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Commercial Freedom of Speech vs. Consumers' Right to Know: Milking the First Amendment for All It's Worth

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Milking the First Amendment for All It's Worth

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COMMERCIAL FREEDOM OF SPEECH VS. CONSUMERS' RIGHT TO KNOW: MILKING THE FIRST AMENDMENT FOR ALL IT'S WORTH

Jessie Smith Nibley

I. INTRODUCTION

The First Amendment protects our rights to speak and to refrain from speaking. These rights exist because "the ultimate good desired is better reached by free trade in ideas…the best test of truth is the power of the thought to get itself accepted in the competition of the market."[1] Over time, the Supreme Court has extended these rights even to speech that does "no more than propose a commercial transaction."[2] Nevertheless, it is recognized that some regulation of commercial speech *must* be permissible.[3] Impositions on speech of this nature are justified on the basis that:

> The truth of commercial speech…may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely.[4]

In few arenas is the imbalance of information between producer and consumer more prevalent than that of food production. Indeed, many food producers lobby to prevent consumers from discovering anything about their products.[5] Thus, there is a tension between consumers—most of whom want to know what they are eating, where it

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[1] Abrams v. U.S., 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
[2] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 762 (1976).
[3] *Id.* at 770.
[4] *Id.* at 772.
[5] *See, e.g.*, A.G. Sulzberger, *States Look to Ban Efforts to Reveal Farm Abuse*, N.Y. TIMES, April 13, 2011, *available at* http://www.nytimes.com/2011/04/14/us/14video.html?_r=2&ref=us (discussing proposed laws that would criminalize production, distribution, or possession of photos or videos taken at agricultural facilities without permission).

came from, and how it was produced—and food manufacturers—most of whom do whatever they can not to disclose this information. Under current First Amendment doctrine, just what do food companies have the right *not* to tell their customers?

This question came into sharp focus in the aftermath of the 1993 U.S. Food and Drug Administration (FDA) decision to approve the use of recombinant bovine somatotropin (rBST),[6] a genetically modified growth hormone, in dairy cows.[7] The hormone has been observed to increase milk production by approximately 10%,[8] and Monsanto, the manufacturer of the commercial variety of the drug (Posilac), touts the possibility of vastly increased profits for dairies that use it.[9] Since the time it was being considered for commercial use, many scientists and consumer groups have voiced concerns over the possible negative effects of the drug on human, animal, and public health. One issue is that rBST use increases the level of insulin-like growth factor-1 (IGF-1) in the milk and ultimately in the blood of the consumer.[10] Elevated levels of IGF-1 have been repeatedly linked to an increased risk of breast, prostate, and colon cancer.[11]

Another problem is that rBST increases the incidence of mastitis—udder infections—in dairy herds by about 25%, requiring substantial use of antibiotics.[12] Many studies have warned against the overuse of antibiotics in agriculture and its negative

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[6] This drug is also known as "recombinant bovine growth hormone," or rBGH.

[7] T. Adler, *Debating BST 'til the Cows Come Home*, 149 SCIENCE NEWS 52, 52 (1996).

[8] William D. McBride, et al., *The Adoption and Impact of Bovine Somatotropin on U.S. Dairy Farms*, 26 REVIEW OF AGRICULTURAL ECONOMICS 472, 472. A few studies report increases as low as 5% or as high as 30%.

[9] George Raine, *More Dairy Producers Dump Monsanto's rbST*, SAN FRANCISCO CHRONICLE, Mar. 25, 2007.

[10] M.C. Lucy, et al., *Somatotropic Axis Components and Nutrient Partitioning in Genetically Diverse Dairy Cows Managed Under Different Feed Allowances in a Pasture System*, 92 JOURNAL OF DAIRY SCIENCE 526, 526 (2009).

[11] June M. Chan, et al., *Plasma Insulin-Like Growth Factor-I and Prostate Cancer Risk: A Prospective Study*, 279 SCIENCE 563, 563 (Jan. 1998).

[12] George Prentice, *Got Milk? Got Drugs? Got Both?: State Responds After Idaho Dairy Cattle Test Positive in Food Safety Tests*, BOISE WEEKLY, Apr. 6, 2011, *available at* http://www.boiseweekly.com/gyrobase/got-milk-got-drugs-got-both-state-responds-after-idaho-dairy-cattle-test-positive-in-federal-good-safety-tests/Content?oid=2174048&showFullText=true.

impact on public health—these studies have found specifically that antibiotic-resistant food-borne infections such as salmonella are caused primarily by overuse of antibiotics in agriculture.[13] Worse, the FDA admits that antibiotic residues may be found in the milk from treated cows.[14] Mastitis infections also lead to higher amounts of somatic cells—pus—in the milk, which is not only unappetizing but also causes milk to sour more quickly.[15] Severe mastitis problems can be contained only by culling the affected members of a dairy herd. FDA warns that use of the hormone causes lameness in cows.[16] Finally, rBST causes cows unnaturally to produce milk in their "negative energy phase"—the period after calving, during which a cow's energy intake is less than its energy output—causing the milk to be lower in protein.[17] These concerns have led most of the industrialized nations of the world, including all 25 members of the European Union, to ban the artificial hormone.[18]

Despite these problems, however, the FDA approved its use "in one of the most oft-criticized decisions in its history because agency employees with former ties to Monsanto were involved."[19] A Government Accountability Office inquiry cleared those involved of any conflict-of-interest violations, despite the fact that a former Monsanto researcher "was

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[13] Frank M. Aarestrup, et al., *International Spread of Multidrug-resistant Salmonella Schwarzengrund in Food Products*, 13 EMERGING INFECTIOUS DISEASES 726, 730 (May 2007) ("antimicrobial drug resistance among Salmonella isolates from food animals commonly reflects antimicrobial drug use in food animals"); Jennifer M. Nelson, et al., *Fluoroquinolone-Resistant Campylobacter Species and the Withdrawal of Fluoroquinolones from Use in Poultry: A Public Health Success Story*, 44 FOOD SAFETY 977, 978 (April 2007); Jennifer E. Stevenson, et al., *Increase in Nalidixic Acid Resistance among Non-Typhi Salmonella enterica Isolates in the United States from 1996 to 2003*, 51 ANTIMICROBIAL AGENTS AND CHEMOTHERAPY 195, 196–97 (Jan. 2007).

[14] Prentice, *supra* note 12 (quoting an FDA spokesperson as saying that "Yes, the FDA is concerned that the same poor management practices which led to the meat [antibiotic] residues may also result in drug residues in milk"); Alex Pulaski, *Hormone Fuels a Fight in Tillamook* THE SUNDAY OREGONIAN, February 27, 2005.

[15] 21 C.F.R. § 522.2112.

[16] *Id.*

[17] Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 636 (6th Cir. 2010).

[18] Martin Donohoe, MD, open letter to MSNBC Health Editor: "Errors in MSNBC Story on Organic Milk," *available at* http://www.organic-center.org/science.safety.php?action=view&report_id=60.

[19] Pulaski, *supra* note 14.

asked to reach conclusions about whether artificial growth hormones could be detected in milk, even though she had done precisely the same work at Monsanto" and "Michael R. Taylor, who wrote the [FDA]'s guidelines on why milk produced by using growth hormones should not be labeled as such…has been a Monsanto vice president and a partner in King & Spalding, a firm that represents Monsanto."[20] "Even longtime Washington hands said that the control this nascent [agricultural biotechnology] industry exerted over its own regulatory destiny—through the Environmental Protection Agency, the Agriculture Department and ultimately the Food and Drug Administration—was astonishing."[21]

The same consumer groups that fought against approval of rBST shifted their focus to a new goal of mandating disclosure by dairies that used the drug. These efforts were largely unsuccessful; Vermont was the only state to pass a statute requiring labeling of milk from cows treated with rBST.[22] However, several states enacted voluntary labeling regimes, whereby dairy producers would be allowed to label their milk with an "rBST-free" or similar notice.[23] Three states—Illinois, Nevada and Texas—prohibit rBST-free labeling.[24]

In International Dairy Foods Ass'n v. Amestoy, Vermont's statute was struck down based on dairy manufacturers' First Amendment right not to speak.[25] The Second Circuit ruled specifically that consumers' right to know which producers use rBST and make

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[20] *Id.*

[21] Kurt Eichenwald, et al., *Biotechnology Food: From the Lab to a Debacle*, NEW YORK TIMES, Jan. 25, 2001, at A1.

[22] 6 V.S.A. § 2754.

[23] Terence J. Centner & Kyle W. Lathrop, *Labeling rbST-Derived Milk Products: State Responses to Federal Law*, 45 KAN. L. REV. 511, 517 (Mar. 1997).

[24] *Id.*

[25] 92 F.3d 67 (2d Cir. 1996).

purchasing decisions based on that information was an insufficient justification for curtailing the producers' right not to speak.[26]

Not only do dairy producers not have to disclose their use of the synthetic hormone, but since 1994, any dairy producer that wants to make an "rBST-free" claim on its milk must also include an FDA-imposed disclaimer stating "No significant difference has been shown between milk derived from rBST-treated and non-rBST treated cows,"[27] a disclaimer that was also written by Monsanto VP–to–be Michael Taylor.[28] Monsanto, however, is still not satisfied, claiming that any mention of rBST is misleading to consumers because it implies there is something wrong with rBST use.[29] The corporation has continued to lobby to have the Guidance changed to completely disallow any rBST claims on labels.[30]

A similar story has played out with the use of genetically engineered (GE) crops and, most recently, genetically engineered animals for human consumption. The FDA is on the verge of approving the first GE animal, the AquAdvantage® salmon, for use as food for humans.[31] The salmon was created by a Massachusetts biotechnology company called AquaBounty by combining genes of Atlantic salmon with those of the ocean pout, an eel-

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[26] *Id.* at 73.

[27] 59 FR 6279. Though this disclaimer is not mandated by statute, it is included in FDA industry Guidance. *See also* http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/ucm059036.htm.

[28] Ken Roseboro, *Monsanto Pressures FDA to Keep Consumers in the Dark*, THE ORGANIC & NON-GMO REPORT (May 2007), *available at* http://www.non-gmoreport.com/articles/may07/misleading_rBST-free_labeling.php.

[29] *Id.* (discussing a letter in which Monsanto admonishes the FDA that "For years now, deceptive milk labeling practices have misled consumers about the quality, safety, or value of milk and milk products from cows supplemented with recombinant bovine somatotropin.").

[30] *Id.* Tellingly, Monsanto has not expressed any First Amendment concerns over such a restriction on rBST-free dairies.

[31] John McQuaid, *Is Genetically Engineered Food the Food of the Future?*, EATING WELL (Mar./Apr. 2011).

like fish, and adding a growth hormone from a Chinook salmon.[32] The result is a fish that grows twice as fast as natural Atlantic salmon because it does not stop growing in the colder months when natural salmon conserve their energy.[33] Already, consumers have criticized the FDA for its lack of transparency throughout the approval process and have expressed concerns over whether the salmon will be identified as GE when finally offered for purchase.[34] The FDA has responded by stating that "food from AquAdvantage Salmon…is as safe to eat as food from other Atlantic salmon" and that they "have found no biologically relevant difference between food from [AquaBounty salmon] and conventional Atlantic salmon."[35]

Consumer groups are concerned that AquAdvantage® salmon may be sold to the public with no labeling that distinguishes it from natural salmon. This concern is well justified by the FDA's record with regard to GE food labeling. Not only does the FDA not require labeling of GE foods,[36] it currently discourages food producers from advertising that their products *do not* contain genetically engineered ingredients by disseminating Guidances that suggest "no GMO," "GMO-free" and like claims may be actionable under the misbranding statute of the FDCA.[37] They are misleading, the FDA maintains, because they imply that genetic modification is bad and because a consumer might assume, from a "GMO-free" label, that foods without that label actually *contain* other genetically modified

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[32] Lyndsey Layton, *FDA Nears Approval as Food of Genetically Altered Salmon*, WASHINGTON POST, September 7, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/09/06/AR2010090603223.html?wprss=rss_print/asection.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] Lyndsey Layton, *FDA rules won't require Labeling of Genetically Modified Salmon*, WASHINGTON POST, September 18, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/09/18/AR2010091803520.html?wprss=rss_nation.

[37] *Id.* The FDA suggests using language such as "We do not use ingredients that were produced using biotechnology"—as long as it is not implied anywhere on the label that non-GE foods are better in any way than GE.

organisms, rather than being genetically modified themselves.[38] Additionally, the FDA has stated that "Data indicate that consumers do not have a good understanding that essentially all food crops have been genetically modified [through traditional breeding practices] and that bioengineering technology is only one of a number of technologies used to genetically modify crops."[39] This Guidance is not binding, but it is a strong indication of what kind of labeling FDA will and will not attack.[40]

Due in part to such Guidance, consumers today encounter GE organisms in more than 75% of processed foods,[41] and most are unaware of this fact: fewer than half of the consumers interviewed in a Rutgers survey were aware that GE foods are sold in supermarkets at all.[42] The most common GE crops are corn, soy, cottonseed, canola, sugar beets, and alfalfa—today, 86% of corn, 93% of cotton, and 93% of soy sold in the United States is genetically engineered.[43]

Many of these popular GE organisms are patented by Monsanto,[44] whose influence within the FDA was described above. Some local governments, stymied by federal rules against "no GMO" labeling, have attempted to ban GE foods altogether.[45] In response, the biotech lobby has rushed to pass laws restricting regulation of plants to the more industry-

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[38] FDA Guidance for Industry, Voluntary Labeling Indicating Whether Foods Have or Have Note Been Developed Using Bioengineering, *available at* http://www.fda.gov/food/guidancecomplianceregulatoryinformation/guidancedocuments/foodlabelingnutrition/ucm059098.htm.

[39] *Id.*

[40] *Id.*

[41] McQuaid, *supra* note 31.

[42] Linda A. Johnson, *Genetically Modified Foods Eaten Regularly*, ASSOCIATED PRESS, Mar. 23, 2005.

[43] United States Department of Agriculture Economic Research Service, *U.S. Genetically Engineered (GE) Crop Adoption Has Grown Steadily Since Their Introduction in 1996*, *available at* http://www.ers.usda.gov/ChartsOfNote/Default.aspx?mode=detail&id=111.

[44] Monsanto produces Roundup Ready soy, alfalfa, corn, cotton, canola, and sugarbeets, designed to be unaffected by Monsanto's Roundup herbicide. *See* Monsanto Roundup Ready System Overview, http://www.monsanto.com/weedmanagement/Pages/roundup-ready-system.aspx.

[45] Hope Shand, *"Monsanto Laws" Would Take Away Right to Ban GMOs*, THE NEWS & OBSERVER, North Carolina, May 19, 2005.

friendly state governments and removing GE crops from local governments' regulatory authority.[46] The FDA presumes that new GE plants are "generally recognized as safe" (GRAS)—meaning they are not subject to the petition and approval process required of new food additives; instead, GE foods are subject only to post-market surveillance like food.[47] This GRAS rule was drafted by former Monsanto lawyer, later Monsanto VP Michael Taylor, who also approved rBST while he was at the FDA.[48]

Today, genetic engineering is one of several band-aids used to solve problems in our food production system. For example, due to the costs and serious environmental harms of storing and disposing of the waste from the millions of animals raised each year in confined animal feeding operations (CAFOs),[49] scientists in Canada have developed a pig with altered genes from mice and the E. coli bacterium that produces more environmentally friendly manure.[50] CAFOs also breed disease, and the problem is so bad that roughly 97% of hogs in CAFOs receive continuous antibiotics in their food and water.[51] In response to mad cow disease scares, scientists created a mad-cow-resistant cow by removing a protein from its DNA.[52] However, mad cow disease is usually spread through the common industry practice of using cattle parts in cattle feed.[53] A quicker and more appropriate fix than a costly disease-resistant cow, it seems, would be to ban the cannibalistic feeding practice,

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[46] *Id.*

[47] 57 FR 22984; D.R. Cooley, *Transgenic Organisms and Some Legal Ethics*, 18 PUBLIC AFFAIRS QUARTERLY 91, 92 (2004).

[48] Marion Nestle, *FDA's Surprisingly Good Choice*, THE ATLANTIC, July 8, 2009, *available at* http://www.theatlantic.com/life/archive/2009/07/fdas-surprisingly-good-choice/20817/.

[49] Nicolette Hahn Niman, RIGHTEOUS PORKCHOP: FINDING A LIFE AND GOOD FOOD BEYOND FACTORY FARMS 93–96, 104 (HarperCollins 2009).

[50] McQuaid, *supra* note 31.

[51] Niman, *supra* note 49, at 99.

[52] Jürgen A. Richt, et al., *Production of Cattle Lacking Prion Protein*, 25 NATURE BIOTECHNOLOGY 132, 132 (Jan. 2007).

[53] Phuong Cat Le & Lewis Kamb, *Mad Cow Feed: A New Clue*, SEATTLE POST-INTELLIGENCER (Dec. 31, 2003), *available at* http://www.seattlepi.com/local/article/Mad-cow-feed-A-new-clue-1133581.php.

but the FDA has taken only half-measures to address the root of the problem. A 1997 regulation[54] prohibited the use of most, but not all, mammal parts in ruminant feed; in 2008, the FDA finally prohibited the use of most cattle parts in the feed of all animals, but it still allows the use of entire cattle carcasses under 30 months of age, including brains and spinal cords, and entire carcasses of older cattle with the brains and spinal cords removed.[55]

In light of these grisly facts, it is no surprise that food manufacturers are interested in halting the flow of information. The public points again and again at its "right to know," and consumers' overwhelming desire to have rBST and other GE products labeled has been documented in numerous studies and surveys.[56] There is an undeniable imbalance of information between consumers and food producers, and there is little that pervades our lives so much as the foods we put into our bodies every day. For these reasons, state legislatures have continually attempted to bridge the information gap with reasonable impositions on food producers' commercial speech. Such impositions could be analyzed either under the *Central Hudson* "substantial governmental interest" framework or under the less stringent "rational basis" standard set forth in *Zauderer*. This paper examines both tests and how they have been applied in the context of food labeling and concludes that, although consumers' right to know how their food is produced could satisfy either

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[54] 21 C.F.R. § 589.2000.

[55] 21 C.F. R. § 589.2001.

[56] *See, e.g.*, Roseboro, *supra* note 28 ("A recent poll by Food & Water Watch found that 80% of consumers want milk produced without rBST to be labeled as such"); Statement of Gregory A. Jaffe at Pew Initiative on Food and Biotechnology's Public Forum, June 27, 2002 ("a survey in 2001 by the Center for Science in the Public Interest found approximately two-thirds of consumers desire labeling of GE food. That survey found most Americans also desire labeling for many other currently unlabeled food processes, such as whether crops were sprayed with pesticides (76%) or imported (56%)").

standard, the proper analysis for speech restrictions regarding rBST and genetic engineering generally is the rational basis test.

II. ANALYSIS

A. *Commercial Speech Framework—The* Central Hudson *Test*

Commercial speech—that is, speech for the purpose of commercial gain—is subject to a lower level of protection than noncommercial speech. The Supreme Court distinguishes between them because, it argues, requiring equal protection for both types of speech "could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to" noncommercial speech.[57] The Court therefore "afford[s] commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression."[58] Regulations that restrict commercial speech are thus analyzed using intermediate scrutiny. The *Central Hudson* standard of scrutiny test directs courts to first determine whether the commercial expression concerns lawful activity and is not misleading.[59] This is merely a threshold for First Amendment protection. Second, the court asks whether the interest asserted by the government is substantial.[60] Third, the restriction must directly advance the asserted interest; and fourth, it must be no more extensive than necessary to serve that interest.[61]

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[57] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).
[58] *Id.*
[59] Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564 (1980).
[60] *Id.*
[61] *Id.*

"The party seeking to uphold a restriction on commercial speech carries the burden of justifying it."[62]

1. The *Amestoy* Case

In International Dairy Foods Association v. Amestoy,[63] the court applied the *Central Hudson* test to a Vermont statute requiring that "if rBST has been used in the production of milk or a milk product for retail sale in this state, the retail milk or milk product shall be labeled as such."[64] The regulations promulgated under the statute directed that milk products from treated cows be marked with either a notice stating that rBST was or may have been used or a blue rectangle or sticker.[65] In either case, the indicator was to be accompanied by a notice stating that "The United States Food and Drug Administration has determined that there is no significant difference between milk from treated and untreated cows. It is the law of Vermont that products made from the milk of rBST-treated cows be labeled to help consumers make informed shopping decisions."[66] Vermont's asserted interest in the speech restriction was "strong consumer interest and the public's 'right to know'"; the state did not, in the pleadings, explicitly claim any public health or safety rationale.[67]

The court determined that consumers' right to know was not a substantial governmental interest justifying speech restrictions under *Central Hudson*.[68] In fact, the

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[62] Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 71 (1983).
[63] 92 F.3d 67 (2d Cir. 1996).
[64] *Id.* at 69; 6 V.S.A. § 2754.
[65] 92 F.3d at 70; Adopted Rules (rBST Notification and Labeling Regulations Relating to Milk and Milk Products) of Vermont Dep't of Agriculture, Food and Markets, § 3.1b.
[66] 92 F.3d at 70; Adopted Rules (rBST Notification and Labeling Regulations Relating to Milk and Milk Products) of Vermont Dep't of Agriculture, Food and Markets, § 3.1b.
[67] 92 F.3d at 73.
[68] *Id.*

majority characterized the asserted interest as nothing more than "consumer curiosity," because the state had not, itself, explicitly adopted the concerns of its consumers.[69] In deciding this was insufficient, the *Amestoy* court relied on the fact that the FDA had determined there was no significant difference in milk from cows treated with rBST and from those not treated.[70] The court overlooked not only substantial research supporting the opposite conclusion but also a number of reasons other than food safety that consumers use to make purchasing decisions and that therefore underlie any desire to know how food is produced.

Judge Leval, dissenting, pointed out many of these reasons that appeared in the legislative history of the statute, including "human health, cow health, biotechnology, and the survival of small dairy farms."[71] He argued that this was far from mere "curiosity" and that the court's reliance on the FDA's findings regarding safety was misplaced: "To suggest that a government agency's failure to find a health risk in a short-term study of a new genetic technology should bar a state from requiring simple disclosure of the use of that technology where its citizens are concerned about such health risks would be unreasonable and dangerous."[72] The majority's view of the asserted interest as "consumer curiosity," and its subsequent determination that this interest was not substantial, however, obviously carried the day.

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[69] *Id.* at 73–74.
[70] *Id.*
[71] *Id.* at 76.
[72] *Id.* at 77.

2. Consumers' Right to Know as a Substantial Interest

The FDA has primary authority over food advertising and labeling. In assessing the adequacy and appropriateness of labeling, the agency looks to the Food, Drug, and Cosmetic Act, which dictates that a food is misbranded if the label is "false or misleading in any particular."[73] This section is illuminated further by section 201 of the Act: "in determining whether the labeling or advertising is misleading there shall be taken into account…not only representations made…but also the extent to which the labeling or advertising fails to reveal facts material in the light of such representations."[74]

The agency has stated, in the context of irradiation of food, that "Whether information is material under section 201(n) of the act depends not on the abstract worth of the information but on *whether consumers view such information as important* and whether the omission of label information may mislead a consumer."[75] FDA concluded that irradiation—used to destroy insects and microorganisms—could cause changes in organoleptic properties of the finished food and that, without special labeling, consumers might assume that such foods were unprocessed.[76] Thus, the agency considered the information "material" for purposes of the Act.

During hearings on GE foods, "Many consumers commented that they had a right or desire to know that a food had been derived from a plant developed by 'genetic engineering.'"[77] In doing so, they relied on the definition of materiality in section 201(n)

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[73] 21 U.S.C. § 343(a). Note that the U.S.C. sections are numbered differently from the FDCA sections.
[74] 21 U.S.C. § 321(n).
[75] 51 FR 13376 (Irradiation in the Production, Processing, and Handling of Food).
[76] 58 FR 25837, 25838 (Food Labeling; Foods Derived From New Plant Varieties).
[77] 58 FR 25837-03 (Food Labeling; Foods Derived From New Plant Varieties).

and the FDA's comments on materiality in reference to irradiation. However, the FDA, again with the help of Michael Taylor,[78] declined to find materiality with respect to genetic engineering and thus refused to require disclosure of GE ingredients on labels.[79] That decision was based on the FDA's assessment that there is no meaningful difference between GE and non-GE foods.[80]

However, plenty of food regulations have nothing to do with "significant" differences in foods produced in various ways and could only be based on consumers' desire to have information that is important to them. For instance, until 1997, the FDA directed that the term "kosher" "be used only on food products that meet certain religious dietary requirements."[81] It also found that the phrase "kosher style" was likely to "cause the prospective purchaser to think that the product is 'kosher'" and thus discouraged use of the phrase.[82] It is relevant that the FDA repealed the rule because misuse of "kosher" and "kosher style" was adequately covered by the general "misbranding" statute of the FDCA, because this necessarily implies that the FDA considers kosher to be a material fact. This materiality can come only from consumer preference—indeed, it would be impossible to devise a test to distinguish between foods prepared by Jews and those prepared by Gentiles. The "organic" label is another food regulation that caters to consumers' desire to know about their food rather than to any safety concerns due to significant differences in end products. The takeaway is that even the FDA and other regulatory agencies, which can be stingy in their classification of what "material information" is, have policies that

[78] Nestle, *supra* note 48.
[79] 57 FR 22984 (Statement of Policy: Foods Derived From New Plant Varieties).
[80] *Id.*
[81] 21 C.F.R. § 101.29 (repealed August 12, 1997, by 62 FR 43071).
[82] *Id.*

demonstrate the substantial interest consumers have in knowing how their food is produced, regardless of whether the end product is compositionally different.

And courts are not even limited to consideration of FDA food safety findings in deciding whether a consumer's right to know is a substantial interest. An FDA finding that a food is safe for human consumption should not and need not end the discussion of states' other asserted interests in compelling disclosures on labels. The FDA disagrees; it takes the position that its regulations and Guidances should act as both a "floor"—establishing a baseline for safety—and a "ceiling"—barring state regulations and tort actions.[83] This position was accepted with regard to medical device labeling, because Congress included an express preemption provision in the medical device statute;[84] however, FDA preemption has been rejected for both drugs[85] and food.[86] This certainly makes sense with regard to food, because there are so many concerns besides safety when it comes to food and how it is produced. And, as long as there are any cases of food contamination, it doesn't make sense to preempt state laws that could help prevent or contain food-borne disease.

If the court looks beyond bare minimum food safety standards, it will see, as Judge Leval did in his *Amestoy* dissent, a plethora of legitimate concerns states and their citizens have about the mystery surrounding much of the food we eat. Consumer concerns about animal health, public health, overuse of antibiotics, environmental effects of CAFOs and other industry practices, religious concerns and more pile up quickly to surpass the "substantial interest" threshold. These interests are at least as strong as many the courts

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[83] Statement of Randall W. Lutter, Deputy Commissioner for Policy, Food and Drug Administration, Department of Health and Human Services before the U.S. House of Representatives Committee on Oversight and Government Reform, "FDA Regulation and State Liability Claims," May 14, 2008.

[84] Riegel v. Medtronic, Inc., 552 U.S. 312, 330 (2008).

[85] Wyeth v. Levine, 555 U.S. 555, 129 S. Ct. 1187, 1204 (2009).

[86] McDermott v. Wis., 228 U.S. 115, 131 (1913) (recognizing "the power of the State to make regulations concerning" food, as long as they do not interfere with the operation of the Food and Drugs Act).

have deemed "substantial" over the years. For instance, Congress's assessment that use of the word "Olympic" by athletic associations other than the U.S. Olympic Committee was given credence by the Court, because the government had a substantial interest in "ensur[ing] that the USOC receives the benefit of its own efforts so that the USOC will have an incentive to continue to produce a 'quality product,' that, in turn, benefits the public" and in "promoting, through the activities of the USOC, the participation of amateur athletes from the United States in 'the great four-yearly sport festival, the Olympic Games.'"[87] The Court has also found that a government's interest in preventing unsubstantiated harmful effects "on the health, safety and welfare of the Puerto Rican citizens, such as the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime" was substantial enough to prohibit the advertising of casino gambling to Puerto Rico residents (because "the legislators wanted the tourists to flock to the casinos to gamble, but not [their] own people")—despite the fact that casino gambling was perfectly legal.[88] The Court has even found "[preserving] the quality of urban life" to be an interest substantial enough to support a ban on adult theaters within 1,000 feet of any residential area, home, church, park, or school, in spite of a lack of any studies regarding the effect of adult theaters on urban life in that area.[89] A consumer's right to know, especially when based on the weighty concerns described above, is at least as substantial as any of these.

[87] San Francisco Arts & Ath. v. United States Olympic Comm., 483 U.S. 522, 537 (1987).
[88] Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 341 (1986).
[89] Renton v. Playtime Theatres, 475 U.S. 41, 63 (1986).

B. *Compelled Disclosure—The* Zauderer *Standard of Scrutiny*

Although mandatory disclosures about rBST, GE foods, and other food processing information could survive intermediate scrutiny, they do not have to. There is a separate standard of scrutiny for commercial speech where a regulation is aimed at protecting consumers from deception.

> Commercial 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. Such disclosure furthers, rather than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the 'marketplace of ideas.' Protection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal. In such a case, then, less exacting scrutiny is required than where truthful, nonmisleading commercial speech is restricted.[90]

Rather than the substantial interest framework outlined in *Central Hudson*, in the case of commercial disclosure, "The [First] Amendment is satisfied…by a rational connection between the purpose of a commercial disclosure requirement and the means employed to realize that purpose."[91] The rational basis test, as formulated in McCulloch v. Maryland, asks whether a governmental action is a reasonable means to an end that may legitimately be pursued by the government.[92] This framework for mandatory disclosures was established by Zauderer v. Office of Disciplinary Counsel of Supreme Court. Essentially, if a disclosure is required "to dissipate the possibility of consumer confusion or deception," the speech restriction is analyzed under a rational basis standard.[93]

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[90] Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 113–114 (2d Cir. 2001).
[91] *Id.* at 115.
[92] 17 U.S. 316, 421 (1819).
[93] Zauderer v. Office of Disciplinary Counsel of Supreme Court, 471 U.S. 626, 651 (1985).

The *Zauderer* standard of scrutiny was applied in Milavetz, Gallop & Milavetz, P.A. v. U.S.[94] The statute at issue in that case was the Bankruptcy Abuse Prevention and Consumer Protection Act, which required debt relief agencies—professionals providing bankruptcy services to individual consumers—to identify themselves as debt relief agencies and disclose that their services may entail bankruptcy relief in their advertisements.[95] The statute was aimed at preventing consumers seeking debt relief from being caught by surprise when the "debt relief" offered—bankruptcy services—turned out to cost money.[96] The plaintiffs contended that the disclosure requirement violated their First Amendment rights.[97] They pressed for a *Central Hudson* analysis, but the court held that the rational basis standard of *Zauderer* applied, because the disclosures were "intended to combat the problem of inherently misleading commercial advertisements, and they entail only an accurate statement of the advertiser's legal status and the character of the assistance provided. Moreover, they do not prevent debt relief agencies from conveying any additional information through their advertisements."[98]

The *Zauderer* standard does not permit disclosure requirements that go beyond compelling accurate, uncontroversial statements to prevent consumer deception. In National Commission on Egg Nutrition v. FTC, the government tried to compel the egg industry (NCEN) to include in their advertisements a statement that "many medical experts believe increased consumption of dietary cholesterol, including that in eggs, may increase the risk of heart disease."[99] The FTC ordered the NCEN to do this after a sustained

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[94] 130 S. Ct. 1324, 1328–29 (U.S. 2010).
[95] *Id.* at 1330.
[96] *Id.*
[97] *Id.*at 1339.
[98] *Id.* at 1340.
[99] Nat' Comm'n on Egg Nutrition v. FTC, 570 F.2d 157, 164 (7th Cir. 1977).

advertising campaign by the NCEN asserting that eggs are harmless and necessary for human nutrition and that there was no scientific evidence that eating eggs raises one's cholesterol.[100] The NCEN challenged the label, and the Court applied the *Zauderer* standard, because the speech restriction at issue was a mandatory disclosure. The court held that the compelled disclosure went beyond what was necessary to correct any past deception, because it required the NCEN to argue the other side of a controversial issue.[101] However, the court determined that the FTC *could* require NCEN to include an uncontroversial statement that there is disagreement among experts regarding the safety of eggs.[102] Furthermore, in the event the NCEN chose to argue its side of the controversy in an advertisement, the FTC could compel it to include the original warning at issue.[103]

NCEN thus establishes the boundaries of the *Zauderer* standard. The state may mandate accurate statements of fact to correct or prevent consumer deception; it may not require companies to argue a side of a controversial issue that is unfavorable to them or antagonistic to their message.

1. The *Boggs* Case

The Sixth Circuit in International Dairy Foods Association v. Boggs considered roughly the inverse question from that in *Amestoy*: whether restrictions on voluntary labeling regarding *non-use* of rBST violated the First Amendment.[104] Fourteen years after the *Amestoy* case, the same trade association that had fought against disclosure of rBST use

[100] Nat'l Comm'n On Egg Nutrition v. F.T.C., 570 F.2d 157, 159 (7th Cir. 1977).
[101] *Id.* at 164.
[102] *Id.*
[103] *Id.*
[104] 622 F.3d 628 (6th Cir. 2010).

was challenging an Ohio statute that restricted dairies' rights to advertise non-use of rBST in two different ways. First, the statute at issue, essentially tracking FDA Guidance on the issue, would allow disclosure of non-use, but not statements like "rBST-free," because they might mislead consumers as to what's in their milk.[105] The FDA had determined that such claims are misleading both because consumers might assume that unlabeled milk actually contains the growth hormone, rather than just having been produced from cows injected with it, and because consumers might assume that milk from rBST-treated cows is inferior, when the FDA had found no significant difference.[106] Second, all claims had to be accompanied by the statement "FDA has determined that no significant difference has been shown between milk derived from rbST-supplemented and non-rbST-supplemented cows." The disclaimer had to appear "on the same label panel, "in exactly the same font, style, case, and color and at least half the size (but no smaller than seven point font)," and it had to be contiguous with the rBST non-use notice.[107]

With regard to the first restriction—disallowing claims such as "rBST-free"—the court applied the *Central Hudson* test, because this part of the statute attempted to ban certain speech.[108] The court concluded, first, that the banned speech was not inherently misleading and was thus entitled to First Amendment protection. In making this finding, the court explicitly recognized several compositional differences between rBST and non-rBST milk that justify a differentiation. Higher levels of IGF-1 and somatic cells and lower nutritional quality of the milk were all held up as significant differences, meaning that it

[105] Ohio Admin. Code § 901:11-8-01; 622 F.3d at 634.
[106] 622 F.3d at 634.
[107] Ohio Admin. Code § 901:11-8-01.
[108] 622 F.3d at 636.

was not misleading to imply that non-rBST milk is better.[109] Additionally, the fact that available technology did not allow the FDA to differentiate between naturally occurring BST and rBST in the milk was not conclusive evidence that there was, in fact, no rBST present in milk from treated cows.[110] The state even conceded that milk from treated cows "could" contain rBST.[111] For this reason, and because it was conclusively true that milk from untreated cows definitely could not contain rBST, the court found that an "rBST-free" claim was not misleading.[112]

Moving through the *Central Hudson* factors, the court found that Ohio's asserted interest in preventing consumer deception—although conceded to be substantial—was invalid, because Ohio and the FDA, whose Guidance the statute was based on, had found only that the prohibited labels "may" be misleading.[113] The court placed the burden on Ohio to show that the harm it aimed to prevent would actually occur absent the speech restriction and characterized the record of consumer deception as "weak at best."[114] The court did not rely heavily on this prong of the test, however, because it also found the speech prohibition was not narrowly tailored; instead of banning the "rBST-free" label, Ohio could have required the additional statement that "rSBT has yet to be detected in conventional milk."[115] The restriction thus failed *Central Hudson*'s intermediate scrutiny.[116]

In examining the second speech restriction—the compulsory "no significant difference" disclaimer—the court applied the *Zauderer* standard despite IDFA's push for a

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[109] *Id.* at 636–37.
[110] *Id.* at 637.
[111] *Id.*
[112] *Id.*
[113] *Id.* at 638.
[114] *Id.*
[115] *Id.* at 639.
[116] *Id.* at 640.

Central Hudson analysis.[117] The court construed *Milavetz*[118] as extending the *Zauderer* standard beyond inherently misleading speech to speech that is merely *potentially* misleading and found that such a standard should apply to the rBST disclaimer.[119] Importantly, the court noted that "First Amendment protection for commercial speech is justified in large part by the information's value to consumers" and that the speech rights of advertisers are less valuable than consumers'; specifically, businesses' "constitutionally protected interest in *not* providing the required factual information is 'minimal.'"[120] Again, Ohio argued that it was following FDA Guidance when it decided to require a "no significant difference" disclaimer—the FDA had issued the Guidance because, it said, rBST-free claims might mislead consumers into thinking there's something wrong with milk produced using rBST.[121] This possibility of deception was found to be better than "speculative," and therefore sufficient under the *Zauderer* standard. The court then determined that the disclaimer was reasonably related to preventing the possible consumer deception.[122] Thus, the court upheld the disclaimer as permissible mandatory speech under the rational basis test.

As for the requirement that the disclaimer appear contiguous to the "rBST-free" claim, however, the court found the rational basis test was not satisfied. The IDFA wanted to link the disclaimer to their "rBST-free" language with an asterisk, but this was specifically disallowed under the statute.[123] Ohio Department of Agriculture Director

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[117] *Id.* ("disclosure requirements do not violate an advertiser's First Amendment rights where the requirements 'are reasonably related to the State's interest in preventing deception of consumers.'").
[118] *See supra* text accompanying notes 94–98.
[119] 622 F.3d at 641.
[120] *Id.*
[121] *Id.* at 642.
[122] *Id.*
[123] *Id.* at 643.

Boggs testified that he had "been aware of [asterisks being a problem in conveying information] for a long time" and that the contiguity requirement was based on "anecdotal evidence" from talking to grocery store patrons, who made statements such as: "oftentimes it's hard to understand labels, especially when the print is so small."[124] Because this concern did not reflect the inefficacy of joining the FDA disclaimer with an asterisk, the court found, the contiguity requirement had "no demonstrable connection to ensuring that consumers are not misled" and it thus failed the rational basis test.[125]

Although the *Boggs* case does not speak specifically to whether a state may mandate disclosure of rBST use, it does address related issues, and, in the process, it establishes baselines for what does and does not pass muster under the *Zauderer* standard.

2. Consumers' Right to Know Under the Rational Basis Test

A disclosure of rBST use or some other fact about the manner in which a food was produced is accurate and not controversial and clearly aimed at preventing consumer deception. Mandatory labeling, then, clearly falls within the *Zauderer* framework. The question remains whether mandatory disclosures can survive rational basis scrutiny when the basis being scrutinized is the right of consumers to know about their food.

Consumers have myriad reasons to choose from as a foundation for their desire to know how their food is produced. With regard to rBST, the most prevalent are those credited by Judge Leval in his *Amestoy* dissent: human and cow health and concerns about

[124] *Id.*
[125] *Id.*

small businesses and biotechnology generally. Environmental concerns also exist—rBST treatment requires the use and disposal of pre-filled syringes as medical waste.[126]

Concerns about biotechnology may, in turn, be based on a host of other factors. Proponents of genetic engineering have long argued that GE crops are an indispensable tool for feeding a hungry and rapidly growing human population.[127] However, GE crops are costly to develop, and those costs are passed on to farmers. Poor farmers in hunger-stricken areas simply cannot afford to buy seeds.[128] In any case, we already produce enough food to feed everyone on the planet; the problem is not in the production but in the distribution.[129] Additionally, the lack of biodiversity that results from widespread use of identical crops may increase the risk of famine, as the crops will all be vulnerable to the same unforeseen diseases, pests, or climate conditions.[130] GE crops may also have unintended effects on the balance of ecosystems, because, although safe for human consumption, some GE crops are deadly to other organisms.[131] These biodiversity concerns are exacerbated by the common phenomenon of transgenic pollution—cross-pollination of non-GE crops with pollen from nearby GE farms. Transgenic pollution can cause devastating financial losses by destroying the value of organic crops (organic labeling

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[126] James R. Gillespie, MODERN LIVESTOCK AND POULTRY PRODUCTION, at 227 (7th Ed. 2004).

[127] Miguel Altieri, *No: Poor Farmers Won't Reap the Benefits*, 119 FOREIGN POLICY 123, 123 (2000); Peter Pringle, *Hunger and the Biotech Wars*, 20 WORLD POLICY JOURNAL 43, 45 (2003).

[128] Altieri, *supra* note 127.

[129] *Id.* at 124.

[130] *Id.* at 126.

[131] *Id.* at 127; Mary Dejevsky, *US Limits GM Maize to Save Monarch Butterfly*, THE INDEPENDENT, Jan. 17, 2000, *available at* http://www.independent.co.uk/environment/us-limits-gm-maize-to-save-monarch-butterfly-727021.html.

precludes the presence of more than 5% genetically modified organisms[132]) and may open innocent farmers up to infringement suits by seed patent owners.[133]

A GE concern recognized even by the FDA is that of allergenicity. When genetic material is taken from a plant that is commonly allergenic, such as a peanut, there is a danger that the resulting GE plant may share the allergenic traits. Thus, the presence of any known allergens in GE foods must be disclosed on the label of those foods.[134]

New information about rBST and GE foods is constantly being uncovered. In light of the uncertainty surrounding any new product, many consumers harbor a general skepticism of foods that have not been tried and tested through generations of use. And, in light of the many unanticipated negative effects of new food science, such as those given credence in *Boggs*, this skepticism can and should be upheld as a rational basis for imposing speech regulations.

C. *How* Amestoy *Got it Wrong*

Boggs, and not *Amestoy*, must serve as the relevant precedent for future mandatory disclosure cases, because the reasoning of *Amestoy* is flawed in several critical ways. The court applied the wrong level of scrutiny to the speech restriction, mischaracterized the interest asserted by the government, and erroneously relied exclusively on the FDA's

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[132] Deirdre Imus, *Messing with Mother Nature: Genetically Modified Organisms*, FoxNews.com, Apr. 11, 2011, *available at* http://www.foxnews.com/health/2011/04/11/messing-mother-nature-genetically-modified-organisms/.

[133] Cooley, *supra* note 47, at 94.

[134] FDA Guidance for Industry, Voluntary Labeling Indicating Whether Foods Have or Have Note Been Developed Using Bioengineering, *available at* http://www.fda.gov/food/guidancecomplianceregulatoryinformation/guidancedocuments/foodlabelingnutrition/ucm059098.htm.

finding that rBST was safe and that milk produced using the drug was indistinguishable from natural milk.

The *Amestoy* court applied the *Central Hudson* intermediate level of scrutiny in a case where *Zauderer*'s rational basis test clearly applies. The statute at issue was not restricting commercial speech; it was compelling it. National Electrical Manufacturers Association v. Sorrell, a later 2d Circuit case out of Vermont, attempted to distinguish—and thereby salvage—the precedent by arguing that *Amestoy*'s application of intermediate scrutiny "was expressly limited to cases in which a state disclosure requirement is supported by no interest other than the gratification of 'consumer curiosity.'"[135] The *Sorrell* court went on to say that, because of "the state's inability to identify a sufficient legitimate state interest, we did not reach the proper relationship between a disclosure regulation's means and its ends" in *Amestoy*.[136] The problem is that the *Amestoy* court never considered whether Vermont had asserted a *legitimate* state interest—the standard for rational basis review—because it applied the *Central Hudson* test, which requires a *substantial* interest. And *Sorrell* purports to say that, where the asserted interest in a mandatory disclosure is only "gratification of consumer curiosity," which the court determined was not a legitimate interest and would therefore fail under rational basis, *Central Hudson* applies. In other words, intermediate scrutiny applies to mandatory disclosures that would fail under rational basis scrutiny. Such a rule is completely nonsensical. Had *Amestoy* correctly used rational basis scrutiny, the disclosure would have been upheld. Disclosure of rBST use is factual and not controversial—and, under the Vermont statute, would even have been accompanied by FDA's "no significant difference"

[135] 272 F.3d 104, 115 (2d Cir. 2001).
[136] *Id.*

language. Based on the results of rBST and other GE foods awareness surveys, it would not be difficult to show that, without rBST labels, consumers assume their milk does not contain it or are unaware that it even exists.[137] Furthermore, disclosure of rBST use does not even rise to the level of the *NCEN* disclosure, which appears far more likely to lead consumers to believe eggs are bad than a mere statement of fact about production—especially considering the inclusion of the "no significant difference" disclaimer. A mandatory label would address this possibility for deception and would thus survive rational basis scrutiny.

A second problem with the *Amestoy* decision is that, had the court properly characterized the asserted state interest as a consumer's right to know (based on various health, animal welfare, business and other concerns), the statute would have survived even the intermediate scrutiny of *Central Hudson*. In other words, the court never issued a ruling on a "consumer's right to know" as a substantial interest, because it improperly equated it with mere "consumer curiosity" without examining any of the reasons milk purchasers are interested in how their milk is produced. Even the FDA has characterized a consumer's right to know as a substantial interest, stating that whether information is "material" or not under the FDCA depends in part on whether consumers view the information as important.

Finally, in analyzing the government's asserted interest, the court looked no further than the FDA's safety findings with regard to rBST use and failed to consider that there may be other bases for consumer choice besides a minimum threshold of safety for consumption. The consumer's right to know in the case of rBST and other food labeling

[137] *See, e.g.*, Mateusz Perkowski, *rBST controversy gives dairy farmers marketing advantage*, CAPITAL PRESS, Mar. 2, 2007 (describing a Washington study showing that 36% of respondents were unaware of rBST).

issues is strong despite any FDA safety determination, because the FDA's analysis is narrow; it does not consider animal welfare, public health, economic, environmental, or any other concerns. Courts applying *Zauderer* do not restrict their analysis to the FDA's position on food safety or labeling. For example, there was no allegation in *NCEN* that eggs are not safe for human consumption; the Seventh Circuit examined the asserted interest apart from any FDA concerns and affirmed the government's right to compel disclosures of information that is totally unrelated to whether a food is "safe." Had the court looked beyond the FDA's position, it would have arrived at the same conclusion as Judge Leval.

III. CONCLUSION

Given the FDA's and other agencies' slip-ups in consumer protection in recent years, as well as the revolving door between the FDA and food industry giants such as Monsanto,[138] many consumers have developed a cautionary approach to new food technology, even when those technologies have been given a governmental stamp of approval. Consumers have many reasons for wanting information about the foods they eat. Where states respond to these concerns and create mandatory or even voluntary disclosure regimes, the court need not and should not block their path. The First Amendment should not stand as an obstacle to receiving accurate information about the foods we eat. Rather, the First Amendment should be held up to its original purposes of fostering open communication, enlarging and enriching the marketplace of ideas, and ultimately aiding in our search for truth.

[138] As of 2009, former Monsanto lawyer and VP Michael Taylor is back at the FDA as an advisor to the FDA Commissioner on food safety. Nestle, *supra* note 48.

It remains to be seen whether courts will follow the lead of *Boggs* or *Amestoy* in the inevitable future cases regarding mandatory food labeling. Given the explosion in food technology in recent years, the path we choose will have a dramatic impact on how much truth we get when it comes to our food. A consumer's right to know is the same as his right to decide what to purchase and what to eat based on whatever criteria he deems important—not just whether it is poisonous or not. We do not endeavor to keep vegetarians and vegans from discovering whether there are animal products in food, because we recognize that vegetarianism and veganism are legitimate food choices based on something other than safety—which, for animal products, has been demonstrated through thousands of generations of omnivorous humans. The biotech industrial farming lobby's position that information about food "only confuses the consumer"[139] cuts against the values expressed in the First Amendment—the free flow of information, a rich marketplace of ideas, and the pursuit of truth. If the worth of an idea is to be measured by its acceptance in that free marketplace, let the information about industrial farming practices flow freely, and let us see how worthwhile these practices are.

[139] Layton, *supra* note 36.