THE MEANING OF MEAT

By
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Plant-based and cell-based meat companies are vying to take over the trillion-dollar meat industry—and, in recent years, they have gained momentum. Responding to consumer demand and widespread fear about global climate change, investors like Bill Gates, Richard Branson, and even Tyson Foods began investing in alternative meat. Beyond Meat became a publicly traded company and partnered with Dunkin' Donuts, while Impossible Foods partnered with Burger King, bringing plant-based meat products into the mainstream. But many states with strong ties to animal agriculture have sought to impede the growth of the alternative-meat market. In August 2018, Missouri became the first state to restrict how alternative companies use the word 'meat' and related terms on their labels. Eleven more states have passed similar 'Tag-Gag' statutes. This Article reviews three primary constitutional challenges plant-based companies have leveled against such provisions—challenges based on the First Amendment, Due Process, and the Dormant Commerce Clause. After Part II evaluates the merits of these claims, Part III explores how they could advance or inadvertently undermine other animal and civil-rights lawyering strategies. To supplement the standard arguments, Part IV proposes ways for cause-driven plaintiffs like Tofurky—the first company to challenge Tag-Gag laws—to amplify their free speech claims. First, this Part suggests that although the statutes at issue appear to target mere commercial speech, courts have reason to view them as regulations of political speech calling for strict, rather than intermediate, scrutiny. Second, this Part suggests that plaintiffs could challenge Tag-Gag statutes not only under the First Amendment but also under the free speech provisions of state constitutions.

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I. INTRODUCTION—THE PASSWORD TO A TRILLION-DOLLAR INDUSTRY

In a world that is closing in on self-driving cars and delivery drones, it is easy to overlook new technologies in the food industry—an industry we take for granted in our daily lives. But these technologies could become the most important and disruptive of our generation. Animal agriculture[1] bears substantial responsibility for the world's largest problems—environmental, moral, health, labor, and financial—and now, for the first time in history, alternative-meat products[2] are gaining traction in the marketplace, calling into question the per-

[1] 'Animal Agriculture' refers to the world of dairy, meat, and eggs. For a defense of that world and its opposition to alternative meat, please refer to the Animal Agriculture Alliance website. *See, e.g.*, *Animal Agriculture Alliance Releases its 2016 "Advances in Animal Ag" Report*, ANIMAL AGRIC. ALLIANCE (June 29, 2016), https://animalagalliance.org/resource/animal-agriculture-alliance-releases-2016-advances-in-animal-ag-report/ [https://perma.cc/J258-8HP9] (accessed Feb. 6, 2020) (listing advances and improvements in animal agriculture practices); *see also* MEAT MATTERS, meatmatters.redmeatinfo.com [https://perma.cc/YTG4-W7YD] (accessed Feb. 6, 2020) (presenting clever headlines including, but not limited to, "Red meat the facts").

[2] This Article uses the term 'alternative meat' to refer to plant-based and cell-based meat collectively. 'Plant-based' refers to products such as Impossible Burgers, Tofurky Roasts, and Beyond Sausages, which replicate the texture and taste of animal flesh using protein from plants, such as peas. 'Cell-based' meat refers to actual animal tissue that is grown in a laboratory rather than processed from a slaughtered animal.

manency of animal industries. As 'Big Ag'[3] and alternative-meat companies go to war with one another over market share,[4] animal advocates, environmentalists, meat producers, and investors must ask: will alternative-meat products continue to serve a financially insignificant niche, or can they carve into a trillion-dollar space?

For alternative-meat companies, the first major battle involves securing the right to honest, fair, and effective marketing. For several years, it appeared the labeling fights would focus chiefly on plant-based milk; in response to rising sales of products like soy milk, almond milk, coconut milk, and oat milk,[5] the dairy industry, a handful of consumers, and members of Congress proposed prohibiting purveyors of plant-based products from using the word 'milk' on their labels.[6] The United States Cattlemen's Association (U.S. Cattlemen's Association) was the "unmo[o]ved mo[o]ver"[7] that dragged meat into the labeling debates. In February 2018, the U.S. Cattlemen's Association petitioned the United States Department of Agriculture (USDA)[8] to "exclude products not derived directly from animals raised and slaugh-

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[3] 'Big Ag' refers generically to large animal agriculture corporations, interest groups, and lobbies.

[4] *See* Frank Morris, *Big Beef Prepares for Battle, as Interest Grows in Plant-Based and Lab-Grown Meats*, NPR (Dec. 18, 2018), https://www.npr.org/sections/thesalt/2018/12/18/677581085/big-beef-prepares-for-battle-as-interest-grows-in-plant-based-and-lab-grown-meat [https://perma.cc/S387-RRGH] (accessed Feb. 6, 2020) (comparing plant-based meat substitutes to conventional meat as they are prepared, bought, consumed, and regulated today).

[5] Karen Asp, *What We Talk About When We Talk About Milk*, SIERRA CLUB (Jan. 14, 2019), https://www.sierraclub.org/sierra/what-we-talk-about-when-we-talk-about-milk [https://perma.cc/VJ6G-T2FM] (accessed Feb. 6, 2020) ("After all, the 61 percent rise in sales for non-dairy milks, cheeses, and yogurts over the past five years can be credited to consumer demand. According to Mintel data, plant-based milks make up 13 percent of today's total U.S. fluid milk sales, while overall sales of dairy milk have slumped 15 percent since 2012.").

[6] The Wisconsin-based dairy lobbying group, American Dairy Coalition, is one example of dairy industry supporters actively fighting to bar plant-based milks from using the word 'milk' on their labels. *See* Jan Shepel, *Use of 'Milk' Terminology by Plant-Based Drinks Still on FDA Docket*, WIS. ST. FARMER (Oct. 26, 2018), https://www.wisfarmer.com/story/news/2018/10/26/use-milk-terminology-plant-based-drinks-still-fda-docket/1665667002/ [https://perma.cc/6FGD-W747] (accessed Feb. 6, 2020) (discussing how farmers and dairy groups have been urging the FDA to disallow the use of the milk label on non-dairy milk). Regarding congressional action, in January 2017, Senator Tammy Baldwin proposed the Dairy Pride Act to "require enforcement against misbranded milk alternatives." Dairy Pride Act, S. 130, 115th Cong. (2017). Furthermore, in September 2018, the FDA issued a notice requesting comments about labeling plant-based products with names of dairy foods. Use of the Names of Dairy Foods in the Labeling of Plant-Based Products, 83 Fed. Reg. 49,103, 49,103 (Sept. 28, 2018) (closed for comment Nov. 27, 2018).

[7] *See generally* ARISTOTLE, METAPHYSICS bk. XII (Dana Densmore ed., Joe Sachs trans., Green Lion Press 1999) (c. 350 B.C.E.) (discussing the idea of the 'unmoved mover' as "the very cause of itself").

[8] *See* Petition for the U.S. Cattlemen's Association at 8, *Beef and Meat Labeling Requirements: To Exclude Products Not Derived Directly from Animals Raised and Slaughtered from the Definition of "Beef" and "Meat"*, (Pet. 18-01), [hereinafter USCA Petition] (showing a group of cattlemen petitioning the Department of Agriculture Food

tered from the definition of 'beef' and 'meat.'"[9] Six months later, Missouri amended its meat-advertising law, Mo. Ann. Stat. § 265.494(7), to prohibit "misrepresenting a product as meat that is not derived from harvested production livestock or poultry."[10] The law gives Missouri the apparent discretion to criminally prosecute any alternative-meat company that uses words like 'meat' on its products' labels. Eleven states have passed legislation that follows, more or less, in Missouri's footsteps, and other state legislatures have considered similar provisions.[11] This Article refers to these statutes collectively as 'Tag-Gag' legislation. Now, the American Civil Liberties Union (ACLU), Animal Legal Defense Fund (ALDF),[12] and Good Food Institute (GFI) are representing Tofurky and challenging Tag-Gag statutes in Missouri and Arkansas, both of which fall within the Eighth Circuit.[13] They have thereby taken the lead in resisting state constraints on alternative-meat labeling.

Promoting the rights of alternative-meat companies is an exciting new frontier for animal law; helping plant-based and cell-based products reach more consumers could reduce consumers' demand for products that require the violent deaths of billions of animals a year. But representing alternative-meat companies also creates potential ethical dilemmas for cause-driven lawyers. Rather than fighting industry, animal-rights lawyers find themselves supporting it; and instead of encouraging the states to adopt stricter regulations than the federal government has, animal-rights lawyers are in the unfamiliar position of challenging state regulations as overly burdensome. A diversity of strategies is generally beneficial to any movement, but when jousting from across the aisle, animal-rights lawyers must carefully walk a tightrope to avoid setting precedent that could damage the movement as a whole, as well as allied environmental, civil rights, and other progressive constituencies.

This Article reflects on tactics for challenging Tag-Gag laws that might best walk this tightrope: they are promising on the merits and create the least tension with existing animal law strategies. Part II outlines three standard constitutional challenges that an alternative-meat company could bring against Tag-Gag laws, each of which the

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Safety and Inspection Service to prohibit labeling of alternative-meat products as meat).

[9] *Id.*

[10] Mo. Ann. Stat. § 265.494(7) (West 2018), *amended by* 2018 Mo. Legis. Serv. S.B. 627 & 925.

[11] *See, e.g.*, H.R. 2274, 100th Gen. Assemb., Reg. Sess. (Va. 2019) (providing a Virginia resolution prohibiting false and misleading labels on commercial items).

[12] Jareb Gleckel worked with the Animal Legal Defense Fund in the summer of 2019, including on one of the Tag-Gag complaints. The views expressed in this Article are solely our own and do not represent the views of the Animal Legal Defense Fund.

[13] Complaint for Declaratory and Injunctive Relief, Turtle Island Foods v. Soman, 4:19-cv-514-KGB (E.D. Ark. Jul. 22, 2019) [hereinafter Arkansas Compl.]; Complaint for Declaratory and Injunctive Relief, Turtle Island Foods v. Richardson, No. 18-cv-4173 (W.D. Mo. Aug. 27, 2018) [hereinafter Missouri Compl.].

plant-based company Tofurky has raised in its complaints against Missouri and Arkansas: one based on the First Amendment, a second on Due Process (vagueness), and a third on the Dormant Commerce Clause. We briefly explain why each argument ought to succeed on the merits and then suggest additional claims that a cell-based meat producing plaintiff could bring under the First Amendment and the Supremacy Clause. Part III discusses how these various constitutional claims might advance other objectives of animal lawyers and allied professionals. This Part then turns to potential drawbacks we anticipate in connection with the standard arguments, drawbacks that might accompany reinforcing and expanding commercial-speech doctrine and those entailed in suppressing the role of the states in relation to that of the federal government. Finally, Part IV proposes a novel approach through which cause-driven plaintiffs can amplify and purify their free speech challenge to Tag-Gag statutes. Tag-Gag laws appear on the surface to target mere commercial speech. Yet courts have reason to regard such regulations as censoring core political speech and therefore as calling for strict—rather than intermediate—constitutional scrutiny. This Part also proposes that plaintiffs might benefit from challenging Tag-Gag statutes not only under the First Amendment but also under the free speech provisions of state constitutions. At the very least, state constitutional claims would give animal-rights lawyers two bites at the apple.

II. AN OVERVIEW OF FEDERAL CONSTITUTIONAL CLAIMS AGAINST STATE TAG-GAG LAWS.

The three standard federal constitutional sources for claims against state Tag-Gag laws are the Free Speech Clause of the First and Fourteenth Amendments,[14] the Dormant Commerce Clause, and the Due Process Clause. This Part provides a brief overview of each in turn.

A. First Amendment Challenges to Tag-Gag Statutes.

In 1942, the United States Supreme Court held that commercial advertising receives no protection under the First Amendment.[15] The Court did not reverse course for another three decades.[16] In the 1970s and thereafter, things changed rather dramatically, with the intermediate scrutiny test announced in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York (Central Hudson)* emerging as the primary means of evaluating whether a statute vio-

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[14] Every time the term 'First Amendment' appears in this Article, we mean to refer to the First Amendment as incorporated against the states by the Fourteenth Amendment.

[15] Valentine v. Chrestensen, 316 U.S. 52, 54–55 (1942).

[16] Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

lates commercial speech rights.[17] The threshold prong of the *Central Hudson* test asks whether the commercial speech in question concerns unlawful activity or is inherently misleading; if so, the First Amendment offers no protection.[18] When this threshold criterion does not disqualify the commercial speech in question, regulations must satisfy intermediate scrutiny, which requires that: (1) the government has a substantial interest in prohibiting the speech; (2) the government's regulation directly advances the asserted governmental interest; and (3) the regulation is "not more extensive than is necessary to serve that interest."[19] More recently, in *Sorrell v. IMS Health Inc.*,[20] the Supreme Court suggested that courts may have to review statutes burdening commercial speech under a stricter standard than that announced in *Central Hudson*.[21]

Tofurky has chosen to rely exclusively on the *Central Hudson* test to challenge Tag-Gag laws, electing not to lean on the arguably more generous *Sorrell* standard.[22] We believe this was the right approach and offer our own argument that Tag-Gag statutes fail intermediate scrutiny. This Part first examines patterns of "inherently misleading speech" identified across the circuits, demonstrating that words like 'meat' and 'burger'—as used by alternative-meat companies—fall outside of the offending patterns. It then explains why Tag-Gag statutes will be hard-pressed to satisfy the remaining *Central Hudson* prongs.

1. The Threshold Prong of Central Hudson: Common Sense Aside, is Veggie Bacon an Inherently Misleading Label?

As a threshold matter, we find implausible the claim that labeling an alternative-meat product using terms like 'burger' is inherently misleading. We address this issue periscopically: rather than making arguments specific to the Eighth Circuit and applying them to a small number of particular statutes, we look instead at courts around the country, observing a pattern regarding what qualifies as 'inherently misleading' speech. We observe that the word meat and related language do not fit the pattern.[23]

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[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] Sorrell v. IMS Health Inc., 564 U.S. 552, 572 (2011).

[21] *Id.* at 571–72.

[22] Tofurky argued that consumers looking for plant-based alternatives to meat would find labels describing the texture and flavor of the product more helpful than simply stating the product is plant-based. *See* Missouri Compl., *supra* note 13, at 8–9 (arguing that the nature of the Statute was too broad and that the burdens placed on plaintiffs were not proportional to the government's interest).

[23] We consider this reasoning a version of 'casuistry,' a problem-solving method dating back to Aristotle and popular among Jesuit thinkers, examining how different actors go about solving similar problems under a variety of circumstances. *See generally* RICHARD B. MILLER, CASUISTRY AND MODERN ETHICS: A POETICS OF PRACTICAL REASONING 3–5 (1996) (explaining casuistry and comparing it to legal inquiry).

First, the speech to which courts refer as inherently misleading has such a singular, fixed meaning that disclosure by way of explanation cannot cure the risk of deception. Meat and other similar words fall well outside this category. Second, declaring that words are inherently misleading involves identifying rather than inventing the definitions of words. Courts therefore cannot hold the word meat to be inherently misleading based simply on a state's own *ipse dixit*. Third, and finally, states must offer evidence that prohibited terms deceive consumers when companies use them on alternative-meat products. States have failed to do that.

Scanning case law in different circuits clarifies how strong the "constitutional presumption favoring disclosure over concealment" really is.[24] Courts consistently reject claims that descriptive terms are inherently misleading and invalidate laws banning their use, unless the targeted terms are so narrowly qualified as to convey a singular, fixed meaning. Few terms fall into that verboten category. The Fifth Circuit, for example, held that someone who designs the interiors of homes may, without triggering prohibitions against inherently misleading words describe herself as an 'interior designer,' even if she is not registered with the state as an interior designer.[25] Rather, to inherently mislead consumers into believing that she was registered with the state, she would have to call herself a 'registered interior designer'—a phrase impossible to construe in any other way.[26] The Eleventh Circuit likewise held that, because it was legal for unlicensed individuals to practice psychology in Florida, it was not inherently misleading for those unlicensed individuals to advertise as psychologists.[27] One would have to advertise as a 'licensed psychologist' to qualify as inherently misleading to potential clients.[28] Most recently, in *Järlström v. Aldridge*, a federal district court in Oregon held that a non-licensed engineer—who had a Bachelor of Science in engineering from Sweden but no professional license to practice in any state—had not engaged in inherently misleading speech by describing himself as an engineer.[29] The Oregon District Court explained that the term 'professional engineer' might be inherently misleading, but that 'engineer' alone was a generic term that has "enjoyed widespread usage" in numerous professions, including 'ferry engineer' and 'custodial engineer.'[30]

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[24] Peel v. Attorney Registration & Disciplinary Comm'n of Ill., 496 U.S. 91, 111 (1990).

[25] Byrum v. Landreth, 566 F.3d 442, 447 (5th Cir. 2009); *see also* Roberts v. Farrell, 630 F. Supp. 2d 242, 248 (D. Conn. 2009) (discussing the states' decision to regulate "more specialized terms" such as 'registered interior designer' but not 'interior designer').

[26] *Landreth*, 566 F.3d at 447.

[27] Abramson v. Gonzalez, 949 F.2d 1567, 1576 (11th Cir. 1992).

[28] *Id.*

[29] Järlström v. Aldridge, 366 F. Supp. 3d 1205, 1210–11, 1220 (D. Or. 2018).

[30] *Id.* at 1220.

In the cases just described, the courts rejected claims that a term open to different interpretations was inherently misleading. Interior designer was open to one of two interpretations—registered or unregistered—so it was not inherently misleading.[31] Only if the user of the term so narrowly qualified it as to give it a singular, fixed meaning—such as registered interior designer, licensed psychologist, and professional engineer—did the term become inherently misleading. An alternative way to frame the same observation is to suggest that a user qualifying a term to the point of giving it such a precise meaning rebuts the constitutional presumption favoring disclosure over censorship. For example, an unregistered designer simply cannot describe himself as a registered interior designer without misleading the public.

By contrast to the term registered designer, it would be inaccurate to suggest that the term meat is inherently misleading or so interchangeable with 'animal flesh' as to render the phrase 'vegan meat' oxymoronic. Whereas the term 'pigeon meat,' like the term licensed psychologist, admits of only one reading, the word meat by itself is a generic term that, like engineer, enjoys widespread use and can be qualified in ways that give it a variety of meanings. *Merriam-Webster*'s first definition of meat is: (a) "Solid food as distinguished from drink" and (b) "the edible part of something as distinguished from its covering (such as a husk or shell)."[32] This definition does not even include the word 'animal.' Perhaps even more telling, as Tofurky indicates in its complaint against Missouri's statute, the Food and Drug Administration (FDA) itself uses the term meat to describe non-animal products, such as when referring to part of a nut or fruit.[33] Of course, the term meat could still *potentially* mislead consumers in some circumstances—for example, if used alone on a plant-based product that resembles animal flesh—but as long as people customarily use the word in a variety of ways, the prohibited use triggers heightened scrutiny, pursuant to the threshold prong of *Central Hudson*.[34]

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[31] Although it didn't, the court in *Landreth* could still have found the term interior designer to be potentially misleading, at which point it could have required a qualifying disclosure.

[32] *Meat*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/meat [https://perma.cc/FE7K-2L3Z] (accessed Feb. 6, 2020).

[33] *See* Missouri Compl., *supra* note 13, at 7 (citing Food Drug Admin., GUIDANCE FOR INDUSTRY: QUESTIONS AND ANSWERS ON JUICE HACCP REGULATION (2003), https://www.fda.gov/regulatory-information/search-fda-guidance-documents/guidance-industry-questions-and-answers-juice-haccp-regulation-2003 [https://perma.cc/C5UZ-L7CB] (site no longer available) ("Coconut is considered to be a fruit and any liquid extracted from coconut (i.e., water or milk from the meat) is considered a juice . . . ."); *see also* Food Drug Admin., REFERENCE AMOUNTS CUSTOMARILY CONSUMED: LIST OF PRODUCTS FOR EACH PRODUCT CATEGORY: GUIDANCE FOR INDUSTRY 27 (2018), https://www.fda.gov/downloads/food/guidanceregulation/guidancedocumentsregulatoryinformation/ucm535370.pdf [https://perma.cc/W4F9-LY46] (accessed Feb. 6, 2020) ("Coconut concentrate is an extract of the cooked mixture of water and coconut meat . . . .").

[34] The fact that the USDA has its own definition for meat at 9 C.F.R. § 301.2 does not undermine the conclusion that meat can be qualified to convey meanings that are

The second lesson from a range of cases from across the country is that a state cannot render a company's use of a term inherently misleading simply by installing its own preferred definition, inconsistent with the company's.[35] If the contrary were true, states could insulate their commercial speech regulations from First Amendment review by fiat, ensuring that courts never reached heightened scrutiny analysis under *Central Hudson*.[36] Florida's official definition of 'skim milk,' for example, required specified levels of vitamin A.[37] The petitioner in *Ocheesee Creamery LLC v. Putnam*, a dairy, skimmed its milk (along with the vitamin A found in the fatty part), and failed to replenish the

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distinct from that definition. Butter, for example, has its own standard of identity. *See* 21 U.S.C. § 321a (1923) ("'[B]utter' shall be understood to mean the food product usually known as butter, and which is made exclusively from milk or cream, or both . . . ."). Nevertheless, the FDA gives 'peanut butter' and 'fruit butter' distinct standards of identity, even though neither contains 'butter.' 21 C.F.R § 164.150 (2005) ("Peanut butter is the food prepared by grinding . . . shelled and roasted peanut ingredients . . . ."); 21 C.F.R. § 150.110 (2005) ("[F]ruit butters . . . are the smooth, semisolid foods each of which is made from a mixture of one or a permitted combination of the optional fruit ingredients specified [in subsequent sections]."). Similarly, the FDA has allowed plant-based products to incorporate terms with animal-related definitions into their names. For example, the FDA wrote a warning letter to Hampton Creek (doing business currently as Just Foods) in 2015, stating that "Just Mayo and Just Mayo Sriracha products [we]re misbranded . . . in that they purport[ed] to be the standardized food mayonnaise due to the misleading name and imagery used on the label . . . ." Letter from William A. Correll, Jr., Dir., Office of Compliance, Center for Food Safety, FDA, to Joshua Tetrick, CEO, Hampton Creek Foods, Inc. (Aug. 12, 2015), https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/hampton-creek-foods-08122015 [https://perma.cc/BM5B-J3YX] (Feb. 6, 2020). But only four months later, the FDA resolved its complaint because Hampton Creek made the phrase 'egg-free' larger, made the image of a cracked-egg smaller, and added the words 'spread' and 'dressing' to the label. Letter from William A. Correll, Jr., Dir., Office of Compliance, Center for Food Safety, FDA, to Joshua Tetrick, CEO, Hampton Creek Foods, Inc. (Dec. 18, 2015), https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/hampton-creek-foods-close-out-letter-121815 [https://perma.cc/K2QY-NUDX] (accessed Feb. 6, 2020); Beth Kowitt, *The Mayo Wars Just Ended*, FORTUNE (Dec. 17, 2015), http://fortune.com/2015/12/17/hampton-creek-just-mayo-fda/ [https://perma.cc/H5XN-4JCU] (accessed Feb. 6, 2020). Despite acknowledging that mayonnaise is "a food for which a definition and standard of identity has been prescribed by regulation," the FDA did not require Hampton Creek to change the name 'Just Mayo.' Letter from William A. Correll, Jr., Dir., Office of Compliance, Center for Food Safety, FDA, to Joshua Tetrick, CEO, Hampton Creek Foods, Inc. (Aug. 12, 2015), https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/hampton-creek-foods-08122015 (accessed Dec. 31, 2019); Stephanie Strom, *F.D.A. Allows Maker of Just Mayo to Keep Product's Name*, N.Y. TIMES (Dec. 17, 2015), https://www.nytimes.com/2015/12/18/business/fda-allows-maker-of-just-mayo-to-keep-products-name.html [https://perma.cc/28HH-3GAB] (accessed Feb. 6, 2020).

[35] *See, e.g.*, Ocheesee Creamery L.L.C. v. Putnam, 851 F.3d 1228, 1238 (11th Cir. 2017) (stating that just because a state has a preferred definition does not mean that any other use of the term is inherently misleading).

[36] *Id.*; *see also Roberts*, 630 F. Supp. 2d at 249 (holding that Connecticut could not define the term interior designer as requiring people to register with the state, and then argue that the term interior designer was inherently misleading if used by non-registered individuals).

[37] *Ocheesee Creamery L.L.C.*, 851 F.3d at 1231.

vitamin to meet the statutory criterion.[38] Yet the Eleventh Circuit held that the First Amendment protected the dairy's use of the skim milk label.[39]

Just as Florida's statute narrowly defined skim milk, states are now promulgating their own constricted definitions of meat. Specifically, Missouri's statute allows prosecutors to deem products 'misrepresented' as meat if not "derived from harvested production livestock or poultry."[40] Notably, however, the 'harvested' language is unique to Missouri's statute—it does not, for instance, appear in the Federal Meat Inspection Act's (FMIA) definition of meat.[41] Arkansas's statute thus invents the notion that meat cannot be a "[s]ynthetic product derived from a plant, insect, or other source; or [p]roduct grown in a laboratory from animal cells."[42] Just as *Ocheesee*'s use of the term skim milk did not become inherently misleading merely because of Florida's idiosyncratic statutory definition of milk, plant-based companies' use of the term meat does not become inherently misleading simply by virtue of a state's challenged restriction. Missouri accordingly cannot persuasively argue that defining meat as harvested magically renders use of the term meat inherently misleading when found on labels for unharvested products. Likewise, Arkansas is unpersuasive in suggesting that using the term meat to refer to plant-based (or cell-based) meat products is inherently misleading just because Arkansas passed a law defining meat to exclude such products.

The third observation from the case law is that the government has the burden of providing evidence of deception, and states defending Tag-Gag statutes have failed to meet this burden.[43] In Missouri, for example, the Attorney General has never taken any legal action on the premise that a plant-based meat label is misleading—and neither has the FDA or Federal Trade Commission (FTC).[44] More generally, no empirical studies evidence consumer confusion about plant-based products carrying the term meat in their labels; indeed, relatedly and to the contrary, studies about plant-based milks provide evidence that plant-based products, labeled as such, do nothing to confuse consum-

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[38] *Id.* at 1238–39.

[39] *Id.* at 1240.

[40] MO. REV. STAT. §§ 265.494(7), 265.497 (2018).

[41] Federal Meat Inspection Act, 21 U.S.C. § 601 (2018).

[42] ARK. CODE ANN. § 2-1-302(7)(B) (2019).

[43] *See, e.g.*, Pearson v. Shalala, 164 F.3d 650, 655 (D.C. Cir. 1999) (discussing that paternalistic assumptions are inadequate to demonstrate that speech is inherently misleading); *see also* Ibanez v. Florida Dep't of Bus. & Prof'l Reg.n, Bd. of Accountancy, 512 U.S. 136, 148–49 (1994) (discussing that the record was too 'bare' to warrant speech restrictions and citing Edenfield v. Fane, 507 U.S. 761, 771 (1993) and Zauderer v. Office of Disciplinary Coun. of Sup. Ct. of Ohio, 471 U.S. 626, 648–49 (1985) for the same tenet).

[44] *Animal Law Podcast #43: The Case of the Meaning Of "Meat"*, OUR HEN HOUSE (Dec. 26, 2018), https://www.ourhenhouse.org/2018/12/animal-law-podcast-43-the-case-of-the-meaning-of-meat/ [https://perma.cc/28HH-3GAB] (accessed Feb. 6, 2020).

ers.[45] Perhaps most importantly, more than one court has affirmatively recognized the absence of such claimed confusion.[46] One court—while holding that 'almond milk' is not a misleading term—spontaneously referenced 'veggie bacon' as an example of a product that plainly would never mislead consumers.[47] Finally, even if there were evidence of consumer confusion, "unfamiliarity is not synonymous with misinformation."[48] If a few consumers, unfamiliar with plant-based products, make a mistaken purchase, they will learn quickly and stop being confused. They will suffer *de minimis* harm, if any, since they can probably return the product. At the same time, there is no reason to suppose that plant-based meat companies are trying to confuse potential customers. State defendants have indeed offered no plausible motive that plant-based companies might have to deceive consumers. If anything, a plant-based meat company benefits when consumers understand its products because the consumers can then purchase food with the desired tastes, textures, and uses while reducing animal suffering and environmental impact.[49] Given that plant-based companies selling novel products have every incentive to educate consumers, and no reason to mislead them, the government will be hard-pressed to substantiate the purported existence of a marketing strategy so poor as to be inherently misleading.

2. Tag-Gag Statutes Fail Intermediate Scrutiny

To address the first prong of *Central Hudson*, courts must ask whether a state's interest in preventing the speech at issue is substantial.[50] In performing this analysis, the court will "consider whether 'it

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[45] Taimie Bryant, Fac. Director, UCLA Animal Law and Policy Program, Comment Letter on FDA's Comprehensive, Multi-Year Nutrition Strategy (Oct. 5, 2018), https://www.regulations.gov/document?D=FDA-2018-N-2381-1104 [https://perma.cc/C7AG-P4X3] (accessed Feb. 6, 2020) (finding first that participants identified plant-based dairy as well as they identified animal dairy and second that participants were better at distinguishing plant-based milks from animal milks than they were at distinguishing between different animal milks); *see also* Megan Meyer, *What's in a Name? Survey Explores Consumers' Comprehension of Milk and Non-Dairy Alternatives*, INT'L FOOD INFO. COUNCIL FOUND. (Oct. 11, 2018), https://foodinsight.org/whats-in-a-name-survey-explores-consumers-comprehension-of-milk-and-non-dairy-alternatives/ [https://perma.cc/ELJ7-KGG8] (accessed Feb. 6, 2020) (reporting that roughly the same percentage of Americans report they are confused about whether 'nonfat milk' and 'skim milk' contain cow's milk as those that report confusion over 'almond milk.').

[46] *See* Ang v. Whitewave Foods Co., No. CV-13-1953-LB, 2013 WL 6492353, at *4 (N.D. Cal. Dec. 10, 2013) ("Under Plaintiffs' logic, a reasonable consumer might also believe that *veggie bacon contains pork*, that flourless chocolate cake contains flour, or that e-books are made out of paper.") (emphasis added).

[47] *Id.*

[48] Mason v. Fla. Bar, 208 F.3d 952, 957 (11th Cir. 2000) (citing Ibanez v. Florida Dept. of Bus. & Prof. Reg., Bd. Acct., 512 U.S. 136, 147 (1994)).

[49] *See* Missouri Compl., *supra* note 13, at 3, 7 (stating that plant-based producers distinguish their products from meat products and emphasizing consumers choices in products being influenced by health and environmental concerns).

[50] *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 564.

appears that the stated interests are not the actual interests served by the restriction.'"[51] Although Tag-Gag statutes purport to prevent consumer confusion, their real aim is to protect animal agriculture, cattle industries in particular, from competition.[52] As expressed by the D.C. Circuit in *R.J. Reynolds Tobacco Co. v. Food & Drug Administration*, however, the desire to suppress fair competition does not represent a substantial government interest.[53] In *R.J. Reynolds*, the court reviewed the administrative record and determined that the FDA's reason for compelling graphic warning labels on cigarettes was to discourage consumers from purchasing tobacco and, accordingly, to decrease smoking rates.[54] The court expressed doubt "that the government could assert a substantial interest in discouraging consumers from purchasing a lawful product, even one that has been conclusively linked to adverse health consequences."[55] Because plant-based products are lawful and have *not* been conclusively (or otherwise) linked to adverse health consequences, the government *a fortiori* lacks a substantial interest in discouraging consumers from making plant-based purchases. Therefore, states will satisfy the first prong of the *Central Hudson* test only if they can each convince a court that they are pursuing a genuine interest in preventing consumer confusion.[56]

Unlike protecting the animal agriculture industry, preventing consumer confusion is a substantial government interest.[57] Therefore, if states can convince courts that their Tag-Gag statutes have the purpose of preventing consumer confusion, they can successfully assert a substantial government interest. Nevertheless, Tag-Gag statutes fail for not directly advancing that interest, as the second prong of the *Central Hudson* test requires. In *R.J Reynolds*, the court assumed, *arguendo*, that the FDA had a substantial interest in deterring smoking;

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[51] Turtle Island Foods, SPC v. Soman, 2019 WL 7546141, at *10 (E.D. Ark., Dec. 11, 2019).

[52] *See* discussion *infra* Part II, Section C, Subsection 1, Dormant Commerce Clause (examining lawmakers' statements about and the legislative history of Missouri's law and citing, *inter alia*, a statement by Senator Sandy Crawford that "[w]e wanted to protect our cattlemen in Missouri and protect our beef brand").

[53] R.J. Reynolds Tobacco Co. v. Food & Drug Admin., 696 F.3d 1205, 1218–19 (D.C. Cir. 2012), *overruled on other grounds by* Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 22–23 (D.C. Cir. 2014).

[54] *Id.* at 1216–17.

[55] *Id.* at 1218 n.13 (acknowledging that smoking could, arguably, be the sole exception because the Supreme Court recognized it as the single most significant threat to Americans' health).

[56] *See generally* Christina Troitino, *Missouri Becomes First State to Start Regulating Meat Alternative Labels*, FORBES (Aug. 31, 2018, 11:02 AM), https://www.forbes.com/sites/christinatroitino/2018/08/31/missouri-now-regulating-meat-alternative-labels-as-regulatory-war-gets-bloody/#2a1b0ad36886 [https://perma.cc/6RE5-H9YZ] (accessed Feb. 6, 2020) (discussing passage of Missouri's state law regulating the word 'meat' in food products, and supporters of the law claiming it will help reduce consumer confusion).

[57] *See* Zauderer v. Office of Disciplinary Coun. of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985) (finding that "preventing deception of customers" is a substantial interest).

yet, the court rejected the FDA's claim that graphic-warning labels would directly advance that interest.[58] To support this finding, the court noted that the FDA did not provide "a shred of evidence—much less . . . 'substantial evidence'" of a causal relationship between graphic labels and smoking rates.[59] Like the FDA in *R.J. Reynolds*, the states here have no evidence that their meat regulation provisions will remedy consumer confusion, especially given no evidence of consumer confusion in need of a remedy.[60] In reality, using words like meat *improves* consumers' understanding. A plant-based company utilizing terms like 'deli slices,' for example, tells consumers that they can use the product to fulfill the same role that traditional meat fills in a sandwich.[61] Plant-based companies use terms like meat, not to pass off their food as animal-based but to inform consumers—who increasingly choose plant-based products for moral, environmental, and health reasons—about how to replace different animal products in their diets.[62] Presumably, calling a product 'veggie bacon' prevents consumer confusion just as well as—or better than—calling it 'breakfast food alternative' under Tag-Gag requirements. Therefore, Tag-Gag laws could, if anything, aggravate consumer confusion by eliminating helpful comparisons.

Turning to the final prong of *Central Hudson*: even assuming, contrary to the evidence, that Tag-Gag laws advance a substantial interest in preventing consumer confusion, they are far more extensive than necessary to achieve that goal. As a general principle, courts favor "more disclosure, rather than less"[63] and "repeatedly [point] to disclaimers as constitutionally preferable to outright suppression."[64] Recall that in *Ocheesee Creamery*, the Eleventh Circuit allowed a dairy to use the term skim milk on a product, even though it did not contain adequate vitamin A under Florida's statutory definition.[65] The court explained that Florida's statute was not narrowly tailored to the state's interest because Florida could, instead of eliminating the label, require a disclaimer about reduced vitamin A levels in the milk.[66]

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[58] *R.J. Reynolds Tobacco Co*., 696 F.3d at 1218, 1221–22.

[59] *Id.* at 1219.

[60] *See supra* Part II, Section A, Subsection 1 (discussing the lack of evidence that Tag-Gag statutes have in attempting to regulate the use of the word 'meat' due to the word's definition and widespread use, as well as the states inability to meet their burden of proof when faced with lawsuits over the word).

[61] *See* Missouri Compl., *supra* note 13, at 7 (describing that language like "deli slices" with "accompanying qualifying and descriptive language" will indicate that products are plant based and can fulfill the role conventionally filled by animal products in consumers' meals).

[62] *See* Missouri Compl., *supra* note 13, at 3, 7 (providing that consumers are looking for alternative food products for multiple reasons, and that the use of the word 'meat' allows those consumers to see where the plant-based products can be used to replace traditional animal products in their diets).

[63] Bates v. State Bd. of Ariz., 433 U.S. 350, 375 (1977).

[64] *Pearson*, 164 F.3d at 657.

[65] *Ocheesee Creamery L.L.C.*, 851 F.3d at 1240.

[66] *Id.*

Finally, under *Central Hudson*, Tag-Gag laws are more extensive than necessary to prevent consumer confusion because the states passing the laws already have statutes, as they should, authorizing lawsuits for misleading labeling and advertising.[67] Moreover, the FDA mandates ingredient and nutrition labeling for all products, including plant-based foods, under the Nutrition Labeling and Education Act.[68] Together, these provisions regulate plant-based meat labels as much as they regulate any other food labels to prevent consumer confusion. Additional, speech-restricting provisions targeting vegan food labels are therefore excessive.

B. Vagueness Challenges to Tag-Gag Statutes.

Another available argument for attacking Tag-Gag statutes falls into the category of Due Process vagueness. In our opinion, a focus on vagueness is especially illuminating because it helps to smoke out underlying censorship efforts contained within Tag-Gag statutes. Justice Gorsuch authored an opinion in *United States v. Davis* emphasizing the importance of the vagueness doctrine.[69] Writing for a majority of the Court he explained, "In our constitutional order, a vague law is no law at all . . . . When Congress passes a vague law, the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again."[70]

A law is unconstitutionally vague if it fails to give "people 'of common intelligence' fair notice of what the law demands of them."[71] Courts apply a strict vagueness test to both criminal statutes,[72] like Missouri's, and statutes imposing civil penalties, like Arkansas's, if they are quasi-criminal (i.e., punitive) or impact constitutional rights.[73]

Vagueness arguments in the context of Tag-Gag litigation are helpful—and useful—because Tag-Gag statutes rarely specify exactly what kinds of words or even images they prohibit or require alternative-meat products to bear. In both Missouri and Arkansas, for example, it is hard to tell what constitutes misrepresentation, and in Arkansas it is unclear what terms have been "defined historically in

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[67] *See, e.g.*, MO. REV. STAT. § 407.020.1 (2019) (prohibiting "[t]he act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce").

[68] 21 C.F.R. §§ 101.4, 101.9 (2019).

[69] United States v. Davis, 139 S. Ct. 2319, 2319, 2323 (2019).

[70] *Id.* at 2323.

[71] *Id.* at 2325 (citing Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)).

[72] *See, e.g.*, *id.* at 2323–25 (noting that the second part of the statutory definition of "crime of violence" in 18 U.S.C. § 924(c) is unconstitutionally vague).

[73] *See* Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982) (stating that if a law is quasi-criminal or interferes with the right to free speech, a strict vagueness test should apply).

reference to a specific agricultural product."[74] Do such terms include burger, for example, even though 'veggie burgers' have been around for decades, and do they include words like deli slices or even images of deli slices that might look like deli meat?

A case from the Missouri Supreme Court, *State v. Shaw*, seems at first glance to contradict this vagueness claim. Rejecting a challenge, the court explained that the word 'fraud' is not vague because courts have a long history of grappling with its meaning. The court then noted that "'false pretenses,' 'false promises' and 'misrepresentation' have gained commonly understood meanings as identifiable species of fraud."[75] It appears, however, that distinguishing *Shaw* from plant-based meat challenges to Tag-Gag statutes actually helps elucidate *why* states have positive incentives to write vague Tag-Gag statutes.

In *Shaw*, the fraud statute at issue, to allow implementation on a state level as other states had accomplished, replicated many long-standing federal laws.[76] In stark contrast, states are passing Tag-Gag statutes on top of not only federal but also their own state laws about misrepresentation.[77] Using the same meaning of misrepresentation as existing state and federal misbranding provisions would thus create state laws that are redundant with preexisting laws in the same state. This creates a catch-22. On the one hand, Tag-Gag statutes cannot purport to have any independent value unless they add protections above and beyond existing state and federal misbranding statutes by using the term 'misrepresentation' to mean something more than it does in other contexts. On the other hand, if misrepresentation means more in the Tag-Gag context, the problem is that Tag-Gag statutes do not define this 'something more.' The confusion is evident if we compare two recent preliminary orders from two federal district courts—both in the Eighth Circuit. The Missouri Order explains "that plaintiffs are not likely to succeed . . . because the statute does not prohibit their speech."[78] In other words, the Missouri court assumes that plant-based companies are not "misrepresenting [their] product as meat" as long as they use qualifiers like 'vegan.'[79] In Arkansas, by contrast, Judge Baker's opinion recognizes that under the law, as both parties agree, Tofurky's products could be subject to severe civil penalties.[80] If two federal courts in the same circuit have interpreted nearly identical statutes—and government defenses—in divergent ways, plant-based companies are bound to be confused.

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[74] *See* ARK. CODE ANN. § 2-1-305 (2019) (providing no statutory guidance for what this term may mean).

[75] State v. Shaw, 847 S.W.2d 768, 775 (Mo. 1993).

[76] *Id.* at 774.

[77] *See e.g.*, MO. REV. STAT. § 407.020.1 (2019).

[78] Turtle Island Foods, SPC v. Richardson, 2019 WL 7546586, at *5 (W.D. Mo., Sept. 30, 2019).

[79] *Id.* at *1.

[80] *Soman*, 2019 WL 7546141, at *5.

Perhaps states leave some ambiguity in their Tag-Gag statutes so they can chill speech without admitting openly that their purpose is an outright moratorium on certain words. This possibility highlights the utility of the vagueness argument: it smokes out the underlying wish to ban words from certain types of products. If states pass clearer statutes that say, for example, "The following words shall not appear on a plant-based or cell-based food: meat, burger, cheese, frankfurter, pigeon, hot dog, dog, sausage, deli, etc.," individuals would have no difficulty recognizing censorship. As written, a lack of clarity and censorship work together in a mutually reinforcing way, with each obscuring the other. Vagueness is troubling enough on its own, but there is something especially insidious about using it to mask censorship that may itself violate the First Amendment.

C. Dormant Commerce Clause Challenges to Tag-Gag Statutes.

Yet another standard argument one could direct against Tag-Gag statutes is based on the Dormant Commerce Clause (DCC).

The Commerce Clause gives Congress affirmative power over interstate commerce,[81] and though there is no literal second clause, the doctrine that has come to be known as the Dormant Commerce Clause restricts the exercise of states' power to regulate even absent federal legislation.[82] Courts perform a two-tiered analysis to determine whether state laws violate the DCC.[83] First, courts determine whether a statute discriminates against interstate commerce through "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[84] If a statute is discriminatory in this way, it survives only if it is the exclusive means available for advancing a legitimate local interest.[85] If the statute does not discriminate but only incidentally burdens interstate commerce, courts apply a forgiving balancing test under which the state law survives unless the statute imposes a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits."[86]

The best understanding of Tag-Gag statutes is that they raise difficulties under the DCC in the same way that they do under the First Amendment. The only legible animating purpose behind the statutes is to protect animal agriculture in states with strong agribusiness lobbies against the rising, out-of-state alternative-meat industry. This goal is plainly discriminatory. Furthermore, the alleged purpose, to prevent consumer confusion, is hard to credit when the states have failed to produce any evidence of consumer confusion. Finally, if the

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[81] U.S. CONST. art. I, § 8, cl. 3.

[82] C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1994).

[83] S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 593 (8th Cir. 2003).

[84] *Id.* (quoting Oregon Waste Sys., Inc. v. Department of Envtl. Quality, 511 U.S. 93, 99 (1994)).

[85] Smithfield Foods, Inc. v. Miller, 367 F.3d 1061, 1065 (8th Cir. 2004).

[86] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

states' goal truly is to prevent consumer confusion, it would seem inescapable that the statute's harmful consequences, here, for interstate commerce, outweigh any claimed benefits because narrower means are available.

A litigant mentioned before, Tofurky, invoked the DCC in its complaint, but not in its preliminary injunction briefs.[87] We will discuss this switch in more detail later. For purposes of this Section, we outline a DCC argument that a plant-based company could use to challenge Tag-Gag statutes, focusing on Missouri's statute as a concrete example.

1. Tag-Gag Statutes like Missouri's Appear to Discriminate Against Out-of-State Interests

A statute can discriminate against out-of-state interests on its face, in its practical effect, or in its purpose.[88] A statute discriminates facially if its plain language imposes distinct hardships on out-of-state companies.[89] A statute has a discriminatory effect if it substantially impacts products produced outside the state relative to those produced in-state.[90] Plaintiffs can offer different types of evidence to show that a law has a discriminatory purpose, including: "statements by lawmakers;" "the sequence of events leading up to the statute's adoption;" the State's consistent pattern of discrimination; "the statute's historical background;" and "the statute's use of highly ineffective means" of promoting a legitimate state interest.[91]

In *Hunt v. Washington State Apple Advertising Commission*, the Supreme Court held that a North Carolina regulation impermissibly discriminated against out-of-state apple producers.[92] The regulation limited any company shipping apples into North Carolina to indicating the United States Department of Agriculture (USDA) grade of their apples; companies could not indicate state or other apple grades on their shipping containers.[93] The negative effects of the regulation fell on Washington State (i.e., out-of-state) apple companies; Washington apple growers, who met their state's stricter apple grading standards, were barred when selling to North Carolina retailers from indicating their products' superiority.[94] Therefore, the Court held the statute had

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[87] *See* Missouri Compl., *supra* note 13, at 11.

[88] *Smithfield Foods*, 367 F.3d at 1063–64.

[89] *See* Chemical Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 338–39 (1992) (emphasis added) (striking down an Alabama waste-disposal statute for facial discrimination where the statute imposed an additional fee "[f]or waste and substances which are generated *outside of Alabama*").

[90] SDDS, Inc. v. S.D., 47 F.3d 263, 268, 271 n.12 (8th Cir. 1995) ("The fact that only 90% rather than 100% of the costs of excluding the waste fall on out-of-staters does not eliminate the discriminatory effect.").

[91] *Smithfield Foods*, 367 F.3d at 1065.

[92] Hunt v. Washington State Apple Advert. Comm'n, 432 U.S. 333, 352–53 (1977).

[93] *Id.* at 337.

[94] *Id.* at 336–38.

a discriminatory effect.[95] The *Washington State Apple* Court also stated that the *purpose* of the statute was 'suspect': local producers "were mainly responsible for this legislation being passed," and the Court regarded container labels as a suspiciously ineffective way to protect consumers from confusion in the marketplace—the purported state interest—because consumers generally do not even see the shipping containers.[96]

In *SDDS Inc. v. State of S.D.*, the Eighth Circuit applied the decision in *Washington State Apple* to hold that a South Dakota referendum, which enjoined operation of a waste facility, discriminated against out-of-state waste producers.[97] The court found a discriminatory effect because the waste facility would have received 95% of its waste from out-of-state.[98] The *SDDS* court also found the statute had a discriminatory purpose, in part because a state-sponsored pamphlet accompanying the referendum was "brimming with protectionist rhetoric," including the assertion that "South Dakota is not the nation's dumping grounds."[99]

Lastly, in *Pete's Brewing Co. v. Whitehead*, the Western District of Missouri held that a beer-labeling statute, requiring beer labels to include the "name, owner and address of the [brewing] facility," discriminated against out-of-state breweries.[100] The statute had a discriminatory effect because it did not require Missouri's three biggest brewers—who produced over 99% of the beer that Missouri companies sold and consumed in-state—to change their labeling practices; yet it had a drastic effect on some out-of-state brewers.[101] Specifically, the statute left out-of-state brewers with three undesirable options: "Producers could develop Missouri only labels, which would result in a higher cost of business. Alternatively, they could change all of their labels, which may lead to market confusion and competitive disadvantages in other states. Finally, they could stop selling their products in Missouri."[102] The *Pete's Brewing* Court also found discriminatory purpose, even absent clear, incriminating legislative history.[103] The judges emphasized that a local beer company had proposed the stat-

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[95] *Id.* at 350.

[96] *Id.* at 352–53.

[97] *SDDS, Inc.*, 47 F.3d at 271.

[98] *Id.*

[99] *Id.* at 268; *see also* South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 594 (8th Cir. 2003) (holding a South Dakota referendum had the discriminatory purpose to keep profits away from large out-of-state agricultural corporations and in the hands of family farmers, where a drafter wrote that without the proposed amendment, "[d]esperately needed profits [would] be skimmed out of local economies and into the pockets of distant corporations").

[100] Pete's Brewing Co. v. Whitehead, 19 F. Supp. 2d 1004, 1007, 1015 (W.D. Mo. 1998).

[101] *Id.* at 1011.

[102] *Id.* at 1012.

[103] *Id.* at 1015–16.

ute.[104] Moreover, although Missouri stated the purpose of the statute was to prevent consumer confusion about whether or not they were buying craft beer, there was no evidence of consumer confusion needing prevention—notably, the Missouri Department of Liquor Control had received no consumer complaints.[105] The statute, by requiring companies to disclose the brewing location, did "conspicuously little" to advance the purported interest in distinguishing craft beer.[106]

On their face, none of the Tag-Gag statutes, including Missouri's, discriminates against out-of-state commerce on their face because not one mentions out-of-state producers. Every one of them, however, appears to discriminate in effect and purpose. The statutes likely discriminate in effect because they impose no burdens on livestock or poultry producers, which are both central to the relevant in-state economies; in Missouri, for example, meat from livestock and poultry comprise the largest agribusinesses.[107] Meanwhile, plant-based meat companies are primarily based in Silicon Valley rather than agricultural states, and only one plant-based meat company, to our knowledge, even has production facilities in Missouri.[108] Therefore, out-of-state producers, like Tofurky, will predominantly bear the cost of Tag-Gag statutes.[109] The cost to out-of-state producers is large. Like the out-of-state beer companies at issue in *Pete's Brewing*, plant-based meat companies would have to choose among three exorbitantly expensive ways to comply with Tag-Gag statutes: attach state-specific labels, change their labels on all products, or refrain from selling in the relevant state.[110] As the court held in *Pete's Brewing*, these options are likely unacceptable.

In addition to the evidence of discriminatory effect, there appears to be an alternative basis for recovery under the DCC. Tag-Gag statutes almost certainly result from a discriminatory purpose. The discriminatory purpose in Missouri's Tag-Gag statute is particularly clear. Statements by lawmakers, like those of lawmakers in *SDDS* and *Hazeltine*, are "brimming with protectionist rhetoric."[111] As Tofurky noted in its complaint, Senator Crawford, a drafter of Missouri's law, explained the statute by stating, "We wanted to protect our cattlemen

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104 *Id.* at 1015.

105 *Id.*

106 *Id.* at 1016.

107 Decision Innovation Sols., Economic Contributions of Missouri Agriculture and Forestry 5 (Dec. 2016), https://agriculture.mo.gov/economicimpact/ [https://perma.cc/YC3U-HSA4] (accessed Feb. 6, 2020).

108 *See* Ashley Williams, *Beyond Meat Opens Second Missouri Facility to Fuel Plant-Based Demand*, GlobalMeatNews.com (July 2, 2018), https://www.globalmeatnews.com/Article/2018/07/02/Beyond-Meat-opens-second-Missouri-facility [https://perma.cc/F5CS-8CVM] (accessed Feb. 6, 2020) (indicating that Beyond Meat opened a second facility in Missouri).

109 Missouri Compl., *supra* note 13, at 20.

110 Missouri Compl., *supra* note 13, at 19.

111 *South Dakota Farm Bureau, Inc.,* 340 F.3d at 594; *SDDS, Inc.*, 47 F.3d at 26.

in Missouri and protect our beef brand."[112] Furthermore, just as North Carolina's apple producers proposed the state's discriminatory apple-labeling statute, and just as Missouri's beer producers proposed the discriminatory beer-labeling statute, the Missouri Cattlemen's Association proposed Missouri's Tag-Gag statute.[113] Moreover, the Senate sponsor of the omnibus bill containing Missouri's Tag-Gag language is a member of the Missouri Cattlemen's Association.[114] Finally, Missouri's meat-labeling statute, like Missouri's beer-labeling statute in *Pete's Brewing* and North Carolina's apple-labeling statute in *Washington State Apple*, creates an ineffective way to prevent consumer confusion. There appears to be no confusion in need of prevention. The Missouri Department of Agriculture has not received a single complaint about consumers confused over plant-based meat labels,[115] just as the Missouri Department of Liquor Control, at issue in *Pete's Brewing*, received no complaints from consumers confused about which beers were craft beers.[116] As discussed below,[117] there is also no other evidence consumers are confused—and there is certainly no evidence that removing words like meat from labels would helpfully address any consumer confusion that might exist. Therefore, Missouri's law and other similar provisions appear to discriminate in effect and purpose and are thus subject to strict scrutiny.[118]

2. Tag-Gag Statutes Like Missouri's Appear to Unduly Burden Interstate Commerce

Even if Tag-Gag statutes were not discriminatory, the courts could conclude these statutes unduly burden interstate commerce. Under *Pike*, courts must uphold a state law unless the burden on interstate commerce is "clearly excessive in relation to the putative local benefits."[119] Courts assess the burden on interstate commerce "by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not

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[112] *See* Missouri Compl., *supra* note 13, at 4–5 (providing quotes from Senator Crawford and Representative Knight confirming that the statute was needed to protect Missouri beef); *see also* Sara Brown, *How Missouri Began to Tackle Fake Meat: Missouri Sen. Sandy Crawford,* DROVERS (May 31, 2018, 8:03 AM), https://www.drovers.com/article/how-missouri-began-tackle-fake-meat-missouri-sen-sandy-crawford [https://perma.cc/CBL6-EFNC] (accessed Feb. 6, 2020) (quoting Senator Crawford as proposing a law that requires labeling of plant-based products "to protect [their] cattlemen").

[113] Missouri Compl., *supra* note 13, at 4.

[114] Missouri Compl., *supra* note 13, at 5.

[115] Missouri Compl., *supra* note 13, at 6.

[116] *Pete's Brewing Co.*, 19 F. Supp. 2d at 1015.

[117] *See infra* Part II, Section A, Subsection 1.

[118] Missouri's statute would not survive strict scrutiny because it is not the only means of preventing consumer confusion. We do not discuss this argument here because a full discussion of alternatives to Missouri's statute is included *infra* Part IV.

[119] *Pike*, 397 U.S. at 142.

one, but many or every, State adopted similar legislation."[120] Moreover, courts may not credit a law's stated purpose if there is no evidence the law would advance that purpose.[121] Finally, courts tend to place less weight on a statute's local benefits if alternative regulations that are available would achieve the same benefits.[122]

In *U & I Sanitation v. City of Columbus*, the City of Columbus enacted a waste ordinance mandating that waste collected in the city, and destined for in-state disposal, must be processed at a transfer station owned by the city.[123] The Eighth Circuit struck down this law after performing the *Pike* balancing test.[124] First, the court observed that if every city enacted a similar ordinance, the aggregate effect would be to drastically diminish the "free movement of solid waste" and shrink the interstate market in recyclable materials.[125] Second, the court did not recognize "preventing hazardous waste accidents" as a local benefit because the city failed to provide evidence that the ordinance would, in fact, improve safety.[126] Finally, the court discussed the existence of other ways for the city to raise revenues (such as taxation) and promote safety (such as enacting uniform safety regulations).[127]

Tag-Gag statutes, if enforced, would drastically diminish the 'free movement' of plant-based meats and diminish the interstate market in these products. Even individually, Tag-Gag statutes threaten the national business of plant-based companies. Companies needing specific labels to comply with individual states' laws would face a "logistical nightmare in distribution channels that service neighboring states."[128] Moreover, to remain in compliance with the law, companies would have to worry about prohibited media advertising that could spill over into states with Tag-Gag laws.[129] Finally, as discussed in the commercial speech analysis above, Tag-Gag statutes do not seem to advance states' purported interest in preventing consumer confusion, and even if they did, they would likely represent 'clearly excessive' means to this end because both states and the federal government already have laws on the books that prohibit misbranding food products.

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120 U & I Sanitation v. City of Columbus, 205 F.3d 1063, 1069 (8th Cir. 2000) (citing Healy v. Beer Inst., 491 U.S. 324, 336 (1989)).

121 *Id.* at 1070–71.

122 *Id.* at 1071.

123 *Id.* at 1065.

124 *Id.* at 1068.

125 *Id.* at 1072 (citing *Carbone*, 511 U.S. at 406 (O'Connor, J. concurring)).

126 *Id.* at 1070.

127 *Id.* at 1071.

128 Missouri Compl., *supra* note 13, at 16; *see also* Arkansas Compl., *supra* note 13, at 12 (detailing the burdens Tofurky would face if it had to choose between changing national advertising, which could cost upwards of $1,000,000, or withdrawing its products from an entire region).

129 Missouri Compl., *supra* note 13, at 17.

D. Cell-Based Meat Challenges to Tag-Gag Statutes

In Missouri and Arkansas, the primary (or only) plaintiff challenging Tag-Gag statutes is Tofurky—a plant-based company. Therefore, to this point, this Article has discussed claims predicated on a plant-based meat company suffering the consequences of such laws. Given that Tag-Gag statutes target cell-based as well as plant-based companies, and in some instances exclusively cell-based companies,[130] it is important to discuss the distinct arguments that this targeted group could make.

Consider, for example, that the USDA's regulations state that a food is misbranded if "it purports to be or is represented as a food for which a definition and standard of identity or composition has been prescribed . . . *unless* . . . *[i]t conforms to such definition and standard*."[131] Likewise, Arkansas's statute prohibits "[r]epresenting the agricultural product as a food for which a definition and standard of identity has been provided by regulations under § 20-56-219 or by the Federal Food, Drug, and Cosmetic Act . . . *unless: The agricultural product conforms to the definition and standard*."[132] Unlike plant-based meat, cell-based conforms to the definition and standard of meat—and the beef industry itself has argued as much. In 2018, both the North American Meat Institute and the National Cattlemen's Beef Association argued that the USDA, rather than the FDA, should oversee cell-based meat regulation[133] because cell-based meat comes from a carcass, and therefore conforms to the Federal Meat Inspection Act's (FMIA) definition of 'meat food product.'[134] Because cell-based meat conforms to the definition of meat, it follows that it cannot be *mis*branded as meat.

Further, states cannot argue that cell-based meat conforms to federal—but not state—definitions of meat, because the FMIA preempts

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[130] *See, e.g.*, 2019 Alabama Laws Act 2019-310, Ala. H.B. 518 (2019) ("A food product that contains cultured animal tissue produced from animal cell cultures outside of the organism from which it is derived may not be labeled as meat or a meat food product.").

[131] 9 C.F.R. § 301.2(7)(i) (2019) (emphasis added).

[132] ARK. CODE ANN. § 2-1-305.

[133] *See* Letter from Mark Dopp, Senior Vice President, Regulatory and Scientific Affairs, and Gen. Counsel, NAMI, to Matthew Michael, Dir. and Mary Poretta, Petitions Manager, FSIS (May 16, 2018) (on file with author) ("Granting USDA's petition would likely result in the Food and Drug Administration (FDA) having jurisdiction over so-called . . . 'cell cultured' meat and poultry products—a result that would yield chaos in the marketplace"); *see also* Letter from Kevin Kester, President, Nat'l Cattlemen's Beef Ass'n, to Carmen M. Rottenberg, Acting Deputy Undersecretary for Food Safety, FSIS (Apr. 10, 2018) (on file with author) (arguing that the USDA is the appropriate agency to oversee cell cultured meat because it has jurisdiction over meat and meat products, while the FDA has jurisdiction over labeling but is unwilling to "take action against egregiously labeled imitation products").

[134] In pertinent part, the Federal Meat Inspection Act (FMIA) defines 'meat food product' to include food "made wholly or in part from any meat or other portion of the carcass of cattle, sheep, swine, or goats." 21 U.S.C. § 601(j) (2018); 9 C.F.R. § 301.2(7)(i) (2019).

state statutes and regulations with regard to packaging and labeling.[135] The Supremacy Clause of the U.S. Constitution provides that federal law takes precedence over, or preempts, contrary state law, regardless of whether the conflicting federal law is legislative, judicial, or administrative, or constitutional.[136] Preemption, in turn, can be express[137] or implied.[138] Express preemption occurs when a federal law states the intent to preempt state law.[139] Implied preemption encompasses conflict preemption, where state law stands as an obstacle to fulfilling the purposes underlying the federal law,[140] and field preemption, where "federal law occupies a legislative field to such an extent that it is reasonable to conclude that Congress left no room for state regulation in that field."[141]

The FMIA contains an express preemption provision prohibiting state laws from imposing "[m]arking, labeling, [and] packaging" requirements "in addition to, or different than" its own.[142] States may exercise concurrent jurisdiction over misbranded products "consistent with the requirements under this chapter."[143] Therefore, when Tag-Gag statutes like Missouri's add language that meat must be 'traditionally harvested,' the state law imposes stricter regulations than federal law and is accordingly preempted.

III. FEDERAL CONSTITUTIONAL CLAIMS ABOUT THE WORD MEAT AND THE BROADER CONTEXT OF MOVEMENT LAWYERING

A. Commercial Speech and Movement Lawyering

The notion that plant-based and cell-based companies could have First Amendment commercial speech rights is empowering. At long last, businesses committed to the common good can participate on equal terms in the marketplace, where they, and their products, persuade customers to 'choose me.' Protecting plant-based meat and cell-based meat labels under the rubric of 'commercial speech,' moreover, has a satisfying Jiu Jitsu quality, like a slaughter truck built by, and for, corporate villains, coming to offer refuge and safety to rescued animals. It is akin to "beat[ing] . . . swords into plowshares, and . . . spears into pruninghooks."[144] Is it not? In three words: yes and no. Compa-

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135 *See* 21 U.S.C. § 678 (2018).

136 U.S. CONST. art. VI, cl. 2.

137 English v. General Elec. Co., 496 U.S. 72, 78 (1990).

138 Massachusetts Ass'n of HMOs v. Ruthardt, 194 F.3d 176, 179 (1st Cir. 1999).

139 *English*, 496 U.S. at 78–79.

140 Holk v. Snapple Beverage Corp., 575 F.3d 329, 339 (3rd Cir. 2009).

141 Chae v. SLM Corp., 593 F.3d 936, 941 (9th Cir. 2010).

142 21 U.S.C. § 678 (2018). This provision applies to "articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter"—meaning products that the USDA inspects. Therefore, it cannot extend to provisions that regulate plant-based products. *Id.*

143 *Id.*

144 *Isaiah* 2:4 (King James).

nies like Tofurky deserve to benefit from doctrines developed for big business. If it is necessary to rely on commercial speech cases to protect the brave and small Davids from corporate Goliaths, then such reliance is understandable. But it is not without risk.

The commercial speech doctrine, on balance, serves the interests of very wealthy companies.[145] One might even say that commercial speech doctrine is, on its face, aimed at protecting businesses, whatever their size, against the government agents who try to regulate them. We see this aim in the fact that commercial speech doctrine protects advertising and other tools for selling a product—against efforts to curb advertising and related appeals to potential customers. Commercial speech regulations, by limiting advertising by businesses, will accordingly tend to protect consumers from vendors.

Consider *Virginia State Board of Pharmacy v. Virginia Consumer Council*.[146] In this case, a state law prohibited pharmacists from advertising prescription drug prices, a prohibition intended to prevent aggressive advertising that could harm consumers.[147] The Court invalidated the law as impermissibly burdening commercial speech.[148] Then-Justice Rehnquist at the time dissented in words evoking Justice Holmes's dissent from *Lochner v. New York*: "There is certainly nothing in the United States Constitution which requires the Virginia Legislature to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession."[149] Justice Rehnquist predicted, with some prescience, that the commercial speech doctrine could be used to challenge labor laws, bans on cigarette and alcohol advertisements, and other efforts to curb marketing of prescription drugs directly to the lay consumer.[150]

First National Bank v. Bellotti struck down a law limiting corporate spending in state referenda, and the Court there cited *Virginia Board of Pharmacy*.[151] *Central Hudson* itself, which announced the test for assessing commercial speech claims, struck down a New York law aimed at reducing electricity usage during the energy crisis by banning utility companies from promotional advertising.[152] Once again, Justice Rehnquist reacted to the decision with alarm, warning that it signaled a return to *Lochner*: "The Court in so doing returns to

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145 Adam M. Samaha & Roy Germano, *Are Commercial Speech Cases Ideological? An Empirical Inquiry*, 25 WM. & MARY BILL OF RTS. J. 827, 882 (2017) (finding marginally statistically significant effect for business size on judicial voting in commercial speech cases after the year 2000).

146 Virginia State Bd. of Pharmacy v. Virginia Consumer Council, 425 U.S. 748, 748 (1976).

147 *Id.* at 749–50.

148 *Id.* at 773.

149 *Id.* at 784 (Rehnquist, J., dissenting).

150 *Id.* at 785–86, 789 (Rehnquist, J., dissenting).

151 First Nat'l Bank v. Bellotti, 435 U.S. 765, 792–93, 795 (1978).

152 *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 566, 571–72.

the bygone era of [*Lochner*], in which it was common practice for this Court to strike down economic regulations . . . ."[153]

This comparison between commercial speech doctrine and *Lochner* is a recurring one.[154] If the government may not generally regulate the words businesses use to help maximize profits, then there truly is a sacred marketplace immune from the State's wish to protect consumers, workers, and other vulnerable (or potentially vulnerable) parties. How different is the right to televise confusing ads about mysterious pills from the right to employ laborers who will inhale particulate matter into their lungs for 65, 80, or even 100 hours a week? Given the development of commercial speech doctrine, it may be unsurprising that, according to John Coates IV, prior to *Virginia State Board of Pharmacy*, businesses won 20% of First Amendment cases, but after the decision business wins rose to 55%.[155]

Perhaps the most disturbing commercial speech case, from the perspective of protecting the vulnerable, is also the most promising for those challenging the Tag-Gag laws: *Sorrell v. IMS Health*.[156] *Sorrell* invalidated Vermont's Prescription Confidentiality Law, which barred companies—mainly pharmaceutical companies—from obtaining prescriber-identifiable prescription data for marketing purposes.[157] Such information is useful to pharmaceutical companies because it enables them to assess how effective their efforts to influence doctors to prescribe their name brand drugs have been.[158] Stated differently, the ability to gather prescriber-specific information might allow pharmaceutical companies to conduct a kind of controlled experiment on doctors to investigate what salesmanship techniques work best. Independent variables could include distributing pens with a drug's name on them, giving out samples of a drug, sending out iPads, having very attractive representatives visit the doctors, and sponsoring medical conferences in exotic venues. Note that such manipulations—enabled by the sale of information protected by the First Amendment as commercial speech—seem unlikely to result in excellent patient care or prescription practices. Yet if the law at issue in *Sorrell* was unconstitutional, then it follows *a fortiori* that states, and the federal government, may not prohibit a plant-based company from labeling vegan sandwich meats 'plant-based deli slices.'

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153 *Id.* at 589 (Rehnquist, J., dissenting).

154 *See* Robert C. Post, *Compelled Commercial Speech*, YALE L. SCH. FAC. SCHOLARSHIP SERIES 867, 919 (2015), https://digitalcommons.law.yale.edu/fss_papers/5244 [https://perma.cc/28NA-XUSF] (accessed Feb. 6, 2020) (noting the multiple references to *Lochner* in the First Amendment jurisprudence).

155 John Coates IV, *Corporate Speech and the First Amendment: History, Data, and Implications*, 30 CONST. COMMENTARY 223, 251 (2015).

156 *See generally* Sorrell v. IMS Health Inc., 564 U.S. 552, 557 (2011) (describing Vermont's argument that the prohibition will diminish prescription decisions not in the best interest of the consumer or state).

157 *Id.* at 580.

158 *Id.* at 558.

Sorrell thus exemplifies the ethical dilemma that faces animal-rights lawyers who recruit commercial speech precedents to challenge Tag-Gag laws. The cases may conditionally work very well as weapons of the weak, but they also support a market structure oppressive to those most vulnerable in an increasingly laissez faire economy. As Justin Marceau discussed in his book, *Beyond Cages: Animal Law and Criminal Punishment*, and during his appearance on the Animal Law Podcast, it behooves the animal protection movement to link arms with other groups that protect the powerless rather than standing alone, indifferent to the moral implications of their work, self-stranded on animal law island.[159]

Beyond the risks of alienating potential allies and failing to live up to the demands of moral consistency, relying on commercial speech precedents can hurt animal-rights lawyers in a more direct way. As between Tofurky and companies like Pilgrim's Pride that sell meat from slaughtered animals, the freedom to advertise without state interference will tend to do more to benefit the latter than the former. The animal meat industry, and slaughter-based industries more generally, engage in an enormous amount of misleading speech, particularly if the tally includes sins of omission.[160] When an industry employs large numbers of undocumented workers[161] and makes use of sentenced prisoners who fall outside the protection of the Thirteenth

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[159] *See* JUSTIN MARCEAU, BEYOND CAGES: ANIMAL LAW AND CRIMINAL PUNISHMENT 6–7 (2019) (urging that the animal-rights movement view itself as engaged in a civil rights struggle that ought to commit its members to alliances with opponents of mass incarceration, even when the people to be incarcerated are animal abusers); *Animal Law Podcast #50: Justin Marceau on Animal Law and Criminal Punishment*, OUR HEN HOUSE (July 24, 2019), https://www.ourhenhouse.org/2019/07/animal-law-podcast-50-justin-marceau-on-animal-law-and-criminal-punishment/ [https://perma.cc/XXU6-6ULQ] (accessed Feb. 6, 2020) (giving the example of a slaughterhouse that used undocumented workers partially because they are easier to control); *see also* Michael C. Dorf, *The Meaning and Challenge of Intersectional Activism*, DORF ON LAW (July 6, 2017), http://www.dorfonlaw.org/2017/07/the-meaning-and-challenge-of.htm [https://perma.cc/B6LY-J6VH] (accessed Feb. 6, 2020) (arguing that veganism "is rooted in the same sorts of values that . . . oppose racism, sexism, and homophobia," so that inter-movement solidarity can "win coverts," but warning that "the tendency of this form of intersectionality to demand a kind of down-the-line ideological rigidity [also] risks alienating potential converts.").

[160] C. Victor Spain et al., *Are They Buying It? United States Consumers' Changing Attitudes Toward More Humanely Raised Meat, Eggs, and Dairy*, 8 ANIMALS 128, 128 (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6116027/ [https://perma.cc/UB89-VAR9] (accessed Feb. 6, 2020); *Consumers Are Being Misled by Meat Labeling, Says Consumer Group*, FOODNAVIGATOR.COM (Nov. 6, 2015, 1:51 PM), https://www.foodnavigator.com/article/2015/11/06/consumers-are-being-misled-by-meat-labelling-says-consumer-group [https://perma.cc/UTD2-RZRW] (accessed Feb. 6, 2020).

[161] *See generally* Lynn Waltz, *The Price of Cheap Meat? Raided Slaughterhouses and Upended Communities*, WASH. POST (Apr. 11, 2018), https://www.washingtonpost.com/news/posteverything/wp/2018/04/11/the-price-of-cheap-meat-raided-slaughterhouses-and-upended-communities/ [https://perma.cc/HN8R-XYS8] (accessed Feb. 6, 2020) (providing an example of the meatpacking industry's pattern of relying on undocumented workers for low-cost labor).

Amendment,[162] the industry can be expected to resort to concealment and deceptive speech. Add to this the fact that the entire business model rests on treating living, breathing, suffering beings as though they were dirty socks, and you have a recipe for pervasive concealment and deception.

Thus, relying on commercial speech precedents may come back to bite animal-rights lawyers when the animal meat industry cites animal advocates' cases to defend the word 'natural' on the labels of their hyper-processed pork, or when animal defenders want to require disclosures regarding e-coli, pus, and toxin-releasing mold in the food headed for your grocer's freezer.[163] Some federal courts of appeals have already begun to treat various business disclosure requirements as 'compelled speech' in violation of the First Amendment,[164] a development that the animal meat industry surely welcomes. Like the right to keep a licensed firearm in one's home, the right to advertise can become a user's worst enemy when a larger, quicker, and more agile intruder disarms the user and makes the weapon his own. Recall Viserion, the dragon on Game of Thrones, killed and reanimated by the Night King to turn the dragon's flames against the army he once protected.[165]

Judges and scholars alike have spoken about the danger of 'weaponizing' the First Amendment. In *Janus v. AFSCME*, the Supreme Court struck down an Illinois law—which resembled laws in many other states—allowing public sector unions to charge non-union members' dues for nonpolitical activities like collective bargaining.[166] The Court held that compelling people to pay money to a union, even to cover bargaining and nonpolitical activities, is compelled speech in violation of the First Amendment, because the money subsidizes other private actors' speech.[167] This ruling eliminated an important solution to the collective action problems that accompany laborers bargaining as individuals across the table from a more powerful employer. It also embraced a position that the Court had rejected since it decided *Abood*

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[162] *See* Michael Grabell, *Exploitation and Abuse at the Chicken Plant*, NEW YORKER (May 1, 2017), https://www.newyorker.com/magazine/2017/05/08/exploitation-and-abuse-at-the-chicken-plant [https://perma.cc/8M87-54UE] (accessed Feb. 6, 2020) (accessed Dec. 31, 2019) (noting the use of vulnerable undocumented immigrants to bypass labor laws).

[163] *See, e.g.*, ALDF v. Hormel Foods Corp., No. 16-1575(CKK) (D.D.C. 2017) (challenging Hormel's 'natural' food labels).

[164] For lower federal court cases striking down required commercial disclosures as compelled speech in violation of the First Amendment, *see* Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359, 370, 373 (D.C. Cir. 2014); Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947, 957–58 (D.C. Cir. 2013); R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1212, 1217, 1226, 1233 (D.C. Cir. 2012); Authentic Beverages Co. v. Tex. Alcoholic Beverage Comm'n, 835 F. Supp. 2d 227, 241, 245 (W.D. Tex. 2011).

[165] *Game of Thrones: The Long Night* (HBO television broadcast Apr. 27, 2019).

[166] Janus v. AFSCME 138 S. Ct. 2448, 2486 (2018).

[167] *Id.* at 2456.

v. Detroit Board of Education in 1977.[168] Justice Kagan, this time, was the dissenter gesturing at the specter of *Lochner* in the garb of free speech.[169] On the day the Court announced the opinion, she declared from the bench that the Court had "turn[ed] the First Amendment into a sword and us[ed] it against workaday economic and regulatory policy."[170]

Though not technically a *commercial* speech decision, *Janus* embraces a similar vision of freedom as the unimpeded pursuit of wealth by dominant market actors, a vision that has worried conservatives like Justice Rehnquist, who had predicted that laws regulating economic transactions in the public interest might fall before a commercialized First Amendment,[171] and liberals like Justice Kagan, who spoke expressly of weaponization.[172] *Janus* also followed in the footsteps of *Lochner*, which itself ignored the collective action problems that unallied individuals face when competing with one another for a job. Not unlike the liberty protected in *Janus*, *Lochner* championed freedom for the individual laborer to agree to work more than 60-hours-a-week in a bakery, a freedom that humane labor laws had unconstitutionally threatened.[173]

Is the solution, then, to surrender the commercial speech argument? Even lawyers whose primary commitment is to a civil rights cause, rather than to an individual client in litigation, have an ethical obligation to try to prevail in court, and advancing the interests of plant-based companies is an important step towards reducing animal cruelty. Attorneys generally must work with the tools they have. Some witnesses exaggerate or lie, but if those are the only eyewitnesses, then one or the other party is going to call them to testify. Winning may not be everything (or the only thing), but winning is surely important when one represents someone else, and a decision to forgo a surefire winner disserves the client and perhaps the cause as well.

What makes the commercial speech dilemma a dilemma is the fact that it is such a promising legal theory for protecting plant-based and cell-based labeling, given the accurate and informative nature of such labeling. Yet the doctrine generally, and maybe inherently, helps those

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168 *Id.* at 2487 (Kagan, J., dissenting).

169 *Id.* at 2501 (accusing the majority of "weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy").

170 *Id.*

171 *See Virginia Bd. of Pharmacy*, 425 U.S. at 781 ("Under the Court's opinion, the way will be open not only for dissemination of price information, but for active promotion of prescription drugs, liquor, cigarettes, and other products the use of which it has previously been thought desirable to discourage. Now, however, such promotion is protected by the First Amendment so long as it is not misleading or does not promote an illegal product or enterprise. In coming to this conclusion, the Court . . . extends the protection of [the First] Amendment to purely commercial endeavors which its most vigorous champions on this Court had thought to be beyond its pale.").

172 *AFSCME*, 138 S. Ct. at 2501 (Kagan, J., dissenting).

173 Lochner v. New York, 198 U.S. 45, 46, 64 (1905).

who already enjoy wealth and power to exploit those who do not, a pattern all too familiar to lawyers who represent the interests of animals. Because of its systemic effects, reliance on the commercial speech doctrine risks driving away those who should be allies of animal advocate attorneys and their clients. If not used carefully, the law that plant-based and cell-based companies make on the basis of the commercial speech doctrine could easily prove harmful later on, when the meat industry claims the right to utter deceptive words that induce people to ignore animal cruelty and purchase animal products.

A group of attorneys that have tried to square the circle around commercial speech include the American Civil Liberties Union (ACLU), the Animal Legal Defense Fund (ALDF), and the Good Food Institute in representing Tofurky. Perhaps recognizing the dilemma identified here, these organizations raised commercial speech challenges under *Central Hudson*[174] rather than rely expressly on *Sorrell* and its promise of ever-stricter scrutiny for commercial speech. Other interest groups that challenge Tag-Gag statutes could consider showing similar solidarity with animal and human allies by doing the same, effectively boycotting the more dangerous of the commercial speech precedents. Courts can, of course, still look to *Sorrell* and fortify commercial speech doctrine even if parties try to circumscribe the arguments they present. Though courts can decide to rely on an uncited case, however, attorneys cannot entirely avoid the choice between disserving their client, on the one hand, and empowering a potentially threatening doctrine, on the other.

B. Vagueness Challenges and Movement Lawyering

As discussed above, a vagueness challenge serves as a helpful adjunct to First Amendment claims due to the role that vagueness plays in obscuring the scope of censorship entailed in Tag-Gag statutes. But how might this two-part argument play with the current Court, and how would it work with other areas of law?

First, there is reason to think that the current Supreme Court would be favorably inclined toward a vagueness challenge. Justice Gorsuch recently wrote for a majority of the Court emphasizing the vagueness doctrine.[175] Moreover, this decision came on the heels of the Gorsuch concurrence in *Sessions v. Dimaya*, which pressed for strengthening the vagueness doctrine as it applies to civil statutes.[176] For those relying on these cases to pursue progressive ends, one potential risk arises from the fact that Justice Gorsuch's attachment to the

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174 Missouri Compl., *supra* note 13, at 8.

175 *See* United States v. Davis, 139 S. Ct. 2319, 2319 (2019) ("In our constitutional order, a vague law is no law at all. The vagueness doctrine rests on the twin constitutional pillars of due process and separation of powers.").

176 Sessions v. Dimaya, 138 S. Ct. 1204, 1229 (2018) ("[A]ny suggestion that criminal cases warrant a heightened standard of review does more to persuade me that the criminal standard should be set *above* our precedent's current threshold than to suggest the civil standard should be buried *below* it.").

vagueness doctrine stems not primarily from a concern about due process notice,[177] but from the desire to fortify separation of powers doctrine. Quoting earlier Supreme Court precedents, Justice Gorsuch writes: "The *more important* aspect of vagueness doctrine is not actual notice, but . . . the requirement that a legislature establish minimal guidelines to govern law enforcement and keep the separate branches within their proper spheres."[178]

This affinity between vagueness and the separation of powers may be a potential risk for progressive lawyers because separation of powers principles are central to the nondelegation doctrine. Under the nondelegation doctrine, Congress may not delegate an excess of legislative power to other branches of government, to agencies, or to private entities, though this doctrine has lain largely dormant since *A.L.A. Schechter Poultry Corp. v. United States*.[179] In *Schechter Poultry*, Congress gave the executive branch the power to regulate the whole economy without an intelligible principle.[180] Justice Gorsuch has betrayed an interest in reviving the nondelegation doctrine, such as in his dissent in *Gundy v. United States*, and the associated preoccupation with separation of powers principles in the 'vagueness' context could presage plans for this particular brand of judicial activism.[181] Importantly, Justice Gorsuch may represent a majority view in favor of reviving a constitutional limit on delegation: Justice Thomas and Chief Justice Roberts joined the *Gundy* dissent; Justice Alito, in his concurrence, expressed willingness to revisit the nondelegation doctrine;[182] and Justice Kavanaugh did not participate.

Reviving nondelegation doctrine—good, bad, or indifferent—would impact animal and environmental law. It would empower courts to cabin agencies' reach in passing new regulations. To the extent agencies like the Environmental Protection Agency (EPA) issue regu-

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177 When we refer to Due Process notice, we refer to notice to civilians of what they may and may not do. When Justice Gorsuch writes about "guidelines to govern law enforcement," he appears to express concern about notice to law enforcement of which conduct they may and may not disrupt, a concern that does inure to the benefit of civilians. *Id.* at 1228.

178 *Id.* at 1228 (internal quotations omitted).

179 A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

180 *Id.* at 537.

181 *See* Gundy v. United States, 139 S. Ct. 2116, 2131, 2148 (2019) (Gorsuch, J., dissenting) ("I remain hopeful that the Court may yet recognize that, while Congress can enlist considerable assistance from the executive branch in filling up details and finding facts, it may never hand off to the nation's chief prosecutor the power to write his own criminal code. That 'is delegation running riot.'"); *see also* Mark Joseph Stern, *The Supreme Court May Revive a Legal Theory Last Used to Strike Down New Deal Laws*, SLATE (Mar. 5, 2018), https://slate.com/news-and-politics/2018/03/supreme-court-may-revive-non-delegation-doctrine-in-gundy-v-united-states.html [https://perma.cc/MX2C-U6HU] (accessed Feb. 6, 2020) (discussing two occasions during which then-Judge Gorsuch praised the nondelegation doctrine).

182 *Gundy*, 139 S. Ct. at 2131 (Alito, J. concurring) ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.").

lations aimed at protecting the environment or animals, a more powerful judiciary poised to enforce the nondelegation doctrine could be something for the animal protection movement to fear.

Reviving nondelegation doctrine could prove risky in another respect as well—one connected more directly to courts than to administrative agencies. Just as executive agencies may not take over the work of Congress, so then courts too may not legislate from the bench, a state of affairs that could pose an obstacle for plaintiffs. And on the civil side of court dockets, the dispossessed and powerless tend to be plaintiffs. Civil defendants, by contrast, are often businesses flush with cash and reputational assets. A strict separation of powers, yielding a nondelegation doctrine with teeth, would commonly result in the death of new theories of recovery and of common law development remedying unanticipated injustices. Justice Gorsuch's view that a right to notice has much to do with the separation of powers and nondelegation doctrine could predictably lead courts to refuse to order relief found outside the four corners of a statute. Judges necessarily announce a common law remedy for the first time when deciding a case in which defendants had no advance notice that they would have to pay. Justice Gorsuch might say that such an outcome is unconstitutional. It is the job of the legislature, not the courts, to announce prospective rules.[183] Litigation on behalf of animals could collapse before this approach whenever the horrible things that people do to the earth and its nonhuman inhabitants find no precise enumeration in the statutes passed to protect them.

Setting aside potential concerns about a Gorsuch-led nondelegation revival, we find promising the prospect of animal protection groups bringing claims against Tag-Gag laws under the vagueness doctrine. Such litigation—which relies on principles familiar and friendly to the criminal defense bar—could help build a bridge between the animal rights movement and groups that support the rights of criminal defendants. If constitutional doctrine bars prosecutors from pursuing defendants for violating unclear laws, then defendants, and potential defendants, will enjoy greater due process protection. As Justin Marceau argues, supporters of criminal justice reform have natural allies in animal protection advocates because both movements seek to help the most powerless and neglected beings in our midst.[184] To the extent a vagueness challenge advances both sets of interests, animal rights groups seeking allies might consider such a challenge a net-positive step for the movement.

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[183] *See generally* Case of Hayburn 2 U.S. 408, 408 (1792) (announcing a prohibition on advisory opinions).

[184] *See generally* MARCEAU, BEYOND CAGES, *supra* note 159.

C. Dormant Commerce Clause and Preemption Challenges and Movement Lawyering

As this Article has suggested, bringing commercial speech and due process claims in federal court on behalf of slaughter-free meat could risk making law that generally favors animal-adverse interests. Going a step further, arguments for plant-based and cell-based meat that sound in the Dormant Commerce Clause and preemption could directly damage animal law's progress in a domain that has been at least somewhat accommodating to such progress—state courts.

At least some animal law scholars have argued that federal law has done little for animals. Justin Marceau went so far as to write an article arguing that the Animal Welfare Act may have accomplished more harm than good.[185] State measures, by contrast, have helped achieve some legal progress for animals. In Oregon, for example, some animals have gained 'crime victim' status under the law. In *State v. Hess*, the Oregon Court of Appeals upheld a trial court decision refusing to merge forty-five criminal counts of animal neglect.[186] The appellate court relied on the state Supreme Court's logic in *State v. Nix*, which had recognized animals as victims.[187] Now, in *Justice v. Vercher*, Animal Legal Defense Fund (ALDF) is using this favorable state precedent to argue that a horse named Justice has legal personhood and hence standing to bring a *per se* negligence claim against a woman who failed to feed or shelter him during a freezing winter.[188]

In addition to state-based litigation, state and local legislation have helped advance animal protection in a variety of contexts. Two important, recent examples arose in California. In 2004, the state enacted a statute that prohibits "force feed[ing] a bird for the purpose of enlarging the bird's liver beyond normal size,"[189] the process of creating pâté de foie gras. In 2017, California passed the first state law prohibiting pet stores from selling commercially bred ani-

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185 Justin F. Marceau, *How the Animal Welfare Act Harms Animals*, 69 HASTINGS L. J. 925, 928 (2018) ("[A]nimal industries continually deploy the fact that they possess an AWA license as an argument against providing transparency in their animal handling practices, as a soundbite in the media to quell public concern, and even as a basis for defamation actions and related litigation against animal protection groups who criticize the treatment of confined animals.").

186 State v. Hess, 359 P.3d 288, 289–90 (Or. Ct. App. 2015) (internal citations omitted) ("For the reasons stated in *State v. Nix*, we also reject an assignment of error to the court's failure to merge into a single conviction the guilty verdicts on the 45 counts of animal neglect.").

187 State v. Nix, 334 P.3d 437, 438 (Or. 2014) ("On appeal, the Court of Appeals concluded that animals can be victims within the meaning of the anti-merger statute and, accordingly, reversed and remanded for entry a of judgment of conviction on each of the twenty counts and for resentencing."), *vacated on other grounds* 345 P.3d 416, 418 (Or. 2015).

188 *See* Complaint at 2, Justice v. Vercher, 2018 WL 3997811 (Or. Cir. May 1, 2018) (No. 18CV1760) ("The Oregon Supreme Court in *State v. Nix*, recognized that animals are properly the 'victims' of violations of the animal cruelty statutes.").

189 CAL. HEALTH & SAFETY CODE § 25981 (West 2012).

mals,[190] and "hundreds of cities and counties . . . have adopted similar ordinances."[191]

As states make progress for animals by enacting such statutes, industry has challenged that progress under the Dormant Commerce Clause and the Supremacy Clause. Arguably, industry's most successful preemption challenge was in *National Meat Association v. Harris*.[192] The Supreme Court held that the Federal Meat Inspection Act preempted § 599(f) of the state penal code, a California law requiring slaughterhouses to treat non-ambulatory animals, animals who can no longer rise to their feet and walk, more humanely.[193] The California law, in Justice Kagan's words, "endeavor[ed] to regulate the same [thing as the FMIA], at the same time, in the same place—except by imposing different requirements."[194]

Not all of industry's preemption and Dormant Commerce Clause challenges have been successful. In 2012, the same year the Court decided *National Meat Association v. Harris*, California's force-feeding ban went into effect.[195] Industry brought its first main challenge to the ban under the Dormant Commerce Clause, and in 2015, after losing that challenge, industry raised the argument that the Poultry Products Inspection Act (PPIA) preempts California's statute because force-feeding is an ingredient requirement.[196] The Ninth Circuit rejected the preemption argument as well, and the U.S. Supreme Court declined to review the case.[197] Finally, preemption has even reared its head within state government. For example, two states, Arizona and Ohio, passed preemption laws thwarting local ordinances that required pet stores to offer only rescue puppies, and Florida and Georgia attempted the same.[198]

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190 Assembly B. 485, (Cal. 2017) ("This bill would prohibit, on and after January 1, 2019, a pet store operator from selling a live dog, cat, or rabbit in a pet store unless the dog, cat, or rabbit was obtained from a public animal control agency or shelter, society for the prevention of cruelty to animals shelter, humane society shelter, or rescue group, as defined, that is in a cooperative agreement with at least one private or public shelter, as specified.")

191 *See Cities Are Fighting Back Against Puppy Mills – But Some States Won't Let Them*, ANIMAL LEGAL DEF. FUND (Apr. 2, 2018), https://aldf.org/article/cities-fighting-back-puppy-mills-states-wont-let/ [https://perma.cc/AVL9-UKK7] (accessed Feb. 6, 2020) ("In 2017, California made history when it enacted AB 485, the first state law to prohibit stores from selling commercially-bred animals. While California is the first state to enact a retail pet sale ban, hundreds of cities and counties, including Cook County (Chicago) and Philadelphia, have adopted similar ordinances.").

192 National Meat Ass'n v. Harris, 565 U.S. 452, 467–68 (2012).

193 *Id.* at 459–60.

194 *Id.* at 468.

195 CAL. HEALTH & SAFETY CODE § 25982.

196 Association des Éleveurs de Canards et d'Oies du Quebec v. Becerra, 870 F.3d 1140, 1145 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 862 (2019).

197 *Id.; Becerra*, 139 S. Ct. at 862.

198 *See* ALDF, *supra* note 191 (discussing states' attempts to thwart ordinances that would require pet stores to stop offering breeder dogs for sale, and only offer rescue dogs instead).

These examples show that, when states begin making progress for animals, one of industry's go-to responses is to 'go federal' by invoking the Dormant Commerce Clause and preemption. Whether raising these claims successfully will actually strengthen the doctrines is debatable, but on principle, if nothing more, animal-rights advocates may not wish to publicly oppose states' rights when the states are likely their best path to securing victories for animals. If animal-rights lawyers do choose to raise arguments under the Dormant Commerce Clause, they should likely focus on case-specific, egregious legislative histories—like that behind Missouri's Tag-Gag law—and argue that the law had a discriminatory purpose. Industry lawyers may be less able to extrapolate these arguments to future challenges of their own.

IV. EXPANDING THE FREE SPEECH ARGUMENT

A. Why Plant-Based Commercial Speech is Also Political Speech

Up until this point, this Article has suggested that attorneys challenging the constitutionality of Tag-Gag laws have a variety of promising options. They can argue the Supremacy Clause, the Dormant Commerce Clause, the Void for Vagueness doctrine, or Commercial Speech. Recognizing these routes to success, Tofurky and others have presented several of these claims in recent lawsuits brought to declare Tag-Gag statutes in various regions of the country unconstitutional.[199]

Each of these options, however, has potential drawbacks. These constitutional provisions may threaten to undermine related causes—and even, sometimes, the animal cause itself—in the guise of making progress. Moreover, risks that come to pass, and even those that remain inchoate, can alienate potential allies in the larger cause of empowering the weakest and most vulnerable among us. If the risks become realities, the attractive arguments may prove to have been Trojan Horses containing the seeds of the recipient's own destruction. Perhaps this is because none of the arguments offered so far fully align with the objectives of animal advocates.

What is the alternative, though? Do lawyers constantly have to invoke arguments that do not quite match up with what their clients care about most? To take an unappealing client example, attorneys representing Nazis hoping to march in Skokie relied on First Amendment freedom of speech,[200] notwithstanding Nazis' celebrated hostility

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[199] Elise Herron, *Who's Afraid of Tofurky? Oregon's Soy Food Pioneer Fights for the Right to Label Its Product as Meat*, WILLAMETTE WEEK (Sept. 18, 2019, 5:17 AM), https://www.wweek.com/news/2019/09/18/who-is-afraid-of-tofurky-oregons-soy-food-pioneer-fights-for-the-right-to-label-its-product-as-meat/ [https://perma.cc/3WHS-3J4U] (accessed Feb. 6, 2020).

[200] *See* PHILIPPA STRUM, WHEN THE NAZIS CAME TO SKOKIE 1 (1999) (explaining how the events in Stokie "challenged our understanding of and commitment to the First Amendment and free speech."); National Socialist Party of America v. Village of Skokie, 432 U.S. 43, 43–44 (1977) (deciding "marching, walking, or parading" is a First Amendment right).

to free expression. Likewise, prosecutors who use research showing the unreliability of eyewitness identifications to attack an eyewitness for the defense could be strengthening an argument that generally supports defendants rather than prosecutors. In courses that revolve around ethics or morality, it is common to hear the question "What would you do if . . .", and the answer will sometimes be an uneasy compromise between inconsistent objectives. But occasionally, there is a doctrine—if properly applied—that matches the client's ideological objectives perfectly. Animal advocates might find such a doctrine in the First Amendment's protection for political—rather than mere commercial—speech.

If courts classified vegan labeling as political or other noncommercial speech, then not only would strict scrutiny apply, but the classification would leave in place a lower level of protection for the sorts of commercial speech that truly are nothing more central to the marketplace of ideas than a simple attempt to advertise a product. To the extent that *Sorrell* is an undesirable precedent to deploy and fortify, a reliance on pure political speech cases avoids entanglement with ongoing attempts to extend heightened—and arguably reactionary—protection to big business. Finally, if plant-based meat companies can raise political rather than commercial speech challenges, they will be able to bring facial rather than merely as-applied First Amendment challenges to Tag-Gag statutes because the overbreadth doctrine[201] applies to political but not commercial speech.[202]

Political speech is at the core of what the First Amendment protects.[203] The U.S. Supreme Court, in *NAACP v. Button*, quoted language saying that, "Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights."[204] Though commercial speech has been gaining in status since the 1970s, it still technically receives the protection of only intermediate scrutiny.[205] By contrast, political speech triggers strict scrutiny—state censorship of political expression must advance a compelling governmental interest in a manner that is narrowly tailored to serving that interest, neither over nor under-inclusive.[206] Regulations aimed at the content or viewpoint expressed in political speech would

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[201] United States v. Stevens, 559 U.S. 460, 473 (2010) (quoting Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449 n.6 (2008) ("[R]ecogniz[ing] a second type of facial challenge [in the First Amendment context], whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional judged in relation to the statute's plainly legitimate sweep.").

[202] *Central Hudson Gas & Elec. Corp*. 447 U.S. at 5665 n.8.

[203] *See Citizens United*, 588 U.S. 310, 329 (2010) ("Political speech . . . is central to the First Amendment's meaning and purpose.").

[204] National Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 431 (1963) (internal quotations omitted).

[205] American Acad. of Implant Dentistry v. Parker, 152 F. Supp. 3d 641, 649 (W.D. Tex. 2016), *aff'd* 860 F.3d 300 (5th Cir. 2017).

[206] *Citizens United*, 588 U.S. at 340.

most likely fail strict scrutiny and amount to a First Amendment violation.

How, though, can a label on a package of veggie burgers be said to constitute core political speech? Does it not seem clear that labels are commercial rather than political forms of communication, directed at consumers trying to decide what purchases to make? How could one call the phrase veggie burgers political speech without also calling the phrases 'whitening toothpaste' and 'powerful stain remover' political speech as well? And if there is no distinction, then are we proposing that commercial speech itself—which we earlier criticized as power-reinforcing—should receive protection in the form of strict scrutiny?

The answer is that there is a distinction, one that courts have made and must necessarily make in many political speech cases. When a business attempts to persuade consumers to buy its products, its efforts generally do appear best characterized as commercial speech. The goal of the speech is to induce a purchase rather than to express a disputed idea about the world. Cigarette advertisements from the first half of the twentieth century include one in which a doctor holds an open pack and says, "Give your throat a vacation . . . . Smoke a Fresh Cigarette."[207] This advertisement for cigarettes, which conveys no ideas beyond the invitation to use the advertised product (for a 'throat vacation,' in which the doctor's throat is ostensibly enjoying a vacation from oxygen) is obviously commercial speech, a type of speech currently entitled only to the protection of intermediate scrutiny. How is the phrase veggie burgers different?

In one respect, the two are the same. People who sell vegan burgers want customers, and one way to get customers is to let people know what's for sale. If a company puts together a product that tastes exactly like a beef burger but is made exclusively of plants, the company would presumably want to convey these facts to potential customers. In the case of veggie burgers, as in the case of cigarettes, the company uses words to attract potential buyers.

However, one additional feature distinguishes veggie burgers from cigarettes (beyond the obvious). The vendor of veggie burgers will frequently be a business that wishes to persuade the consumer—and ultimately the world—that one can stop supporting the slaughter industry and still enjoy the burger experience. That would be a message about the wrongfulness of killing animals unnecessarily, not just a message about making a purchase.

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[207] *See* Robert Klara, *Throwback Thursday: When Doctors Prescribed 'Healthy' Cigarette Brands*, ADWEEK (June 18, 2015), https://www.adweek.com/brand-marketing/throwback-thursday-when-doctors-prescribed-healthy-cigarette-brands-165404/ [https://perma.cc/U4BU-YHFQ] (accessed Feb. 6, 2020) (showing an old Camel cigarette advertisement).

To understand the difference, consider the fact that almost everyone in the country right now consumes animal products.[208] Imagine that one of the companies providing such products offered to help a vegan company break into the profitable animal-product industry. In most cases, the vegan company would likely say no, and the reason would have little to do with the potential for meat sellers to make a profit. A vegan company often chooses to be vegan because its owners believe it is a more just alternative to the non-vegan meat companies in existence. The vegan company's message to the public is therefore one of sparing the lives of animals or of saving the environment rather than simply one of 'mmmmm burgers!'[209] The goal is not just to get people to buy their product but to persuade people to take meat out of their diet because consuming meat causes harm. If you told Tofurky's CEO that you would not be buying Tofurky products but that you were convinced by Tofurky to eat vegan from now on, the Tofurky CEO would likely be happy knowing he had influenced you to make more ethical food choices.[210] If, on the other hand, you told Cargill that you would not be buying the meat that they sell but that you would be buying meat from a competitor, Cargill would likely take little joy in that revelation.

Companies that have a moral message to share are engaged in ideological and political speech, even if they are simultaneously marketing a product. One might say that the reason such companies sell the product that they do is frequently to support and promote their worldview. For standard corporations, the opposite is true. Businesses sell products that they anticipate will attract buyers. They then advertise—and perhaps even express a worldview—with an eye towards attracting buyers. The bottom line is at the center of any speech that a corporation typically disseminates.

In addition to looking at the motives of the speakers themselves—a look that suggests a difference between companies like Tofurky and Cargill—individuals can productively consider the motives of the cen-

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208 RJ Reinhart, *Snapshot: Few Americans Vegetarian or Vegan*, GALLUP (Aug. 1, 2018), https://news.gallup.com/poll/238328/snapshot-few-americans-vegetarian-vegan.aspx [https://perma.cc/Y7BE-4SQV] (accessed Feb. 6, 2020).

209 However, some companies, such as Impossible Foods, have made the decision to partner with major companies like Burger King to bring vegan options into such large animal-product heavy chains. *See* Kelly Tyko, *Burger King Plans to Release Plant-Based Impossible Whopper Nationwide by End of Year*, USA TODAY (Apr. 29, 2019, 2:35 PM), https://www.usatoday.com/story/money/food/2019/04/29/burger-king-impossible-whopper-vegan-burger-released-nationwide/3591837002/ [https://perma.cc/A5EQ-PJB2] (accessed Feb. 6, 2020) (indicating "the plant-based Whopper developed by Silicon Valley-based Impossible Foods" is available at Burger King restaurants).

210 *See Interview with Seth Tibbott*, THE GHOSTS IN OUR MACHINE, https://www.theghostsinourmachine.com/interview-with-seth-tibbott/ [https://perma.cc/3X9C-3F66] (accessed Feb. 6, 2020) ("We understand the need to make a decent profit . . . [b]ut we also view ourselves as partners with so many noble organizations and initiatives that are sharing our journey to reinvent the world's diet.").

sors as well. What is the government looking to do when it regulates the speech of Tofurky and Cargill, respectively?

When the government regulates the meat industry, as it tends to do inadequately, it does so to protect the public.[211] In 1906, Upton Sinclair published *The Jungle*, a novel that blew the lid off the slaughter—'meat processing'—business.[212] Sinclair's goal was to let the public know about labor abuses in the industry, but in doing so, he exposed the filth, including some number of human body parts, that makes its way into animal meat.[213] People were disgusted by what they read, and Congress responded.[214] In later describing the public's reaction to his novel, Sinclair wrote, "I aimed at the public's heart, and by accident I hit it in the stomach."[215]

By passing legislation after publication of Sinclair's book, the government aimed to regulate industry in accord with the public will. One might take issue with how well these laws have achieved their objective,[216] but the goal was to improve the safety and quality of slaughterhouse products.

Contrast this with 'consumer protection' regulations Missouri and other states enacted to regulate use of such words as burger or frankfurter in connection with plant-based or cell-based products. The goal of such legislation was not to protect people's health. Plant-based meat substitutes are no *less* healthful than is slaughterhouse-based food, and cell-based meat will likely be cleaner than its slaughterhouse analogue because cells do not defecate, grow abscesses, shed pus, or otherwise contaminate themselves with gastrointestinal fauna. And, as discussed above, we suspect that about as many consumers believe a soy dog is made of beef as believe that the 'Lawn Doctor' is a kind old physician who makes house calls to people's gardens.

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211 *See* INST. OF MED., FOOD & NUTRITION BOARD, CATTLE INSPECTION: COMMITTEE ON EVALUATION OF USDA STREAMLINED INSPECTION SYSTEM FOR CATTLE (SIS-C) 8 (1990), https://www.ncbi.nlm.nih.gov/books/NBK235652/pdf/Bookshelf_NBK235652.pdf [https://perma.cc/VCX6-T5AQ] (accessed Feb. 6, 2020) ("The Federal Meat Inspection Act of 1906 (P.L. 59-242) and the Wholesome Meat Act of 1967 (P.L. 90-201) were designed and implemented to provide the public with a safe, wholesome meat supply.").

212 UPTON SINCLAIR, THE JUNGLE (1906).

213 *Id.* at 143 ("When, for instance, a man had fallen into one of the rendering tanks and had been made into pure leaf lard . . . .").

214 *See* Pure Food Act, 59 Pub. L. No. 384, 34 Stat. 768 (1906) (establishing federal law which, in part, prevented "the manufacture, sale, or transport of adulterated or misbranded or poisonous or deleterious foods").

215 Upton Sinclair, *What Life Means to Me*, 41 COSMOPOLITAN MAGAZINE, 591, 594 (May–Oct., 1906).

216 The laws may not have been that effective in the end, given that meat processing plants continue to trigger condemnation for human rights violations in which slaughterhouse line speeds and working conditions result in employee distress and food contamination. *See* Food Empowerment Project, *Slaughterhouse Workers*, FOOD IS POWER, https://foodispower.org/human-labor-slavery/slaughterhouse-workers/ [https://perma.cc/MB3A-WA7F] (accessed Feb. 6, 2020) (detailing ongoing workers' rights violations in U.S. slaughterhouses).

The baselessness of the proffered need to protect consumers from confusion is relevant in a number of ways already discussed, including to show that the regulations in question should fail constitutional scrutiny under the commercial speech doctrine and other constitutional provisions. Its relevance also extends to this Article's discussion of political speech.

Under the political speech doctrine, the fact that consumers are not confused about veggie burgers suggests that those who lobbied for the legislation—the voices of animal agriculture—are interested in censorship rather than in consumer protection. Under the strict scrutiny test that applies to regulations of core speech under the First Amendment, the actual intention of the government can be dispositive. If the goal is to regulate speech in an effort to suppress expression of a particular viewpoint, then the measure must further a compelling government interest in the narrowest way available.

The absurdity of the goal that states claim to be pursuing reveals what they are really up to. That hidden objective—to suppress the message that plant-based food offers a meat alternative—is not a legitimate state interest and certainly not a compelling one. It is inherently censorious of a dissenting view.

The U.S. Supreme Court has long understood dissenting views as lying at the heart of what the First Amendment protects. In *West Virginia State Board of Education v. Barnette*, the Court invalidated a law requiring students to salute the flag at school.[217] Challengers were Jehovah's Witness families whose children were expelled for refusing to salute.[218] In protecting their freedom of expression, Justice Jackson wrote,

> [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox.[219]

It is difficult to imagine a more entrenched orthodoxy than the one that says animal products are a crucial part of everyone's diet. The orthodoxy virtually whispers in every ear, 'where do you get your protein?' and produces an alarming degree of conformity of diet and dietary ideology.

Companies that sell vegan alternatives to animal-based meat and dairy challenge the orthodoxy and tell people that there is another way to live, a diet that leaves behind the brutality of 'raising' animals and slaughtering them long before their time. It is accordingly unsurprising that those who profit most from the entrenched orthodoxy have moved state legislatures to prohibit the expression of this dissenting viewpoint. One could understand prohibiting comparisons between the

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[217] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
[218] *Id.* at 629–30.
[219] *Id.* at 642.

flavor and protein content of animal-based and plant-based meat, respectively, as comparable to prohibiting conduct—like kneeling instead of standing—that expresses dissent from the Star-Spangled Banner. To dispute the proposition that 'you need to kill animals to have a great burger,' one must be able to say a person can enjoy a quality burger without killing. One cannot say this very well while observing a prohibition against the very words needed to express dissent. To say, "I disagree with the conventional wisdom, X," as vegan vendors like Tofurky want to say on every package, it is crucial to be able to call out X by name.[220] Just imagine trying to write a book condemning the availability of the most lethal firearms while observing a fatwa against naming the weapons under consideration.

More than thirty years after Justice Jackson's eloquent words appeared in *Barnette*, the Court decided *Wooley v. Maynard*, protecting the right of Jehovah's Witnesses (again) to cover up a New Hampshire license plate that carried a message offensive to Witnesses, "Live Free or Die."[221] Here too, the Court sought to protect the dissenter's freedom of expression. "The fact that most individuals agree . . . is not the test," explained the Court.[222] "The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable."[223] The point of view that vendors, like Tofurky, hold is that it is wrong to slaughter animals for food when there are other enjoyable options that are equally if not more nutritious. Tofurky has never been primarily in it for the money.[224] It has sought to persuade people of its point of view in what may be the most effective manner possible. In a twist on what Upton Sinclair said about his novel, one may be most effective at changing hearts and minds by aiming directly at people's stomachs. Tucking into a Tofurky sausage can powerfully drive home the message that no one need suffer another day, neither human nor fish nor fowl. To have to write 'veggie disk' or 'vegan spicy cylinder' or something else besides veggie burger, 'soy dog,' or 'vegan sausage' is to endorse, under compulsion, the controverted viewpoint that hamburgers and hot dogs require slaughter.

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220 By way of analogy to the law of intellectual property, a parody may borrow from its competitor without infringing the latter's copyright. *See*, *e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580–81 (1994) ("Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing."). The terms 'veggie burger' and 'plant-based sausage' are like parodies of animal-based analogs, insofar as they must reference the original to make their critical point.

221 Wooley v. Maynard, 430 U.S. 705, 706–07, 717 (1977).

222 *Id.* at 715.

223 *Id.*

224 *See Our Roots*, TOFURKY, https://tofurky.com/our-story/our-roots/ [https://perma.cc/2NH8-ZSYZ] (accessed Feb. 6, 2020) ("Family-owned for 40 years, Tofurky has always focused on purpose over profits.").

Texas v. Johnson struck down a law that prohibited flag desecration.[225] The Court said there that "[a] bedrock principle underlying the First Amendment . . . is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[226] Society does find veganism disagreeable. That is why even what many regard as a progressive network like NPR hosts a comedy show, *Wait Wait . . . Don't Tell Me*, on which nasty remarks about vegans and veganism are a regular feature.[227] Products like Tofurky deli slices once again express the message that vegan food is actually a wonderful substitute for what comes out of the slaughterhouse, letting consumers know the exact thing for which it is a substitute. Like Sinclair's novel did inadvertently, the vegan message deliberately hits the consumer in the stomach, but in a positive way.

Can we just characterize commercial speech as political speech, though? Are these categories separate and bounded? The answer to this question is unclear. Although some speech is obviously not commercial—such as kneeling during the Star-Spangled Banner—the reverse is less straightforward.

Consider the iconic case of *New York Times v. Sullivan*, in which the Supreme Court announced a higher standard for proving defamation against a defendant that publishes a falsehood about a public official.[228] People routinely refer to the case as a triumph for the freedom of speech because when it is easy to make out a case of libel, speakers become more hesitant about making factual statements. Such a standard significantly chills expression.

Aside from being an important First Amendment free speech case, *Sullivan* is noteworthy for another reason. The alleged libel at issue appeared as part of a paid advertisement in the corporate petitioner's newspaper, the *New York Times*.[229] The Court explained that free expression does not lose constitutional protection just because it happens to appear in a paid advertisement.[230] The content of the advertisement—describing alleged police action against student civil rights demonstrators—remains protected speech despite the payment of money.[231] This holding alone does not make vegan labels a slam dunk. The paid advertisement in question was plainly a political statement about public officials. No one was attempting to sell a product to a customer through advertising. Those paying were perhaps like editorial writers with no publisher prepared to circulate their work gratis.

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225 Texas v. Johnson, 491 U.S. 397, 399 (1989).

226 *Id*. at 414.

227 *See* Rachel Krantz, *Stop Telling Vegans to "Get a Sense of Humor,"* MERCY FOR ANIMALS (Jan. 5, 2018), https://mercyforanimals.org/stop-telling-vegans-to-get-a-sense-of-humor [https://perma.cc/F8PQ-JVNV] (accessed Feb. 6, 2020) (discussing how society pokes fun at vegans).

228 New York Times Co. v. Sullivan, 376 U.S. 254, 256, 265–66 (1964).

229 *Id.* at 256.

230 *Id.* at 266.

231 *Id.*

Yet the irrelevance of the speaker having paid to run an ad in the newspaper suggests more than a simple focus on the noncommercial aspect of the content. After all, one could imagine a very easy line of demarcation with advertisements of whatever sort on one side and unpaid individual or corporate speakers on the other. But would that really be such an easy line to draw? Professional writers receive money for their creations, whether opinion pieces, short stories, plays, or novels, yet who would suggest that their words therefore amount to commercial speech subject to diminished constitutional protection? In *Simon & Schuster v. Crime Victims Board*, the Supreme Court specifically extended First Amendment protection to convicted felons who write about their crimes, not only for the writing—which no one was seeking to censor—but for the receipt of compensation from a publisher.[232] Making money from one's creative endeavors finds the highest standard of protection under the First Amendment, even when one is a convicted criminal whom some would characterize as extracting wealth from the very misconduct that led to the conviction. But for the crime, there would be no money. However, as with all First Amendment rulings, the State could collect the same money by simply expanding the scope of the law to encompass all fruits of the misconduct, including non-speech-connected profits. New York State did just that after the Court's decision came down.[233]

What does any of this have to do with meat labels? These decisions tell us that we have to take a closer look at the content of speech, even when it appears inside an advertisement. Only by examining the message—as well as the motives of the government actors attempting to regulate it—can individuals determine whether regulation of the words before them qualifies for strict scrutiny. The exchange of cash and the fact that an advertisement is at issue do not automatically result in a commercial speech designation. Money is often the means through which people are able to engage in political, ideological, religious, and other protected speech. And once we recognize the significance of the message, regardless of its container, we can look upon the labels attached to vegan products and understand them for what they are—the expression of a dissenting view about the proper place of nonhuman animals in our lives and on our planet.

The U.S. Supreme Court, in *National Institute of Family and Life Associates (NIFLA) v. Becerra*, once again demonstrated that what may seem like mere commercial speech can qualify as the more significant type of speech protected by strict scrutiny.[234] In *NIFLA*, California had passed a law requiring that clinics serving primarily pregnant women make abortion-related information (including government-

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[232] Simon & Schuster, Inc. v. Members of the N.Y. St. Crime Victims Bd., 502 U.S. 105, 108, 123 (1991).

[233] *See* N.Y. Exec. Law § 632(a) (defining funds of a convicted person as "all funds and property received from any source by a person convicted of a specified crime").

[234] National Inst. Of Family & Life Advocates (NIFLA) v. Becerra, 138 S. Ct. 2361, 2372 (2018).

funded abortion services) available to patients.[235] Crisis pregnancy centers, which offer pregnancy care but oppose abortion, challenged the law under the First Amendment.[236] The Supreme Court ruled in their favor and struck down the California law.[237] Though the Court briefly considered the possibility that the government was regulating commercial speech, it rejected this classification—which one might call a professional disclosure mandate—in part because abortion is not an 'uncontroversial' topic on which a business or professional might offer straightforward factual revelations.[238]

Note that it would have been easy for the Supreme Court to hold that distributing information about the availability of free abortion services is really just the sort of disclosure that businesses have to make all the time. Cigarette companies must disclose the risks of smoking on their packaging, and an unobtrusive mandatory warning does not violate the First Amendment.[239] Packaged foods must disclose their ingredients and other nutritional information.[240] Such compelled disclosures do not, and should not, fall into the same category as censoring a political editorial or as requiring Jehovah's Witnesses to salute the flag.

Yet the Court viewed the forced provision of abortion information as something different. It was different, because telling people where they can get an abortion implicitly tells them that getting an abortion is morally acceptable. It is accordingly not just the conveyance of simple facts, but the expression of a normative viewpoint, one that would likely be anathema to anyone working at a crisis pregnancy center. Pro-life advocates believe that abortion is tantamount to the murder of a baby.[241] Discomfort with the message would not primarily reflect a profit-oriented concern.

Significantly, the Supreme Court has recognized that when a hybrid situation arises, the political speech character of the mix dominates over the commercial speech aspect of it. In *Riley v. National Federation of the Blind*, the Court struck down North Carolina's rules governing charitable donations and the percentages of donations to be

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235 *Id.* at 2368.

236 *Id*.

237 *Id.* at 2375.

238 *Id.* at 2372.

239 *See* Family Smoking Prevention & Tobacco Control Act of 2009, Pub. L. No. 111-31, 123 Stat. 1842 (2009) (amending 15 U.S.C. § 1333 (1985)) (requiring warning labels on the packages of all cigarettes).

240 *See, e.g.*, U.S. FOOD & DRUG ADMIN., A FOOD LABELING GUIDE: GUIDANCE FOR INDUSTRY 4 (2013) (providing the food industry with guidelines for how to properly label packaged food and providing the relevant statutory provisions they must satisfy).

241 *See* Thomas Edsall, *Opinion: Why the Fight Over Abortion Is Unrelenting*, N.Y. TIMES (May 29, 2019), https://www.nytimes.com/2019/05/29/opinion/abortion-restrictions-politics.html [https://perma.cc/EGN4-K7ZB] (accessed Feb. 6, 2020) (quoting sociologist Kristin Luker, who said that for opponents of abortion, "abortion is morally equivalent to murder").

allocated to the fundraiser.[242] One of the issues before the Justices was whether the law could require the disclosure to potential donors of the percentage collected, by the fundraiser, in the past year.[243] The Court struck down this provision as well, even after assuming *arguendo* that the fundraiser's speech itself is commercial speech. It said that

> [W]e do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech. Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon. This is the teaching of Schaumburg and Munson, in which we refused to separate the component parts of charitable solicitations from the fully protected whole.[244]

For the same reason, even though the phrase veggie burgers or deli slices might appear on a package of food along with commercial speech, the phrases remain within the realm of political speech protected by strict scrutiny.

One other case may provide support for the characterization of plant-based-meat labels as noncommercial speech—*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.[245] The case involved a same-sex couple that sought to buy a wedding cake from the petitioner, a Christian baker who refused the men a cake because same-sex weddings conflicted with his religious observance.[246] The Court rested its ruling for the baker on the First Amendment's Free Exercise Clause on the ground that respondent, Colorado Civil Rights Commission, had exhibited hostility to religion in making its ruling against the baker.[247] Justice Thomas, however, wrote separately to address whether compelling an opponent of same-sex marriage to create a same-sex wedding cake would violate the First Amendment free speech rights of the baker.[248] In deciding that creating a cake was expressive conduct, he wrote,

> [E]ven assuming that most for-profit companies prioritize maximizing profits over communicating a message, that is not true for Masterpiece Cakeshop. Phillips routinely sacrifices profits to ensure that Masterpiece operates in a way that represents his Christian faith. He is not open on Sundays, he pays his employees a higher-than-average wage, and he loans them money in times of need. Phillips also refuses to bake cakes containing alcohol, cakes with racist or homophobic messages, cakes criticizing God, and cakes celebrating Halloween—even though Halloween is one of the most lucrative seasons for bakeries. These efforts to exercise control over

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242 Riley v. National Fed'n of the Blind, 487 U.S. 781, 784 (1988).

243 *Id.* at 795.

244 *Id.* at 796.

245 Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rights Comm'n, 138 S. Ct. 1719, 1720 (2018).

246 *Id.* at 1723.

247 *Id.* at 1723–24, 1732.

248 *Id.* at 1744 (Thomas, J., concurring).

> the messages that Masterpiece sends are still more evidence that Phillips' conduct is expressive.[249]

Despite recognizing that a bakery is a for-profit business, Justice Thomas examined the nature of the baker's conduct, determined that it was expressive, and noted that it was the baker's primary purpose.[250]

One can say the same of a vegan business like Tofurky. Those who sell plant-based or, in the future, cell-based meat, are often invested not only in profits but also in leaving the environmental devastation and animal cruelty of livestock agriculture behind.[251] Indeed, like pro-life staff at a crisis pregnancy center or a Christian baker who opposes same-sex marriage, vegan vendors may be more committed to the political message that their products' packaging conveys than to the financial well-being of their businesses. In Ithaca, where we both live, a vendor appears each week at the local farmer's market and sells prepared vegan foods that she cooks or bakes herself, including lasagna and macaroni and cheese. She named her business "Save Animals Go Vegan Bistro," and she sells the food at a loss (or hands it out for free) to enable anyone interested in trying it to do so and then perhaps to consider giving up animal-based foods.[252] Her 'mac and cheese' labels and advertisements are, we think, political rather than commercial speech because economics played little to no role in motivating her conduct.

Most businesses will not, and indeed cannot, operate at a loss, but the dedication that underlies the willingness to do so is familiar to anyone in a dissenting business, one that by its very existence challenges the prevailing ideology. In the case of plant-based and cell-based meat, censoring labels that simply tell the truth about the existence of alternatives to slaughtered animal foods stifles dissent and interferes with speech that may be as controversial as the expression of viewpoints regarding abortion. In keeping with the original meaning of the word meat as food, nourishment, and sustenance, plant-based businesses (and perhaps, down the road, cell-based businesses as well) make an argument with their labeling—they advance the proposition that food need not consist of an innocent creature who once lived and breathed as we do and whose life was brutally cut short.

Line-drawing challenges are inevitable here, as elsewhere in the law. Even in straightforward cases, an advertisement might contain both commercial and noncommercial speech. When Tofurky lists the

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[249] *Id*. at 1745 (Thomas, J., concurring).

[250] *Id.* at 1743 (Thomas, J., concurring).

[251] *See A Better World*, TOFURKY, https://tofurky.com/our-story/a-better-world/ [https://perma.cc/TZ6T-8TZD] (accessed Feb. 6, 2020) ("We believe in people, animals, and the environment over profits. As Tofurky grows, we continue to reinvest in animal welfare and environmental initiatives").

[252] *Current Market Offerings,* SAVE ANIMALS GO VEGAN BISTRO, http://www.saveanimalsgovegan.com/currentofferings.html [https://perma.cc/8BVW-JR8M] (accessed Feb. 6, 2020).

ingredients in a vegan sausage, as it is required by law to do, that list represents compelled commercial speech, an enumeration of uncontroversial facts that it must disclose to the consumer.[253] The same is true for revelations about fat content or calories. It is only the very narrow titles that Tofurky gives to the food, whether a plant-based sausage or deli slices, that we believe ought to qualify as noncommercial speech, in no small part because of the evident motive that drives the legislation seeking to censor such titles. It is, of course, common for the government's motives to affect the constitutionality of its actions.[254]

One remaining question is whether harvested meat vendors are also engaged in protected noncommercial speech or whether only vendors who offer alternatives to animal products can take advantage of strict scrutiny for their labels. We believe that reasonable minds could differ on this question.

The more compelling view is that animal agriculture should not have recourse to the principle of 'noncommercial commercial speech' described in these pages. In our world, nothing could be less controversial than for a business to say "Beef. It's what's for dinner."[255] One cannot help but observe that the words of the ad say nothing about beef and exploit the human urge to mimic others. Indeed, companies selling 'harvested livestock' do not even bother to say that producing and consuming their product is legitimate. What they do say is simply predicated on the assumption that such production and consumption is legitimate, an assumption that few would question. They can accordingly focus their attention on commercial advertising entitled to lighter First Amendment protection. Our position here, in keeping with the work of Steven H. Shiffrin, is that people expressing views that depart from those of the majority should receive the most robust free speech protection by virtue of their vulnerable status as ideological dissenters.[256] Under this application of his approach, it could be noncommercial speech to promote plant-based meat and commercial speech to promote animal-based meat.

Yet even as we make this argument, we cannot help but identify some weaknesses. First, it seems dissonant to characterize the affirmative position in a debate on a particular topic as commercial while characterizing the opposing position in the same debate as noncom-

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253 *See Zauderer*, 471 U.S. at 637 (indicating that compelled commercial speech is consistent with the First Amendment).

254 *See* Washington v. Davis, 426 U.S. 229, 239 (1976) (holding there is no equal protection violation absent discriminatory purpose); Whren v. United States, 517 U.S. 806, 813 (1996) (mentioning, in dicta, that even if police have probable cause to arrest a suspect, they might nonetheless be violating the Equal Protection Clause in selecting a target for arrest on the basis of race).

255 *Beef. It's What's for Dinner*, CATTLEMEN'S BEEF BOARD & NAT'L CATTLEMEN'S BEEF ASS'N, https://www.beefitswhatsfordinner.com/ [https://perma.cc/VN8V-L7HP] (accessed Feb. 6, 2020).

256 STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA 128 (Princeton Univ. Press 1999).

mercial. Shouldn't one determine the class of speech in a viewpoint-neutral fashion? Doesn't the failure to do so seem to violate the principles of viewpoint neutrality that the First Amendment doctrine holds dear? Second, how do we determine that someone is a dissenter? For example, in the abortion context that arose earlier, the U.S. Supreme Court refused to classify pro-life speech as commercial, partly because of the controversy that surrounds the topic.[257] Does that make pro-choice speech commercial in nature? The Court has not said anything of the kind in its precedents. When the Court addresses a subject in which viewpoints are less lopsided than they are in the debate over eating animals, we worry about giving the Justices discretion to decide who qualifies as a dissenter. If our worries are justified, it would make sense to classify any controversial assertions on food packaging as non-commercial speech, with the understanding that they are less likely to appear at all when everyone takes them for granted.

B. Why Plant-Based Plaintiff Companies Should be Bringing State Constitutional Free Speech Claims

In 1977, Justice Brennan wrote a seminal article about using state constitutions to protect individual rights.[258] Over the years, his arguments have found good company. Former Chief Judge Kaye of the New York Court of Appeals, for example, has written about freedom of the press under state constitutions.[259] Most recently, and in most detail, Judge Jeffrey Sutton has published a book titled *51 Imperfect Solutions: States and the Making of American Constitutional Law*.[260] In the book, he details the interplay between state and federal constitutional law by examining four issues in turn: public school funding,[261] the exclusionary rule,[262] eugenics,[263] and mandatory flag salutes.[264] Judge Sutton concludes that progress in the state courts can prove more durable than what the Supreme Court can offer. For example, in the school funding context, he describes how in the wake of *San Antonio Independent School District v. Rodriguez*—where the Supreme Court declined to hold that students in low-income Texas school districts had a fundamental right to the same education as students in the wealthy districts—state courts and legislatures, including in Texas, quickly advanced their own remedies to address school funding

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257 *NIFLA*, 138 S. Ct. at 2372.

258 William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

259 Judith S. Kaye, *State Constitutions*, FREEDOM FORUM INST. (Sept. 13, 2002), https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-the-press/state-constitutions/ [https://perma.cc/EZ75-K7BE] (accessed Feb. 6, 2020).

260 JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018).

261 *Id.* at 22–41.

262 *Id.* at 41–83.

263 *Id.* at 84–132.

264 *Id.* at 133–72.

disparities.[265] By contrast, in the exclusionary rule context, Sutton argues that the Supreme Court, in *Mapp v. Ohio*, might have acted prematurely, causing the states to simply follow the high court in lockstep, including when the Supreme Court later created exclusionary rule exceptions.[266]

Animal law, too, has made progress through state constitutions. Memorably, in November 2018, Florida's citizens voted to amend its state constitution to ban greyhound racing.[267] Now, in addition to lobbying for constitutional amendments, animal-rights lawyers should litigate state constitutional challenges. If nothing more, supplementing federal constitutional challenges with state constitutional challenges will give animal-rights lawyers 'two bites at the apple.' It will also give animal advocates opportunities to experiment without risking unfavorable federal precedent.

A full analysis of state constitutional challenges to Tag-Gag statutes is beyond the scope of this Article, but we conclude with a brief example. Missouri's constitution provides that "no law shall be passed impairing the freedom of speech, no matter by what means communicated."[268] Although the Missouri Supreme Court has clarified that free speech in Missouri is not an absolute right,[269] there is room for plant-based companies to bring separate state challenges under this provision. For example, the phrase "by any means communicated" arguably conveys that Missouri's constitution gives more protection to commercial speech than the federal constitution does. Raising a challenge under Missouri's constitution could therefore allow plant-based companies to seek heightened scrutiny without setting potentially adverse federal precedent.

V. CONCLUSION

This Article has explored challenges to the state Tag-Gag laws that have recently begun plaguing plant-based meat companies. In addition to reviewing these challenges on the merits, Part III explored them in the larger context of the animal law movement and other allied or potentially allied movements. Part IV then developed an original conception of noncommercial commercial speech that may offer the most robust protection for alternative-meat labels while threatening the fewest collateral effects. We hope, and predict, that animal law will continue moving forward, and that alternative-meat companies will

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265 *Id.* at 22–32; San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 2 (1973).

266 SUTTON, *supra* note 259, at 42–62; Mapp v. Ohio, 367 U.S. 643, 660 (1961).

267 *Florida Amendment 13, Ban on Wagering on Dog Races Amendment (2018)*, BALLOTPEDIA, https://ballotpedia.org/Florida_Amendment_13,_Ban_on_Wagering_on_Dog_Races_Amendment_(2018) [https://perma.cc/CKF2-5CV9] (accessed Feb. 6, 2020); *see also* FLA. CONST. art. X, § 32 (incorporating the amendment language into the state constitution).

268 MO. CONST. art. I, § 8.

269 BBC Fireworks, Inc. v. State Highway & Transp. Comm'n, 828 S.W.2d 879, 881 (Mo. 1992).

bolster rather than interfere with this progress. Ultimately, alternative-meat companies will benefit the animal law movement if they can market their products honestly and effectively with words that describe the taste, use, and nutritional value of their products. Being able to do so is their constitutional right.