GOVERNMENT'S UDDER DISREGARD FOR A CONSUMER'S RIGHT TO INFORMATION ON RBST: MANDATORY LABELING OF MILK PRODUCTS SHOULD BE ALLOWED

INTRODUCTION

Since 1986, there have been over 2,000 field trials where genetically mutated plants were entered into the natural environment.[1] These field trials have led to the approval of approximately ten bioengineered products, such as Calgene's FLAVR SAVR super tomato,[2] Monsanto's Roundup Ready soybeans,[3] and Ciba-Geigy's corn.[4] These products are considered just the beginning for an agricultural biotechnology industry that started slowly but is on the verge of quickly multiplying.[5]

Consumers are worried about a variety of problems associated with genetically engineered food; specifically, consumers have voiced concerns about potential health side effects, appropriate testing methods, and adequate labeling.[6] In October 1996, over 300 agricultural, health, and trade organizations began a boycott of certain brands of foods containing genetically engineered corn and soybeans.[7] This is nothing compared to the outrage associated with the tampering of milk that began with the approval of Posilac.[8]

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1. *See* Maurizio G. Paoletti & David Pimentel, *Genetic Engineering in Agriculture and the Environment: Assessing Risks and Benefits*, BIOSCIENCE, Oct. 1, 1996, at 665, *available in* 1996 WL 9002403.

2. *See* 57 Fed. Reg. 22,984-85 (1992). Consumer reaction to the FLAVR SAVR tomato has been mixed: "Taste tests varied. Some people could not differentiate between a [genetically engineered tomato] and a store-bought 'in season' tomato. Others found the quality in between store-bought and fresh-summer-farm-stand. Still others reported a faint metallic taste." Kirsten A. Conover, *Genetically Altered Tomatoes Are Still Creating Controversy*, PORTLAND OREGONIAN, Mar. 12, 1996, at FD04, *available in* 1996 WL 4121032.

3. *See* James Geary, *Battle of the Bean Genes[;] European Consumers and Environmentalists Are Finding Bioengineered Soybeans Hard to Swallow*, TIME INT'L, Oct. 28, 1996, at 46, *available in* 1996 WL 12731932.

4. *See Coalition Seeks Labeling of Genetically Engineered Corn, Soybeans; Launches Worldwide Boycott*, FOOD LABELING NEWS, Oct. 10, 1996, *available in* 1996 WL 14382913.

5. This growth pattern was recently recognized in a trade magazine:

> This [agricultural biotechnology] industry is on the point of really taking off . . . . Despite all the skepticism—and there's been good reason for the skepticism—this industry is at the point now where the rocket ship is ready to take off and demonstrate to the real world, as well as the financial community, that this technology base is for real.

Monsanto Takeover Plan Sends Calgene's Shares Up, COM. APPEAL, Aug. 1, 1996, at B4, *available in* 1996 WL 11058995.

6. *See* 58 Fed. Reg. 25,837-38 (1993).

7. *See Coalition Seeks Labeling of Genetically Engineered Corn, Soybeans; Launches Worldwide Boycott*, *supra* note 4.

8. Consumers have always considered milk the one food that is both pure and natural and they

Posilac, derived from recombinant bovine somatotropin (rbST) (also known as recombinant bovine growth hormone (rbGH)),[9] is injected into dairy cows to increase milk production by supplementing the amount of naturally occurring bovine somatotropin (bST).[10] BST is a hormone "that is released from the pituitary gland [of bovines] and which influences the amount of milk produced."[11] Scientists now can "isolate the gene responsible for natural bovine growth hormone, transfer that genetic material into bacterial cells called a 'recombinant fermentation organism' and 'program' the bacterial cells to produce a synthetic version of the hormone."[12]

Consumers want to be able to choose whether or not to purchase products derived from cows injected with rbST.[13] However, the current federal regulatory framework does not mandate that producers provide consumers with the information they need to make informed decisions about the foods

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don't want that to change. Consider the following comments: "From the broader perspective of genetically engineered food products, the milk hormone is one of the worst products the industry could have started with. . . . Milk is something people consider natural and sacred. They don't want to see it manipulated." Robert Lee Hotz, *Fruits of Genetic Tinkering Are Headed for U.S. Tables*, L.A. TIMES, Nov. 12, 1993, at 1, *available in* 1993 WL 2253579. "For years, people thought of milk as the perfect food—perfectly healthful and perfectly safe. They were wrong on both counts." Marian Burros, *Organic Milk Moo-ving up Fast*, L.A. DAILY NEWS, Nov. 14, 1996, at H12, *available in* 1996 WL 6581096. "'Typically, when there is concern about new food technology it tends to trend down as time goes on' . . . . With rBGH, that has not been the case." Jennifer A. Galloway, *Survey: RBGH Still Scares Consumers*[;] *10% of Milk Drinkers Say They Buy Products from Non-Treated Cows*, WIS. ST. J., Jan. 26, 1996, at 8B, *available in* 1996 WL 7069838.

9. For purposes of this Note, the terms rbGH, rBGH, rBST, and rbST will be used interchangeably.

10. See Int'l Dairy Foods Ass'n v. Amestoy, 898 F. Supp. 246, 248 (D. Vt. 1995) [*Int'l Dairy I*].

11. *Id.*

12. Stauber v. Shalala, 895 F. Supp. 1178, 1183 (W.D. Wis. 1995).

13. *See* 58 Fed. Reg. 25,837-38 (1993). The Food and Drug Administration (FDA) determined that there was "no significant difference between milk from treated and untreated cows and, therefore, concluded that under the Federal Food, Drug, and Cosmetic Act . . ., the agency did not have the authority . . . to require special labeling for milk from rbST-treated cows." 59 Fed. Reg. 6279, 6280 (1994). However, the FDA did find that there were dangers associated with Posilac:

> Use may result in reduced pregnancy rates and, in first calf heifers, an increase in days open. Use of the product has also been associated with increases in cystic ovaries and disorders of the uterus during the treatment period. Also, the incidence of retained placenta may be higher following subsequent calving. Treated cows are at an increased risk for clinical mastitis and subclinical mastitis. In some herds, use has been associated with increases in somatic cell counts in milk. . . . Use may result in an increase in digestive disorders such as indigestion, bloat, and diarrhea. . . . Cows treated with this product may have increased numbers of enlarged hocks and lesions of the knee (carpal region), and second lactation or older cows may have more disorders of the foot region. Use has been associated with reductions in hemoglobin and hematocrit values during treatment. Human warning: Avoid prolonged or repeated contact with eyes and skin.

21 C.F.R. § 522.2112(c)(1997).

they buy. The Federal Food, Drug, and Cosmetic Act (FDCA)[14] governs the labeling of genetically engineered foods. The Food and Drug Administration (FDA) is responsible for interpreting the FDCA to determine whether labeling is required.[15] The FDA could have required the labeling of genetically engineered foods if it would have considered genetically engineered foods "misbranded" under section 343(a) of the FDCA.[16] A food is considered "misbranded" if a label is "false or misleading in a material respect."[17] The FDA chose not to consider the "methods" used in the development of new foods as "material"—even though consumers consider this information important—and therefore, mandatory labeling was not required at the federal level.[18]

Since there is no federal mandatory, uniform labeling scheme for products derived from cows injected with rbST, several state legislatures have passed their own voluntary labeling laws. For example, Wisconsin allows dairy plants, retail food stores, and restaurants to display product labels stating "Farmer-certified rBGH free."[19] Minnesota also allows producers to label their dairy products as: "[F]armer certified rBGH-free" or "Milk in this product is from cows not treated with rBGH."[20] On the other hand, Nevada and Texas specifically forbid any dairy products to be labeled rbST-free.[21]

Vermont, however, is the only state that required milk products produced by rbST- injected cows to be specifically labeled as such.[22] But in August 1996, the Second Circuit Court of Appeals granted an injunction against enforcement of this labeling law in *International Dairy II*.[23] Vermont Attorney General Jeffrey Amestoy decided not to appeal the decision.[24] Thus,

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14. Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-395 (1994 & Supp. 1997).

15. *See* 58 Fed Reg. 25,837 (1993).

16. 21 U.S.C. § 343(a) (Supp. 1997).

17. *Id.*

18. *See infra* text accompanying notes 46-52.

19. WIS. STAT. ANN. § 97.25(3) (West Supp. 1996).

20. MINN. STAT. ANN. § 32.75(2)(a) (West Supp. 1997).

21. Terence J. Centner & Kyle W. Lathrop, *Labeling rbST-Derived Milk Products: State Responses to Federal Law*, 45 U. KAN. L. REV. 511, 548 (1997). Illinois originally did not allow products to be labeled "rBGH-free" but recently entered a settlement with a coalition of organic food companies (including Ben & Jerry's Homemade, Inc.) to allow manufacturers to put the following label on their products: "We oppose recombinant bovine growth hormone. The family farmers who supply our milk and cream pledge not to treat their cows with rBGH. The FDA has said no significant difference has been shown and no test can now distinguish between milk from rBGH treated and untreated cows." Beth Berselli, *Settlement Reached in Hormone Labeling Case; Ben and Jerry's, States Agree Food Makers Can Indicate Absence of Added Product*, WASH. POST, Aug. 15, 1997, at A22, *available in* 1997 WL 12881480.

22. *See* VT. STAT. ANN. tit. 6, § 2754(c) (Supp. 1996).

23. Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 68 (2d Cir. 1996) [*Int'l Dairy II*].

24. Attorney General Jeffrey Amestoy's decision to end the fight over mandatory labeling at the end of August, 1996 was reported in newspapers across the country. One newspaper specifically reported:

> Vermont dropped its challenge to a court ruling that barred grocers from labeling

the question of whether a consumer has a right to know when food is altered by DNA technology remains unanswered.

This Note argues that mandatory labeling for genetically altered food products should be an option for states.[25] This Note discusses three constitutional issues raised by mandatory labeling laws: preemption, interference with interstate commerce, and freedom of speech. Part I discusses in detail Vermont's mandatory rbST labeling law. Part II discusses how the federal government has not preempted states from requiring labeling within their borders. Part III shows how mandatory labeling laws are not an undue burden on interstate commerce. Finally, Part IV shows how mandatory labeling laws do not offend the First Amendment.

I. VERMONT'S MANDATORY LABELING LAW

On April 13, 1994, Vermont Governor Howard Dean signed into law a requirement that where "rBST has been used in the production of milk or a milk product for retail sale in this state, the retail milk or milk product shall be labeled as such."[26] When challenged, Vermont justified its mandatory labeling law, citing "strong consumer interest and the public's 'right to know' whether a particular dairy product contains milk produced by cows given rBST."[27] Upon passage of the law, Vermont's Commissioner of Agriculture adopted the following rules for the labeling of products from rbST-treated cows:

> The rules allow for shelf-labeling of milk derived from rBST-treated cows, through the use of blue shelf labels, blue stickers, or explanatory signs placed in retail establishments. It is anticipated that larger supermarkets will use a combination of shelf labels and

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dairy products that come from cows injected with an artificial growth hormone.

Attorney General Jeffrey Amestoy said Friday the state decided to settle because it was getting too expensive to fight for the labeling law, which he expected would be found unconstitutional, and was due to expire next summer.

Vermont Gives Up Dairy Label Fight, FRESNO BEE, Aug. 31, 1996, at E2, *available in* 1996 WL 6821355.

25. While this Note focuses primarily on Vermont's labeling law, it has significance for other states:

> A lot of people are keeping an eye on the way BGH [sic] is regulated, the labeling requirements, and the way consumers accept or reject its use, because all these things are potential precedents for other bio-engineered products. Vermont may well be the bellwether state in this process. Few other states are so dependent on a single agricultural product as Vermont is on milk. And Vermont trades heavily on its reputation for purity and integrity in the marketing of food products.

Chris Granstrom, *Great-Tasting Milk*, COUNTRY J., Jan. 11, 1996, at 53, *available in* 1996 WL 9041711.

26. VT. STAT. ANN. tit. 6, § 2754(c) (Supp. 1996).

27. *Int'l Dairy I*, 898 F. Supp. at 249.

> blue stickers. The shelf labels are transparent blue overlays designed to snap into place over the existing unit price information. The blue stickers are round blue dots which may be placed directly on items that are physically difficult to locate or are sold in the deli department. These labels and sticker [sic] contain no text; however, they refer to a sign which the State will provide at no cost to retailers.[28]

The explanatory sign stated, "The United States Food and Drug Administration has determined that there is no significant difference between milk from treated and untreated cows. It is the law of Vermont that products made from the milk of rBST-treated cows be labeled to help consumers make informed shopping decisions."[29] Since the labels could be placed directly on the milk products, Vermont did not require dairy manufacturers to change their normal labeling.

Six Vermont dairy associations[30] petitioned the federal district court of Vermont to grant a preliminary injunction against enforcement of the mandatory labeling law.[31] The groups claimed that the law violated the Supremacy Clause, the Commerce Clause, and the First Amendment.[32] In order to win injunctive relief, a party must show:

> (a) It will suffer irreparable harm in the absence of an injunction; and (b) either (i) a likelihood of success on the merits or (ii) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor.[33]

The district court refused to grant the injunction, finding that the plaintiff associations did not show "irreparable harm" or a "likelihood of success on the merits."[34] Instead, the court found that consumers in Vermont were well-

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28. *Id.*

29. *Id.* at 250.

30. The following trade associations who distribute dairy products in Vermont challenged Vermont's mandatory labeling law: (1) International Dairy Foods Association; (2) Milk Industry Foundation; (3) International Ice Cream Association; (4) National Cheese Institute; (5) Grocery Manufacturers of America, Inc.; and (6) National Food Processors Association. *See id.* at 248.

31. *See id.* at 247.

32. *See id.* For purposes of the injunction, the dairy associations did not pursue a Supremacy Clause challenge: "Both in their papers and in a prehearing conference held on August 1, 1995, the plaintiffs indicated that they would not pursue their claims under the Supremacy Clause for the purpose of seeking preliminary injunctive relief. Accordingly, in the instant ruling, the Court renders no opinion on the merits of any claim the plaintiffs may pursue under the Supremacy Clause." *See id.* at 247 n.1.

33. *Id.* at 250-51.

34. *Id.* at 252.

informed about rbST and might not want to purchase products from cows injected with rbST for the following reasons:

> (1) They consider the use of a genetically-engineered hormone in the production unnatural; (2) they believe that use of the hormone will result in increased milk production and lower milk prices, thereby hurting small dairy farmers; (3) they believe that use of rBST is harmful to cows and potentially harmful to humans; and, (4) they feel that there is a lack of knowledge regarding the long-term effects of rBST.[35]

The plaintiff associations pursued an appeal of this decision to the Second Circuit in November 1995. The Second Circuit reversed the district court and granted the dairy associations' request for a preliminary injunction. The appellate court found that the dairy associations did suffer irreparable harm in that they were forced to make an involuntary statement about their products, which violated their First Amendment rights.[36] The appellate court also found that the dairy associations would likely succeed on the merits under First Amendment analysis if the case indeed went to trial.[37]

While the appellate court may have found that the dairy associations would *likely* succeed on the merits of its case, this Note contends that the Vermont mandatory labeling law would have survived a Supremacy Clause challenge, a Commerce Clause challenge, and a First Amendment challenge.

II. SUPREMACY CLAUSE

The Supremacy Clause of the U.S. Constitution "mandates that federal law overrides, *i.e.*, preempts, any state regulation where there is an actual conflict between the two sets of legislation."[38] Because no federal law prohibits states from passing an rbST mandatory labeling law, the Vermont law is consistent with the objectives of Congress, and is not preempted.

Federal preemption of state law can occur in two ways: (1) a federal law can explicitly exclude states from enacting legislation in a particular field or (2) a state law standing as an obstacle to the objectives of Congress can be overturned.[39] A leading U.S. Supreme Court decision, *Jones v. Rath Packing*

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35. *Id.* at 250.
36. *See Int'l Dairy II*, 92 F.3d at 72, 74.
37. *See id.* at 74.
38. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 9.1, at 319 (5th ed. 1995).
39. *See* Jones v. Rath Packing Co., 430 U.S. 519, 525-26 (1977).

Co., outlined the steps that courts should follow to determine whether a federal law preempts a state law.[40] The Court in *Jones* examined a California law that required accurate labeling of net weight in the packaging of meat and did not allow for any deviations resulting from moisture loss.[41] The federal Wholesome Meat Act,[42] on the other hand, did allow deviations in weight from moisture loss.[43] To determine whether the Wholesome Meat Act preempted the California law, the Court first analyzed the threshold question of whether Congress had prohibited the states from regulating the labeling of meat packaging. In answering that question in the negative, the Court reasoned that if "the field which Congress is said to have pre-empted has been traditionally occupied by the States, . . . 'we start with the assumption that the historic police powers of the States were *not* to be superseded by the Federal Act unless that was the *clear and manifest* purpose of Congress.'"[44]

If Congress' intent in such a case is not "clear and manifest," courts must decide if the state and federal laws conflict: "'whether, under the circumstances of this particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[45] Since the Wholesome Meat Act contains an explicit preemption clause, it was not difficult for the court to find that the California law was preempted.[46] However, absent such an explicit statement by Congress, determining conflict between the state and federal law is more difficult.

This difficulty is evidenced by the controversy that has surrounded laws requiring labeling of genetically altered food products. Opponents of labeling would argue that since the FDCA (as interpreted by the FDA) does not require mandatory labeling of genetically altered food products, any state law which does require labeling would be in conflict with the FDCA and, therefore, preempted. Proponents, on the other hand, would argue that when one looks at the language of the FDCA, mandatory labeling does not stand in the way of Congress' objective of providing material, truthful, and non-misleading information to the public, and therefore is not preempted.

A producer of genetically altered food must "describe the product by its common or usual name or in the absence thereof, an appropriately descriptive

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40. *See id.*

41. *See id.* at 526-27.

42. Wholesome Meat Act, 21 U.S.C. §§ 601-695 (1994).

43. *See Jones*, 430 U.S. at 529-30.

44. *Id.* at 525 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)) (emphasis added).

45. *Id.* at 526 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

46. *See id.* at 530-31. The Wholesome Meat Act "prohibits the imposition of '[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under' the Act." *Id.* at 530.

term and reveal all facts that are material in light of representations made."[47] The FDCA does not provide a definition for "material"[48] but the FDA has declared that information concerning the *method* by which a food product is produced is *not* a material fact.[49] Yet, the FDA has stated in the past that, in the case of irradiated foods, the materiality of production information "depends not on the abstract worth of the information but on *whether consumers view such information as important* and whether the omission of label information may mislead a consumer."[50]

However, the FDA did not employ this rationale when determining whether to require the mandatory labeling of milk from rbST-treated cows.[51] Instead, the FDA focused on whether the recombinant DNA techniques will cause a known or potential allergen to appear in a new food product.[52] Thus, because the FDA concluded that milk from rbGH-treated and untreated cows is not significantly different, the FDA felt it did not have the authority under the FDCA "to require special labeling for milk from rbST-treated cows."[53] Even though the FDA chose not to require mandatory labeling of genetically altered food products, that does not mean that states are prohibited from doing so as long as the FDCA does not prohibit it.

Applying the *Jones* test, the FDCA did not preempt Vermont's mandatory labeling law. First, Congress did not make it "clear and manifest" that federal regulations for milk labeling should supersede all state laws. There is no language in the FDCA which expressly regulates this field and the federal government has stated that milk production has historically been regulated by the states.[54] Therefore, in examining Vermont's law, a court

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47. 57 Fed. Reg. 22,984, 22,991 (1992) (citation omitted).

48. *See* Anne Miller, Comment, *Time for Government to Get Mooo-ving: Facing up the to [sic] RBST Labeling Problem*, 18 HAMLINE L. REV. 503, 510 (1995).

49. *See* 57 Fed. Reg. 22,984, 22,991 (1992).

50. 51 Fed. Reg. 13,376, 13,388 (1986) (emphasis added); *see also* Miller, *supra* note 48 at 510.

51. Former FDA Commissioner, Dr. David Kessler, explained in a May 27, 1993 radio broadcast of "The Diane Rehm Show" focusing on the labeling of milk that "what we're hearing from consumers is that they want the right to know. They want to make the decision for themselves. I'm not arguing that shouldn't be the case. . . . I just need to say what the current law says and that FDA acts under the current law. . . . I mean, if enough consumers feel that way, perhaps the current law would need to be reevaluated." *BST Labels May Need New Law, Kessler Hints; Monsanto Insists*, FOOD LABELING NEWS, June 10, 1993, *available in* 1993 WL 2793245. If states are not successful in passing laws regulating labeling of genetically altered food products, another avenue may be to petition a change in the FDCA to consider genetic modification as "material" as a result of strong consumer interest in the information.

52. *See* 57 Fed. Reg. 22,984, 22,987 (1992). If an "allergen were moved into a variety of a plant species that never before produced that allergen, the susceptible population would not know to avoid food from that variety. . . . Labeling of foods newly containing a known or suspect allergen may be needed to inform consumers of such potential." *Id.*

53. 59 Fed. Reg. 6279, 6280 (1994).

54. The FDA made it clear that state involvement was not only acceptable, but needed. "Given the traditional role of the States in overseeing milk production, the [FDA] intends to rely primarily on the

must "'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"[55]

Second, Vermont's law does not stand as an obstacle to the objectives of any federal law. The FDCA protects against the intentional "misbranding" of food. Section 343(a) of the FDCA stipulates that a food is misbranded if its labeling is "false or misleading."[56] FDCA section 321(n) states that a label can be misleading depending on either the presence or the absence of specific information.[57] Vermont's labeling law did not conflict with the FDCA because it provided factual information that was necessary for consumers to make an informed decision. The sign required by Vermont's labeling law in no way implied that rbST-treated milk was inferior and explicitly stated that the information was solely there to help consumers make informed shopping decisions. Instead, it identified that certain products contained rbST but explained that the FDA had determined that there was no difference in the quality of the milk.[58]

Congress did not make it "clear and manifest" that federal reasons for milk labeling should supersede all state laws and Vermont's law does not stand as an obstacle to te objectives of the FDCA. Therefore, under the test prescribed by *Jones*, the Vermont mandatory labeling law would not have been preempted by federal law.

III. DORMANT COMMERCE CLAUSE

Even though regulation of the dairy industry has traditionally been left to the states, Vermont may not pass a law that will burden interstate commerce. Since Vermont's mandatory labeling law did not discriminate between intrastate and interstate commerce and was not clearly excessive, Vermont's law was not violative of the Constitution's Commerce Clause.

Congress is granted sole power to regulate interstate commerce.[59] If Congress enacts a law under the Commerce Clause and a state law conflicts

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enforcement activities of the interested States to ensure that rbST labeling claims are truthful and not misleading." *Id.*

55. *Jones*, 430 U.S. at 525 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

56. 21 U.S.C. § 343(a) (Supp. 1997).

57. *See* 21 U.S.C. § 321(n) (Supp. 1997).

58. *See Int'l Dairy I*, 898 F. Supp. at 249-50; It is interesting that Minnesota's and Wisconsin's *voluntary* labeling laws allow the statement "Farmer-certified rBGH free"/"farmer certified rBGH-free" without any other explanation. MINN. STAT. ANN. § 32.75(2)(a) (West Supp. 1997); WIS. STAT. ANN. § 97.25(3) (West Supp. 1996).

59. *See* U.S. CONST. art. I, § 8 ("Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

with it, the state law will be preempted.[60] However, the issue is less clear when a state passes a law that *affects* interstate commerce and Congress has not preempted the field.[61] Generally, the U.S. Supreme Court has abided by the precept that "local legislation that thwarts the operation of the common market of the U.S. exceeds the permissible limits of the dormant commerce clause."[62]

In *Pike v. Bruce Church*,[63] the U.S. Supreme Court provided a framework for dormant commerce clause scrutiny:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, but more frequently it has spoken in terms of "direct" and "indirect" effects and burdens.[64]

The Court has boiled this test down to whether the state law applies even-handedly to both in-state and out-of-state interests. If it does not apply even-handedly, but instead represents economic protectionism, then the state law is "virtually per se invalid."[65] If the state law does apply even-handedly, it is unconstitutional only if the burden on interstate commerce is clearly excessive when compared to the local benefits.[66]

A. The Vermont Law is Not Economic Protectionism

Vermont did not pass its mandatory labeling law to protect Vermont dairy farmers from outside competition. Instead, Vermont applied the law evenly between in-state and out-of-state milk producers. The situation is analogous to *Minnesota v. Clover Leaf Creamery Co.* where the Supreme Court held that a Minnesota statute which forbade the retail sale of milk in

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60. *See* Nowak & Rotunda, *supra* note 38, at 281.
61. This is known as the "dormant commerce clause." *See id.*
62. NOWAK & ROTUNDA, *supra* note 38, at 283.
63. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).
64. *Id.* at 142.
65. City of Phila. v. New Jersey, 437 U.S. 617, 624 (1978).
66. *See Pike*, 397 U.S. at 142.

nonreturnable plastic containers, but allowed the sale in nonreturnable paper containers, was applied even-handedly.[67] Milk sellers challenged the law as violating the Commerce Clause but Minnesota argued that the law was designed to "promote resource conservation, ease solid waste disposal problems, and conserve energy."[68] The Federal District Court of Minnesota found that Minnesota was trying to protect the predominantly in-state dairy and pulpwood industries from the predominantly out-of-state plastic industry by giving them a competitive advantage through the ban on nonreturnable plastic milk containers.[69]

The U.S. Supreme Court, however, overturned that decision.[70] The Court found that the law was not "simple economic protectionism" but instead was applied even-handedly because the Minnesota law did not regulate retailers outside of Minnesota differently from retailers inside Minnesota.[71] In addition, the Court found that the burden imposed on interstate commerce was slight: "Milk products may continue to move freely across the Minnesota border, and since most dairies package their products in more than one type of containers, the inconvenience of having to conform to different packaging requirements in Minnesota and the surrounding States should be slight."[72] Therefore, since Minnesota's law applied even-handedly to retailers inside and outside of Minnesota, and the burden on interstate commerce was not clearly excessive, the Minnesota law survived dormant commerce clause scrutiny.

Similarly, Vermont's mandatory labeling law was even-handed legislation. It applied to all milk products sold in the state of Vermont regardless of where they were produced. Vermont's law could not be characterized as economic protectionism because Vermont was not trying to protect its milk industry from out-of-state competition. Farmers in Vermont who chose to use rbST would have had to label their products in the same manner as farmers outside Vermont who chose to use rbST. Any incidental costs (i.e., inspection of retail facilities) would also have been applied uniformly to in-state and out-of-state manufacturers.

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67. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 470-71 (1981).

68. *Id.* at 459.

69. The district court (in an unpublished opinion) found that Minnesota was trying "to promote the economic interests of certain segments of the local dairy and pulpwood industries at the expense of the economic interests of other segments of the dairy industry and the plastics industry." *Id.* at 460.

70. *See id.* at 470.

71. *See id* at 471-72.

72. *Id.* at 472.

B. The Burden on Interstate Commerce is Not Clearly Excessive

The second part of the *Pike* test is whether the burden on interstate commerce is clearly excessive as compared to the local benefits. Vermont's law advanced a strong local benefit and did not place a large burden on interstate commerce. Vermont's law was distinguishable from the Milk Control Act that was struck down in the Supreme Court case, *West Lynn Creamery v. Healy*.[73] The Milk Control Act required milk dealers doing business in Massachusetts to contribute a monthly premium payment into the Massachusetts Dairy Equalization Fund.[74] While the premium payment formula was applied uniformly to in-state and out-of-state milk dealers (and thus applied evenhandedly), shares of the fund went only to the *Massachusetts* milk dealers.[75] West Lynn Creamery and LeComte's Dairy, Inc., both licensed to do business in Massachusetts, sought an injunction against enforcement of the Milk Control Act claiming it violated the Commerce Clause.[76] Massachusetts defended its pricing order by arguing that the Milk Control Act had only an incidental effect on interstate commerce when compared to the benefit of preserving the entire Massachusetts dairy industry.[77] The Supreme Court disagreed and found that the burden was clearly excessive because the premium payments made out-of-state milk more expensive to market in Massachusetts, in addition to making out-of-state producers compete against subsidized Massachusetts milk producers: "Preservation of local industry by protecting it from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits."[78]

Vermont's law did not prohibit out-of-state milk producers from using rbST to increase their production of milk, thereby decreasing their milk prices, and giving them an economic advantage to Vermont dairy farmers who chose not to use rbST.[79] Vermont also did not require manufacturers to change their milk-product labels specifically to conform with Vermont's regulations.

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73. West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994).

74. *See id.* at 190.

75. *See id.* at 191.

76. *See id.*

77. The Commissioner of the Massachusetts Department of Food and Agriculture on January 28, 1992, declared a State of Emergency for Massachusetts dairy farmers: "Regionally, the industry is in serious trouble . . . [W]e must act on the state level to preserve our local industry, maintain reasonable minimum prices for the dairy farmers, thereby ensur[ing] a continuous and adequate supply of fresh milk for our market, and protect the public health." *Id.* at 190.

78. *Id.* at 205.

79. "Milk marketing officials . . . say price and brand remain far more important factors for consumers than the presence or absence of [bGH]." *Critical of Cheese Market Findings*, UPI, Aug. 27, 1996, *available in* LEXIS, News Library, UPI File.

Instead, Vermont required blue dots to identify "rbST" milk and explanatory signs were provided at no cost to manufacturers.

Vermont also had a strong local interest—regulation of milk for the benefit of its consumers.[80] Vermont's consumers have showed an overwhelming concern about milk produced from cows injected with rbGH.[81] Since Vermont's law was tailored to provide information in a way that did not impact out-of-staters disproportionately, Vermont's law satisfied dormant commerce clause scrutiny.

IV. FIRST AMENDMENT: COMMERCIAL SPEECH

The First Amendment of the U.S. Constitution protects an individual's right both to speak and not to speak.[82] In *International Dairy I*, the plaintiffs argued that Vermont's mandatory labeling law was an unconstitutional infringement on their First Amendment right not to speak because it compelled disclosure of information that the FDA did not require.[83] Courts do not look favorably on laws that compel a person to speak or act contrary to their religious, political, or ideological ideals.[84] However, courts have generally held that laws compelling persons to speak on *commercial* matters do not warrant the same degree of protection. In these types of cases courts are more concerned with whether the commercial entity is being forced to state a message that is hostile to its own particular message.[85]

The District Court characterized the rbGH labeling as commercial speech because "despite the current public debate, the labels required by 6 V.S.A. § 2754 relate to commercial transactions involving specific products and are therefore *commercial speech*."[86] Vermont's mandatory labeling law,

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80. "The local interest which the Vermont statute is designed to protect is a legitimate one. 'States have traditionally acted to protect consumers by regulating foods produced and/or marketed within their borders.'" Int'l Dairy Foods Ass'n v. Amestoy, 898 F. Supp. 246, 252 (D. Vt. 1995) (quoting Grocery Mfrs. Of America v. Gerace, 755 F.2d 993, 1003 (2d Cir. 1985)).

81. "We do not doubt that Vermont's asserted interest, the demand of its citizenry for such information is genuine. . . ." Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 73 (2d Cir. 1996).

82. *See, e.g.*, Pacific Gas and Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 11 (1986) ("There is necessarily . . . a concomitant freedom not to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.") (quoting Estate of Hemingway v. Random House, 23 N.Y.2d 341, 348 (1968)).

83. *Int'l Dairy I*, 898 F. Supp. at 246.

84. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 714 (1977) (explaining that a "system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline from fostering such concepts.").

85. *See* United States v. Frame, 885 F.2d 1119 (3d Cir. 1989).

86. *Int'l Dairy I*, 898 F. Supp. at 253 (emphasis added). The Second Circuit took no position on whether the District Court erred in characterizing the labels as commercial speech. *See Int'l Dairy II*, 92 F.3d at 67. For purposes of this Note, it will be assumed that labels on milk products constitute commercial

therefore, compelled disclosure of commercial speech by dairy manufacturers. Compelled speech usually falls into one of two categories—religious, political, and ideological speech, or commercial speech. Subpart A will examine the dichotomy between compelled religious, political, and ideological speech, and compelled commercial speech and show how Vermont's rbST labeling law did not force manufacturers to make a statement that was hostile to its own message.

Though Vermont's mandatory labeling law involved traditionally less-protected commercial speech, the U.S. Supreme Court has recently indicated that commercial speech may be entitled to a degree of protection approaching that afforded to political speech.[87] Subpart B will trace this dramatic change in the Supreme Court's treatment of commercial speech.[88] Yet, even under this more heightened First Amendment scrutiny, Vermont's rbGH labeling law was constitutionally sound.[89]

A. The Right Not to Speak

The majority of the U.S. Supreme Court's "compelled speech" cases involve a state law that threatens a person's religious, political, or ideological beliefs. For example, the defendant in *Board of Education v. Barnette* objected on ideological grounds to being forced to participate in a daily flag-honoring ceremony.[90] The West Virginia statute at issue required all public school children to salute the flag, making non-compliance punishable by expulsion.[91] The defendant, Walter Barnette, a Jehovah's Witness, sought an injunction claiming that the law infringed upon his freedom of religion and freedom of speech.[92] The Court, in finding the law unconstitutional, held that the requirement to salute the flag was an unacceptable curtailment of personal liberties because "no official, high or petty, can prescribe what shall be

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speech.

87. *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996).

88. The history of commercial speech began with the unanimous 1942 *Valentine* decision denying First Amendment protection to commercial speech, continued through the creation of the *Central Hudson* test, and culminated most recently with the unanimous 1996 *44 Liquormart* decision to grant First Amendment protection to commercial speech. *See generally 44 Liquormart, Inc.*, 116 S. Ct. 1495; Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980); Valentine v. Chrestensen, 316 U.S. 52 (1942).

89. In addition, the rbGH labeling law is supported by the policy behind the reasons why the Supreme Court granted First Amendment protection to commercial speech—"the value to consumers of the information such speech provides." Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985).

90. *See* West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 629 (1943).

91. *See id.*

92. *See id.* at 629-30.

orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein."[93]

In *Wooley v. Maynard*, two defendants appealed their convictions for violating a New Hampshire statute that made it a crime to obscure the state motto, "Live Free or Die" on all non-commercial license plates.[94] The defendants, two Jehovah's Witnesses, objected to the motto on religious, moral, and political grounds.[95] The U.S. Supreme Court, in finding the law unconstitutional, stated that "[t]he First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable."[96]

These two cases stand for the proposition that states may not force individuals to disseminate religious, political, or ideological messages against their will.[97] However, compelled commercial speech cases do not involve such a dramatic level of deeply held beliefs. Commercial entities generally want to refrain from speaking on an issue because of the resultant economic impact. In such cases where the compelled commercial speech involves only economic issues, courts are generally concerned with whether the commercial entity was forced to associate itself with a message contrary to its own interests.

In *National Commission on Egg Nutrition v. Federal Trade Commission*, the Seventh Circuit found that a commercial entity could not be forced to publicly espouse an opinion contrary to its interests.[98] *National Commission on Egg Nutrition* involved a claim by the Federal Trade Commission (FTC) that the National Commission on Egg Nutrition (NCEN) had made false and misleading statements in its advertising regarding the relationship between eggs and heart disease.[99] The circuit court held that while the FTC could prevent the NCEN from making those patently false claims, it could *not* force

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93. *Id.* at 642.

94. Wooley v. Maynard, 430 U.S. 705, 707 (1977).

95. The defendant, George Maynard, explained that he objected to the state motto because:

> [B]y religious training and belief, I believe my 'government'—Jehovah's Kingdom—offers everlasting life. It would be contrary to that belief to give up my life for the state, even if it meant living in bondage. Although I obey all laws of the state not in conflict with my conscience, this slogan is directly at odds with my deeply held religious convictions.

Id. at 707 n.2.

96. *Id.* at 715.

97. *See id.* at 714.

98. National Comm'n on Egg Nutrition v. Federal Trade Comm'n, 570 F.2d 157, 164 (7th Cir. 1977).

99. For example, NCEN admitted that it had falsely advertised that there was no scientific evidence linking eggs with an increase in heart disease. *See id.* at 159.

the NCEN to include in future advertisements: "many medical experts believe increased consumption of dietary cholesterol, including that in eggs, may increase the risk of heart disease."[100] In overturning the FTC's ruling, the court held that such a statement would "interfer[e] unnecessarily with . . . the pro-egg position," and was thus an impermissible infringement of NCEN's right to *not* speak.[101]

In contrast, where the compelled speech is not adverse to the plaintiff's interest, the requirement to speak will most likely not infringe upon the plaintiff's First Amendment rights. For example, the Supreme Court in *Glickman v. Wileman Bros. & Elliott, Inc.*, held that the 1937 Agricultural Marketing Agreement Act did not violate California fruit producers First Amendment rights.[102] The 1937 Agricultural Marketing Agreement Act requires growers, handlers and processors of California fruits to financially contribute to an advertising fund which advertises California fruits as wholesome and delicious.[103] The Court found that "[o]ur compelled speech case law . . . is clearly inapplicable to the regulatory scheme at issue here. The use of assessments to pay for advertising does not require respondents to repeat an objectional message out of their own mouths . . . or force them to respond to a *hostile* message . . . ."[104]

Similarly, the Third Circuit in *United States v. Frame* upheld a federal law requiring ranchers to pay an excise tax on their herds to help pay for a national ad campaign to increase beef consumption.[105] The federal Beef Promotion and Research Act of 1985[106] required Frame, a cattle rancher and auctioneer, to collect $1.00 on each head of cattle he sold.[107] The Beef Promotion Act was designed to be a "self-help" program to increase beef sales without excessive governmental regulation.[108] Frame refused to pay and challenged the law as an unconstitutional infringement on his right to not speak. The court found, however, that the Beef Promotion & Research Act was "ideologically neutral"[109] and as a result did not force Frame to contribute financially to "economic, political, professional, scientific, [or] religious"

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100. *Id.* at 164.

101. *Id.*

102. *See* Glickman v. Wileman Bros. & Elliott, Inc., 117 S. Ct. 2130 (1997).

103. *See id.* at 2135.

104. *Id.* at 2139 (emphasis added).

105. United States v. Frame, 885 F.2d 1119, 1124 (3d Cir. 1989).

106. Beef Promotion and Research Act of 1985, 7 U.S.C. §§ 2901-2911 (1994).

107. *See Frame*, 885 F.2d at 1124.

108. "Beef Promotion Act directs the Secretary of Agriculture to promulgate a Beef Promotion and Research Order that establishes this self-help program and provides for its financing through assessments on all cattle sold in the U.S. and on cattle, beef, and beef products imported into the United States." *Frame*, 885 F.2d at 1122.

109. *Id.* at 1135.

programs with which he disagreed.[110] Thus, the court held that the "government has enacted this legislation in furtherance of an ideologically neutral compelling state interest."[111]

Thus, recent circuit cases support the position that government regulations cannot compel a commercial entity to engage in commercial speech that is contrary or hostile to its own message. Vermont's mandatory rbST labeling law does *not* require dairy manufacturers to say that rbGH is unhealthy or even that consumers are worried about the effects of rbGH. Instead, the labeling law requires only that producers notify consumers and even mandates that the labels include the message that the FDA has found no differences in milk from treated and untreated cows. Such a statement is definitely not contrary to the interests of dairy associations and therefore, the dairy associations have not had their First Amendment right not to speak infringed upon.

B. Freedom to Speak Commercially

The Vermont labeling law involved a restriction on First Amendment rights—not the right to speak, but rather the rights of commercial entities *not* to speak against their interests. The Supreme Court has never enunciated a test for this particular situation, but since it involves commercial speech, the *Central Hudson* test is the test the Court would most likely apply to determine the constitutionality of the Vermont labeling law.[112] Therefore, a discussion of the history of commercial speech and the various interpretations of the *Central Hudson* test is necessary in order to hypothesize how the Court would react to a law similar to Vermont's.

The distinction between non-commercial and commercial freedom of speech was first stated by the U.S. Supreme Court in *Valentine v. Chrestensen*.[113] Chrestensen owned a decommissioned United States Navy submarine and exhibited the ship for money.[114] A New York City ordinance forbade the distribution of commercial advertising, so Chrestensen printed flyers that advertised the submarine, and also contained a political message.[115]

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110. *Id.* at 1137.

111. *Id.*

112. In *International Dairy II*, the Court of Appeals for the Second Circuit, in determining whether the dairy associations would likely succeed on the merits of their First Amendment claim, explained that: "We need not address the controversy concerning the nature of the speech in question - commercial or political - because we find that Vermont fails to meet the less stringent constitutional requirements applicable to *compelled commercial speech*. Under the *Central Hudson* test we must determine . . . ." *Int'l Dairy II*, 92 F.3d at 72 (emphasis added).

113. Valentine v. Chrestensen, 316 U.S. 52 (1942).

114. *See id.* at 52.

115. *See id.* at 53.

Chrestensen was warned by police that the advertisement was in violation of the New York City ordinance and was restrained when he continued to distribute them.[116] Chrestensen sought an injunction to prohibit interference with his distribution of the flyers.[117] The Supreme Court found that the political message was a sham, included only to evade the ordinance.[118] Therefore, the flyers could be prohibited because "though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes *no such restraint on government as respects purely commercial advertising.*"[119] The Court's opinion, however, failed to cite any case law to support its proposition and seemed to pull the distinction between commercial and non-commercial speech "out of thin air."[120]

For the next thirty years, the Supreme Court slowly chipped away at the decision in *Valentine* until finally in the 1976 *Virginia State Board of Pharmacy* decision, the Court unequivocally stated that the First Amendment does protect commercial speech.[121] *Virginia Pharmacy* involved a Virginia law that forbade licensed pharmacists from advertising prescription drug prices.[122] Virginia was concerned with maintaining the integrity of the pharmaceutical profession and felt that advertising would be "unprofessional conduct."[123] Consumers of prescription drugs who wanted access to that information challenged the law[124] and the Court concluded that the law was invalid because a state may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients."[125]

The *Virginia Pharmacy* decision did more than merely afford commercial speech First Amendment protection; this was the first time the Supreme Court stressed the importance of guaranteeing the free flow of information in a commercial context.[126] Importantly, the Court also extended commercial

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116. *See id.*

117. *See id.* at 54.

118. *See id.* at 55.

119. *Id.* at 54 (emphasis added).

120. John M. Blim, Comment, *Free Speech and Health Claims Under the Nutrition Labeling and Education Act of 1990: Applying a Rehabilitated* Central Hudson *Test for Commercial Speech*, 88 NW. U. L. REV. 733, 744 (1994).

121. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

122. *See id.* at 749-50.

123. *See id.* at 750-51.

124. *See id.* at 753.

125. *Id.* at 773.

126. The Court in *Virginia Pharmacy* realized the importance of commercial information to

speech protection from the advertiser to the consumer: "If there is a right to advertise, there is a reciprocal right to receive the advertising . . . ."[127]

Under the *Virginia Pharmacy* logic, the Vermont mandatory labeling law should have received protection for two reasons: (1) Fear of how a consumer will react is not a valid reason for suppressing truthful information. Just because producers of genetically altered food products are worried about the effect that the labeling information will have on consumers does not mean that they can suppress that information. (2) If pro-label consumers want certain information to make intelligent choices, they have a constitutionally protected right to receive that information.

The next major case, *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, involved a challenge to a New York Public Service Commission ban on promotional advertising by electric utilities.[128] The ban was originally enacted because of a perceived fuel shortage for the winter of 1973-74.[129] Any advertising by electric utilities intended to "stimulate the purchase of utility services" was banned because it was against the national policy of conserving energy.[130] However, advertising *not* intended to promote sales (informational advertising), but instead intended to encourage consumers to shift their electricity consumption from peak to nonpeak periods was allowed.[131] Therefore, the Commission's order only restricted commercial speech.

The Court in *Central Hudson* expanded on *Virginia Pharmacy*'s logic and created the modern framework for deciding when commercial speech is protected under the First Amendment.[132] The familiar four-part *Central Hudson* test begins with the threshold question of whether the speech concerns an unlawful activity or is misleading.[133] If it is, then the analysis is at an end.[134] If the speech is not misleading, the governmental interests involved must be

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consumers when they are making a purchasing decision:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Id. at 765.

127. *Id.* at 757.

128. Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557 (1980).

129. *See id.* at 559.

130. *See id.*

131. *See id.* at 560.

132. *See id.* at 566.

133. *See id.* This is consistent with the rationale behind extending First Amendment protection to commercial speech—the informational value to consumers. False speech is not information that would help consumers make an intelligent choice in the free market. *See id.*

134. *See id.*

analyzed.[135] The next three steps ask: whether the governmental interest is "substantial"; whether the regulation "directly advances the governmental interest"; and whether the regulation is "more extensive than is necessary" to achieve the governmental interest.[136]

Applying the test to the New York law, the Court found that the threshold criteria was met because the speech at issue was not misleading nor concerned an unlawful activity.[137] The Court then analyzed the governmental interest involved.[138] New York claimed that it had a substantial governmental interest in energy conservation.[139] The Court agreed that this was a substantial state interest; therefore the second strand was satisfied.[140] The third strand was also satisfied because the New York law directly advanced the substantial state interest of energy conservation.[141]

The fourth element of the *Central Hudson* test required that New York show that energy conservation could not be accomplished through a less speech-restrictive means than a total ban on promotional advertising.[142] In finding the law unconstitutional, the Court held that New York had failed to consider the least restrictive means possible.[143]

Therefore, after *Central Hudson*, states had the formidable burden of showing that no other alternatives could accomplish their interests. Subsequent case law has, however, refined the *Central Hudson* test in order to provide more or less protection to commercial speech as circumstances dictate.[144]

In 1989, in *State University of New York v. Fox*, the Court interpreted the fourth *Central Hudson* element to provide less protection to commercial speech than that afforded by the *Central Hudson* Court.[145] *Fox* involved a First Amendment challenge to a regulation barring companies from selling "housewares" in college dormitories.[146] The Court found substantial state

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135. *See id.*

136. *Id.*

137. *See id.*

138. *See id.* at 568.

139. *See id.*

140. *See id.*

141. *See id.* at 569. "There is an immediate connection between advertising and demand for electricity" but "[t]he impact of promotional advertising on the equity of appellant's rates is highly speculative." *Id.*

142. *See id.* at 569-70.

143. *Id.* at 570. Since the state made "no showing . . . that a more limited restriction on the content of promotional advertising would not serve adequately the state's interests[,]" the ban on promotional advertising was unconstitutional. *Id.*

144. *See, e.g.*, City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993); Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989).

145. *See Fox*, 492 U.S. at 480.

146. *Id.* at 470.

interests in "promoting an educational rather than commercial atmosphere on SUNY's campuses, promoting safety and security, preventing commercial exploitation of students, and preserving residential tranquility."[147]

The Court concluded that in applying the least-restrictive means analysis some deference should be given to the regulators.

> We have not gone so far as to impose upon [would-be regulators] the burden of demonstrating that the distinguishment is 100% complete, or that the manner of restriction is absolutely the least severe that will achieve the desired end. What our decisions require is a "'fit' between the legislature's ends and the means chosen to accomplish those ends"—a fit that is not necessarily perfect, but reasonable. . . .[148]

In 1993, the Court in *City of Cincinnati v. Discovery Network* reversed *Fox*'s trend toward less protection of commercial speech.[149] *Discovery Network* involved a Cincinnati ordinance prohibiting companies from distributing commercial publications other than newspapers on news racks.[150] Commercial publishers sought an injunction against enforcement of the ordinance.[151] Finding that Cincinnati's interests in safety and aesthetics were substantial,[152] the Court nevertheless overturned the ordinance because it was too restrictive:

> A regulation need not be 'absolutely the least severe that will achieve the desired end, but if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the "fit" between ends and means is reasonable.[153]

This dicta from *Discovery Network* elevated commercial speech from its position of receiving less protection than other constitutionally guaranteed expression.[154] The Court stated that: "In our view, the city's argument attaches more importance to the distinction between commercial and noncommercial speech than our cases warrant and seriously underestimates

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147. *Id.* at 475.

148. *Id.* at 480 (citation omitted).

149. *See Discovery Network*, 507 U.S. at 430.

150. *See id.* at 413.

151. *See id.* at 410. Discovery Network was prohibited from distributing on newsracks its free magazine which advertised recreational programs for adults in Cincinnati. *See id.* at 412.

152. *See id.* at 416.

153. *Id.* at 417 n.13 (citation omitted).

154. *Compare Discovery Network*, 507 U.S. at 417, *with Central Hudson*, 447 U.S. at 563.

the value of commercial speech."[155] The Court once again acknowledged the informational value of commercial speech and the reasons for protecting it: "The listener's interest [in commercial speech] is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue."[156]

The same year, the Supreme Court clarified *Central Hudson's* third element. In *Edenfield v. Fane*, a Florida law banned any in-person solicitation by certified public accountants.[157] The defendant, Fane, challenged this law as a serious obstacle to opening an accounting business in Florida because he would not be able to make unsolicited telephone calls in order to explain his qualifications to businesses.[158] Florida asserted that the ban was needed to protect consumers from fraud and deception because CPAs who solicit clients are "obviously in need of business and may be willing to bend the rules."[159] While the Court found that this was a substantial state interest, it did not find that it was advanced by a ban on in-person solicitation by CPAs.[160] The Court significantly increased commercial speech protection by requiring Florida to prove that its ban would advance the state's interest to a "material" degree.[161] In finding that Florida did not meet this burden, the Court explained that Florida did not submit any studies or evidence that showed that personal solicitation by CPAs was linked to fraud.[162] States would no longer be able to base restrictions of commercial speech on "mere speculation or conjecture," but would have to present some factually supported basis proving the need for the regulation.[163]

The Supreme Court in 1995 continued the trend towards stronger protection of commercial speech by requiring that the governmental interest be advanced in a material way. In *Rubin v. Coors Brewing Co.*, the Supreme Court heard a challenge by Coors to a U.S. Bureau of Alcohol, Tobacco and Firearms (BATF) regulation that denied Coors the right to display alcohol content on its beer labels or in advertisements on the grounds that it violated the Federal Alcohol Administration Act.[164] The government argued that the

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155. *Discovery Network*, 507 U.S. at 419.

156. *Id.* at 421 n.17 (quoting Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

157. *Edenfield v. Fane*, 507 U.S. 761, 763 (1993).

158. *See id.* at 764. "In Fane's experience, persuading a business to sever its existing accounting relations . . . requires the new CPA to contact the business and explain the advantages of the change." *Id.*

159. *Id.* at 765 (citation omitted).

160. *See id.* at 773.

161. *Id.* at 770-71. "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.*

162. *See id.* at 771.

163. *Id.* at 770-71.

164. *See* Rubin v. Coors Brewing Co., 514 U.S. 476, 478 (1995).

display of alcohol content would lead to alcoholic "strength wars" which would in turn lead to greater alcohol abuse.[165] The Court held that the government "failed to present any credible evidence showing that the disclosure of alcohol content would promote strength wars."[166] In addition, the Court once again noted that the "free flow of commercial information is 'indispensable to the proper allocation of resources in a free enterprise system' because it informs the numerous private decisions that drive the system."[167]

In the last commercial speech case to date, the Supreme Court affirmed the trend toward greater protection of commercial speech. The Court in *44 Liquormart v. Rhode Island* unanimously decided that a Rhode Island law banning the advertisement of retail liquor prices, except at the place of sale, was unconstitutional.[168] 44 Liquormart, a Rhode Island liquor store, was forced to pay a fine for violating the law when it placed an advertisement in a Rhode Island newspaper with the word "WOW" next to pictures of vodka and rum.[169] Although a specific price was not mentioned, the Rhode Island Liquor Control Administrator found that it implied "bargain prices for liquor" and therefore violated the ban.[170] The Court disagreed, a plurality stating that Rhode Island failed to justify the complete ban on price advertising and therefore unconstitutionally violated 44 Liquormart's First Amendment rights.[171]

Although the Court was unanimous in its decision, a majority of Justices could not agree on the rationale behind declaring the law unconstitutional; therefore it is difficult to determine how the Court will decide its next commercial speech case. However, there are two themes that give guidance as to whether or not Vermont's mandatory labeling law would pass constitutional scrutiny.

First, four members of the Court agreed that blanket bans on commercial speech should receive the same scrutiny as other First Amendment cases.[172] Four members of the Court also reiterated the importance of allowing the

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165. *Id.* at 479, 485. The federal government felt that brewers would try to compete on the basis of alcohol strength which would cause consumers to drink more high alcohol content beers. *See id.*

166. *Id.* at 489.

167. *Id.* at 481 (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976)).

168. *See* 44 Liquormart v. Rhode Island, 116 S. Ct. 1495 (1996) (plurality opinion).

169. *See id.* at 1503.

170. *Id.*

171. *See id.* at 1515.

172. *See id.* at 1507. "When a state entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the *rigorous review* that the First Amendment generally demands." *Id.* (emphasis added).

public to receive commercial messages, first voiced in *Virginia Pharmacy*.[173] Bans on advertisements of truthful commercial speech close the channels of communication and counteract the public interest of having intelligent and well-informed citizens and should not be upheld. In contrast, Vermont's labeling law attempted to provide consumers with information about the milk they were going to purchase but the Second Circuit effectively closed that channel of communication.

Second, although two members of the Court were dissatisfied with the *Central Hudson* test, eight acknowledged that it is the test that the Court must apply.[174] The Court did, however, expand protection for commercial speech by reworking the fourth element of the *Central Hudson* test.[175] The Court will interpret the "no more extensive than necessary" element more restrictively by requiring states to pursue non-speech restrictions if they would also accomplish the state goal:

> It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance. . . . [H]igher prices can be maintained either by direct regulation or by increased taxation. Per capita purchases could be limited as is the case with prescription drugs.[176]

After *44 Liquormart*, it could be argued that states must explore *any* non-speech regulation, no matter how onerous, before enacting a total ban on speech. Vermont's labeling law, however, was not a total ban on speech but instead was a way to inform consumers of certain information. Therefore, it is possible that *Central Hudson* is not relevant to mandatory labeling laws and

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173. *See id.* at 1504-05.

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Id. at 1505 (quoting *Virginia Pharmacy*, 425 U.S. at 765).

174. *See 44 Liquormart*, 116 S. Ct. at 1495. Justice Scalia in his concurrence explained that he felt uncomfortable with the *Central Hudson* test because it had "nothing more than policy intuition to support it." *Id.* at 1515. However, Scalia acknowledged that since the Court has not done away with the *Central Hudson* test, commercial speech cases must go through its four-part analysis. *See id.*

On the other hand, Justice Thomas would like the Court not to apply the *Central Hudson* test when "the asserted interest is one that is to be achieved through keeping would-be recipients of the speech in the dark. Application of the advancement-of-state-interest prong of *Central Hudson* makes little sense to me in such circumstances." *Id.* at 1518. Therefore, Thomas would most likely not apply the *Central Hudson* test to the Vermont labeling law.

175. *Id.* at 1510 (citation omitted).

176. *Id.*

should be reserved for only *restrictions* on speech. However, as was explained earlier, this situation has never been presented to the Supreme Court. Since Vermont's rbGH labeling law involved commercial speech, its application to the modern version of *Central Hudson* should be explored.

C. Central Hudson Test Applied

Vermont's mandatory labeling law for rbGH would have survived First Amendment scrutiny under the *Central Hudson* test. First, the rbGH labeling law easily meets the first element of the *Central Hudson* test. The speech that Vermont required from dairy associations did not involve an unlawful activity or misleading information. Instead, it mandated truthful commercial information about milk products.

Second, Vermont had a substantial interest in mandating labeling to provide the public with information necessary to make informed decisions. The Second Circuit in *International Dairy II* explained that "consumer interest and the public's 'right to know' . . . were insufficient to justify compromising protected constitutional rights."[177] However, the dissent pointed out that "the majority justifies its conclusion of absence of a substantial interest by its assertion that Vermont advanced no interest other than *consumer curiosity*, a conclusion that is contradicted by both the record and the district court's findings."[178] Therefore, it seems that upon a showing that more than "curiosity" sparked the law, Vermont's "substantial interest" argument would be strengthened.

Vermont also had a substantial interest in protecting small dairy farmers.[179] Historically, Vermont has tried to protect the small dairy farmer and has enacted programs throughout the years to help them remain economically viable.[180] This law protected small producers who would have

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177. *Int'l Dairy II*, 92 F.3d at 67, 73 (quoting *Int'l Dairy I*, 898 F. Supp. at 249).

178. *Id.* at 78 (emphasis added).

179. This interest does not contradict the dormant commerce clause analysis because Vermont was not attempting to protect all Vermont dairy farmers from competition from farms located in other states. Instead, Vermont was trying to protect Vermont's small family-owned farms from large dairy farms located within Vermont and elsewhere.

180. *See* VERMONT ECONOMIC DEVELOPMENT AUTHORITY, AGRICULTURAL LENDING PROGRAMS; 1994 VERMONT ECONOMIC DEVELOPMENT AUTHORITY ANNOTATED REPORTERS 1. The Vermont Development Authority has designed a number of financing programs for Vermont's family farms. *See id.* Two examples are the Agricultural Finance Program and the Debt Stabilization Program. *See id.* The Agricultural Finance program provides family farmers with low-interest, variable rate loans to "fund real estate purchases, refinance livestock, machinery and equipment acquisitions." *Id.* The Debt Stabilization Program helps family farmers refinance operating debt through low-interest, variable rate loans up to $200,000. *See id.* at 2. The Debt Stabilization Program is often the only program available to small family farmers to keep them operating. *See id.* at 1.

suffered financially if they did not use rbGH and provided consumers with information so they could choose not to buy "rbGH milk." The stabilization of a specific industry can be a substantial governmental interest.[181]

Third, Vermont's mandatory labeling law "directly advances" its interest of helping small dairy farmers remain economically viable in a "material" way. Vermont's position is supported by a U.S. Department of Agriculture economist who stated that if "rBST is heavily adopted and milk prices are reduced, at least some of the smaller farmers that do not use rBST might be forced out of the dairy business, because they would not be producing economically sufficient volumes of milk."[182] However, since price and brand are currently the two most popular factors affecting consumer's choice of milk, Vermont would have to provide statistics showing that consumers would take into account rbST to save the small farmer if they had the choice.[183]

Fourth, the question of whether there are less restrictive means of furthering the state's interest presents a difficulty. In *44 Liquormart*, the plurality explained that: "[i]t is perfectly obvious that alternative forms of regulation that would not involve *any restriction on speech* would be more likely to achieve the State's goal . . . ."[184] Thus, it appears that if Vermont could protect the small farmer in ways that would not infringe upon a milk producer's right *not* to speak, those measures would have to be adopted.

There are, however, two arguments that can be made against that position. First, *44 Liquormart* is distinguishable because it involved a total ban on speech. Vermont was not trying to keep consumers in the dark but was trying to inform them of certain valuable information. Second, in striking down the advertising ban, the Court stressed the importance of consumers being able to make informed, intelligent decisions. Thus, the consumer's right to know should satisfy the least extensive means analysis.

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181. The Second Circuit should adopt the reasoning of the Ninth Circuit and the Third Circuit in finding that economic interests are substantial. *See* Cal-Almond, Inc. v. United States Dep't of Agric., 14 F.3d 429, 436 (9th Cir. 1993) (holding that "stimulating the demand for almonds in order to enhance returns to almond producers and stabilize the health of the almond industry is a substantial state interest"); United States v. Frame, 885 F.2d 1119, 1134 (3d Cir. 1989) (finding that the "interest advanced by the Beef Promotion Act is primarily economic [but that] does not diminish its importance" and therefore, the "interest in maintaining and expanding beef markets proves . . . compelling").

182. *Int'l Dairy II*, 92 F.3d at 78.

183. Lee Berquist, *BGH Still Hasn't Gained Favor Among State's Dairy Farmers*, MILWAUKEE J. SENTINEL, Aug. 22, 1996, at 1.

184. *44 Liquormart*, 116 S. Ct. at 1510 (emphasis added).

V. CONCLUSION

Drafting a mandatory labeling law for genetically-altered food products is not an easy task, but it is possible. Vermont's rbST mandatory labeling law is a good example because it was written with the goal of providing consumers with the information that they have shown a strong desire to receive. Although the FDA has determined that Posilac will not cause health effects adverse to humans, that should not be a reason to deny consumers the right to know when their milk has been produced from cows injected with rbST. Congress has passed laws in the past that enable consumers access to information that they consider important. For example, Congress has passed requirements for labeling tuna "dolphin safe."[185] Tuna that is caught in nets along with dolphins is "nutritionally" the same as tuna that is caught in nets without dolphins. And yet, Congress determined that consumers have a right to know that dolphins are being protected. The same rationale should apply to Vermont's mandatory rbST labeling law. The consumers of Vermont have made it extremely clear that they want the information and as long as the law can survive constitutional scrutiny, it should be within Vermont's power to provide it to them.

Vermont's mandatory labeling law has a good chance of surviving constitutional scrutiny under the: (1) Supremacy Clause; (2) Commerce Clause; and (3) First Amendment. Under the Supremacy Clause, the FDA did not preempt states from passing labeling laws consistent with the federal Food, Drug and Cosmetic Act. Under the Commerce Clause, the mandatory labeling law did not discriminate between in-state and out-of-state milk producers and did not burden interstate commerce. Finally, under the First Amendment, the mandatory labeling law would survive the modern *Central Hudson* test. The rationale behind the First Amendment protection of commercial speech is to allow consumers access to information. Vermont listened to its consumers and provided them with the information that they wanted and needed. States should not be discouraged by the Second Circuit's opinion because it is possible to pass an impartial mandatory labeling law for genetically-altered food products.

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185. Dolphin Safe Tuna Labeling, 50 C.F.R. §§ 216.90-216.95 (1996); *see Dolphin Law Has Served its Purpose; Reform It*, USA TODAY, Dec. 27, 1996, at 12A, *available in* 1996 WL 15362371.