

FREEDOM OF SPEECH & THE HIGH PRICE OF
COLLEGE TEXTBOOKS: DO NEW LAWS
AFFECTING DISCLOSURE OF TEXTBOOK
INFORMATION GO TOO FAR AND VIOLATE THE
FIRST AMENDMENT?

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INTRODUCTION

Among the many tough fiscal realities facing college students today is the hefty price of required textbooks. As one newspaper reported in September 2007, the cost of textbooks “has been climbing at twice the rate of

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inflation for 20 years.”¹ That piece of information only begins to tell the full story of the money expended on books in higher education. In July 2005, for example, the United States Government Accountability Office (GAO) issued a report finding that “[i]n academic year 2003-2004, students and their families spent over \$6 billion on new and used textbooks,”² and that “[s]ince December of 1986, textbook prices have nearly tripled, increasing by 186 percent, while tuition and fees increased by 240 percent and overall prices grew by 72 percent.”³ Among other findings, the GAO report noted specific concerns about the so-called “bundling” of supplements and other peripheral materials such as CD-ROMs and workbooks with textbooks into a single package, a practice that some contend “limits students’ ability to reduce their costs by purchasing less expensive used books and choosing which, if any, supplements they want to purchase.”⁴

More recently, in February 2007, the Student Public Interest Research Groups (Student PIRGs)⁵ published a provocatively titled report, *Exposing the Textbook Industry: How Publishers’ Pricing Tactics Drive Up the Cost of College Textbooks*.⁶ The damning document asserts that

The gap between tuition and fees and financial aid leaves many students working long hours through college, struggling to make ends meet, and graduating with large debts. The high cost of textbooks is yet another financial burden. The cost of textbooks is not just a drop in the bucket of tuition and fees; the average student spends about \$900 per year on textbooks, which is nearly 20% of tuition and fees at a four year public institution. Moreover, textbook prices are rising at about four times the rate of inflation.⁷

Among the specific complaints, in addition to the alleged problems caused by bundling noted in the GAO’s report, the Student PIRGs’ study blasted publishers’ practices of issuing new editions of textbooks. The report asserted that

1. Paige Austin, *New Laws Try to Rein in Textbook Costs*, PRESS-ENTERPRISE (Riverside, Cal.), Sept. 19, 2007, at A1, available at http://www.pe.com/localnews/higher_education/stories/PE_News_Local_R_texts20.6b6349.html.

2. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-806, COLLEGE TEXTBOOKS: ENHANCED OFFERINGS APPEAR TO DRIVE RECENT PRICE INCREASES 1 (2005), available at <http://www.gao.gov/new.items/d05806.pdf>.

3. *Id.* at 2.

4. *Id.* at 16.

5. The Student PIRGs describe themselves as “independent state-based student organizations that work to solve public interest problems related to the environment, consumer protection, and government reform.” Student Public Interest Research Groups, About Us: Student PIRGs, <http://www.studentpirgs.org/action.asp?id2=18920> (last visited Apr. 21, 2008).

6. Saffron Zomer, *Exposing the Textbook Industry: How Publishers’ Pricing Tactics Drive Up the Cost of College Textbooks* (2007), http://www.maketextbooksaffordable.org/Exposing_the_Textbook_Industry.pdf [hereinafter *Exposing the Textbook Industry*].

7. *Id.* at 4.

[o]f the professors . . . surveyed, 71% said that new editions of textbooks in their field are justified only 'sometimes' or 'rarely', confirming earlier PIRG research. Since new editions are on average 12% more expensive than the previous edition, students are spending a lot of money for little educational gain. New editions also hamper the used book market, the most practical source for most students to access cheaper books.⁸

The controversy over textbook costs is now heating up in the mainstream news media, too, catching the public's attention. For instance, Professor Michael Granof of the McCombs School of Business at the University of Texas published a commentary in August 2007 in *The New York Times* in which he argued that "college students and their parents have been warned: textbooks are outrageously expensive. Few textbooks for semester-long courses retail for less than \$120, and those for science and math courses typically approach \$180. Contrast this with the \$20 to \$30 cost of most hardcover best sellers and other trade books."⁹ Granof explained how the used-textbook market undermines publishers' profits, noting that publishing houses are given "the chance to sell a book to only one of the multiple students who eventually use it. Hence, publishers must cover their costs and make their profit in the first semester their books are sold—before used copies swamp the market. That's why the prices are so high."¹⁰ Granof asserted that some publishers simply create needlessly new and repeatedly revised editions of a book, when no new changes actually are warranted, in "a transparent attempt to ensure premature textbook obsolescence. Publishers also try to discourage students from buying used books by bundling the text with extra materials like workbooks and CDs that are not reusable and therefore cannot be passed from one student to another."¹¹

More recently, in January 2008, the *Salt Lake Tribune* focused on the problem, reporting that "[c]ritics say greed motivates the frequent releases of 'revised' editions, which greatly undermine the market for used books and force professors to revise their syllabuses and lecture materials frequently,"¹² but adding that "industry representatives say the problem is not as severe as critics allege."¹³ The situation, however, has gotten to the point where some Internet-based companies have been formed in order to allow students to save costs by renting textbooks.¹⁴ All of this has given rise to

8. *Id.* at 5.

9. Michael Granof, Op-Ed., *Course Requirement: Extortion*, N.Y. TIMES, Aug. 12, 2007, at 10.

10. *Id.*

11. *Id.*

12. Brian Maffly, *Soaring Textbook Costs Burden Students*, SALT LAKE TRIB., Jan. 13, 2008, at Local 1.

13. *Id.*

14. See Chad Swiatecki & Michele M. Melendez, *Do the Math: Renting College Texts Sometimes Makes a Lot of Cents*, FLINT J., Dec. 24, 2007, at D1 (writing that "[b]y letting students rent high-rotation texts, the sites bookrenter.com and chegg.com claim thry

what the *Philadelphia Inquirer* in February 2008 called “a growing revolt against the heart-stopping price of college books, which cost students an average of \$900 a year.”¹⁵

In light of all of the finger-pointing and blame-casting over the cost of textbooks, it is perhaps not surprising that the issue now has worked its way into politics and the legal system. A December 2007 article in the *Times-Picayune* pointed out that “more than 80 textbook-affordability bills were introduced in the 2007 legislative sessions of 27 states. Arkansas, California, Maryland, Minnesota, Oklahoma, Oregon, Tennessee and Washington passed new laws.”¹⁶ Even more significantly, perhaps, the U.S. Congress in 2007 and 2008 was considering a bill affecting textbook publishers and the information they must reveal to faculty members during the textbook adoption process.¹⁷ Under this federal measure, “[p]ublishers would have to make clear, in all promotional materials, their textbooks’ wholesale prices, the copyright dates of previous editions, summaries of substantial content revisions, and other formats—such as paperback or unbound—in which products are available.”¹⁸ In fact, on February 7, 2008, the federal bill was

[sic] can save as much as 75 percent off the retail price of books with prices that rise as much as double the rate of inflation”).

15. Kathy Boccella, *Unrest Over Cost of Texts Sends Colleges a Message: Relief is Sought in Congress and Online*, PHILA. INQUIRER, Feb. 10, 2008, at 1, available at http://www.philly.com/inquirer/education/20080210_Relief_is_sought_in_Congress_and_online.html.

16. Michele M. Melendez, *Textbook Businesses on the Same Page: Campus Retailers Often Pay Little*, TIMES-PICAYUNE (New Orleans, La.), Dec. 30, 2007, at Money 4.

17. Section 134 of the College Opportunity and Affordability Act of 2007 provides, in relevant part and as originally proposed, that

When a publisher provides a faculty member or other person or adopting entity in charge of selecting course materials at an institution of higher education with information regarding a college textbook or supplemental material, the publisher shall include, with any such information and in writing, the following:

(A) The price at which the publisher would make the college textbook or supplemental material available to the bookstore on the campus of, or otherwise associated with, such institution of higher education.

(B) The copyright dates of all previous editions of such college textbook, if any.

(C) The substantial content revisions made between the current edition of the college textbook or supplemental material and the previous edition, if any.

(D) Whether the college textbook or supplemental material is available in any other format, including paperback and unbound, and the price at which the publisher would make the college textbook or supplemental material in the other format available to the bookstore on the campus of, or otherwise associated with, such institution of higher education.

H.R. 4137, 110th Cong. § 134(c)(1) (2007), available at <http://edlabor.house.gov/bills/HEAReauthorizationText.pdf>.

18. Sara Lipka, *House Bill Proposes Disclosure Rules to Control Textbook Prices*, CHRON. HIGHER EDUC. (Wash., D.C.), Feb. 8, 2008, at A20.

approved in the U.S. House of Representatives by a 354 to 58 vote.¹⁹ Although the individual bills and laws take a variety of forms, they collectively raise important First Amendment²⁰ questions about freedom of expression that have, as of the writing of this Article, apparently gone unnoticed and unaddressed in scholarship published in law journals and law reviews. The author of this Article could not locate a single law journal article on either LexisNexis or Westlaw devoted to textbook-disclosure laws as of March 2008; this Article, then, appears to represent an initial attempt to grapple with a new issue that affects freedom of speech within the world of academia.

In particular, the bills and statutes frequently impose some form of a compelled-speech obligation²¹ on book publishers to reveal and disclose certain information related to both book price and book content. A critical question, thus, is whether such mandatory disclosure of information at particular steps of the textbook adoption and sales process infringes on an unenumerated First Amendment right not to speak.²² As the U.S. Supreme Court succinctly stated more than thirty years ago, “the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and *the right to refrain from speaking at all.*”²³ This right is especially relevant in the print medium, which is the most applicable to college textbook publishers. Specifically, in 1974, the nation’s high Court, in *Miami Herald Publishing Co. v. Tornillo*,²⁴ struck down a

19. See Press Release, H. Comm. on Educ. & Labor, House Overwhelmingly Approves Bill to Address Rising College Prices & Remove Other Barriers to College Enrollment (Feb. 7, 2008), available at http://www.house.gov/apps/list/speech/edlabor_dem/rel020708hea.html.

20. The First Amendment to the U.S. Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .” U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated more than eight decades ago through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

21. The U.S. Supreme Court recently defined a compelled-speech case as one “in which an individual is obliged personally to express a message he disagrees with, imposed by the government.” *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 557 (2005).

22. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (writing that “one important manifestation of the principle of free speech is that one who chooses to speak may also decide ‘what not to say’”) (quoting *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 16 (1986)).

23. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (emphasis added). The Court in *Wooley* added that “[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’” *Id.* (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

24. 418 U.S. 241 (1974).

state right-of-reply statute imposed on print newspapers that assailed or criticized the records or character of candidates for public office.²⁵

In addition to questions of compelled speech, the statutes also raise issues involving the commercial speech doctrine.²⁶ In particular, the new textbook laws affect how books are marketed and sold—specifically, what information must be made available to faculty members and, in some instances, to bookstores during the process in which a faculty member chooses whether to adopt a particular book. Given that the U.S. Supreme Court has defined commercial speech as “expression related solely to the economic interests of the speaker and its audience,”²⁷ the information made available by publishers (the “sellers”) potentially affects two key audiences, namely: (1) professors, who may choose not to adopt a new edition of a book because it either is too expensive or because it does not have sufficient new material to justify using it instead of relying on used copies of the older, previous edition; and (2) students, who are impacted economically downstream from the professorial textbook selection process when they choose whether to purchase the textbook new or used or, alternatively, whether to use an older edition or to check out a campus library copy.

This Article examines the now-emerging First Amendment issues of both compelled expression and commercial speech that are raised by the wave of textbook-price legislation now washing across the nation. The primary research question addressed here is, thus, whether the compelled-speech obligations of disclosure imposed on textbook publishers and their sales agents/representatives violate the publishers’ First Amendment rights of free expression.

To address and analyze this question, Part I of this Article initially provides examples and an overview of this legislation, specifically in terms of the statutory provisions and sections that call into question issues of freedom of expression.²⁸ Particular attention is paid in Part I to a new textbook law that took effect on January 1, 2008, in California.²⁹ Part II then briefly

25. *Id.* at 258 (holding that “[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment”).

26. See generally RUSSELL L. WEAVER & DONALD E. LIVELY, UNDERSTANDING THE FIRST AMENDMENT 74-84 (2003) (providing an overview of commercial speech and the commercial speech doctrine).

27. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561 (1980).

28. *Infra* notes 33-83 and accompanying text. Other parts of the textbook legislation, such as proposals in some states to prohibit the bundling of textbooks with peripheral products, are beyond the scope of this Article, which instead concentrates on First Amendment issues of free expression.

29. CAL. EDUC. CODE § 66406.7 (West 2007), available at <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=edc&group=66001-67000&file=66400-66406.7>.

articulates and summarizes key principles of both the compelled expression and commercial speech law under which the potentially suspect statutory measures likely would be judicially evaluated.³⁰ Next, Part III analyzes and critiques the sections of the laws that raise First Amendment issues, applying the rules and tests of compelled speech and commercial speech that were outlined in Part II.³¹ Significantly, Part III argues that the laws most likely will *not* pass constitutional muster under the commercial speech doctrine, thus answering the research question posed above in the negative. Finally, this Article concludes by summarizing the big-picture problems and tensions raised in the quest to make textbooks more affordable to cash-starved college students.³²

I. TEXTBOOK-DISCLOSURE STATUTES: LEGISLATIVE EFFORTS TO HELP STUDENTS PURCHASE AFFORDABLE BOOKS

This Part of the Article identifies, describes, and critiques those portions of the recently enacted textbook statutes that raise legal concerns about freedom of expression. Rather than separately analyzing state legislation on a statute-by-statute basis, this Part is organized around the types of provisions that raise red flags. In particular, Section I.A addresses provisions requiring the disclosure by publishers or their sales agents of the substantive content changes made in new editions of textbooks. Section I.B then addresses statutory provisions that either mandate or suggest disclosure of price-related information when book representatives meet with professors. In the process of discussing these provisions, the Article explores the motivations and apparent purposes that gave rise to the legislation.

In particular, the Student PIRGs' *Make Textbooks Affordable Campaign* draws a close connection between disclosure of content changes and price information, on the one hand, and the lowering of the cost to students of textbooks, on the other. As the organization states in its analysis of the federal College Opportunity and Affordability Act of 2007 described earlier:³³

Since the problem is that cost is not naturally a part of textbook sales, the first step is to get that information on the table. Faculty can use the price information to select the right textbook at the best price. Faculty can use the revision history to determine whether a cheaper, older edition would be sufficient for the class.³⁴

30. See *infra* notes 84-125 and accompanying text.

31. See *infra* notes 126-64 and accompanying text.

32. See *infra* notes 165-68 and accompanying text.

33. See *supra* note 17 and accompanying text (setting forth the text of this bill).

34. Press Release, Make Textbooks Affordable Campaign, Analysis of H.R. 4137 Textbooks Measure (Nov. 15, 2007), available at <http://www.maketextbooksaffordable.org/newsroom.asp?id2=36865>.

Importantly, this Article draws on background material from legislative history, where relevant, to shed light on these issues. In Connecticut, for instance, the report of the Higher Education and Employment Advancement Committee on House Bill 5527³⁵ makes clear the economic motivation behind that state's textbook-disclosure statute.³⁶ The report provides that the measure "was introduced in order to '*make college textbooks more affordable* and accessible by requiring disclosure of textbook pricing before a sales transaction is entered into and to provide for a system for students to purchase textbooks using financial aid that has not yet been received by the student.'"³⁷ In particular, representatives from the Connecticut Department of Higher Education testified in favor of the bill because it would "support legislation that *will make textbooks more affordable*."³⁸ In addition to examining legislative history, the author engaged in one-on-one email correspondence with Nicole Allen, the textbook advocate for the Student PIRGs,³⁹ to find out what that key organization's beliefs are about the California legislation.

A. Disclosure of Substantive Content Changes/Revisions in New Editions

Is the content in new editions of college textbooks really significantly different from that in older versions of the same books? California attempts to address that issue with its College Textbook Transparency Act, which provides in relevant part that

On or after January 1, 2010, the publisher of a textbook shall print on the outer cover of, or within, the standard textbook, both of the following items: (A) For any new editions of textbooks initially published on or after January 1, 2010, a *summary of the substantive content differences between the new edition and the prior edition*. (B) The copyright date of the previous edition of the textbook.⁴⁰

35. H.B. 5527, Reg. Sess. (Conn. 2006).

36. HIGHER EDUC. & EMP. ADVANCEMENT COMM., REPORT ON BILLS FAVORABLY REPORTED BY COMMITTEE 1 (Conn. Mar. 7, 2006), available at <http://www.cga.ct.gov/2006/JFR/H/2006HB-05527-R00HED-JFR.htm>.

37. *Id.* (emphasis added).

38. *Id.* (emphasis added).

39. See *supra* note 5 and accompanying text (providing background information about this organization).

40. CAL. EDUC. CODE § 66406.7(d)(1)(A)-(B) (West 2007) (emphasis added). The law defines a "textbook" as "a book that contains printed material and is intended for use as a source of study material for a class or group of students, a copy of which is expected to be available for the use of each of the students in that class or group." *Id.* § 66406.7(b)(6). A new edition of a textbook is defined, in turn, as "a subsequent version of an earlier standard textbook. A standard textbook is the primary, full, and unabridged edition of a textbook. An abridged, alternate format, or alternate version of a standard textbook shall not be considered a new edition." *Id.* § 66406.7(b)(4).

When the measure, Assembly Bill 1548, originally dubbed the Transparency in College Textbook Publishing Practices Act,⁴¹ initially cleared the California Assembly Higher Education Committee in March 2007, its author, Assemblyman Jose Solorio, proclaimed in a press release that “[t]his bill does not prohibit textbooks [sic] publishers from profiting—it simply requires transparency of textbook information. If there is nothing wrong, there should be nothing to hide.”⁴² Later, when California Governor Arnold Schwarzenegger (R.) signed the legislation in its final, amended form in October 2007, Solorio trumpeted that the bill “provides a comprehensive approach to controlling college textbook prices by placing additional disclosure requirements on all parties involved in creating the high prices,”⁴³ and he claimed that it “will create the transparency that students need to make good textbook purchasing decisions in a time of skyrocketing prices.”⁴⁴

Assemblyman Solorio’s effort at “transparency” imposes on textbook publishers a mandatory obligation to speak, as it were, by dictating that all textbooks sold in California at an institution of higher education include “a summary of the substantive content differences between the new edition and the prior edition.”⁴⁵ The inclusion of the statutory language “shall print” makes it clear that this is a mandatory, affirmative obligation, not simply an item that merely is suggested, advisable, or recommended, which would flow from the use of the “may print” terminology.

As addressed later in Part III of this Article, however, not only is there a question of compelled speech raised by this language, but the terminology also is susceptible to a void-for-vagueness challenge because the phrase “substantive content differences” is left undefined in the remainder of the law.⁴⁶ In fact, a March 2007 Assembly Committee analysis of Assembly Bill 1548 specifically raised this precise vagueness problem in relationship

41. Assemb. B. 1548, 2007-08 Assemb., Reg. Sess. (Cal. 2007).

42. Press Release, Assemb. Jose Solorio, Assembly Comm. on Higher Educ. Approves Transparency in Coll. Textbook Publ’g Practices Act (Mar. 27, 2007), *available at* <http://democrats.assembly.ca.gov/members/A69/newsroom/20070327AD69PR01.htm>.

43. Press Release, Assemb. Jose Solorio, Governor Signs Assemblyman Solorio’s Bill to Control Textbook Prices for Coll. Students (Oct. 16, 2007), *available at* <http://democrats.assembly.ca.gov/members/A69/newsroom/20071016AD69PR01.htm>.

44. *Id.*

45. *See supra* note 40 and accompanying text (setting forth the text of California statute).

46. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (providing, in pertinent part, that “[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined” and that “we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly”). *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 910 (2d ed. 2002) (writing that “[a] law is unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted. Unduly vague laws violate due process whether or not speech is regulated.”) (internal citation omitted).

to the textbook-changes provision when the committee noted that opposition to the measure by the Association of American Publishers included the following:

Basic information on the changes between editions can be found in the preface of textbooks or at a publisher's website. A detailed list of changes between editions is competitive information that publishers will readily share with potential adopters but would never want to post publicly for their competitors to see and use. Finally, *this bill lacks a clear definition of the term "substantive", which is of particular concern because the bill enables anyone to bring a civil action to enforce this and other provisions in this bill.*⁴⁷

The omission of a definition of "substantive content differences" is especially conspicuous because the new law is otherwise careful to define terms such as "textbook," "new edition of a textbook," "publisher," and "adopter."⁴⁸ In email correspondence with the author of this Article, Nicole Allen wrote that the intent of the substance changes provision "was to give professors a way of determining how different this edition is from the older ones. Of course, it won't really help them much."⁴⁹ That last sentiment, of course, remains to be seen, especially given the undefined nature of the term "substantive," how that term is interpreted by textbook publishers, and the fact that this provision applies only to textbooks published "on or after January 1, 2010."⁵⁰

Finally, it is important to note that California's requirement of disclosure of substantive changes, either on the cover or the inside of a new edition of a textbook, may not, in fact, impose that great or significant of a compelled-speech burden on publishers. This is because some publishers, it seems, already are disclosing such content changes, at least in the field of communications law. For instance, the 2008 edition of Wayne Overbeck's textbook, *Major Principles of Media Law*, provides in the preface a chapter-by-chapter breakdown of what Overbeck describes as "some of the highlights of what is new in this edition."⁵¹ In addition, the 2007 update of Kent R. Middleton and William E. Lee's textbook, *The Law of Public Communication*, provides on its back cover a list of ten bullet-point items that are

47. ASSEMB. COMM. ON HIGHER EDUC., ASSEMB. B. 1548 – BILL ANALYSIS (Mar. 27, 2007), available at http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_1501-1550/ab_1548_cfa_20070323_155003_asm_comm.html (emphasis added).

48. See CAL. EDUC. CODE § 66406.7(b) (West 2007) (providing definitions for each of these terms).

49. E-mail from Nicole Allen, Textbooks Program Director, The Student PIRGs, to Clay Calvert, John & Ann Curley Professor of First Amendment Studies, The Pennsylvania State University (Jan. 17, 2008, 19:37:58 EST) (on file with author).

50. CAL. EDUC. CODE § 66406.7(d)(1).

51. WAYNE OVERBECK, MAJOR PRINCIPLES OF MEDIA LAW (2008 ed.).

new to that edition.⁵² Finally, the 2007–2008 edition of Don R. Pember and the author’s textbook, *Mass Media Law*, includes in its preface a list of more than twenty-five items that the authors dub “important new, expanded and updated material.”⁵³ All of this could well have legal relevance, at least to the extent that such voluntary disclosure of information, prior to the enactment of the current legislation, is not an undue burden on the First Amendment rights of publishers. Publishers, in fact, most likely want to include this information so that their sales representatives can more easily tell instructors about the new material in revised and updated editions of textbooks.

In addition to compelling textbook publishers to describe content changes “on the outer cover of, or within, the standard textbook,”⁵⁴ California’s statute also addresses the disclosure of content changes during the negotiations between book representatives and faculty members who are considering adopting a textbook. Specifically, the law provides that

A publisher, or agent or employee of a publisher, of textbooks intended for use at a postsecondary educational institution shall respond to a request from an adopter for . . . [a] list of the substantial content differences or changes made between the current edition initially published on or after January 1, 2010, and the previous edition of the textbook, including, but not necessarily limited to, new chapters, additional eras of time, new themes, or new subject matter.⁵⁵

It is important to note here that the compelled-speech obligation is only triggered when the adopter actually requests such information. In other words, a book representative is under no obligation to reveal or describe substantial content differences or changes unless the adopter—defined as “any faculty member or academic department or other adopting entity at an institution of higher education responsible for considering and choosing course materials to be used in connection with the accredited courses taught at that institution”⁵⁶—affirmatively requests it. Nicole Allen explained that the upon-request provision in the California law “defeats the whole purpose,”⁵⁷ and thus the measure “lacks teeth.”⁵⁸

California is not the only state, however, with legislation pertaining to the disclosure of content differences between older and newer editions of

52. KENT R. MIDDLETON & WILLIAM E. LEE, *THE LAW OF PUBLIC COMMUNICATION*, 2007 UPDATE (2007 ed.).

53. DON R. PEMBER & CLAY CALVERT, *MASS MEDIA LAW*, 2007–2008, at xiii-xiv (2007).

54. CAL. EDUC. CODE § 66406.7(d)(1).

55. *Id.* § 66406.7(e)(1).

56. *Id.* § 66406.7(b)(1).

57. E-mail from Nicole Allen, Textbooks Program Director, The Student PIRGs, to Clay Calvert, John & Ann Curley Professor of First Amendment Studies, The Pennsylvania State University (Jan. 15, 2008, 7:50:50 EST) (on file with author).

58. *Id.*

the same textbooks. In particular, other states have adopted statutes that impose disclosure requirements during the negotiation-of-adoption process between book representatives and faculty members. For instance, Washington's law provides that "[e]ach publisher of college textbooks shall make immediately available to faculty of institutions of higher education . . . [t]he history of revisions for the products, if any,"⁵⁹ with "immediate availability" meaning at the time that "any marketing materials [are] presented to a member of the faculty."⁶⁰ The Washington law, however, offers no definition of "history of revisions," no information about what specific information must be disclosed on marketing materials, and no definition of what type of change actually constitutes a revision. These problems raise possible void-for-vagueness issues.⁶¹ Significantly, the Washington statute imposes a mandatory obligation—it uses the term "shall"—that is stronger in an important way than California's law; recall that California's disclosure obligation during the book representative and faculty member negotiations is triggered only after a faculty member specifically requested the information, while Washington's statute imposes a proactive disclosure obligation on publishers and their textbook representatives, regardless of whether the faculty member actually asks for the information.

When Washington Governor Christine Gregoire signed the bill into law in April 2007, the Student PIRGs' *Make Textbooks Affordable Campaign* issued a press release calling it "a landmark measure . . . that will help lower the cost of textbooks for Washington college students."⁶² One of the bill's sponsors, Representative Bob Hasegawa (D-Seattle), concurred with this sentiment, as he proclaimed that the law "will help reduce costs."⁶³

Indeed, Hasegawa issued a press release in April 2007 claiming that his bill "will help reduce the cost of textbooks by requiring publishers to inform faculty members about the intended price of their products in college bookstores. When marketing the books to college faculties, publishers will also be required to disclose the history of revisions to their products."⁶⁴

This belief that there is a causal connection between disclosure of information and textbook affordability also underlies and animates Connecti-

59. WASH. REV. CODE § 28B.10.592 (2007).

60. *Id.*

61. *See supra* note 46 (providing the test for determining when a law is void for vagueness).

62. Press Release, *Make Textbooks Affordable Campaign*, Washington Governor Signs College Textbook Transparency Act: Requires Publishers to Disclose Prices to Faculty, Makes Washington First State to Act in '07 (Apr. 21, 2007), *available at* <http://www.maketextbooksaffordable.org/newsroom.asp?id2=32426>.

63. *Id.*

64. Press Release, Rep. Bob Hasegawa, 11th Legislative Dist., Hasegawa Bill to Aid Students by Helping Keep Textbook Costs Down (Apr. 10, 2007), *available at* http://www.housedemocrats.wa.gov/members/hasegawa/20070410_textbooks.asp.

cut's statute.⁶⁵ Connecticut's terminology, in fact, is very similar to that employed in Washington, with the Connecticut law providing that "[e]ach publisher of college textbooks shall make available to a prospective purchaser of their products who is a member of the faculty of an institution of higher education . . . the history of revisions for such products, if any."⁶⁶ Unlike Washington's law, however, there is no requirement of "immediate" availability of a history of revisions. In addition, Connecticut's statute fails to define what "availability" means,⁶⁷ whereas Washington's law makes it clear that "availability" encompasses marketing materials.⁶⁸

Minnesota's statute, which is known as the Textbook Disclosure, Pricing, and Access Act, also addresses content changes, and it provides in relevant part that

Beginning January 1, 2009, any publisher that sells or distributes course material for classroom use in a postsecondary institution must make . . . available in an easily accessible manner to faculty, bookstores, and postsecondary institutions in Minnesota . . . a summary of revisions between current and previous editions of course materials.⁶⁹

This statute, however, fails to describe both what constitutes "an easily accessible manner" (online information? hard-copy brochure? telephonic correspondence with a book representative?) and what is necessary to satisfy the "summary of revisions" (a generalized paragraph or two? a point-by-point, itemized list of revised items?) requirement. The failure to precisely articulate what is meant by such language not only creates potential void-for-vagueness problems⁷⁰ that could render the law nugatory, but it also provides publishers with wide latitude for interpreting the terms in a manner most favorable to their own interests.

Finally, Oklahoma's statute provides that publishers of textbooks "used by students enrolled at institutions in The Oklahoma State System of Higher Education shall make available to the faculty and staff of that institution . . . [a] list of the revisions for the instructional materials since the last published edition, if any."⁷¹ The language regarding a "list of revisions"

65. See *supra* notes 35-38 and accompanying text (summarizing the legislative goals behind Connecticut's textbook-disclosure statute).

66. CONN. GEN. STAT. § 10a-44a (2007), available at <http://www.cga.ct.gov/2006/ACT/PA/2006PA-00103-R00HB-05527-PA.htm>.

67. *Id.*

68. WASH. REV. CODE § 28B.10.592 (2007).

69. MINN. STAT. § 135A.25 (2007), available at <http://www.revisor.leg.state.mn.us/statutes/?id=135A.25>.

70. See *supra* note 46 (providing the test for determining when a law is void for vagueness).

71. OKLA. STAT. tit. 70, § 3241.1 (2008), available at <http://www.lsb.state.ok.us> (follow "Okla Statutes & Constitution" hyperlink; then follow "Okla Statutes – Titles 1-85" hyperlink; then follow "Title 70" hyperlink).

seems somewhat more specific than Minnesota's requirement of a "summary of revisions" noted above, but there is no further language in Oklahoma's law spelling out what constitutes a revision. This omission, itself, is problematic. Would a new case hypothetical in a communications law or media law textbook constitute a "revision" when the underlying legal rules and principles to be employed by students in analyzing that new hypothetical have not changed in any way from the previous edition? Would the inclusion of a new photograph to illustrate a case described in an earlier edition constitute a revision, or would this be an addition? Indeed, is there a difference between *revisions* and *additions*? This is not simply a matter of semantics and verbal gymnastics; a revision could be interpreted to imply simply updating or tweaking existing material, while the inclusion of completely new material—a new chapter, for instance—on a given topic in the wide area of media law that was not previously covered in the textbooks would seem to constitute an addition rather than a revision.

In summary, then, there are two basic ways in which states have attempted, through legislation, to make publishers disclose content differences between new and previous editions of textbooks: (1) through the mandatory inclusion in the textbooks themselves, either on the back cover or on the inside pages, of content changes; and (2) through mandatory disclosure during the adoption, negotiation, and discussion process between faculty members and sales representatives, of content changes. To date, California is the only state to adopt the former approach, while other states have focused their efforts on the latter method.⁷²

This Section also has revealed that there are substantial vagueness problems in several statutes that not only could hamper the statutes' effectiveness, but also could lead to their downfall in court. In addition, there is a difference between laws that require mandatory disclosure by sales representatives of content differences, and laws, such as the one in California, that only require a sales representative to disclose such information if the instructor actually requests it. This might be thought of as a dichotomy between *proactive* and *reactive* disclosure.

B. Disclosure of Price-Related Information

One of the central concerns of the public interest groups supporting laws aimed at making college textbooks more affordable is that publishing companies allegedly do not share with or reveal to professors the prices of the books that the professors are considering for adoption in their courses.

72. See CONN. GEN. STAT. § 10a-44a (2007); MINN. STAT. § 135A.25; OKLA. STAT. tit. 70, § 3241.1; WASH. REV. CODE § 28B.10.592.

Emily Rusch, a consumer advocate with the California Public Interest Research Group, recently explained the problem:

The person who orders the book (faculty) is not the same person who buys the book (students). Therefore, the cost of a textbook is not the primary factor during the purchasing process. Publishers, cynically aware of the immense market power this gives them, respond by *withholding the price of textbooks*. As has now been clearly documented by a rigorous study released by CALPIRG, 77% of faculty report that publishers rarely or never report the price of a book during sales interactions.⁷³

Along these lines, a group calling itself the Affordable Textbooks Campaign⁷⁴ contends on its website that “77% of recently surveyed Massachusetts faculty said that publishers’ sales representatives rarely or never offer up the price unless asked, and only 38% said that sales representatives ‘always’ offer the price when asked.”⁷⁵ These figures are derived from the *Exposing the Textbook Industry: How Publishers’ Pricing Tactics Drive Up the Cost of College Textbooks*⁷⁶ report described earlier in this Article.⁷⁷

In light of these concerns, it is not surprising that much of the textbook legislation across the nation focuses on the disclosure of price-related information to professors and instructors who select and then order textbooks. For instance, Connecticut’s textbook statute provides, in relevant part, that

Each publisher of college textbooks *shall* make available to a prospective purchaser of their products who is a member of the faculty of an institution of higher education . . . *the price* at which the publisher would make the products available to the store on the campus of such institution that would offer such products to students.⁷⁸

73. Emily Rusch, *Schwarzenegger’s Veto of the College Textbook Affordability Act: Where Do We Go From Here?*, CAL. PROGRESS REP., Oct. 17, 2007, http://www.californiaprogressreport.com/2007/10/schwarzeneggers_15.html (emphasis added). As the headline of the Rusch article suggests, there were two different textbook-disclosure bills pending in the California legislature in 2007, one of which Governor Schwarzenegger signed (Assembly Bill 1548) and one of which he vetoed (Senate Bill 832). A complete discussion of the vetoed measure is beyond the scope of this Article, but Governor Schwarzenegger said he vetoed Senate Bill 832 because it “focuses strictly on textbook publisher policies and fails to recognize that the affordability of textbooks is a shared responsibility among publishers, college bookstores, and faculty members.” Press Release, *supra* note 43. The text of the vetoed, final version of Senate Bill 832 is available online at http://info.sen.ca.gov/pub/07-08/bill/sen/sb_0801-0850/sb_832_bill_20070223_introduced.html.

74. This organization describes itself as “a coalition of Student PIRGs and Student Government Associations in fourteen states who are working to make college more affordable.” MakeTextbooksAffordable.Org: About Our Coalition, <http://www.maketextbooksaffordable.org/textbooks.asp?id2=14214> (last visited Feb. 25, 2008).

75. MakeTextbooksAffordable.Org: The Campaign, <http://www.maketextbooksaffordable.org/textbooks.asp?id2=14215> (last visited Feb. 25, 2008).

76. *Exposing the Textbook Industry*, *supra* note 6.

77. See *supra* notes 5-8 and accompanying text.

78. CONN. GEN. STAT. § 10a-44a (2007) (emphasis added).

Similarly, Minnesota's recently enacted textbook law provides, in pertinent part, that

Beginning January 1, 2009, any publisher that sells or distributes course material for classroom use in a postsecondary institution *must* make the following available in an easily accessible manner to faculty, bookstores, and postsecondary institutions in Minnesota . . . the *undiscounted price* at which the course materials are available to a bookstore . . . [and] the formats, including bundled and unbundled, in which those course materials are offered and the *undiscounted prices* of the various components, both sold separately or packaged together.⁷⁹

Oklahoma requires the publishers of textbooks that will be used by students in the Oklahoma State System of Higher Education to

make available to the faculty and staff of that institution the . . . [p]rice at which the publisher will make the instructional materials available to bookstores, either those located on campus of the institution or those which have a contract with the institution to provide bookstore services to students.⁸⁰

Oregon, in turn, which adopted textbook disclosure legislation in June 2007, provides that a textbook publisher:

must provide to prospective adopters of a particular textbook or set of textbooks in a subject area in which an instructor is teaching a course . . . the price at which the publisher would make the textbook or set of textbooks . . . available to adopters and higher education institutions that would resell the components to students.⁸¹

Unlike these statutes, however, California's textbook law provides a much weaker price provision; in particular, a textbook publisher or agent of the publisher must provide the "price at which the new book is available from the publisher"⁸² only upon "a request from an adopter."⁸³ There is no up-front, affirmative obligation to disclose the price, in other words, unless a faculty member requests it. With this overview of the current wave of textbook legislation in mind, the Article now turns to the First Amendment standards and principles to which these new laws would be subjected in a court of law.

II. COMPELLED-SPEECH OBLIGATIONS & THE COMMERCIAL SPEECH DOCTRINE

In a 2002 law journal article, Northwestern University Professor Andrew Kopelman asserted that "it is well settled" that the First Amendment

79. MINN. STAT. § 135A.25 (2007) (emphasis added).

80. OKLA. STAT. tit. 70, § 3241.1 (2008).

81. OR. REV. STAT. § 582 (2007) (emphasis added).

82. CAL. EDUC. CODE § 66406.7 (2007).

83. *Id.* (emphasis added).

protects the right not to speak.⁸⁴ Koppelman added that “[t]his right is not contingent on any finding that the message being sent is antagonistic to the speaker’s own views. The fact that the speaker objects is sufficient.”⁸⁵ A right-not-to-speak jurisprudence has evolved over the past sixty-five years in a series of cases that includes, among others, *West Virginia State Board of Education v. Barnette*,⁸⁶ *Miami Herald Publishing Co. v. Tornillo*,⁸⁷ *Wooley v. Maynard*,⁸⁸ and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*.⁸⁹ More recently, in 2006, the United States Supreme Court made it clear that “[s]ome of this Court’s leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say.”⁹⁰

The right not to speak may be thought of in terms of a right to be free from government-compelled speech, with compelled-speech cases involving a scenario in which “an individual is obliged personally to express a message he disagrees with, imposed by the government.”⁹¹ In turn, the right not to speak is sometimes viewed as a negative First Amendment right, in contrast to a positive or affirmative right to speak.⁹²

Significantly for textbook publishers, which often are vast corporate entities and who may object to being compelled to disclose factual information about content changes and pricing, the right not to speak under the compelled-speech doctrine has been held “to include the right to refrain

84. Andrew Koppelman, *Signs of the Times: Dale v. Boy Scouts of America and the Changing Meaning of Nondiscrimination*, 23 CARDOZO L. REV. 1819, 1827 (2002).

85. *Id.*

86. 319 U.S. 624 (1943) (declaring unconstitutional, in a public school setting, a compulsory flag salute and pledge requirement).

87. 418 U.S. 241, 258 (1974) (Brennan, J., concurring) (striking down a Florida statute that placed an affirmative duty upon newspapers to publish the replies of political candidates whom they had criticized, and asserting that “[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment”).

88. 430 U.S. 705, 714 (1977) (allowing individuals to cover a portion of their New Hampshire automobile license plates that contained the motto, “Live Free or Die,” and writing that “the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all”).

89. 515 U.S. 557 (1995) (affirming the right of parade organizers to exclude groups from participating in the parade when those groups had messages with which the organizers disagreed).

90. *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 61 (2006).

91. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 557 (2005).

92. See generally Meredith R. Miller, Comment, *Southworth v. Grebe: The Conservative Utilization of “Negative” First Amendment Rights to Attack Diversity of Thought at Public Universities*, 65 BROOK. L. REV. 529, 530 (1999) (writing that “[n]egative” First Amendment rights have evolved, mostly in the area of labor law to protect individuals from government-compelled speech and association, essentially guaranteeing corollary rights *not* to speak or to associate”) (internal citation omitted).

from stating *an objective fact*. This right extends not only to individuals, as one would expect if the right were grounded in freedom of conscience or thought, but also to *corporations*, which lack a conscience or the capacity for thought.⁹³ As the U.S. Supreme Court wrote more than two decades ago in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*,⁹⁴ “[f]or corporations as for individuals, the choice to speak includes within it the choice of what not to say.”⁹⁵ Viewed collectively, then, corporate book publishers have a presumptive First Amendment right not to be compelled to assert facts that they do not see fit to assert—i.e., they have a constitutional right not to be forced to disclose the type of factual content now being mandated for disclosure under the statutes described in Part I.

Furthermore, the right not to be compelled to speak or to convey messages has been upheld within the context of commercial speech. Commercial speech, as described *infra*, would seem to encompass both: (1) the face-to-face speech engaged in by the sales representatives of textbook publishers when they meet with instructors and professors in their offices to try to persuade them to adopt certain books; and (2) the printed and published speech found in the new edition of a textbook’s preface or on its back cover that lists substantive changes in a manner designed to entice a professor to adopt that edition.

As Professor Edward J. Schoen and his co-authors wrote in a 2002 law journal article, the U.S. Supreme Court’s decision in *United States v. United Foods, Inc.*⁹⁶ “extended established protections against compelled speech . . . from the political arena to the commercial arena.”⁹⁷ In fact, however, the Supreme Court had struck down a compelled-speech regulation in the commercial speech arena even earlier—in 1986—in *Pacific Gas & Electric Corp. v. Public Utilities Commission*,⁹⁸ where it held unconstitutional a state government order that compelled a privately owned utility company to include in its mailed billings the “speech of a third party with which the utility disagrees.”⁹⁹

It should be noted here that the regulations at issue in the textbook-disclosure laws would fall within what Justice Antonin Scalia recently

93. Brent T. White, *Say You’re Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1298 (2006) (emphasis added) (internal citations omitted).

94. 475 U.S. 1 (1986).

95. *Id.* at 16.

96. 533 U.S. 405 (2001).

97. Edward J. Schoen, *United Foods and Wileman Bros.: Protection Against Compelled Commercial Speech—Now You See It, Now You Don’t*, 39 AM. BUS. L.J. 467, 468-69 (2002).

98. 475 U.S. 1 (1986).

99. *Id.* at 4.

called “true ‘compelled speech’ cases,”¹⁰⁰ as opposed to “*compelled-subsidy* cases”¹⁰¹ —i.e., cases in which the government compels a private person or entity to monetarily subsidize a government message with which he or she disagrees. Likewise, the textbook laws do not involve what Justice Scalia termed “government speech”¹⁰² in *Johanns v. Livestock Marketing Ass’n*,¹⁰³ a case in which the government actually composed and controlled the text of the subsidized message “right down to the wording.”¹⁰⁴ In *Johanns*, the message at issue, “Beef. It’s What’s for Dinner,” was held by a majority of the high Court to constitute government speech and was part of a compelled-subsidy program, and thus it did not raise the First Amendment concerns that go with “true” compelled-speech cases.¹⁰⁵

In all likelihood, then, the constitutionality of textbook legislation compelling publishers to reveal to faculty members information about new-edition content changes and price-related matters would be evaluated under the commercial speech doctrine articulated by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.¹⁰⁶ Regardless of whether the changes appear in published form on the back cover of a textbook or on an inside preface page—the type of regulation California has, in part, adopted¹⁰⁷—or are conveyed directly in a face-to-face setting to a faculty member by a sales representative, both content- and price-related information are matters of commercial speech “related solely to the economic interests of the speaker.”¹⁰⁸ In this case, the speaker is the textbook publisher or its sales representative with a vested economic interest in selling textbooks.

Viewed from another vantage point, such price-related information and a summary or bullet-pointed identification of content-based changes in a new edition are designed to sell the book via the book’s adoption as required reading material by the instructor. If the faculty member adopts the book as required course reading, it will then be sold to students and, in turn,

100. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 557 (2005).

101. *Id.* (emphasis added).

102. *Id.* at 563.

103. *Id.* at 550.

104. *Id.* at 563.

105. *See id.* at 562 (observing that “[c]itizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech”); *cf.* *Choose Life of Mo., Inc. v. Vincent*, No. 06-0443-CV-W-SOW, 2008 U.S. Dist. LEXIS 6524, at *9-12 (W.D. Mo. Jan. 23, 2008) (providing very recent discussion articulating the differences between government speech and private speech, and noting that “[t]here is no clear standard enunciated in this circuit or by the Supreme Court for determining when the government is ‘speaking for itself’”).

106. 447 U.S. 557 (1980).

107. *See supra* note 40 and accompanying text.

108. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561 (1980).

the economic interests of the publisher will be rewarded. Although there is “no single litmus test”¹⁰⁹ for defining what constitutes commercial speech, certainly the face-to-face office meeting between the sales representative and the professor constitutes, in the words of the Supreme Court, the “type of personal solicitation”¹¹⁰ that may lead the sales representative to “propose a commercial transaction.”¹¹¹

Under the commercial speech doctrine articulated in *Central Hudson*, the government may permissibly regulate truthful, non-misleading speech for a lawful product or lawful activity only if it proves that: (1) “the asserted governmental interest is substantial;”¹¹² (2) “the regulation directly advances the governmental interest asserted;”¹¹³ and (3) the regulation “is not more extensive than is necessary to serve that interest.”¹¹⁴ The third requirement has been interpreted to mean that there must be a “reasonable”¹¹⁵ fit between the asserted interest and the terms of the statute that allegedly serve that interest.¹¹⁶ As one legal scholar recently wrote about the final prong of *Central Hudson*:

the Court does not use the phrase, “not more extensive than is necessary,” as if it means “the least restrictive means.” In *Edenfield v. Fane*, the Court stated that “laws restricting commercial speech, unlike laws burdening other forms of protected expression, need only be tailored in a *reasonable manner* to serve a substantial state interest”¹¹⁷

In summary, the *Central Hudson* test for commercial speech regulations represents an “intermediate level of scrutiny”¹¹⁸—a more relaxed form of judicial review when compared with the rigorous strict scrutiny standard of review that typically applies to content-based speech regulations.¹¹⁹ It

109. JOHN D. ZELEZNY, COMMUNICATIONS LAW: LIBERTIES, RESTRAINTS, AND THE MODERN MEDIA 461 (5th ed. 2007).

110. *Edenfield v. Fane*, 507 U.S. 761, 765 (1993).

111. *Id.* at 767.

112. *Cent. Hudson*, 447 U.S. at 566.

113. *Id.*

114. *Id.*

115. *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

116. See *Pagan v. Fruchey*, 492 F.3d 766, 771 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 711 (2007) (writing that under the final prong of the *Central Hudson* test, “[t]he tailoring inquiry does *not* require a ‘least restrictive means’ analysis,” but instead requires that there must be a “reasonable fit”) (emphasis added).

117. Soon Chul Huh, *Invasion of Privacy v. Commercial Speech: Regulation of Spam with a Comparative Constitutional Point of View*, 70 ALB. L. REV. 181, 205-06 (2006) (emphasis added) (internal citations omitted).

118. *Midwest Media Prop., L.L.C. v. Symmes Twp.*, 503 F.3d 456, 474 (6th Cir. 2007). It is a form of scrutiny that was described in early 2008 by one federal appellate court as “substantially similar to the test for time, place, and manner restrictions.” *Naser Jewelers, Inc. v. City of Concord*, 513 F.3d 27, 31 n.1 (1st Cir. 2008) (internal quotation omitted).

119. See *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000) (writing that a “content-based speech restriction” is permissible “only if it satisfies strict

thus is somewhat easier for the government to regulate commercial speech than political speech.¹²⁰ As one federal appellate court wrote, commercial speech “has been placed lower in the First Amendment food chain, somewhere between political speech and pornography. It deserves protection, but authorities are more free to regulate commercial speech than core-value speech.”¹²¹

It is important to note, however, that the Supreme Court has held that the government’s “burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”¹²² As Part III below argues, there is absolutely no evidence at all that imposing price- and content-related disclosure requirements on textbook publishers will actually serve the state interest behind the measures discussed in Part I—namely, the economic interest in making textbooks more affordable for cash-strapped college students so that they can continue to attend college.

In addition to exploring how the statutes would be subjected to judicial analysis under the commercial speech doctrine, this Article also made clear in Part I that there are terms and phrases in the various textbook-disclosure laws that are susceptible to facial challenges¹²³ based upon the void-for-vagueness doctrine.¹²⁴ While these problems are very serious, the next part of this Article concentrates on and explores the more complex

scrutiny,” which requires that the law in question “be narrowly tailored to promote a compelling Government interest”); *Sable Commc’ns Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (writing that the government may “regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest”). See generally ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 903 (2d ed. 2002) (writing that “content-based discrimination must meet strict scrutiny”).

120. See *Summit Media, LLC v. City of Los Angeles*, 530 F. Supp. 2d 1084, 1087 (C.D. Cal. 2008) (writing that “commercial speech is afforded less protection than other forms of expression”).

121. *Gresham v. Peterson*, 225 F.3d 899, 904 (7th Cir. 2000).

122. *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993).

123. *Am. Booksellers Found. for Free Expression v. Strickland*, 512 F. Supp. 2d 1082, 1097 (S.D. Ohio 2007) (providing that “a facial challenge to a statute requires that the challenger demonstrate that the statute is invalid in all its applications”).

124. See, e.g., *supra* notes 46-48 and accompanying text (defining the void-for-vagueness doctrine and describing how the phrase “substantive content differences” is left undefined in California’s textbook law); *supra* notes 59-61 and accompanying text (identifying in the surrounding text the vagueness problems in Washington’s statute); *supra* notes 69-70 and accompanying text (identifying in the surrounding text the vagueness problems in Minnesota’s statute).

commercial speech doctrine analysis as the laws are specifically applied to textbook publishers.¹²⁵

III. WHY THE TEXTBOOK-DISCLOSURE LAWS WOULD LIKELY FAIL TO SURVIVE THE COMMERCIAL SPEECH DOCTRINE

As set forth in the Introduction, this Article addresses the previously unexplored question of whether the compelled-speech obligations of disclosure and revelation imposed on textbook publishers and their sales agents/representatives violate the publishers' First Amendment right of free expression. What follows, then, is a step-by-step application of the *Central Hudson* test spelled out in Part II of the Article¹²⁶ as applied to the compelled-speech provisions of the textbook-disclosure laws set forth in Part I.

Initially, as explained above, the textbook-disclosure requirements pertaining to both price and content fall within the ambit of commercial speech.¹²⁷ Significantly, the speech does *not* affect or dictate the substantive content of the lessons and chapters in textbooks that students read—authors of communications law textbooks, for instance, are not being told they must cover libel or privacy. Rather, the speech is compelled under the legislation either during the adoption-negotiation process between sales representatives and faculty members, or it is printed on the outside cover or inside preface pages describing changes. The back-cover matter mentioning changes in a textbook, for instance, amounts to an advertisement for the content that is inside the book. This speech is intended to give faculty members more information about whether they should select for adoption a particular book and whether, in turn, students must purchase it. Put differently, the compelled-speech requirements are *not* triggered by a particular type of subject matter, topic, or idea an author chooses to include in a work. The requirements are simply designed to influence the potential adoption and subsequent sale of a book by giving professors more information about price and content changes.

Assuming, then, that the speech in question is commercial, the first step under *Central Hudson* involves a determination of whether the regulation in question relates to a lawful good or service and whether it regulates

125. See generally *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 193-94 (6th Cir. 1997) (addressing the differences between facial challenges and as-applied challenges).

126. See *supra* notes 112-16 and accompanying text (setting forth the *Central Hudson* test for the commercial speech doctrine).

127. See *supra* notes 106-11 and accompanying text (explaining why the speech that is being compelled under the textbook-disclosure laws would likely be considered commercial speech).

speech that is either false or misleading.¹²⁸ This step, as applied to textbooks, is rather perfunctory. Textbooks are lawful goods, and there is no indication in the legislation that the laws apply only to either those textbooks (and to the sale of those textbooks) that contain false or misleading information, or to textbook publishers who falsely represent the content or price of their wares. The compelled-speech regulations at issue are designed to add more speech to the mix, not to police false or misleading information. Thus, because textbooks are lawful goods and the regulation applies to truthful speech, the First Amendment rights of publishers are at stake, and the government must prove that it has a substantial interest to justify the laws.¹²⁹

In the case of textbook-disclosure statutes, the critical interest at stake is economic. In particular, the underlying interest behind the laws is to make textbooks more affordable for college students.¹³⁰ The economic interest here would indeed appear to be substantial. This is because the rising costs of tuition, when coupled with the rapidly rising costs of textbooks,¹³¹ may be enough to deter and prevent some very bright young men and women from obtaining a college education. A May 2007 report prepared by the Advisory Committee on Student Financial Assistance (a federal advisory committee chartered by the United States Congress), entitled *Turn the Page: Making College Textbooks More Affordable*, makes the case about the substantial interest that connects economics with education:

Students and parents are experiencing sticker shock when it comes to college textbooks. After assessing family resources, applying for financial aid, and often taking out additional public and private loans, students enroll in college, select courses, and go about the process of purchasing required textbooks and other course materials. Students and parents often pay the textbook bill out of pocket. What they see is often out of line with the price of books in other venues. Since the textbook bill comes last, it can strain or exceed remaining financial resources. In such cases, *textbook expenses can become the final barrier to college*.¹³²

The report, spanning more than sixty-five pages and replete with data, charts, and graphs to illustrate the dangers posed by rising textbook costs,

128. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980) (writing that “[a]t the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading”).

129. See *id.* (writing that, under the commercial speech doctrine, “we ask whether the asserted governmental interest is substantial”).

130. See *supra* notes 33-38 and accompanying text (discussing the intent behind the laws).

131. See *supra* notes 1-7 and accompanying text (describing the costs of college textbooks).

132. ADVISORY COMM. ON STUDENT FIN. ASSISTANCE, *TURN THE PAGE: MAKING COLLEGE TEXTBOOKS MORE AFFORDABLE 2* (2007), available at <http://www.ed.gov/about/bdscomm/list/acsfa/turnthepage.pdf> [hereinafter *TURN THE PAGE*] (emphasis added).

goes on to note that “[t]extbook expenses are especially troublesome for students from low- and moderate-income families because financial aid rarely covers them.”¹³³ The report concludes that “textbooks and other learning materials appear to be unaffordable for students from low- and moderate-income families at both two- and four-year public colleges.”¹³⁴

Surely the economic and concomitant educational interests in making textbooks more affordable are substantial, especially given that courts have repeatedly held under the commercial speech doctrine that seemingly far less important matters such as “preserving community aesthetics”¹³⁵ and protecting intangible “privacy”¹³⁶ interests of accident victims from obtrusive solicitations constitute substantial interests. Not only do current and prospective college students have substantial interests in textbook affordability, in terms of helping to make their own personal quest for a higher education more financially feasible, but society at large has a substantial interest in having an educated and informed populace. The bottom line, if one accepts the May 2007 report of the congressionally-authorized Advisory Committee on Student Financial Assistance,¹³⁷ is that the high price of textbooks may indeed be a barrier for some students in receiving a higher education. In fact, it would be very difficult for even textbook publishers to argue that the government does not have a substantial interest in making higher education more affordable.

Higher education is readily acknowledged by the American judiciary as being of the utmost importance to our civilization. In particular, the United States Supreme Court recognized more than five decades ago that college “students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”¹³⁸ A decade later, the Court found that “[t]he classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas.”¹³⁹ If the high price of college textbooks puts access to this court-recognized marketplace of ideas¹⁴⁰ out of reach for some prospective students, then the

133. *Id.* at 47.

134. *Id.* at 9.

135. *Ballen v. City of Redmond*, 466 F.3d 736, 742 (9th Cir. 2006) (holding that a government municipality’s “dual goals of promoting vehicular and pedestrian safety and preserving community aesthetics are substantial governmental interests”).

136. *Capobianco v. Summers*, 377 F.3d 559, 562 (6th Cir. 2004).

137. *See supra* notes 132-34 and accompanying text.

138. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

139. *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967).

140. The marketplace of ideas theory for protecting expression “represents one of the most powerful images of free speech, both for legal thinkers and for laypersons.” MATTHEW D. BUNKER, *CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY* 2 (2001). Rodney Smolla, current dean of the Washington and Lee

government surely must have a substantial interest in reducing such a fiscal barrier.

On the other hand, the textbook publishing industry offers some data of its own that would seem to erode and refute the notion that there is a “substantial” interest in reducing the costs of college textbooks. In February 2008, on its TextBookFacts.org website, the Association of American Publishers claimed that “[t]extbooks make up less than 5 percent of all direct higher education expenses,”¹⁴¹ and that “[c]ollege students spend more on electronics, cell phones, dorm room decorations, clothes and accessories, and their cars than they do on textbooks.”¹⁴² Viewed in a light most favorable to textbook publishers, this information, which contextualizes textbook expenditures within a much broader fiscal framework, suggests that while there is an *interest* in reducing the price of college textbooks that may be *legitimate*, it may not be a *substantial* interest as is required under the commercial speech doctrine.¹⁴³ A court thus would need to factor in and weigh such information under *Central Hudson* with the counter-posed arguments about textbook costs creating a barrier to higher education to determine if, in fact, there is the requisite substantial interest under the commercial speech doctrine.

But even if there is a substantial interest at both the individual and societal levels in reducing the cost of college textbooks, this does not end the judicial inquiry under the commercial speech doctrine and *Central Hudson*. In particular, a state that has adopted a textbook-disclosure law must also prove that “the regulation directly advances the governmental interest asserted.”¹⁴⁴ This is a rigorous prong of the *Central Hudson* test, at least to the extent that it places the burden on the government to “demonstrate that the harms it recites are real and that *its restriction will in fact alleviate them to a material degree.*”¹⁴⁵ The government cannot rely on “mere speculation or conjecture”¹⁴⁶ in its efforts to discharge this requirement.

It is on this prong of the *Central Hudson* test where the textbook-disclosure laws stand a fairly large chance of being held unconstitutional. In particular, there must be real evidence to support the theory that provid-

School of Law, has called it “perhaps the most powerful metaphor in the free speech tradition.” RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 6 (1992).

141. Text Book Facts: Key Facts at a Glance, <http://www.textbookfacts.org/about.htm> (last visited Apr. 22, 2008).

142. *Id.*

143. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980) (writing that “[f]or commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is *substantial*”) (emphasis added).

144. *Id.*

145. *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (emphasis added).

146. *Id.* at 770.

ing price information and new-edition-content-change information to faculty members will, in fact, alleviate “to a material degree”¹⁴⁷ the problem of high-priced college textbooks preventing students from attending college. The theory apparently is premised on the assumption that college professors will necessarily choose to adopt only those books that are either less expensive, or that they will choose to stick with older editions (and thus used copies of them) when there are only minor substantive content changes between one edition of a book and the next. This theory also assumes, to a certain degree, that professors will sometimes allow the economic interests of their students to hold sway in the textbook-adoption process, rather than academic or pedagogical merit.¹⁴⁸ Thus, the bottom line of this theory is that if price and content-change information is disclosed to professors, then textbooks will become more affordable for college students.

The difficulty, as is the case with almost anything in academia, is turning theory into practice. The theory fails to account for what the author of this Article calls *textbook inertia*—the possible tendency of a professor to keep on using a particular textbook that has worked well for her in the past. The author speculates that there is a distinct possibility that once a professor adopts a particular textbook for a given course and she finds that this particular textbook works well and provides a very good pedagogical grounding for students, she will continue to use it in the future when new editions come out, regardless of their price or how significant the substantive changes are in new editions. Although some professors certainly will change books if they are unhappy with the current ones they are using,¹⁴⁹ “prepping” a course with a completely new book would seem to require somewhat more time than prepping a course with the revised version of a previously-used book.

It is important to stress that even if this author’s textbook inertia theory is off-base or does not hold true in all cases, it is *not* the burden of the textbook publishers to refute the states’ theory for adopting textbook-disclosure laws. Rather, the burden rests squarely on the government to

147. *Id.* at 771.

148. In a rather ironic twist that appeared in a student newspaper column lamenting the high price of college textbooks, Elizabeth Thomas of *The Lantern*, the newspaper at Ohio State University, wrote that “[w]hen a professor selects a textbook, it should be based on academic merit alone.” Elizabeth Thomas, *Terrible Textbook Trap*, LANTERN (Ohio State University), Mar. 30, 2007, available at <http://media.www.thelantern.com/media/storage/paper333/news/2007/03/30/Opinion/Terrible.Textbook.Trap-2814845.shtml>. This student’s comment necessarily implies that price should *not* be a consideration for a professor, given that the decision to adopt should, instead, be based on “academic merit alone.” This sentiment, of course, undermines the stance of the Student PIRGs that professors should take into account the price of a textbook when considering whether to adopt it.

149. The author of this Article once spoke with a professor at an academic conference who said that he/she switches communication law textbooks each year to stay fresh with the material and to constantly see which book is, for him/her, better at the time.

prove that those laws will in fact materially alleviate the problem of high-priced textbooks.¹⁵⁰ The textbook inertia theory is simply offered to show one possible obstacle or hurdle for the government when trying to prove its case under *Central Hudson*.

The only “evidence” the author of this Article could find to support the theory underlying the legislation—that price- and content-change information for new editions will make textbooks more affordable—appears to be both anecdotal and tangential. In particular, a Student PIRGs’ survey of 287 professors from a variety of disciplines at Massachusetts’ colleges and universities conducted during the fall of 2006 found that

an overwhelming majority—94%—said they would prefer to assign a cheaper book if two equally good options were available. Only 63% of the professors we surveyed, however, said that they typically know the price of the books they assign. This means many professors want to save students money but do not have the information they need to take cost into account when choosing their texts. These professors may well make different choices on occasion if they had better price information.¹⁵¹

In addition, the same report made findings regarding faculty members’ beliefs about the usefulness of new editions of textbooks. The report provided that

the dim view taken by the faculty of unnecessary new editions may be more widespread than initially thought. Some professors we surveyed who were aware of the high cost to students and considered the new edition of their preferred text unnecessary said that they permitted students to continue to use the old edition of the book.¹⁵²

These figures and findings about both price-related information and new editions only tap in to faculty *attitudes* and *beliefs* about these issues, not their actual *behavior* in the textbook selection process. This is an important distinction because, as one communications scholar observes, “the relationship between attitudes and behaviors has been difficult to establish. Since the early 1930s, investigations of this relationship have produced mixed findings and stimulated considerable debate about the utility of the attitude construct.”¹⁵³ Indeed, “the prediction of a specific behavior depends on a number of factors in addition to some kind of measure of attitude.”¹⁵⁴ It thus is not clear that the attitude that “many professors want to save students money”¹⁵⁵ will actually translate into behavior that, in fact, leads to the use of lower-cost textbooks. To date, there simply is no evidence to show

150. See *supra* note 122 and accompanying text.

151. *Exposing the Textbook Industry*, *supra* note 6, at 10.

152. *Id.* at 12.

153. JAMES B. STIFF, PERSUASIVE COMMUNICATION 47 (1994).

154. WERNER J. SEVERIN & JAMES W. TANKARD, JR., COMMUNICATION THEORIES: ORIGINS, METHODS, AND USES IN THE MASS MEDIA 171 (5th ed. 2001).

155. *Exposing the Textbook Industry*, *supra* note 6, at 10.

that disclosure of price- and content-change information “will in fact alleviate”¹⁵⁶ to a “material degree”¹⁵⁷ the problems students confront with high-priced textbooks. The laws thus are likely to be struck down on this prong of *Central Hudson*.

Assuming for the sake of argument, however, that legislative bodies could demonstrate real evidence of a cause-and-effect relationship between publishers disclosing certain information and actual savings to students on their textbooks, the governmental entities still must overcome the final part of the commercial speech doctrine. In brief, the government must demonstrate that there is a “reasonable fit between the legislature’s ends and the means chosen to accomplish those ends.”¹⁵⁸ As noted earlier in this Article, many publishers already include content-change information on the back covers or inside pages of new editions of textbooks,¹⁵⁹ and the forced disclosure of the price of a new edition of a book does not seem to intrude too deeply, if at all, into the editorial control exercised by publishers over the actual substantive content of college textbooks. Textbook publishers, however, would be wise to argue that there are alternative means of serving the asserted interest in making textbooks more affordable, means that would not in any way require government legislation that infringes upon freedom of expression. For instance, students can save money on new textbooks by purchasing them on the Internet from foreign dealers. As a June 2007 report by the National Association of College Stores states:

Lower prices on college textbooks are available overseas because some U.S. publishers have sold these titles to wholesalers or retailers abroad at prices that are greatly reduced in comparison to those available to U.S. college stores and other retailers. The Internet has made it possible for foreign wholesalers and distributors to pass along lower prices on textbooks to U.S. consumers, placing them in direct competition with U.S. college stores.¹⁶⁰

Students can also take the initiative in other ways. For instance, by the Fall 2007 semester at Harvard, students had “the services of a student-run price-comparison Web site at their disposal for a third consecutive semester.”¹⁶¹ Other alternatives involve a combination of professorial selection and publisher-based options. The Association of American Publishers notes on its website that

156. *Edenfield v. Fane*, 507 U.S. 761, 771 (1993).

157. *Id.*

158. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001) (internal quotation omitted).

159. See *supra* notes 51-53 and accompanying text.

160. NAT’L ASS’N OF COLLEGE STORES, FAQ ON COLLEGE TEXTBOOKS 2 (2007), available at http://www.nacs.org/common/research/faq_textbooks.pdf.

161. Christian B. Flow, *Textbook Price-Saving Site Endures*, HARVARD CRIMSON, Sept. 12, 2007, available at <http://www.thecrimson.com/article.aspx?ref=519484>.

An increasing number of college instructors are adopting digital materials that are available online through password-protected websites, and are less expensive than printed materials. These savings are upfront and guaranteed. Some e-books are available for a specified amount of time, while others can be downloaded directly to a computer, where they can be saved indefinitely.¹⁶²

In fact, McGraw-Hill “offers almost 95 percent of its textbooks as e-books, and the publisher has seen a steady growth in interest over the past several years, albeit from a small base.”¹⁶³ Some textbook publishers also allow professors to custom-make a book to fit their teaching needs, thus alleviating the need for multiple books and wasted pages. As the *Stanford Daily* reported in January 2006, one Stanford instructor “was able to put together and order a tailored textbook for his class from McGraw-Hill’s Primis Online, a Web site that allows professors to assemble custom textbooks for their classes.”¹⁶⁴

In summary, there are many potential pitfalls that the current spate of textbook-disclosure laws faces under the commercial speech doctrine. The most relevant appears to be the lack of evidence that the disclosure provisions will, in fact, directly advance the alleged substantial interest in college education by reducing textbook costs.

CONCLUSION

The college textbook industry is big business; in 2004, the *Washington Post* called it a \$3.4 billion-a-year enterprise.¹⁶⁵ It is a business, however, that would seem to have some ethical and social obligations to the people from whom it profits, namely, cash-strapped students seeking a higher education while holding down jobs to make ends meet. As one such college student noted in an October 2007 article in the *Boston Globe* while discussing the \$330 price tag for two of her required textbooks, “They always tell you 20 hours is good enough to work and go to school full time. . . . I have to work three jobs to pay for two books.”¹⁶⁶

Legislators thus are rightfully concerned with this problem, as it erects a barrier to higher education that ultimately harms both the individual student and society at large. The question, in turn, becomes whether laws de-

162. Textbookfacts.org, Tips to Save on Textbooks and to Succeed in College!, <http://www.textbookfacts.org/about.htm> (follow “Tips to Save on Textbooks and Succeed in College!” hyperlink) (last visited Apr. 22, 2008).

163. *E-Textbooks—For Real This Time?*, INSIDE HIGHER ED.COM, Jan. 3, 2008, <http://www.textbookfacts.org/about.htm>.

164. Li Tao, *Textbook Prices on the Rise*, STANFORD DAILY, Jan. 9, 2006, at 1, available at <http://daily.stanford.edu/article/2006/1/9/textbookPricesOnTheRise>.

165. Margaret Webb Pressler, *Textbook Prices on the Rise*, WASH. POST, Sept. 18, 2004, at E1.

166. April Simpson, *State House Hearing Focuses on Costs of College Textbooks*, BOSTON GLOBE, Oct. 3, 2007, at B4.

signed to address this issue that raise First Amendment concerns about both compelled speech and commercial expression provide constitutionally sound and effective remedies. This Article has suggested that, in addition to void-for-vagueness problems that plague most of the current textbook-disclosure laws, there are serious troubles with these measures when analyzed under the commercial speech doctrine and the constitutional standards articulated by the U.S. Supreme Court in *Central Hudson* and its progeny. The research question posed in the Introduction thus is resolved in the negative. The article has, in fact, explored several reasons why the laws may not survive and pass constitutional muster. Furthermore, the concluding section of Part III identified multiple ways in which textbook costs potentially may be reined in that do not pose First Amendment issues. Those avenues, such as the use of so-called e-textbooks,¹⁶⁷ should be given an opportunity to work before more states, such as Illinois, craft potentially flawed legislative solutions that may not, in fact, directly and materially advance the interests they are ostensibly designed to serve.¹⁶⁸

In summary, this Article has attempted to provide an initial scholarly review of the First Amendment issues raised by the new wave of textbook-disclosure legislation. It remains to be seen, of course, how courts will rule on these laws if and when textbook publishers decide to challenge them in court. Until that time, this Article suggests that the laws are, indeed, vulnerable to such challenges under both the commercial speech doctrine and the void-for-vagueness doctrine.

167. See Stephanie Gottschlich, *Schools, Publishers Experiment to Cut Textbook Prices*, DAYTON DAILY NEWS, Mar. 10, 2008, at A5 (noting how “two universities, the University of Dayton and Miami University in Oxford, have spent the last two semesters using e-textbooks as an alternative to traditional textbooks. The students buy passcodes from their campus bookstores and connect to the textbooks through OhioLINK, the statewide network of 86 college and university libraries”).

168. See Kathleen Haughney, *Illinois Measure Aims to Lighten Load of College Book Bill*, ST. LOUIS POST-DISPATCH, Mar. 17, 2008, at B8 (describing how the Illinois legislature was considering textbook legislation in 2008).