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CONSTITUTIONAL LAW—FREE SPEECH AND GENETICALLY MODIFIED FOOD LABELING: A PROPOSED FRAMEWORK FOR DETERMINING THE CONTROVERSIAL CHARACTER OF COMPELLED COMMERCIAL SPEECH

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CONSTITUTIONAL LAW—FREE SPEECH AND GENETICALLY MODIFIED FOOD LABELING: A PROPOSED FRAMEWORK FOR DETERMINING THE CONTROVERSIAL CHARACTER OF COMPELLED COMMERCIAL SPEECH

*Richard W. Keidel**

Food is an inextricable ingredient of life. Today, food manufacturers use modes of genetic modification to produce foodstuffs. As a result of the citizenry's increased awareness of this fact, states are requiring food manufacturers to disclose which of their products are genetically modified. However, within the context of the First Amendment to the United States Constitution, state-mandated labeling of genetically modified food stands on an infirm foothold. The constitutionality of these disclosure requirements turns on whether state-mandated, genetically modified food labels are uncontroversial. Moreover, under the commercial speech doctrine, it is unclear how a court should assess and what a court should examine to determine whether compelled commercial speech is controversial. This Note proposes that (1) a court should examine the speech's tendency to advance a controversial ideology, and (2) a court can assess the speech's tendency to advance a controversial ideology by determining if the speech is relevant to a normative value and whether the speech's normative force outweighs its informative force. This Note concludes that state-mandated, genetically modified food labels are controversial; therefore, the commercial speech doctrine's more lenient form of means-end scrutiny is inapposite in analyzing state disclosure requirements that concern genetically modified food.

INTRODUCTION

Spensley Rickert and his wife live in the Pioneer Valley.[1] Like

* B.A., Philosophy, Washington College, 2012; J.D. Candidate, Western New England University School of Law, 2016. This Note is dedicated to my late father, Richard J. Keidel, Esq., whose dedication to law and family inspires me every day. Many thanks to Taylor Flynn for her guidance and mentorship, and to Jeanne Kaiser for her comments on an earlier draft of this Note. Also, special thanks to the editors and staff of Western New England Law Review, particularly Dan Benoit, Mark Squires, Jessica Scouten, Heather Harris, and Jennifer Weekley.

1. For the basis of this introduction, *see* Tom Vannah, *Between the Lines:*

many others in the Pioneer Valley, Mr. Rickert is a farmer by trade.[2] Armed with a degree in agriculture from Cornell and a whole lifetime of farming experience, Mr. Rickert operates the Hatfield Feed & Seed—a small farm located in North Hatfield, Massachusetts, just off of Interstate 91.[3] The Hatfield Feed & Seed implements environmentally sustainable practices and produces organic foodstuffs.[4] These two distinct features of the Hatfield Feed & Seed are dear not only to Mr. Rickert, but they are also important to consumers.[5] Mr. Rickert explains that twenty-first century consumers are different from those of a bygone era: "[t]oday consumers are attuned to labels that indicate, in fairly specific terms, how various foodstuffs are produced . . . ."[6] In the Pioneer Valley, in the greater New England region, and on a national level, considerations ranging from health, to food safety, to climate change are all driving the focus on food.[7]

Consumers are specifically interested in a particular label—the genetically modified ("GM")[8] food label.[9] However, an information divide with respect to food identification allegedly

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Practically Organic, VALLEY ADVOCATE, October 15, 2014, at 7. "The Pioneer Valley region contains three counties in Western Massachusetts with the Connecticut River running down the middle." RANDY GORDON ET AL., A MONUMENTAL HISTORY OF THE PIONEER VALLEY 3 (2009).

2. Vannah, *supra* note 1, at 7.

3. Vannah, *supra* note 1, at 7.

4. *Id.*

5. *See id.*

6. *Id.* "[L]ocal food is making a comeback; locavores look for locally grown or raised food, and other epicurean consumers seek organic and naturally produced food." David J. Berg, *Food Choice Is A Fundamental Liberty Right*, 9 J. FOOD L. & POL'Y 173, 175 (2013).

7. *See* ALEX RIGLEY SCHROEDER, MASSACHUSETTS WORKFORCE ALLIANCE, LOCAL FOOD, LOCAL JOBS: JOB GROWTH AND CREATION IN THE PIONEER VALLEY FOOD SYSTEM, 11 (Deborah Mutschler, Feb. 2013), http://www.mass.gov/eea/docs/agr/boards-commissions/mwa-food-report-03062013-screen.pdf [http://perma.cc/55EQ-BF6X].

8. A note on terminology: this Note will employ the full term "genetic modification" as a noun, and "GM" as an adjective, e.g., GM tomatoes.

9. Genetic modification is "[t]he alteration of an organism's genome by human intervention, by introducing, modifying, or eliminating specific genes." PAMELA C. RONALD & RAOUL W. ADAMCHAK, TOMORROW'S TABLE: ORGANIC FARMING, GENETICS, AND THE FUTURE OF FOOD 172 (2008). *See* James Maryanski, *Testimony before the H. Subcomm. on Basic Scientific Research*, U.S. FOOD & DRUG ADMINISTRATION (Oct. 19, 1999), http://www.fda.gov/newsevents/testimony/ucm115032.htm [http://perma.cc/B37H-CKMM] (last updated Aug. 06, 2009) ("The United States uses the term genetic modification to refer to all forms of breeding, both modern, i.e., genetic engineering, and conventional.").

sunders the symbiotic relationship between food producers and consumers.[10] As consumers prowl the aisles of the local grocery store, it can be difficult to differentiate GM foodstuffs from non-GM foodstuffs.[11] As a result, Massachusetts's voters took political action in order to ameliorate the information divide.

On January 13, 2015, several Massachusetts politicians filed a GM food-labeling bill, House Bill 369, in the Massachusetts legislature for the 2015–2016 legislative season.[12] The bill has four chief sponsors—two of the four, Representatives Ellen Story and Todd Smola, speak on behalf of the Pioneer Valley.[13] Moreover, House Bill 369 is specifically modeled after Vermont's GM food-labeling law,[14] which is currently fraught with legal opposition by food producers and members of the biotechnology community. Thus, Massachusetts should expect substantially similar legal challenges if or when House Bill 369 becomes law.

In the litigation concerning Vermont's GM food-labeling law, food producers and members of the biotechnology community claim violations of their free speech rights under the First Amendment to the United States Constitution.[15] One of the pivotal issues concerning this claim is whether government-mandated labeling of GM foodstuffs is uncontroversial commercial speech. This inquiry could be a double-edged blade—not only could it determine the applicable mode of means-end scrutiny,[16] but the applicable mode of means-end scrutiny could be determinative of the constitutionality of Vermont's GM food-labeling law.[17]

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10. *See* Berg, *supra* note 6, at 175.

11. However, non-GM foodstuffs need not necessarily be "organic." *See* Miles McEvoy, *Organic 101: Can GMOs Be Used in Organic Products?*, U.S. DEP'T OF AGRIC. (May 17, 2013, 1:20 PM), http://blogs.usda.gov/2013/05/17/organic-101-can-gmos-be-used-in-organic-products/ (setting out the standard for organic products).

12. H.D. 369, 189th Gen. Court (Mass. 2015); *see also GMO Labeling Bill Just Introduced in New Legislative Session: Help Recruit Co-sponsors*, MA RIGHT TO KNOW GMOS (Jan. 13, 2015), http://marighttoknow.com/home/newsession [http://perma.cc/MJQ3-57AD].

13. *Fact Sheet*, *Massachusetts GMO Labeling Legislation*, MASSACHUSETTS COALITION FOR GMO LABELING 2 (Jan. 14, 2015), http://marighttoknow.com/home/legislative-support/ma-legislation/ [http://perma.cc/JG9E-CGHE].

14. *Id.*

15. *See* Complaint, Grocery Mfrs. Ass'n v. Sorrell, No. 5:14-cv-00117-cr (D.Vt. June 12, 2014), ECF No. 1.

16. "Means-end scrutiny is an analytical process involving examination of the purposes (ends) which conduct is designed to serve and the methods (means) chosen to further those purposes." Russell W. Galloway, Jr., *Means-End Scrutiny in American Constitutional Law*, 21 LOY. L.A. L. REV. 449, 449 (1988).

17. *See, e.g.*, Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67 (2d Cir. 1996)

Moreover, the doctrine on this issue is unsettled; "it is unclear how [a court] should assess and what [a court] should examine to determine whether a mandatory disclosure is controversial."[18] This Note adds to the literature on this topic in two ways.[19] First, this Note pinpoints the substance that a court should examine in determining whether compelled commercial speech is controversial. Second, by drawing on concepts from the Federal Rules of Evidence and building upon Professor Ellen Goodman's "germaneness requirement,"[20] this Note offers an analytical tool to determine whether compelled commercial speech is controversial. The guiding forces behind this Note's analysis are the constitutional value at the heart of the commercial speech doctrine and the scientific and societal factors that make GM foods a hot-button topic.

Part I of this Note discusses the broad principles that underpin the debate surrounding GM foods. Specifically, Part I.A. discusses the relevant scientific principles and historical context behind GM food. Part I.B sets out and analyzes the statutory framework of Vermont's GM food-labeling law, the same legislation upon which House Bill 369 is based.

Part II briefly sketches the important constitutional principles that underpin the legal dispute over state-mandated GM food labeling. Part II.A. provides the theoretical justifications for the free speech guarantee. Part II.B. discusses the doctrinal principles surrounding the free speech guarantee and commercial speech. Part II.C. asserts that GM food labeling is compelled commercial speech, and is thereby afforded some degree of constitutional protection under the free speech guarantee. Part II.D. discusses the primary modes of means-end analysis that are applicable to commercial speech, and analyzes why the distinction between the two forms of scrutiny is important for GM food-labeling laws.

Part III sets out the gravamen of this Note. Specifically, Part III.A. argues that a GM food label is *purely factual* compelled commercial speech, and therefore satisfies the first threshold requirement for less exacting judicial scrutiny. Part III.B. argues

(holding that Vermont could not compel dairy producers to disclose whether their products contain rGBH, a type of GM hormone).

18. Am. Meat Inst. v. U.S. Dep't. of Agric., 760 F.3d 18, 34 (D.C. Cir. 2014) (Kavanaugh, J., concurring).

19. *See* Ellen P. Goodman, *Visual Gut Punch: Persuasion, Emotion, and the Constitutional Meaning of Graphic Disclosure*, 99 CORNELL L. REV. 513, 568 (2014) (There is little scholarship on compelled commercial speech).

20. *Id.* at 553.

that GM food labeling is not *uncontroversial* compelled commercial speech, and therefore fails to satisfy the second threshold requirement for less exacting judicial scrutiny. This Part also pinpoints the substance that a court should examine in determining whether compelled commercial speech is controversial, and offers an analytical mechanism for evaluating the relevant substantive information.

I. SCIENCE, HISTORY, AND STATUTES

To properly appreciate this Note's proposal, it is necessary to examine the scientific principles of genetic modification and the relevant historical development of genetic modification.

A. *Scientific Principles & Historical Context*

Humans have used rudimentary methods of genetic modification to produce food for thousands of years.[21] For instance, the prehistoric inhabitants of the Balsas River basin in Mexico developed modern corn (maize) from teosinte, a wild, stone-like form of grass, about nine thousand years ago.[22] In so doing, these early farmers would choose teosinte that had superior kernel quality, large size and better taste, then save and plant their seeds for future harvest.[23]

This ancient process, which is known as artificial selection, is man's first known feat of genetic modification.[24] Due to our long history of artificially shaping organisms for consumption,[25] "[m]any of our common crops—including rice, wheat, corn, and beans—cannot reproduce themselves without human help . . . ."[26] Thus, humans have a long-rooted, symbiotic relationship with food by virtue of our historical use of artificial selection. It is of no surprise that Charles Darwin devoted the entire first chapter of *On the*

21. Brooke Glass-O'Shea, *The History and Future of Genetically Modified Crops: Frankenfoods, Superweeds, & the Developing World*, 7 J. FOOD. L. & POL'Y 1, 3 (2011).

22. Nina V. Redoroff, *Prehistoric GM Corn*, 302 SCIENCE, NEW SERIES, no. 5648, Nov. 14, 2003, at 1158, 1158–59; *The Evolution of Corn*, UNIV. UTAH HEALTH SCIENCES, http://learn.genetics.utah.edu/content/selection/corn/ [http://perma.cc/UFK6-KKQF] (last visited Oct. 1, 2015).

23. Redoroff, *supra* note 22, at 1158.

24. *Id.*

25. Glenn Davis Stone, *The Anthropology of Genetically Modified Crops*, 39 ANN. R. ANTHROPOL. 381, 383 (2010).

26. Glass-O'Shea, *supra* note 21, at 3.

Origin of Species to this process.[27]

The advent of modern science has advanced humans' ability to alter the genetic makeup of organisms. In general, genetic modification refers to distinct subcategories of modalities that scientists use to alter organisms for future consumption.[28] One subcategory of genetic modification is *genetic engineering*, which "involves making an intentional targeted change in a plant or animal gene sequence to effect a specific result . . . through the use of recombinant deoxyribonucleic acid (rDNA) technology."[29] Genetic engineering was developed in the early-1970s, when Stanley Cohen and Herbert Boyer discovered the process of *gene-splicing* or *recombinant-DNA modification*.[30] Genetic engineering's first breakthrough was the therapeutic drug Humulin, a form of insulin that is regularly taken by diabetics worldwide.[31] The first foodstuff produced by means of genetic engineering was the Flavr Savr tomato, which was approved by the U.S. Food and Drug Administration in 1994.[32] Flavr Savr's genetic modification was a significant breakthrough because the modification delayed rotting and increased flavor.[33]

Another subcategory of genetic modification is *biotechnology*, which encompasses contemporary methods of modification, such as somatic hybridization (protoplast fusion), embryo rescue, somaclonal variation, mutation breeding, and cell selection.[34] Specifically, protoplast fusion is a process whereby "cells growing in a culture medium are stripped of their protective walls, usually using pectinase, cellulase, and hemicellulase enzymes. These stripped cells, called protoplasts, are pooled from different sources and, through the use of varied techniques such as electrical shock, are fused with one another."[35] The resulting plant has

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27. Jeffrey K. Connor, *Artificial Selection: A Powerful Tool for Ecologists*, 84 ECOLOGY 1650, 1650 (2003).

28. SAFETY OF GENETICALLY ENGINEERED FOODS, COMM. ON IDENTIFYING & ASSESSING UNINTENDED EFFECTS OF GENETICALLY ENGINEERED FOODS ON HUMAN HEALTH, INST. OF MED. & NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS. 18 (2004).

29. *Id.*

30. Glass-O'Shea, *supra* note 21, at 8.

31. *Id.*

32. *See* Stone, *supra* note 25, at 382. *See also* Premarket Notice Concerning Bioengineered Foods, 66 Fed. Reg. 4706, 4707–08 (proposed Jan. 18, 2001) (to be codified at 21 C.F.R. pts. 192 & 592) (discussing the Flavr Savr tomato).

33. *See* Stone, *supra* note 25, at 382.

34. SAFETY OF GENETICALLY ENGINEERED FOODS, *supra* note 28, at 18, 24–28.

35. *Id.* at 26.

characteristics from both parents—protoplast fusion is hybridization at the vegetative level.[36] Although it is not the most precise methods of modern genetic modification,[37] protoplast fusion is viewed as a viable method of genetic modification for some industries.[38] For instance, it is sometimes used in the production of tobacco.[39]

Another subcategory of genetic modification is *conventional breeding*, which denotes "traditional methods of breeding, or crossing, plants, animals, or microbes with certain desired characteristics for the purpose of generating offspring that express those characteristics."[40] For instance, artificial selection is a form of conventional breeding.[41] Seeds from a plant with desirable characteristics are preserved for future harvest; thus, the crops of the future harvest tend to possess the superior characteristics of the progenitor plant.[42] Despite its vintage, modern technology has helped enhance artificial selection's productivity.[43]

Unsurprisingly, American farmers began cultivating GM crops with beneficial traits, such as, herbicide tolerance and insect resistance.[44] Despite the benefits of GM crops for farmers, consumers became quite skeptical of GM food production and consumption over the last decade.[45]

B. *The Statutory Framework: Vermont's GM Food-Labeling Law*

General skepticism of GM food is not uncommon in American

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36. Laszlo Menczel et al., *Effect of Radiation Dosage on Efficiency of Chloroplast Transfer By Protoplast Fusion in Nicotiana*, 100 GENETICS 487, 487 (1982).

37. Statement of Policy: Foods Derived from New Plant Varieties, 57 Fed. Reg. 22984 (May 29, 1992) ("Mutagenesis techniques are limited, however, by their inability to target a desired trait.").

38. *See* Menczel et al., *supra* note 36, at 487 ("Protoplast fusion offers the possibility of one-step transfer of organelles between plant species, replacing the tedious procedure involving repeated back-crosses.").

39. *Id.*

40. SAFETY OF GENETICALLY ENGINEERED FOODS, *supra* note 28, at 24.

41. *See id.*

42. *See id.*

43. *See id.*

44. *See* Stone, *supra* note 25, at 382.

45. Anton E. Wohlers, *Regarding Genetically Modified food: Policy Trajectories, Political Culture, & Risk Perceptions in the U.S., Canada & EU*, 29 POL. & LIFE SCI. 17, 23 (2010). "Concerns have focused on the capacity of genetically modified foods to cross biological boundaries, causing harm to humans and the environment. However, resistance also stems from the post-material values movement of the 1960s and 1970s . . . ." *Id.* at 17.

society.[46] A logical outgrowth of society's suspicion is the specific issue of government-mandated labeling of GM foodstuffs.[47] Before House Bill 369 was introduced in Massachusetts, the citizenry of Vermont expressed its will on the issue of GM food labeling by means of the democratic process.[48] Moreover, title 9, sections 3041 through 3048 of the Vermont Statutes Annotated ("labeling law") codify Vermont's labeling requirements for GM foods.[49] Five aspects of the labeling law are particularly relevant for this Note's discussion.

First, the operative term of Vermont's labeling law is *genetic engineering*.[50] For purposes of the labeling law, genetic engineering is (1) a process, (2) by which a foodstuff that is intended for human consumption is produced, (3) from an organism, and (4) the organism's genetic material has been changed through the application of either (A) "in vitro nucleic acid techniques," (B) cell fusion, or (C) "hybridization techniques that overcome natural physiological, reproductive, or recombination barriers."[51]

Note well—the labeling law's definition of genetic engineering sits in contrast to the more narrow definition of genetic engineering.[52] But, as a matter of black letter law, "when a legislature defines the language it uses, its definition is binding . . . even though the definition does not coincide with the ordinary meaning of the words."[53] In this vein, a word is merely "the skin of a living thought"; a word's meaning can vary depending on the circumstances in which it is used.[54] Hence, what matters most is the

46. *See id.*; *see also* Glass-O'Shea, *supra* note 21, at 16 (questioning citizens' fright of GM foods).

47. *See* Travis Nunziato, *"You Say Tomato, I Say Solanum Lycopersicum Containing Beta-ionone and Phenylacetaldehyde": An Analysis of Connecticut's GMO Labeling Legislation*, 69 FOOD & DRUG L. J. 471, 481 (2014) ("[T]he labeling of genetically modified food is of great interest to consumers in the United States.").

48. George A. Nation III, *We the People: The Consent of the Governed in the Twenty-First Century: The People's Unalienable Right to Make Law*, 4 DREXEL L. REV. 319, 329 (2012) (stating that the only legitimate source of governmental power is the people). "In a representative democracy, the people do not exercise their power to govern directly; rather, they periodically delegate their authority to an agent or representative." *Id.*

49. VT. STAT. ANN. tit. 9, §§ 3041–48 (2014) (effective July 1, 2016).

50. *See id.* § 3042(4)(A)–(B).

51. *Id.*

52. *See* discussion *supra* Part I.A.

53. 1A NORMAN SINGER & SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 20:8 (7th ed. 2007).

54. Towne v. Eisner, 245 U.S. 418, 425 (1918).

flesh behind the skin—in this case, the intent of the legislature.[55] The labeling law's definition of genetic engineering is conceptually congruent to the United States' conception of genetic modification.[56] In light of this similarity, the intent of the Vermont legislature is clear; notwithstanding the use of the term genetic engineering, the labeling law's operative term codifies the essential meaning of genetic modification.

Second, if a foodstuff meets the labeling law's definition of genetic engineering, and it is offered for retail sale in Vermont, the foodstuff must be labeled as either produced entirely or in part from genetic engineering.[57] The duty of actually labeling the foodstuff falls upon either the manufacturer or the retailer.[58] Food manufacturers are obligated to append the required label to the packaging of both "raw agricultural commodities" and "processed food."[59] On the other hand, food retailers are required to comply with the labeling law only in the case of a raw agricultural commodity that is not separately packaged.[60] In such a circumstance, the retailer of the food product is obligated to affix the required label to "the retail store shelf or bin in which the commodity is displayed for sale . . . ."[61] Food retailers who prepare food for immediate consumption, such as restaurants, are not subject to the labeling law.[62]

Third, certain foods need not be labeled: "food consisting entirely of or derived entirely from an animal that has not itself been produced with genetic engineering";[63] processing aids and enzymes;[64] alcoholic beverages;[65] processed foods that contain

55. *See* Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928) (stating that it would be arbitrary to interpret a statute in a way that is contrary to legislative intent that is supported by persuasive evidence).

56. James Maryanski, *Testimony before the H. Subcomm. on Basic Scientific Research*, U.S. FOOD & DRUG ADMIN. (Oct. 19, 1999), http://www.fda.gov/newsevents/testimony/ucm115032.htm [http://perma.cc/B37H-CKMM] (last updated Aug. 06, 2009) (explaining that "[t]he United States uses the term 'genetic modification' to refer to all forms of breeding, both modern, i.e., genetic engineering, and conventional"); *see also supra* Part I.A.

57. VT. STAT. ANN. tit. 9, §§ 3043(a)(1)–(2).

58. *Id.* §§ 3043(b)(1)–(3).

59. *Id.* §§ 3043(b)(1)–(3); *see id.* § 3042(10) (defining "raw agricultural commodity"); *id.* § 3042(8) (defining "processed food").

60. *Id.* § 3043(b)(2).

61. *Id.*

62. *Id.* §§ 3043(d)(1)–(2).

63. *Id.* § 3044(1).

64. *Id.* § 3044(3).

65. *Id.* § 3044(4).

materials that, in the aggregate, account for no more than 0.9 percent of the processed food's total weight;[66] and "medical food."[67]

Fourth, the labeling law has four purposes.[68] Food manufacturers or retailers must provide information regarding GM food so that consumers can make informed commercial decisions in light of (1) the potential health effects of GM food, (2) the potential environmental effects of producing GM food, (3) certain religious objections to the use and consumption of GM food, and (4) the risk of consumer confusion and deception.[69]

On June 12, 2014, the Grocery Manufacturers Association ("GMA") filed suit for injunctive relief in federal district court against Attorney General Sorrell ("Vermont").[70] GMA claims that the Vermont labeling law is unconstitutional on several grounds.[71] Specifically, GMA asserts that the labeling law contravenes the First Amendment by unconstitutionally regulating commercial speech.[72] To fully appraise the gravity of this claim, this Note will analyze the constitutional principles that underpin the legal dispute over government-mandated labeling of GM foodstuffs.

II. CONSTITUTIONAL PRINCIPLES

The First Amendment to the Federal Constitution guarantees the right of free speech.[73] The Due Process Clause of the Fourteenth Amendment incorporates the free speech guarantee against the several states.[74] "The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph

66. *Id.* § 3044(5).

67. *Id.* § 3044(8); 21 U.S.C. § 360ee(b)(3) (2012) (defining "medical food").

68. VT. STAT. ANN. tit. 9, §§ 3041(1)–(4).

69. *Id.*

70. *See* Terri Hallenbeck, *Vermont Defends GMO Labeling Law*, BURLINGTON FREE PRESS, http://www.burlingtonfreepress.com/story/news/politics/2014/08/08/gmo-lawsuit-response/13800873/ [http://perma.cc/4NWR-MYNU] (last visited Oct. 1, 2015) (discussing the lawsuit that was filed against the State of Vermont in May 2014).

71. *See* Complaint at 13–21, Grocery Man. Ass'n v. Sorrell, No. 5:14-cv-00117-cr (D. Vt. June. 12, 2014), ECF No. 1.

72. *See id.* at 13–16.

73. U.S. CONST. amend. I.

74. Gitlow v. New York, 268 U.S. 652, 666 (1925); *see* Palko v. Connecticut, 302 U.S. 319, 324–25 (1937) ("[Freedom of speech is] implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.").

over slothful ignorance."[75] In this light, the right of free speech encompasses both the rights of speakers and listeners.[76] Specifically, speakers enjoy the right to speak and the right against being compelled to speak.[77] Both rights are corollaries of the broader concept of individual freedom of mind.[78] Moreover, listeners enjoy the right to receive speech.[79] The right to receive speech is just as important as the right to speak at all—"[t]he dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them."[80] Even before the ratification of the First Amendment in 1791, scholars, jurists, and lawyers have sought to pinpoint the purpose of the right of free speech.[81]

A. *Theoretical Justifications for the Free Speech Guarantee*

Today, there are "three classic free speech theories" that account for the purpose of the free speech guarantee.[82] First, the "'marketplace of ideas' theory"[83] justifies the right of free speech on the basis that:

> [T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which [peoples'] wishes safely can be carried out.[84]

In essence, the marketplace of ideas theory rests on the supposition that free speech leads to the discovery of truth.[85]

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75. Martin v. City of Struthers, Ohio, 319 U.S. 141, 143 (1943).

76. Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 966 (2009).

77. Wooley v. Maynard, 430 U.S. 705, 714 (1977).

78. *Id.*

79. *Martin*, 319 U.S. at 143.

80. Lamont v. Postmaster General of U.S., 381 U.S. 301, 308 (1965) (Brennan, J., concurring). For a discussion of the right against compelled listening, which is currently an unrecognized right under the free speech guarantee, *see* Corbin, *supra* note 76, at 980 (arguing that the courts should recognize a First Amendment right against compelled listening).

81. RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 1.04 (1994) (discussing Blackstone's narrow conception of freedom of speech).

82. *Id.* § 2.01.

83. *Id.*

84. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see also* Knox v. Serv. Emps. Int'l Union, Local 1000, 132 S. Ct. 2277, 2288 (2012).

85. FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 15–16

Second, the "'democratic self-governance' theory"[86] justifies the right of free speech on the ground that it "[i]s a necessary component of a society premised on the assumption that the population at large is sovereign."[87] By making possible an informed electorate, and encouraging citizens to participate in the political process, the right of freedom of speech fosters "the formation of public opinion [which] is vital to the legitimacy of the democratic state."[88] In essence, the democratic self-governance theory rests on the supposition that "[d]emocracy subordinates government to public opinion."[89]

Third, the "'human dignity and self-fulfillment' theory" justifies the right of free speech on the ground that it promotes individual autonomy.[90] Identifying individual autonomy as the theoretical centerpiece of the free speech guarantee implicitly recognizes the ultimate sanctity of individual choice and expression.[91] In essence, the human dignity and self-fulfillment theory rests on the supposition that the right of free speech protects "the inner life that [speech] expresses."[92] Nevertheless, these three theories "should be understood, however, not as mutually exclusive, but as mutually *supportive* rationales which combine to make an overwhelming case for the elevation of freedom of speech as a transcendent value in an open society."[93] The free speech guarantee encompasses a broad array of constitutionally protected rights for both speakers and listeners, and the theoretical justifications for the free speech guarantee are manifold. Despite the free speech guarantee's expansive protections and sundry philosophical justifications, it is beyond dispute that "[n]ot every case is a first amendment case."[94] "Thus, only a certain category of behavior is covered by the first amendment."[95] Next, this Note will examine whether GM food labels fall within the category of

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(1982).

86. SMOLLA, *supra* note 81, § 2.01.

87. SCHAUER, *supra* note 85, at 35.

88. Corbin, *supra* note 76, at 970.

89. *See* ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM 35 (2012).

90. Corbin, *supra* note 76, at 970–71; *see also* SMOLLA, *supra* note 81, § 2.01.

91. SCHAUER, *supra* note 85, at 68.

92. Caroline Mala Corbin, *Compelled Disclosures,* 65 ALA. L. REV. 1277, 1298 (2014); *see also* Corbin, *supra* note 76, at 972.

93. SMOLLA, *supra* note 81, § 2.01.

94. Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 267 (1981).

95. *Id.*

behavior that the First Amendment protects.

B. *Determining the Correct Category*

The free speech guarantee protects "speech as such."[96] This is an extremely broad category—constitutional protection attaches to any communicative act "whenever an intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[97] By implication, "the constitutional definition of the word 'speech' carves out a category that is not coextensive with the ordinary language meaning of the word 'speech.'"[98] The critical principle in this respect is that "[t]he First Amendment affords protection to symbolic or expressive conduct as well as to actual speech."[99]

In general, a communicative act that comes within the free speech guarantee's purview can be the subject of government regulation only if the government satisfies strict scrutiny.[100] However, not all speech regulations are categorically subject to strict scrutiny—there are several exceptions to the general rule.[101] For purposes of this Note, the most important genus consists of speech that is characterized as either low value or devoid of any protection.[102] Specifically, this category consists of "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem."[103] Examples include "fighting words,"[104]

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96. Glickman v. Wileman Bros. & Elliot, Inc., 521 U.S. 457, 478 (1997) (Souter, J., dissenting).

97. Robert C. Post, Essay, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1251 (1995) (quoting Spence v. Washington, 418 U.S. 405, 410–11 (1974)).

98. Schauer, *supra* note 94, at 273; *see id.* at 269 (recognizing that, in general, constitutional language is a form of technical language that should be interpreted in its unique context and with reference to its particular purposes).

99. Virginia v. Black, 538 U.S. 343, 358 (2003).

100. *See* Matthew D. Bunker et al., *Strict in Theory, But Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM. L. & POL'Y 349, 351 (2011).

101. *Id.* at 357 (explaining that strict scrutiny is not applicable if (1) the speech regulation is classified as content neutral, (2) the regulated speech is characterized as either "low value or devoid of any protection," (3) the declarant of the speech is treated as a "second-class citizen," or (4) the speech regulation is deemed "to be one of general applicability such that any restriction on speech is merely incidental).

102. *See id.* at 360–62 (discussing low value speech and speech that is devoid of constitutional protection).

103. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

104. Cohen v. California, 403 U.S. 15, 20 (1971).

"true threats,"[105] "advocacy intended, and likely, to incite imminent lawless action,"[106] obscenity,[107] child pornography,[108] etc.[109] This category also encompasses forms of speech that enjoy only a limited measure of protection under the free speech guarantee. For example, libelous speech is partially protected by the First Amendment.[110] Like libelous speech, commercial speech is currently a second-class First Amendment citizen.[111]

Traditionally, commercial speech was beyond the scope of the free speech guarantee.[112] However, a paradigm shift occurred in the Court's treatment of commercial speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[113] In *Virginia State Board*, the Court held, for the first time, that the free speech guarantee affords some degree of constitutional protection to commercial speech.[114] The Court explained that commercial speech is "indispensable to the formation of intelligent opinions as to how [a free market economy] ought to be regulated or altered."[115] On this notion, the Court reasoned that it should drape a thin veil of constitutional protection over commercial speech due to the informative value of commercial speech to the

105. R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992).

106. United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012).

107. Miller v. California, 413 U.S. 15, 23 (1973).

108. New York v. Ferber, 458 U.S. 747, 765–66 (1982).

109. *See generally* United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012) (discussing categories of speech that are not protected by the free speech guarantee).

110. New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (holding that a public official can recover damages for a defamatory falsehood relating to her official conduct if she proves that the statement was made with "actual malice").

111. *See* Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 830 (2001) (referring to commercial speech as "a second-class First Amendment citizen"). Commercial speech is a second-class citizen in the sense that it is not viewed as being as important as other forms of speech, such as political speech. *See* Robert C. Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 25–26 (2000) (summarizing the ways by which commercial speech is treated differently from "public discourse" for constitutional purposes). Thus, commercial speech does not receive the same degree of constitutional protection as non-commercial speech. *See id.* at 26–28 (discussing how commercial speech and public discourse are treated differently specifically within the context of compelled disclosures).

112. *See* Bus. Exec. Move for Viet. Peace v. F.C.C., 450 F.2d 642, 658 n.38 (D.C. Cir. 1971) ("Commercial advertising–indeed, any sort of commercial speech–is less fully protected than other speech, because it generally does not communicate ideas and thus is not directly related to the central purpose of the First Amendment.").

113. Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).

114. *Id.* at 762.

115. *Id.* at 765.

general public.[116] With respect to the three theoretical justifications for free speech, commercial speech hangs its hat on the democratic self-governance theory.[117] In this vein, the primary constitutional value of commercial speech is the circulation of accurate and useful information.[118]

In this light, GM food labeling is presumptively within the ambit of the free speech guarantee. However, if GM food labeling falls into the commercial speech subcategory, it becomes a First Amendment second-class citizen. The next section of this Note will examine the definition of "commercial speech" and whether GM food labeling aligns with this definition.

C. *Defining Commercial Speech*—Bolger *and Common Sense*

The definition of "commercial speech" is opaque.[119] Among the priorities of the Court, defining the precise contours of commercial speech is not one of them.[120] However, maintaining an opaque conception of "commercial speech" might be a sound policy—"the creativity of marketing professionals appears to be truly inexhaustible, with new marketing techniques dreamed up every day."[121] As a conceptual matter, commercial speech could be similar to "hard-core pornography" in the sense that we know it when we see it.[122] In essence, common sense is an important aid in

116. *See id.* at 763 (going so far as to say that the value of commercial speech to a consumer "may be as keen, if not keener by far, than his interest in the day's most urgent political debate"); Post, *supra* note 111, at 28.

117. *See supra* Part II.A. (discussing the theoretical justifications of the free speech guarantee); Post, *supra* note 111, at 27 (describing commercial speech as the set of communicative acts about commercial subjects that within a public communicative sphere convey information of relevance to democratic decision making).

118. Zauderer v. Office of Disciplinary Council, 471 U.S. 626, 651 (1985).

119. *See* Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583, 2592 (2008).

120. *See* Nike, Inc. v. Kasky, 539 U.S. 654, 663–65 (2003) (per curiam) (declining to address a "novel First Amendment question[]" regarding "a blending of commercial speech, noncommercial speech and debate on an issue of public importance"); *see also* Erwin Chemerinsky & Catherine Fisk, *What is Commercial Speech? The Issue Not Decided in Nike v. Kasky*, 54 CASE W. RES. L. REV. 1143, 1156 (2004) (clarifying that the proper issue before the Court in *Nike* was the definition of commercial speech).

121. TAMARA R. PIETY, BRANDISHING THE FIRST AMENDMENT: COMMERCIAL SPEECH IN AMERICA 31 (Univ. of Mich. Press 2013).

122. *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description . . . . But I know it when I see it, and the motion picture involved in this case is not that."). *See also* Nat'l Ass'n of Mfrs. v. S.E.C., 800 F.3d 518, 521 n.8 (D.C. Cir. 2015) ("It is easier to discern what the Supreme

identifying commercial speech.[123]

This is not to say that the Court has not given analytical guidance at all. In *Bolger v. Youngs Drug Products Corp.*,[124] the Court identified three factors that tend to identify commercial speech.[125] The three factors are (1) whether the speech is rendered in an advertisement-like format, (2) whether a nexus exists between a commercial product and the speech, and (3) whether a nexus exists between the economic interests of the speaker and the speech.[126] The Court elucidated that all three factors need not be present for speech to be commercial.[127] In addition to these factors, the commonsense distinction between speech that does no more than propose a commercial transaction and other forms of speech remains highly relevant.[128]

In light of the second *and* third *Bolger* factors, and sheer common sense, GM food labeling is patent commercial speech.[129] First, a strong nexus exists between a GM food label and the foodstuff upon which it is placed. To begin, an article that a person can use for food or drink, i.e., a foodstuff,[130] that is offered for sale is a commercial product—once the foodstuff is purchased, it enters the flow of interstate commerce.[131] In addition, as written or printed material that appears on the immediate container of a foodstuff,[132] a GM food label broadcasts data about the foodstuff to

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Court does not consider 'commercial speech' than to determine what speech falls within that category.").

123. *See* Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976) ("In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable [sic] from other forms. There are commonsense differences between speech that does no more than propose a commercial transaction, and other varieties." (citations omitted)).

124. Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60 (1983).

125. *See id.* at 66–67.

126. *Id.* (considering three factors in determining whether "mailings fall within the core notion of commercial speech–speech which does 'no more than propose a commercial transaction'"); *see also* Chemerinsky & Fisk, *supra* note 120, at 1147–48 (applying the *Bolger* factors to the facts of *Nike*).

127. *Bolger*, 463 U.S. at 66–67 n.14.

128. *See Va. State Bd. of Pharm.*, 425 U.S. at 771, n.24.

129. *See* Goodman, *supra* note 19, at 518 ("Product labels are commercial speech.").

130. *See* 21 U.S.C. § 321(f) (2012) (defining "food").

131. *See* United States v. Kuch, 288 F. Supp. 439, 442 (D.D.C. 1968) (stating that the Federal Food, Drug, and Cosmetic Act is a valid exercise of the commerce power).

132. *See* 21 U.S.C. § 321(k) (2012) (defining "label").

which it relates.[133] The broadcasted information can be either true or false—either way, for purposes of the second *Bolger* factor, a GM food label's content is inextricably intertwined with the merits (or vices) of the foodstuff.[134] The nexus between a GM food label and the foodstuff to which it relates is clear; a label conveys substantive information about the product that bears the label.

Second, a strong nexus exists between a GM food label and the economic interests of many food producers. For some food producers, GM food labeling yields economic gain.[135] Other food producers have an economic motivation in protesting mandatory GM food labeling, especially in light of the potential for reduced sales.[136] Thus, GM food labeling implicates the economic interests of food producers in either a beneficial or negative way depending on the circumstances. For purposes of the third *Bolger* factor, the fact of the matter is that food producers' economic interests are implicated at all. The nexus between a GM food label and food producers' economic interests is unambiguous. In addition to the two *Bolger* factors, common sense bolsters the conclusion that GM food labeling is commercial speech—it is part and parcel of a proposal to engage in a commercial transaction.[137]

The two *Bolger* factors and common sense support the conclusion that GM food labels are commercial speech; this means that GM food labeling enjoys only a limited measure of protection under the free speech guarantee. Or in other words, the general rule doesn't apply—a government regulation of commercial speech is not subject to strict scrutiny analysis.[138] Next, this Note will discuss the two alternative modes of means-end scrutiny that courts use to analyze commercial speech regulations.

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133. *See, e.g.*, Fleminger, Inc. v. U.S. Dep't of Health & Human Serv., 854 F. Supp. 2d 192, 203 (D. Conn. 2012) (describing a green tea label that claimed that daily consumption of green tea can reduce risk of certain forms of cancer).

134. *See* R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin., 845 F. Supp. 2d 266, 269 (D.D.C. 2012) (discussing textual warnings that cigarette packages must bear to inform consumers of the threat that cigarettes pose to health).

135. *See, e.g.*, *GMO: Your Right to Know*, WHOLE FOODS MARKET, http://www.wholefoodsmarket.com/gmo-your-right-know [http://perma.cc/LEW3-9W6N] (last visited Oct. 1, 2015) (labeling all food products sold in its stores that are non-GMO).

136. *See* Dan D'Ambrosio, *With Vermont in Front, GMO Fight Heats Up*, BURLINGTON FREE PRESS, June 9, 2013, 2013 WLNR 14164173.

137. *See* Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976).

138. *Id.* at 771–72 ("The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.").

D. Central Hudson *and* Zauderer

Over the course of exercising judicial review for more than two centuries,[139] the judiciary has established several tests to enforce constitutional limits on government action.[140] Of these several tests,[141] means-end scrutiny is the most common and important form of constitutional analysis—it is "a systematic method for evaluating the sufficiency of the government's justification for its conduct."[142] In general, there are several different species of means-end scrutiny.[143] But specifically within the commercial speech context, the default mode of means-ends scrutiny is set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.[144] Under *Central Hudson*, a law constitutionally regulates commercial speech if (1) the speech is not misleading, (2) the speech concerns lawful activity, (3) the government has a "substantial" interest in regulating the speech, (4) the law "directly advances" the government's substantial interest and (5) the law is "not more extensive than is necessary to serve that interest."[145] *Central Hudson*'s mode of means-ends scrutiny is described as "intermediate scrutiny."[146]

The first two prongs of *Central Hudson* establish "threshold requirements" for the application of First Amendment protections.[147] With constitutional impunity, the government can

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139. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.").

140. Russell W. Galloway, *Means-End Scrutiny in American Constitutional Law*, 21 LOY. L.A. L. REV. 449, 449 (1988).

141. *See id.* at n.2 (listing, inter alia, "the clear and present danger test," "the actual malice test," and "ad hoc multi-factor balancing tests").

142. *Id.* at 449.

143. *See id.* at 457–58 (setting out the different "levels" of means-end scrutiny in tabular format); Post, *supra* note 111, at 42 (stating that *Central Hudson* is the "major doctrinal test" within the commercial speech doctrine).

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

145. *Id.* at 564–66; *see* Galloway, *supra* note 140, at 456 ("In commercial speech cases, the Court requires a showing that government restrictions directly advance a 'substantial' government interest and are necessary.").

146. Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 249 (2010) (describing the *Central Hudson* analysis as intermediate scrutiny); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, § 16.31(b) (8th ed. 2010) (same); *but see* Galloway, *supra* note 140, at 456 (describing the *Central Hudson* analysis as "sub-intermediate scrutiny").

147. Post, *supra* note 111, at 34.

regulate commercial speech that does not "inform the public about lawful activity."[148] These threshold requirements contemplate the constitutional value of commercial speech—the circulation of accurate and useful information.[149] In order to satisfy the three remaining prongs,[150] the law need only "directly advance a substantial interest in a manner that is not too overinclusive; that is, in a manner whose scope is in proportion to the interest served."[151] A law that regulates GM food labeling, which is commercial speech, would presumably have to satisfy *Central Hudson*'s intermediate scrutiny to pass muster under the free speech guarantee.

However, in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*,[152] the Court established an alternative to *Central Hudson*—a "less exacting"[153] form of means-end scrutiny that *can* apply to a law that compels commercial speech. In *Zauderer*, plaintiff Philip Q. Zauderer was an attorney who practiced criminal defense and personal injury litigation in Columbus, Ohio.[154] In an attempt to bolster his business, Mr. Zauderer placed an advertisement in thirty-six Ohio newspapers in the spring of 1982.[155] The advertisement broadcasted Mr. Zauderer's willingness to represent—on a contingent-fee basis—women who incurred personal injuries as a result of using the Dalkon Shield Intrauterine Device.[156] However, the Supreme Court of Ohio's Office of Disciplinary Counsel took exception to Mr. Zauderer's advertisement.[157]

In the summer of 1982, the Office of Disciplinary Counsel filed an attorney grievance complaint against Mr. Zauderer.[158] The complaint alleged, inter alia, that the Dalkon Shield advertisement, which advertised legal representation on a contingent-fee basis, failed to disclose, in contravention of a then-effective attorney

148. *Cent. Hudson*, 447 U.S. at 563–64.

149. *See id.* at 563 (stating that the free speech guarantee's "concern for commercial speech is based on the informational function of advertising.").

150. *See* Post, *supra* note 111, at 42 (describing the remaining prongs as "astonishingly abstract").

151. *Id.* (citing Bd. of Trs. v. Fox, 492 U.S. 469, 480 (1989)).

152. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985).

153. Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 230 (2010).

154. *Zauderer*, 471 U.S. at 629–31.

155. *Id.* at 630.

156. *Id.* at 630–31.

157. *See id.*

158. *Id.*

discipline rule[159] ("the disciplinary rule"), whether the percentage of the contingent fee was computed before or after court costs and expenses were deducted from the recovered damages, if any.[160] Due to this omission, the Office of Disciplinary Counsel argued that "the ad's failure to inform clients that they would be liable for costs (as opposed to legal fees) even if their claims were unsuccessful rendered the advertisement 'deceptive' in violation of [the Ohio Code of Professional Responsibility]."[161] Before both a panel of the Board of Bar Commissioners and the Supreme Court of Ohio, Mr. Zauderer unsuccessfully argued that the disciplinary rule was unconstitutional under the free speech guarantee.[162] Mr. Zauderer appealed to the Supreme Court of the United States for further review.[163]

At the outset, the Court recognized that the issue before it—whether a state may seek to prevent potential deception of the public by requiring attorneys to disclose in their advertising certain information regarding fee arrangements—was different from prior cases involving commercial speech.[164] Rather than *restraining* commercial speech, the disciplinary rule regulated commercial speech "by requiring attorneys to *disclose* in their advertising certain information regarding fee arrangements."[165] The Court recognized that there are material differences between disclosure requirements and outright prohibitions on commercial speech.[166] Because the primary constitutional value of commercial speech is the circulation of accurate and useful information, disclosure requirements complement this value by adding data to the stream of commercial information.[167] Thus, the Court held that a regulation that compels the disclosure of commercial speech does not violate the free speech guarantee when the disclosure consists of "purely factual and uncontroversial information" and the disclosure is "reasonably related to the State's interest in preventing deception of consumers."[168] The Court concluded that the disciplinary rule satisfied this standard, and upheld Mr.

159. For the full text of the disciplinary rule, *see Zauderer*, 471 U.S. at 632 n.4.
160. *Zauderer*, 471 U.S. at 633–34.
161. *Id.*
162. *Id.* at 634–36.
163. *Id.*
164. *Id.* at 629 ("This case presents additional unresolved questions regarding the regulation of commercial speech . . . .").
165. *Id.*
166. *Id.* at 650.
167. *Id.* at 651.
168. *Id.*

Zauderer's public reprimand.[169]

In the successor case to *Zauderer*,[170] the Court described the standard set forth in *Zauderer* as "less exacting" means-end scrutiny ("less exacting scrutiny").[171] On this point, it is paramount to understand that less exacting scrutiny is more stringent than mere rational basis review—the two forms of means-end scrutiny should not be equivocated.[172] Judge Kavanaugh of the U.S. Court of Appeals for the District of Columbia Circuit elaborated on this point in *American Meat Institute v. U.S. Department of Agriculture*, a recent case involving compelled commercial speech:

> When the Supreme Court applies rational basis review, it does not attach a host of requirements of the kind prescribed by *Zauderer*. Rational basis review is extremely deferential and in this context would undoubtedly tolerate government mandates of moral or policy-laden messages, of controversial messages, of burdensome labels, of disclosures that are only indirectly related to the Government's interests. *Zauderer* tolerates none of that. *Zauderer* tightly limits mandatory disclosures to a very narrow class that meets the various *Zauderer* requirements.[173]

The Court's characterization of *Zauderer* as less exacting scrutiny when compared to *Central Hudson*'s intermediate scrutiny is appropriate. Zauderer is less exacting in its analysis of the means used by the government to further its interest, most notably in two ways.[174]

First, *Central Hudson* requires a commercial speech regulation to directly advance the government's interest.[175] Under *Zauderer*, a commercial speech regulation need only be reasonably related to the government's interest.[176] Second, by requiring a commercial

169. *Id.* at 652–55.

170. Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229 (2010); *see* Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 22 (D.C. Cir. 2014) (describing *Milavetz* as the Court's "later application of *Zauderer*").

171. *Milavetz*, 559 U.S. at 249.

172. *Am. Meat Inst.*, 760 F.3d at 33–34 (Kavanaugh, J., concurring).

173. *Id.*; *see also* Igor Kirman, *Standing Apart To Be Apart: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083, 2084 (1995) ("At the minimum, concurrences provide a commentary on the decisions that they accompany and may aid lower courts in interpreting and applying such decisions.").

174. *See Am. Meat Inst.*, 760 F.3d at 33 (Kavanaugh, J., concurring) ("As I read it, the Supreme Court's decision in *Zauderer* applied the *Central Hudson* 'tailored in a reasonable manner' requirement to compelled commercial disclosures.").

175. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980).

176. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).

speech regulation to be not more extensive than is necessary to serve the government's interest, *Central Hudson* conditions a commercial speech regulation's constitutionality on the absence of a less restrictive alternative for achieving the government's interest.[177] On the other hand, *Zauderer*'s less exacting scrutiny does not analyze the availability of less restrictive alternatives.[178] Given these differences, it is no surprise that "recently the *Central Hudson* test has been applied with a severity that borders on strict scrutiny."[179] Determining which standard of scrutiny applies to a GM food labeling law is where the heart of the legal dispute between GMA and the State of Vermont lies, with Vermont arguing for less exacting scrutiny under *Zauderer*. To satisfy the first two prongs of *Zauderer*, however, a GM food label must be both purely factual and uncontroversial.

III. "PURELY FACTUAL" AND "UNCONTROVERSIAL"

The government can compel commercial speech by force of law.[180] However, for the government to invoke the benefit of less exacting scrutiny, the compelled commercial speech must be purely factual and uncontroversial.[181]

A. *GM Food Labels as "Purely Factual" Compelled Commercial Speech*

Specifically, the purely factual requirement furthers the primary constitutional value underlying the commercial speech doctrine.[182] By compelling purely factual commercial speech, the government furthers the circulation of accurate and useful information.[183] In contrast, compelled commercial speech that is

177. *Cent. Hudson*, 447 U.S. at 564.

178. *Zauderer*, 471 U.S. at 651 n.14 ("Because the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed, we do not think it appropriate to strike down such requirements merely because other possible means by which the State might achieve its purposes can be hypothesized.").

179. Post, *supra* note 111, at 42.

180. *See* Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771–72 (1976) ("The First Amendment, as we construe it today does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.").

181. *Zauderer*, 471 U.S. at 651; Grocery Mfrs. Ass'n v. Sorrell, No. 5:14-CV-117, 2015 WL 1931142, at *29 (D. Vt. Apr. 27, 2015).

182. The primary constitutional value of commercial speech is "the circulation of accurate and useful information." Post, *supra* note 111, at 28.

183. "Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech

non-factual obstructs the commercial speech doctrine's primary constitutional value.[184] By compelling non-factual commercial speech, the government hampers the circulation of accurate and useful information by disseminating government-prescribed orthodoxies.[185] As a doctrinal matter, compelled commercial speech is non-factual if the government's idiosyncratic value judgments serve as the criterion[186] against which the subject matter of the speech's content is evaluated.[187]

For instance, in *Entertainment Software Association v. Blagojevich*, the Seventh Circuit held that compelled commercial speech that addressed the suitability of video games for minors was non-factual.[188] Specifically, the State of Illinois required video game retailers to append a four-inch square label that bore the numbers "18" to the packaging of "sexually explicit" video games.[189] The "18" sticker (the compelled commercial speech) communicated to consumers that a video game (the subject matter of the speech's content) that bore the "18" sticker was not appropriate for minors (the speech's content) because it was "sexually explicit" (the criterion—an idiosyncratic value judgment). In so holding, the *Blagojevich* court affirmed the lower court's ruling that whether a particular video game is "sexually explicit" is inherently "opinion-based."[190]

In *Blagojevich*, the idiosyncratic value judgments of the State of Illinois served as the criterion against which video games were

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provides . . . [Zauderer's] constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." *Zauderer*, 471 U.S. at 651.

184. *See* Nat'l Elec. Mfrs Ass'n v. Sorrell, 272 F.3d 104, 114 n.5 (2d Cir. 2001) ("Our decision reaches only required disclosure of factual commercial information. Requiring actors in the marketplace to espouse particular opinions would likely raise issues not presented here.").

185. *See Zauderer*, 471 U.S. at 651 (distinguishing government attempts to prescribe what shall be orthodox in matters of opinion and attempts to prescribe what shall be orthodox in commercial advertising).

186. This Note employs the term "criterion" as meaning "a standard on which a decision or judgment may be based" or "a standard of judgment." WEBSTER'S NEW INT'L DICTIONARY 538 (3d. ed. 2002).

187. *See generally* Entm't Software Ass'n v. Blagojevich, 469 F.3d 641 (7th Cir. 2006) *aff'g* 404 F. Supp. 2d 1051 (N.D. Ill. 2005); Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950 (9th Cir. 2009); *aff'd sub nom.* Brown v. Entm't Merchants Ass'n, 131 S. Ct. 2729 (2011).

188. *Blagojevich*, 469 F.3d at 651–53.

189. The term "sexually explicit" was defined by statute. *Id.* at 643–44.

190. *Entm't Software Ass'n*, 404 F. Supp. 2d at 1081 ("Unlike labeling requirements that have been upheld under the commercial speech test, the question whether a game is violent or sexually-explicit is a subjective evaluation left to the discretion of the retailer.").

assessed. Conceptions of "sexually explicit" are as manifold as conceptions of "beauty," "justice" or "piety." Thus, "sexually explicit" lacks a fixed factual meaning because any meaning attributable to the term is relative to the opinion of the person defining it.[191] By implication, communicating that a particular video game is inappropriate for minors on the ground that it is "sexually explicit" amounts to nothing more than an expression of opinion.[192] Whether or not *Grand Theft Auto: San Andreas* is "sexually explicit" is entirely in the eye of the player.[193]

The Seventh Circuit's holding is supported on theoretical grounds as well; the reasoning in *Blagojevich* complements the marketplace of ideas justification for the free speech guarantee.[194] In the words of Justice Holmes, the theory behind the Constitution is that "the best test of truth is the power of thought to get itself accepted in the competition of the market . . . ."[195] Moreover, when the government compels non-factual commercial speech on a given topic, the government subordinates the commercial speaker's opinion on the same topic.[196] By doing so, the government drives highly relevant opinions out of the marketplace of ideas.[197] Thereby, the government insulates the accuracy of the non-factual commercial speech from adversarial scrutiny, and covers the non-factual speech with a thin veil of presumptive utility. This undercuts the primary constitutional value of the commercial speech doctrine, since non-factual commercial speech fails to materially advance the circulation of accurate and useful

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191. *See* Plaintiffs' Memorandum of Law in Support of Motion for a Preliminary Injunction at 31, Grocery Mfrs. Ass'n v. Sorrell, No. 5:14-cv-00117-cr (D.Vt. Sept. 11, 2014), ECF No.33-1 (arguing that GM labeling is non-factual commercial speech).

192. *See* BLACK'S LAW DICTIONARY 1267 (10th ed. 2014) (defining "opinion" as "[a] person's thought, belief or inference . . . as opposed to personal knowledge of the fact themselves.").

193. To justify the videogame labeling law, the State of Illinois introduced screenshots from three videogames: (1) *Grand Theft Auto: San Andreas*, (2) *Leisure Suit Larry: Magna Cum Laude*, and (3) *The Guy Game: Uncut and Uncensored*. *Blagojevich*, 469 F.3d at 644.

194. *See supra* Part II.A. Individuals objectively assess competing opinions to determine which one, if any, conveys the "truth" of the matter. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, § 16.6 (d) (8th ed. 2010) (discussing Holmes' "marketplace of ideas").

195. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

196. *See Blagojevich*, 469 F.3d at 652.

197. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 564 n.6 (1980) ("[C]ommercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity.").

information.

In summation, the "18" sticker in *Blagojevich* was non-factual because the idiosyncratic value judgments of the State of Illinois served as the criterion against which the subject matter of the speech's content was evaluated.[198] Compelling non-factual commercial speech frustrates the inner-workings of the marketplace of ideas, which thereby obstructs the advancement of the commercial speech doctrine's primary value. As a result, Illinois could not invoke the benefit of *Zauderer*'s less exacting scrutiny; instead, it faced strict scrutiny and the court held that the law was unconstitutional.[199]

In stark contrast to the "18" sticker, a GM food label is purely factual compelled commercial speech.[200] The GM food label (the compelled commercial speech) communicates to consumers that the label-bearing foodstuff (the subject matter of the speech's content) is genetically modified (the speech's content) because the product was produced by means of either in vitro nucleic acid techniques or cell fusion or hybridization techniques that overcome natural physiological, reproductive, or recombination barriers (the criterion). With respect to Vermont's labeling law, the idiosyncratic value judgments of the State of Vermont do not serve as the criterion against which a foodstuff is assessed. Instead, an external body of verifiable knowledge serves as the applicable criterion, which is set forth in section 3042(4) of the labeling law.[201] Vermont's statutory criterion is congruent with the scientific understanding of which modes of food production constitute methods of genetic modification.[202]

Since Vermont's statutory criterion is congruent to the

198. *See Blagojevich*, 469 F.3d at 652 (stating that the sticker communicates a subjective and highly controversial message).

199. *Id.* at 652–53.

200. *See* Defendants' Memorandum of Law in Support of Motion to Dismiss at 10–11, Grocery Mfrs. Ass'n v. Sorrell, No. 5:14-cv-00117-cr (D.Vt. Aug. 8, 2014).

201. VT. STAT. ANN. tit. 9, §§ 3042(4)(A)–(B) (defining "genetic engineering"). *See* Jeanne Frazier Price, *Wagging, Not Barking: Statutory Definitions*, 60 CLEV. ST. L. REV. 999, 1019 (2013) ("By defining terms, statutes create categories into which behaviors, entities, individuals, and actions—both present and future—are somehow made to fit.").

202. James Maryanski, *Testimony before the H. Subcomm. on Basic Scientific Research*, U.S. FOOD & DRUG ADMINISTRATION (Oct. 19, 1999), http://www.fda.gov/newsevents/testimony/ucm115032.htm [http://perma.cc/B37H-CKMM] (last updated Aug. 06, 2009) ("the United States uses the term genetic modification to refer to all forms of breeding, both modern, i.e., genetic engineering, and conventional").

scientific consensus on the matter,[203] it has a fixed factual meaning. In other words, Vermont's criterion is different from Illinois's definition of "sexually explicit" because it was not shaped by the person defining it. Instead, Vermont's criterion is a transplanted conception that was shaped by third parties who specialize in the areas of concern, namely, genetics and biotechnology.[204] Therefore, within the context of Vermont's labeling law, GM food labeling is purely factual compelled commercial speech.[205]

By way of counterargument, it is immaterial that Vermont's criterion encompasses different methods of genetic modification.[206] This feature does not mean that Vermont's criterion, as a whole, is devoid of a fixed factual meaning.[207] If anything, Vermont's criterion of genetic modification clarifies the term by providing an express analytical framework that breaks down the technical, scientific concepts that the term generally includes in common parlance.[208] Vermont's criterion breaks down a "lexical chunk" into small, digestible concepts, which allows food producers and consumers alike to understand and use it for objective assessment of food products.[209]

In summation, Vermont's criterion accords with the scientific conception of genetic modification—it has fixed, empirical referent and is not shaped by subjective value judgments. In addition, Vermont's criterion allows for an objective evaluation of food products that yields black and white answers: a food product is either genetically modified or not. GM food labeling communicates non-opinion based information about food products intended for human consumption. In stark contrast to Illinois' "18" sticker in

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203. *See id.*

204. *See id.*

205. BLACK'S LAW DICTIONARY 709 (10th ed. 2014) (defining "fact" as "[s]omething that actually exists; an aspect of reality").

206. Grocery Mfrs. Ass'n v. Sorrell, No. 5:14-CV-117, 2015 WL 1931142, at *31 n.33 (D. Vt. Apr. 27, 2015) (Plaintiffs point to no authority for the proposition that speech is misleading when it fails to reflect a party's preferred definition of a statutorily-defined term.).

207. *See id.* (denying plaintiff's argument that the labeling law is factually misleading because there are multiple, plausible definitions of "GE"); *see also* Plaintiffs' Memorandum of Points and Authorities in Support of Motion for a Preliminary Injunction at 31, Grocery Mfrs. Ass'n v. Sorrell, No. 5:14-cv-00117-cr (D.Vt. Sept. 11, 2014), ECF No.33-1 (arguing that Vermont's GE definition does not have a fixed meaning).

208. *See* Price, *supra* note 201, at 1024 (explaining that technical terms are understood best by means of a conceptual model).

209. *See id.* (discussing that "lexical chunks," i.e., nuanced technical terms, are more difficult to understand than individual words).

Blagojevich, GM food labeling is "purely factual" compelled commercial speech.

B. *GM Food Labels as Controversial Compelled Commercial Speech*

The purely factual requirement is not the only hurdle that the government must surmount to invoke the benefit of *Zauderer*'s less exacting scrutiny. Compelled commercial speech must also be uncontroversial ("the uncontroversial requirement").[210] At the outset it is important to highlight that, as a matter of legal doctrine, the precise contours of the uncontroversial requirement are far from clear.[211] Judge Kavanaugh made this point clear in *American Meat Institute*: "To be sure, determining whether a disclosure is 'uncontroversial' may be difficult in some compelled commercial speech cases, in part because it is unclear *how we should assess* and *what we should examine* to determine whether a mandatory disclosure is controversial."[212] The first section of this part will analyze and critique the perspectives of GMA and Vermont concerning what a court should examine to determine if the uncontroversial requirement is satisfied.[213] The second section of this part will offer a method to assess compelled commercial speech for impermissible controversy.

1. Substance: What a Court Should Examine

First, Vermont's perspective is quite narrow—the court should focus on whether empirical evidence supports the existence of the disclosed fact.[214] From this outlook, compelled commercial speech is controversial if it does not convey empirically accurate

210. Zauderer v. Office of Disciplinary Council, 471 U.S. 626, 651 (1985).

211. Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 34 (D.C. Cir. 2014) (Kavanaugh, J., concurring).

212. *Id.* (emphasis added).

213. In the end, the district court sustained Vermont's conception of the uncontroversial requirement. Grocery Mfrs. Ass'n v. Sorrell, No. 5:14-CV-117, 2015 WL 1931142, at *32 ("Because Act 120's GE disclosure requirement mandates the disclosure of only factual information—whether a food product contains GE ingredients—in conjunction with a purely commercial transaction, it does not require the disclosure of 'controversial' information.").

214. *See id.* (concluding that the labeling law was uncontroversial because it mandates the disclosure of factual information); Defendants' Memorandum of Law in Support of Their Motion to Dismiss Plaintiffs' Complaint at 12, Grocery Mfrs. Ass'n v. Sorrell, No. 5:14-CV-117 (D. Vt. Aug. 8, 2014), ECF No. 24 [hereinafter *Defendants' Memorandum of Law*](arguing that GM food labeling is uncontroversial because "a disclosure that food was produced with genetic engineering—which is all Act 120 requires—is a true and objective fact.").

information about some discrete aspect of the world.[215] "For example, if a loaf of bread contains wheat flour, that fact is demonstrably provable and not open to value disagreements. It describes an *uncontroverted* state of being."[216] In essence, from Vermont's perspective, compelled commercial speech that conveys a fact that has definitive, rather than mixed, empirical support amounts to uncontroversial commercial speech.[217]

On the other hand, GMA's perspective is quite broad—the court should focus on whether the disclosed fact advances a controversial ideology as opposed to a generally accepted norm.[218] From GMA's outlook, compelled commercial speech advances a controversial ideology when the disclosed fact is "germane" to a norm, and the norm to which the disclosed fact is germane is in some way contested.[219] If the disclosed fact is germane to a contested norm, the compelled commercial speech is impermissibly controversial.[220] Professor Goodman analyzes this perspective from the government's vantage point. Specifically, when the government compels commercial speech, it becomes "a participant in information markets, using its regulatory power or spending power to get private parties to speak."[221] If the government implicitly takes a side about whether the disclosed fact is germane to the transaction at hand, the compelled commercial speech is

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215. *See* Defendants' Memorandum of Law, *supra* note 214, at 12.

216. Dayna B. Royal, *Resolving the Compelled-Commercial-Speech Conundrum*, 19 VA. J. SOC. POL'Y & L. 205, 237 (2011) (emphasis added).

217. *See id.* at 238 ("For factual information to be 'controverted,' it must have mixed empirical support for its existence as an actual state of being.").

218. *See* Complaint for Declaratory & Injunctive Relief at 14, Grocery Mfrs. Ass'n v. Sorrell, No. 5:14-CV-117 (D. Vt. June 12, 2014), ECF No. 1; Plaintiffs' Memorandum of Points and Authorities in Support of Motion for a Preliminary Injunction at 31, Grocery Man. Ass'n v. Sorrell, No. 5:14-cv-00117-cr (D. Vt. Sept. 11, 2014), ECF No. 33-1 ("[The labeling law] is intended to fuel controversy."); *see also* Goodman, *supra* note 19, at 550 (asserting that the unconstitutional requirement concerns "disclosures that, even if purely factual, are designed to advance a controversial ideology as opposed to a generally accepted norm").

219. *See* Goodman, *supra* note 19, at 553–54 ("The work that 'noncontroversial' does in the advancement of consumer-autonomy interests is to impose a germaneness requirement on the state. . . . Limiting *Zauderer* review to instances in which the mandated disclosure is of uncontroversial relevance to consumer purchases would serve the same purpose.").

220. *See* Memorandum of Points & Authorities in Support of Plaintiffs' Motion for a Preliminary Injunction at 33, Grocery Mfrs. Ass'n v. Sorrell, No. 5:14-CV-117 (D. Vt. Sept. 11, 2014), ECF No. 33 ("As one witness put it, mandatory labeling is merely a 'shibboleth, for a far larger issue' about modern agriculture."); Goodman, *supra* note 19, at 553 (construing *Zauderer*'s "noncontroversial" language to impose a "germaneness" requirement on the state).

221. Goodman, *supra* note 19, at 553.

impermissibly controversial.[222]

For example, a "conflict free" insignia on the packaging of a product that typically incorporates "conflict minerals" conveys a fact. [223] The fact is that the specific, insignia-bearing product is devoid of minerals that are typically extracted from warlord-controlled mining sites in the Democratic Republic of the Congo.[224] Moreover, the important point is that the conflict free insignia is also highly germane to a normative value. The normative value to which the conflict free insignia is germane is that it is impermissible for American consumers to condone the war and humanitarian catastrophes that have occurred in the Congo through the purchasing power of the dollar.[225] In this example, the conflict free insignia performs two functions—it broadcasts an empirically uncontroverted fact, and, because it is germane to a normative value that is controversial, it furthers a controversial ideology as opposed to a generally accepted norm.[226] In sum, GMA's perspective requires a court to examine whether the compelled commercial speech is germane to a controversial normative value, i.e., whether the disclosed fact advances a controversial ideology.[227]

Between the perspectives of Vermont and GMA concerning what substantive information a court should examine to determine if the uncontroversial requirement is satisfied, GMA's outlook should prevail for two reasons. First, Vermont's reading of *Zauderer* is interpretatively unsound. Second, Vermont's construction is anathema to the primary constitutional value of commercial speech. At the same time, GMA's perspective embraces an evenhanded reading of *Zauderer*, and it complements the primary constitutional value of commercial speech.

a. *Interpretative Issues*

It is important to highlight the interpretive issues surrounding

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222. *Id.* at 553–54.

223. This example derives from the facts of *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359 (D.C. Cir. 2014) (overruled on other grounds by *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 34 (D.C. Cir. 2014)).

224. *Id.* at 362–63 (explaining that armed groups finance the war in the Congo by exploiting the country's trade in gold, tantalum, tin, and tungsten, which are colloquially referred to as "conflict minerals").

225. *See id.* at 371 (holding that the SEC's disclosure requirement violated the First Amendment because it "compell[ed] an issuer to confess blood on its hands").

226. *See id.* at 373.

227. *See* Goodman, *supra* note 19, at 549 ("While value may be inextricable from fact, that does not mean that the kind and strength of value is irrelevant to First Amendment considerations.").

Vermont's perspective on what courts should examine in determining if the uncontroversial requirement is satisfied. In *Zauderer*, the Court's holding focused in part on the content of the commercial speech; specifically, it sustained the constitutionality of the disciplinary rule because the rule provided mere "*purely factual and uncontroversial* information about the terms under which . . . services will be available."[228] Vermont's reading of the latter-quoted language is interpretatively unsound.

Specifically, Vermont's reading of *Zauderer* is unsound in light of two important principles of legal interpretation. First, when two words or phrases are separated by the word "and" in a specific sentence, each of the two words or phrases constitutes a discrete requirement or element.[229] Second, an interpretation that would render a word or phrase redundant or meaningless should be rejected.[230] At the confluence of these two principles lies the sound conclusion that Vermont's perspective is interpretatively unsound.

Vermont's reading of *Zauderer* equivocates the words "uncontroversial" and "factual."[231] By doing so, it deprives the word "uncontroversial" of actual meaning; in other words, the narrow reading of *Zauderer* renders particular language of the Court superfluous and void.[232] Since Vermont's perspective would, in essence, write the word "uncontroversial" out of the Court's opinion in *Zauderer*, it should be rejected. In addition, Vermont's reading of *Zauderer* fails to honor the fact that the Court separated "purely factual" and "uncontroversial" with the word "and." From the phraseology used in *Zauderer*, it is fair to infer that the Court intended to establish two discrete and substantively different requirements—namely, that compelled commercial speech must be both "purely factual" and "uncontroversial" to receive the benefit

228. Zauderer v. Office of Disciplinary Council, 471 U.S. 626, 651 (1985) (emphasis added).

229. *Cf.* 1A SINGER & SINGER, *supra* note 53, § 21:14.

230. *See* Nat'l Ass'n of Mfrs. v. S.E.C., 800 F.3d 518, 529 n.28 (D.C. Cir. 2015) (explaining that interpreting "purely factual and uncontroversial" as "purely factual and accurate" leads to a redundancy). *Cf.* 2A NORMAN SINGER & SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46:6 (7th ed. 2014) ("It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.") (citing United States v. Menasche, 348 U.S. 528, 538–39 (1955)).

231. *See* Goodman, *supra* note 19, at 552 ("In other words, *'uncontroversial'* is synonymous with *'factual.'*" (emphasis added)). *See also* Nat'l Ass'n of Mfrs., 800 F.3d at 529 n.28 ("Is there such a thing as a 'purely factual' proposition that is not 'accurate'?").

232. *Cf.* 2A SINGER & SINGER, *supra* note 230, § 46:6 (stating that courts interpret laws so that no part of the law is either inoperative, superfluous or void).

of less exacting scrutiny.

Vermont's perspective on what substantive information courts should examine in determining if the uncontroversial requirement is satisfied runs contrary to the Court's intent, which can be inferred from the phraseology of *Zauderer*. As a result, Vermont's outlook results in unnecessary duplicity. Examining whether the disclosed fact conveys uncontroverted information about some discrete aspect of the external world is tantamount to investigating whether compelled commercial speech is accurate and true, or in other words, purely factual. Vermont's perspective is unsound.

b. *Constructive Issues*

Most significantly, it is paramount to stress the fact that Vermont's perspective on what substantive information courts should examine in determining if the uncontroversial requirement is satisfied is injurious to the primary constitutional value of commercial speech. In holding that the free speech guarantee affords some degree of constitutional protection to commercial speech, the Court in *Virginia State Board of Pharmacy* reasoned that the primary constitutional value of commercial speech is the circulation of accurate and useful information.[233]

Identifying the circulation of accurate and useful information as the primary constitutional value of commercial speech hinges on a key presupposition—democracy subordinates government to public opinion.[234] Specifically, the proper functioning of American democracy depends on the citizenry's access to commercial information.[235] The grant of constitutional protection to commercial speech allows commercial information to freely enter the communicative sphere.[236] Enabling individuals to tap into a vast depository of commercial information cognitively empowers the citizenry;[237] armed with such information, individuals can voice

233. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976); *Zauderer*, 471 U.S. at 650–51; Post, *supra* note 111, at 28 ("For the state to mandate disclosures designed more fully and completely to convey information is thus to advance, rather than to contradict, pertinent constitutional values.").

234. POST, *supra* note 89, at 35.

235. *See Va. State Bd. of Pharmacy*, 425 U.S. at 765 ("Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decision-making in a democracy, we could not say that the free flow of information does not serve that goal.") (footnote omitted) (citing ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948)).

236. *See* Post, *supra* note 111, at 25.

237. *See* Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 630 (1982).

competent opinions with respect to the "significant issues of the day."[238] It is beyond doubt that an "informed public opinion will more intelligently and effectively supervise the government."[239] Therefore, without competent commercial speech, the citizenry would lose its epistemic depth, and when the citizenry could no longer touch the bottom, government would go deaf, blind, and dumb.[240]

Vermont's perspective eviscerates the presupposition upon which the primary constitutional value of commercial speech hinges.[241] By only examining the empirical accuracy of the commercial speech in determining if the uncontroversial requirement is satisfied, the government could infuse purely factual information that is germane to a highly contested norm into the communicative sphere.[242] In other words, under Vermont's theory, the government would be at complete liberty to inject the particular ideological stance that it endorses into a protracted and substantial controversy of public concern.[243]

Rather than cognitively empowering the citizenry, purely factual compelled commercial speech that is germane to a contested norm would shackle the minds of citizens to the government's ideological standpoint.[244] In such a case, public opinion and government policy would be indistinguishable. Rather than public opinion shaping government action through the democratic process, government policy could unilaterally dictate public opinion and private action with respect to matters of unsettled controversy.[245] The Court recognized the problems

238. Bates v. St. Bar of Ariz., 433 U.S. 350, 364 (1977). *See* POST, *supra* note 89, at 40–41 (asserting that commercial speech conveys factual knowledge that "cognitively empowers public opinion").

239. POST, *supra* note 89, at 35.

240. ROBERT BOLT, A MAN FOR ALL SEASONS 122 (1990).

241. Identifying the circulation of accurate and useful information as the primary constitutional value of the commercial speech doctrine hinges on the premise that democracy subordinates government to public opinion. POST, *supra* note 89, at 43.

242. *See* Nat'l Ass'n of Mfrs. v. S.E.C., 800 F.3d 518, 529 n.28 (D.C. Cir. 2015) ("[A]s Mark Twain wrote, 'Often, the surest way to convey misinformation is to tell the strict truth.'").

243. *See id.* at 530 n.29.

244. *See* Zauderer v. Office of Disciplinary Council, 471 U.S. 626, 651 (1985) (explaining that the government cannot "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein" (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

245. *See id.* at 651 (emphasizing how government orthodoxy is constitutionally impermissible).

surrounding such a situation by examining history:

> Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.[246]

Vermont does violence to the primary constitutional value of commercial speech by endorsing a narrow perspective on what substantive information courts should examine in determining if the uncontroversial requirement is satisfied. By undermining commercial speech's primary constitutional value, Vermont's outlook places the proper functioning of American democracy much at hazard and maims the autonomy interests of private individuals.

By adopting GMA's perspective on what substantive information courts should examine in determining if the uncontroversial requirement is satisfied, a safety valve is incorporated into *Zauderer*'s less exacting scrutiny. GMA's outlook allows for the free flow of accurate and useful commercial information. At the same time, it also mitigates the potential for purely factual compelled commercial speech to be used as a prod by the government. It dampens the possibility that the government can use compelled commercial speech to unduly influence the thoughts and conduct of citizens with respect to contested social issues. Between the respective outlooks proposed by Vermont and GMA, GMA's perspective on what courts should examine in determining if the uncontroversial requirement is satisfied must prevail.

2. Procedure: How a Court Should Assess Compelled Commercial Speech

In the section prior, this Note assessed the two prevailing perspectives regarding what substantive information courts should examine in determining if compelled commercial speech is impermissibly controversial. The section prior argued that GMA's perspective should prevail. In sum and substance, GMA's

246. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943).

perspective focuses on whether the compelled commercial speech, even if purely factual, advances a controversial ideology.[247] From this outlook, compelled commercial speech advances a controversial ideology when the disclosed fact is germane to a contested norm.[248] A purely factual compelled disclosure that advances a generally accepted norm is not constitutionally impermissible under the applicable uncontroversial requirement.[249] This is the case because by doing so, the government is not advancing its own opinion with respect to a dispute; rather, it is legitimizing the bona fide conventions of society at large.[250] In this section, this Note will offer an analytical mechanism to assess the substantive information that was identified in the section prior.

To begin, in order to determine whether a disclosed fact is germane to a contested normative value it is necessary to: (1) identify the disclosed fact, (2) identify the norm to which the disclosed fact is germane,[251] (3) determine whether the norm is contested,[252] and (4) weigh the informative force of the disclosed fact against the normative force of the contested value to which it is relevant.[253] If the normative force of the compelled commercial speech outweighs its informative force, the compelled commercial speech is impermissibly controversial, and not subject to *Zauderer*'s less exacting scrutiny.[254]

First, the Vermont labeling law[255] mandates food producers to disclose which of their food products were produced by means of genetic modification.[256] The information a GM food label conveys

247. *See* Goodman, *supra* note 19, at 550 ("We should be skeptical of disclosures that, even if purely factual, are designed to advance a controversial ideology as opposed to a generally accepted norm.").

248. *See* Memorandum of Points & Authorities in Support of Plaintiffs' Motion for a Preliminary Injunction at 31, Grocery Mfrs. Ass'n v. Sorrell, No. 5:14-cv-117-cr (D. Vt. Sept. 11, 2014), ECF No. 33.

249. *See id.*; Goodman, *supra* note 19, at 550.

250. *See* Nation, *supra* note 48, at 329.

251. *See, e.g.*, Goodman, *supra* note 19, at 553 (giving an example between a sugar level disclosure and the health norm relevant to the disclosure).

252. *See* Goodman, *supra* note 19, at 554 ("A usable definition of 'controversial' would have to be worked out, as courts have worked out other standards based on assessments of social consensus.").

253. "What is important is both the nature of the value and the balance of contestable value with uncontestable fact." Goodman, *supra* note 19, at 549.

254. *See* Goodman, *supra* note 19, at 553—54 ("Somewhere along this continuum, the normative agenda overwhelms the informative agenda and more searching scrutiny would be warranted.").

255. *See supra* Part I.B.

256. VT. STAT. ANN. tit. 9, § 3043(b) (2014) (effective July 1, 2016).

is clear: based on an objective evaluation of the processes used to produce the label-bearing product, the labeled product was produced by means of genetic modification. A GM food label broadcasts factual information because idiosyncratic value judgments do not form the criterion against which the food product is assessed for purposes of the labeling law.[257]

The second step is to identify the norm to which the disclosed fact is germane. Building on Professor Goodman's "germaneness requirement," this Note proposes that the concept of relevance, as set forth in Rule 401 of the Federal Rules of Evidence, can be used to assess whether compelled commercial speech is germane to a normative value.[258] In this vein, a disclosed fact is relevant to a normative value if the fact's presence makes it more or less probable that subjective value judgments could influence the consumer's decision to purchase or not to purchase the good to which the disclosed fact relates.[259]

For example, in *CTIA–The Wireless Association v. City & County of San Francisco*, the defendant passed an ordinance, which required cell phone resellers to disclose to consumers that cell phones emit radiofrequency energy that is absorbed by the head and body.[260] Under this Note's proposal, the norm to which the radiofrequency disclosure is relevant is that it is good to reduce your exposure to radiofrequency energy for health reasons.

GM food labeling is substantially similar to the disclosure in *CTIA–The Wireless Association*. By mandating the food manufacturer or retailer to append a GM food label in "clear and conspicuous" words to a foodstuff's container,[261] the norm to which the GM food label is relevant is that it is allegedly good to reduce your consumption of GM foods out of, inter alia, health and environmental concerns.[262] The choice to highlight the fact that the food is genetically modified reflects a normative value, namely,

257. *See* Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 652 (7th Cir. 2006) ("Even if one assumes that the State's definition of 'sexually explicit' is precise, it is the State's definition—the video game manufacturer or retailer may have an entirely different definition of this term.").

258. *See* FED. R. EVID. 401 (establishing the test for relevant evidence).

259. *See id.*; *see generally* GLEN WEISSENBERGER & JAMES J. DUANE, WEISSENBERGER'S FEDERAL EVIDENCE, § 401.3, at 99 (6th ed. 2009) ("The offered evidence need only make the fact sought to be proven more probable or less probable in order to satisfy Rule 401.").

260. CTIA–Wireless Ass'n v. City & Cty.of San Francisco, 827 F.Supp.2d 1054 (N.D. Cal. 2011), *aff'd* 494 F. App'x 752 (9th Cir. 2012).

261. VT. STAT. ANN. tit. 9, § 3043(b) (2014) (effective July 1, 2016).

262. *See id.* § 3041(1)–(2).

GM foods are inherently different for the wrong reasons.[263]

The third step is to ascertain the nature of the relevant norms, or in other words, a court must determine whether the relevant norms are contested, uncontested, or somewhere in the middle. In so doing, it is important to appreciate the kind and strength of the norm at issue.[264] Professor Goodman instructs that, in similar fashion to other areas of constitutional law, a court should look at the state of society at the time the issue arose.[265] With respect to GM food labeling, the specific norm—the limitation of GM food consumption for health and environmental reasons—is contested as a matter of science and as a general matter of societal concern.[266] "One need not witness a 'March Against Monsanto' to grasp the point; the controversy is . . . on the face of Act 120."[267]

The last step is to weigh the informative force of the disclosed fact against the countervailing normative force.[268] Specifically, the court should determine whether the normative force of the compelled disclosure overwhelms its informative force.[269] In an effort to make this abstract assessment more concrete, this Note proposes that the concept of balancing probative value against unfair prejudice, as set forth in Rule 403 of the Federal Rules of Evidence, can be used to assess whether the informative force of compelled commercial speech is stronger than the countervailing normative force.[270]

In assessing the informative force of compelled commercial

263. *See* Goodman, *supra* note 19, at 546 ("The choice to include sugar on a nutritional label is arguably free of normative content. But the choice to highlight sugar on a front-of-pack label reflects a norm that sugar is special among ingredients.").

264. *See* Goodman, *supra* note 19, at 549.

265. *See* Goodman, *supra* note 19, at 554 n.252 (discussing how the Court has considered "social consensus" with respect to defining "obscenity" and "cruel and unusual punishment" for constitutional purposes).

266. *See* Glass-O'Shea, *supra* note 21, at 10 ("Remarkably, even with this high level of [GE food] consumption, there have been no cases of demonstrated harm to humans from eating GM foods."); Glass-O'Shea, *supra* note 21, at 12; James Shanahan et al., *Attitudes About Agricultural Biotechnology & Genetically Modified Organisms*, 65 PUB. OPINION Q., no. 2, 267, 272 (2001).

267. Memorandum of Points & Authorities in Support of Plaintiffs' Motion for a Preliminary Injunction at 31, Grocery Mfrs. Ass'n v. Sorrell, No. 5:14-cv-117-cr (D. Vt. Sept. 11, 2014), ECF No. 33.

268. *See* Goodman, *supra* note 19, at 549 ("What is important is both the nature of the value and the balance of contestable value with uncontestable fact.").

269. *See* Goodman, *supra* note 19, at 554 ("Somewhere along this continuum, the normative agenda overwhelms the informative agenda and more searching scrutiny would be warranted.").

270. *See* FED. R. EVID. 403.

speech, a court could assess the "facial vagueness"[271] of the commercial speech at issue and consumers' need for the particular compelled commercial speech.[272] In assessing the normative force of compelled commercial speech, a court can assess, in light of the identified normative value(s), the effect of the commercial speech on the probable behavior of consumers.[273] This assessment implicates whether the compelled commercial speech at issue undermines the constitutional value of commercial speech—the circulation of accurate and useful information.[274] As Professor Goodman explains, striking the right balance between the two forces is important—the normative force of compelled commercial speech could subsume its capacity to convey factual data by unfairly prejudicing or misleading consumers in some way.[275]

Specifically, the normative force of a GM food label outweighs its informative force. With respect to a GM food label's informative force, the content of a GM food label is readily understandable.[276] It conveys "factually straightforward"[277] information—the particular foodstuff to which the GM food label relates was produced by means of genetic modification. Notwithstanding a GM food label's lack of facial vagueness, consumers' need for this information is not dire for three reasons.

First, the private sector offers food producers, such as Mr. Rickert,[278] who want to voluntarily certify and market their products as non-GM the means to do so.[279] In addition, some

271. Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?*, 41 VAND. L. REV. 879, 884 (1988) (explaining how a judge can ascertain the probative value of logically relevant evidence).

272. *Cf.* Andrews v. State, 429 S.W.3d 849, 865 (Tex. App. 2014), *reh'g overruled* (May 6, 2014), *petition for discretionary review refused* (Aug. 20, 2014) (considering the inherent probative force of the proffered item of evidence along with the proponent's need for that evidence).

273. *Cf. id.*; Imwinkelried, *supra* note 271, at 889–90 (stating that the focus is on the cognitive behavior of the jury during trial).

274. Goodman, *supra* note 19, at 553 ("Somewhere along this continuum, the normative agenda overwhelms the informative agenda and more searching scrutiny would be warranted.").

275. Goodman, *supra* note 19, at 553; *see also* Goodman, *supra* note 19, at 552.

276. *See* Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 34 (D.C. Cir. 2014) (Kavanaugh, J., concurring in judgment) (considering that the content of a country-of-origin label was readily understandable).

277. *Id.*

278. *See supra* p. 1 and note 1.

279. *About*, *Who We Are*, NON-GMO PROJECT, http://www.nongmoproject.org/about/who-we-are/ [http://perma.cc/2XMK-EULQ] (last visited Oct. 1, 2015) (offering private non-GMO certification for food producers).

members of the private sector voluntarily label non-GM foodstuffs.[280] Last, the U.S. Food and Drug Administration "is not aware of any information showing that foods derived by these new methods differ from other foods in any meaningful or uniform way, or that, as a class, foods developed by the new techniques present any different or greater safety concern than foods developed by traditional plant breeding."[281] Placing significance on the distinction between GM and non-GM foodstuffs is inapposite in light of the Federal Food and Drug Administration's 1992 Statement of Policy, and because it is far from the case that consumers have absolutely no idea as to which products derive from genetic modification.

With respect to a GM food label's normative force, the presence of a GM food label increases the possibility of consumers making consumption choices on improper bases. The bases upon which a consumer can make a consumption choice with respect to a foodstuff that bears a GM food label are found in the labeling law itself.[282] Specifically, a consumer could abstain from purchasing a GM foodstuff that is labeled as such for health or environmental reasons.[283] The bases are improper for at least three reasons.

First, whether or not GM foodstuffs are injurious to human health has yet to be answered with definitive scientific evidence.[284] Second, the U.S. Food and Drug Administration's 1992 Statement of Policy explicitly states that GM foodstuffs pose no more risk to human health than non-GM foodstuffs.[285] Last, the Food and Drug Administration specifically stated in the 1992 Statement of Policy that its laissez-faire approach to GM foodstuffs "does not individually or cumulatively have a significant effect on the human environment."[286] In this light, when faced with a GM food label,

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280. *See GMO: Your Right to Know*, WHOLE FOODS MARKET, http://www.wholefoodsmarket.com/gmo-your-right-know [http://perma.cc/LEW3-9W6N] (last visited Oct. 1, 2015) (labeling all food products sold in its stores that are non-GM).

281. Statement of Policy - Foods Derived from New Plant Varieties, 57 Fed. Reg. 22984, 22991 (May 29, 1992) http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/Biotechnology/ucm096095.htm#summary [http://perma.cc/EC2L-LJFC].

282. *See* VT. STAT. ANN. tit. 9, § 3041(1)–(4).

283. *See id.* § 3041(1)–(2).

284. *See* Glass-O'Shea, *supra* note 21, at 10 ("Remarkably, even with this high level of [GM food] consumption, there have been no cases of demonstrated harm to humans from eating GM foods.").

285. Statement of Policy - Foods Derived from New Plant Varieties, 57 Fed. Reg. at 22991 (May 29, 1992).

286. *Id.* at 23,005; *see also* Glass-O'Shea, *supra* note 21, at 12.

making a consumption decision on the basis of either health or environmental concern is misplaced.

Hence, the normative force of a GM food label outweighs its informative force—GM food labeling is not uncontroversial. Under *Zauderer*, this is constitutionally impermissible. Given the current circumstances, a government-mandated GM food label, i.e., compelled commercial speech, reflects the side in the GM food debate to which the government adheres. By dragooning consumers into making consumption choices that alights with its policy on GM foodstuffs, the government unilaterally dictates public opinion and private action with respect to a scientific and societal controversy. In essence, GM food labeling advances a controversial ideological standpoint. Therefore, GM food labeling, although purely factual, is controversial compelled commercial speech. *Zauderer*'s less exacting scrutiny does not apply.

CONCLUSION

In conclusion, Vermont cannot claim the benefit of *Zauderer*'s less exacting scrutiny. Although GM food labeling is purely factual commercial speech, it is not uncontroversial. GM food labeling is controversial because it advances the government's perspective with respect to a controversial ideology. By doing so, Vermont places the proper functioning of democracy at hazard and maims the autonomy interests of private individuals. In essence, allowing Vermont to invoke the benefit of *Zauderer*'s rational-relationship rule with respect to controversial speech would eviscerate the constitutional value of commercial speech.

This conclusion directly impacts Massachusetts and House Bill 369. If House Bill 369 becomes law in Massachusetts, Massachusetts should expect to defend the constitutionality of House Bill 369 under a more exacting level of judicial scrutiny. Whether Massachusetts can successfully do so is called into doubt by existing precedent.[287] In this vein, House Bill 369 should not pass, since it would probably succumb to the pressure of the constitutional crucible.

At the same time, Massachusetts could attempt to claim the benefit of *Zauderer*'s less exacting scrutiny by showing that state-mandated labeling of genetically modified food is not controversial. In light of this Note's proposed framework, Massachusetts could

287. *See* Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67 (2d Cir. 1996) (holding that Vermont could not compel manufacturers of dairy products to disclose whether their products contain rGBH, a type of GE hormone).

satisfy this requirement by showing that GM foods present different or greater safety concerns than non-GM foods; thus, the informative value of state-mandated GM food labels would outweigh any normative force. It would be necessary for Massachusetts to fund scientific research that supplants the Food and Drug Administration's 1992 Statement of Policy to succeed in doing this.[288] Therefore, leading-edge scientific conclusions could be the key to the legal viability of House Bill 369 under *Zauderer*'s less exacting scrutiny.[289]

288. Statement of Policy - Foods Derived from New Plant Varieties, 57 Fed. Reg. 22984, 22991 (May 29, 1992). "The central role of the science community in funding decisions diminishes when the broader community becomes involved in decisions on the application of technology." Steven Goldberg, *The Reluctant Embrace: Law and Science in America*, 75 GEO. L. J. 1341, 1368 (1987).

289. Goldberg, *supra* note 288, at 1368 ("From the railroad to the automobile to the airplane and beyond, legal doctrines have been shaped by technology and have, in turn, shaped technology itself.").