutrient contents in food products on a voluntary basis.[91] As one study concluded, "[i]ncentives for voluntary disclosure of nutritional content by food processing companies did not generally result in reliable and consistent quality signaling to consumers."[92] Further, although University of California, Santa Cruz researchers recently found that 81% of respondents listed labels as their preferred source of information about foods,[93] only 2% of those who responded to a Harris Interactive Poll were able to correctly identify the definition of the term "natural" on meat and poultry.[94] Such a significant information failure suggests that some consumers may not be selecting products that represent their food preferences.

Additionally, many consumers do not understand fundamental aspects of our current methods of food production. As previously mentioned, more than 70% of processed foods contain GM ingredients.[95] However, the Pew Initiative on Food and Biotechnology found in 2003 that 58% of Americans believed they had never eaten GM food.[96]

Theoretically, if some eggs bear voluntary labels indicating an added quality such as cage free production, the absence of such a label indicates that the added quality is not present. However, it is unclear whether consumers do this calculation, or whether they are often aware of the values of added qualities.

Despite these statistics, consumers typically do very little active research on products they purchase, even when they are shopping for expensive products.[97] In deciding whether to research a product, consumers use a cost-benefit analysis: research continues until the value of an additional unit of information equals the cost of obtaining

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[91] Caswell & Mojduszka, *Nutritional Quality*, *supra* note 10, at 298.

[92] *Id.* at 308.

[93] ANIMAL WELFARE INST., CONSUMER PERCEPTIONS OF FARM ANIMAL WELFARE 3 (Apr. 17, 2011), *available at* http://67.227.178.42/sites/default/files/uploads/legacy-uploads/documents/FA-Consumerperceptionsoffarmwelfare5-011010-1285950277-document-25066.pdf.

[94] *Id.* at 4.

[95] Streiffer & Rubel, *supra* note 50, at 66.

[96] *Id.*

[97] *See* Howard Beales et al., *Consumer Search and Public Policy*, 8 J. CONSUMER RES. 11, 11 (1981).

that unit of information.[98] Consumers have little incentive to continue researching if they believe they already know about the important aspects of a product.[99] However, consumers may not have accurate concepts of the benefits to be gained by additional research.[100] As one scholar explained, "[i]nformation is a commodity the worth of which can never be exactly known before purchase . . . [so] a consumer who sees little merit in gathering information may never discover that more information would have been valuable."[101] As applied to eggs, many, if not most, consumers may not understand that differences in methods of egg production often impact the nutritional qualities of eggs, or that some eggs are more likely to carry *Salmonella* than others, so they may never seek such information.

Opponents of mandatory labeling argue that some consumers make irrational food selections based on labels because they lack information or understanding, potentially lowering demand for food produced by processes that are ultimately beneficial for society.[102] For example, according to one researcher, "[i]rradiated foods are required to be labeled . . . . Given the negative connotations associated with the words 'radiation' and 'irradiation,' the labeling requirement is viewed as an obstacle to consumer acceptance."[103]

Economics assumes that the aggregation of consumer choices makes the market more efficient than if control of the market comes from a few individuals. If we trust in market forces for products, what makes the market for food production different? As law professor Douglas Kysar has noted, "[a]lthough proponents of the process/product distinction tend to view manufacturing processes as especially unreliable bases for consumer distinction, process

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[98] *See id.*

[99] *See id.* at 12.

[100] *See id.* at 14 (stating that policy is difficult "where consumers have accurate information about individual items, but inaccurate estimates of the variance in the marketplace.").

[101] *Id.* at 17.

[102] Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 526, 531 (2004) ("[P]roponents of the process/product distinction believe that withholding process-based considerations from consumers helps to moderate market demand in cases where unfettered consumer choice could lead to socially undesirable outcomes. Such outcomes may occur either because individuals suffer from certain informational and cognitive deficiencies that impair their ability to comprehend process information accurately, or because interest groups have strong incentives to exploit public perceptions of manufacturing processes for private purposes").

[103] John A. Fox, *Influences on Purchase of Irradiated Foods*, 52 FOOD TECH. 34, 38 (2002).

preferences on close examination appear to reflect coherent, well-grounded consumer viewpoints, essentially indistinguishable from other aspects of preference that have been regarded as unassailable within the liberal market framework."[104]

Labeling a credence attribute may have positive effects on the market. First, additional labeling may alter consumers' behavior,[105] in turn benefiting society. For example, consumers may opt for eggs produced by methods that minimize their risk of contracting *Salmonella*, potentially avoiding costly illnesses. Second, a change in consumer preference (e.g., selecting free-range or cage-free eggs because they are less likely to carry *Salmonella*) may encourage egg producers to alter production methods to accommodate consumers' preferences, resulting in an overall increase in food safety.[106] Eventually, if there is little to no market for the undesired attribute, the required label may become unnecessary.[107] Third, consumers may like additional labeling even if the labeling does not influence their purchasing decisions because labeling serves as an assurance that government agencies are considering their interests.[108]

IV. FIRST AMENDMENT DOCTRINE ON COMMERCIAL SPEECH

The Free Speech Clause of the First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech."[109] However, as the U.S. Supreme Court established in 1919, "[i]t is too plain for argument that a manufacturer or vendor has no constitutional right to sell goods without giving to the purchaser fair information of what it is that is being sold."[110] Commercial speech is entitled to less deference than other types of speech in the interest of providing consumers with information that helps them correctly identify the value of products and services.[111] As the Court has explained, "[i]nformation is not in itself harmful [and] people will

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[104] *Id.* at 580.

[105] Caswell & Padberg, *supra* note 13, at 466.

[106] *Id.*

[107] *Id.* at 463.

[108] Donna M. Byrne, *Cloned Meat, Voluntary Food Labeling, and Organic Oreos*, 8 PIERCE L. REV. 31, 71 (2009); *see also* Caswell & Padberg, *supra* note 13, at 465 (asserting that "[c]onsumers may value the presence of comprehensive labeling independently of the value they place on labels as a direct shopping aid" because labeling generates "consumer confidence in the food supply").

[109] U.S. CONST. amend. 1. The First Amendment applies to the States through the Fourteenth Amendment. *See* Gitlow v. N.Y., 268 U.S. 652, 666 (1925).

[110] Corn Prods. Ref. Co. v. Eddy, 249 U.S. 427, 431 (1919).

[111] *Id.* at 431–32.

perceive their own best interests if only they are well enough informed."[112] Advocating the provision of information, the Court has asserted that the "[d]isclosure of truthful, relevant information is more likely to make a positive contribution to decision-making than is concealment of such information."[113]

A government can restrict commercial speech only if the restriction serves a substantial interest, furthers that substantial interest, and is not more extensive than reasonably necessary. Governments have been permitted to compel commercial speech in the form of disclosures if there is a rational relationship between the expression and a governmental interest, and the disclosure requirement is neither unjustified nor unduly burdensome.[114]

A. Intermediate Scrutiny for Restrictions on Commercial Speech

The Court has explained that its "[g]eneral approach to restrictions on commercial speech is also by now well settled."[115] According to the Court, "[t]he States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading, or that proposes an illegal transaction," but "[c]ommercial speech that is not false or deceptive and does not concern unlawful activities . . . may be restricted only in the service of a substantial governmental interest, and only through a means that directly advance[s] that interest."[116]

The Court has consistently invalidated restrictions that deprive consumers of accurate information about products and services[117] – the following cases establish that approach.

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[112] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

[113] Peel v. Att'y Registration & Disciplinary Comm'n of Ill., 496 U.S. 91, 108 (1990). Focusing on the interests of the consumer, the Court specified that "[c]ommercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Id.*; *see also* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561–62 (1980).

[114] *See* Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio, 471 U.S. 626, 638 (1985).

[115] *Id.* at 638.

[116] *Id.* The Court has further clarified that "only false, deceptive, or misleading commercial speech may be banned . . . . " *Id.* (citing Friedman v. Rogers, 440 U.S. 1, 9 (1979)), and that "[t]ruthful advertising related to lawful activities is entitled to the protections of the First Amendment . . . . Misleading advertising may be prohibited entirely." In re R.M.J., 455 U.S. 191, 203 (1982).

[117] *See, e.g.*, Bates v. State Bar of Ariz., 433 U.S. 350 (1977); Bigelow v.

1. *Central Hudson* (1980)

In *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, the issue presented to the Court was whether the Public Commission of New York could ban promotional advertising by Central Hudson Gas & Electric Corp., an electrical utility company.[118] The Commission had found that "the interconnected utility system in New York State [did] not have sufficient fuel stocks or sources of supply to continue furnishing all customer demands for the 1973–1974 winter" and ordered electric utilities companies in the state to cease all advertising that "promot[ed] the use of electricity."[119] In defense of its ban, the Commission asserted that promotional advertising encouraging the increased use of electricity was contrary to the national policy of conserving energy, and therefore that the ban was a vehicle for conservation.[120]

Because the ban on promotional advertising was complete, it prohibited Central Hudson from marketing "off-peak" use, although the Commission did permit Central Hudson to target "informational" advertising to encourage shifts of consumption from peak to off-peak hours.[121] According to the Commission, promotional advertising for use during off-peak hours would appear to encourage additional energy consumption.[122] The Commission asserted that additional energy use would aggravate economic inequities,[123] explaining that although only certain consumers would increase energy consumption in response to the advertisements, all consumers would subsidize the increased consumption in the form of rate increases.[124]

To evaluate the Commission's suppression of commercial speech, the Court developed a four-part analysis.[125] Under the four-part analysis, the first question is whether the speech at issue deserves First Amendment protection. As the Court explained, First

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Virginia, 421 U.S. 809 (1975); Carey v. Population Serv. Int'l, 431 U.S. 678 (1977); Linmark Assocs., Inc. v. Twp. of Willingboro, 431 U.S. 85 (1977); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc. 425 U.S. 748, 772 (1976).

[118] *Cent. Hudson*, 447 U.S. at 558–59.

[119] *Id.* at 558.

[120] *Id.* at 559.

[121] *Id.* at 559–60.

[122] *Id.* at 560.

[123] *Id.* at 568–69.

[124] *Id.* at 565.

[125] *Id.* at 566.

Amendment protection is appropriate when commercial speech is both concerned with lawful activity and is not misleading.[126] The second question is whether the governmental interest asserted as the justification for the regulation of the protected commercial speech is substantial.[127] If the commercial speech is deserving of First Amendment protection and the governmental interest in regulation is substantial, a court proceeds to the third and fourth parts of its analysis, under which it asks whether the regulation directly advances the governmental interest asserted, and whether the regulation is not more extensive than necessary to serve that interest.[128]

In *Central Hudson*, the Court held that the Commission's ban on advertising was unconstitutional. The Court found that the first three elements of the analysis were met: Central Hudson's promotional advertising was worthy of First Amendment protection;[129] the state's interest in energy conservation was a substantial governmental interest;[130] and the state's interest in energy conservation was directly advanced by the ban on promotional advertising, because there is a direct link between advertising and consumption.[131] However, when it proceeded to the fourth part of its analysis, the Court decided that because the Commission's ban reached all promotional advertising, including "information about electric devices or services that would cause no net increase in total energy use," the Commission had failed to show that a more limited restriction on Central Hudson's promotional advertising would not serve the state's interest in energy conservation.[132] Thus, the Court concluded that the Commission's ban was unconstitutional.[133]

2. *Board of Trustees* (1989)

In 1989, the Supreme Court reviewed its holding in *Central*

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[126] *Id.*; *see also id.* at 563–64 (discussing the origin of the *Central Hudson* analysis).

[127] *Id.* at 566.

[128] *Id.*

[129] *Id.* at 566–68.

[130] *Id.* at 568–69. The Court declined to apply the full four-part analysis to the Commission's asserted interest in fair utility rates because it noted that, while "laudable," the Commission's concern about the equity of Central Hudson's rates was "highly tenuous" and therefore could not justify the "silencing" of the promotional advertising. *Id.* at 569.

[131] *Id.* The Court observed that "Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales." *Id.*

[132] *Id.* at 570.

[133] *Id.*

Hudson in *Board of Trustees of State University of New York v. Fox*, elaborating upon the application of the *Central Hudson* test for restrictions on commercial speech.[134] The issue in *Board of Trustees* was whether the University could limit the operation of private commercial enterprises on the campus.[135] In discussing *Central Hudson's* four-part analysis, the Court observed that it could be construed as a least restrictive means test, therefore requiring that the manner of restriction be absolutely the least severe that will achieve its desired end.[136] However, the Court asserted that "other formulations of [its] commercial speech cases support[ed] a more flexible reading of the *Central Hudson* test."[137]

In particular, the Court noted that it had previously concluded that restrictions intended to prevent deceptive advertising must be "narrowly tailored" and "no more extensive than reasonably necessary to further substantial interests."[138] The Court observed that imposing a least restrictive means test on government disclosure requirements would place a heavy burden on states, which is at odds with granting commercial speech only a limited measure of protection.[139] In fully explaining its position on the test, the Court stated:

> [W]e have not gone so far as to impose upon [regulators] the burden of demonstrating that . . . the manner of restriction is absolutely the least severe that will achieve the desired end. What our decisions require is a [fit between ends and means] . . . that is not necessarily perfect, but reasonable . . . . Within those bounds we leave it to governmental decision makers to judge what manner of regulation may best be employed.[140]

Thus, the Court softened the effect of the test it had outlined in *Central Hudson*. However, adding to its explanation of the *Central Hudson* test, the Court, in *Edenfield v. Fane* in 1993, further noted that "a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material

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[134] Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 469 (1989).
[135] *Id.*
[136] *Id.* at 476.
[137] *Id.* at 477.
[138] *Id.* (quoting In re R.M.J., 455 U.S. 191, 203, 207 (1982)).
[139] *Id.*
[140] *Id.* at 480.

degree."[141] The Court explained in *Ibanez* in 1994 that in the interest of retaining the protections afforded commercial speech, "we cannot allow rote invocation of the words 'potentially misleading' to supplant the . . . burden to 'demonstrate that the harms . . . recite[d] are real and that . . . restriction will in fact alleviate them to a material degree.'"[142]

B. Rational Basis for Restrictions on Commercial Speech

According to the Court, "[t]he mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them."[143] The Court clarified its constitutional analysis of compelled commercial speech by explaining that "[w]hen a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review."[144]

The Court has explained that a state may require commercial messages to "appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive,"[145] and restrict aggressive forms of advertising that have the potential to exert "undue influence" over consumers.[146] The Court has maintained that the greater "objectivity" of commercial speech justifies allowing a state to distinguish false or misleading commercial advertisements from those that are true.[147]

Thus, "[w]hen a State entirely prohibits the dissemination of truthful, non-misleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands."[148] The Court applied this doctrine in *Zauderer*

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[141] Edenfield v. Fane, 507 U.S. 761, 770–71 (1993). The Court further stated that the regulation must advance a substantial state interest in a "direct and material way" and be in "reasonable proportion to the interests served." *Id.* at 767.

[142] Ibanez v. Fl. Dep't of Business & Professional Regulation, Bd. of Accountancy, 512 U.S. 136, 146 (1994).

[143] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996).

[144] *Id.*

[145] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S.748, 772 (1976).

[146] Bates v. State Bar of Ariz., 433 U.S. 350, 366 (1977).

[147] *Va. State Bd. of Pharmacy*, 425 U.S. at 771.

[148] *Id.*

and *Milavetz*, the two leading Supreme Court cases on compelled commercial speech.

1. *Zauderer* (1980)

In *Zauderer v. Supreme Court of Ohio*, the Supreme Court considered whether a restriction on appellant's newspaper advertisement was consistent with the First Amendment.[149] The advertisement announced Zauderer's willingness to represent women who had injuries resulting from the use of a contraceptive known as the Dalkon Shield Intrauterine Device.[150] In his ad, Zauderer stated that Dalkon cases "are handled on a contingency fee basis" and reassured potential clients that "[i]f there is no recovery, no legal fees are owed by our clients."[151]

An Ohio disciplinary rule required that an ad mentioning a contingent-fee basis for rates "[d]isclos[e] whether percentages are computed before or after deduction of court costs and expenses."[152] Ohio required this statement so potential clients would be aware that, although they would owe no legal fees to a lawyer if their cases were unsuccessful, they might still be liable for court costs.[153] Zauderer did not include that disclosure in his ads, and the Supreme Court of Ohio's Office of Disciplinary Counsel alleged that this omission was deceptive.[154]

On review, the U.S. Supreme Court observed that there is no doubt as to whether commercial speech is deserving of First Amendment protection, even if that protection is less than the level of protection afforded other types of speech.[155] The Court noted that it was not certain of the precise bounds of the category of commercial speech, but that Zauderer's ads, "advertising – pure and simple," were clearly commercial speech.[156]

Having decided the disclosure was commercial speech, the Court considered Ohio's requirement that Zauderer provide a disclosure explaining the costs associated with a contingent-fee

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[149] Zauderer v. Office of Discipinary Counsel of Sup. Ct. of Ohio, 471 U.S. 626, 630, 637–53 (1985).

[150] *Id.* at 630.

[151] *Id.* at 631.

[152] *Id.* at 633.

[153] *Id.*

[154] *Id.* at 633–34.

[155] *Id.* at 637.

[156] *Id.*

arrangement on his advertisements was constitutional.[157] In its discussion, the Court first observed that there are "material differences between disclosure requirements and outright prohibitions on speech."[158] It further explained, "all our discussions of restraints on commercial speech have recommended disclosure requirements as one of the acceptable less restrictive alternatives to actual suppression of speech."[159] The Court noted that the extension of First Amendment protections to commercial speech is valuable primarily because of the information such speech provides to consumers.[160] The Court further stated that requiring disclosures infringes on an advertiser's interests much less than a prohibition on speech.[161] As a result of consumers' interests in product information, an advertiser's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal."[162] The Court then went on to note that "unjustified or unduly burdensome disclosure requirements" might be unconstitutional.[163] The Court clarified its position by providing a reasonably related test for the compelled disclosure of commercial speech: "An advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."[164] According to the Court, "[t]he right of a commercial speaker not to divulge accurate information regarding his services is not . . . a fundamental right."[165]

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[157] *Id.* In *Zauderer*, a second issue was whether Ohio could discipline Zauderer for soliciting business by running an advertisement containing an illustration and legal advice. *Id.* at 629. Ohio Disciplinary Rules prohibit the use of illustrations in attorney advertisements and accepting employment resulting from unsolicited advice to a layman that the layman should obtain counsel or take legal action, among other things. *Id.* at 632–33. Zauderer's advertisement included a line drawing of the Dalkon Shield, and explained the alleged dangers of the Shield, stating "[i]f you or a friend have had a similar experience do not assume it is too late to take legal action against the Shield's manufacturer" and "[o]ur law firm is presently representing women on such cases." *Id.* at 630–31. The Court concluded that neither Zauderer's illustration nor solicitation of business was false, misleading or deceptive, and held that Ohio could not prohibit Zauderer from including those elements in his advertisements because Ohio had failed to show that it could not combat the potential abuses of those elements by means short of a ban. *Id.* at 646–47, 649.

[158] *Id.* at 650.

[159] *Id.* at 651.

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] *Id.*

[165] *Id.* at 651.

In arriving at this test, the Court explicitly stated that a least restrictive means analysis derived from *Central Hudson* would not have been appropriately applied to this situation.[166] Explaining its choice, the Court stated, "Although we have subjected outright prohibitions on speech to [the *Central Hudson*] analysis, all our discussions of restraints on commercial speech have recommended disclosure requirements as one of the acceptable less restrictive alternatives to actual suppression of speech."[167] The Court observed that the test it was outlining did not require that there be no other means for the state to achieve its objective, or that the mandated disclosure get at all the facets of the problem the state is addressing.[168]

The Court concluded that Ohio's disclosure requirement was reasonably related to its interest in preventing the deception of legal clients because "[t]he assumption that substantial numbers of potential clients would be . . . misled [was] hardly a speculative one."[169] The Court concluded that it was not unduly burdensome to require an attorney to disclose in his advertisements of a contingent-fee arrangement that the potential client might be liable for court costs even if the lawsuit was unsuccessful.[170] Therefore, the Court held that Ohio's disclosure requirement was a constitutionally permissible form of compelled commercial speech.[171]

2. *Milavetz* (2010)

The circumstances in *Milavetz,* were similar to those in *Zauderer*: both cases required disclosures to correct highly misleading commercial advertisements concerning professional services.[172] In *Milavetz*, the question was whether a disclosure required by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") was permissible.[173] The BAPCPA required Milavetz, a debt relief agency, to disclose in its advertisements of debt relief services that those services might

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[166] *Id.* at 651 n.14.

[167] *Id.*

[168] *Id.*

[169] *Id.* at 652.

[170] *Id.* at 652 n.15.

[171] *Id.* at 652. The Court observed that Ohio's disclosure requirement "easily passe[d] muster" under this test. *Id.*

[172] *See* Milavetz, Gallop & Milavetz, P.A., v. U.S., 130 S. Ct. 1324, 1329 (2010); *see also Zauderer*, 471 U.S. at 630.

[173] *Milavetz*, 130 S. Ct. at 1329.

involve bankruptcy relief.[174] The BAPCPA also required Milavetz to identify itself as a debt relief agency,[175] in order to correct a possible public assumption that an agency was offering debt relief services that did not involve filing for bankruptcy, which has inherent costs.[176] The BAPCPA did not prevent debt agencies from providing additional information of their choosing.[177]

After identifying the affected speech as commercial, the Court sought to determine the applicable standard of scrutiny.[178] Milavetz argued that the Court should choose the intermediate level of scrutiny applied to non-misleading commercial speech under the *Central Hudson* analysis.[179] The Government maintained that, on the contrary, the challenged disclosure requirement was directed at misleading speech, asserting that the Court should thus apply the reasonably related test articulated in *Zauderer*.[180]

Milavetz contended that the Government had not produced evidence that the advertisements were misleading.[181] However, the Court held that because deception was self-evident, the Government did not need to collect evidence before determining that it was misleading.[182] The Court opted to apply *Zauderer* rather than *Central Hudson* on the basis that Zauderer's advertisement was "*misleading* commercial speech" absent the disclosure.[183] The Court noted that the challenged provision shared essential features with the rule at issue in *Zauderer*.[184] According to the Court, both disclosures were intended to reconcile the problem of inherently misleading commercial advertisements by requiring only an accurate statement without limiting the conveyance of additional information.[185] The Court also opined that evidence in the *Congressional Record* demonstrating the likelihood of consumer confusion resulting from advertisements such as Milavetz's was "adequate to establish that the likelihood of

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[174] *Id.* at 1330.
[175] *Id.*
[176] *Id.* at 1340.
[177] *See id.*
[178] *Id.*
[179] *Id.* at 1339.
[180] *Id.*; *see also* Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985) (stating that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.").
[181] *Milavetz,* 130 S. Ct.. at 1340.
[182] *Id.*
[183] *Id.* at 1339.
[184] *Id.* at 1340.
[185] *Id.*

deception in this case 'is hardly a speculative one'" and implied that the possibility of deception is "self-evident," as it was in *Zauderer*.[186]

In deciding whether to apply *Central Hudson*, the Court observed that advertisements for professional services present a particular risk of deception.[187] Quoting *Zauderer*, the Court held that the BAPCPA's disclosure requirement mandating the advertiser to disclose its identity as a debt relief agency and that its services might involve bankruptcy relief was "reasonably related to the [Government's] interest in preventing deception of consumers."[188] In reference to *Zauderer's* requirement that the compulsion of commercial speech not be unjustified or unduly burdensome, the Court concluded that an advertiser's rights are sufficiently protected if the disclosure requirement is reasonably related to the government's interest.[189]

3. Cases in Other Federal Courts (2001–2011)

Numerous federal cases have interpreted *Zauderer* to apply where the compulsion of speech is reasonably related to the government's interest.[190] For example, in 2001, the Second Circuit

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[186] *Id.*

[187] *Id.*

[188] *Id.* at 134.

[189] *Id.* at 1339–40.

[190] *See* Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115 (2d. Cir. 2001), *cert. denied*, 536 U.S. 905 (2002); *see also* Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 310 (1st Cir. 2005); Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67 (2d Cir. 1996). In *Amestoy*, the Second Circuit applied *Central Hudson's* four-part test to a commercial disclosure requirement. *Id.* at 72. The dairy manufacturers challenged the constitutionality of a Vermont law requiring milk producers to label products from cows that were treated with an artificial growth hormone, rBST (recombinant Bovine Somatotropin), which increases cows' milk production. *Id.* at 69. Vermont defended the statute by pointing to a strong consumer interest in knowing whether dairy products come from cows treated with rBST and claiming a public "right to know." *Id.* at 73. The court observed that the district court had plainly stated, "Vermont t[ook] no position on whether rBST is beneficial or detrimental," and that Vermont's only expressed interest was "consumer curiosity." *Id.* at 73 n.1. According to the Economic Impact Statement Vermont prepared to assess its statute, consumer interest in the disclosure of rBST use was based on concerns about human health and safety impacts from recombinant gene technology, worry over the hormone's impact on bovine health, and fears that surplus milk made possible by the technology would have a negative impact on Vermont's dairy industry. *Id.* at 75. The Second Circuit noted that Vermont had not taken a position on whether rBST was beneficial or detrimental. *Id.* at 73 n.1. According to the court, Vermont identified consumer concern about treating dairy

upheld a state law requiring manufacturers of products containing mercury to disclose information about product disposal. The court concluded that the disclosure requirement was reasonably related to the state's interest in preventing mercury contamination.[191] Similarly, in 2003, the Ninth Circuit upheld a statute requiring sewer providers to educate the public about hazards of improper waste disposal as constitutional, because it found that the purpose of the statute was consistent with the goals of the Clean Water Act.[192] In 2009, the Second Circuit decided that it was constitutional for New York to require restaurants to post information about caloric intake because this requirement was reasonably related to New York's interest in reducing obesity.[193] In 2010, the Sixth Circuit held that it was

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cows with artificial hormones but did not itself claim to have this concern. *Id.* The court thus concluded that Vermont "fail[ed] to defend its constitutional intrusion on the ground that [treating dairy cows with rBST] negatively impacts public health." *Id.* at 73.

[191] *See Sorrell*, 272 F.3d at 115. In *Sorrell*, the issue was whether Vermont's requirement that producers of some products containing mercury label their products as such and include disposal instructions on the product was permissible. *Id.* at 107. The requirement applied to the National Electrical Manufacturers Association's (NEMA) lamps. *Id.* NEMA conceded that only commercial speech was at issue here. *Id.* at 113. The court observed that "[c]ommercial disclosure requirements are treated differently from restrictions on commercial speech because mandated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests." *Id.* at 113–14. The court noted that compelled commercial speech is entitled to limited First Amendment protection as long as disclosure pertains to factual statements rather than opinions. *Id.* at 114, n. 5. The court then summarized its position on compelled commercial speech by noting that "mandating that commercial actors disclose commercial information ordinarily does not offend the important utilitarian and individual liberty interests that lie at the heart of the First Amendment." *Id.* at 114–15. It concluded that *Zauderer's* rational basis test applies where commercial speech is *compelled* and *Central Hudson's* four-part analysis applies where commercial speech is *restricted*. *Id.* at 115. The Second Circuit thus concluded that Vermont's disclosure requirement was reasonably related to its interest in reducing mercury contamination. *Id.*

[192] *See* Envtl. Defense Ctr., Inc. v. EPA, 344 F.3d 832, 849 (9th Cir. 2003).

[193] N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114, 118 (2d Cir. 2009). In *New York State Restaurant Association v. New York City Board of Health*, the First Amendment question was whether New York City could require restaurants to post information about caloric contents on their menus and menu boards. *Id.* The Second Circuit asserted that caloric information on message boards and menus in restaurants is information connected to a proposed commercial transaction and is therefore commercial speech. *Id.* at 131. The court noted that "regulations that compel 'purely factual and uncontroversial' commercial speech

constitutional for the Ohio Department of Agriculture to require milk producers who advertised the nonuse of a growth hormone to include a disclaimer.[194] The disclaimer noted that the Food and Drug

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are subject to more lenient review than regulations that restrict accurate commercial speech. *Id.* at 132 (internal citation omitted). In reviewing its 2001 decision in *Sorrell* to apply *Zauderer* where it permitted the compelled disclosure of mercury in products, the court explained that that decision did not address consumer confusion or deception "per se," but rather focused on informing consumers about mercury used in a variety of projects. *Id.* at 133. The court noted that the goal of informing consumers about the presence of mercury was not inconsistent with the policies behind First Amendment protections for commercial speech. *Id.* Thus, it proceeded to a rational basis test. *Id.* The court asserted that "New York City ha[d] plainly demonstrated a reasonable relationship between the purpose [of the regulation] . . . and the means employed to achieve that purpose." *Id.* at 134. The court then concluded that New York City had shown that its disclosure requirement was reasonably related to the City's interest in reducing obesity. *N.Y. St. Restaurant Assn.*, 556 F.3d at 135. Interestingly, the court did not opine as to whether New York City's disclosure requirement was reasonably related to its stated goal of reducing consumer confusion and deception. *See id.* at 134 (listing New York City's goals as (1) reduc[ing] consumer confusion and deception; and (2) . . . promot[ing] consumer decision-making so as to reduce obesity and the diseases associated with it"); *id.* at 135 (identifying New York City's goal of reducing obesity as reasonably related to its regulation but declining to discuss the City's goal of reducing consumer confusion and deception).

[194] Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 650 (6th Cir. 2010). In *International Dairy Foods Association v. Boggs*, the question pertinent to a discussion of compelled commercial speech was whether the Ohio Department of Agriculture (ODA) could mandate that milk producers who advertised their nonuse of artificial growth hormones include a disclaimer on their products stating that "[t]he FDA has determined that no significant difference has been shown between milk derived from rbRT-supplemented and non-rbST-supplemented cows." *Id.* at 634. The FDA had previously issued a Guidance determining that milk producers could voluntarily label their products with statements such as "from cows not treated with rbST," however the agency had cautioned that such labels had the potential to be "false and misleading" because they provided the potential for consumers to mistakenly believe that milk from untreated cows is of a higher quality or is safer. *Id.* at 632–33. In analyzing the ODA's disclosure requirement, the Sixth Circuit cited *Milavetz* as establishing that *Zauderer's* "reasonably related" test applies where a disclosure requirement targets speech that is "*inherently* misleading," concluding that *Zauderer* also applies where commercial speech is "*potentially* misleading." *Id.* at 641 (emphases in original). The court explained that it arrived at this conclusion for two reasons. First, it observed, "in *Milavetz*, the Court did not explicitly limit its application of *Zauderer* to inherently misleading speech, instead stating that a relaxed standard of review applies to disclosure requirements regulating '*misleading* commercial speech.'" *Id.* (emphasis in original). Second, the Sixth Circuit reiterated the Supreme Court's recognition that an advertiser's "'constitutionally protected interest in *not* providing the required

Administration found no significant difference between milk from cows treated with a hormone and milk from cows not treated.[195] The court asserted this requirement was constitutional because it was reasonably related to the state's interest in preventing consumer deception.[196] In 2011, the Western District of Washington upheld an ordinance requiring yellow pages vendors to include a statement on the cover of the yellow pages directories and on their websites that Seattle residents could opt out of receiving the phone books, because the city had an interest in allowing residents to reject unwanted yellow pages directories.[197]

V. CONSTITUTIONAL ANALYSIS OF COMPELLING PRODUCTION METHOD LABELING ON EGGS

Disclosures on foods are a method of proposing a commercial transaction, so they are commercial speech. As commercial speech, disclosures on food are entitled to First Amendment protection, although less than that granted to noncommercial forms of speech. The three-tiered system of disclosures on eggs, which includes the labels Free-Range Eggs, Cage-Free Eggs, and Eggs from Caged Hens, is likely constitutional because, following *Zauderer*, such

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factual information is minimal,'" reasoning that the interest in avoiding disclosure, and thus the propriety of compelling disclosure, would adhere "regardless of whether the speech being targeted is inherently or potentially misleading." *Id.* (emphasis in original). The court concluded that *Zauderer* applies when a disclosure requirement addresses potentially misleading speech, observing that a statement such as "from cows not treated with rbST" is potentially misleading because it may imply that milk from cows treated with artificial growth hormones is inferior or less safe. *Id.* at 642. It then applied *Zauderer's* "reasonably related" test and held that "the Rule's disclosure requirement is reasonably related to the State's interest in preventing consumers from being deceived by production claims." *Id.* The court noted that a government's burden of providing evidence that a production claim is misleading is relaxed where disclosure statements are at issue, explaining that "[a]lthough the FDA's Interim Guidance and the consumer comments relied on by the State constitute weak evidence of deception, they at least demonstrate that the risk of deception in this case is not speculative." *Id.* The Sixth Circuit further explained that "[a]t a minimum, the Guidance supports the conclusion that production claims can be misleading and the comments show that there is general confusion among some Ohio consumers regarding what substances are (or are not) in the milk they purchase," which sets a very low threshold for determining whether an expression is potentially misleading. *Id.*

[195] *Id.* at 632.

[196] *Id.* at 642.

[197] Dex Media W., Inc. v. City of Seattle, No. C10-1857JLR, 2011 WL 2559391, at *10–11 (W.D. Wash. June 28, 2011).

disclosures are rationally related to governmental interests in facilitating the selection of nutritious food that is expected to be free of food borne pathogens. The three-tiered disclosure system is not unjustified or unduly burdensome.

A. Are Disclosures on Foods Speech?

Because labeling on food proposes a commercial transaction, inviting purchase, courts are almost certain to decide that labeling on food is commercial speech. For example, the Second Circuit analyzed a mandated disclosure of caloric content on menus as commercial speech in 2009.[198]

B. Are Disclosures on Foods Commercial Speech?

Under a First Amendment analysis, the second issue to consider is whether disclosures on foods are commercial speech.[199] Although commercial speech is not beyond the scope of First Amendment protection,[200] the Supreme Court has noted that "[t]he Constitution affords a lesser protection to commercial speech than to other constitutionally guaranteed expression."[201] However, despite the constitutional significance of determining whether speech is commercial, there is no clear test: the Court has stated that the "precise bounds" of commercial speech are "subject to doubt."[202] But even without a clear test, food labels likely qualify as commercial speech because they propose a commercial transaction.[203] Like other claims found on food products, disclosures inform consumers and thus influence their purchasing choices. Indeed, the Sixth Circuit analyzed a disclosure on a food as commercial speech as recently as

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[198] N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114, 135 (2d Cir. 2009) ("As commercial speech is speech that proposes a commercial transaction, and Regulation 81.50 'requires disclosure of calorie information in connection with a proposed commercial transaction-the sale of a restaurant meal,' the form of speech affected by Regulation 81.50 is clearly commercial speech.").

[199] Zauderer v. Office of Discipinary Counsel of Sup. Ct. of Ohio, 471 U.S. 626, 637 (1985).

[200] *See e.g.* Thomas v. Anchorage Equal Rights Commn., 165 F.3d 692, 709 (9th Cir. 1999).

[201] U.S. v. Edge Broad. Co., 509 U.S. 418, 426 (1993).

[202] *Zauderer*, 471 U.S. at 637.

[203] *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (identifying speech as commercial speech if it "does no more than propose a commercial transaction").

2010.[204]

C. Constitutionality of the Three-Tiered Disclosure System

The Court has not yet squarely addressed the question of whether *Central Hudson* or *Zauderer* applies to compelled commercial speech.[205] If the three-tiered disclosure system is scrutinized under *Zauderer*'s rational basis test, it will probably be found constitutional, because the disclosures are reasonably related to the government's interest in preventing deception of consumers. Moreover, the proposed disclosures are reasonably related to the government's interest in allowing consumers to reliably select food products that have superior health qualities and are less likely to make them sick than other similar food products.

1. Analyzing Compelled Commercial Speech

In *Zauderer*, the Court determined that a disclosure requirement must be reasonably related to a governmental interest and must not be unjustified or unduly burdensome.[206] *Zauderer's* rational basis test is considerably easier to meet than *Central Hudson's* test, which amounts to an intermediate level of scrutiny.[207]

The Court's decision in *Milavetz* to apply *Zauderer's* rational basis test to the compelled disclosure of commercial speech[208] suggests that while *Central Hudson* applies to cases of restricted

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[204] *See* Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 635 (6th Cir. 2010).

[205] *See* Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 74 (2d Cir. 1996) (concluding that "[a]bsent . . . some indication that this information [about rBGH treatment] bears on a reasonable concern for human health or safety or some other sufficiently substantial governmental concern, the manufacturers cannot be compelled to disclose it," and that consumer curiosity is not a substantial governmental interest sufficient to justify compelled commercial speech); *but see* Milavetz, Gallop & Milavetz, P.A. v. U.S., 130 S. Ct. 1324, 1339 (2010) (stating that "[e]vidence in the congressional record demonstrating a pattern of advertisements that hold out the promise of debt relief without alerting consumers to its potential cost is adequate to establish that the likelihood of deception is this case 'is hardly a speculative one'"); *see also Boggs*, 622 F.3d at 632, 641 (concluding that *Zauderer's* rational basis test applies where speech is "*potentially* misleading" (emphasis in original)); Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115 (2d. Cir. 2001) (concluding that *Zauderer's* rational basis test applies where commercial speech is compelled and *Central Hudson's* four-part analysis applies where commercial speech is restricted).

[206] *Zauderer*, 471 U.S. at 651.

[207] *See supra* pt. IV.B.2.

[208] *Milavetz*, 130 S. Ct. at 1339.

commercial speech, *Zauderer* applies to cases of compelled commercial speech. Indeed, the Second Circuit has recently stated exactly this.[209] However, it is not clear whether *Milavetz's* application of *Zauderer* is limited just to commercial speech that is "inherently misleading"[210] or has the "self-evident possibility of deception,"[211] which are fairly high standards, or is applicable to all compelled commercial speech.

In *Milavetz*, the Court concluded that the challenged provision was "directed at *misleading* commercial speech."[212] Most recently, the Second Circuit identified *Milavetz*, and thus *Zauderer*, as applying to speech that is either inherently or potentially misleading.[213] It remains to be seen whether the Supreme Court will extend the rational basis test to compelled commercial speech remedying speech that is potentially, rather than inherently, misleading, or to speech that is neither inherently nor potentially misleading but is reasonably related to a governmental interest.

If *Zauderer* applies only where speech is inherently or self-evidently misleading, *Central Hudson*, applies to disclosure requirements correcting commercial speech that is less than inherently misleading (e.g., perhaps only potentially or possibly misleading). However, as discussed *supra*, many lower federal courts have used the rational basis test articulated in *Zauderer* where disclosures are intended to address social problems, rather than inherently misleading language.[214] Government interests ranging from preventing mercury contamination[215] and combating obesity[216] to providing consumers with a program allowing them to opt out from deliveries of yellow pages directories have received judicial approval.[217]

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[209] *Sorrell*, 272 F.3d at 115 n.6. The court was distancing itself from *International Dairy Foods Association v. Amestoy*, which was a 1996 decision to apply *Central Hudson* to compelled commercial speech to the facts of that case, and in particular only to situations where the government's alleged interest is in "consumer curiosity." 92 F.3d 67 (1996).

[210] *Milavetz*, 130 S. Ct. at 1340.

[211] *Id.* (quoting *Zauderer*, 471 U.S. at 652–53).

[212] *Id.* at 1339.

[213] *See* Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 641 (6th Cir. 2010).

[214] *See supra* pt. V(B)(3) (discussing cases that examined compelled commercial speech between 2000 and 2011).

[215] Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115 (2d. Cir. 2001).

[216] N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114, 136 (2d Cir. 2009).

[217] *See* Dex Media W., Inc. v. City of Seattle, No. C10-1857JLR, 2011 WL 2559391, at *10–11 (W.D. Wash. June 28, 2011).

As *Zauderer* stated, the Supreme Court rejected the contention that it should subject the disclosure requirements to a strict "least restrictive means" analysis. The Court explained in *Zauderer* that while it had submitted prohibitions on speech to such an analysis, that similar to *Central Hudson*, "all [its] discussions of restraints on commercial speech have recommended disclosure requirements as one of the acceptable less restrictive alternatives to actual suppression of speech."[218] Given this Supreme Court precedent, it is unlikely that the Court would so limit *Zauderer* as to apply its rational basis test only to inherently misleading speech.

2. Three-Tiered Disclosures on Eggs Are Probably Constitutional

Despite the uncertainties presently surrounding the commercial speech doctrine, courts will likely apply *Zauderer* to instances of compelled commercial speech until the Supreme Court speaks on the issue, based on the precedent of *Milavetz* and *Zauderer*. Furthermore, no Supreme Court case has applied *Central Hudson* to an example of compelled commercial speech.

If a court applies the test in *Zauderer*, it will probably find that there is a rational basis for the Food and Drug Administration to have an interest in requiring the disclosure of production methods on eggs. This is so because some current labeling implies that eggs are produced on traditional farms, rather than in battery cages, which is misleading. In addition to resolving this confusion, the three-tiered disclosures would allow consumers to select eggs with superior nutrient contents, and eggs less likely to expose them to *Salmonella Enteritis*.

First, under *Zauderer*, compelling a production method disclosure on eggs would likely be constitutional. Egg producers provide graphic and textual references making it difficult for consumers to tell whether the eggs are from caged hens,[219] so there is a rational basis for the FDA's interest in addressing misleading advertising. For example, the petition discussed *supra* asserts that eggs from caged hens bear labels such as "Animal Friendly" and from "happy chickens" that are "gently cared for."[220] Other eggs from caged hens are labeled as "naturally raised," "natural," or "farm fresh."[221] Such claims imply that those eggs are from hens that lived

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[218] Zauderer v. Office of Discipinary Counsel of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985).

[219] *See* Compassion Over Killing, Inc. et al., *supra* note 1, at 5, 11–17.

[220] *Id.* at 11.

[221] *Id.* at 12–13.

in a natural environment. However, it is misleading to imply that tiered wire cages wherein each hen has the space equivalent to an 8.5" x 11" piece of paper are "natural" environments.[222]

As compared to *Zauderer* and *Milavetz*, which involved commercial expressions that were implicitly misleading, claims such as "naturally raised" are more directly misleading. Undoubtedly, most consumers would not find tiny wire battery cages to be natural. Furthermore, and as noted earlier, only 2% of those who responded to a Harris Interactive Poll were able to correctly identify the definition of the term natural on meat and poultry,[223] so it is unlikely that consumers know enough about this assertion to discover the inaccuracy. Similar to *Zauderer* and *Milavetz*, other terms on eggs are misleading because they imply production method qualities of the commodity, such as access to the outdoors, that do not exist.

The Supreme Court concluded in both *Zauderer* and *Milavetz* that commercial speech can be deceiving despite the fact that the information necessary to remedy the deception is available to consumers.[224] Thus, consistent with *Zauderer* and *Milavetz*, although it is possible for consumers to do research to uncover the conditions that are typical within battery cage systems, advertisers must provide commercial speech that does not create misunderstandings rather than obligating consumers to research statements.

In Zauderer, the advertisement stated, "[i]f there is no recovery, no legal fees are owed by our clients."[225] In *Zauderer*, what was "self-evident" was the "possibility of deception" rather than actual deception.[226] The Supreme Court identified the possibility of deception resulting from the advertisement as "self-evident," because other costs could be involved even if no legal fees were assessed.[227]

Thus, the possibility of deception arose as a result of an implication – that the client would owe *no* fees – rather than an untruth – strictly speaking, Zauderer's assertion would have been correct.[228] For example, clients with a legal background would have understood from Zauderer's advertisement that, when initiating a lawsuit, not paying legal fees does not mean that one would not incur cost. However, most of Zauderer's potential clients were unlikely to

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[222] Milavetz, Gallop & Milavetz, P.A. v. U.S., 130 S. Ct. 1324, 1340 (2010) (quoting *Zauderer*, 471 U.S. at 652–53).

[223] *See* ANIMAL WELFARE INST., *supra* note 93, at 4.

[224] *See Milavetz*, 130 S. Ct. at 1340; *see also Zauderer*, 471 U.S. at 652–53.

[225] *Zauderer*, 471 U.S. at 652.

[226] *Id.* at 652–53.

[227] *Id.*

[228] *Id.* at 633.

anticipate such a technical distinction between terms. Thus, in the arena of disclosure requirements, "self-evident" deception results from a combination of inclusions and omissions that are relevant to a consumer's selection of a product or service.

Following *Zauderer*, disclosure requirements are appropriate where many or most consumers would fail to grasp the subtleties of terminology. This is true even though consumers could discover the distinction if they do sufficient research. The burden to provide information that would be accurately perceived was on Zauderer, in the form of a disclosure, rather than on the consumer, who could have done research but was unlikely either to have actually done so or to have anticipated that such research would be necessary.

In *Milavetz*, it was arguably even less clear that the advertisement would deceive consumers. As discussed *supra*, the question in *Milavetz* was whether advertising bankruptcy services without identifying oneself as a "debt relief agency" would deceive consumers by implying that the cost of bankruptcy services would not involve the cost of filing for bankruptcy.[229] The Court concluded that Milavetz' advertisement was inherently misleading.[230] As in *Zauderer*, only the potential for deception was necessary in *Milavetz*.[231] Although some consumers would be deceived, others would understand the distinction between terms and anticipate that bankruptcy services might involve filing for bankruptcy. Additionally, while relatively minimal research into Milavetz's firm or the practices involved in addressing bankruptcy could have remedied any potential deception, the Court placed the burden to clarify the advertisement's offering on the advertiser rather than the consumer.[232] Consumer confusion resulting from current egg labeling is analogous to that of potential clients who could not anticipate differences between types of assistance with bankruptcy, the issue the

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[229] *See Milavetz*, 130 S. Ct. at 1330, 1340 (describing the bankruptcy advertisement necessitating a disclosure requirement as stating that the advertiser was a debt relief agency and the reasoning that a consumer might mistakenly believe that bankruptcy assistance did not involve the fees involved with filing bankruptcy absent the disclosure).

[230] *Id.* As noted earlier, the Court found both that Milavetz's advertisement was inherently misleading and that "[t]he likelihood of deception was "hardly a speculative one." *Id.* Interestingly, there is a significant difference between the possibility of deception being *inherent* and the possibility of deception being *hardly speculative*; specifically, 'inherent' deception is a much higher standard than 'hardly speculative.'

[231] *Id.*

[232] *Id.*

court faced in *Milavetz*.

Second, the three-tiered disclosures on eggs would probably pass *Zauderer*'s rational basis test because production methods affect nutrient levels and risk of transmission of *Salmonella*[233] and the state has a legitimate interest in protecting and promoting public health.[234] There is almost certainly a rational basis for the FDA's interest in providing consumers with enough information to make distinctions between products that are more or less likely to carry *Salmonella Enteritis*.

The *Zauderer* rational basis test requires a reasonable relationship, not a perfect fit, between the disclosure requirement and the interest served. Thus, a government is entitled to attack a problem piecemeal, unless the rights implicated by this policy are so fundamental that strict scrutiny is necessary. Following *Zauderer*, a disclosure requirement would not be vulnerable to legal challenges merely because it does not fully solve the problem that is being targeted.

Finally, the three-tiered system of disclosures on eggs is neither unjustified nor unduly burdensome. In *Milavetz*, the Court held that the compulsion of commercial speech was not unjustified or unduly burdensome because Milavetz's rights were sufficiently protected by a disclosure requirement that was reasonably related to the government's interest.[235] Thus, following *Milavetz*, a disclosure requirement that is reasonably related to the government's interest is not unduly burdensome. Requiring production method disclosures on eggs is neither unjustified nor unduly burdensome because the requirement is reasonably related to states' interests in protecting consumers.[236]

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[233] *See* Compassion Over Killing, Inc. et al., *supra* note 1, at 25–28.

[234] *See id.* at 57–59, 61–64.

[235] *Milavetz*, 130 S. Ct. at 1339–41.

[236] One group estimates that mandatory certification and labeling of the three proposed tiers would not directly affect the cost to producers in the third tier, Eggs from Caged Hens, because they would not need to verify their labeling claim. Compassion Over Killing, Inc. et al., *supra* note 1, at 67. Producers in the first and second tiers, Free-Range Eggs and Cage-Free Eggs, would experience a .3 to .9 percent increase in the cost of certification and labeling, which would be compensated for by consumer demand for humane products. *Id.* at 67–69. There are no regular substitutes for eggs, so consumers purchase almost the same number of eggs when there are small increases in price. *Id.* at 69. Thus, given the relative inelasticity of the market for eggs, it is estimated that a .3 to .9 percent increase in the retail price of cage-free eggs would decrease demand only .02 to .05 percent. *Id.* at 67.

VI. CONCLUSION

Balancing the need for government intervention on behalf of consumers with a respect for producer sovereignty is a delicate endeavor, and one that has not yet been perfected. Currently, many consumers are paying premiums for eggs adorned with images of farms without knowing what those illustrations mean. Other consumers are declining to pay for eggs with superior nutritional or safety qualities because they do not have enough information about how eggs are produced to know that those added qualities are important, or they do not trust that labeling indicating those qualities is truthful. Thus, there is a breakdown in the relationship between consumer preference and the types of eggs consumers ultimately choose.

Such a breakdown indicates a market failure, because egg prices are not reflecting actual demand for food qualities, such as increased nutrient content. Indeed, one may conclude that there is a lower supply of high-quality food products (e.g., cage-free or free-range eggs) than there would be if this information asymmetry were remedied. By mandating a disclosure system on egg cartons such as the proposed three-tiered disclosures, regulators could correct the asymmetry.

Compelling disclosure about egg production methods would probably withstand a challenge under the Constitution because, under Zauderer, states have a significant interest in preventing consumer deception. Following precedent circuit courts established when examining compelled disclosures, states also have a significant interest in facilitating the purchase of safe and nutritious foods.