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Compelled Commercial Speech as Compelled Consent Speech

Leslie Gielow Jacobs♦

The topic of this symposium is “compelled commercial speech,” and that is certainly one way to cut through the cases. This grouping seems to fit nicely into the existing Free Speech Clause categories. We have fully protected speech and commercial speech, and, within both of these areas, we have speech restraints and speech that a government entity compels the speaker to say. Commercial speech may be subject to greater government regulation than fully protected speech because the reason that the Constitution protects it is different.¹ Similarly, government entities may compel commercial speakers to disclose information more freely than they may compel individuals to utter fully protected speech.² In fact, in the realm of fully protected speech, government-imposed compulsions are subject to the same high level of scrutiny as speech restraints.³ This symmetry of treatment between speech compulsions and speech restraints does not, however, exist within commercial speech. The Constitution permits government entities to compel commercial speech more freely than they may restrain commercial speech,⁴ and only one Justice on the current Supreme Court has expressed a willingness to reexamine this principle.⁵

Despite the fact that the standards of review for speech restraints and compulsions do not align precisely within the category of commercial speech as they do with fully protected speech, it would be possible to create a perfectly sensible jurisprudence by segregating the category of compelled commercial speech. The Court in *Zauderer v. Office of*

♦ Thanks to Maureen Moran for helpful assistance with citations.

¹ See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976) (commercial speech is entitled to “a different degree of [Free Speech Clause] protection” than fully protected speech).

² *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985) (“[T]he interests at stake [where a government entity compels commercial speech disclosures] are not of the same order as those [where the government compels individuals to utter fully protected speech].”).

³ See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 713 (1977) (state may not compel individual to display “Live Free or Die” on his vehicle license plate); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (state may not compel a child to recite the pledge of allegiance).

⁴ Compare *Barnette*, 319 U.S. at 642 (strict scrutiny applies to fully protected compelled speech), with *Zauderer*, 471 U.S. at 647 (rational basis scrutiny applies to compelled commercial speech).

⁵ See *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 255 (2010) (Thomas, J., concurring) (“I am skeptical of the premise . . . that, in the commercial speech context, ‘the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed.’” (quoting *Zauderer*, 471 U.S. at 652 n.14)).

*Disciplinary Counsel of the Supreme Court of Ohio*⁶ started down this road by noting that because a different justification underlies the protection of commercial speech,⁷ disclosure requirements imposed on commercial speakers do not present the same Free Speech Clause danger as commercial speech restraints.⁸ The Court explicitly noted that the symmetry of speech doctrine that applies to restraints and compulsions of fully protected speech does not apply to commercial speech.⁹ The potential for confusion in compelled speech doctrine arises, however, because the Court's interpretations of the scope of corporate speech rights¹⁰ and of the protection of commercial speakers from speech restraints¹¹ has been ratcheting upward. Corporate speakers have seized the opportunity to challenge government-imposed disclosure requirements over and over again, arguing that commercial speech compulsions should be reviewed under the same heightened standard as commercial speech restraints.¹² These efforts have been effective, resulting in a smattering of inconsistent lower court decisions, as some courts hew to the *Zauderer* speech

⁶ 471 U.S. 626.

⁷ *Id.* at 651 ("Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides . . . appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976))).

⁸ *Id.* at 651 n.14.

⁹ *Id.* at 651 ("[By compelling commercial speech, the state] has not attempted to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.' The State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available." (citation omitted) (quoting *Barnette*, 319 U.S. at 642)).

¹⁰ See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010) (holding that corporations and labor unions have political speech rights).

¹¹ See, e.g., *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2672 (2011) (invalidating state restriction on sale of commercial information while finding unconstitutional content-based and speaker-based distinctions within the category of commercial speech); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371 (2002) (invalidating restriction on advertising of compounded drugs and holding that the government did not prove that less restrictive means were not available).

¹² The Washington Legal Foundation litigates on behalf of corporate speech rights. As to its interpretations of compelled commercial speech doctrine, see, e.g., Sarah Roller & Donnelly McDowell, *Biotech Food Labeling Proposal Raises First Amendment Concerns*, LEGAL OPINION LETTER (Wash. Legal Found., D.C.), Oct. 19, 2012, at 1, available at http://www.wlf.org/upload/legalstudies/legalopinionletter/10-19-12RollerMcDowell_LegalOpinionLetter.pdf; Sarah Roller & Donnelly McDowell, "FOP" Food Labeling: The Energy Star® Model Raises First Amendment Concerns (Wash. Legal Found. Critical Legal Issues Working Paper Series, No. 180, 2012), available at <http://www.wlf.org/upload/legalstudies/workingpaper/RollerMcDowellWPFINAL.pdf>; Charles M. English, *Compelled Speech And The First Amendment: Neutral Fact Or Government Opinion?*, LEGAL BACKGROUNDER (Wash. Legal Found., D.C.), Jan. 13, 2012, at 1, available at http://www.wlf.org/upload/legalstudies/legalbackgrounder/1-13-12English_LegalBackgrounder.pdf.

restraint/disclosure requirement line and others look to the Court's changing commercial speech restraint jurisprudence as a signal to tighten judicial review of disclosure requirements.¹³ Therefore, the theoretical distinctions that could have worked are not working in practice. The jurisprudence of compelled commercial speech is becoming warped due to the pull of other lines of cases that relate only superficially. To solidify the core of the compelled commercial speech cases, it is helpful to slice through the instances of government speech compulsions in a different way.

Rather than grouping compelled commercial speech cases as a class to themselves, it is useful to recognize that most of these cases involve government compelled speech in connection with a sale transaction, and that compelled disclosures in the context of sale transactions are part of a broader group of compelled disclosures in interpersonal transactions. Viewing the cases this way makes a number of points clear. First, governments effectively require communication between parties to commercial transactions all the time as a routine, ordinary and accepted exercise of state police power or of the federal government's Commerce Clause power. Second, there is no basis in the Constitution to limit the deferential review of commercial disclosure requirements, articulated in *Zauderer* and reaffirmed in *Milavetz, Gallop & Milavetz, P.A. v. United States*¹⁴ to disclosure requirements aimed at correcting deceptive or misleading commercial speech. Rather, those instances are properly viewed as part of a subset of broader government authority to define the facts material to the consent that makes an interpersonal transaction legal and enforceable. Third, recognizing the inherent government power to define the facts material to valid consent makes sense of the subset of compelled commercial speech cases. It identifies the few disclosure requirements that fall out of bounds, and it makes clear that the primary

¹³ Compare *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1214 (D.C. Cir. 2012) (interpreting *Zauderer* and more recent Court cases as establishing "that a disclosure requirement is only appropriate if the government shows that, absent a warning, there is a self-evident – or at least 'potentially real' – danger that an advertisement will mislead consumers" (quoting *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 146 (1994))), with *id.* at 1227 n.6 (Rogers, J., dissenting) ("As other circuits have recognized, in *Zauderer* the Supreme Court appears simply to have held that a government interest in protecting consumers from possible deception is *sufficient* to support a disclosure requirement – not that this particular interest is *necessary* to support such a requirement." (citing *Zauderer*, 471 U.S. at 650-51; *Disc. Tobacco City & Lottery v. United States*, 674 F.3d 509, 556 (6th Cir. 2012); *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 133 & n.21 (2d Cir. 2009); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 n.8 (1st Cir. 2005); *Nat'l Elec. Mfrs. Ass'n v. Sorell*, 272 F.3d 104, 115 (2d Cir. 2001))).

¹⁴ 559 U.S. 229 (2010).

work to be done in the compelled speech jurisprudence is to identify what limits the Constitution places on the types of information governments require commercial speakers to present and how they must present it, not to argue over whether the government has the authority to require disclosures at all – it clearly does.

A recent case decided in the Southern District of New York provides a useful structure that illustrates each of these points. The case does not clearly involve commercial speech.¹⁵ In fact, the court held that it did not involve compelled speech at all. The case, *Central Rabbinical Congress of the USA & Canada v. New York City Department of Health & Mental Hygiene*,¹⁶ involved an amendment to the New York City Health Code, enacted in 2012, addressing the practice of direct oral suction circumcision performed in certain Orthodox Jewish communities on baby boys.¹⁷ After two babies died following the procedure because of germ transfer,¹⁸ the New York regulation requires the rabbis, or mohelim, to obtain written consent from the boys' parents before performing the procedure. The consent form may be supplied by the Department of Health or by the rabbi, but it must contain the following statement:

I understand that direct oral suction will be performed on my child and that the New York City Department of Health and Mental Hygiene advises parents that direct oral suction should not be performed because it exposes an infant to the risk of transmission of herpes simplex virus infection, which may result in brain damage or death.¹⁹

The mohelim claimed that the consent form requirement unconstitutionally compelled them to speak.²⁰ The court held that the

¹⁵ The case involves a disclosure requirement imposed on the procedure of ritual circumcision. It is not clear in the case whether parents pay a fee to have the procedure performed.

¹⁶ No. 12 Civ. 7590(NRB), 2013 WL 126399 (S.D.N.Y. Jan. 10, 2013).

¹⁷ *Notice of Adoption of an Amendment to Article 181 of the New York City Health Code*, 139 CITY REC. 2600 (Sept. 21, 2012).

¹⁸ *Cent. Rabbinical Cong.*, 2013 WL 126399, at *9 (“[T]he Department had found, since 2000, eleven laboratory-confirmed cases of neonatal herpes in infants who had undergone a circumcision that definitely or likely involved direct oral suction. Of those eleven cases, two infants died and two suffered brain damage.” (footnote and citation omitted)).

¹⁹ N.Y.C., N.Y., HEALTH CODE § 181.21 (2012).

²⁰ The mohelim claimed that the regulation unconstitutionally compelled them “to pass along the Department’s “advice” against [the procedure]” and that strict scrutiny should apply. *Cent. Rabbinical Cong.*, 2013 WL 126399, at *20 (citing Plaintiff’s Motion at 5).

consent form requirement did not force them to speak.²¹ It dealt with the claim as a facial challenge, and looked to whether “no set of circumstances” could render the requirement valid.²² According to the court, parents could obtain the consent form from the Health Department website, or a pediatrician’s office, which would “not involve communicative action by the mohelim”²³ and even in the odd circumstance where parents could not locate a form without the mohel’s assistance, “the mohel would still be free not to say anything or otherwise to undertake any communicative act” because, in lieu of speaking, he “simply could not perform [the procedure]” and “there would be no compelled speech.”²⁴

The result seems correct – the Constitution must permit a government agency to make certain that parents know they are choosing a procedure that carries the risk of death for their infant. But the conclusion that the government does not compel speech en route to this result cannot be right. At the very least, the parents are required to consent to the procedure by signing the form, and the mohelim are required to receive it. This is an act of communication that the government compels as a condition to engaging in an activity. It is no response that the individual can avoid the compulsion simply by refraining from engaging in the activity. It would not be a response in the core compelled speech cases – that Marie and Gathie Barnett could avoid the compelled speech inherent in the flag salute by staying home from school²⁵ or that George Maynard and his wife could avoid broadcasting New Hampshire’s “Live Free or Die” motto by failing to own or drive a car²⁶ – and it is not an adequate response in this instance either. The New York City Health Department regulation compels speech, but the court was correct that it is not constitutionally suspect compelled speech of the flag salute or license plate variety. Because the ritual circumcision case involves a challenge to an explicitly labeled “consent form,” it helpfully lays bare what is really going on in most of the compelled commercial speech cases. The government is defining the facts

²¹ *Id.* at *21 (“Nowhere in the regulation are mohelim required to provide a consent form to parents or even to inform parents that such a form exists.”).

²² *Id.* (citing *Arizona v. United States*, 132 S. Ct. 2492, 2534 (2012) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987))).

²³ *Id.*

²⁴ *Id.*

²⁵ These sisters were the daughters of the lead plaintiff in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). David L. Hudson, Jr., *Speech Commentary: Woman in Barnette Reflects on Famous Flag-Salute Case*, FIRST AMENDMENT CENTER (Dec. 28, 2009), <http://www.firstamendmentcenter.org/woman-in-barnette-reflects-on-famous-flag-salute-case> (noting that due to a clerk’s error, the case name misspells their last name, which was Barnett).

²⁶ *Wooley v. Maynard*, 430 U.S. 705 (1977).

that are material to creating legal and enforceable consent to an interpersonal transaction.

This case of consent-to-circumcision illustrates my first point, which is that government entities require consent all the time without triggering heightened Free Speech Clause scrutiny. An agreement to have a mohel perform a circumcision is a contract.²⁷ A contract is an act of compelled communication – there must be offer and acceptance, and acceptance must entail consent. “Consent,” however, is a term of art, which may be defined thinly or robustly by the state.²⁸ Governments have long required that “material” facts be disclosed to create a valid and enforceable contract. Fact finders may make the determination of which facts are material to a particular contract if its validity must be decided at trial. Alternatively, legislative or regulatory bodies may spell out facts material to particular contracts. And the judgments of these various decision makers may vary as to which facts are “material” and must be disclosed to create valid consent.²⁹ In either of these instances, the government compels the parties to a contract to communicate facts that the particular decision maker determines are relevant to the informed consent that makes the contract valid and enforceable.

This government regulatory power to require the disclosure of facts material to informed consent is not limited to commercial contracts. Consent is a crucial element that renders many types of transactions legal and enforceable. Governments have always had the authority to define the facts that must be communicated and the circumstances that must exist to create this critical element of consent. Indeed, this regulatory authority extends deep into our everyday lives. Specifically, consent is often the crucial element that defines when transactions are torts or crimes. The doctrine of informed consent to medical procedures marks the line between a valid transaction and an assault or battery.³⁰ Thus, government entities compel the communication of facts they determine are material to informed consent and the reciprocal communication of consent every time we see a doctor to avoid tort liability. And this requirement of bilateral

²⁷ Mohelim are usually paid for their services, although they may not charge a set price. See Dovid Zaklikowski, *No Set Payment for the Circumcision?: How Much Does a Mohel Cost?*, CHABAD, http://www.chabad.org/library/article_cdo/aid/1668419/jewish/No-Set-Payment-for-the-Circumcision.htm (last visited Feb. 25, 2014).

²⁸ See Brian H. Bix, *Contracts*, in *THE ETHICS OF CONSENT: THEORY AND PRACTICE* 251 (Franklin G. Miller & Alan Wertheimer eds., 2010).

²⁹ See, e.g., Dale A. Oesterle, *The Overused and Under-Defined Notion of “Material” in Securities Law*, 14 U. PA. J. BUS. L. 167 (2011).

³⁰ Peter M. Murray, *The History of Informed Consent*, 10 IOWA ORTHOPAEDIC J. 104 (1990).

communication of information and consent is not limited to the medical context where it evolved. It applies in any context where a touching would otherwise constitute a tort. For example, dentists, hair dressers, massage therapists and others must communicate information and secure consent. Consent makes what would be a theft legal. And the government effectively compels speech every time we have sex, because without the communication of consent, either implicitly or explicitly, the act is a crime.³¹ The requirement that mohelim secure informed consent to perform a circumcision is no different than all of these other instances of day-to-day activities in which one party must secure consent to a physical touching or else face legal liability. The bottom line is that compelled speech to secure informed consent to interpersonal transactions is an ordinary exercise of government regulatory authority to protect health, safety and welfare.

My second point is that the government power to require disclosures as part of a commercial transaction is not limited to correcting affirmatively “deceptive” or “misleading” speech.³² Although *Zauderer* and *Milavetz* dealt with situations where the government required disclosures to correct deceptive or misleading speech,³³ there is no constitutional basis for limiting deferential review to that circumstance. The category of “deceptive” or “misleading” speech is not even actionable fraud; it does not otherwise have determinate meaning.³⁴ The pertinent question is why the government has the authority to require corrections to misleading speech. The broader authority is to define what facts must be disclosed to constitute valid and enforceable consent.

³¹ See, e.g., N.Y. PENAL LAW § 130.05(1) (McKinney 2013) (“Whether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without consent of the victim.”).

³² The Court in *Zauderer* articulated the rational basis standard of review in connection with the state’s purpose of preventing consumer deception, and corporate litigants have seized on this language to argue that it limits the scope of judicial deference to commercial speech disclosure requirements. See *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985) (“[W]e hold that an advertiser’s rights are adequately protected so long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.”).

³³ *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010) (“[The] required disclosures are intended to combat the problem of inherently misleading commercial advertisements – specifically, the promise of debt relief without any reference to the possibility of filing for bankruptcy, which has inherent costs.”); *Zauderer*, 471 U.S. at 653 (“The State’s position that it is deceptive to employ advertising that refers to contingent-fee arrangements without mentioning the client’s liability for costs is reasonable enough to support a requirement that information regarding the client’s liability for costs be disclosed.”).

³⁴ See Rebecca Tushnet, *It Depends on What the Meaning of “False” is: Falsity and Misleadingness in Commercial Speech Doctrine*, 41 LOY. L.A. L. REV. 227, 227 (2007) (“The distinction between the true and the misleading is normative.” (quoting Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1219 (1983))).

The evolution of informed consent to medical procedures usefully illustrates the scope of the government's police power to compel disclosure of facts to ensure consent. The informed consent requirement began as an antidote inserted by the common law to respond to the practice of deceiving patients about the medical procedures to which they were submitting.³⁵ In its early manifestations, the doctrine required factual disclosures in order to counteract affirmative deception. As it has evolved, it has required a broad range of factual disclosures to fully inform a patient of the risks and benefits of a medical procedure in instances where no affirmative deceptive or misleading speech exists. The informed consent requirements have moved from common law to statutes in many jurisdictions, with the elements varying according to the judgments of the legislative decision makers.³⁶ Throughout this evolution, it has been assumed that the power to require these factual disclosures and define their specific terms falls within the state's power to protect health, safety and welfare, subject to deferential rational basis review.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,³⁷ the plurality addressed the claim that disclosures to secure informed consent to abortion should be subject to greater than rational basis review. Pennsylvania required that the abortion provider inform the woman seeking an abortion "of the availability of printed material published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion."³⁸ In response to the abortion providers' claim that the disclosure requirement unconstitutionally compelled them to speak, the plurality reasoned:

³⁵ See Murray, *supra* note 30.

³⁶ See Lori B. Andrews, *Informed Consent Statutes and the Decision Making Process*, 5 J. LEGAL MED. 163 (1984); *Background: Requirements for Informed Consent, A Practical Guide to Informed Consent*, TEMPLE UNIVERSITY HEALTH SYSTEM, <http://www.templehealth.org/ICTOOLKIT/html/ictoolkitpage5.html> (last visited Feb. 26, 2014) ("Informed consent is an ethical concept—that all patients should understand and agree to the potential consequences of their care—that has become codified in the law and in daily practice at every medical institution. . . . The case law and rules pertaining to informed consent have changed over the years and all 50 states now have legislation that requires some level of informed consent. Although the details of these laws vary from state to state, the bottom line is that failure to obtain informed consent renders any U.S. physician liable for negligence or battery and constitutes medical malpractice." (citation omitted)).

³⁷ 505 U.S. 833 (1992).

³⁸ *Id.* at 881.

To be sure, the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.³⁹

Although the plurality's explanation could have been less terse, its conclusion that factual disclosure requirements imposed upon doctors are subject to rational basis review because they fall within the state's licensing authority is consistent with the broad authority that government entities have always enjoyed to require and define the facts material to informed consent.

The *Casey* plurality's affirmation that rational basis review applies to abortion disclosure requirements reveals that there is no basis to limit government authority to require disclosures in commercial contexts to those necessary to counter affirmatively deceptive or misleading speech. The particular factual disclosures at issue in *Casey* were not required to prevent deception. The doctors proposing to perform abortions had not said anything affirmatively deceptive or misleading about the developmental stage of the fetuses or the options available to women if they chose childbirth.⁴⁰ The government imposed the disclosure requirements to remind women to think beyond their own interests to consider the welfare of the fetus.⁴¹ Despite the fact that patients would not be deceived or misled by an absence of speech, the plurality found that the state had broad police power authority to require doctors to disclose facts the government had decided were relevant – or should be relevant – to women's consent to abortion procedures.⁴²

The Court's decisions in *Zauderer* and *Milavetz* addressed disclosure requirements imposed in response to advertisements. In this context, the Court stated that the government has the authority to impose disclosure requirements to counter deceptive or misleading speech.⁴³ But, viewed in light of abortion disclosures, these cases address only a subset of the police power authority to require disclosures that ensure informed consent. The

³⁹ *Id.* at 884 (citations omitted).

⁴⁰ *See id.* at 883 (calling the information given in this case "truthful" and "nonmisleading").

⁴¹ *Id.* at 877 (noting that the information delivery requirement created "a structural mechanism by which the State . . . may express profound respect for the life of the unborn").

⁴² *Id.* at 884-85.

⁴³ *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 251-52 (2010); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

information disclosures imposed upon doctors have evolved beyond preventing deception to requiring information that a majority of the population decides should be relevant to an individual patient's consent. There is no basis in the Constitution to find a greater police power authority to compel doctor speech than the speech of lawyers or merchants. So long as the disclosures required by the state in *Casey* are subject to rational basis review, similar disclosures imposed on parties to other professional and commercial transactions must be subject to deferential review as well, even if the disclosures are not aimed at countering affirmatively misleading speech.

Review of the ritual circumcision case against the disclosure requirements approved in *Casey* reinforces the conclusion that the government police power to define the facts material to consent must logically and consistently extend beyond facts necessary to correct affirmatively misleading speech. The mohelim did not provoke the requirement that they ensure that parents received facts relating to health risks associated with the circumcision procedure by affirmatively advertising that the procedure was safe. Nevertheless, the New York City Health Department reasonably determined that knowledge of the risk of death to their child was relevant to the parents' informed consent. Likewise, in the absence of affirmative misrepresentations by abortion providers, Pennsylvania required that women be informed of the approximate age and characteristics of the fetuses they sought to abort. The source of authority exercised by the government entities, the free speech interests of the service providers, and the interests of the parties seeking the services relevant to informed consent are the same in both instances, and so, too, must be the degree of deference of a court's Free Speech Clause review.

My third point is that understanding that governments have the regulatory authority to define the information material to valid consent, subject to deferential rational basis review, groups compelled commercial speech into two categories: those in which the government compels commercial speakers to convey information about their products or services to potential consumers, and those in which the government compels commercial speakers to convey other types of information or convey information to individuals who are not potential consumers. Grouping the cases in this way is helpful in a number of ways. It identifies the cases that fall outside the *Casey/Zauderer* paradigm and require a different justification for the government action, which may or may not warrant low level judicial review. It also identifies the cases that fall inside

the *Casey/Zauderer* paradigm but nevertheless potentially trigger heightened review because the compelled speech impacts a separately protected constitutional right. The cases that remain reveal that the constitutional question in cases in which the government compels commercial speech to inform consent reduces to determining which types of information and manners of communicating information fall outside the boundaries of reasonably informing a potential consumer's consent. I will discuss each of these in turn.

Grouping the cases in terms of a government purpose to inform consent identifies instances of compelled commercial speech that are out of bounds and need to be separately justified because the government does not or cannot plausibly claim that the disclosure requirements are imposed for this reason. The compelled subsidy for generic advertising cases fall outside the *Casey/Zauderer* paradigm.⁴⁴ Requirement of disclosures after the commercial transaction, such as requirements that providers report information related to abortions,⁴⁵ pharmacies report the types and frequency of drug prescriptions,⁴⁶ or parties report real estate sale prices⁴⁷ must be justified by a government purpose other than defining information relevant to consent.⁴⁸ Within cases, as well, some disclosure requirements may fall within the *Casey/Zauderer* paradigm and others outside it. For example, a requirement that a center offering pregnancy counseling post a sign stating that “the Center does not have a licensed medical professional on staff” falls within the paradigm whereas a sign stating that the county health officer “encourages women who are or may be pregnant to consult with a licensed health care provider” falls outside the paradigm and requires a justification other than informing consent.⁴⁹

⁴⁴ See *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005); *United States v. United Foods, Inc.*, 533 U.S. 405 (2001).

⁴⁵ See *Casey*, 505 U.S. at 900 (reviewing under the Due Process Clause a requirement that providers report abortions after they occur and noting that such requirements are valid if “reasonably directed to the preservation of maternal health”).

⁴⁶ See *Whalen v. Roe*, 429 U.S. 589, 598 (1977) (upholding against a Due Process Clause challenge a state requirement that doctors disclose the names of persons obtaining certain drugs, finding it to be “a reasonable exercise of [the state’s] broad police powers”).

⁴⁷ Jay MacDonald, *BANKRATE.COM, Should Home Sale Prices Stay Secret?*, MSN REAL ESTATE, <http://realestate.msn.com/article.aspx?cp-documentid=13107736> (last visited Feb. 25, 2014) (reporting that 37 states require full disclosure of home sale prices).

⁴⁸ See Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in United Foods, Zauderer, and Abood*, 40 VAL. U. L. REV. 555, 562 (2006) (“[F]requently the disclosure of information is required in order to promote transparent and efficient markets.”).

⁴⁹ See, e.g., *Tepeyac v. Montgomery Cnty.*, 683 F.3d 591, 593 (4th Cir. 2012) (quoting *Montgomery Cnty. Resolution No. 16-1252*), *aff’d sub nom. Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184 (4th Cir. 2013) (en banc).

Most instances of compelled disclosures are aimed at informing consent, so recognizing these instances as presumptively valid reveals cases where judicial scrutiny may be higher – not because the compelled speech alone provokes heightened scrutiny, but because the compulsion impacts a separately protected constitutional right. Recognizing that heightened scrutiny is provoked by individual rights guarantees entirely separate from the Free Speech Clause helps to eliminate the confusion in the compelled commercial speech jurisprudence by making clear that in most instances of compelled commercial speech, where the compulsion stands alone for the purpose of informing consent to the transaction, rational basis applies.

The most evident informed consent requirements that may burden a separately protected constitutional right are those imposed by states on abortion providers. The disclosure requirements do not provoke heightened Free Speech Clause scrutiny because they fall within the state's police power to require delivery of information relevant to informed consent to the transaction. The separate question, however, is whether the same information delivery requirements impose an undue burden on the right to choose abortion prior to viability, which the substantive portion of the Fourteenth Amendment's Due Process Clause protects.⁵⁰ Although the plurality in *Casey* upheld the information delivery requirements before it under both the Free Speech and Due Process Clauses, its Due Process inquiry was more detailed and prolonged.⁵¹ More aggressive abortion disclosure requirements subsequently imposed by state legislatures may violate the Constitution because they impose an undue burden on a woman's right to choose abortion prior to viability, even though they do not infringe upon free speech.

Video game labeling requirements are another example of disclosure requirements that may burden a separately protected constitutional right. The United States Supreme Court recently made clear that strict scrutiny applies to violent video game labeling laws because the labels are content-based restrictions on fully protected speech.⁵² Prior to this decision, a circuit court had addressed a challenge to a similar labeling requirement imposed on sexually explicit video games. According to that court, *Zauderer's* deferential review did not apply because the "18" sticker, which designated sexually explicit speech, went beyond "purely factual

⁵⁰ *Casey*, 505 U.S. at 846.

⁵¹ *See id.* at 846-53, 870-79, 881-84, 884-85.

⁵² *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738-39 (2011).

disclosures” and communicated “a subjective and highly controversial message.”⁵³ But governments require labels with evaluative judgments about safety, healthfulness, and age-appropriateness in many other instances without provoking heightened scrutiny. The reason that the scrutiny increases when governments label video games is that the product is separately protected as speech.

The ritual circumcision case provides a final example of a disclosure requirement intersecting with a separately protected constitutional right. Like video game vendors, the mohelim argued that the consent form requirement unconstitutionally compelled them to communicate the government’s “subjective advice.”⁵⁴ But, as noted above, this claim alone is not sufficient to render the consent form requirement unconstitutional. The reason that the mohelim’s claim could possibly be successful is that, in addition to the Free Speech Clause claim, the mohelim argued that the disclosure requirement unconstitutionally burdened their free exercise of religion.⁵⁵ The district court rejected this argument, finding no constitutional violation according to the standard of review that applies to the Free Exercise Clause.⁵⁶ However, like the examples listed above, if heightened review were to be applied to a disclosure requirement like that imposed by the New York City Health Department, it would be because it burdened the separate free exercise right.

Once we identify the disclosure requirements that are outside of the *Casey/Zauderer* paradigm, either because they do not aim at informing consent or they intersect with another constitutional right, we are left with the bulk of the compelled commercial disclosure cases where the government plausibly asserts a purpose to require disclosure of information relevant to informed consent. This is very helpful. Now the constitutional inquiry is narrowed to one that does not necessarily have a clear answer, but is nevertheless quite manageable: What types of information and manners of presentation may a government rationally determine are relevant to consent?

Once this segregation of information-relevant-to-consent cases is made, we can look at the cases and ask the right questions. Many, many disclosure requirements exist, and it is possible to arrange them on a

⁵³ *Entm’t Software Ass’n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006).

⁵⁴ Memorandum of Law in Support of Plaintiffs’ Motion for a Preliminary Injunction at 14, *Cent. Rabbinical Cong. of the USA & Can. v. N.Y.C. Dep’t of Health & Mental Hygiene*, No. 12 Civ. 7590(NRB), 2013 WL 126399 (S.D.N.Y. Jan. 10, 2013), 2012 WL 5461809.

⁵⁵ *Id.* at 21-27.

⁵⁶ *Cent. Rabbinical Cong.*, 2013 WL 126399, at *17.

spectrum according to the types of information required to be disclosed and the manners of presentation in order to analyze them to determine which of these should significantly alter the constitutional inquiry. I will not offer a full analysis here, but will sketch the spectrum of disclosure requirements to identify some of the questions about types of information and manners of presentation that must be addressed.

Are there types of facts that are outside the boundary of what a government entity can rationally determine is relevant or should be relevant to a consumer's informed consent? The *Zauderer* and *Milavetz* cases involved disclosures relating to price, which relates to the interest of the immediate consumer and is undoubtedly at the heart of a commercial exchange. Many disclosure requirements relate to product qualities, such as requirements that sellers disclose the attributes of securities,⁵⁷ the ingredients of a food item,⁵⁸ the hazardous chemicals in a pesticide,⁵⁹ or the average mileage that a vehicle will attain per gallon of gas.⁶⁰ Other disclosures relate to what is not in a product, such as the requirement that pajama vendors disclose those that are not flame resistant⁶¹ or the voluntary label that milk vendors sought to apply denoting that the product was "rbST Free."⁶²

Many disclosure requirements relate to the consequences of using the product or instructions for proper use. Some of these disclosures relate primarily to consequences to the immediate consumer, such as prescription drug warnings and instructions, disclosure of the trans-fat content in a food item,⁶³ a disclosure about cell phone radiation risk,⁶⁴ and instructions that

⁵⁷ See *The Laws That Govern the Securities Industry*, U.S. SEC. & EXCHANGE COMMISSION, <http://www.sec.gov/about/laws.shtml> (last modified Oct. 1, 2013) ("Often referred to as the 'truth in securities' law, the Securities Act of 1933 has two basic objectives: require that investors receive financial and other significant information concerning securities being offered for public sale; and prohibit deceit, misrepresentations, and other fraud in the sale of securities.").

⁵⁸ See, e.g., 21 C.F.R. pt. 101 (2013) (setting out federal nutrition labeling requirements).

⁵⁹ U.S. ENVTL. PROT. AGENCY, *Chapter 5: Ingredient Statement Pesticides*, in LABEL REVIEW MANUAL 5-10 (2013), available at <http://www.epa.gov/oppfead1/labeling/lrm/label-review-manual.pdf>.

⁶⁰ Revisions and Additions to Motor Vehicle Fuel Economy Label, 76 Fed. Reg. 39,478 (July 6, 2011).

⁶¹ U.S. CONSUMER PROD. SAFETY COMM'N, NEWS RELEASE NO. 00129, NEW LABELS ON CHILDREN'S SLEEPWEAR ALERT PARENTS TO FIRE DANGERS (2000), available at <http://www.cpsc.gov/en/Newsroom/News-Releases/2000/New-Labels-on-Childrens-Sleepwear-Alert-Parents-to-Fire-Dangers/>.

⁶² Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628 (6th Cir. 2010) (striking down Ohio ban on "rbST Free" labels).

⁶³ See 21 C.F.R. §§ 101.9, 101.36 (2013) (setting out the required declaration of trans fatty acids in the nutrition label of conventional foods and dietary supplements, respectively).

pajamas be worn snugly so as not to catch fire.⁶⁵ Other disclosures relate to consequences that implicate both the interests of the immediate consumer and of the public more generally, such as alcohol labeling that warns of the dangers of ingesting during pregnancy or of drunk driving,⁶⁶ disclosures that foods are genetically modified,⁶⁷ and labels that disclose car mileage⁶⁸ or appliance energy efficiency.⁶⁹ Still other disclosures relate primarily to disclosing the public harms that relate to the product, such as warnings on tobacco products about secondhand smoke,⁷⁰ information about proper disposal of products containing mercury,⁷¹ and securities disclosures relating to whether the investments are “DRC conflict free.”⁷²

Beyond the type of fact presented is its manner of presentation. Any presentation of facts is selective and depends upon the judgment of a government entity of relevance. The question is how and why the Constitution may limit a government entity’s discretion to determine relevance. Must the government demonstrate some sort of harm, whether to the immediate consumer, the general public or both, from nondisclosure? If so, to what degree of certainty must the “risk” exist when experts disagree, as with the “risks” of genetically modified products, or of

⁶⁴ See CTIA—The Wireless Ass’n v. City & Cnty. of S.F., 827 F. Supp. 2d 1054 (N.D. Cal. 2011) (reviewing a San Francisco ordinance requiring cell phone retailers to inform consumers about the potential health risks of cell phone use).

⁶⁵ U.S. CONSUMER PROD. SAFETY COMM’N, *supra* note 61.

⁶⁶ See 27 U.S.C. § 215 (2012) (requiring the following statement on all alcohol beverages for sale or distribution in the U.S. containing not less than 0.5% alcohol by volume: “GOVERNMENT WARNING: (1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects. (2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and may cause health problems”).

⁶⁷ No laws yet require that genetically modified foods be labeled for sale in the United States. See Elizabeth Weise, *Washington State Voters Reject Labeling of GMO Foods*, USA TODAY, Nov. 6, 2013, <http://www.usatoday.com/story/news/nation/2013/11/06/washington-state-voters-reject-gmo-labeling/3450705/>.

⁶⁸ Revisions and Additions to Motor Vehicle Fuel Economy Label, 76 Fed. Reg. 39,478 (July 6, 2011).

⁶⁹ The Environmental Protection Agency Energy Star Labeling System allows appliance manufacturers to choose to qualify and display an Energy Star label. See *How a Product Earns the Energy Star Label*, ENERGY STAR, <https://www.energystar.gov/certified-products/how-product-earns-label> (last visited Feb. 28, 2014).

⁷⁰ See 15 U.S.C. § 1333(a)(1) (2012) (requiring cigarette packages to carry one of nine new warnings, one of which is: “WARNING: Tobacco smoke causes fatal lung disease in nonsmokers”).

⁷¹ Nat’l Elec. Mfrs. Ass’n v. Sorrell, 272 F.3d 104 (2d Cir. 2001) (upholding state requirement that manufacturers of some mercury containing products label them to inform consumers about proper disposal).

⁷² Dodd-Frank Act § 1502, 15 U.S.C. § 78m(p)(1)(A)(ii) (West 2013) (requiring companies to disclose that their products are not “DRC conflict free,” which means that a product does not contain conflict minerals that directly or indirectly finance armed groups in the Democratic Republic of Congo).

cell phone use?⁷³ Is there some limit to the authority of government entities to require disclosure of their evaluative judgments, such as percentage of daily recommended nutritional value, age-appropriateness for toys and health inspection grades for restaurants? Are there standards a government entity must apply to reach a valid evaluative judgment? Are particular government decision makers permitted by the Constitution to make and mandate the disclosure of evaluative judgments more freely than others?⁷⁴

In addition, does it matter how the disclosure is presented? Many required disclosures are explicitly normative such as “Don’t use this drug in combination with alcohol” or “Don’t use this product near flame.” Is it less constitutionally suspect or more so if the warnings are explicitly presented as government speech, such as the surgeon general’s warning on cigarette packages or the consent form required for ritual circumcision? May required disclosures include symbols, such as a skull and crossbones for danger, or green and red lights for food recommendations? May government entities mandate a form of disclosure to grab the consumer’s attention or use emotion to drive home the meaning of fact? Many disclosure requirements contain size-of-print or placement requirements for information.⁷⁵ The graphic tobacco labels recently mandated by the Food and Drug Administration raise these questions in combination, by imposing text, color, graphic, size and placement requirements to inform consumers about the dangers of cigarette use.⁷⁶

These questions about the type of fact and manner of presentation remain open and are, to some extent, vexing. They are, however, limited,

⁷³ See *CTIA—The Wireless Ass’n v. City & Cnty. of S.F.*, 827 F. Supp. 2d 1054, 1060 (N.D. Cal. 2011) (“San Francisco’s claimed interest falls short of protecting the public from a ‘known’ carcinogen or even from a ‘probable’ carcinogen but amounts only to protecting the public from a ‘possible’ carcinogen, meaning that no one yet knows if the agent (RF radiation) is actually harmful (or not).”).

⁷⁴ See Tushnet, *supra* note 34, at 253 (noting the problem of choosing the decision maker in the context of determining the truth or falsity of information on product labels).

⁷⁵ See, e.g., FED. TRADE COMM’N, *COMPLYING WITH THE FUNERAL RULE 26* (2012), available at <http://www.business.ftc.gov/sites/default/files/pdf/BUS05-complyfuneral.pdf> (“You must make all the required disclosures to consumers in a clear and conspicuous manner. Your goal should be to present the information in a reasonably understandable form. In addition, the disclosures must be legible. The print or type must be large and prominent enough that consumers can easily notice and read the information.”); U.S. DEP’T OF HEALTH & HUMAN SERVS. & FOOD & DRUG ADMIN., *GUIDANCE FOR INDUSTRY: WARNINGS AND PRECAUTIONS, CONTRAINDICATIONS, AND BOXED WARNING SECTIONS OF LABELING FOR PRESCRIPTION DRUG AND BIOLOGICAL PRODUCTS – CONTENT AND FORMAT* (2011), available at <http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/ucm075096.pdf> (describing, inter alia, the “boxed warnings” that highlight urgent dangers).

⁷⁶ The FDA is reconsidering the content of the labels after Court of Appeals for the District of Columbia Circuit affirmed a district court judge’s injunction blocking the original versions from taking effect. See *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205 (D.C. Cir. 2012); Steve Almasy, *FDA Changes Course on Graphic Warning Labels for Cigarettes*, CNN, Mar. 20, 2013, <http://www.cnn.com/2013/03/19/health/fda-graphic-tobacco-warnings/>.

and by lining up the many disclosure requirements that exist, it is very possible to identify common attributes and to draw principled lines. Recognizing that most of the instances that we call compelled commercial speech fall within the broad police power of government entities to require disclosure of facts they determine to be relevant to consent to interpersonal transactions cabins the inquiry: what types of facts and manners of disclosure may a government determine are rationally related to informing consent? The answers may not be easy, but with this question in mind, we can clear away much of the confusion that currently exists in compelled commercial speech cases. And that is a helpful step toward a coherent and principled jurisprudence.