Wyoming Law Review

Volume 4 | Number 1 Article 9

January 2004

Constitutional Law - First Amendment Review of Beef Check-off Assessments; Beef May Be for Dinner, but May Producers Be Compelled to Say So

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CONSTITUTIONAL LAW – First Amendment Review of Beef Checkoff Assessments; Beef May Be for Dinner, But May Producers Be Compelled to Say So? *Livestock Marketing Association v. United States Department of Agriculture*, 335 F.3d 711 (8th Cir. 2003).

INTRODUCTION

Beef believers and veggie variants alike are by now surely conditioned to the tell-tale advertising sounds designed to remind us what we *really* want for dinner. The opening strings of Aaron Copland's "Rodeo" stimulate our senses, making us receptive to the dependable and reassuring voice of Sam Elliott informing us that beef not only satisfies our more extravagant culinary desires, but fits into an active and healthy lifestyle as well.

Anyone with a television or who pays more than passing attention to print advertisement is likely to be familiar with the long-running *"Beef. It's What's For Dinner."* advertising campaign, as well as many other generic advertising slogans that are designed to promote consumption of various agricultural commodities. But most consumers exposed to such messages likely have no idea that these marketing campaigns are initiated, funded, and designed by the producers of the commodities themselves, under the authority of what is commonly called a "checkoff" program.[1] The term "checkoff" refers to the fixed, per-unit fee that producers are required by law to pay into the program each time they market a unit of the pertinent commodity.[2] Those fees in turn are utilized for research, promotion, and informational activities designed to maintain and expand markets for the commodity, advance the welfare of persons engaged in production, marketing, and consumption of the commodity, and enhance overall market demand for the commodity.[3]

Authorization for certain checkoff programs, including the beef

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1. *See* United States Dep't of Agric., *Research and Promotion Programs*, *available at* http://www.ams.usda.gov/lsg/mpb/lsrp.htm. "Commonly referred to as 'check-off' programs, they operate under promotion and research orders or agreements issued by the Secretary of Agriculture and are financed by industry-established assessments." *Id.*

2. *Id.* The rate of assessment varies by commodity and may be either a flat fee per unit marketed or a percentage based on the market value of each unit marketed. *See, e.g.*, United States Dep't of Agric., *Beef Promotion and Research Order*, *available at* http://www.ams.usda.gov/lsg/mpb/beef/beefchk.htm (noting that beef checkoff program is funded by a mandatory assessment of $1-per-head collected each time cattle are sold); United States Dep't of Agric., *Pork Promotion, Research and Consumer Information Order*, *available at* http://www.ams.usda.gov/lsg/mpb/pork/porkchk.htm (noting that pork checkoff is funded by a mandatory assessment of 0.4 of 1 percent on the market value of all hogs sold); United States Dep't of Agric., *Soybean Promotion and Research Program*, *available at* http://www.ams.usda.gov/lsg/mpb/rp-soy.htm (noting that soybean checkoff is funded by a mandatory assessment of 0.5 of 1 percent of the net market price of soybeans).

3. *See, e.g.*, Commodity Promotion, Research, and Indus. Info. Act of 1996, 7 U.S.C. § 7411(a) (1999).

checkoff, is provided by a commodity-specific statute designed specifically to establish the checkoff itself.[4] Most checkoff programs, however, and particularly those authorized for fruits and vegetables, exist as just one of a number of regulatory components of a broader marketing order authorized by the Agricultural Marketing Agreement Act of 1937.[5] Others are authorized by the Commodity Promotion, Research, and Information Act of 1996, which provides for the creation of a checkoff program upon either the discretion of the Secretary of the United States Department of Agriculture ("the Secretary") or the submission of a proposal by a qualified party.[6]

Congress established the beef checkoff in 1985 with the passage of the Beef Promotion and Research Act ("the Act").[7] The Act authorized the Secretary to promulgate an initial Beef Promotion and Research Order ("the Order") to implement the program, which was to be followed by a nationwide referendum of qualified producers.[8] That referendum was conducted in 1988, wherein a majority of producers voted to continue the program.[9] Since then, individual cattle producers and beef importers have continued to contribute one dollar for each head of cattle marketed to program activities, with the bulk of funds allocated to generic commercial advertising for beef.[10]

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4. *See, e.g.*, Beef Promotion and Research Act of 1985, 7 U.S.C. §§ 2901-2918 (1999); Pork Promotion, Research, and Consumer Info. Act of 1985, 7 U.S.C. §§ 4801-4819 (1999); Watermelon Research and Promotion Act of 1985, 7 U.S.C. §§ 4901-4916 (1999 & Supp. 2003). Soybean Promotion, Research, and Consumer Info. Act, 7 U.S.C. §§ 6301-6311 (1999 & Supp. 2003); Cotton Research and Promotion Act of 1966, 7 U.S.C. §§ 2101-2118 (1999); Dairy Prod. Stabilization Act of 1983, 7 U.S.C. §§ 4501-4514 (1999 & Supp. 2003); Haas Avocado Promotion, Research, and Info. Act of 2000, 7 U.S.C. §§ 7801-7813 (1999 & Supp. 2003); Popcorn Promotion, Research, and Consumer Info. Act, 7 U.S.C. §§ 7481-7491 (1999).

5. Act of June 3, 1937, Pub. L. No. 75-137, 50 Stat. 2467 (codified as amended at 7 U.S.C. § 601-626 (1999 & Supp. 2003)).

6. 7 U.S.C. §§ 7411-7425 (1999). Such proposals may be submitted by "an association of producers of the agricultural commodity" or "any other person that may be affected by the issuance of an order with respect to the agricultural commodity." *Id.* at § 7413(b)(1)(B)(i)-(ii). Consideration of submitted proposals is discretionary, but the Secretary "shall publish the proposed order" and initiate notice and comment rulemaking if she determines the proposal is "consistent with and will effectuate the purpose of this subchapter." *Id.* at § 7413(b)(2).

7. 7 U.S.C. § 2901-2911 (1999).

8. *Id.* § 2903-2906.

9. *See* United States Dep't of Agric., *Beef Promotion and Research Order, available at* http://www.ams.usda.gov/lsg/mpb/beef/beefchk.htm. Of the 256,505 valid ballots cast in the May 10, 1988, referendum, 78.91 percent of cattle producers and importers voting favored the program. *Id.*

10. *See* 2002 Beef Bd. Annual Report, Indep. Auditors' Report Statement of Revenues, Expenses, and Changes in Fund Balances for the fiscal year ending Sept., 2002 (hereinafter 2002 Beef Bd. Annual Report). Out of a total of $46.5 million collected from producer assessments and interest income earned during fiscal year 2002, 55.3 percent went to domestic consumer promotion (advertising), followed by 12.4 percent to consumer information, 11.1 percent to foreign marketing, and 11.0 percent to research. *Id.* The balance was allocated to

In *Livestock Marketing Association v. United States Department of Agriculture*, a group of beef producers claimed that the generic advertising conducted pursuant to the beef checkoff program violated their First Amendment rights to freedom of speech and freedom of association.[11] The producers asserted that they disagreed with the program's content and should not be compelled to financially support speech with which they disagree.[12] In the lower court proceeding, the United States District Court for the District of South Dakota held the beef checkoff was unconstitutional "because it requires plaintiffs to pay, in part, for speech to which the plaintiffs object."[13] The issue before a panel of the United States Court of Appeals for the Eighth Circuit was whether the mandatory beef checkoff assessment represented an impermissible regulation of speech that violated the appellees' First Amendment right to freedom of speech.[14]

The Court of Appeals upheld the District Court decision, finding that "the Beef Act and the Beef Order are unconstitutional and unenforceable."[15] In reaching its conclusion, the court interpreted and applied the United States Supreme Court's commercial speech doctrine, a still-evolving body of law that applies varying degrees of First Amendment scrutiny to actions either restricting commercial speech or compelling financial support for such speech.[16] Specifically, the court looked to Supreme Court decisions in *Glickman v. Wileman Brothers & Elliott, Inc.* and *United States v. United Foods*, the only two cases where the Supreme Court has applied the commercial speech doctrine in the context of commodity checkoff programs.[17] Adopting a modified version of a test that had been rejected by the Court in both *Glickman* and *United Foods*, the court concluded that "the government's interest in protecting the welfare of the beef industry by compelling all beef producers and importers to pay for generic beef advertising is not

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items such as industry information, producer communications, program evaluation, and administration. *Id.*

11. Livestock Mktg. Ass'n v. United States Dep't of Agric., 335 F.3d 711, 715 (8th Cir. 2003).

12. *Id.* at 721.

13. Livestock Mktg. Ass'n v. United States Dep't of Agric., 207 F. Supp. 2d 992, 1002 (D.S.D. 2002).

14. *Livestock Mktg. Ass'n*, 335 F.3d at 721. The court noted that:

> [I]f appellees' First Amendment claim challenged only the fact that they are being compelled to contribute to a collective fund, their claim would implicate only their free association right. However, because appellees are additionally challenging the use of those funds to pay for disfavored speech, their claim predominantly implicates their free speech right.

Id. n.6.

15. *Id.* at 726.

16. For a complete discussion of the commercial speech doctrine, *see infra* notes 34-85 and accompanying text.

17. For a complete discussion of *Glickman* and *United Foods*, *see infra* notes 86-145 and accompanying text.

sufficiently substantial to justify the infringement on appellees' First Amendment free speech right."[18]

While agreeing with the holding, this case note will argue that the Eighth Circuit's strained analysis unnecessarily confuses First Amendment scrutiny of the checkoff program at issue in the principal case. Initially, this note will present the statutory history and specific provisions of the Act. Next, the note will detail the case law history of the United States Supreme Court's commercial speech doctrine, beginning with a discussion of First Amendment review of actions that restrict commercial speech as well as actions that compel either speech itself or the funding of speech in both ideological and commercial contexts.[19] The case law history will continue by reviewing the application of the commercial speech doctrine in *Glickman* and *United Foods*, and will conclude with an overview of subsequent lower court decisions reviewing agricultural checkoff programs. This note will then present the principal case, followed by an analysis of the manner in which the Eighth Circuit manufactured its own test. The analysis will argue that the court not only embraced a legal standard expressly rejected by the United States Supreme Court in resolving First Amendment challenges to checkoff programs, but also largely ignored a more appropriate standard utilized by the Court in the strikingly similar *United Foods* decision. Finally, in identifying the proper standard to be applied in the present case, this note will consider the application of both *Glickman* and *United Foods*, and propose a more coherent and protective legal framework based on the historical underpinnings of the commercial speech doctrine.

BACKGROUND

Statutory history

Congress adopted the Act in 1985 as part of that year's comprehensive "farm bill," the Food Security Act of 1985, legislation that reauthorized and amended existing statutes governing federal farm payments, food assistance, and a host of other programs.[20] The Act's findings extolled the importance of beef in the human diet, recognized the economic importance of the beef industry to the nation's economy, and identified the maintenance and expansion of beef markets as an issue of vital importance to the industry and the nation.[21] Congress therefore declared it to be in the public interest to

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18. *Livestock Mktg. Ass'n*, 335 F.3d at 725-26.

19. This note will not analyze application of the government speech doctrine, which was relied upon by both the appellants in the principal case and the United States Court of Appeals for the Third Circuit in *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989). For a discussion of *Frame*, *see infra* notes 146-50 and accompanying text.

20. Food Sec. Act of 1985, Pub. L. No. 99-198, 99 Stat. 1354 (codified as amended in scattered sections of 7 U.S.C.).

21. 7 U.S.C. § 2901(a) (1999).

establish a "coordinated program of promotion and research" aimed at strengthening the industry economically and building on markets both domestic and foreign.[22] The program is similar in purpose and in form to other such "self-help" checkoff programs authorized for various other agricultural commodities.[23]

In furtherance of these findings and declaration, the Act authorized the Secretary to promulgate regulations creating the Order, which governed the formation of the Cattlemen's Beef Promotion and Research Board ("the Board") and Operating Committee.[24] Qualified state beef councils and importers nominate members to the Board, who are then appointed by the Secretary.[25] The number of members appointed to serve on the Board and the geographic representation of that membership are determined by the cattle inventory in various states.[26] The number of importer representatives is determined similarly based on the conversion of import volumes to live animal equivalents.[27] The Board elects ten of its members to the Operating Committee, which is supplemented by ten other members elected separately by a federation of the state beef councils.[28] Responsibilities of the Operating Committee include development of plans, projects, and budgets.[29]

Subsequent to the Secretary's promulgation of the Order, the Act required an affirmative vote of cattle producers in a nationwide referendum in order to continue the program.[30] That initial referendum was conducted in 1988, and the Order was approved.[31] The Act prohibits the use of any funds collected under the Order for the purpose of influencing government policy,

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22. *Id.* § 2901(b).

23. *See, e.g., id.* § 2611-2627 (1999) (potato research and promotion); *id.* § 4501-4514 (1999 & Supp. 2003) (dairy promotion program).

24. *See id.* § 2903(b) (promulgation of the Order); *id.* § 2904(1) (establishment of the Board); *id.* § 2904(A) (election of the Operating Committee).

25. *Id.* § 2904(1). A qualified state beef council is defined as "a beef promotion entity that is authorized by State statute or is organized and operating within a State, that receives voluntary contributions and conducts beef *promotion*, research, and consumer information programs, and that is recognized by the Board as the beef promotion entity within such State[.]" *Id.* § 2902(14).

26. *Id.* § 2904(1)(B). States with more than 500,000 head of cattle will be represented by at least one Board member, and those with less than 500,000 head will be grouped with other similarly situated states, to the extent practicable, in geographically contiguous units. *Id.* States earn one additional Board representative for each additional one million head of cattle over the 500,000 head threshold. *Id.*

27. *Id.* § 2904(1)(B).

28. *Id.* § 2904(4)(A).

29. *Id.* § 2904(4)(B)-(D).

30. *Id.* § 2906(a).

31. Livestock Mktg. Ass'n v. United States Dep't of Agric., 335 F.3d 711, 714 (8th Cir. 2003). Additional referenda to consider the continuation of the program may be initiated upon request to the Secretary by a representative group comprising at least ten percent of the number of cattle producers. 7 U.S.C. § 2906(b).

other than recommending amendments to the Order.[32] In carrying out the Act, the Secretary is authorized to issue orders restraining or preventing producers from violating the Order, and may assess civil penalties of not more than $5,000 for such violation.[33]

Case law history

In considering First Amendment challenges to commodity checkoff programs, courts have relied upon a body of United States Supreme Court cases that constitute the commercial speech doctrine. That doctrine embodies not just scrutiny of the validity of state actions that place restrictions on the free exercise of commercial speech, but also those actions that may compel individuals to engage in or finance speech with which they disagree. This section discusses case law pertinent to the development of the doctrine with respect to both restricted and compelled commercial speech, and reviews application of the doctrine to cases involving First Amendment challenges to commodity checkoff programs.

1. First Amendment scrutiny of restrictions on commercial speech

The degree of First Amendment protection afforded commercial speech has evolved considerably during the past thirty years.[34] Until the 1970s, commercial speech was regarded as another form of commerce that could be regulated without regard to First Amendment issues.[35] The Supreme Court initially defined commercial speech as speech that does "no more than propose a commercial transaction," a definition that focused primarily on commercial advertising.[36] The landmark ruling in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* represented a turning point wherein the Court recognized that the First Amendment does protect commercial speech from unwarranted governmental regulations.[37] In

32. 7 U.S.C. § 2904(10) (1999).

33. *Id.* § 2908.

34. Ann K. Wooster, Annotation, *Prot. of Commercial Speech Under First Amendment-Supreme Court Cases*, 164 A.L.R. FED 1, 11-12 (2000).

35. Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (upholding New York ordinance prohibiting distribution of commercial handbills on the street). According to the Court, the Constitution imposes no "restraint on government as respects purely commercial advertising." *Id.*

36. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973).

37. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976). While *Virginia Pharmacy* represents the touchstone case in the evolution of the doctrine, Justice Blackmun, in writing that opinion, recognized similar movement toward First Amendment protection in other cases. *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809, 826 (1975). In reversing a conviction for violation of a Virginia statute prohibiting any publication promoting abortion in that state, the Court held that "the Virginia courts erred in their assumptions that advertising, as such, was entitled to no First Amendment protection . . . ." *Id.* at 825.

that case, the Court held that a state may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity."[38] In striking down a Virginia statute prohibiting licensed pharmacists from advertising prescription drug prices, the Court spoke out against the "highly paternalistic approach" chosen by the legislature, preferring the alternative where "people will perceive their own best interests if only they are well enough informed."[39] Both consumers and society in general have an "interest in the free flow of commercial information," and the former's interest in such information may at times be even greater than his or her interest in political matters and other more protected forms of speech.[40] On the other hand, speech that is false or misleading in any way "has never been protected for its own sake."[41] The Court confidently predicted that "commonsense differences" would allow states to differentiate between "other varieties" of speech that are afforded greater First Amendment protection and varieties of commercial speech that may be regulated to ensure the truthfulness of its content.[42] In his dissent, Justice Rehnquist did not share that optimism, writing that the dividing line between "truthful" and "false and misleading" commercial speech is actually quite blurry.[43] Moreover, legislatures could quite properly draw the initial line between higher and lower forms of speech in accordance with the First Amendment, a line of reasoning consistent with the earlier doctrine that deferred to the regulation of commercial speech as a form of commerce.[44]

In the term following *Virginia Pharmacy*, the Court reinforced this shift toward protecting truthful commercial speech by extending First Amendment protection to the truthful advertising of legal services in *Bates v. State Bar of Arizona*.[45] Justice Blackmun, writing for the Court, indicated that the bar's justifications for prohibiting price advertising for legal services were impermissibly based on keeping the public ignorant rather than allowing them to be "trusted with correct but incomplete information."[46] However, one year later in *Ohralik v. Ohio State Bar Association*, the Court upheld a bar association rule that prevented lawyers from engaging in aggressive in-person solicitation of potential clients as part of the association's

38. *Va. Pharmacy*, 425 U.S. at 773.
39. *Id.* at 770. Justice Blackmun noted that the Virginia legislature was free to regulate the pharmacy profession or protect them from competition in various ways, but "it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering." *Id.*
40. *Id.* at 763.
41. *Id.* at 771.
42. *Id.* at 772 n.24.
43. *Id.* at 787 (Rehnquist, J., dissenting).
44. *Id.*
45. Bates v. State Bar of Ariz., 433 U.S. 350, 384 (1977) (reversing a state court ruling upholding a state bar association rule prohibiting the advertising of prices for routine legal services).
46. *Id.* at 375.

standards of professional ethics.[47] To uphold the bar's prohibition, *Ohralik* distinguished such solicitation techniques from the types of truthful advertising that were before the Court in *Bates*, as well as other "forms of speech more traditionally within the concern of the First Amendment."[48] Echoing the line drawn between truthful and false or misleading speech in *Virginia Pharmacy*, First Amendment protection would not be extended where the government has a "'compelling' interest in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct.'"[49]

The Court upset this distinction between truthful and false or misleading commercial speech in 1980 by holding in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York* that First Amendment protection could be limited with respect to all forms of commercial speech, including truthful speech.[50] *Central Hudson* involved a challenge to a regulation promulgated by the state regulator of utilities that banned all promotional advertising by electric utility companies, ostensibly as a means of conserving energy.[51] In reaching its decision, the Court set forth a four-part analytical framework to use in balancing the right to express the commercial speech in question against the state's interest in suppressing it:

> At 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. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[52]

In applying the test, the *Central Hudson* Court found the first three prongs were satisfied, but held that the advertising ban violated the fourth prong because the regulation, as enacted, was "more extensive than necessary to serve the state interest."[53]

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47. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 448 (1978).
48. *Id.* at 455.
49. *Id.* at 462.
50. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).
51. *Id.* at 558-59.
52. *Id.* at 566.
53. *Id.* at 572. The four prongs were applied as follows: (1) advertising by a monopoly supplier of electricity is protected by the First Amendment because such suppliers compete with alternative forms of energy in several markets; (2) the state's interest in energy conserva-

The net effect of *Central Hudson* upon the *Ohralik* status quo was to subject even truthful, nonmisleading speech restrictions to a lower, intermediate standard of review.[54] In formulating the first prong of the test, the Court stated that "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity."[55] This merely disposed of any question regarding commercial speech that is false, misleading, or related to unlawful activity; the type that had been walled off from First Amendment protection in *Virginia Pharmacy*.[56] The second prong, whereby the state "must assert a substantial interest to be achieved by restrictions on commercial speech," broadened the scope of commercial speech that might be regulated beyond the variety at issue in *Ohralik*.[57] If a substantial interest is identified, the third and fourth prongs serve as a means by which the restriction may be invalidated either because it does not directly bear on the governmental interest or it is not narrowly tailored in advancing that interest.[58]

Although *Central Hudson* opened the door to permitting the restriction of truthful commercial speech, it has in practice provided the Court with a flexible and generally deferential means of reviewing such impositions.[59]

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tion and preservation of fair and efficient electricity prices was substantial; (3) because of an immediate connection between advertising and demand for electricity the regulation directly advances the state's interest; but (4) the regulation was more restrictive than necessary in that it "suppresses speech that in no way impairs the State's interest in energy conservation." *Id.* at 567-70.

54. Nicole B. Casarez, *Don't Tell Me What To Say: Compelled Commercial Speech and The First Amendment*, 63 MO. L. REV. 929, 947 (1998). As enunciated by Justice Blackmun in a concurring opinion, this "intermediate level of scrutiny" allows suppression of commercial speech "whenever it 'directly advances' a 'substantial' governmental interest and is 'not more extensive than necessary to serve that interest.'" *Cent. Hudson*, 447 U.S. at 573 (Blackmun, J., dissenting).

55. *Cent. Hudson*, 447 U.S. at 563.

56. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771-72 (1976) (holding that a state may permissibly regulate some forms of commercial speech, including that which is false, misleading, or illegal).

57. *Cent. Hudson*, 447 U.S. at 564. While *Ohralik* dealt specifically with the potentially "overreaching" nature of a lawyer's in-person solicitation of potential clients, the Court in that case went further in identifying the state's interest as "protecting the lay public"—a broader field of interest that *Central Hudson* stepped in to occupy. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 468 (1978).

58. At least one commentator has noted that the fourth prong's "least restrictive alternative" requirement has, in subsequent cases, been reformulated as a requirement that "the regulation must be narrowly tailored to achieve the government's goal." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES § 11.3.7.3, at 1050 (2d ed. 2002).

59. Casarez, *supra* note 54, at 939 ("By embracing both anti-paternalism rhetoric in some commercial speech cases and pro-paternalism results in others, the Court provided itself with precedent to do anything it pleased with respect to advertising."). *See* Rubin v. Coors Brewing Co., 514 U.S. 476, 478 (1995) (striking down a federal law that prohibited brewers from publishing alcohol content on their labels in order to prevent "strength wars" between brewers under both the third and fourth prongs of *Central Hudson*); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 412 (1993) (striking down a Cincinnati ordinance designed to

That flexibility is evident in the significant differences in approach that subsequently emerged from the bench, differences that contributed to a plurality opinion in *44 Liquormart, Inc. v. Rhode Island*.[60] There, the Court struck down a Rhode Island law prohibiting off-premises advertising of retail liquor prices by liquor retailers.[61] In a plurality opinion, Justice Stevens echoed the anti-paternalist underpinnings of *Virginia Pharmacy* with the reminder that the "First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."[62] He also stressed the distinction between two categories of commercial speech:

> When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review. However, when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.[63]

This suggests that regulations either restricting misleading and untruthful messages or compelling the disclosure of beneficial information should be afforded deference, while restrictions on truthful commercial speech should be subject to strict scrutiny.[64] In spite of the fact that the advertising under consideration in *44 Liquormart* was truthful, not misleading, and otherwise lawful, a plurality of the Court proceeded to apply the intermediate scrutiny of *Central Hudson* and struck down the Rhode Island law

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improve sidewalk safety and appearance that banned newsracks dispensing free periodicals but not those dispensing newspapers for sale because it failed the "reasonable fit" test). *But see* Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) (upholding a state regulation prohibiting private commercial solicitations on campus facilities because the fit between the regulatory interest and the restriction itself need be only "reasonable" instead of the least restrictive available); Posadas de P.R. Associates v. Tourism Co. of P.R., 478 U.S. 328, 331 (1986) (upholding a ban on truthful casino advertising that applied to Puerto Rican residents but not to tourists).

60. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

61. *Id.* at 488. The asserted state interest was in "reducing alcohol consumption." *Id.* at 504.

62. *Id.* at 503.

63. *Id.* at 501.

64. *See generally* Casarez, *supra* note 54, at 945 ("[*44 Liquormart*] practically guarantees that restrictions on truthful, nonmisleading commercial information about lawful commodities are invalid, regardless of whether the *Central Hudson* test is used or not.").

for failing the third and fourth prongs.[65] In a concurring opinion, Justice Thomas spoke out against the *Central Hudson* test and urged a return to *Virginia Pharmacy*, endorsing Justice Blackmun's concurrence in that case "that all attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible."[66]

2. Compelled speech

A widely quoted passage from *West Virginia State Board of Education v. Barnette* reflects the established notion that First Amendment freedom of speech protections extend to those who wish to not speak at all: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, 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."[67] As reflected in that passage, protection against compelled speech, or what may be regarded as "negative free speech" rights, has been recognized in a variety of ideological and non-commercial contexts.[68] Even in instances where fully protected non-commercial speech is inextricably intertwined with commercial speech, the Court will treat it as a whole as a "fully protected expression" and apply a strict level of scrutiny.[69]

The Court made clear in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, however, that instances in which the compelled speech is commercial in nature warrant a lesser degree of protection than that afforded to ideological and other non-commercial forms.[70] In that case, the appellant was challenging an Ohio disciplinary rule that required contingency fee lawyers to state in their advertising that unsuccessful clients

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65. *44 Liquormart*, 517 U.S. at 504-08. Although Justice Stevens' invocation of strict scrutiny for restrictions on truthful advertising accorded with *Virginia Pharmacy*, he applied *Central Hudson* to argue that the state's interest in encouraging temperance was not directly advanced by a proven link between advertised prices and consumption (third prong) and could be achieved by alternative means such as increased taxes that would not restrict speech (fourth prong). *Id.*

66. *Id.* at 526 (Thomas, J., concurring in part and in judgment).

67. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

68. *See, e.g.*, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, 515 U.S. 557, 559 (1995) (holding that the state cannot require private parade organizers to allow marchers to participate who advocate incompatible views); Wooley v. Maynard, 430 U.S. 705, 713 (1977) (holding that the state cannot require its citizens to display the state motto on their license plates); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (holding that the state cannot require newspaper to provide reply space to candidates for political office who had been criticized in print).

69. Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796 (1988) (holding that the state cannot compel professional fundraisers to disclose to potential donors the historical proportion of funds devoted to charity).

70. Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985) ("[T]he interests at stake in this case are not of the same order as those discussed in *Wooley*, *Tornillo*, and *Barnette*.").

would still be responsible for litigation expenses.[71] While the Court acknowledged that "compulsion to speak" had been declared a violation of the First Amendment in *Barnette*, *Wooley*, and *Tornillo*—cases involving non-commercial speech—they distinguished the "interests at stake in this case" as not being of the same order.[72] Recognizing that "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal."[73] The Court noted that *Virginia Pharmacy* had first advanced the notion that such compelled disclosures might be a preferable alternative to restricting commercial speech.[74] Based on these considerations, a more deferential level of review was afforded in holding that the rights of advertisers are sufficiently protected "as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."[75] In upholding the disclosure requirement, the Court maintained that "all our discussions of restraints on commercial speech have recommended disclosure requirements as one of the acceptable less restrictive alternatives to actual suppression of speech."[76]

In *Abood v. Detroit Board of Education*, the Court addressed the compelled funding of ideological activities associated with a public teacher's union.[77] Under Michigan's agency shop law, non-union teachers were required to pay "service fees" equal to union dues paid by members of the union.[78] The non-union teachers objected, claiming these fees were being used by the union to advance ideological, political activities to which they objected and were not related to duties associated with the union's collective

71. *Id.* at 629. Noting that commercial speech can be identified based on "the commonsense distinction between speech proposing a commercial transaction . . . and other varieties of speech," the Court held that the speech in question in *Zauderer* was advertising pure and simple and clearly fell within those bounds. *Id.* at 637 (citing Orhralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978)).

72. *Id.* at 651.

73. *Id.* at 651 (internal citation omitted).

74. *Id.* While extending First Amendment protection to certain commercial speech, the *Virginia Pharmacy* Court observed that it might be "appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive." Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 772 n.24 (1976).

75. *Zauderer*, 471 U.S. at 651.

76. *Id.* (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 565 (1980)).

77. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 211 (1977).

78. *Id.* at 222. The Court explained that such agency shop arrangements are designed to "distribute fairly the cost of [collective bargaining] activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become 'free riders'—to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees." *Id.*

bargaining agreement.[79] Recognizing that being compelled to make such contributions was no different than being prohibited from doing so, the Court held that the union could constitutionally finance ideological activities not germane to its collective bargaining duties only with funds paid by non-objecting employees.[80] The Court acknowledged that this germaneness analysis could pose "difficult problems in drawing lines," between those activities for which contributions may be compelled and those that are non-germane and for which compelled contributions are prohibited.[81]

Faced with the same line-drawing task in *Keller v. State Bar of California*, a case involving use of bar association funds to advance ideological activities, the Court applied the *Abood* germaneness test by asking "whether the challenged expenditures are necessarily or reasonably incurred" for the purpose for which compelled association was justified.[82] While recognizing that determining "where the line falls" between germane and non-germane activities may be difficult to discern, the *Keller* Court reversed the California Supreme Court's rejection of *Abood* and remanded the case so that such a line could be drawn.[83]

From this line of compelled speech cases it appears clear that attempts to compel individuals to engage in ideological, non-commercial speech must pass a strict scrutiny analysis.[84] Although compelling speech or activities that are commercial in nature raises First Amendment issues of a lower order and will be reviewed with more deference to legislative decisions, that deference is limited to the narrow state interest of safeguarding against consumer deception.[85] In many cases, courts will be called upon to

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79. *Id.* at 213. The complaint alleged that the union was engaged in "a number and variety of activities and programs which are economic, political, professional, scientific and religious in nature of which Plaintiffs do not approve, and in which they will have no voice, and which are not and will not be collective bargaining activities . . . ." *Id.*

80. *Id.* at 235-36.

81. *Id.* at 236.

82. Keller v. State Bar of Cal., 496 U.S. 1, 14 (1990). In *Abood*, that purpose was representation in the collective bargaining process. *Abood*, 431 U.S. at 211. In *Keller*, the purpose was regulating the quality of legal services in California. *Keller*, 496 U.S. at 13 ("Here the compelled association and integrated bar is justified by the State's interest in regulating the legal profession and improving the quality of legal services.").

83. *Keller*, 496 U.S. at 15. The Court disagreed with the California Supreme Court's claim that application of *Abood* to case-by-case analysis of the bar association's activities would represent "an extraordinary burden," agreeing instead with the dissent's assertion of the contrary. *Id.* at 16. In light of the statutory regulation and oversight already exercised over the bar association, the Court held that, in this context at least, the burden of meeting the *Abood* requirement "is hardly sufficient to justify contravention of the constitutional mandate." *Id.* at 16-17 (citing Keller v. State Bar of Cal., 47 Cal. 3d 1152, 1192 (1989) (Kaufman, J., dissenting)).

84. For a discussion of compelled speech in the ideological context, *see supra* notes 67-70 and accompanying text.

85. For a discussion of compelled speech in the commercial context, *see supra* notes 71-76 and accompanying text.

draw lines between activities that may be compelled (commercial) and those which may not be compelled (ideological), and in so doing must ask whether the complained of activity is germane to the principal interest and purpose of the association.

3. The Supreme Court's First Amendment review of agricultural checkoff programs

The Supreme Court has on two relatively recent occasions reviewed First Amendment challenges to mandatory assessments under commodity checkoff programs. In *Glickman v. Wileman Brothers and Elliott, Inc.*, a group of California tree fruit growers, handlers, and processors challenged mandatory assessments levied upon them to fund generic advertising for fruit from their state.[86] The United States Court of Appeals for the Ninth Circuit had held that these assessments violated the First Amendment rights of the handlers.[87] Noting that the Ninth Circuit holding conflicted with a decision of the United States Court of Appeals for the Third Circuit, the Supreme Court "granted the Secretary's petition for certiorari to resolve the conflict."[88]

The question presented to the Court was whether the assessments violated the producers' freedom of speech, giving rise to a First Amendment issue, or rather was "simply a question of economic policy for Congress and the Executive to resolve."[89] The Court stressed the "statutory context" in which that question was presented, which required an examination of the extent to which individual marketing autonomy had already been sacrificed in favor of the broader regulatory scheme represented by the marketing orders themselves.[90]

The majority opinion, written by Justice Stevens, began this contextual review by considering the extent to which the California tree fruit industry is regulated pursuant to marketing orders promulgated under the authority of the Agricultural Marketing Agreement Act of 1937 (AMAA).[91] The

86. Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 460 (1997).

87. *Id.* at 465. The District Court, reviewing the decision of the Judicial Officer of the Department of Agriculture, upheld the orders and entered judgment on behalf of the government. *Id.* at 464. On appeal, the Ninth Circuit applied the *Central Hudson* test for commercial speech, holding that the assessments violated both the second prong (government failed to prove that generic advertising directly advanced the state interest involved) and the third prong (program was not narrowly tailored) of that analysis. *Id.* at 466.

88. *Id.* at 466-67. The Third Circuit upheld the Act in United States v. Frame, 885 F.2d 1119 (3d Cir. 1989). For a discussion of *Frame*, *see infra* notes 146-50 and accompanying text.

89. *Glickman*, 521 U.S. at 468.

90. *Id.* at 469.

91. 7 U.S.C. § 601-625 (1999 & Supp. 2003). Congress enacted the AMAA to establish and maintain orderly marketing conditions and fair prices for agricultural commodities. *Id.* § 602(1).

orders were characterized as a "species of economic regulation" that serve to displace competition to such an extent that they are expressly exempted from antitrust laws.[92] Adoption of such orders requires the initial approval of growers, and implementation is subsequently carried out by committees comprised of regulated growers that are appointed by the Secretary of Agriculture.[93] Additional regulatory guidelines and restraints constituted an industry that, by adopting the marketing orders, had embraced what the Court deemed a "policy of collective, rather than competitive marketing."[94]

Pursuant to this analysis, the Court upheld the assessments by finding that a First Amendment question did not even arise because the program in question was "a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress."[95] In reaching this conclusion, the Court began by distinguishing the regulatory scheme at issue from laws that have previously been found to violate the First Amendment under a commercial speech analysis.[96] First, the tree fruit marketing orders "impose no restraint on the freedom of any producer to communicate any message to any audience."[97] Second, the orders "do not compel any person to engage in any actual or symbolic speech."[98] Finally, they "do not compel the producers to endorse

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92. *Glickman*, 521 U.S. at 461. Furthermore, as the Court noted:

> [T]hese orders may include mechanisms that provide a uniform price to all producers in a particular market, that limit the quality and the quantity of the commodity that may be marketed, that determine the grade and size of the commodity, and that make an orderly disposition of any surplus that might depress market prices.

Id. (internal citations omitted).

93. *Id.* at 461-62.

94. *Id.* at 461.

95. *Id.* at 477.

96. *Id.* at 469.

97. *Id.* This distinguished *Glickman* from the limits on commercial speech at issue in *Central Hudson*, *Virginia Pharmacy*, and *44 Liquormart*. *Id.* at 470 n.12. The Court rejected the growers' argument that the mandatory assessments functioned as a restriction in that they reduced the amount of money available to conduct their own advertising. *Id.* at 470. Stating that this argument is equally true for any other expense incurred in complying with a marketing order, the Court concluded:

> The First Amendment has never been construed to require heightened scrutiny of any financial burden that has the incidental effect of constraining the size of a firm's advertising budget. The fact that an economic regulation may indirectly lead to a reduction in a handler's individual advertising budget does not itself amount to a restriction on speech.

Id.

98. *Id.* at 469. This distinguished *Glickman* from the compelled speech in *Barnette*, *Wooley*, *Riley*, and *Hurley*. *Id.* at 470 n.13. The growers "are not required themselves to speak, but are merely required to make contributions for advertising. . . . Furthermore, the advertising is attributed not to them, but to the California Tree Fruit Agreement or 'California Summer Fruits.'" *Id.* at 471.

or to finance any political or ideological views."[99] Sweeping aside the specific objections of the producers by maintaining that it is "fair to presume" that such producers in fact *do* agree with the generic advertising, the Court determined that the scheme should be evaluated under a standard no different than that which would be "applicable to the other anticompetitive features" of the orders; that is, rational basis review.[100]

After rejecting a *Central Hudson* analysis, the Court reviewed the growers' claims under the compelled speech cases and found the doctrine "clearly inapplicable to the regulatory scheme at issue here."[101] The assessment scheme was distinguished from compelled speech case law because the scheme compelled financial contributions, as opposed to speech itself.[102] With respect to such financial contributions, the Court maintained that *Abood* did not set forth a First Amendment safeguard against compelled financial support for programs or organizations advancing "expressive activities."[103] To the contrary, "*Abood* merely recognized a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's 'freedom of belief.'"[104] That interest can be abridged only if the compelled contributions used for political purposes that are unrelated to the principle purpose of the regulatory scheme "interfere with the values lying at the 'heart of the First Amendment—the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the state.'"[105] Applying this standard to the tree fruit assessments, the Court concluded that the required assessments "cannot be said to engender any crisis of conscience."[106] As to the principal *Abood* requirement that assessments used for ideological purposes must be germane to the legitimate governmental purpose, the Court held that test to be

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99. *Id.* at 469-70. This distinguished *Glickman* from cases such as *Abood* and *Keller*. *Id.* at 470 n.14. The Court stated that none of the growers' objections "makes this case comparable to those in which an objection rested on political or ideological disagreement with the content of the message. The mere fact that objectors believe their money is not being well spent 'does not mean [that] they have a First Amendment complaint.'" *Id.* at 472 (citing Ellis v. Ry. Clerks, 466 U.S. 435, 456 (1984)).

100. *Id.* at 470.

101. *Id.*

102. *Id.* at 471. Use of the compelled assessments to pay for advertising did not "require respondents to repeat an objectional [sic] message out of their own mouths, require them to use their own property to convey an antagonistic ideological message, or require them to be publicly identified or associated with another's message." *Id.* (internal citations omitted). *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980); Wooley v. Maynard, 430 U.S. 705, 713 (1977); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943).

103. *Glickman*, 521 U.S. at 471.

104. *Id.* (quoting *Abood*, 431 U.S. at 235).

105. *Id.* at 472 (quoting *Abood*, 431 U.S. at 234-35).

106. *Id.*

"clearly satisfied" as well.[107]

Justice Souter's dissent began by reasserting two "basic principles of First Amendment law: that speech as such is subject to some level of protection unless it falls within a category, such as obscenity, placing it beyond the Amendment's scope; and that protected speech may not be made the subject of coercion to speak or coercion to subsidize speech."[108] He went on to fault the Court's reading of *Abood* that a First Amendment issue does not arise "if the speech is either germane to an otherwise permissible regulatory scheme or is non-ideological.[109] Such a reading suggests, incorrectly in the dissent's view, that "each of these characteristics constitutes an independent, sufficient criterion for upholding the subsidy."[110] A correct application of *Abood* would uphold a mandatory fee only if it if passes the germane test with respect to a "legitimate" regulatory scheme, is "justified by vital policy interests of the government," and achieves those interests without significantly burdening free speech.[111]

The dissent maintained that *Central Hudson* was the appropriate legal standard, regardless of whether the issue was a law compelling speech or restricting commercial speech.[112] Applying the test, the dissent found the compelled assessment to fail on all three principal prongs.[113] In a separate dissent, Justice Thomas criticized the use of *Central Hudson*, arguing

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107. *Id.* at 473. The Court based this determination on its finding that "(1) the generic advertising of California peaches and nectarines is unquestionably germane to the purposes of the marketing orders and, (2) in any event, the assessments are not used to fund ideological activities." *Id.*

108. *Id.* at 478 (Souter, J., dissenting).

109. *Id.* at 483 n.3 (Souter, J., dissenting).

110. *Id.* (Souter, J., dissenting).

111. *Id.* at 485 (Souter, J., dissenting).

112. *Id.* at 491 (Souter, J., dissenting).

113. *Id.* at 492 (Souter, J., dissenting). The dissent stated the application of *Central Hudson* as a three-prong test, whereby "the law may be held constitutional only if (1) the interest being pursued by the government is substantial, (2) the regulation directly advances that interest and (3) is narrowly tailored to serve it." *Id.* at 491 (Souter, J., dissenting). As for the first prong, noting "the arbitrariness or underinclusiveness of the scheme chosen by the government may well suggest that the asserted interests either are not pressing or are not the real objects animating the restriction on speech," the dissent argued that "the AMAA's authorization of compelled advertising programs is so random and so randomly implemented . . . as to unsettle any inference that the Government's asserted interest is either substantial or even real." *Id.* at 493-95 (Souter, J., dissenting). To pass the second prong, "the Government has to show that its mandatory scheme appreciably increases the total amount of advertising for a commodity or somehow does a better job of sparking the right level of consumer demand than a wholly voluntary system would. There is no evidence of this in the record here." *Id.* at 501 (Souter, J., dissenting). Finally, observing that some marketing orders authorized under the AMAA for other commodities provide for a credit to growers wishing to conduct their own advertising, the dissent concluded "there could be no finding that a program completely denying credits for all individual advertising expenditures is narrowly tailored to an interest in the stability or expansion of overall markets for a commodity." *Id.* at 503-04 (Souter, J., dissenting).

against the "discounted weight given to commercial speech generally," and calling for a higher, strict scrutiny standard to be applied to all speech.[114] Justice Thomas was joined by Justice Scalia in Part II of his dissent, in which they criticized "the majority's conclusion that coerced funding of advertising by others does not involve 'speech' at all and does not even raise a First Amendment 'issue.'"[115] These dissenters argued that the majority opinion posed "one of two disturbing consequences":

> Either (1) paying for advertising is not speech at all, while such activities as draft card burning, flag burning, armband wearing, public sleeping, and nude dancing are, or (2) compelling payment for third party communication does not implicate speech, and thus the Government would be free to force payment for a whole variety of expressive conduct that it could not restrict. In either case, surely we have lost our way.[116]

Four years following *Glickman*, the Court again faced the question of compelled marketing assessments in *United States v. United Foods*.[117] This time the Court was asked to evaluate mandatory checkoff assessments imposed on mushroom growers and handlers.[118]

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114. *Id.* at 504 (Thomas, J., dissenting). Noting that "the regulation at issue here fails even the more lenient *Central Hudson* test," it would also fail strict scrutiny, which "should be applied to all speech, whether commercial or not." *Id.* (Thomas, J., dissenting).

115. *Id.* (Thomas, J., dissenting). These dissenters went on to catalog cases in which the Court held that "paying money for the purposes of advertising involves speech." *Id.* at 505 n.1 (Thomas, J., dissenting) (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 568 (1980) (advertising to promote the use of electricity is speech); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 767 (1978) (corporate advertising regarding referendum); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 211 (1977) (payment of dues used to engage in speech); Buckley v. Valeo, 424 U.S. 1, 7 (1976) (contributions for political advertising)). The dissent also noted cases in which the "Court also has recognized that compelling speech raises a First Amendment issue just as much as restricting speech." *Id.* at 505 n.2 (Thomas, J., dissenting) (citing Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 185 (1997) (coerced carriage of broadcast signals over cable television facilities); Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal., 475 U.S. 1, 4 (1986) (coerced inclusion of private messages in utility bill envelopes); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 76-77 (1980) (coerced creation of a speaker's forum on private property); *Abood*, 431 U.S. 209, 211 (coerced payment of dues used to engage in speech); Wooley v. Maynard, 430 U.S. 705, 706 (1977) (coerced display of state license plate); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 243 (1974) (coerced right of reply to newspaper editorials); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 626 (1943) (coerced pledge of allegiance)).

116. *Glickman*, 521 U.S. at 506 (Thomas, J., dissenting).

117. United States v. United Foods, 533 U.S. 405, 408 (2001).

118. *Id.* The Mushroom Promotion, Research, and Consumer Information Act (the Mushroom Act) authorized the Secretary of Agriculture to establish a Mushroom Council comprised of mushroom producers and importers that would oversee the collection and administration of mandatory assessments used for mushroom industry promotion, research, con-

Writing for the majority, Justice Kennedy began by citing precedent that First Amendment freedom of speech protection extends not only to those whose speech is restricted, but also to those who are compelled to express certain views or "to pay subsidies for speech to which they object."[119] Although commercial speech is afforded a lesser degree of protection, First Amendment issues were still raised "because of the requirement that producers subsidize speech with which they disagree."[120]

Having found that a First Amendment issue did arise with respect to the compelled mushroom assessments, the Court then engaged in a *Glickman* contextual analysis of the statutory scheme in order to distinguish its holding from that in *Glickman*.[121] As opposed to the marketing order statute in question in *Glickman*, which authorized expansive regulation of the tree fruit industry in addition to mandatory marketing assessments, the statute at issue in *United Foods* authorized only mandatory assessments to be used for generic advertising.[122] The mushroom industry operates under no marketing orders regulating production and marketing, benefits from no antitrust protection, and the individual autonomy of individual growers is in no way curtailed.[123] Far from being ancillary to a broader regulatory scheme, the com-

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sumer information, and industry information. Mushroom Promotion, Research, and Consumer Info. Act, 105 Stat. 3854, 7 U.S.C. § 6101-6112 (1999 & Supp. 2003).

119. *United Foods*, 533 U.S. at 410. The Court cited *Wooley* and *Barnette* with respect to compelled expression of certain views and *Abood* and *Keller* with respect to compelled subsidies for objectionable speech. *Id.* Note that these assertions, argued here by the majority, directly embrace the principle concerns expressed by Justices Thomas and Scalia in their *Glickman* dissent, wherein they specifically criticized the *Glickman* majority for holding that (1) the advertising in that case was not speech at all and (2) that compelling payment for third party communication does not implicate speech. *See Glickman*, 521 U.S. at 504-06 (Thomas, J., dissenting).

120. *United Foods*, 533 U.S. at 411. The subsidies in question are authorized by § 6104(g)(2) of the Mushroom Act, which allows the Mushroom Council "to impose mandatory assessments upon handlers of fresh mushrooms in an amount not to exceed one cent per pound of mushrooms produced or imported." *Id.* at 408. As for the plaintiff's objections, they claimed "that other mushroom producers shape the content of the advertising to its disadvantage and that the administrative process allows a majority of producers to create advertising to its detriment." United Foods, Inc. v. United States, 197 F.3d 221, 222 (6th Cir. 1999).

121. *United Foods*, 533 U.S. at 411. In *United Foods*, the Court noted that the government stressed the same factors used by the *Glickman* Court in determining there was no First Amendment issue. *Id.* The assessment, the government argued, "imposes no restraint on the freedom of an objecting party to communicate its own message; . . . does not compel an objecting party . . . itself to express views it disfavors; and . . . does not compel the expression of political or ideological views." *Id.* The Court dismissed these points as being part of a "different type of regulatory scheme" that was not controlling. *Id.*

122. *Id.* at 412. The Court noted that even the government did not contest that nearly all of the funds collected under the mandatory mushroom assessments went to the sole purpose of generic advertising. *Id.*

123. *Id.* The mushroom regulatory scheme included "no marketing orders that regulate how mushrooms may be produced and sold, no exemption from the antitrust laws, and nothing preventing individual producers from making their own marketing decisions." *Id.*

pelled advertising "is the principal object of the regulatory scheme."[124] As such, the Court found that "the mandated support is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity."[125]

At the outset, the Court noted that the government did not rely upon *Central Hudson* in challenging the lower court's decision, and "we therefore do not consider whether the Government's interest could be considered substantial for purposes of the *Central Hudson* test."[126] Instead, the Court turned to *Abood* and began with an initial inquiry as to whether there existed within the mushroom industry some state-imposed obligation that made membership in the group being compelled to subsidize the speech "less than voluntary."[127] The involuntary union-shop arrangement in *Abood* was constitutionally justified in deference to the legislature's aim toward improving labor relations and providing an effective means for collective bargaining.[128] Mandatory participation in a state bar association in *Keller* was also upheld as a means of achieving the legitimate goal of maintaining professional standards in the legal profession.[129] Similarly, the cooperative scheme in *Glickman* required individual producers to forego their autonomy in support of the broader goal of maintaining a stable market.[130]

Conversely, the Court found no such group action mandated under the statutory scheme in *United Foods*, except that which is necessary to fund the speech itself.[131] This circumstance distinguished the case from *Abood*,

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124. *Id.*

125. *Id.* at 413. The Court cited *Abood* and *Keller* as the principal cases setting forth these principles. *Id.*

126. *Id.* at 410. Noting that the *Central Hudson* test "has been subject to some criticism," the Court maintained it could find "no basis under either *Glickman* or our other precedents to sustain the compelled assessments sought in this case." *Id.* at 409-10. This seemed to cast *United Foods* as a case of first impression in which "the question is 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." *Id.* at 410.

127. *Id.* at 413. With respect to such group membership, the Court noted that "it is only the overriding associational purpose which allows any compelled subsidy for speech in the first place." *Id.*

128. *Id.* at 414.

129. *Id.* In reviewing the validity of the mandatory association in *Keller*, the Court reiterated the central holding in that case that "objecting members were not required to give speech subsidies for matters not germane to the larger regulatory purpose which justified the required association." *Id.*

130. *Id.* The Court also noted, "Given that producers were bound together in the common venture, the imposition upon their First Amendment rights caused by using compelled contributions for germane advertising was, as in *Abood* and *Keller*, in furtherance of an otherwise legitimate program." *Id.* at 414-15.

131. *Id.* at 415. ("[T]he statute does not require group action, save to generate the very speech to which some handlers object.").

Keller, and *Glickman* because it meant that there was no basis from which the Court could evaluate whether the compelled speech was germane to a legitimate governmental purpose.[132] As a result, the mushroom scheme failed this threshold analysis because there was no underlying associational purpose which might have justified the compelled speech assessments.[133] An inability to conduct a germaneness test did not prevent *Abood* from controlling, however, because the Court held that "the rationale of *Abood* extends to the party who objects to the compelled support for this speech."[134] Furthermore, the Court maintained that its holding was consistent with the *Zauderer* decision that upheld a disclosure requirement for advertisement of legal services based on "the State's interest in 'preventing deception of consumers.'"[135] The Court distinguished mandatory assessments for generic advertising of mushrooms from permissible disclosure requirements because "there is no suggestion in the case now before us that the mandatory assessments . . . are somehow necessary to make voluntary advertisements nonmisleading for consumers."[136]

In a concurring opinion, Justice Stevens squared the Court's decision with that in *Glickman* by reiterating that First Amendment issues are not raised if the compelled funding is "ancillary, or 'germane,' to a valid cooperative endeavor."[137] Conversely, the "naked imposition" of commercial speech whereby an individual is compelled to fund advertising that benefits his competitors does raise such constitutional issues.[138] Justice Thomas, also concurring, remained consistent with his dissent in *Glickman* by calling for "the most stringent First Amendment scrutiny" for any regulation that compels the funding of advertising.[139]

Justice Breyer's dissent dismissed the manner in which the Court distinguished the statutory scheme in question from that at question in *Glickman*, arguing that the differences "could not have been critical."[140]

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132. *Id.* ("Were it sufficient to say speech is germane to itself, the limits observed in *Abood* and *Keller* would be empty of meaning and significance.").

133. *Id.* ("[T]he expression respondent is required to support is not germane to a purpose related to an association independent from the speech itself.").

134. *Id.* at 415-16.

135. *Id.* at 416 (quoting Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985)).

136. *Id.*

137. *Id.* at 418 (Stevens, J., concurring).

138. *Id.* (Stevens, J., concurring).

139. *Id.* at 419 (Thomas, J., concurring). Justice Thomas cited his dissent in *Glickman*, wherein he stated his continued disagreement "with the use of the *Central Hudson* balancing test and the discounted weight given to commercial speech generally." Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 504 (1997) (Thomas, J., dissenting).

140. *United Foods*, 533 U.S. at 420 (Breyer, J., dissenting). Justice Breyer maintained that the Court in *Glickman* "did not refer to the *presence* of price or output regulations. It referred to the fact that Congress had 'authorized' that kind of regulation." *Id.* (Breyer, J., dissenting). Noting that the same Agricultural Marketing Agreement Act of 1937 that established market-

Rather than focus on differences in the schemes that had actually been promulgated and were presently being administered by the Secretary of Agriculture, the dissent noted that a broad regulatory scheme had in fact been authorized in statute for both the tree fruit industry in *Glickman* and the mushroom industry in *United Foods*.[141] Although the full arsenal of regulatory schemes that Congress had authorized for the mushroom industry had not been implemented, it did not follow that such generic advertising was not directly related to the underlying goal of "maintaining and expanding existing markets and uses for mushrooms."[142] The dissent found it "difficult" to understand how a less invasive form of regulation that relies only on minimal mandatory advertising assessments could be invalidated while a much more intrusive regulatory scheme that denies individual autonomy could be upheld.[143] The dissent went on to characterize the regulatory scheme in question not as speech but, as in *Glickman*, a "species of economic regulation."[144] Even if the scheme were to be regarded as speech, the dissent concluded that *Central Hudson* provided the appropriate test, under which they would have found sufficient justification to uphold the scheme.[145]

4. Lower court review of agricultural checkoff programs

In 1989, prior to both *Glickman* and *United Foods*, the United States Court of Appeals for the Third Circuit upheld the Act as constitutional in *United States v. Frame*.[146] In *Frame*, the government initiated an action against the defendant livestock market operator and cattle producer for failure to collect and remit checkoff assessments.[147] The court began its First Amendment analysis by rejecting the District Court's conclusion that "the speech authorized and funded by the Act was 'government speech,'" and

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ing orders and other means of regulatory intervention for the tree fruit industry in *Glickman* also *authorized* the same kind of scheme for the mushroom industry, Justice Breyer found no room to distinguish the regulatory schemes actually in place simply because the Secretary of Agriculture had not exercised her discretion to promulgated such intervention in the mushroom industry. *Id.* at 420-21 (Breyer, J., dissenting).

141. *Id.* at 420 (Breyer, J., dissenting).

142. *Id.* at 421 (Breyer, J., dissenting). Calling such collective promotion a "perfectly traditional form of government intervention in the marketplace," the dissent clearly favored a deferential, rational basis review of the statute. *Id.* (Breyer, J., dissenting).

143. *Id.* at 422 (Breyer, J., dissenting).

144. *Id.* at 425 (Breyer, J., dissenting) (citing *Glickman*, 521 U.S. at 477).

145. *Id.* at 429 (Breyer, J., dissenting). Noting that the governmental interest is substantial, the scheme both directly advances that interest (by solving the problem of "free riders" associated with voluntary promotional programs) and is not "disproportionately restrictive." *Id.* at 429-30 (Breyer, J., dissenting).

146. United States v. Frame, 885 F.2d 1119, 1122 (3d Cir. 1989).

147. *Id.* at 1124-25. As a producer, Frame was required under the Act to pay the assessment on each head of cattle he marketed as a producer. *Id.* at 1124. As a "collecting person" under the Act, he was also required to collect and remit assessments to the relevant qualified state beef council on all cattle sold through his auction market. *Id.*

therefore exempt from First Amendment scrutiny.[148] Recognizing that First Amendment rights were implicated, the court applied *Central Hudson* to resolve the free speech claim.[149] In doing so, the court held that because "the government's interest in preventing the collapse of a vital sector of the national economy qualifies as a compelling state interest, and that requiring beef producers to contribute to the cost of commercial advertising intrudes upon speech and association rights no more than necessary to achieve this goal, we find that the Act serves, at the very least, a 'substantial' government interest, and that the Act is 'carefully designed' to serve that goal."[150]

After the *Glickman* decision and prior to *United Foods*, the United States Court of Appeals for the Tenth Circuit considered a First Amendment challenge to the beef checkoff in *Goetz v. Glickman*.[151] In that case, the District Court followed the Third Circuit's decision in *Frame*, viewing the speech in question as commercial speech and upholding the Act under a *Central Hudson* analysis.[152] On appeal, the Tenth Circuit agreed with the Secretary that "the Act is 'government speech' (as opposed to commercial speech) and there are no First Amendment restrictions on 'government speech.'"[153] Basing its decision on *Glickman*, the court construed that holding for the apparent proposition that there is no interference with speech

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148. *Id.* at 1129. In its discussion of government speech, the *Frame* court observed that "[c]itizens' tax dollars purchase a considerable amount of 'government speech,'" and when the government speaks it "is engaging in expressive activities on behalf of everyone." *Id.* at 1131. Citing *Abood*, the court explained the rationale behind protecting government speech from First Amendment scrutiny:

> Compelled support of private association is fundamentally different from compelled support of government. Clearly, a local school board does not need to demonstrate a compelling state interest every time it spends a taxpayer's money in ways the taxpayer finds abhorrent. But the reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests. The withholding of financial support is fully protected as speech in this context.

Id. (quoting Abood v. Detroit Bd. of Educ., 431 U.S. 209, 259 n.13 (1977) (Powell, J., concurring)).

149. *Id.* at 1133-34. Because the defendant also raised a free association claim, the court incorporated the Supreme Court's decision in *Roberts v. United States Jaycees* in its *Central Hudson* analysis to require that the state interest advanced by the interference be "unrelated to the suppression of ideas." *Id.* at 1134 (citing Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984)).

150. *Id.* at 1134 n.12. The court held that the purpose underlying the Act "is ideologically neutral." *Id.* at 1135.

151. Goetz v. Glickman, 149 F.3d 1131, 1134 (10th Cir. 1998).

152. *Id.* at 1134.

153. *Id.* at 1138.

because advertising under the Act does not constitute compelled speech.[154]

One year after *Goetz*, in *Gallo Cattle Company v. California Milk Advisory Board*, the United States Court of Appeals for the Ninth Circuit applied *Glickman* in a First Amendment challenge to mandatory assessments collected under the authority of a California state milk marketing order.[155] Holding that the order was "a species of economic regulation that does not abridge [appellant's] First Amendment rights," the court upheld the order by first construing *Glickman* to require an initial analysis of the statutory context of the order to determine whether the freedom of regulated producers to act independently is already constrained by a broader regulatory scheme.[156] Finding that "California milk producers are regulated to the same extent as, if not more than, the tree fruit growers" in *Glickman*, the court found that "the first step in [*Glickman*] is therefore satisfied."[157]

The next step under *Glickman*, the court held, required consideration of whether the assessments in question are a part of that extensive regulatory scheme such that they are "subject to review only as an economic regulation," or if they instead act to abridge the appellant's First Amendment rights.[158] The court held that, under *Glickman*, this analysis requires the court to apply "a three-part test: (1) the marketing orders must not impose a restraint on the freedom of any producer to communicate any message to any audience; (2) the marketing orders must not compel any person to engage in any actual or symbolic speech; and (3) the marketing orders must not compel the producers to endorse or finance any political or ideological views that are not 'germane' to the purpose for which compelled association is justified."[159] Under the first prong, the court found that the marketing order did not impose a restraint on the appellant's freedom to communicate because he was free to advertise any message to any audience he chooses.[160] Applying the second prong, the court found the appellant was not compelled to engage in any actual or symbolic speech, because the retail display of a marketing seal was voluntary under the provisions of the marketing order.[161] Finally, under

154. Although the *Goetz* court offered little in explanation, this reasoning is supported by their interpretation of *Glickman*. The court cited *Glickman* for the proposition that there is no compelled speech when the assessments do "not require . . . producers to repeat objectionable messages, use their property to convey antagonistic ideological messages, force them to respond to a hostile message when they prefer to remain silent or require them to be publicly identified or associated with another's message." *Id.* at 1139.

155. Gallo Cattle Co. v. Cal. Milk Advisory Bd., 185 F.3d 969, 974-77 (9th Cir. 1999).

156. *Id.* at 977. The court began its analysis by stating "[t]he first step in [*Glickman*] is an examination of the statutory scheme under which the assessments are made." *Id.* at 974.

157. *Id.* at 974-75.

158. *Id.* at 975.

159. *Id.* at 973.

160. *Id.* at 975. The court noted that this distinguished *Gallo* from the limits on commercial speech at issue in *44 Liquormart*, *Central Hudson*, and *Virginia Pharmacy*. *Id.* n.6.

161. *Id.* at 976. The court noted that the voluntary nature of this aspect of the program distinguished *Gallo* from the compelled speech in *Riley*, *Wooley*, and *Barnette*. *Id.* n.7.

the third prong, the court held that the advertising programs funded by the assessments were "'germane' to the purposes and goals of the Marketing Act and the Marketing Order."[162] In reaching this conclusion, the court did not analyze whether the appellant's objections were indeed based on ideological grounds, finding it sufficient that the "advertising campaign is 'germane' to the purposes for which the compelled association is justified."[163]

That same year, in *Cal-Almond, Inc. v. United States Department of Agriculture*, the Ninth Circuit applied the same analysis in upholding mandatory assessments levied upon almond handlers pursuant to an almond marketing order.[164] Applying the same analysis as in *Gallo*, the court initially found that almond handlers were subject to a broad regulatory scheme.[165] Moving to the subsequent "tripartite" *Glickman* test, the court held that under the program the handlers were neither restricted in their ability to communicate nor compelled to engage in any actual or symbolic speech.[166] Finally, the court found the assessments "germane to the purposes of the Almond Order and the Act."[167]

After the *United Foods* decision, the United States District Court for the District of Montana upheld the beef checkoff as constitutional in *Charter v. United States Department of Agriculture*.[168] Noting how the existence of a broader regulatory scheme distinguished the United States Supreme Court's decisions in *Glickman* and *United Foods*, the court initially held that "the beef checkoff program is not germane to a larger regulatory scheme, and it is subject to First Amendment constraints."[169] Because the entities set up under the Act to administer the checkoff "are groups of private speakers the government utilizes to transmit a specific government message," the court held that "the beef checkoff funded advertising is attributable to Congress and the

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162. *Id.* at 976.

163. *Id.* Basing this analysis on *Abood*, the court was consistent with the majority holding in *Glickman* that interpreted *Abood* as an "either-or" test, whereby such compelled assessments may be upheld if they are either germane to the purpose for which compelled association was justified, or are otherwise non-ideological. For further discussion on the "either-or" test, *see supra* notes 109-11.

164. Cal-Almond, Inc. v. United States Dep't of Agric., 192 F.3d 1272, 1274 (9th Cir. 1999). The almond marketing order was issued by the U.S. Department of Agriculture under the authority of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 (as amended) (1999 & Supp. 2003). *Id.* at 1273.

165. *Id.* at 1274-75.

166. *Id.* at 1274-76.

167. *Id.* at 1276. While the "germaneness" analysis satisfied the *Abood* test set forth by the third prong, the court went on to note in dicta that *Abood* was separately satisfied because the messages in question were non-ideological, in that they did not "engender any crisis of conscience." *Id.* (citing Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 472 (1997)).

168. Charter v. United States Dep't of Agric., 230 F. Supp. 2d 1121, 1142 (D. Mont. 2002).

169. *Id.* at 1129.

USDA."[170] As such, the checkoff is "non-ideological, content-oriented government speech which does not violate free speech or free association."[171]

In *Michigan Pork Producers Association, Inc. v. Veneman*, a case decided after *Livestock Marketing Association*, the United States Court of Appeals for the Sixth Circuit affirmed a lower court ruling that the pork checkoff "violates the First Amendment rights of pork producers by compelling them to subsidize speech with which they do not agree."[172] Rejecting the government's argument that the checkoff constituted government speech and was therefore exempt from First Amendment scrutiny, the court held that the Pork Act "is nearly identical in purpose, structure, and implementation to the Mushroom Act," and therefore "unconstitutional under the analysis set forth in *United Foods*."[173] Although the plaintiff pork producers attempted to distinguish the Mushroom Act from the Pork Act, arguing that only a small portion of the funds collected under the latter were used for generic advertising, the court found that in fact a majority of funds collected under the Pork Act were devoted to "Demand Enhancement."[174] Moreover, the court noted that the District Court "found that Pork Act programs providing for 'education' and 'research' were designed to further the Act's promotional goals."[175] The court found the use of assessments to fund advertising under the Pork Act was prohibited by the First Amendment because such compelled expression "is not germane to a purpose related to an association independent from the speech itself."[176]

PRINCIPAL CASE

Appellee Livestock Marketing Association ("Livestock Marketing"), a trade association representing livestock markets, initiated a petition drive in 1998 to require the Secretary of Agriculture to conduct a nationwide pro-

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170. *Id.* at 1140.

171. *Id.* at 1141.

172. Michigan Pork Producers Ass'n, Inc. v. Veneman, 348 F.3d 157, 159 (6th Cir. 2003). The pork checkoff is authorized by the Pork Promotion, Research, and Consumer Information Act, 7 U.S.C. § 4801 (2003). *See Michigan Pork Producers* at 159-60.

173. *Id.* at 162-63.

174. *Id.* at 163. The court observed that the 2001 budget for programs operated under the Pork Act "called for $29,388,491, or 51 percent of the total expenses, to be used under the category of 'Demand Enhancement.'" *Id.* Program categories associated with demand enhancement activities included Advertising, Merchandising, Foodservice, Pork Information Bureau, and Foreign Market Development/World Trade. *Id.*

175. *Id.* While the District Court indicated that checkoff opponents objected to funding of education and research activities under the Pork Act, the District Court did not expressly equate such activities to furthering the promotional goals of the checkoff program. Michigan Pork Producers Ass'n v. Campaign for Family Farms, 229 F. Supp. 2d 772, 776-77 (W.D. Mich. 2002). Instead, the District Court merely noted that such objections, though "not always consistent nor persuasive," were nevertheless "sincere and strongly-held views" maintained by program opponents. *Id.* at 777.

176. *Michigan Pork Producers*, 348 F.3d at 163 (citation omitted).

ducer referendum on the continuation of the beef checkoff.[177] After the Secretary failed to act in certifying the submitted petitions and scheduling a vote, Livestock Marketing brought suit in the United States District Court for the District of South Dakota seeking a declaratory judgment and injunctive relief.[178] The District Court granted injunctive relief in February, 2001, restricting the Secretary from using any checkoff funds to finance any policy or producer communications activities designed to enhance or support checkoff-related activities.[179]

After the United States Supreme Court held that similar assessments violated the First Amendment rights of mushroom growers in *United Foods*, appellees were granted leave to amend their complaint to include a claim that the generic advertising funded and conducted under the Act violated their First Amendment rights of freedom of speech and freedom of association.[180] Appellees objected to the assessments because they believed that such generic advertising promoted the consumption of foreign beef as well as domestically produced beef.[181]

The Secretary responded by arguing that promotional activities conducted under the Act constitute government speech and are therefore exempt from First Amendment scrutiny.[182] In rejecting that defense and following the Supreme Court's decision in *United Foods*, the District Court held that "[t]he beef checkoff is unconstitutional in violation of the First Amendment because it requires plaintiffs to pay, in part, for speech to which the plaintiffs object."[183] Like the *Glickman* Court, the District Court refused to apply a *Central Hudson* analysis since *Central Hudson* was in fact a case involving "a restriction on commercial speech rather than the compelled funding of speech . . . ."[184] Instead, the District Court focused on a *Glickman* analysis of the statutory context in which the compelled assessments operate.[185] Based on this contextual review, the court found that "[t]he beef checkoff is, in all material respects, identical to the mushroom checkoff" reviewed in *United Foods*.[186] As such, the court held that *United Foods* was controlling,

177. Livestock Mktg. Ass'n v. United States Dep't of Agric., 335 F.3d 711, 714 (8th Cir. 2003).
178. Livestock Mktg. Ass'n v. United States Dep't of Agric., 132 F. Supp. 2d 817 (D.S.D. 2001).
179. *Id.* at 832.
180. Livestock Mktg. Ass'n v. United States Dep't of Agric., 207 F. Supp. 2d 992, 996 (D.S.D. 2002). After the filing of the amended complaint, the District Court denied parties cross-motions for partial summary judgment on the First Amendment claim. *Id.*
181. *Id.* at 997.
182. *Id.* at 1003.
183. *Id.* at 1002.
184. *Id.* at 999.
185. *Id.* at 1000. The District Court noted that the existence of a broad regulatory regime "was dispositive of the outcome in *Glickman*. Thus, the extent of the regulatory scheme in connection with the beef checkoff must be largely dispositive in this case." *Id.*
186. *Id.* at 1002.

and because "the principal object of the beef checkoff program is the commercial speech itself," the assessments failed First Amendment scrutiny under the "germaneness" standard grounded in *Abood* and its progeny.[187]

On appeal, the Eighth Circuit upheld the District Court "holding that the Beef Act and the Beef Order are unconstitutional and unenforceable."[188] However, the panel disagreed with the District Court's rejection of a *Central Hudson* analysis because their reasoning "fail[ed] to account for the more recent pronouncements in *United Foods*."[189] After observing how the *United Foods* Court distinguished the narrow regulatory objectives of the Mushroom Act from the broad regulatory scheme for California tree fruits under review in *Glickman*, the court flatly stated that "*Glickman* does not provide a complete answer to this commercial speech issue."[190] Instead, as the court noted:

> We infer that, had the government relied upon *Central Hudson* in *United Foods*, the Supreme Court would have adapted the *Central Hudson* test to the circumstances of that case . . . . We reach this conclusion recognizing that *Central Hudson* involved a restriction on speech while the present case involves compelled speech. In our view, it is more significant that *Central Hudson* and the case at bar both involve government interference with private speech in a commercial context.[191]

The court thus adapted the *Central Hudson* test to the present case, finding the first prong satisfied because the appellees had a protected First Amendment interest at stake.[192] The next three prongs of the analysis were recast in what the court regarded as a more succinct manner: "[W]hether the governmental interest in the commercial advertising under the Beef Act is sufficiently substantial to justify the infringement upon appellee's First

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187. *Id.*

188. Livestock Mktg. Ass'n v. United States Dep't of Agric., 335 F.3d 711, 726 (8th Cir. 2003).

189. *Id.* at 722.

190. *Id.*

191. *Id.* In *United Foods*, the Court observed that "the Government itself does not rely upon *Central Hudson* to challenge the Court of Appeal's decision, and we therefore do not consider whether the Government's interest could be considered substantial for purposes of the *Central Hudson* test." United States v. United Foods, 533 U.S. 405, 410 (2001) (internal citations omitted).

192. *Livestock Mktg. Ass'n*, 335 F.3d at 723. Without further explanation, the court stated that "under the compelled speech line of cases, appellees have a protected First Amendment interest at stake." *Id.* The court apparently reached this conclusion earlier in its opinion when it noted Justice Stevens' statement in *United Foods* that "cases such as *Keller*, *Abood*, and the case at bar—involving compelled payment of money—may be viewed as the 'compelled subsidy' subset of the compelled speech cases." *Id.* at 721 (quoting *United Foods*, 533 U.S. at 417-18 (Stevens, J., concurring)).

Amendment right not to be compelled to subsidize that commercial speech."[193]

The court maintained that the answer to this question "turns largely upon the nature of the speech in question."[194] To make that determination, the court turned to the Supreme Court's rulings in *Abood* and *Keller*, where it was necessary to determine whether the speech at issue "was *germane* to the institutional purposes which justified the mandatory dues in the first place."[195] Although making such a determination often involves difficult line-drawing, the court found that the "relevant line" had already been drawn for the present case by the Supreme Court in *United Foods*.[196] There, the Court had noted that a statute authorizing no broader regulatory scheme than that compelling the speech itself could not be upheld.[197] Without a broader scheme, the program in *United Foods* in essence collapsed of its own weight, since "[w]ere it sufficient to say speech is germane to itself, the limits observed in *Abood* and *Keller* would be empty of meaning and significance."[198] Based on this reasoning from the compelled speech line of cases, the court concluded its *Central Hudson* analysis by holding that "the government's interest in protecting the welfare of the beef industry by compelling all beef producers and importers to pay for generic beef advertising is not sufficiently substantial to justify the infringement on appellee's First Amendment free speech right."[199]

ANALYSIS

Two aspects of the Eighth Circuit's analysis in *Livestock Marketing* leap out as seemingly inconsistent with established Supreme Court precedent in the context of First Amendment review of commodity checkoff programs. The first is the court's refusal to simply follow the decision in *United Foods*, a case that is nearly identical in terms of its facts and the statutory context of the contested program.[200] Second, the court's decision to adapt a modified version of the *Central Hudson* test stands in stark contrast to the Supreme Court's express refusal to apply that test in either *Glickman* or *United*

193. *Id.* at 723.
194. *Id.* at 723-24.
195. *Id.* at 724.
196. *Id.* at 725.
197. *Id.* "We have not upheld compelled subsidies for speech in the context of a program where the principal object is speech itself." *Id.* (citing *United Foods*, 533 U.S. at 415-16 (internal citation omitted)).
198. *Id.* at 725 (citing *United Foods*, 533 U.S. at 415-16 (internal citation omitted)).
199. *Id.* at 725-26.
200. The District Court noted that "the beef checkoff is, in all material respects, identical to the mushroom checkoff," "the principal object of the beef checkoff program is the commercial speech itself," and "the assessments are not germane to a larger regulatory purpose." Livestock Mktg. Ass'n v. United States Dep't of Agric., 207 F. Supp. 2d 992, 1002 (D.S.D. 2002). As such, "[t]his case is therefore controlled by *United Foods* and not by *Glickman*." *Id.*

Foods.[201]

Of course, neither of these observations stands for the proposition that the Eight Circuit got it wrong, because there is ample evidence that the Supreme Court itself is still searching for the correct approach in this emergent area of First Amendment jurisprudence.[202] In effect, however, the Eighth Circuit's reasoning does unfortunately roil these already muddy waters, and evinces the need for a more rational analytical framework.[203] A more appropriate framework requires a departure from the limited on-point Supreme Court precedent represented by *Glickman* and *United Foods*, and a return to those standards that undergird the historical protection afforded commercial speech under the First Amendment.

Livestock Marketing traces a tortured path through the commercial speech doctrine

Even Supreme Court Justices can differ and do continue to differ as to the appropriate level of deference to be afforded legislative acts that either restrict or compel commercial speech.[204] The *Glickman* decision, in particular, constituted "a significant departure from traditional commercial speech and compelled speech analysis."[205] While the Eighth Circuit made a valiant

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201. In *Glickman*, the majority observed that the criticism of the generic advertising in question provided "no basis for concluding that factually accurate advertising constitutes an abridgment of anybody's right to speak freely," and so it was "error for the Court of Appeals to rely on *Central Hudson* for the purpose of testing the constitutionality of market order assessments for promotional advertising." Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 474 (1997). At least implicitly, the majority drew a line of distinction as to where *Central Hudson* would be an appropriate analysis by noting that "[t]he Court of Appeals fails to explain why the *Central Hudson* test, which involved a restriction on commercial speech, should govern a case involving the compelled funding of speech." *Id.* n.18.

202. As Justice Souter pointed out in his dissent in *Glickman*, that case represented "the first commercial-speech subsidy case to come before us." *Id.* at 488 (Souter, J., dissenting).

203. *Preview of United States Supreme Court Cases, 2000-2001 Term*, 8 A.B.A. J. 418 (2001) (observing the wide differences of approach employed by the Justices of the Supreme Court in *United Foods* and noting that in any decision invoking a *Central Hudson* analysis it seems "the Justices appear destined to choose up sides based on those four factors on a case-by-case basis.").

204. *See, e.g.*, Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1 (2000). Professor Post characterized the commercial speech doctrine as "a notoriously unstable and contentious domain of First Amendment jurisprudence. No other realm of First Amendment law has proved as divisive." *Id.* at 2.

205. Casarez, *supra* note 58, at 960. Professor Casarez continued:

> The majority's contextual approach resulted in a house-of-cards opinion based on a faulty premise: that compelled commercial speech does not raise a First Amendment issue because its speakers do not suffer a 'crisis of conscience.' This premise overlooks three settled First Amendment principles: first, that compelled speech is just as constitutionally suspect as restricted speech; second, that paying for speech is constitutionally equivalent to speaking; and third, that commercial speech falls within the

attempt to discern a path within the constraints of *Glickman* and *United Foods*, its analysis suffers by the inappropriate application of precedential tools that are themselves improper in the present context.

The Eighth Circuit principally invoked *Glickman*, *United Foods*, and *Central Hudson*.[206] The manner in which the court alternatively distinguished and relied on these precedents in deciding the principal case provides instruction as to their inadequacy with respect to First Amendment review of compelled subsidies for commercial speech. The line of reasoning adopted by the Eighth Circuit to justify its use of *Central Hudson* is, at best, difficult to follow. The court began by noting that the District Court had declined the use of *Central Hudson* because the Supreme Court also declined its use in *Glickman*.[207] This conclusion, according to the Eighth Circuit, was erroneous because it ignored the more recent pronouncements in *United Foods*.[208] There, the Supreme Court had made a special effort to distinguish the unregulated nature of the mushroom industry at issue in that case from the highly regulated marketing order scheme at issue in *Glickman*.[209] Having distinguished *Glickman*, the Eighth Circuit felt free to "infer" that—here comes the leap—the Supreme Court would indeed have applied *Central Hudson* in *United Foods* if only the government had relied on that test in their brief.[210] The court justified this inference based on the passage in *United Foods* in which the Supreme Court stated that it need not engage in an analysis of the substantiality of the government's interest because the government was not arguing on the basis of *Central Hudson*.[211] Aligning itself with *United Foods* by noting that the beef checkoff is materially identical to the mushroom checkoff, the Eighth Circuit announced that it would "now adapt the *Central Hudson* test" that had just been read into the *United Foods* decision.[212]

The test adapted, however, bore little resemblance to *Central Hudson*.[213] After setting out the four prongs, the Eighth Circuit took the liberty of "more succinctly" restating the test: "[T]he issue is whether the governmental interest in the commercial advertising under the Beef Act is suffi-

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> scope of the First Amendment. It is obvious that the Court ignored these principles[.]

Id.

206. For a discussion of the Eighth Circuit decision, *see supra* notes 177-99 and accompanying text.

207. Livestock Mktg. Ass'n v. United States Dep't of Agric., 335 F.3d 711, 722 (8th Cir. 2003).

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. For the four-prong test outlined in *Central Hudson*, *see supra* note 53 and accompanying text.

ciently substantial to justify the infringement upon appellee's First Amendment right not to be compelled to subsidize that commercial speech."[214] While the second-prong "substantial governmental interest" inquiry made it into the succinct version, the third-prong requirement that the program "directly advance" the government interest had disappeared.[215] The court's succinct version of *Central Hudson* also dropped the fourth-prong requirement that the program be "no more extensive than necessary" to advance the government interest.[216] As such, this "more succinct" test bore no resemblance to *Central Hudson*.

Having reformulated the *Central Hudson* test into a one-prong "sufficiently substantial" analysis of the governmental interest being advanced, the court stated that this inquiry "turns largely upon the nature of the speech in question."[217] The nature of the speech can be analyzed differently in different contexts, either in terms of its "germaneness" to an underlying associational purpose, its "viewpoint neutrality" with respect to the speech that is financed, or some other benchmark.[218] Each of these tests, the court observed, involves a "difficult line-drawing exercise" used to determine whether the infringement on speech in question is permissible.[219] The court found that the "relevant line" had already been drawn for them by the Supreme Court in the *United Foods* decision:

> We have not upheld compelled subsidies for speech in the

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214. *Livestock Mktg. Ass'n*, 335 F.3d at 723. The court found the first prong of *Central Hudson* satisfied by holding that "appellees have a protected First Amendment interest at stake." *Id.* The remaining three prongs were traditionally stated as "whether the governmental interest in the beef checkoff program is substantial and, if so, whether the beef checkoff program directly advances that governmental interest and is not more extensive than necessary to serve that interest." *Id.*

215. Although the court identified the third prong of *Central Hudson* as an inquiry into "whether the beef checkoff program directly advances" a substantial governmental interest, its reformulated version asks only whether the governmental interest is "sufficiently substantial to justify the infringement upon appellee's First Amendment right." *Id.*

216. Although the court identified the fourth prong of *Central Hudson* as an inquiry into whether the beef checkoff program "is not more extensive than necessary to serve" a substantial governmental interest, its reformulated version asks only whether the governmental interest is "sufficiently substantial to justify the infringement upon appellee's First Amendment right." *Id.*

217. *Id.* at 723-24.

218. *Id.* at 724. The germaneness analysis was of course the standard set forth in *Abood* and *Keller*, cases in which the Supreme Court "considered the nature of the speech at issue in terms of whether or not it was *germane* to the institutional purposes which justified the mandatory dues in the first place." *Id.* Properly, the Eighth Circuit in the present case recognized that a germaneness analysis would not apply in every context. *Id.* (citing Bd. of Regents v. Southworth, 529 U.S. 217, 232-35 (2000)). A "viewpoint neutrality" analysis was adopted in *Southworth*, wherein the Supreme Court held that because the germaneness analysis was unmanageable in the context of challenges to compelled student activity fees at a state university, the proper standard in that context was to require viewpoint neutrality in allocating those fees to fund various campus organizations. *Southworth*, 529 U.S. at 233.

219. *Livestock Mktg. Ass'n*, 335 F.3d at 724.

> context of a program where the principal object is speech itself. . . . [T]he expression respondent is required to support is not germane to a purpose related to an association independent from the speech itself; and the rationale of *Abood* extends to the party who objects to the compelled support for this speech.[220]

Thus, the court concluded that, in the context of the beef checkoff program, the government's interest was "not sufficiently substantial to justify the infringement on appellee's First Amendment free speech right."[221] While the court did not expand further in either identifying or analyzing the purported governmental interest, it appears that the court found as dispositive the apparent lack of a more comprehensive regulatory scheme against which the compelled speech could be analyzed under an *Abood* germaneness test.

Based on the court's reasoning, criticism of the Eighth Circuit decision in *Livestock Marketing* can therefore be summarized along lines associated with the three Supreme Court precedents outlined earlier. First, the court improperly inferred the applicability of *Central Hudson*, and in its subsequent reformulation of that test performed an analysis that in essence ignored all but the initial, threshold prong. Second, while properly distinguishing *Glickman*, the court nevertheless invoked that case as a basis from which to distinguish the beef checkoff much as the Supreme Court distinguished the mushroom checkoff in *United Foods*.[222] By doing so, the court found a First Amendment issue based solely upon its analysis of the extent of the regulatory scheme at issue, rather than by examining the nature of the speech itself in order to determine whether the First Amendment was invoked.[223] Finally, although the court properly invoked *United Foods* and its extension of *Abood* to a commercial context, the court merely rubberstamped the *United Foods* analysis of the Mushroom Act without a further factual inquiry into the regulatory scheme implemented under the authority

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220. *Id.* at 725 (citing *United Foods*, 533 U.S. at 415-16).

221. *Id.* at 726.

222. *See generally* Paul M. Schoenhard, *The End of Compelled Contributions for Subsidized Advertising?*, 25 HARV. J.L. & PUB. POL. 1185, 1199 (2002) ("*United Foods* identifies a First Amendment boundary between compelled contributions for advertising under a regulatory scheme aimed exclusively at such advertising and similar contributions under more expansive regulatory programs.").

223. This limited inquiry, while consistent with the Supreme Court's decision in *United Foods*, also sidestepped any consideration of the First Amendment validity of other programs authorized, funded, and carried out under the Act. *See* William Conner Eldridge, Note, *United We Stand, Divided We Fall—Arguing the Constitutionality of Commodity Checkoff Programs*, 56 ARK. L. REV. 147, 175 (2003) ("United Foods may be read to permit the constitutionality of checkoff programs that spend significant amounts of money on non-promotional activities and that involve highly regulated commodities.").

of the Beef Act.[224]

The Eighth Circuit analysis applies inadequate standards to the present context

A review of the three principal standards outlined above reveals that each suffers limitations when applied to the context of compelled subsidies for commercial speech. When *Central Hudson* was first enunciated by the Supreme Court in striking down a state-imposed restriction on commercial speech, it was regarded as an intermediate level of scrutiny requiring that the state "assert a substantial interest" and that the restriction "directly advance" that interest.[225] In its subsequent application, however, *Central Hudson* could aptly be described as the commercial speech analogue to Justice Stewart's famous phrase characterizing his own flexible test for identifying that which is obscene: "I know it when I see it."[226]

In particular, the 1986 *Posadas* decision represented something other than intermediate scrutiny, and has been characterized as the "low water mark" for protection of commercial speech under *Central Hudson* analysis.[227] The "extremely deferential" application of the fourth prong of *Central Hudson* by the *Posadas* Court marked a clear retreat from the level of scrutiny that had initially been envisioned.[228] The Court expressly restated this lower rational basis standard in *Fox*, holding that the fit between the legislature's ends and its chosen means of achieving those ends must be "not necessarily perfect, but reasonable."[229]

Protection for commercial speech under *Central Hudson* has enjoyed a revival of sorts, but in an unpredictable manner. In the 1993 *Discovery Network* decision, the Court strictly applied the third prong and held that there was not a reasonable fit between the restriction employed and the ex-

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224. *See Livestock Mktg. Ass'n*, 335 F.3d at 722 ("[T]he beef checkoff program at issue in the present case is identical in all material respects to the mushroom checkoff program at issue in *United Foods* . . . .").

225. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 564 (1980). For characterization of the test in *Central Hudson*, at least initially, as constituting intermediate scrutiny, *see* Edward J. Schoen et al., *Glickman v. Wileman Bros. & Elliott: California Fruit Marketing Orders Prune the First Amendment*, 10 WIDENER J. PUB. L. 21, 39 (2000) ("*Central Hudson* . . . formalized the . . . intermediate-level protection accorded to commercial speech"); Casarez, *supra* note 54, at 947 ("*Central Hudson* reduced the First Amendment protection granted to truthful, nonmisleading commercial speech to an intermediate level.").

226. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

227. P. Cameron DeVore, *The Two Faces of Commercial Speech under the First Amendment*, 12 COMM. LAW. 1, 23 (1994). For a discussion of *Posadas*, *see supra* note 59.

228. *See* Schoen et al., *supra* note 225, at 44. ("Under *Posadas*, infringements on commercial speech can pass constitutional muster so long as they are camouflaged with express statements of government policy.").

229. Bd. of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989).

pressed state interest.[230] Three terms later, Justice Stevens went much further in enhancing commercial speech protection in his *44 Liquormart* plurality opinion, arguing for an intermediate standard of review under *Central Hudson* for speech restrictions designed to protect consumers, and for strict scrutiny of those measures that restrict truthful, nonmisleading commercial speech.[231] Because *44 Liquormart* was decided by a plurality, however, it is questionable as to whether the Court in any subsequent case will follow Justice Stevens in affording this higher level of protection to commercial speech, or fall back instead to a more deferential standard of review.[232]

In spite of the trend toward more vigorous review of commercial speech restrictions under the *Central Hudson* test, this standard remains subject to the vicissitudes of the Court. Because *Central Hudson* has been used to apply rational basis review to government actions infringing First Amendment rights to freedom of speech, it is imperative to look to alternative tests that employ a higher level of scrutiny in determining the constitutionality of such actions.

The reasoning advanced in *Glickman* surely fails to provide such a standard.[233] Importantly, the Eighth Circuit recognized that *Glickman* was

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230. For a discussion of *Discovery Network*, *see supra* note 59. While the holding represents greater protection for commercial speech when compared to either *Posadas* or *Fox*, it still employs the "reasonable" language associated with rational basis review.

231. For a discussion of *44 Liquormart*, *see supra* notes 60-66 and accompanying text.

232. Justice Stevens was joined for most of his plurality opinion by Justices Kennedy, Ginsburg, and Souter. Importantly, Justices Kennedy and Ginsburg joined in arguing for intermediate scrutiny for restrictions designed to protect consumers and strict scrutiny for measures restricting truthful, nonmisleading speech. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996) (Stevens, J., plurality opinion). Justice Thomas concurred in the judgment, but advocated against *Central Hudson* and in favor of strict scrutiny, maintaining that "I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech." *Id.* at 522 (Thomas, J., concurring). Justice Scalia also concurred in the judgment, and although he was noncommittal as to the proper standard to apply, he admitted that he did "share Justice Thomas' discomfort with the *Central Hudson* test." *Id.* at 517 (Scalia, J., concurring). Taken together, these opinions do seem to point to something more than a five-Justice majority that is willing to invoke a higher level of scrutiny when reviewing commercial speech restrictions. *See also* Casarez, *supra* note 54, at 945. Here the author noted:

> [T]he case practically guarantees that restrictions on truthful, nonmisleading commercial information about lawful commodities are invalid, regardless of whether the *Central Hudson* test is used or not. Whether the Court applies strict scrutiny in such situations (Justice Stevens' approach), invalidates the restriction based on anti-paternalism (Justice Thomas' choice), or applies a stricter version of *Central Hudson*'s third and fourth prongs (Justice O'Connor's preference), the result should be the same.

Id.

233. *See, e.g.*, Jennifer R. Franklin, *Peaches, Speech, and Clarence Thomas: Yes, California, There is a Justice Who Understands the Ramifications of Controlling Commercial*

not controlling in the principal case, albeit for reasons not associated with its dubious holding that commercial speech is not speech at all if compelled in concert with an ancillary and broader regulatory scheme.[234] While the court certainly did not need to reach this flawed premise underlying *Glickman*, its decision in *Livestock Marketing* did implicitly endorse *Glickman*. The court did so by finding that the narrow purpose and function of the Beef Act and the apparent lack of a broader regulatory scheme—rather than the presence of legitimate First Amendment interests—necessarily took the challenge to the beef checkoff out of *Glickman*'s shadow.[235]

In *Glickman*, the majority simply reviewed its earlier First Amendment cases, found nothing on point, and declared that speech was not even at issue.[236] Seemingly bound and determined to apply rational basis review and uphold the assessments from the outset, the *Glickman* court did so by first distinguishing three characteristics of the regulatory scheme at issue from laws that have been found to violate the First Amendment.[237]

The *Glickman* majority observed that the marketing orders: (1) impose no restraint on the freedom of any producer to communicate any message to any audience; (2) do not compel any person to engage in any actual or symbolic speech; and (3) do not compel the producers to endorse or to finance any political or ideological views.[238] Boldly assuming that the respondent tree fruit producers actually agree with "the central message of the

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Speech, 12 REGENT U.L. REV. 627, 647 (2000) ("To stop short of recognizing the speech implicated in [*Glickman*] is to deny the protection afforded by the First Amendment.").

234. The Eighth Circuit distinguished *Glickman* for the same reasons as the Supreme Court did in *United Foods*; specifically, "the collective advertising was the 'principal object' of the Mushroom Act, whereas the collective advertising in *Glickman* was just one among many of the 'anticompetitive features of the [California tree fruit] marketing orders.'" Livestock Mktg. Ass'n v. United States Dep't of Agric., 335 F.3d 711, 722 (8th Cir. 2003) (citing Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 470 (1997)). The Eighth Circuit further noted, "Accordingly, we conclude that *Glickman* does not provide a complete answer to this commercial speech issue." *Id.*

235. Of course, as long as the *Glickman* and *United Foods* paradigm is allowed to stand, uncertainty will weigh on those industries that have established "free-standing" checkoff programs such as the Beef Act. Whether such programs actions are held to violate the First Amendment under either *United Foods* or reasoning similar to that employed by the Eighth Circuit, one remedial measure that could be employed to revive the programs would appear to be imposition of regulatory measures that further limit the independence of individual producers. Indeed, this was the very irony underscored by Justice Breyer in his *United Foods* dissent: "It is difficult to see why a 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." United States v. United Foods, 533 U.S. 405, 422 (2001) (Breyer, J., dissenting) (internal citation omitted).

236. For a discussion of *Glickman*, *see supra* notes 86-116 and accompanying text.

237. At least one commentator has observed that "[p]rescient readers could glean the Court's conclusion from the second paragraph of the opinion, where Justice Stevens characterized the marketing orders as 'a species of economic regulation . . . .'" Casarez, *supra* note 54, at 955-56.

238. *Glickman*, 521 U.S. at 469-70.

speech" that they were nonetheless challenging, the majority seemed convinced that these three categories constitute the entire realm of possible First Amendment infringement.[239]

As Justice Souter astutely noted in his dissent, the majority could not find a controlling precedent for the simple reason that *Glickman* represented the first "commercial-speech subsidy case to come before us."[240] While the majority did recognize that the tree fruit assessments compelled financial contributions used to fund advertising, they went on to hold that such subsidies did not invoke the interests protected by *Abood*, which only protected First Amendment "freedom of belief" interests.[241] Because the assessments in question in *Glickman* "cannot be said to engender any crisis of conscience," the majority reasoned that *Abood* did not apply and no First Amendment issue arose.[242]

Glickman has been criticized by commentators as "a sharp doctrinal departure, arguably taking a step towards undoing all protection against compelled funding of private expression."[243] The observations of Professor Casarez suggest that the *Glickman* majority did not find guiding precedent because they wrongly determined that the speech in question was not really speech:

> According to the Court, compelled ideological speech and restricted commercial speech constitute 'speech' in the constitutional sense. However, compelled commercial speech does not. The only reason given by the Court for this distinction is that commercial speech is not ideological. A more circular and unsatisfactory answer is hard to imagine.[244]

By so ruling, the Court "failed to expand First Amendment protec-

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239. *Id.* at 470. ("[N]one of our First Amendment jurisprudence provides any support for the suggestion that the promotional regulations should be scrutinized under a different standard than that applicable to the other anticompetitive features of the marketing orders.").

240. *Id.* at 488 (Stevens, J., dissenting).

241. *Glickman*, 521 U.S. at 471 (quoting Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1976)).

242. *Id.* at 472.

243. Howard M. Wasserman, *Compelled Expression and the Public Forum Doctrine*, 77 TUL. L. REV. 163, 204 (2002). With respect to the *Glickman* majority's focus on whether respondents in that case agreed or disagreed with the message conveyed by the generic advertising, Wasserman observes that *Glickman* contradicts *Hurley*, where the Supreme Court stated that "there need not be any articulable message presented for an objector to challenge the compulsion. If there need not be any clear and articulable message, there need not be disagreement with any message for an objecting payer to challenge a funding requirement." *Id.*

244. Casarez, *supra* note 54, at 962.

tions against compelled speech to the arena of commercial speech."[245] That failure carried with it an even more troubling prospect: that the unpredictable protection of commercial speech afforded by *Central Hudson* might be replaced by a more predictable standard ruling out First Amendment scrutiny entirely.[246]

The Supreme Court decision in *United Foods* is the third key precedent considered by the Eighth Circuit in *Livestock Marketing*. In stopping short of overruling *Glickman*, the *United Foods* decision nonetheless prepared the ground for a return to a higher level of First Amendment protection against compelled subsidies for commercial speech.[247] Unfortunately, the Eighth Circuit seemed content to use the decision in *United Foods* merely to draw "the relevant line" establishing that, under *Abood*, speech cannot be "germane to itself."[248] As such, the Eighth Circuit held the compelled subsidies under the Beef Act are not germane to a broader regulatory scheme and so must fail First Amendment scrutiny.

This narrow use of *United Foods* represents a missed opportunity to clarify First Amendment jurisprudence in this context because *United Foods* stood for much more than a mere germaneness analysis. By choosing to distinguish rather than overturn *Glickman*, the majority in *United Foods* importantly reinterpreted *Abood* as being much broader than the majority in *Glickman* had presumed.[249]

The *Glickman* majority claimed that *Abood* "merely recognized a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's 'freedom of belief.'"[250] As such, *Glickman* was distinguished from *Abood* because "requiring respondents to pay the assessments cannot be said to engender any crisis of conscience."[251] As one commentator has observed:

> Reconsidering the precedent, the Court in *United Foods* reads *Abood* more broadly and 'take[s] further instruction . . . from *Abood*'s statement that speech need not be characterized as political before it receives First Amendment protec-

245. Schoen et al., *supra* note 225, at 69.
246. *Id.* ("In effect the Court expanded the divide between political and ideological speech, the first tier of protected speech, and commercial speech, the second tier of protected speech.").
247. Schoenhard, *supra* note 222, at 1196 ("*United Foods* correctly reaffirmed broad protection for commercial speech.").
248. Livestock Mktg. Ass'n v. United States Dep't of Agric., 335 F.3d 711, 725 (8th Cir. 2003) (citing United States v. United Foods, Inc., 533 U.S. 405, 415 (2001)).
249. Schoenhard, *supra* note 222, at 1196.
250. Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 471 (1997) (quoting Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977)).
251. *Id.* at 472.

> tion.' This latter statement of the Court's intent refers to Justice Stewart's majority opinion in *Abood*, which repeatedly denies limitation to the First Amendment's coverage.[252]

A suggested framework

A broader read of *Abood*, together with the principles set forth in *Virginia Pharmacy* and reinforced by *Zauderer*, represents the proper framework in which compelled subsidies for commercial speech should be afforded a higher degree of First Amendment protection.[253] Application of *Abood* in a commercial context requires the reviewing court to recognize that First Amendment interests are implicated when individuals are compelled to pay for commercial speech, and *Virginia Pharmacy* and *Zauderer* place constitutional limits upon the purposes for which such speech may be compelled.

The extension of the *Abood* germaneness test to the commercial arena in *United Foods* is important in the context of commodity checkoff programs because there are numerous "free-standing" checkoff programs that exist independently of the much broader regulatory scheme imposed by the marketing orders at issue in *Glickman*.[254] If the *Abood* germaneness analysis is applied mechanically to those programs along the lines exercised both by the Supreme Court in *United Foods* and by the Eighth Circuit in *Livestock Marketing*, then presumably each must fail First Amendment scrutiny.[255] Such a conclusion, however, must be preceded by an analysis of the programs actually implemented under the authorizing statute in order to determine whether, as the *United Foods* Court found, the "principal object" of the program is "speech itself."[256] Without expressly quantifying the proportion of assessments collected under the Mushroom Act that were devoted to generic advertising, the Court in *United Foods* found that "[i]t is undisputed . . . that most monies raised by the assessments are spent for generic adver-

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252. Schoenhard, *supra* note 222, at 1196-97 (quoting *United Foods*, 533 U.S. at 413).

253. For a discussion of *Virginia Pharmacy*, *see supra* notes 37-44 and accompanying text. For a discussion of *Zauderer*, *see supra* notes 70-76 and accompanying text.

254. *See generally* United States Dep't of Agric., *Agricultural Marketing Service*, *available at* http://www.ams.usda.gov. Promotional activities are authorized by commodity-specific statutes for fourteen different commodities not subject to marketing orders promulgated under the AMAA, 7 U.S.C. § 601 (1999 & Supp. 2003). *See* United States Dep't of Agric., *Agricultural Marketing Service*, *available at* http://www.ams.usda.gov. There are thirty-three marketing orders for fruits and vegetables presently active under the authority of the AMAA, although not all of these have put into effect the generic advertising programs authorized by that Act. *Id.*

255. This assertion follows the *United Foods* language cited as controlling in *Livestock Marketing*: "We have not upheld compelled subsidies for speech in the context of a program where the principal object is speech itself." Livestock Mktg. Ass'n v. United States Dep't of Agric., 335 F.3d 711, 725 (2003) (citing *United Foods*, 533 U.S. at 415).

256. *United Foods*, 533 U.S. at 415.

tising to promote mushroom sales."[257] The Court therefore left open the question, not raised by the Eighth Circuit in the principal case, of whether the use of a significant portion of assessments for purposes other than generic advertising might allow the statute to survive First Amendment scrutiny.

Such an inquiry is particularly applicable to the beef checkoff, under which nearly half of all assessments collected are devoted to activities other than promotion.[258] Whether these non-promotional activities are either non-expressive in nature or qualify as a legitimate state interest for which association may be compelled under the rationale of *Abood* requires a specific factual inquiry. That inquiry can and should have been conducted in the principal case within the framework of an *Abood* germaneness analysis, since the appellee producers objected to paying for generic advertising, not to being required to support research and other arguably non-expressive activities. Accepting the Supreme Court's definition of commercial speech as that which does "no more than propose a commercial transaction," it is reasonable to conclude that generic advertising conducted under the Act qualifies, while research does not.[259] If certain activities conducted under the authority of the Act are legitimate, even as economic regulations, then those activities provide a basis against which the challenged assessments for generic advertising may be analyzed.

In short, while other programs authorized by and carried out under the Act may not be as pervasive as the regulatory constraints imposed by a marketing order, they nevertheless do provide the basis for a more in-depth analysis than the Eighth Circuit chose to undertake. And, under such an analysis the challenged assessments need not fail First Amendment scrutiny under *Abood* as a *fait accompli*. To be sure, if the challenged assessments are found, under an *Abood* analysis, to not be germane to an underlying and legitimate associational purpose, then they must fail First Amendment scrutiny.[260] If, however, an *Abood* inquiry finds that the challenged assessments are germane to a broader purpose, the analysis must proceed to a review of

257. *Id.* at 408. This finding closed off any analysis of whether such expenditures were germane to other purposes authorized by the Mushroom Act, which included "projects of mushroom promotion, research, consumer information, and industry information." *Id.* (quoting the Mushroom Promotion, Research, and Consumer Info. Act, 7 U.S.C. § 6101, 6104(c)(4) (1999)).

258. 2002 Beef Bd. Annual Report at 16. During fiscal year 2002, fifty-six percent (56%) of program expenditures under the Act were devoted to promotion. For a complete review of program expenditures, *see supra* note 10.

259. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973).

260. In the context of a public-sector labor union's use of funds for activities not germane to its role as collective bargaining representative, the *Abood* Court held that "the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas . . . ." Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235-36 (1976).

the nature of the speech funded.

Under this second phase of inquiry, the speech financed by such compulsory assessments should be analyzed within the constraints imposed by *Virginia Pharmacy*, which held that compelled speech may be permissible in a commercial context if the message is designed to prevent deceptive speech.[261] The Supreme Court expressly affirmed such intervention in *Zauderer*, holding that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."[262] With respect to the importance of commercial speech generally, *Virginia Pharmacy* also recognized an interest in preserving the free flow of commercial information.[263] The *Zauderer* Court extended recognition of this "free flow" interest beyond the context of commercial speech restrictions, recognizing that compelling commercial speech could also, in certain instances, serve the same objective.[264] Based on this dual instruction set forth in *Virginia Pharmacy* and later affirmed in *Zauderer*, compelled checkoff assessments that first survive the *Abood* germaneness test should subsequently be evaluated to determine whether their use is intended either to (1) prevent or safeguard against consumer deception, or (2) to preserve and enhance the free flow of commercial information.

A standard designed solely around these limited purposes is a narrow standard indeed, but reflects the importance and validity of the First Amendment interests at stake. Importantly, however, the Court in *Zauderer* held that the disclosure requirement at issue there must be "reasonably related" to the state's interest in preventing consumer deception.[265] This language suggest rational basis review of the state-imposed interference so long as the objective is to advance an interest as legitimate as preventing consumer deception. This choice of language builds on that of *Virginia Pharmacy*, in which the Court held that a state may not "completely suppress the dissemination of concededly truthful information about an entirely lawful activity," but reserved ruling on "other questions" involving other factual settings.[266] Taken together, these cases suggest room for judicial deference in considering legislative attempts to further a legitimate state interest in-

261. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 772 n.24 (1976).
262. Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985).
263. *Va. Pharmacy*, 425 U.S. at 765 ("It is a matter of public interest that [private economic decisions], in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.").
264. *Zauderer*, 471 U.S. at 651 ("Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal.").
265. *Zauderer*, 471 U.S. at 651.
266. *Va. Pharmacy*, 425 U.S. at 773.

tended either to safeguard consumers or protect the free flow of commercial information by compelling individuals to subsidize commercial speech. While generic advertising designed to enhance *producer* returns might never qualify under these *consumer*-oriented targets set forth by the Supreme Court, application of *Abood*, *Virginia Pharmacy*, and *Zauderer* within the framework outlined above leaves room for affected industries to tailor their self-help programs in a more limited manner that comports with First Amendment protections afforded participating producers.

CONCLUSION

The Eighth Circuit decision in *Livestock Marketing Association* reflects the unsettled state of First Amendment compelled commercial speech jurisprudence. Provided with only two Supreme Court cases decided in the context of commodity checkoff programs, the Eighth Circuit improperly devised its own legal standard in holding that generic advertising funded by mandatory assessments collected under the Beef Act violates the First Amendment rights of objecting producers. While the holding is sound, the court missed an opportunity to solidify the Supreme Court's extension of *Abood* to the commercial speech setting, and failed to draw upon historical commercial speech guidelines that set forth permissible forms of commercial speech interference.

Properly applied, the Eighth Circuit should have first conducted an *Abood* germaneness analysis of the Beef Act, recognizing that assessments collected do in fact fund what are arguably non-expressive activities such as research and consumer information. Those activities constitute a regulatory scheme separate from the speech itself that serves as the basis for an *Abood* analysis, and a factual inquiry would likely reveal that the generic advertising in question is indeed germane to that underlying regulatory scheme. Having passed the germaneness test, the analysis should continue by reviewing the limitations on commercial speech interference set forth in *Virginia Pharmacy* and *Zauderer*. Those decisions limit First Amendment protection for commercial speech interference to activities designed to advance the related state interests of preventing consumer deception and preserving the free flow of commercial information. If a factual inquiry reveals that generic advertising conducted under the Beef Act is intended to benefit producer interests rather than those limited consumer interests identified by the Supreme Court, the assessments should fail as impermissible compelled commercial speech in violation of the First Amendment free speech rights of objecting producers. Other non-expressive regulatory programs carried out under the authority of the Beef Act should be upheld under rational basis review as economic regulations, and industry should not be precluded from engaging in self-help activities that are legitimately designed to further the state's interest in protecting consumers.

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