Mandatory Labels and Free Speech Interests in U.S.

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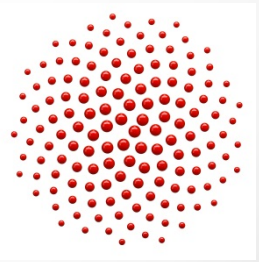


Labeling as regulatory tool

Objectives:

- Move markets in a pro-social direction

- Enhance consumer autonomy

First Amendment to the U.S. Constitution:

"Congress shall make no law abridging the freedom of speech, or of the press"

Article 10 to the European Convention on Human Rights:

"the right to freedom of expression… shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority …. The exercise of these freedoms, … may be subject to such … restrictions … [as] are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, …"

Speech requirement = Speech restriction

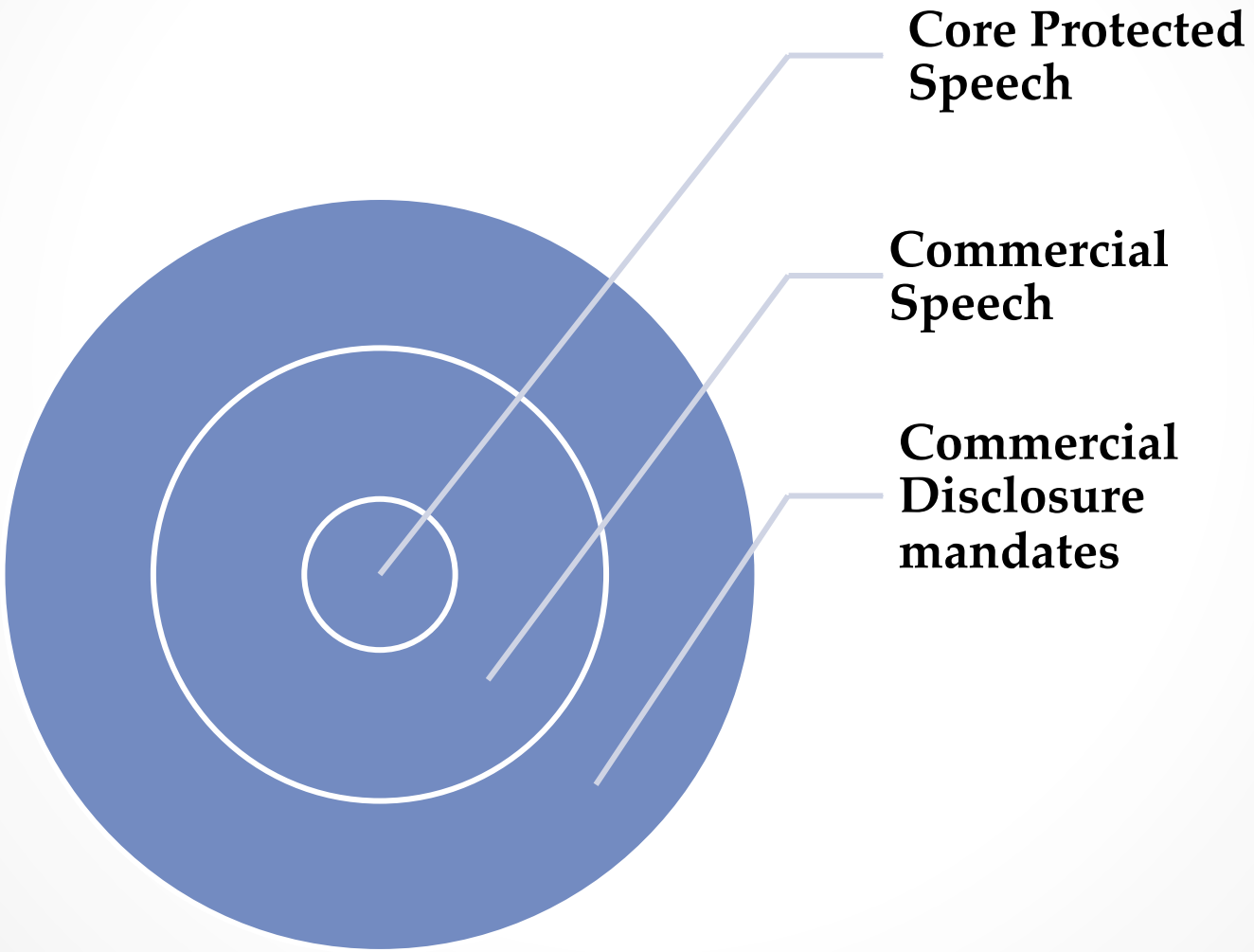
For example…

- You can't be required to swear a loyalty oath
- Or to affix an official state automobile license plate that conveys the ideological message "live free or die."

But is it the same for commercial speech and transactional disclosures?

… U.S. Constitutional law distinguishes (for now)

First Amendment Law



Required Disclosures

Many never challenged:

Toxic release inventory; nutritional information; textile contents; textile national origins; securities disclosures; tobacco warnings (textual)

Some vigorously challenged… and upheld

Mercury in lightbulbs…

First State, then Federal Mandate

Lighting Facts Per Bulb

Brightness	870 lumens
Estimated Yearly Energy Cost	$1.57
Based on 3 hrs/day, 11¢/kWh Cost depends on rates and use	
Life	
Based on 3 hrs/day	5.5 years
Light Appearance	
Warm — Cool	
2700 K	
Energy Used	13 watts

Contains Mercury
For more on clean up and safe disposal, visit epa.gov/cfl.

New Back Label for Bulbs Containing Mercury

Constitutional

Some struck down

Unconstitutional

Current & Future Battles

GMO

Obesity

Carbon

The Tobacco Labels

- 2003 Framework Convention on Tobacco Control
- 30-40 countries implementing, with Canada in the lead. A lot of litigation, but mostly on trademark grounds – property rights.
- U.S. Family Smoking Prevention and Tobacco Control Act (2009) – Mandates that the FDA come up with 9 graphics to accompany textual warnings

FDA Implementation


1-800-QUIT-NOW
© U.S. HHS
WARNING:
Smoking can kill you.


1-800-QUIT-NOW
© U.S. HHS
WARNING:
Cigarettes cause cancer.


WARNING: SMOKING DURING PREGNANCY CAN HARM YOUR BABY.
1-800-QUIT-NOW
© U.S. HHS

Legal Standard

1. Deferential ("rational basis") review for mandated disclosures if they are:
   a. Factual, noncontroversial, and no more burdensome than necessary
   b. Imposed in order to prevent consumer deception [?]

2. Otherwise, more demanding standard imposing heavy burden of proof on government to show good fit between means (disclosure) and ends (government goal)

2012 Tobacco Label Litigation

- "Facial challenge" in *Discount Tobacco City & Lottery et al. v. United States* (6th Cir. 2012). **U.S. WINS, labeling law upheld**

- "As applied" challenge in *R.J. Reynolds Tobacco v. FDA* (D.C. Cir. 2012). **TOBACCO WINS, labels struck down**

- Fearing outcome at Supreme Court, U.S. declined to appeal. Commercial speech doctrine in jeopardy.

- FDA will redo warnings.

Labels Unconstitutional?

- D.C. Cir. says not entitled to deferential review:
  - Not designed to combat deception
  - Not purely factual and noncontroversial
    - Emotional, manipulative
    - Non-literal, non-factual
    - Ideological
- Fail stricter review:
  - Government's principal goal was normative (reduce smoking), not informative.
  - Insufficient evidence to show that warnings directly advance anti-smoking goal and that they are not more burdensome than necessary

Questions…

- Role of emotion in communication and its relation to consumer autonomy
- Relationship between facticity and graphic representation
- Normative (regulation by disclosure) vs. informative (autonomy) goals

My Take

- The cigarette labeling cases forefront false dichotomies
  - informative/normative distinction
  - cognitive/emotional distinction
- What should trigger higher scrutiny is
  - controversialness of message (truth value); and
  - speech displacement