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Constitutional Law - Commerical Speech: The Constitution - It's What's for Dinner - United States v. United Foods, Inc. 121 S. Ct. 2334 (2004)

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CONSTITUTIONAL LAW—Commercial Speech: The Constitution—It's What's for Dinner. *United States v. United Foods, Inc.* 121 S. Ct. 2334 (2001).

INTRODUCTION

Celebrities wear milk mustaches in advertisements captioned "Got Milk?" Beef is known to every American as "Beef—It's What's for Dinner." One's grocery shopping is not complete without hearing the jingle of "The Incredible, Edible Egg." These familiar advertisements are among many marketing programs paid for by the producers of commodities through mandatory assessments. These programs collect about $750 million each year to be used for the sole purpose of advertising.[1] One such program involves the mushroom industry. In *United States v. United Foods, Inc.*, the United States Supreme Court considered a First Amendment challenge to the generic mushroom advertising program.[2]

United Foods, Inc. (United) is a large American mushroom producer located in Tennessee.[3] Due to unique characteristics of mushrooms, United Foods confines its distribution to three regional markets, operating mushroom farms in Ventura, California (serving Southern California and Arizona); Salem, Oregon (serving the Pacific Northwest); and Fillmore, Utah (serving the central Rocky Mountain states).[4] Mushrooms have a low density, which causes them to bruise easily in transit.[5] Also, mushrooms spoil soon after harvesting so shipping is costly.[6] Therefore, United has located each of its mushroom farms in certain strategic geographic areas. United competes with only a small number of mushroom suppliers in each local market, which vary by geographic location; thus, its marketing efforts are local rather than national.[7]

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1. David Savage & Nancy Brooks, *Supreme Court Says Farmers Must Keep Paying for Ads*, LA TIMES, June 26, 1997, at D1.

2. United States and Department of Agricultural v. United Foods, Inc., 121 S. Ct. 2334 (2001). This case challenges the fundamental premise of the New Deal agricultural policy: the role of industry groups and collective action to increase overall earnings and awareness.

3. *Id.* at 2337.

4. Brief for Respondent at 2, USDA v. United Foods, Inc., 121 S. Ct. 2334 (2001) (No. 00-276) [hereinafter Respondent's Brief].

5. *Id.*

6. *Id.*

7. *Id.*

United markets its "Pictsweet" brand mushrooms over other mushrooms by targeting certain grocers.[8] United assists in shelf-space planning, subsidizes newspaper advertising, provides point-of-sale promotions, and conducts in-store demonstrations and tastings.[9] United considers this type of marketing essential, because a majority of the public perceives mushrooms as a discretionary item, attractive only to certain customers.[10]

In 1990, Congress passed the Mushroom Promotion, Research, and Consumer Information Act, which established a Mushroom Council.[11] This Council is authorized to order mushroom producers to pay an assessment on the mushrooms they produce in an amount not to exceed one cent per pound of mushrooms produced or imported.[12] The assessment is used primarily for generic advertising to promote mushroom sales. Congress deemed it in the public interest to implement such a regulation to "strengthen the mushroom industry in the marketplace, maintain and expand existing markets used for mushrooms, and to develop new markets and uses for mushrooms."[13]

In 1996, United refused to pay the mandatory assessment.[14] United claimed the mandatory subsidy compelled it to finance speech in violation of the First Amendment and filed a petition with the Secretary of Agriculture.[15] United argued it had the right to advertise its own mushrooms as being superior to any other brand and should not be forced to pay for advertising that supported all mushroom sales.[16]

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8. *Id.* at 3.

9. *Id.* United distinguishes its Pictsweet brand mushrooms and its service to retailers as superior to the competition. *Id.* In order for United to promote its Pictsweet brand name, United coordinates with local grocers to encourage purchasing of United's mushrooms over other brands. *Id.*

10. *Id.* Based on United's considerable industry experience and research, concentrated local marketing has been considered more beneficial due to the delicacy of mushrooms in transit as well as the public perception and consumption of mushrooms. *Id.*

11. *United*, 121 S. Ct. 2334, 2337 (2001).

12. *Id.*

13. 7 U.S.C. § 6101(b)(1-3) (Law. Co-op. 2001).

14. *United*, 121 S. Ct. at 2337.

15. *Id.* First, one files a petition with the appropriate administrative agency in which an Administrative Law Judge (ALJ) hears the case and delivers an opinion. *Id.* Next, the Judicial Officer of the agency reviews the AJL decision and either affirms or overrules the decision. *Id.* Finally, if the parties are unsatisfied with the decision they can appeal to the appropriate United States District Court. *Id.* United paid approximately $100,000 annually under the Mushroom Promotion and Consumer Information Order. Respondent's Brief, *supra* note 4, at 9.

16. *United*, 121 S. Ct. at 2338.

The Agriculture Department then filed an action in the United States District Court for the Western District of Tennessee, seeking an order forcing United to pay the assessment.[17] However, the action was stayed pending a decision from the United States Supreme Court in *Glickman v. Wileman Brothers & Elliott, Inc.*[18] In *Glickman*, the Supreme Court held that the regulations imposed upon California tree fruit producers, a requirement that they pay a fee to finance generic advertising, did not violate the First Amendment.[19]

After *Glickman* was decided, an administrative law judge dismissed United's petition and the judicial officer of the Department of Agriculture affirmed the decision.[20] United then sought review in the district court, where its suit was consolidated with the government's enforcement suit.[21] The district court held that *Glickman* was dispositive of the First Amendment challenge and granted the government's motion for summary judgment.[22] United then appealed to the United States Court of Appeals for the Sixth Circuit, which held that the *United* case was not controlled by *Glickman* and reversed the district court's decision.[23]

The Supreme Court in *United States v. United Foods*, in a 6-3 split, affirmed the judgment of the Sixth Circuit Court and held that the assessments violated the First Amendment.[24] The Court found *United* to be distinguishable from *Glickman* because in *Glickman* the assessments used to finance commercial speech were found to be a small part of a more comprehensive program restricting marketing autonomy.[25] In *United*, the assessments were not a minor part of the regulation, but rather were the whole point of the regulation.[26] The Court held that United had a First Amendment right to object to the assessments.[27]

This case note discusses the history of cases dealing with commercial speech, compelled speech, and the mandatory funding of speech. The note focuses on whether the Supreme Court correctly interpreted the commercial speech doctrine in *United* by reviewing the Supreme Court's varying and convoluted treatment of commercial speech. It then dis-

17. *Id.* at 2337.
18. *Id.*
19. Glickman v. Wileman Bros. & Elliott, Inc., 117 S. Ct. 2130, 2142 (1997).
20. *United*, 121 S. Ct. at 2337.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 2341.
25. *Id.* at 2340.
26. *Id.*
27. *Id.* at 2341.

cusses future implications of the application of the commercial speech doctrine in the agriculture industry. This case note concludes that the Supreme Court's decision in *United* misapplied well-reasoned precedents regarding the First Amendment and commercial speech, imposed a new and unnecessary classification by differentiating between highly versus lightly regulated industries for purposes of determining First Amendment protection, and put in jeopardy $750 million in effective generic advertising programs for agricultural commodities.

BACKGROUND

The Mushroom Promotion, Research, and Consumer Information Act

In 1937, Congress enacted the Agricultural Marketing Agreement Act (AMAA) as part of the New Deal. The AMAA allowed the Secretary of Agriculture to "promulgate marketing orders for certain fruits and vegetables in order to maintain orderly marketing conditions and fair prices."[28] Marketing orders advance the policy of collective rather than competitive marketing and ensure uniformity of policy and pricing within the agricultural industry.[29] Congress has expressly authorized the establishment of projects "designed to assist, improve, or promote the marketing, distribution, and consumption . . . of the commodity, through any form of marketing promotion including paid advertising."[30]

In 1990, Congress enacted the Mushroom, Promotion, and Consumer Information Act (Mushroom Act), because Congress found that "the maintenance and expansion of existing markets and uses [for mushrooms are] vital to the welfare of producers and those concerned with marketing and using mushrooms, as well to the agricultural economy of the Nation."[31] The Mushroom Act authorizes the Secretary of Agriculture to order the establishment of a Mushroom Council and vests the Secretary with authority to implement the statutory policy.[32] In particular, the Mushroom Council has authority "to develop and propose to the Secretary voluntary quality and grade standards for mushrooms."[33] The Mushroom Act provides that the activities of the Mushroom Council are to be funded through assessments collected from producers and import-

28. *Glickman*, 117 S. Ct. at 2134.
29. *Id.*
30. Id.
31. Petitioner's Brief at 2, USDA v. United Foods, Inc., 121 S. Ct. 2334 (2001) (No. 00-276) [hereinafter Petitioner's Brief].
32. *Id.*
33. *Id.* at 4.

ers of fresh mushrooms not to exceed one cent per pound of mushrooms.[34]

Commercial Speech

Prior to 1976, the Supreme Court did not contemplate the notion of "commercial speech."[35] Advertising was not afforded any First Amendment protection whatsoever because advertising restrictions were seen as merely economic regulations.[36] In 1942, the Supreme Court delivered a precedent-setting decision in *Valentine v. Chrestensen*, where it held advertising was not protected by the First Amendment.[37] The Court upheld a New York ordinance forbidding street distribution of commercial handbills.[38] The Court found that the substance of Chrestensen's printed protest amounted to an attempt to dodge the sanitary code and upheld the prohibition of Chrestensen's activity in the streets.[39] The Court declared that the issue of whether individuals should be allowed to promote their business through handbill distribution was simply a matter of legislative discretion.[40]

The Court found that commercial handbills were not protected by the First Amendment because "the Constitution imposes no such restraint."[41] In a six-paragraph opinion, without citing any authority, the Court stated, "We are equally clear that the Constitution imposes no such restraint on government as respects to purely commercial advertis-

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34. *Id.*

35. *See* Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 761. *See also* Sean P. Costello, Comment, *Strange Brew: The State of Commercial Speech Jurisprudence Before and After 44 Liquormart, Inc. v. Rhode Island*, 47 CASE W. RES. L. REV. 681, 681 (1997). The Supreme Court first used the phrase "commercial speech" in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 384 (1973). According to Judge Alex Kozinski and Stuart Banner, District of Columbia Judge Skelly Wright originated the expression in 1971. Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 756 (1993).

36. *See, e.g.*, Ry. Express Agency v. New York, 336 U.S. 106, 109 (1949) (sustaining city advertising prohibition pursuant to economic substantive due process review); Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (upholding commercial handbill ordinance as proper government regulation of business).

37. 316 U.S. at 54.

38. *Id.* Mr. Chrestensen wanted to advertise his operation by distributing handbills in the streets, but a New York Sanitary Code regulation prohibited such activity. *Id.* Chrestensen printed a protest on one side of his handbill and attempted to circulate his advertisements. *Id.* Upon the police stopping Christensen's efforts, Chrestensen filed a suit charging that the sanitary regulation violated the Due Process Clause. *Id.* at 52-54.

39. *Id.* at 55.

40. *Id.*

41. *Id.*

ing."[42] The Court primarily focused on the legitimate power of the government to regulate commerce.[43]

The Court's decision in *Valentine*—that commercial advertising receives no Constitutional protection—engendered the distinction between commercial and noncommercial speech and affected the Court's treatment of commercial speech in the years that followed.[44]

Over thirty years later in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court considered whether the First Amendment protected an advertisement with a solely commercial purpose.[45] The Court found that there were "commonsense differences" between commercial speech and other kinds of speech.[46] Among those differences were that commercial speech was "more easily verifiable" and "more durable" than ordinary speech.[47] However, the Court still found that commercial speech was not "so far removed . . . that it lacked all protection."[48] *Virginia State Board of Pharmacy* recognized for the first time limited protection for commercial speech.[49] The Court did not indicate the extent of protection nor did it develop a test for determining First Amendment protection for commercial speech.[50]

However, in 1980, the Supreme Court set forth a test to establish consistency in commercial speech cases.[51] In *Central Hudson Gas & Electric v. Public Service Commission,* the New York Public Service

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42. *Id.* at 54.

43. *Id.* at 54-55.

44. Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 628 (1990). Since *Valentine*, "the concept of a commercial/noncommercial distinction has remained in the law . . . by now it has become such a well-established part of our jurisprudence that it is accepted almost without question." *Id.*

45. 425 U.S. 748. The Court phrased the specific issue as whether speech proposes something more than a commercial transaction, *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. at 385, is so removed from any "exposition of ideas," *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), and from "truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government," *Roth v. United States,* 354 U.S. 479, 484 (1957), that it lacks all protection. The Court's answer was that it was not. *Id.* at 761-762.

46. *Id.* at 771 n.24.

47. *Id.* These differences indicate that commercial speech is "hardier and retains greater objectivity," thus it may not be necessary to afford commercial speech the same protections as other speech. *Id.*

48. *Id.* at 762.

49. *Id.* at 761-63.

50. *Id.*

51. Central Hudson Gas & Elec. v. Public Serv. Comm'n, 447 U.S. 557, 564 (1980).

Commission prohibited, by regulation, an electric utility company from advertising to promote the use of electricity.[52] The state asserted that its interest in energy conservation and the minimization of costs to prevent general rate increases was reason enough to prevent the utility's commercial speech.[53] The Court held that a ban prohibiting advertising was unconstitutional because it violated the First and Fourteenth Amendments.[54] In deciding *Central Hudson*, the Court outlined a four-part test in order to determine whether regulation of commercial speech violated the First Amendment.[55]

The Court made clear that such restrictions are subject to intermediate scrutiny, holding that commercial speech embodies a lesser protection than traditionally protected speech, such as ideological or political speech.[56] The Court's four-part test was: (1) The commercial speech in question cannot be "misleading or related to unlawful activity;" (2) there must be a substantial government interest in regulating the speech; (3) the restriction must be proportional to the interest advanced; and (4) the restriction is "carefully designed to achieve the state's goal."[57] Applying this test, the Court held that the Public Service Commission's advertising ban violated the First Amendment.[58]

The Court recognized the substantial state interest but held that the restriction on all promotional advertising, regardless of its impact on overall energy use, did not directly advance the government's interest in maintaining its rate structure.[59] The Court also held that the regulation was overly restrictive because the state interest could adequately be served by a more limited restriction on the content of promotional advertising.[60] The *Central Hudson* test has become the standard by which the applicability of the First Amendment to commercial speech is measured.[61]

However, despite the clear test applied in *Central Hudson*, the subsequent decisions regarding commercial speech have been convoluted. In *Posadas de Puerto Rico Associates v. Tourism Co.*, the Court reviewed a Puerto Rican statute allowing casinos to advertise in publica-

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52. *Id.* at 558-61.
53. *Id.* at 566-72.
54. *Id.* at 570.
55. *Id.* at 563-66.
56. *Id.*
57. *Id.* The test is often referred to as the three-pronged test, using just the last three elements.
58. *Id.* at 572.
59. *Id.* at 569-70.
60. *Id.* at 569-71.
61. 44 Liquormart v. Rhode Island, 517 U.S. 518 (1996).

tions aimed at tourists but not in publications aimed at Puerto Rican residents.[62] The Court found that the state had a substantial interest in reducing gambling among its residents.[63] The Court analyzed and found that the State's interest, "basically involves a consideration of the fit between the legislature's ends and the means chosen to accomplish those ends."[64] The Court found that the Legislature's conclusion that the statute would advance that interest was a reasonable one.[65] Then the Court left the fourth prong of the *Central Hudson* analysis for the Legislature to determine.[66] The Court took a paternalistic stance and stated that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling."[67]

Nine years after the *Posadas* decision, the Supreme Court again applied the *Central Hudson* analysis in *Board of Trustees v. Fox.*[68] The *Fox* Court stated that the requirement of the fourth prong of the *Central Hudson* test, that the means used to achieve the state's interest be no more extensive than necessary, was not the same as the least-restrictive-alternative requirement of strict scrutiny.[69] The connection between the restriction on speech and the interest furthered by the restriction did not have to be a "perfect" one but only a "reasonable" one.[70]

The Court again applied a heightened scrutiny in *Rubin v. Coors Brewing Co.*[71] The Court held that a federal statute prohibiting beer manufacturers from displaying alcohol content on labels violated the First Amendment.[72] The Court stated that the government's interest

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62. 478 U.S. 328, 340-41 (1986).

63. *Id.* at 341.

64. *Id.*

65. *Id.* at 342.

66. *Id.* at 344. The Court stated that "it is up to the legislature to decide whether or not [an alternate] policy would be as effective in reducing the demand for casino gambling as a restriction on advertising." *Id.*

67. *Id.* at 345-46.

68. 492 U.S. 469 (1989). In *Fox*, students of the State University of New York held a Tupperware party in violation of a school resolution that forbade commercial enterprises to operate on campus. *Id.* at 471-72. The government asserted the resolution furthered its interest in "promoting an educational rather than commercial atmosphere on . . . campuses." *Id.* at 475. The students claimed that the resolution violated their right to free speech and that the Tupperware party involved both commercial and "pure speech" about fiscal responsibility and operating an efficient household. *Id.* at 474. The Court rejected the theory that the speech at issue was partially pure speech and decided the case under *Central Hudson* standards. *Id.* at 474-75.

69. *Id.* at 480.

70. *Id.*

71. 514 U.S. 476, 486-89 (1995).

72. *Id.* at 490-91. The Court concluded that the Government's interest in preserving

would not directly be advanced by the restrictions, and if anything, those restrictions counteract the government's interest.[73]

In 1996, the Supreme Court decided *44 Liquormart, Inc. v. Rhode Island*, in which 44 Liquormart was fined for placing an advertisement that violated a Rhode Island law prohibiting the advertising of liquor prices.[74] The Court's majority found that the Twenty-first Amendment did not preclude the First Amendment from applying to the statute in question; thus, all of the Justices agreed that the liquor price advertising ban was unconstitutional.[75] However, the members of the Court disagreed about the continuing validity of *Central Hudson* and *Posadas*.[76] The split in the Court over the applicability and continuing use of the *Central Hudson* test is observed in the many commercial speech cases decided post-*Posadas*.

Compelled Speech

The Supreme Court has held that the government cannot compel an individual to speak, as compelled speech is also a violation of the First Amendment.[77] In *West Virginia State Board of Education v. Barnette*, the Supreme Court reviewed a state law that compelled a young school child to recite the pledge of allegiance to the flag, a pledge that conflicted with her parents' religious beliefs.[78] The Court held that this act violated the First Amendment by stating, "if there is any fixed star in our constitutional constellation, it is that no official, high or petty

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state authority is not sufficiently substantial to meet the requirements of *Central Hudson*. *Id.*

73. *Id.* at 489. The government asserted that its substantial interest was in protecting the general welfare of the public by preventing competition wars on the basis of the strength of the alcohol. *Id.* at 487-89.

74. 517 U.S. at 492-93. 44 Liquormart placed an advertisement that did not specifically mention the prices, had the word "WOW" next to the pictures of liquor bottles. *Id.* The Rhode Island Liquor Control Administrator found that the advertisement implied a reference to liquor prices and therefore violated the law prohibiting the advertisement of liquor prices. *Id.*

75. *Id.* at 516. The Twenty-first Amendment repealed the Eighteenth Amendment and allowed the states to prohibit interstate commerce in alcoholic beverages. *See* U.S. CONST. amend. XXI. The Court stated "although the Twenty-first Amendment limits the effect of the dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders, "the Amendment does not license the states to ignore their obligations under other provisions of the Constitution." *44 Liquormart*, 517 U.S. at 516 (quoting Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 712 (1984)).

76. *Id.*

77. Wooley v. Maynard, 430 U.S. 705, 713 (1977).

78. 319 U.S. 624, 626-29 (1943).

can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[79]

Later, in *Wooley v. Maynard,* the Court considered whether a New Hampshire prohibition against covering up the State's motto on license plates, "Live Free or Die," violated the First Amendment.[80] This prohibition addressed the issue of whether the State could require a person to display a political message on private property.[81] The Court held that the First Amendment protects "both the right to speak freely and the right to refrain from speaking at all."[82] The Court found that the State's interests in promoting history and state pride were not compelling enough to outweigh individual rights.[83] This is a vital case in First Amendment jurisprudence as it formalizes the notion that the government cannot compel speech, just as it cannot limit speech.[84]

While the state may not require a person to speak, the Court found in *Pruneyard Shopping Center v. Robins* that one may be required to allow others to speak under some circumstances.[85] The Court upheld an interpretation of the California Constitution that required a private shopping mall owner to allow others to reasonably exercise their free speech rights on the premises.[86] The Court found that the shopping mall was not devoted to the exclusive use of the owner and therefore the message of the pamphleteers would not likely be identified as the owner's own.[87] Second, because the government dictated only access and did not select any particular message to be expressed, there was no danger of government viewpoint discrimination or self-censorship of the mall owner.[88] Third, the mall owner could expressly disavow any connection with the content of the message.[89]

Although *Pruneyard* established that in narrow situations one may be required to allow another to speak, that will not be the case when

79. *Id.* at 642.
80. 430 U.S. at 706. Maynard was a Jehovah Witness who found the slogan to be offensive and deeply at odds with his religious convictions. *Id.* at 707.
81. *Id.* at 713.
82. *Id.* at 714.
83. *Id.* at 716-17.
84. *Id.* at 713.
85. 447 U.S. 74, 88 (1980).
86. *Id.* at 88.
87. *Id.*
88. *Id.* at 87.
89. *Id.* at 88.

doing so would force one to respond to the specific speech.[90] In *Pacific Gas & Electric Co. v. Public Utilities Commission*, a plurality of the Court invalidated an order requiring the utility to share the extra space in its billing envelopes with an organization that opposed its viewpoint.[91] The requirement to include flyers that were critical of the utility company forced the utility company to respond to what the flyers had said, and "that kind of forced response is antithetical to the free discussion the First Amendment seeks to foster."[92] The Court stated that "for corporations as for individuals, the choice to speak includes within it the choice of what not to say."[93] The "message itself is protected" as part of the First Amendment's protection of the free flow of ideas.[94]

Later cases emphasized the importance of the right to remain silent. In *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, the Supreme Court reviewed a Massachusetts public accommodation law to compel the veterans group authorized to organize South Boston's annual St. Patrick's Day Parade to admit a gay, lesbian, and bisexual group in the parade as marchers.[95] The Court found that the group sponsoring a parade was not required to include another group in the parade when it disagreed with the other group's message.[96] Unlike the situation in *Pruneyard*, parade observers would interpret the message of each group marching in the parade as part of the overall theme of the parade and that was enough to uphold the decision to exclude a particular group under the First Amendment.[97]

Mandatory Funding of Speech

Among the cases involving compelled speech the Supreme Court has also heard cases involving the government ordering individuals to finance speech. In *Abood v. Detroit Board of Education*, a teachers' union had a collective bargaining agreement which maintained a provision that the school district would be an "agency shop," so that any teacher who refused to join the union was required to pay a "service charge

90. Pacific Gas & Elec. Co. v. Public Utils. Comm'n., 475 U.S. 1, 16 (1986). In most cases there is no First Amendment right to use private property for speech purposes. *See* Stanley H. Friedelbaum, *Private Property, Public Property: Shopping Centers and Expressive Freedom in the States*, 62 ALB. L. REV. 1229, 1234 (1999).

91. *Pacific Gas & Elec. Co.*, 475 U.S. at 20-21.

92. *Id.* at 16.

93. *Id.*

94. *Id.*

95. 515 U.S. 557, 561-62 (1995).

96. *Id.* at 570.

97. *Id.* at 576-77.

equal to the regular dues" paid by union members.[98] The Supreme Court found that requiring the union to represent all employees did not violate the Constitution.[99] However, some of the money the employees were required to contribute was spent on political and ideological matters unrelated to collective bargaining, and the Court held this did violate the First Amendment.[100] The fact that the employees were "compelled to make, rather than prohibited from making, contributions for political purposes was no less an infringement of their constitutional rights."[101] Thus, while the Court found no violation with the teachers being required to pay union dues, the fact that the dues were spent for political purposes unrelated to the union made the mandatory funding unconstitutional.[102]

The Court in *Abood* provided guidelines to determine when employees could be required to fund expressive union activity; it held that the expression must be germane to the union's purpose and the funding requirement must also be justified by vital policy interests.[103]

In *Glickman v. Wileman Brothers. & Elliott, Inc.*, the Supreme Court decided whether the First Amendment is violated where government regulations require that a certain group pay for generic advertising.[104] The Supreme Court granted certiorari in *Glickman* to resolve a conflict between the Ninth Circuit, which decided *Glickman,* and the Third Circuit, which decided *United States v. Frame.*[105] In *Frame,* the Third Circuit held the Beef Promotion and Research Act implicates the First Amendment by applying the *Central Hudson* test. The Third Circuit held that the state's interest was neutral, compelling, and drafted in a way that did not infringe on the contributors' rights.[106] The Supreme Court held that marketing orders for peaches, plums, and nectarines, which required producers to finance generic advertising through mandatory assessments, were not regulations that raised First Amendment issues. The majority found that the marketing regulations imposed no re-

98. 431 U.S. 209 (1977). An agency shop agreement is an arrangement between the union and the local government where all employees, as a condition of employment, must pay a service fee equal to the amount of union dues, regardless of whether they are a union member or not. *Id.* at 211.

99. *Id.* at 241-42.

100. *Id.* at 234.

101. *Id.*

102. *Id.*

103. *Id.* at 209.

104. 117 S. Ct. 2130 (1997). The group consisted of California peach, plum, and nectarine producers.

105. 885 F.2d 1119 (1989).

106. *Id.* at 1137.

striction on producers from doing their own advertising or separately displaying their own message, and that the regulations do not compel the producers to engage in actual or symbolic speech since they do not order the producers to finance any ideological or political speech.[107]

PRINCIPAL CASE

In *United States v. United Foods, Inc.*, the U.S. Supreme Court framed the issue as "whether the government may underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, some of whom object to the idea being advanced."[108]

In *United*, the Supreme Court held that a government assessment on mushroom handlers to fund generic advertising to promote mushroom sales violated the First Amendment.[109] The Court found that the First Amendment not only protects speech, but also prevents the government from forcing individuals from expressing certain views.[110]

The Court in *United* distinguished this case from *Glickman* in several ways. First, the assessments in *Glickman* embodied mandated assessments for speech, which were a small part of a more comprehensive program restricting marketing autonomy.[111] In *United*, the mandatory funding for speech was not a minor part of the regulation, but rather the main point of the regulation, because the advertisements were not ancillary to a more comprehensive program. In other words, the speech was the principle object of the regulatory scheme in *United*.[112]

Second, the detailed marketing orders in *Glickman* displaced competition to such an extent that the producers were "expressly exempted from the antitrust laws."[113] The tree fruit marketing program was characterized by "collective action, rather than the aggregate consequences of independent competitive choices."[114] Thus, the producers who were compelled to contribute funds toward generic advertising "did

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107. *Glickman*, 117 S. Ct. at 2138.
108. *United*, 121 S. Ct. at 2338.
109. *Id.* at 2341.
110. *Id.* at 2338 (citing Wooley v. Maynard, 430 U.S. 705 (1977)).
111. *Id.* at 2339.
112. *Id.*
113. *Id.* Marketing orders promulgated pursuant to the Agricultural Marketing Agreement Act (AMAA) are a type of economic regulation which have displaced competition in a number of discrete markets and are expressly exempted from antitrust laws § 608(b). *Glickman*, 117 S. Ct. at 2134.
114. United, 121 S. Ct. at 2339.

so as a part of a broader collective enterprise in which their freedom to act independently was already constrained by the regulatory scheme."[115] In *United*, nearly all of the assessments went toward generic advertising. "Beyond the collection and disbursement of advertising funds, there are no marketing orders that regulate how mushrooms are to be produced and sold, no exemption from the antitrust laws, and nothing preventing individual producers from making their own marketing decisions."[116]

Third, unlike the California tree fruit producers in *Glickman*, the mushroom producers in *United* were not compelled to belong to an association of growers to make cooperative decisions.[117] The *Glickman* Court stressed "the importance of the statutory context in which it arises;" thus, the complete regulatory program must be considered when analyzing the case.[118]

The Court found that *Glickman* and *United* are similar in that the "assessments do not prohibit a party from communicating its own message, the program does not compel an objecting party itself to express views it disfavors, and the mandated scheme does not compel the expression of political or ideological views."[119] However, the Court distinguished the principles set forth in *Glickman* from *United* by stressing that the regulatory scheme in *Glickman* differed in a fundamental way.[120] In *Glickman,* the assessments for speech were ancillary to a more comprehensive regulatory program, and in *United,* the entire program is in place to obtain assessments to fund generic advertising.[121] The Court stressed that the entire regulatory program must be considered in resolving a case.[122]

The Supreme Court concluded "mandatory support is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to speech, but who, nevertheless, must remain members of the group by law or necessity."[123]

The Court's analysis ends with an extension of the *Abood* rule, which "recognized a First Amendment interest in not being compelled to

115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* (citing Glickman, 117 S. Ct. 2138).
119. *Id.* at 2338.
120. *Id.*
121. *Id.* at 2338-39.
122. *Id.* at 2339.
123. *Id.*

contribute to an organization whose expressive activities conflict with one's freedom of belief."[124] The Court emphasized that courts must inquire into "whether there is some state-imposed obligation which makes group membership less than voluntary; for it is the only overriding associational purpose which allows any compelled subsidy for speech in the first place."[125] In *United*, mushroom producers are forced to loosely associate only in order to contribute monies to fund a generic advertising scheme, not a broader regulatory scheme.[126]

Thus, the Court held that United had a First Amendment right to object to the assessments and to buy its own advertising supporting a message that its own mushrooms are superior.[127]

Justice Stevens' Concurring Opinion

Justice Stevens agreed with the dissent that the program at issue in *United*, as in *Glickman*, "does not compel speech itself; it compels the payment of money."[128] He went on to note "this fact alone suffices to distinguish compelled subsidies cases from the compelled speech in cases like *West Virginia Board of Education v. Barnette* and *Maynard v. Wooley*."[129] He stated that compelled subsidies are permissible only when ancillary to a larger cooperative scheme.[130] Justice Stevens agreed with the majority that one who has "surrendered a far greater liberty to the collective entity (either voluntary or by permissible compulsion) does not raise a significant constitutional issue if it is ancillary to the main purpose of the collective program."[131] Stevens stressed that the First Amendment is implicated when a person is forced to subsidize speech to which he objects and the speech is not ancillary to a valid comprehensive program.[132] Thus, he found the outcome proper in that the mandatory assessments in this case violate the First Amendment because of the restraint on liberty that "government compulsion to finance objectionable speech imposes."[133]

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124. *Id.* (citing *Abood*, 431 U.S. at 235).
125. *United*, 121 S. Ct. at 2340.
126. *Id.* at 2340-41.
127. *Id.* at 2341.
128. *Id.* at 2342. (Stevens, J., concurring).
129. *Id.* (Stevens, J., concurring).
130. *Id.* (Stevens, J., concurring).
131. *Id.* (Stevens, J., concurring).
132. *Id.* (Stevens, J., concurring).
133. *Id.* (Stevens, J., concurring).

Justice Thomas's Concurring Opinion

Justice Thomas wrote separately to emphasize his view that commercial speech should be held to the same level of heightened scrutiny as non-commercial speech.[134] Justice Thomas reiterated his view that "paying money for the purposes of advertising involves speech and that compelling speech raises a First Amendment issue just as much as restricting speech."[135] He expressed his strong opinion that compelled funding of advertising should be evaluated under strict First Amendment scrutiny.[136]

Justice Breyer's Dissenting Opinion

Justice Breyer, joined by Justice Ginsburg and Justice O'Connor, dissented in *United*. Justice Breyer wrote, "The Court disregards controlling precedent, fails to properly analyze the strength of the relevant regulatory and commercial speech interests, and introduces into First Amendment law an unreasoned legal principle that may well pose an obstacle to the development of beneficial forms of economic regulation."[137]

The dissent maintained that *United* was very similar to *Glickman* because both cases sought to resolve the same issue: "Whether the First Amendment prohibits the government from collecting a fee for collective product advertising from an objecting producer."[138] Just four years earlier, the *Glickman* Court reasoned that the collection of the fee did not "raise a First Amendment issue" for the Court to resolve, but rather was "simply a question of economic policy for Congress and the Executive to resolve."[139] Like the California tree fruit producers, the mushroom handlers are not prohibited from communicating a different message, nor does the Act require the handlers to engage in actual or symbolic speech, and the Act does not compel the handlers to finance political or ideological speech.[140] Justice Breyer indicated that the "similar characteristics of the cases demand a similar conclusion."[141] The Court distinguished *United* from *Glickman* by stressing the difference in regulatory schemes. However, Justice Breyer noted, "It is difficult to see why a

134. *Id.* (Thomas, J., concurring).
135. *Id.* (Thomas, J., concurring).
136. *Id.* (Thomas, J., concurring).
137. *Id.* at 2342. (Breyer, J., dissenting).
138. *Id.* at 2343. (Breyer, J., dissenting).
139. *Id.* at 2342-43. (Breyer, J., dissenting).
140. *Id.* at 2343. (Breyer, J., dissenting).
141. *Id.* (Breyer, J., dissenting).

Constitution that seeks to protect individual freedom would consider the absence of heavy regulation, to amount to a special, determinative reason for refusing to permit this less intrusive program."[142]

The dissent stressed that this regulatory program is a "species of economic regulation which does not warrant special First Amendment scrutiny."[143] This program does not interfere with protected speech interests, because it does not compel speech but rather compels the payment of money.[144] It also does not hinder the basic First Amendment "commercial speech" objective as it promotes truthful information to customers.[145] The speech involved deals with truthful product promotion and does not bind mushroom handlers from any speech or expression.[146] The Court has deemed that the First Amendment's objective when dealing with commercial speech is to protect the consumer from misleading product information.[147] Finally, there is no special risk of harming other forms of speech.[148]

Justice Breyer furthered his argument by analyzing the case with the *Central Hudson* test, thus demonstrating that even if he found this type of compelled assessment to be "commercial speech" he would still find no First Amendment violation.[149] The dissent found that (1) the government's interest is substantial; and (2) compelled monetary contributions are necessary and proportionate to legitimate promotional goals that it seeks, as the volunteer program did not work and there is proof that advertising increases sales of mushrooms.[150] The dissent insisted that the Court erroneously turned an economic policy into a First Amendment issue.[151]

ANALYSIS

The Supreme Court's decision in *United* further confused the al-

142. *Id.* at 2344. (Breyer, J., dissenting).
143. *Id.* at 2346. (Breyer, J., dissenting).
144. *Id.* (Breyer, J., dissenting). "Money and speech are not identical." *Id.* (citing Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 388-389). "Money is property, it is not speech." *Id.* at 400. The government can support programs and policies through taxes even upon objecting parties. *Id.* at 2371 (citing Southworth v. Grebe, 529 U.S. at 241).
145. *United*, 121 S. Ct. at 2346. (Breyer, J., dissenting).
146. *Id.* (Breyer, J., dissenting).
147. *Id.* at 2346-47. (Breyer, J., dissenting).
148. *Id.* at 2347. (Breyer, J., dissenting).
149. *Id.* at 2348. (Breyer, J., dissenting).
150. *Id.* (Breyer, J., dissenting).
151. *Id.* (Breyer, J., dissenting).

ready convoluted legal doctrine of commercial speech and the protection it should be afforded by the Constitution. Throughout the history of commercial speech, the Supreme Court has held that it is afforded a different level of protection than political or ideological speech.[152] Until the 1970s the Court did not grant commercial speech any constitutional protection at all.[153] The Court in *United* took an unprecedented step off the constitutional plank by providing mushroom producers a level of First Amendment protection never previously granted. The Supreme Court determined that a mandatory assessment imposed upon agricultural industries violates the First Amendment.[154]

Constitutional Scrutiny of Commercial Speech: The Central Hudson Test

The Court ignored the existing legal precedent by failing to apply the workable test outlined in *Central Hudson*. The Court stated that it failed to engage in a *Central Hudson* analysis due to the fact that the government did not challenge the court of appeals decision based on such an issue.[155] Thus, the Court did not consider whether the government's interest was substantial under the *Central Hudson* test.[156] However, if the Court had engaged in a *Central Hudson* analysis, this case may have had a very different result.

The Supreme Court has applied the *Central Hudson* test inconsistently, making it difficult to predict when restrictions on commercial speech would be allowed and when they would violate the First Amendment.

Justice Breyer, in dissent, analyzed the case under the *Central Hudson* test and determined that the regulatory scheme at issue did not violate the First Amendment.[157] The speech at issue was plainly not misleading or related to unlawful activity.[158] By examining the Mushroom Act and the legislative findings, a substantial government interest is established.[159] The legislative findings noted that mushrooms are a "valuable part of the human diet," per capita mushroom consumption in Canada was twice that of the United States, and promotion of mushrooms in this country may help to conquer inaccurate perceptions about the prod-

152. *See supra*, note 42, and accompanying text.
153. *Virginia State Bd. of Pharmacy*, 425 U.S. 748.
154. *United*, 121 S. Ct. at 2341.
155. *Id.* at 2348. (Breyer, J., dissenting).
156. *Id.* at 2337-38.
157. *Id.* at 2348. (Breyer, J., dissenting).
158. *Id.* at 2341.
159. *Id.* at 2347. (Breyer, J., dissenting).

uct by overcoming consumer fears about the safety of eating mushrooms.[160] Several features of the program indicate that its compelled assessments are necessary and proportionate to the goals that the government seeks.[161] At the legislative hearings, industry representatives made it clear that previous voluntary contributions had failed miserably as many producers would not pay for the advertising yet would benefit, thus many would take a "free-ride" on the expenditures of others.[162] The final prong of the *Central Hudson* test was also satisfied because the Mushroom Act was carefully designed to achieve the state's goal.

The law was not over-inclusive, as it pertained only to mushroom producers and no other agricultural entity and was not under-inclusive because it was applied to both foreign and domestic mushroom handlers alike.[163] The effect of the mushroom advertising has provided empirical evidence demonstrating the program's effectiveness.[164] The Mushroom Council Program Effectiveness found that for "every million dollars spent by the Mushroom Council . . . the growth rate of mushroom sales increased by 2.1%."[165]

The Supreme Court's holding in this case is inconsistent with previous First Amendment cases or precedent. Although the Court has consistently afforded commercial speech less protection than non-commercial speech, in *United*, the Court struck down a statute even though it passed constitutional muster under the *Central Hudson* test. The *United* Court not only created more confusion in the commercial speech arena, but also failed to set guidelines or create a new workable test to determine which mandatory assessment programs should be protected under the First Amendment. The Court alluded to *Posadas'* "greater-power-includes-the-lesser" dictum.[166] However, *Posadas* has been described as the "low water mark" for commercial speech because the Court applied Central Hudson's prongs in such a way as to provide significant deference to state advertising restrictions.[167]

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160. *Id.* at 2344. (Breyer, J., dissenting).
161. *Id.* (Breyer, J., dissenting).
162. *Id.* (Breyer, J., dissenting).
163. *Id.* at 2348. (Breyer, J., dissenting).
164. *Id.* (Breyer, J., dissenting).
165. *Id.* (Breyer, J., dissenting).
166. Brooks R. Fudenberg, *Unconstitutional Conditions and Greater Powers: A Separability Approach*, 43 UCLA L. REV. 371, 386 n.76 (1995).
167. Cameron De Vore, *The Two Faces of Commercial Speech under the First Amendment*, 12 COMM. LAW. Spring 1994, at 23 (1994).

Similarities of Glickman and United

The fact pattern and legal issues in *United* are nearly identical to those in *Glickman,* and similar cases demand similar conclusions unless the previous case was deemed bad law. The *United* court did not overrule *Glickman* but rather distinguished the case in a simplistic and illogical manner.[168]

The Supreme Court erred in distinguishing this case from *Glickman* on the ground that mushroom producers are not as heavily regulated as the California tree fruit producers.[169] This rationale concludes that once an industry is deemed to be "heavily regulated," First Amendment protections are greatly limited.[170] However, the differences in regulation have not been critical in previous cases.[171] First, the *Glickman* Court referred to the fact that Congress had "authorized" extensive regulation of the industry.[172] However, "some of the marketing orders, price and out-put regulations, while authorized were not, in fact, in place."[173] In *United,* just as in *Glickman,* the Secretary of Agriculture is "authorized" to promulgate price and supply regulations. Thus the level of regulation would not appear to be a critical factor in First Amendment protection.[174] The *United* Court fails to explain or rationalize why producers in a more comprehensively regulated industry are afforded lesser First Amendment protection.[175]

Also, the Supreme Court's First Amendment analysis in *Glickman* is not premised upon the amount of regulation.[176] Rather, the only discussion of industry regulation in *Glickman* was set forth in a section in which the Court merely defined the scope of the controversy.[177] The discussion of industry regulation is not referenced or relied upon as part of the First Amendment analysis.[178] "If the Court had intended its decision in *Glickman* to turn on the extent of regulation of the industry at

168. *United,* 121 S. Ct. at 2338-41.
169. Petitioner's Brief, *supra* note 31, at 12.
170. In order to decipher if an industry is highly or lightly regulated the Court appears to look at several factors, which include: legislative purpose in implementing the marketing orders, the character of the industry, and the relative expenditures involved in generic advertising campaigns versus other expenditures under the program.
171. United, 121 S. Ct. at 2343. (Breyer, J., dissenting).
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. Petitioner's Brief, *supra* note 31, at 12.
177. *Id.* at 21.
178. *Id.* at 22.

issue, the Court would not merely have stated as a fact that the tree fruit industries were regulated in other respects, but would have also explained the significance of that fact to its First Amendment holding."[179]

It is also significant to note that the reason the Supreme Court granted certiorari in *Glickman* was to resolve a conflict between the Ninth Circuit, which decided *Glickman,* and Third Circuit, which decided *United States v. Frame.*[180] The Court did not draw any distinctions of constitutional significance between the regulatory schemes in *Glickman* and *Frame.*[181] If the Court's decision in *Glickman* was limited to generic advertising programs imposed under comprehensive marketing orders for a highly regulated commodity, "then the Court presumably would have said so, having granted certiorari to resolve the conflict between *Glickman* and *Frame.*"[182]

"The purpose of generic advertising programs is the same whether the program stands alone, as here, or is part of a more comprehensive regulatory scheme as in *Glickman.*"[183] In either situation, "the purpose is to maintain and expand the market for an agricultural commodity, to the benefit of the producers and processors of the commodity and, ultimately, of the Nation's agricultural economy as a whole."[184]

This case should not have been distinguished from *Glickman.* For the same three reasons that the Court identified with respect to the generic advertising program in *Glickman,* the generic advertising program for mushrooms is unlike laws that have been held to violate the First Amendment.[185] Like *Glickman,* this case "imposes no restraint on the freedom of any producer to communicate any message to any audience;" it "does not compel any person to engage in any actual or symbolic speech;" and it "does not compel the producers to endorse or finance any political or ideological views."[186] Like the California tree fruit producers, mushroom producers are simply required to share the costs of

179. *Id.*
180. *Id.* at 23. *See* United States v. Frame, 885 F.2d 1119 (1989). This case involved a First Amendment challenge to a generic advertising program pursuant to the Beef Promotion and Research Act of 1985. *Id.* at 1121. Unlike in *Glickman,* this Act does not extensively regulate the beef industry. Petitioner's Brief, *supra* note 31, at 23-24.
181. *Id.* at 24.
182. *Id.*
183. *Id.* at 25.
184. *Id.*
185. *Id.* at 11.
186. *Id.* (citing Glickman v. Wileman Bros. & Elliot, Inc., 521 U.S. 457, 469-70 (1997)).

promotional activities that are non-ideological and "unquestionably germane to the purposes."[187]

The Implications of the United Decision

Because the Court in *United* distinguished *Glickman,* it created a new line of precedent in commercial mandatory funding cases. This decision leaves the agricultural industries' mandatory check-off programs in confusion.[188] Now, without judicial interpretation, it will be difficult for Congress to develop a regulatory program that promotes a specific agricultural commodity that does not violate the First Amendment. Congress will ironically be forced to develop stricter regulatory schemes to achieve industry marketing goals without prompting First Amendment challenges.[189]

Congress and the Department of Agriculture will have a very difficult time implementing these vital mandatory check-off programs without disrupting the agricultural economy and violating the First Amendment. In light of *United*, marketing programs and orders will be built upon more intrusive regulatory schemes than necessary to meet the needs and desires of producers to increase the demand for their commodities.

The ramifications of the decision in *United* are extraordinary, because the agricultural industry relies heavily on mandatory check-off programs, which have proven to benefit various agricultural commodities sales tremendously. Generic commercial slogans are easily recognized and resonate throughout the American economy. Slogans like "The Incredible, Edible Egg," "Ah . . . the Power of Cheese," or "The Touch . . . the Feel of Cotton . . . the Fabric of Our Lives" are common advertisements that ring of familiarity.[190] Millions of dollars are tied up in generic advertising for agricultural commodities and the effects on the industry are positive. The beef industry advertises: "Beef—It's what's for Dinner," and mandates beef producers to pay one dollar per head of

187. *Id.* (citing Glickman v. Wileman Bros. & Elliot, Inc., 521 U.S. 457, 473 (1997)). Unlike the union cases where the real issue was whether the speech was tied to the fundamental purpose of the union, what is at issue here is the point of collective action. For example, it's fine for the government to impose supply-limiting regulations that destroy a portion of a farmer's crop however, to tax the same portion of this crop for generic advertising to increase demand is now considered suspect.

188. *Has the Supreme Court Killed Checkoffs? Case of the Mushrooms and Free Speech*, SUCCESSFUL FARMING, August 1, 2001, at 48.

189. *United*, 121 S. Ct. at 2346. (Breyer, J., dissenting).

190. 1998 AGRICULTURE FACT BOOK, *Marketing and Regulatory Programs, available at* http://usda.gov/news/pubs/fbook98/ch12a.htm (last visited Oct. 7, 2001).

cattle.[191] The beef check-off program has had an incredibly positive effect on the beef industry.[192] The check-off program has not only "halted a 20-year beef demand erosion, but has also increased demand in 10 of the last 12 quarters, including 5% in the second quarter of this year."[193]

Dairy producers pay assessments that add up to over 100 million dollars a year for their nationally recognized celebrity "Got Milk?" campaign.[194] Through this campaign, generic advertising has raised milk sales an estimated 1.4 billion pounds, or 5.9%, between September of 1995 and August of 1996.[195] Since the mandatory assessments in 1983, milk sales are estimated to be 6%, or almost 16.9 billion pounds, above what they would have been without the advertising.[196] Pork producers pay into a regulatory program that yields about $54 million per year for their "The Other White Meat" advertisements.[197]

The *United* decision therefore affects not only the mushroom industry but has implicated dozens of other agricultural promotional programs.[198] To prevent the destruction of these valuable generic advertising programs, Congress will be forced to work harder to develop an assessment scheme that comports with the Court's decision.

CONCLUSION

The majority's refusal in *United* to adhere to precedent and extend to the mushroom advertising program the same level of deference as other types of commercial speech took the Supreme Court's commercial speech jurisprudence in a mystifying and unfounded turn. The Court should have applied the *Central Hudson* intermediate scrutiny test and upheld the Mushroom Promotion, Research, and Consumer Information Act. *Glickman* is controlling and cannot reasonably be distinguished

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191. Steve Raabe, *A Beef: It's What Ranchers Have With Ads*, DENVER POST, July 20, 2001 at C-01.

192. *See* Rod Smith, *Industry Officials See Domino Effect*, FEEDSTUFFS, August 13, 2001 at 1.

193. *Id.*

194. Anne Gearan, *Mandatory Ad Campaigns Violate First Amendment*, CHATTANOOGA TIMES, June 26, 2001 at B5.

195. Noel Blisard, et al., *Evaluation of Fluid Milk and Cheese Advertising from 1984-1996*, ECONOMIC RESEARCH SERVICE U.S. DEPARTMENT OF AGRICULTURE (December 1997), *available at* http://www.ers.usda.gov/publications/summaries/tb1860.htm (last visited Oct. 7, 2001).

196. *Id.*

197. Paul Souhrada, *New Ad Campaign being pitched to Ohio Farmers*, THE COLUMBUS DISPATCH, Feb. 27, 2001 at 1C.

198. *See, supra* notes 191-97, and accompanying text.

from *United*. The concept that a mandatory assessment program within a more comprehensively regulated industry will pass constitutional muster, while a similar program in a less comprehensively regulated industry will not, is absurd. The effect of this decision will be felt throughout the agricultural industry, as many programs will be forced to do away with generic advertising or the government will have to develop a more intrusive regulatory program to include generic advertising in marketing orders.

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