

## REGULATING GENETICALLY MODIFIED FOODS: IS MANDATORY LABELING THE RIGHT ANSWER?

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{1} Thank you. It's a pleasure to be here, and I appreciate the invitation. What I want to talk about are some legal issues relating to labeling and, in particular, constitutional issues relating to mandatory labeling for genetically modified foods or food products that may contain genetically modified components. This is a separate issue from whether or not the FDA, or some other agency, has sufficient statutory authority at present to mandate labeling, and that is something worth discussing. Even if they do have such authority, or even if Congress tomorrow were to give the FDA such authority or were to require the FDA to impose labels on genetically modified foods, or if a state sought, to impose mandatory labeling requirements on genetically modified foods as was proposed in Oregon, there are many reasons to wonder whether such requirements would be held constitutional under the Supreme Court's First Amendment jurisprudence with regard to commercial speech.

{2} For some this may seem a little odd. What do you mean the government couldn't mandate labels? Certainly, up until about thirty years ago, the idea that the government couldn't make companies provide whatever information the government thought important was relatively widespread.<sup>1</sup> In recent years, however, the Supreme Court has made clear that commercial speech is protected speech.<sup>2</sup> It may not be as protected as political speech, but it is nonetheless subject to constitutional protection. Compelled speech is also subject to the same sort of sort of constitutional scrutiny as restricted speech, particularly when laws or regulations compel either individuals or corporations to give voice to messages that may be confused with political content with which the speaker disagrees.<sup>3</sup> I think that in the context of genetically modified foods, we certainly see that potential.

{3} I want to walk through what some of the red flags about mandatory labeling for genetically modified foods and what sorts of constitutional limits such proposals might have. The Supreme Court's commercial speech jurisprudence is, shall we say, a little bit ambiguous. A majority of the current Justices have suggested that the current tests are wrong, but the Justices have yet to settle on a better test or different test.<sup>4</sup> There is a case that will probably be heard this term in the Supreme Court,<sup>5</sup> but certainly there is an element of tea-leave reading in all of this because the Court has not fully clarified the precise limits on regulation of commercial speech. Nonetheless, there are many reasons to be skeptical that a government requirement that products that may contain genetically modified material have to bear the warning, "Contains GMOs" or "May Contain GMOs" would pass muster. Such a requirement could well be struck down on constitutional grounds.

{4} The analysis for commercial speech initially concerns whether there is a need to protect the public from misleading information.<sup>6</sup> There are all kinds of requirements that take the form of: If a company makes a claim, it has to qualify that claim with additional information to ensure the initial claim does not mislead consumers. So for example, when certain nutritional claims are made, if the



FDA does not approve of those claims, the companies can be required to say so. If a company says “Blueberries are good for you,” it may have to qualify the claim in a particular way, or acknowledge that the FDA does not approve of the claim.<sup>7</sup> In such cases, absent the additional information, the initial claim is considered to be misleading. Note that a company in this context always has the option of not making the initial claim.

{5} For the law students here, there are cases involving legal advertising. For example, in some states, if a lawyer advertises that they take all cases on contingency and the lawyer only gets paid if the client wins, if the client could potentially be liable for court costs, lawyers are required to provide that information when they advertise that they take cases on a contingency basis.<sup>8</sup> Otherwise, consumers could be liable for economic costs of which they would not be aware. The initial claim could be misleading.

{6} In the GMO context, however, this analysis is not applicable because companies are not saying anything, so that initial justification for a requirement – to clarify a true, but otherwise misleading statement – is not available. Absent that kind of justification, the government must have what is characterized as a substantial governmental interest to infringe upon commercial speech.<sup>9</sup>

{7} The sorts of substantial interests one can think of are things like unidentifiable health risks, an economic impact, or a physical impact on the consumer. In all cases in which these speech requirements have been upheld, these are the sorts of risks that the uninformed consumer, that is risks to which the consumer without the information could be subject. So, companies must disclose ingredients in products, because consumers may have allergies, or because consumers may be on fat-restricted diets or sodium-restricted diets. This sort of information can prevent a negative material impact on the consumer. In the case of generic labeling for genetically modified foods, however, the question is whether or not that sort of interest can be asserted.

{8} You heard from several speakers about the conclusions of the National Academy of Sciences and the FDA that there is no material difference based on the technology used.<sup>10</sup> So long as that is the consensus of regulatory agencies, it will be very difficult for the government to assert the potential health risk of GMOs as an interest justifying labeling. Generalized consumer desire to have more information, may, under some interpretations, be enough to trigger FDA’s statutory authority, but it probably isn’t enough to satisfy the First Amendment requirements.

{9} In the context of genetically modified foods this, in fact, was tested in federal court. In *International Dairy Foods Association v. Amestoy*, the State of Vermont wanted to require milk producers to label milk that had come from cows that had been treated with a recombinant bovine growth hormone (rBGH).<sup>11</sup> The Second Circuit Court of Appeals said Vermont can’t mandate this because the government did not identify any difference in the milk. It could not identify any health risk, or anything else that would rise to the level of substantial governmental interest that would justify mandating labels on milk and requiring milk producers to provide information that they don’t want to provide.<sup>12</sup>

{10} The court said that absent this interest, there is no reasonable concern for human health or safety or some other sufficiently substantial governmental concern, thus manufacturers cannot be compelled to disclose their use of rBGH. Consumer curiosity alone is not a strong enough state interest to sustain the mandatory labeling, even of a factually accurate statement.<sup>13</sup> Even though we may be a bit more permissive about mandating purely factual statements, it’s not enough that some consumers may care about it. One of the reasons for this is that there is no end to the sort of things government could

possibly require under such a standard.<sup>14</sup>

{11} Even if a substantial interest is demonstrated, there still must be a fit between the speech mandate—the label requirement—and the asserted governmental interest.<sup>15</sup> When it comes to genetically modified foods, briefly consider the following example. Let’s say there is a particular product, a genetically modified product, that does raise the risk of allergenicity and the government said, “we’re worried about allergenicity so we want you to label.” The problem is that a “May Contain GM Products” or “May Contain GMOs” label doesn’t have any connection to the state concern because there is nothing about GM technology, as such, that increases the risks of an allergic reaction. There are lots of products for which GM technology may have been used that pose no foreseeable potential risk for allergenicity. So even where an interest is asserted, there must be some connection, though there is some ambiguity in the Court’s jurisprudence about how close the fit must be.

{12} We also know that there must be some tailoring, some effort by the governmental agency to make the disclosure of the labeling requirement match the concern that justifies mandating speech in the first place. This leads us, I think, to question the constitutionality of a requirement to label foods with “Contains GMOs” or “May Contain GMOs.” While there’s less constitutional question about identifying specific products or specific crosses, or specific genes where those specific genes produce very specific concerns requiring labeling on that basis. What about a qualified product labeling requirement that only applied to those products where there was reason to suspect allergenicity? In this example, labeling might work for these specific instances, but across the board, it would not.

{13} The last thing I want to say is that the GM debate – is mostly about values and about ethical concerns. This fact raises an additional red flag under the First Amendment because the Court has always been very sensitive to the idea that compelling an individual to give voice to a controversial message, or to make a statement with which they disagree, is something that the government should rarely be allowed to do. Anti-GMO proposals are not about health risks, but about how we feel about GM technology and how our foods should be produced.

{14} A GMO labeling requirement would be likely to face additional scrutiny because there would be real suspicion that the basis for the labeling is not health concerns, but political control over the sorts of messages and values that we communicate in the food distribution process and in the food market process. In that context, courts have made it clear that those are the sorts of debates that the government should stay out of and should be left to the market place of ideas.

{15} Let me give one example how this might work. New York State had a law about kosher labeling whereby New York State certified the labeling of kosher products. The law was struck down on constitutional establishment of religion grounds because the State was deciding what was kosher and what wasn’t kosher, and that’s a religious issue.<sup>16</sup> Someone might say “That might leave a lot of people in the dark because for a lot of people knowing how our food is made is incredibly important.” The reality, however, is that there are all kinds of religious, non-government groups that engage in kosher label certification of and employ various levels of stringency for kosher foods. The consumer who cares can still get the information absent a government label.<sup>17</sup>

{16} The constitutional barrier for the government being able to mandate a particular label does not necessarily mean that there are other non-governmental labeling schemes which can rise up and provide consumers with the sort of information that they may, for very good reasons, feel that they want or need when they are deciding what products to buy.







## Food Biotechnology: A Legal Perspective-Jonathan Adler

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<sup>1</sup> This was the prevailing view prior to *Virginia Board of Pharmacy v. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), which struck down a state's blanket ban on price advertising for prescription drugs on First Amendment grounds.

<sup>2</sup> See, e.g., *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002) (striking down federal prohibition on advertising particular compounded drugs); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (striking down state ban on price advertising for prediction drugs).

<sup>3</sup> See *United States v. United Foods*, 533 U.S. 405 (2001) ("Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views, or from compelling certain individuals to pay subsidies for speech to which they object.") (citations omitted).

<sup>4</sup> The prevailing four-part test for restrictions on commercial speech under the First Amendment is that articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). Under *Central Hudson*, if commercial speech (1) concerns lawful activity and is not misleading, then the government must demonstrate that (2) the government has a substantial interest in regulating the speech, (3) the restriction directly serves the asserted government interest, and (4) the restriction is no more extensive than necessary to serve the asserted government interest.

<sup>5</sup> At the time these remarks were delivered, a petition for certiorari was pending in the case of *Nike, Inc. v. Kasky*. The petition was subsequently granted, and then dismissed as improvidently granted. See *Nike, Inc. v. Kasky*, 123 S. Ct. 2554 (2003).

<sup>6</sup> See *Central Hudson*, 447 U.S. at 566.

<sup>7</sup> See, e.g., *Pearson v. Shalala*, 164 F.3d 650 (D.C. Cir. 1999).

<sup>8</sup> See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (upholding requirement that attorney advertising services on contingent-fee basis disclose that clients will be liable for court costs even if lawsuit is unsuccessful).

<sup>9</sup> See *Central Hudson*, 447 U.S. at 564 (government must identify a "substantial interest to be achieved" by the speech restriction).

<sup>10</sup> See, e.g., NATIONAL RESEARCH COUNCIL, ENVIRONMENTAL EFFECTS OF TRANSGENIC PLANTS 49 (2002) (reaffirming the finding that "the transgenic process presents no new categories of risk compared to conventional methods of crop improvement"); NATIONAL RESEARCH COUNCIL, GENETICALLY MODIFIED PEST-PROTECTED PLANTS: SCIENCE AND REGULATION 43 (2000) ("There is no strict dichotomy between, or new categories of, the health and environmental risks that might be posed by transgenic and conventional pest-protected plants.").

<sup>11</sup> *International Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996).

<sup>12</sup> *Id.* at 73 (noting District Court finding that Vermont did "claim that health or safety concerns prompted the passage of the Vermont labeling law").

<sup>13</sup> *Id.* at 74.

<sup>14</sup> *Id.* ("Were consumer interest alone sufficient, there is no end to the information that states could require manufacturers to

disclose about their production methods.”).

<sup>15</sup> See *Central Hudson*, 447 U.S. at 566.

<sup>16</sup> See *Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415 (2d Cir. 2002).

<sup>17</sup> See Gregory Conko, *Eat Drink and Be Merry: Why Mandatory Biotech Food Labeling Is Unnecessary*, Cascade Policy Institute, Oct. 2002, at 9-11, available at [http://www.cascadepolicy.org/pdf/env/I\\_120.pdf](http://www.cascadepolicy.org/pdf/env/I_120.pdf) (discussing voluntary labeling for kosher foods).

