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TITLE: THE “SECRET” RECIPE: WHY FOOD COMPANIES CANNOT BE FORCED TO LABEL GENETICALLY ENGINEERED FOODS

Angelo Cerimele *

I. Introduction

Labels on food and drink give Americans expansive knowledge of what they will potentially consume. In any given packaged product, we know how many calories there are per serving, how many grams of protein there are, and what the active ingredients are. We know not only the fat content of food, but also how much of the fat is saturated, how much is unsaturated, and how much is unnatural trans-fat. Labels on products such as cigarettes and alcohol contain morbid warnings of health defects and openly tell people that it is against their best interests to consume the products.

Labels are silent, however, regarding genetically engineered foods (GEs) and genetically modified organisms (GMOs), even though most foods in America contain genetically modified ingredients. If a person does not actively seek organic foods, he or she is almost certainly consuming ingredients derived from GE plants or treated with GMOs on a daily basis. The United States has the least restrictive regulations regarding GE use; over sixty countries have mandated that GEs be labeled.¹ To some Americans, this is utterly unacceptable. “[I]t’s frustrating and offensive,” says Center for Food Safety executive director Andrew Kimbrell, “that Americans are denied the information about their food that those in Kenya and Saudi Arabia receive.”²

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¹ *International Labeling Laws*, CTR. FOR FOOD SAFETY, <http://www.centerforfoodsafety.org/issues/976/ge-food-labeling/international-labeling-laws> (last visited Sept. 14, 2014).

² *Id.*

In June of 2014, Vermont became the first state to put into effect a law mandating all foods treated with GMOs and GEs to be labeled as such.³ Vermont statute (Act 120) that requires manufacturers to disclose when food has been produced with genetically engineered ingredients by labeling them as either produced, partially produced, or which may be produced with GE ingredients.⁴ Not surprisingly, Vermont's Attorney General was served with a complaint for preliminary injunction almost instantaneously once the governor signed the bill into law.⁵ The most powerful and wealthy agribusiness corporations will undoubtedly funnel money into this litigation, as they have to fight similar ballot propositions⁶, but it will end up being the United States Constitution that will be the biggest opposition for Vermont's mandatory labeling law, specifically the Dormant Commerce Clause and the First Amendment's "free speech" guarantee.

This note does not discuss the ethics of GEs use. Rather, it argues that the Constitution's Dormant Commerce Clause will strike down any state-sponsored GE labeling law like Vermont's, and that the First Amendment will protect against any government—whether state or federal—from compelling companies to label their products as treated with genetically modified organisms. Part II of this note will discuss what GMOs and GEs are, their history in America, and the recent legislative attempts to require the labeling of products treated with GMOs culminating with Vermont's Labeling

³ Dana Ford and Lorenzo Ferrigno, *Vermont governor signs GMO food labeling into law*, CNN (May 8, 2014, 9:17 PM), <http://www.cnn.com/2014/05/08/health/vermont-gmo-labeling/>.

⁴ 2014 Vt. Acts & Resolves No. 120 (hereinafter "Vermont Law")

⁵ Nancy Remsen, *Lawsuit challenges Vermont's GMO labeling law*, USA TODAY (June 12, 2014, 8:58 PM), <http://www.usatoday.com/story/news/nation/2014/06/12/lawsuit-challenges-vermonts-gmo-labeling-law/10402301/>

⁶ For example, prior to a Washington state vote on a labeling bill, the Grocery Manufacturers Association funded over \$22 million for the bill's opposition. Lecia Bushak, *PepsiCo, Coca-Cola, And Nestle Spend Millions To Fund Anti-GMO Labeling Campaign*, MEDICAL DAILY (Oct 31, 2013, 2:34 PM), <http://www.medicaldaily.com/pepsico-coca-cola-and-nestle-spend-millions-fund-anti-gmo-labeling-campaign-261598>.

Law, the first to be put into effect. Part III provides an in-depth analysis of the relevant Constitutional provisions that will challenge Vermont's Labeling Law. Part IV will argue why the Constitutional challenges will be too much for Vermont's Labeling Law to overcome. Part V concludes.

II. GEs and Legislative Attempts at Mandatory Labeling

A. What Are Genetically Engineered Crops?

In short, genetically engineered crops are plants whose genetic composition have been altered using biotechnology. "Biotechnology" includes various techniques that deliberately cut and/or insert DNA material in a plant to enhance a trait already carried by the plant or to introduce a gene that confers a valuable trait from another plant or organism.⁷ These techniques overcome natural physiological reproductive or recombinant barriers that are not possible in traditional breeding and selection.⁸ Genetic modification serves a variety of purposes that promote crop production that is much more effective and efficient.⁹ The biotechnology techniques can treat crops so that they can become resistant to pests and drought, help ease the use of chemical pesticides, and make the crops more apt to deal with changing conditions. Plants treated with GMOs can also be engineered to simplify farming, increase nutrients, or delay natural decay and rotting.¹⁰ The United States Department of Agriculture predicts that GEs may be used as "bioreactors" to

⁷ *Questions & Answers on Food from Genetically Engineered Plants*, U.S. FOOD AND DRUG ADMINISTRATION (July 22, 2014), <http://www.fda.gov/food/foodscienceresearch/biotechnology/ucm346030.htm>.

⁸ H.112, 2013-2014 Leg. Sess. (Vt. 2013) (defining the term "Modern Biotechnology"), *available at* http://www.fao.org/fileadmin/user_upload/gmfp/resources/CXG_044e.pdf.

⁹ Jolie Lee, *What You Need to Know About GMOs*, USA Today (January 3, 2014, 3:05 p.m.), <http://www.usatoday.com/story/news/nation-now/2014/01/03/gmo-genetically-modified-organism-facts-cheerios/4302121/>.

¹⁰ *Id.*

“produce large quantities of inexpensive pharmaceuticals, polymers, industrial enzymes, as well as modified oils, starches, and proteins” in order to benefit society in ways that were not previously possible.¹¹ The recently developed "Golden Rice", for example, is a GMO that has enhanced Vitamin A content and can be easily produced, and therefore can improve the diet of people in third world countries that rely upon rice as their main food source.¹²

Food and food ingredients from genetically engineered plants were commercially introduced into the United States food supply after the FDA first approved a GMO in 1994.¹³ Since then, the United States has been at the forefront of developing genetically engineered plant varieties and in building effective systems of regulatory review around them. Currently, approximately eighty-five percent of corn, ninety-one percent of soybeans, and eighty-eight percent of cotton produced in the United States are genetically engineered,¹⁴ and an estimated seventy percent or more of processed foods in America are derived from genetic engineering.¹⁵

The debate regarding the safety and efficacy of using genetically engineered foods is about as popular in society as GMOs are in foods; obviously, disapproval is inevitable whenever the food supply is influenced. A common argument used by those critical of agricultural biotechnology is to claim that, in just a few short decades, the

¹¹ *What Are GMO's?*, Pennsylvania Farm Bureau, http://www.pfb.com/index.php?option=com_content&view=category&layout=blog&id=64&Itemid=84&limitstart=1 (last visited Jan. 24, 2015).

¹² David Dawe, *Crop Case Study: GMO Golden Rice in Asia with Enhanced Vitamin A Benefits for Consumers*, 10 *AGBIOFORUM* 154 (2007)

¹³ The “Flavr Savr” Tomato, genetically modified to stay ripe for a longer period of time, was the first GE to hit the market. The Flavr Savr has since been removed from production, but it paved the way for what is now the ubiquitous GE food. Michael Winerip, *You Call That a Tomato?*, *NY TIMES* (June 24, 2013), <http://www.nytimes.com/2013/06/24/booming/you-call-that-a-tomato.html>.

¹⁴ Morgan Anderson Helme, *Genetically Modified Food Fight: The FDA Should Step Up to the Regulatory Plate so States Do Not Cross the Constitutional Line*, 98 *MINN. L. REV.* 356 (2013).

¹⁵ Laura Murphy, Jillian Bernstein & Adam Fryska, *More Than Curiosity: The Constitutionality of State Labeling Requirements for Genetically Engineered Foods*, 38 *Vt. L. Rev.* 477.

majority of America's food supply has been affected by biotechnology even though there has been little to no evaluation of the long-term safety of GE crops.¹⁶ Whether or not GEs are killing us slowly is still unknown, opponents maintain. Other labeling proponents have focused their message not on attacking GMOs themselves, but on consumers' right to information.¹⁷ The "ostensible goal" of mandatory labeling is "to provide consumers with facts so that they can make informed choices about the food they purchase."¹⁸

Conversely, proponents of GEs argue that opposition to GMOs is nothing more than a dangerous mania not rooted in scientific fact, and "the people in the grip of it are akin to those who refuse to vaccinate their children or who deny that human activity is changing the Earth's climate."¹⁹ GEs lower food cost, increase production, stabilizing farming, and make the crops immune to draught or other natural crisis, all without being inherently dangerous.²⁰ To this end, Republican Mike Pompeo of Kansas states, "[w]e've had people create food scares not based on science many times in the history of the United States. This is not a new phenomenon."²¹

B. How Does the United States Regulate GEs?

¹⁶ Molly Ball, *Want to Know If Your Food Is Genetically Modified?*, THE ATLANTIC (May 14, 2014), available at <http://www.theatlantic.com/features/archive/2014/05/want-to-know-if-your-food-is-genetically-modified/370812>.

¹⁷ *Id.* ("This bill is not a judgment about whether you should or shouldn't eat foods that are GMO-based," says Vermont governor Peter Shumlin. "We're simply saying when you read the ingredients of what you buy, you ought to be able to know if you're eating a GMO-based product.").

¹⁸ Ross H. Pifer, *Mandatory Labeling Laws: What Do Recent State Enactments Portend for the Future of GMOs?*, 118 PENN ST. L. REV. 789 (2014).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

In 1938, Congress passed the Federal Food, Drug, and Cosmetic Act (FDCA) which provides the basic framework for regulation of food to this day.²² It organized federal food regulations, with the U.S. Food and Drug Administration (FDA) receiving authorization to establish enforceable standards for adulterated and misbranded food.²³ Adulterated food is defined in Section 342 of the FDCA as food containing "any poisonous or deleterious substance which may render it injurious to health," that which contains or may have been contaminated with "filth," or that which has been altered to increase its bulk or value.²⁴ The FDA, therefore, derives authority through the third category to regulate the safety of foods and food products from genetically engineered sources.²⁵

GEs must meet the same requirements, including safety requirements, as foods from traditionally bred plants.²⁶ To do so, the food manufacturer identifies "whether any new material that a person consumed in food made from the genetically engineered plants could be toxic or allergenic ... compares the levels of nutrients in the new genetically engineered plant ... and includes such nutrients as fiber, protein, fat, vitamins, and minerals. The FDA then evaluates for safety and compliance with the law."²⁷ Additionally, the FDA uses a consultation process that urges developers of genetically engineered plants to consult with the FDA before marketing their genetically modified products; "[t]his process helps developers determine the necessary steps to ensure their food products are safe and lawful. The goal of the consultation process is to ensure that

²² See generally 21 U.S.C. §§ 301-399 (2006).

²³ *Id.*

²⁴ 21 U.S.C. § 342.

²⁵ Helme *supra* note 14.

²⁶ *Questions & Answers on Food from Genetically Engineered Plants*, U.S. FOOD AND DRUG ADMINISTRATION (July 22, 2014), <http://www.fda.gov/food/foodscienceresearch/biotechnology/ucm346030.htm>

²⁷ *Id.*

any safety or other regulatory issues related to a food product are resolved before commercial distribution.”²⁸

The Food Additives Amendment of 1958 gave the FDA power to require pre-approval of substances added to food.²⁹ A food additive is defined as that which may reasonably become a component of the food or affect the food's characteristics if it is "not generally recognized, among experts qualified by scientific training and experience to evaluate its safety ... to be safe under the conditions of its intended use."³⁰ An exception to this definition is substances generally recognized as safe.³¹ The FDA recognizes GMOs as safe.³²

The Nutrition Labeling and Education Act (NLEA) supplanted labeling requirements in favor of uniform, mandatory nutritional labeling controlled by the FDA, with express federal preemption over any non-identical state requirements. It is within this regulatory framework that the FDA considers the use of new plant varieties developed through genetic modification in food. ³³

Despite the current regulations, some consumers demand an increasing general tendency "toward identifying foods by process as well as content attributes."³⁴ New technologies and industrial methods of production raise "fundamental questions about the balance between public-and private-sector decisions ... [and raises] the problem of

²⁸ *Id.*

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

³⁰ *Id.*

³¹ *Id.*

³² Helme *supra* note 14.

³³ *Id.*

³⁴ Martha Dragich, *Do You Know What's on Your Plate? The Importance of Regulating the Processes of Food Production*, 28 J. ENVTL. L. & LITIG. 385, 392 (2013).

distinguishing between risk and quality goals.”³⁵ In spite of these concerns, neither the FDA nor any other federal regulatory body has required food manufacturers of GEs to label their food products as such. The FDA indicates, however, that food producers may specify through voluntary labeling whether foods have or have not been developed through genetic engineering, provided that such labeling is truthful and not misleading.³⁶ Indeed, the FDA “supports voluntary labeling” in order to keep curious consumers informed, and supplies draft guidance to the industry for labeling.³⁷

The FDA has nonetheless demonstrated an ability and willingness to analyze and regulate inorganic processes that have been proven harmful. For example, in 2011, the FDA cited published scientific reports “that indicated that organic arsenic, a less toxic form of arsenic and the form present in 3-Nitro® (roxarsone), an approved animal drug, could transform into inorganic arsenic.”³⁸ In response to the studies’ findings, FDA scientists developed an analytical method that could detect inorganic arsenic in edible tissue.³⁹ This method revealed that levels of inorganic arsenic were greater in the livers of chickens treated with 3-Nitro® than in the livers of the untreated control chickens.⁴⁰ Although the FDA could not conclude that consuming trace amounts of inorganic arsenic

³⁵ *Id.*

³⁶ See *supra* note 24

³⁷ *Guidance for Industry: Voluntary Labeling Indicating Whether Foods Have or Have Not Been Developed Using Bioengineering; Draft Guidance*, U.S. FOOD AND DRUG ADMINISTRATION (Dec. 16, 2014), available at <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/ucm059098.htm>

³⁸ *3-Nitro (Roxarsone) and Chicken*, U.S. FOOD AND DRUG ADMINISTRATION (Jan. 23, 2013), <http://www.fda.gov/AnimalVeterinary/SafetyHealth/ProductSafetyInformation/ucm257540.htm>

³⁹ *Id.*

⁴⁰ *Id.*

poses a health risk, the FDA study prompted the 3-Nitro® producer, a subsidiary of Pfizer, Inc., to suspend the sale of the product.⁴¹

C. Legislative Attempts at Mandatory GMO Labeling

Some states have attempted to take more affirmative action to mandate GE labeling. To date, there have been 84 bills proffered on GMO labeling in 29 states.⁴² The majority of these states, however, failed to codify any mandatory practices. Four states—Colorado,⁴³ Washington, Oregon and California—left the issue to the voters to decide.⁴⁴ All propositions have thus far failed in the polls.⁴⁵

Proponents of these measures often argue that consumers' right-to-know is important in making well-informed food choices so that those who choose an organic diet can be encouraged to do so. Opponents argue that such labeling will increase food cost for consumers and add heavy burdens on farmers and the agricultural industry as a whole for minimal benefit. There are no scientific health risks associated with GMOs, they argue, and labeling measures will not include non-retail packaged food and food served at restaurants, so the laws fall short of any intended purpose.

⁴¹ *Id.*

⁴² Ball *supra* note 16.

⁴³ For an example, the following language is what would have been added to food labels, which was presented to Colorado voters on the ballot:

“Shall there be a change to the Colorado Revised Statutes concerning labeling of genetically modified food; and, in connection therewith, requiring food that has been genetically modified or treated with genetically modified material to be labeled, "Produced With Genetic Engineering" starting on July 1, 2016; exempting some foods including but not limited to food from animals that are not genetically modified but have been fed or injected with genetically modified food or drugs, certain food that is not packaged for retail sale and is intended for immediate human consumption, alcoholic beverages, food for animals, and medically prescribed food; requiring the Colorado department of public health and environment to regulate the labeling of genetically modified food; and specifying that no private right of action is created for failure to conform to the labeling requirements?”

Prop 105: Colorado mandatory labeling of GMOs fails, 9NEWS (Nov. 4, 2014), <http://www.9news.com/story/news/politics/elections/2014/11/04/prop-105-colorado-mandatory-labeling-of-gmos-results/18442619/>.

⁴⁴ *Id.*; Helme *supra* note 14.

⁴⁵ Ball *supra* note 16.

Despite these failures, some states have found success in legislation. Both Connecticut and Maine have past labeling bills.⁴⁶ However, both states' labeling requirements are contingent on a "trigger" mechanism: the requirements won't take effect unless several neighboring states take the same step.⁴⁷

In June 2014, Vermont became the first state to both pass a mandatory labeling law and put it into effect. Act 120 (hereinafter "Vermont's Labeling Law") would amend Title 9 of the Vermont Statutes to include a new chapter, 82A: "Labeling of Food Produced with Genetic Engineering."⁴⁸ Act 120 imposes obligations on manufacturers to label foods "produced entirely or in part from genetic engineering" with scripted statements,⁴⁹ and also prohibits said foods from being labeled as "natural", "naturally made", "naturally grown", "all natural," or any "words of similar import" on any signage or advertisements.⁵⁰ The operative provisions of Act 120 take effect July 1, 2016.⁵¹

Importantly, Section 3044 of the Act lists exemptions for (1) food "derived entirely from an animal which has not itself been produced with genetic engineering," such as meat and milk; (2) foods sold in restaurants; (3) alcoholic beverages; and (4) processing aids and enzymes.⁵² Food producers in violation of these provisions would be subject to civil penalties of up to \$1,000 per day, per product.⁵³

III. Constitutional Provisions That Will Challenge Vermont's Labeling Law

⁴⁶ Elaine Watson, *Maine House Backs GMO Labeling Bill*, FOOD NAVIGATOR-USA (June 12, 2013), <http://www.foodnavigator-usa.com/Regulation/Maine-House-backs-GMO-labeling-bill>.

⁴⁷ <http://www.theatlantic.com/features/archive/2014/05/want-to-know-if-your-food-is-genetically-modified/370812/>.

⁴⁸ 2014 Vt. Acts & Resolves No. 120 ("Act 120"), *codified at* 9 V.S.A. §§ 3041-3048

⁴⁹ 9 V.S.A. § 3043(a),(b)

⁵⁰ *Id.* at § 3043(c)

⁵¹ *Id.*

⁵² *Id.* at § 3044

⁵³ *Id.*

Vermont's labeling law will first need judicial approval before actually being implemented. As expected, groups representing the U.S. food industry sued Vermont not long after Vermont Governor Peter Shumlin signed the labeling law. In June 2014, the Grocery Manufacturers Association, among other trade groups, filed a complaint against the Attorney General of Vermont, William Sorrell, seeking to overturn Vermont's law on Constitutional grounds.⁵⁴ The Grocery Manufacturers Association and other food industry groups seek a declaratory and preliminary injunction to Vermont's labeling law, describing it as a costly and unnecessary measure that would trample food groups' constitutional rights.⁵⁵ The Plaintiffs assert that the labeling law is unconstitutional on five counts as a violation of the First, Fifth, and Fourteenth Amendments, the Commerce Clause of Article I, and because it is preempted by existing federal law.⁵⁶

This article focuses specifically on the Commerce Clause and the First Amendment Free Speech issues. This Part outlines the constitutional provisions as they stand today, and Part IV will argue why the Commerce Clause prohibits any state from enacting such a labeling law, and why the First Amendment prohibits any level of government—state or federal—from enacting such legislation.

A. Dormant Commerce Clause

The Commerce Clause gives Congress exclusive power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."⁵⁷ All interstate commerce, consequently, is under plenary Congressional Control. The modern view of the Commerce Clause allows Congress to (1) regulate the channels of interstate

⁵⁴ Complaint for Declaratory and Injunctive Relief, Grocery Mfrs. Ass'n v. Sorrell (D. Vt., June 12, 2014) (No. 5:14-cv-00117-cr) (hereinafter "GMA Complaint")

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ U.S. Const. art. I, § 8, cl. 3.

commerce; (2) protect the instrumentalities, persons, and things involved with interstate commerce from any threat; and, (3) regulate those activities having a "substantial relation to interstate commerce."⁵⁸ Justice Marshall defines commerce as "intercourse" between all phases of business, which encompasses all things that may affect commerce—not just manufacturing, trafficking, buying, selling, etc.⁵⁹

While the Commerce Clause does not expressly prohibit individual States from implementing regulation that might affect interstate commerce, the Supreme Court has long recognized a dormant aspect to the commerce clause (aptly named the “dormant commerce clause”) that implies a corresponding restriction on the power of States to enact laws that impose burdens on interstate commerce.⁶⁰ The Supreme Court has established a two-pronged test to determine whether a state law violates the dormant commerce clause of the U.S. Constitution.⁶¹ First, a court will determine whether the law in question is facially protectionist, meaning a state is attempting to erect barriers to trade in order to protect the economic activities of local residents.⁶² If a state law directly regulates or discriminates against interstate commerce or has an effect that favors in-state economic interests over out-of-state interests, the state law is presumptively invalid and will be "generally struck down ... without further inquiry."⁶³ A statute that clearly discriminates against interstate commerce in favor of intrastate commerce is per se

⁵⁸ U.S. v. Lopez, 514 U.S. 549, 558-59 (1995).

⁵⁹ Gibbons v. Ogden, 22 U.S. 1, 189 (U.S.1824).

⁶⁰ S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87 (1984) ("Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce.")

⁶¹ Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 578-79 (1996).

⁶² *Id.*

⁶³ *Id.*

invalid and can only survive if the discrimination is justified by a valid, recognized exception unrelated to economic protectionism.⁶⁴

Second, if the statute does not employ facial protectionism, but rather “has only indirect effects on interstate commerce and regulates evenhandedly,” then courts apply a balancing test—the *Pike* balancing test—to determine whether the burden on interstate commerce clearly exceeds the local benefits.⁶⁵ State action will burden interstate commerce when it “(i) shifts the costs of regulation onto other states, permitting in-state lawmakers to avoid the costs of their political decisions, (ii) has the practical effect of requiring out-of-state commerce to be conducted at the regulating state's direction, or (iii) alters the interstate flow of the goods in question.”⁶⁶ If the Court discovers a legitimate local purpose, “then the question becomes one of degree.”⁶⁷ The state interest will be weighed against the burden imposed on interstate commerce, and whether the interest could be supported by an alternative course of action with a lesser impact on interstate activities.⁶⁸

In short, the Supreme Court established a legal analytical framework that prompts courts to ask the following questions when adjudicating a state law that affects interstate commerce: (1) Is the state statute facially protectionist? (2) If not, is a legitimate local interest promoted? Does the interest outweigh the burden imposed on interstate

⁶⁴ *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 216 (2d Cir. 2004); One such exception, quarantine laws, would justify protectionism in order to protect the health of citizens of the state. If verification is found that GEs are harmful if consumed, any legislation warning against GE use would be valid.

⁶⁵ *Id.*; *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (“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.”)

⁶⁶ *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200 (2d Cir. 2003).

⁶⁷ *Id.*

⁶⁸ *Id.*

commerce? And are there alternative ways to promote local benefits without burdening interstate commerce?

The Second Circuit, the appellate court that would hear any appeal arising from *Grocery Manufacturers Association*, has previously employed the *Pike* balancing test to a case with related facts. In *Association of International Automobile Manufacturers v. Abrams*⁶⁹, which Plaintiffs in *Grocery Manufacturers Association* rely upon in a recently filed motion in opposition of dismissal⁷⁰, automobile manufacturers brought suit challenging a New York law that required a label to be affixed to new cars stating the maximum speed that would cause only minimal damage to the bumper upon impact.⁷¹ The Second Circuit recognized that, if state regulation affects interstate commerce, “though not distinguishing between articles of commerce on the basis of their domestic or out-of-state origins ... the regulation will not be found to burden commerce impermissibly unless, on balance, the detriments to interstate commerce clearly outweigh the benefits to legitimate local public interests.”⁷²

New York’s legislative history indicated that the legislators sought to make information available that would allow customers to intelligently compare vehicles with respect to safety, repair costs, and insurance costs.⁷³ The Legislators posited that stronger bumpers would satisfy these concerns.⁷⁴ The Court, however, thought the benefits of stronger bumpers were “debatable.”⁷⁵ The Court found that the legislative goals behind

⁶⁹ 84 F.3d 602 (2d Cir. N.Y. 1996)

⁷⁰ Brief for Respondent at 18-20, *Grocery Manufacturers Association v. Sorrell*, No. 5:14-cv-117-cr (D. Vt. Sept. 11, 2014).

⁷¹ *Id.* at 605.

⁷² *Id.* at 612.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* (“For example, AIA submitted an affidavit...stating that...stronger bumpers will decrease costs is superficial because (a) stronger bumpers increase a car's weight, thereby generally increasing exhaust

the law could not automatically satisfy the *Pike* balancing test, especially with strong competing interest.⁷⁶ Whenever there are genuine issues as to the claimed burdens or the putative benefits of a state action affecting interstate commerce, the *Pike* test is a triable issue of fact.⁷⁷

B. First Amendment Corporate Speech

Among the most noteworthy contentions at issue in *Grocery Manufacturers Association* is that the law violates food companies' First Amendment right to refrain from speaking.⁷⁸ According to the complaint, Vermont's food labeling law "compels manufacturers to use their labels to convey an opinion with which they disagree, namely, that consumers should assign significance to the fact that a product contains an ingredient derived from a genetically engineered plant."⁷⁹

The First Amendment to the U.S. Constitution, as incorporated against the States by the Fourteenth Amendment, prohibits any government entity from acting to abridge the freedom of speech.⁸⁰ It protects "both the right to speak freely and the right to refrain from speaking at all."⁸¹ "Free speech" is considered one of the most fundamental privileges of the American society and absolutely essential to American democracy. If government can restrict speech, it has potential to distort that debate through suppression of opposing viewpoints or through compelling communication of a specific viewpoint. As such, the judiciary zealously prioritizes free speech over state action that may affect speech in any way, unless the state action definitively protects against a clear danger or is

emissions and decreasing fuel economy, and (b) some bumper impacts have resulted in unusually expensive." (internal quotations omitted)).

⁷⁶ *Id.* at 613.

⁷⁷ *Id.*

⁷⁸ GMA Complaint at 13.

⁷⁹ *Id.*

⁸⁰ U.S. Const. amend. I.

⁸¹ *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

conclusively for the greater good.

A state action will be presumed unconstitutional if it affects speech unless the restriction of speech is absolutely necessary to achieve a state interest.⁸² Courts analyze such state action with strict scrutiny, and will only uphold the action if it serves a compelling government interest and is narrowly tailored to be the least intrusive method to restrict speech.⁸³ As Justice Brandeis explains:

To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one.⁸⁴

The judiciary, however, treats commercial or corporate speech, such as advertisements and product labels, more sensitively because of competing interests. On the one hand, as discussed *supra*, courts skeptically approach legislation that affects free speech and wish to protect the speaker against everything except a compelling government interest. Business entities are entitled to the same protection. On the other hand, however, commercial expression is unique because of its pervasive nature in society, reaching vulnerable consumers with broad and expedient dissemination. Corporate speech, therefore, can manipulate societal interest.

⁸² Bd of Trustees of SUNY v. Fox, 492 U.S. 469, 480 (1989)

⁸³ *Id.* (When regulating speech, a State must employ "a means narrowly tailored to achieve the desired objective.").

⁸⁴ Whitney v. Cal., 274 U.S. 357 (1927).

Commercial or corporate speech is defined as expression related solely to the economic interests of the speaker and its audience.⁸⁵ The special nature of commercial speech authorizes the State to regulate potentially deceptive advertising more freely than other forms of protected speech, and requires less than strict review of such regulations. The Supreme Court posited, however, that “regulations that entirely suppress commercial speech in order to pursue a policy not related to consumer protection must be reviewed with ‘special care,’ ... such blanket bans should not be approved unless the speech itself was flawed in some way, either because it was deceptive or related to unlawful activity.”⁸⁶

When a state attempts to regulate commercial speech by prohibiting deceptive messages or requiring the disclosure of information, it has the burden to prove the regulation protects the consumers receiving the message. If the state can satisfy this burden, the regulation's purpose justifies less than strict review.⁸⁷ Where a state's reasons are unrelated to the preservation of a fair bargaining process or the concern for public welfare, however, then there is no reason not to employ the rigorous review that the First Amendment generally demands. The Supreme Court cautioned against government actions suppressing or compelling speech for purely paternalistic purposes, and rejected the view that government has complete power to suppress or regulate commercial speech: “[People] will perceive their own best interests.”⁸⁸

⁸⁵ *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980) (“Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.”).

⁸⁶ 44 *Liquormart v. Rhode Island*, 517 U.S. 484, 500 (1996).

⁸⁷ *Id.*

⁸⁸ *Cent. Hudson*, 447 U.S. at 593 n.5.

As such, the Court established a four-part analysis to determine whether restraining or compelling corporate speech is constitutional. First and foremost, misleading or illegal speech is not protected.⁸⁹ For example, false advertisements (misleading) and advertisements for cocaine (illegal) are not protected by the First Amendment. If the speech is truthful and non-misleading, a court next asks whether the asserted governmental interest is substantial.⁹⁰ If the court answers in the affirmative, the court must then determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. In this analysis, the government bears the burden of identifying a substantial interest and justifying the challenged restriction.⁹¹

To again look to binding precedent on the District of Vermont, the Second Circuit has already faced a similar issue limiting state labeling requirements. In 1996, the appeals court struck down a Vermont law that required manufacturers to disclose whether products come from cows that have been treated with growth hormones, namely “rBST”.⁹² The FDA approved the use of rBST and, therefore, did not require the labeling of products derived from cows receiving the supplemental hormone.⁹³ In response, Vermont enacted a statute requiring that “if rBST has been used in the production of milk or a milk product for retail sale in this state, the retail milk or milk product shall be labeled as such.”⁹⁴ The regulation required a label to say both that the product may contain rBST hormones, and the following disclaimer:

⁸⁹ *Id.* at 564.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *International Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 69 (2d Cir. 1996).

⁹³ *Id.*

⁹⁴ *Id.*

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.⁹⁵

Various dairy manufacturers consequently brought suit requesting an injunction from the court, claiming it violated the First Amendment of the U.S. Constitution.⁹⁶ The District Court denied the preliminary injunction and the case was appealed to the Second Circuit, who reversed the decision. Recognizing the great protection the Constitution gives to free speech, the circuit court placed the burden on Vermont to justify its labeling law.⁹⁷ Relying on the Supreme Court's clarification in *Edenfield v. Fane*⁹⁸, they stressed that 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."⁹⁹

The Second Circuit granted the injunction because the statute caused the dairy manufacturers irreparable harm.¹⁰⁰ The constitutional right *not* to speak, the Court articulated, is a serious one, and therefore compelled speech contradicts basic First

⁹⁵ *Id.* at 70.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ 507 U.S. 761, 113 S. Ct. 1792, 1798, 123 L. Ed. 2d 543 (1993)

⁹⁹ *International Dairy*, 92 F.3d at 67. (citing *Edenfield v. Fane*, 507 U.S. 761, 113 S. Ct. 1792, 1798, 123 L. Ed. 2d 543 (1993))

¹⁰⁰ *Id.* (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (It is established that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.")).

Amendment values.¹⁰¹ This constitutional protection extends to statements of fact as well as statements of opinion.¹⁰²

Vermont did not disagree; rather, they argued that corporate speech does not warrant such swift dismissal when a statute aims to protect the consumer.¹⁰³ This argument inspired the Second Circuit into its most precedential finding in the case: that consumer curiosity alone is not a strong enough state interest to permit the compulsion of even an accurate, factual message.¹⁰⁴ Vermont could not claim that rBST posed any health or safety concerns.¹⁰⁵ Instead, the State defended the statute on the basis of strong consumer interest and the public's right to know.¹⁰⁶ These interests, nevertheless, “are insufficient to justify compromising protected constitutional rights.”¹⁰⁷

The Court stressed that a concern for public safety would absolutely be sufficient to satisfy Vermont’s burden.¹⁰⁸ But, because FDA and other relevant studies concluded that rBST has no appreciable effect on the composition of milk produced by treated cows and that there are no human safety or health concerns associated with food products derived from cows treated with rBST, Vermont’s purpose was not substantial enough to infringe on First Amendment rights.¹⁰⁹ Consumer interest alone is insufficient to “justify requiring a product's manufacturers to publish the functional equivalent of a warning about a production method that has no discernable impact on a final product.”¹¹⁰

¹⁰¹ *Id.* at 71.

¹⁰² *Id.*

¹⁰³ *Id.* at 76.

¹⁰⁴ *Id.* at 74.

¹⁰⁵ *Id.* at 77.

¹⁰⁶ *Id.* at 73.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* (“We do not doubt that Vermont's asserted interest, the demand of its citizenry for such information, is genuine; reluctantly, however, we conclude that it is inadequate.”).

¹¹⁰ *Id.*

IV. The Dormant Commerce Clause and the First Amendment Will Estop Any Labeling Legislation from Being Passed

A. Dormant Commerce Clause

The Dormant Commerce Clause presents a significant hurdle to Vermont's law, and will inevitably impede other states that may attempt to pass similar legislation in the future. As aforementioned, the District Court that will soon review Vermont's labeling law will first determine if the statute is facially protectionist.¹¹¹ If so, the law will be struck down without any further inquiry. If not, the Court will apply the *Pike* balancing test to determine whether state interest outweighs the burden placed on interstate commerce, and/or if there are alternatives to satisfy those interests without burdening interstate commerce.¹¹²

Regarding a GMO labeling requirement, food manufacturers both in and out of the state passing legislation presumably bear the same burdens labeling food products, and thus the bill is unlikely to be facially discriminatory. Vermont's labeling law, however, is a unique circumstance. Act 120 enumerates exemptions from mandatory labeling, most notably dairy products and restaurant food.¹¹³ Coincidentally (or, not coincidentally), two of Vermont's most important and profitable industries are dairy farming and tourism,¹¹⁴ and each greatly benefits from being exempted from the bill. There are no major national food distributors in Vermont, but about 3/4 of Vermont's

¹¹¹ See *supra* note 59 and accompanying text.

¹¹² See *supra* note 60 and accompanying text.

¹¹³ Vermont Law § 3044

¹¹⁴ James M. Jeffords, *Economic Impact of Agriculture in Vermont*, VERMONT LEGISLATIVE RESEARCH SERVICE, available at <http://www.uvm.edu/~vlrs/Agriculture/agric%20econ%20impact.pdf>.

agricultural income is generated by the sale of dairy products.¹¹⁵ It can be argued, therefore, that the law has the practical effect of regulating commerce occurring wholly outside state borders. A court may reasonably interpret these exemptions as a protectionist measure in favor of Vermont's most profitable industries, and thus the labeling law will be per se invalid.

Even if the law is not facially discriminatory, Vermont's labeling law essentially forces food manufacturers to create Vermont-specific production lines, and therefore causes a burden on interstate commerce. This will be an expensive and drastic change from the status quo of the American food industry since manufacturers typically do not distinguish the labeling or production to separate crops destined for particular states.¹¹⁶ Consequently, if the manufacturers wish to be compliant with this law, they will incur substantial cost for doing business in Vermont.¹¹⁷ Those who cannot establish Vermont-specific distribution would have to revise their labeling on a regional or even nationwide basis, no matter where in the country their products may ultimately be sold.¹¹⁸ The National Association of Manufacturers, who has recently joined the Grocery Manufacturers Association, argues that "manufacturers do not segregate products according to the state's mandate, and they will now have to create a separate labelling system, a separate stock-keeping unit, and a Vermont-specific distribution chain for Vermont-bound products."¹¹⁹ Additionally, since retailers are immune from the law, manufacturers bear the responsibility to ensure that products with current labels are

¹¹⁵ *2013 State Agriculture Overview: Vermont*, NATIONAL AGRICULTURE STATISTICS SERVICE (Jan 26, 2015), http://www.nass.usda.gov/Quick_Stats/Ag_Overview/stateOverview.php?state=VERMONT

¹¹⁶ *Vermont labeling law for genetically engineered products*, OF MANUFACTURERS (2015), [http://lawcenter.nam.org/Results.aspx?P=Grocery %20Manufacturers%20Ass%27n](http://lawcenter.nam.org/Results.aspx?P=Grocery%20Manufacturers%20Ass%27n).

¹¹⁷ *Id.*

¹¹⁸ GMA Complaint at 18

¹¹⁹ NATIONAL ASSOCIATION OF MANUFACTURERS, *supra* note 116.

replaced: “[a] manufacturer with 100 products could face over \$5 million in potential penalties and liability because the retailer left the products on the shelf for ten days too long.”¹²⁰

The law also prohibits manufacturers from advertising or labeling food in particular ways in Vermont. If manufacturers wish to be in compliance with Vermont’s law, they will have to change nationwide marketing campaigns even though they would prefer to advertise differently in other states. Additionally, if such a law is upheld, every state will get the green light to require manufacturers to comply with their own laws, potentially forcing manufacturers to deal with a 50-state patchwork of conflicting labeling requirements that could force manufacturers to package it’s products differently for each state. The law alters the interstate flow of food commerce.

Vermont would need to assert a state interest that outweighs these burdens on interstate commerce.¹²¹ Section 3041 of the Act states four purposes of the legislation.¹²² First, for “public health and safety,” specifically to enable persons to “make informed decisions regarding the potential health effects of the food they purchase and consume”;¹²³ second, to put the consumer on notice of “the potential environmental effects of food from genetic engineering”;¹²⁴ third, to “[r]educ[e] and prevent consumer

¹²⁰ *Id.*

¹²¹ See *supra* note 60 and accompanying text.

¹²² VT. LAW § 2, § 3041(1)–(4) (2014).

¹²³ *Id.* § 3041(1).

¹²⁴ *Id.* § 3041(2). To this point, the Vermont legislature noted that GE crops contribute to genetic homogeneity, loss of biodiversity, and increased vulnerability of crops to pests and diseases. A labeling requirement, they argue, will allow consumers who are concerned about the environmental impact to adjust their purchasing decisions accordingly.

confusion”;¹²⁵ and fourth, “[to provide] consumers with data from which they may make informed decisions for religious reasons.”¹²⁶

However noble or well-intentioned the posited government purposes are, the law cannot pass judicial scrutiny. Regarding the first proposed state interest, Vermont is unable to claim, without tangible scientific evidence,¹²⁷ that health and safety are significant local interests. The use of language such as “potentially poses risks” and “may cause unintended consequences”¹²⁸ in the bill demonstrates that the Vermont legislature cannot be definitive in its scrutiny of GMOs. Indeed, without more to prove that GEs pose a threat to health, the state interest is speculative, as if to say, “better safe than sorry.” Although most would prefer to err on the side of safety, our Constitution protects speech from all government influence, as noted *supra*, except for an imminent threat of danger. Because of the dearth of proof that GEs will endanger consumers, Vermont’s proposed state interest is effectively nonexistent aside from mere suspicion.

The latter three purposes of the labeling law are not significant enough to outweigh the burden they place on interstate commerce, and there are other means that could satisfy the same purpose while being less burdensome. For example, Vermont wishes to protect the environment from being homogenized and from losing biodiversity;

¹²⁵ *Id.* at Sec. 2, § 3041(3)

¹²⁶ *Id.* at Sec. 2, § 3041(4)

¹²⁷ The Vermont legislature reasons that scientific studies are not needed because the FDA relies entirely on safety studies submitted by manufacturers (*Id.* Sec. 1(2)(B)-(C)), while independent scientists may be limited in their ability to assess GE foods because of industry or patent restrictions on research (*Id.* Sec. 1(2)(F)). The Legislature also found that no long-term or epidemiologic studies have been conducted in the United States examining the safety of human consumption of GE foods. *Id.* Sec. 1(2)(E)

¹²⁸ 2013 Bill Text VT H.B. 112 Sec. 1(4) (“Genetically engineered foods potentially pose risks to health, safety, agriculture, and the environment, as evidenced by the following: ... (b) the genetic engineering of plants and animals may cause unintended consequences”).

a law that influences the actual production of food within Vermont's borders, rather than a labeling law that affects national distribution, could more easily meet these goals.

Regardless of the above, any of Vermont's purported purposes of the labeling law can be rebutted by one fact: nothing is stopping producers from labeling their products as GMO-free or non-GE (many organic supply chains have already begun doing so¹²⁹), and consumers can remove GEs from their diet if they wish. This opens up various alternatives for state action other than burdening interstate commerce, which will give a court even more motivation to strike down the bill. If Vermont, or any other state for that matter, mandates GE labeling to the point where it burdens interstate commerce, they would have to show no other more reasonable alternatives exists in order to satisfy the *Pike* balancing test. States like Vermont can set up websites, for example, that list brands that satisfy organic criteria instead of forcing non-organic producers to identify themselves. The purpose of a law like Vermont's, therefore, is better stated as making shopping more convenient for consumers, rather than to protect them. This can never outweigh such a hefty burden on interstate commerce.

B. Free Speech

Vermont's labeling law is the first of its kind, and will probably be the first to be struck down. If so, the case will probably persuade other courts facing similar legislation to do the same. Yet, with the recent surge of legislative activity and public debate surrounding labeling requirements, the issue will probably not go away soon. The District Court and possibly Appellate Courts that will review Vermont's law may rule that the law violates the Dormant Commerce Clause and reject it without analyzing the much more complicated First Amendment issue. The next logical step, therefore, would

¹²⁹ See *infra* notes 144-147 and accompanying text

be for supporters of the law to urge federal lawmakers to impose a law.¹³⁰ Unfortunately for these supporters, the First Amendment issue would be an inevitable challenge to any federal law.

A labeling law should be found to be in violation of the First Amendment without concrete evidence that GEs pose a risk to human health. We have recently seen courts more willing to extend individual rights to corporations – *Hobby Lobby*, for example¹³¹ – and they will likely find that forcing corporate speech without a substantial state interest is unconstitutional, just as the Second Circuit did when it established that consumer curiosity is insufficient to justify government manipulation of corporate speech.¹³² Against this backdrop, governments will have a difficult time finding another substantial interest in trying to pass labeling legislation.

With mandatory GE labeling, the government essentially forces food manufacturers to convey a message they do not wish to convey – namely, that consumers should assign significance to the fact that a product contains an ingredient derived from a genetically engineered plant; labeling food with these disclosures will stigmatize certain foods over others. Supporters of similar laws argue for a consumer’s right to know, saying when you read the ingredients of what you buy, you ought to be able to know if you’re eating a GMO-based product.¹³³ However, U.S. Secretary of Agriculture Tom Vilsack explained that when the federal government "require[s] a label on something, we're either warning there's a potential safety problem or we're giving nutritional

¹³⁰ Helme *supra* note 14.

¹³¹ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (U.S. 2014) (extending First Amendment religious exercise rights to company).

¹³² *International Dairy*, 92 F.3d at 67.

¹³³ Ball *supra* note 16.

information."¹³⁴ Labeling GE foods "doesn't fit," he said, because "there's not a safety issue, and [GEs don't] affect nutrition."¹³⁵ Requiring labels runs the risk of conveying "the intentional or unintentional message that this is unsafe or there's some issue."¹³⁶

Consequently, GE labeling laws compel food companies "to associate with speech with which [they] may disagree,"¹³⁷ and thereby infuses a paternalistic motivation into the Act. As aforementioned, the Supreme Court has warned against States from making value judgments when regulating corporate speech. If the state action cannot be considered an exercise of its police power – to protect the health, safety and general welfare of its citizens – then the Court will be more prone to consider it paternalistic.

Applying the legal test for corporate speech to these facts, it seems a GE labeling law will not pass constitutional muster. Because a government entity is forcing an actor to speak, it needs both a compelling state interest, and it needs to be the least intrusive way to regulate speech.¹³⁸ So long as no evidence arises that prove GEs are compromising the safety of food, the practice will remain legal and GEs will be regarded as safe for human consumption. The government will thus be unable to name an interest that will be substantial enough to outweigh First Amendment protection. Consumer curiosity, or the "right-to-know", will not prompt a court to uphold a law compelling speech. If Vermont's labeling law were upheld, there would be virtually no limit to what the government could require companies to label. Although GE labeling may be a "good idea", its accompanying legislation could serve as a dangerous precedent for compelling

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Pac. Gas & Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1, 15 (1986) (plurality)

¹³⁸ *Thompson v. W States Med. Ctr*, 535 U.S. 357, 373 (2002) ("If the First Amendment means anything, it means that regulating speech must be a last – not first – resort.")

speech on any topic, such as forcing companies to label how animals were slaughtered in the production of foods, how gelatin is made ((footnote)), or anything that may influence the way a consumer sees a product.

To this extent, the government pushing for the law will be hard-pressed to prove a labeling law is the method that is least intrusive to free speech. If the state believes consumers should have easier access to certified organic or GMO-free foods, the State “can express that view through its own speech.”¹³⁹ For example, it could direct consumers to the many informative web sites that exist on these topics, or identify which producers are certified organic and which producers use GMOs. Additionally, Act 120 does not implement the least restrictive means since labeling systems such as the USDA’s “Certified Organic” program or the Non-GMO Project are already in place.¹⁴⁰

The First Amendment, however, should not be considered an undue burden to proponents of GE-labeling. Rather, it should be liberating, and the tool with which organic foods can be chosen over GEs. The judiciary will prioritize First Amendment protection over almost anything because free speech promotes the search for truth in the Marketplace of Ideas. This theory represents the ideological foundation for free speech: “[the concept of an open market] reflects the type of freedom which we aspire as a society, so speech and action must be free in the same manner.”¹⁴¹ Justice Oliver Wendell Holmes introduced the Marketplace of Ideas metaphor into Supreme Court doctrine in his 1919 dissent in *Abrams v. U.S.* He said society’s ultimate good “is better

¹³⁹ *IMS Health*, 131 S. Ct. at 2671.

¹⁴⁰ NATIONAL ASSOCIATION OF MANUFACTURERS *supra* note 116.

¹⁴¹ Jill Gordon, *John Stuart Mill and the "Marketplace of Ideas"*, 23 SOCIAL THEORY AND PRACTICE 235 (1997).

reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market."¹⁴²

Ideally, through the unhindered exchange of ideas, bad ideas will be weeded out, good ideas will stick, and “truth” will be discovered. The First Amendment protects speech so that open debate among citizens will be the vehicle to foster progress and advance society, no matter what situation arises or technological advancements are adopted. The alternative would be the government telling citizens what values and ideas should be promoted or demoted, a concept that disrupts a democratic society at its core. Justices have used it to bolster free expression in virtually every area of First Amendment jurisprudence: prior restraint, libel, invasion of privacy, pornography, access, advertising, picketing, expressive conduct, broadcasting, and cable regulation.¹⁴³ The Court has repeatedly said the primary purpose of the First Amendment is to protect an uninhibited marketplace where differing ideas can clash.¹⁴⁴ Free speech and the marketplace of ideas, therefore, is democracy’s most powerful tool.

Applying the “marketplace of ideas” theory to this context, it is easy to see why mandatory GE labeling is unconstitutional. For one, the government cannot force society to adopt a particular value, namely that GEs should be avoided and organic food should be purchased. Scientific studies suggest that GEs are as safe as all-natural foods, so if manufacturers wish to distribute them, and consumers wish to purchase them, it is their right to do so.

Further, the First Amendment allows food manufacturers to market their product as certified-organic without the threat that the government will force them to remove that

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

from their labels. Consumers can easily purchase these products if they so wish. For example, consider Kristi Marsh, a mother in suburban Massachusetts. She decided to move away from what she believed to be “the toxicity” around her and began “eliminating worrisome substances from her household, starting with cosmetics and cleaning products, then proceeding to GM foods. ‘I went from living a life of mainstream consumerism to making a conscious decision to put health first and allowing that to guide all my decisions.’”¹⁴⁵ Because the First Amendment encourages the marketplace of ideas, it allows individuals like Ms. Marsh to adapt to any situation in any way they would like. If enough people decide to take the same route as Ms. Marsh, then the market will change common practices to satisfy consumer interest, and GEs will become a thing of the past.

Many food companies have already developed a strong customer base by marketing their products as certified organic or GMO-free. Vermont-based Ben & Jerry’s Ice Cream has stopped the use of GMO ingredients in 2015 and publicly backed labeling laws.¹⁴⁶ Whole Foods Market, one of the nation’s largest grocery store chains, recently became the first retailer in the United States to require labeling of all genetically modified foods sold in its stores.¹⁴⁷ Chipotle Mexican Grill (“Chipotle”) has also aimed to support “responsible farming” by advising consumers on their website which food they serve is

¹⁴⁵ Ball *supra* note 16.

¹⁴⁶ Hunter Stewart, *Ben & Jerry's Will Stop Using Genetically-Modified Ingredients, Company Says*, HUFFINGTON POST (June 3, 2013), http://www.huffingtonpost.com/2013/06/02/ben-and-jerrys-gmos-genetically-modified_n_3372451.html?ncid=edlinkusaolp00000003; *Labelize It!*, BEN & JERRY’S HOMEMADE ICE CREAM, <http://www.benjerry.com/GMO> (last visited Jan. 27, 2015).

¹⁴⁷ Stephanie Strom, *Major Grocer to Label Foods with Gene-Modified Content*, N.Y. TIMES (Mar. 8, 2013), <http://www.nytimes.com/2013/03/09/business/grocery-chain-to-require-labels-for-genetically-modified-food.html?pagewanted=all&r=0>.

GMO-free, where the foods come from, or how meat and poultry were raised.¹⁴⁸ Although the majority of Chipotle's menu does contain GMOs or was cooked in, for example, soybean oil produced with GMOs, Chipotle has supported more transparency about the food they serve.¹⁴⁹

Although this may not be the most efficient way to combat GEs, and it seems unlikely that GEs will ever be completely phased out given their popularity, the First Amendment protects citizens from being forced to adopt a certain value or belief, no matter how worthy the value or belief may be.¹⁵⁰ There is no doubt that forcing foods treated with GMOs to be labeled as such will convey a message that GEs are inherently unsafe, even though they are not proven to be.¹⁵¹ Allowing governments to unreasonably influence a consumer's mindset flies in the face of the First Amendment's purpose, and such action should always be struck down in court.

Some consumers have considered the information available and have determined that the potential, yet unproven, risk of GEs will not deter them from purchasing cheaper, more easily accessible foods. Others have decided not to take the potentially harmful risk and have actively removed GEs from their diets. Mandatory labeling legislation, however, is primarily directed at those who have not considered either option, but rather those who innocently purchase the cheapest option or the option most heavily advertised without knowing the substance of the GE debate, or perhaps without even knowing that GEs exist. Mandatory labeling, however, cannot correct this problem without taking an

¹⁴⁸ Justin Bachman, *The Genetically Modified Burrito: Chipotle Tells All*, BLOOMBERG BUSINESSWEEK (June 18, 2013), <http://www.businessweek.com/articles/2013-06-18/the-genetically-modified-burrito-chipotle-tells-all> (some labels include "responsibly raised meat," "pasture-raised dairy," or a "G" indicating that the food has been treated with GMOs).

¹⁴⁹ *Id.* ("The menu is heavy on genetically modified organisms, from the chicken to the tortillas.").

¹⁵⁰ Ball *supra* note 16.

¹⁵¹ *Id.*

implied, paternalistic interest in the consumer marketplace. Ensuring that the marketplace for ideas is free from government influence has shaped our nation's centralized ideals to date, and will continue to do so going forward.

V. Conclusion

The ethics of GE use raise a myriad of questions: are GEs dangerous? Are studies regarding GEs biased? Why does the FDA approve GEs? Why are large food companies fighting GE labeling so vigorously? Why should anyone care about GEs if they are safe and make farming less expensive and more efficient? Is the federal government in the pockets of big agribusiness? These questions are driven by fear of the pervasiveness of GEs, and concern the use of GEs more so than the labeling of GEs. We will move closer to the truth the more we ask these questions, and thus become more or less comfortable with using GEs. Until then, the constitution that allows a citizen to ask these questions freely is the same constitution that will protect companies from conveying messages they do not wish to convey.