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First Amendment "Beefs": Agricultural Checkoff Programs and Freedom of Speech

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Abstract

In the past fourteen years, the Supreme Court has ruled three separate times on the constitutionality of Federal Farm Promotion Programs under the First Amendment. The challenge has been that the programs, which fund generic advertisements such as "Got Milk?" and "Beef: It's What's For Dinner," compel the subsidization of objectionable speech from private producers. The answers handed down from the Court have been conflicting, but each has contributed to the new, still-emerging "government speech doctrine." In the most recent case, *Johanns v. Livestock Marketing Association* (2005), the Court ruled that the speech in question was completely governmental and therefore could receive no protection against the compelled subsidization of it. This research project seeks to explore the history of checkoff programs and the legal case history that led the Court to reach this conclusion. Furthermore, this paper asserts that the speech in question is not being classified in the proper way to afford it the scrutiny it deserves. First, the Court treats this speech as government speech when it is at least partially private. Second, the Court treats the speech as commercial speech when it is at least partly political. The findings that misclassifications are shaping the emerging government speech doctrine are concerning. The Court repeatedly fails to acknowledge that speech relating to the production of food is inherently political and thus deserves heightened scrutiny.

Keywords

Social Sciences, Political Science, Rogers Smith, Smith, Rogers

Disciplines

Agriculture Law | American Politics | Constitutional Law

First Amendment “Beefs”:

Agricultural Checkoff Programs and Freedom of Speech

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INTRODUCTION:

Many of us have seen the advertising campaigns “Beef. It’s What’s For Dinner,” “Got Milk?” and “Pork: The Other White Meat.” Rarely, however, have we considered where these ads come from and who pays for them. In fact, these seemingly simple questions lead to complex answers, and often further questions, involving First Amendments rights. While free speech is often thought of simply as the right to speak, it actually involves a great deal more. There have long been protections for the right to speak, but from there the issue branches out. First, there are different types of speech: political, commercial, private and government. The classification of the speech determines the level of constitutional protection it has. The government and the Court, for instance, have long regulated, or allowed for the regulation of, commercial speech. Moreover, the First Amendment can also be used to protect against compelled speech, particularly compelled private speech where an individual is coerced into espousing views that are not his or her own. The issue at hand with the generic advertising campaigns mentioned above is one of the compelled subsidization of speech, a topic on which the Court remains divided. The question is whether or not the government can compel agricultural producers to subsidize these generic advertisements even if the producers disagree with the message.

In the past fourteen years, the Supreme Court has granted certiorari to eight cases which all deal with what are called Federal Farm Promotion (checkoff) Programs. The programs in question are characterized by a government tax on a specific group used to promote an agricultural commodity. The Court has tried to decide if this “compelled subsidization of

speech”¹ is constitutional. While only three of these cases were argued and ruled on by the Court (five were remanded), each has dealt with programs that are responsible for these generic advertising campaigns and each has been decided differently. The differences in the decisions come down to how each individual program was interpreted by the Court and/or the types of arguments made to the Court.

The three varying rulings on the issue of compelled speech by Federal Farm Promotion Programs have created a complex and unclear picture on where the Court truly stands on this First Amendment issue. In two of the cases (*Glickman v Wileman Bros. & Elliott* (1997) and *Johanns v. Livestock Marketing Association* (2005), the Court upheld the programs in question, but for different reasons. In another case, *United States v United Foods, Inc.* (2001), the Court struck down a program that was nearly materially identical to the program upheld in *Glickman*, yet again for a different reason. With its failure to rule consistently on this issue, the Court has not yet communicated a clear precedent to lower courts or to citizens about when compelled speech should prompt First Amendment review and result in invalidation of government programs.

In this thesis I will address whether or not these advertisements, and the programs that govern them, are constitutional. I will do this by exploring the implementation of Federal Farm Promotion Programs and looking at individual examples of these programs, as well as focusing on case law that is pertinent to the compelled subsidization of speech. I will argue that the programs are not constitutional for two reasons. First, the Court treats this speech as government speech when it is at least partially private. Second, the Court treats the speech as commercial

¹ Post, Robert C., "Compelled Subsidization of Speech: *Johanns v. Livestock Marketing Association*" (2005). *Faculty Scholarship Series*. Paper 175. Page 195.
http://digitalcommons.law.yale.edu/fss_papers/175

speech when it is at least partly political. The Justices have called these advertisements, which are paid for by and attributed to the producers, both commercial and government speech. In fact, they should be considered at least partially political and private speech, triggering stricter scrutiny. The Court's refusal to acknowledge this speech as political or ideological simply fails to recognize what a political issue food has become in many respects, including the relationship of food production to environmental controversies, worker's rights, animal rights, and health concerns.

Furthermore, these cases serve as examples of the broader significance of the emerging "government speech" doctrine that the Court is using in other areas of First Amendment law. For instance, the Court used the government speech doctrine to rule in *Pleasant Grove City v. Summum* (2009) that the placement of a monument in a public park is government speech. The monument in question was from a religious organization that sought placement of their monument after the city government gave another private group, the Fraternal Order of the Eagles, permission to erect a Ten Commandments monument in the park. The new group, Summum, claimed that the government's choice to permit the Eagle's monument but not their monument unconstitutionally favored one religion over another and violated their free speech rights. The Court ruled that because Pleasant Grove City maintained authority over which monuments could and could not be displayed in order to represent the community's history and civic traditions, the speech represented the city's viewpoint and therefore was government speech on civic affairs, not private speech and not speech endorsing any religion. Therefore, the speech in question did not violate the First Amendment and, indeed, did not receive close scrutiny.² Critics content the decision in effect allows the government to give preference to more

² *Pleasant Grove City v. Summum*, 555 U.S. ___, 129 S.Ct. 1125 (2009).

conventional and powerful groups, including religious groups, over others. This is just one example of the use of the burgeoning government speech doctrine, but it demonstrates some of the problems that the rulings in the checkoff program case, particularly *Johanns*, create.

Because there has been little scholarly analysis of these issues, primary sources make up the bulk of the research for this paper. Although the three cases decided by the Supreme Court are obvious sources, the cases that set precedents for commercial speech, as well as cases that establish semi-private semi-government speech, are also extremely important. Additionally, the individual Federal Farm Promotion Programs that have had challenges raised against them are central. There are, however, also several secondary sources that have been invaluable to this thesis. While only two of these are scholarly pieces, journalistic pieces in agricultural magazines have offered real-world insight on the industries' views on the issue of checkoff programs.

EXISTING SCHOLARSHIP ON CHECKOFF PROGRAMS AND THE FIRST AMENDMENT:

It is unclear why so little literature and legal analysis exist on the issue of checkoff programs in relation to First Amendment Rights. There has been limited legal analysis done on the court cases, and there is very little scholarship on the programs as a whole. The source materials that consider checkoff programs are mostly works on the economics of these programs: how effective they are, what they cost, who they benefit etc. In addition to these pieces, there are journalistic articles covering the topic in agricultural magazines. The few scholarly pieces on the constitutionality of these programs are critical of the Court's decisions, but even more so of its reasoning. This thesis joins in that criticism, but also seeks to advance its logic by critically

examining the impact that these programs have on farmers who fundamentally disagree with the message being promoted by their respective boards.

The most thorough piece covering the case law of checkoff programs is Robert Post's *Compelled Subsidization of Speech: Johannis v. Livestock Marketing Association*. Post opens with an overview of the three cases heard by the Supreme Court regarding the subsidization of speech by producers, though he quickly focuses on the most recent case, *Johannis*. In the first case, *Glickman v. Wileman Bros. & Elliott* (1997), the Court upheld a checkoff program by arguing that the statute and the program it created included generic commercial advertising, and that the producers were already constrained under a broader regulatory scheme.³ In past cases commercial speech has not been granted the same level of First Amendment scrutiny as most other forms of expression. When the funding of this speech occurred as part of a general regulatory program that affected producers in many ways, the Court saw no First Amendment violation. Just four years later, the Supreme Court heard a similar case, *United States v United Foods, Inc.* (2001) and struck down a program that was nearly materially identical. The only difference was that this program was independent of the broader regulations that were included in the program challenged in *Glickman*. The ruling was that when a state requires a person to "subsidize speech with which they disagree,"⁴ it triggers First Amendment scrutiny. Post calls this ruling, and the subsequent decisions it led to, the "Compelled Subsidization of Speech Doctrine" (CSSD).⁵

Post argues that stated without qualification, this idea that "First Amendment scrutiny is triggered whenever someone is forced to pay for speech that she finds objectionable" is

³ *Glickman v Wileman Bros. & Elliott*, 521 U.S. 457 (1997)

⁴ *United States v. United Foods*, 533 U.S. 405, 411 (2001)

⁵ Post 196

unsustainable. It would require strict scrutiny of all taxation and all government speech.⁶ In Post's opinion, it is the extreme nature of this doctrine that led a circuit court in a subsequent case to refuse to use it, which forced the Supreme Court to reconsider its position. Instead of reexamining the entire framework, however, the Court simply made clear that taxation is an exception to First Amendment protection against compelled speech. Post considers this a grave mistake, stating that, "the fundamental premise of CSSD is flawed, and that the premise has accordingly generated a dangerously unstable doctrinal structure which *Johanns* patched but did not repair."⁷ To Post, the real danger is that there has been no clear line drawn to determine "when First Amendment review should be triggered and when it should not."⁸

Another piece that covers *Johanns* is *Johanns v. Livestock Marketing Association- government speech: it's what's for dinner!* This piece, by Andrew Marshall, focuses more on what Post fails to emphasize, the invocation in *Johanns* of the novel and still emerging "government speech" doctrine, which allows the Court to circumvent First Amendment scrutiny almost entirely. Before starting his arguments, Marshall does frame the difficulties of navigating the issues raised by the compelled subsidization of speech. He points out that most First Amendment freedoms are awarded heightened scrutiny because they often protect "other freedoms that are central to the development and maintenance of a democratic society."⁹ On the other hand, Marshall accepts that the government must also "be able, at least at times, to voice its opinion over the dissent of tax-paying citizens."¹⁰ He argues that this necessity arises because the government must be able to operate efficiently and could not do so if small minorities of

⁶ Post 196.

⁷ Post 197.

⁸ Post 198.

⁹ Marshall, Andrew J., *Johanns v. Livestock Marketing Association- Government Speech: It's What's for Dinner!* 53 S.D. L. Rev. 364, 388 (2008). *LexisNexis*. Web. 15 March 2011.

¹⁰ Marshall 388

dissenting citizens could prevent government action. He concludes: “nevertheless, in *Johanns*, the majority reached an incorrect result through the use of flawed reasoning and misinterpretation and disregard of precedent.”¹¹

Marshall’s objection to the Court’s decision is based on four major criticisms: first, that the court fails to recognize the difference between targeted and general taxation; second, that the government’s failure to claim the speech as its own should mean that it cannot claim the protection of the government speech doctrine; third, that the government speech doctrine should not apply to commercial speech; and fourth, that the Court failed to follow its own precedent thereby further obscuring what Justice Souter noted is a “relatively new, and correspondingly imprecise” government speech doctrine. Throughout these arguments, Marshall maintains that the correct examination of checkoff programs would be to treat the advertisement as commercial speech since they occur as part of economic regulation. Therefore, he argues in favor of using the intermediate scrutiny provided by the *Central Hudson Test* designed to check restrictions on commercial speech. This essay will argue for classifying the advertisements differently for First Amendment purposes and so advance a related but distinct critique of the Court’s rulings.

AGRICULTURAL CHECKOFF PROGRAMS BACKGROUND:

The programs that have raised these First Amendment issues are Federal Farm Promotion Programs, which pay for research, education and generic advertising for specific products. The generic advertising may seem odd, since many commodities, both agricultural and otherwise, rely on brand specific advertising. The generic advertising done by these programs, however, is

¹¹ Marshall 389

designed to “expand total demand for the product.”¹² Because many agricultural products must meet predetermined government standards (grades of eggs, classes of milk, etc), there is often little variation between the qualities of individual producers’ items. Therefore, the logic of the programs is that all producers contribute and gain equally from the advertising of the product as a whole to increase demand. Such programs have long existed on smaller scales, but federally mandated examples have become more common in the past few decades. There are currently eighteen mandatory federal checkoff programs in use in the United States.¹³ These programs are: beef, blueberries, cotton, dairy, eggs, fluid milk, hass avocados, honey, lamb, mangoes, mushrooms, peanuts, popcorn, pork, potatoes, sorghum, soybeans and watermelon.¹⁴ The earliest federally run, nationwide program began in 1966 with a checkoff program for cotton and the most recent was the program for sorghum implemented in 2008.¹⁵

The majority of federal farm promotion programs are mandatory, and these appear to be more effective in increasing the rate of return on each unit of product than voluntary programs. However, voluntary programs also exist. As Geoffrey Becker states in a CRS Report for Congress, “producers can and have organized *voluntary* checkoffs, but they account for only a small share of all funding for generic efforts.”¹⁶ Mandatory checkoffs are often viewed as a way to prevent free riding and to make sure that each farmer is contributing as well as gaining from the advertising being done. While some of the mandatory programs were created through individual laws, it was not until the Farm Bill of 1985 that multiple programs were passed with

¹² Becker, Geoffrey S., U.S. Congressional Research Service. Federal Farm Promotion (“Checkoff”) Programs (RL32957; Oct. 20, 2008), Page 2.

¹³ Becker 1

¹⁴ “Research and Promotion Programs.” *United States Department of Agriculture: Agricultural Marketing Service*. United States Department of Agriculture, 25 June 2010. Web. 15 Oct. 2011.

¹⁵ Becker 1

¹⁶ Becker 2

one bill. Both the beef and pork checkoffs were created through this act and they are now two of the largest programs in existence, led only by dairy products, fluid milk and soybeans.

Congress must approve each of these checkoff programs, but some are not put into effect until farmers and other interested parties also vote on the program. Other programs are executed with no input from the people they will largely affect.¹⁷ Although both instances raise First Amendment concerns, the cases in which the industries' representative associations are not given a voice, much less individual producers, seem more egregious. Some programs are approved by referendum, and some of those continue to need a majority vote every few years to continue running, but this is not always a meaningful protection. The referendum results are not always honored. In 2001 there was controversy over a 53% to 47% vote by pork producers to terminate their promotion program. The USDA and the National Pork Producers Council (NPPC) reached a settlement to continue a revised version of the program.¹⁸ Despite producer outrage, the program has continued. Assessments from 2008 were just over \$58.2 million dollars.¹⁹ There is also now talk that the California Tree Fruit Agreement (the program challenged in *Glickman*) may be shut down, but only after its second failed referenda. Furthermore, the beef, dairy, fluid milk, pork, and sorghum industries have all failed to offer, schedule, or respond to requests for continuance referendums.²⁰ Producers are generally invited to participate in the referendums as long as they produce a certain amount of the product each year (often the same amount that triggers their contributions to the Federal Farm Promotion Program.) The soybean producers are

¹⁷ Becker 6

¹⁸ "Research and Promotion Programs." *United States Department of Agriculture: Agricultural Marketing Service*. United States Department of Agriculture, 25 June 2010. Web. 15 Oct. 2011. <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateB&navID=ResearchandPromotion&leftNav=ResearchandPromotion&page=ResearchandPromotion&acct=AMSPW>

¹⁹ "Research and Promotion Programs."

²⁰ "Research and Promotion Programs."

unique in that they have to vote to have a referendum in order to schedule one. A group of eligible producers requested a referendum period in May of 2009, but only 759 producers voted to have a referendum. The necessary number to call for a referendum would be ten percent of producers nationwide, which is around 59,000 soybean producers. Some referenda are successful in shutting down their programs, however. Among checkoffs that were authorized but have not been implemented, or have been terminated by producers in referenda, are canola and rapeseed, wheat, flowers, kiwifruit, limes and pecans.²¹

The Agricultural Marketing Service (AMS), a government agency that is a division of the United States Department of Agriculture (USDA), oversees all checkoff programs. It is divided into five commodity programs:

1. Dairy
2. Fruit and vegetable
3. Livestock and seed
4. Poultry
5. Cotton and tobacco

The AMS oversees product standardization, grading, market news, the enforcement of federal laws, marketing agreements and orders, the administration of research, promotional programs and the purchase of commodities, often through the Federal Farm Promotion Programs.

Although each checkoff program has been implemented with different specific rules and operations, the basic execution of each promotion program is similar. Most industries have a promotion and research board that is overseen by the United States Department of Agriculture (USDA). This board oversees the collection of its industry's tax and the distribution and use of the funds collected. Different groups use different methods to decide who serves on these boards, and the selection methods can lead to different representation of types of farms and

²¹ Becker 2

farmers. Some of the national boards have certified state boards that handle the collection of funds in their states, and those boards are allowed to keep a portion of the money for their state's use. Even in these programs, not every state has a council. Although the programs are generally similar, in the first two court cases considering checkoff programs, the Court relied on slight administrative differences between them to distinguish its rulings.

While the constitutional issues of these programs remain unclear, their economic impact is agreed to be positive overall. In an extensive study done by agricultural economists at Texas A&M University, researchers concluded that the Pork Checkoff Program has, “*on average*, made producers better off than they would have been without the program.”²² The study also revealed, however, that not all producers are able to take advantage of the net gain per hog, and therefore some farmers benefit economically more than others from generic advertising. Producers who operate larger scale operations, particularly concentrated animal feeding operations, benefit more. This is partially due to sheer scale and numbers, but it is also connected to how promotion programs are structured. The \$1.17 increased return per hog is not enough to offset the cost difference among producers. A smaller, high cost producer spends around \$14 more per hog than larger, low cost producers. As expenditures to the checkoff program increase, branded expenditures, which may help high cost producers, decrease.²³ Still, the issues are more than economic. Farmers may also oppose the program on political or ideological grounds alone and therefore not see the tax as a benefit regardless of whether they are high or low cost producers or what net gain per hog they receive.

²² Davis, George C., Oral Capps, Jr., David A. Bessler, James H. Leigh, John P. Nichols, and Ellen Goddard. *An Economic Evaluation of the Pork Checkoff Program*. Department of Agricultural Economics, Texas A&M University, Page V-6. Jan. 2001. Web. 15 Oct. 2010.

²³ Davis ES-4

In a similar study, also from Texas A&M University, researchers found that, “Promotion and research activities were successful in contributing to increases in the domestic consumption of cotton.”²⁴ This has been especially true since the Cotton Research and Promotion Amendments Act of 1990, which modified the Cotton Research and Promotion Act of 1966 so that “All cotton marketed in the United States, whether from domestic or foreign production, was to share in the cost of the research and promotion program.”²⁵ This change made the program mandatory and therefore increased the amount of contributions and the operating budget for the cotton checkoff program. Additionally, another study found the beef checkoff program to be effective in “positive and significant responses to the promotions and information programs,”²⁶ so much so that, “rates of return to the beef programs have consistently been near the five plus range over time.”²⁷ It must be noted, however, that the studies on the cotton checkoff program and the beef checkoff program were funded by the respective boards that oversee their Federal Farm Promotion Programs. Therefore, while the results were peer-reviewed, the source of funding for these studies did have a vested interest.

While these programs benefit most producers (though not all benefit to the same degree), it is necessary to consider the impact that they have on consumers as well. John Cawley at Cornell and Barret Kirwan at University of Maryland, College Park argue in a forthcoming paper that checkoff programs are contributing to the obesity epidemic in America. This is because the boards often promote the consumption of energy and fat dense products (pork and dairy in

²⁴ Capps, Jr., Oral, David A. Bessler, George C. Davis, John P. Nichols, Carl G. Anderson, and Edward G. Smith. *Economic Evaluation of the Cotton Checkoff Program. Departmental Technical Report 97-2*. Department of Agricultural Economics, Texas A&M University, Page ii. Aug. 1997. Web. 15 Oct. 2010.

²⁵ Capps iii

²⁶ Ward, R.W., *Beef Demand and Its Response to the Beef Checkoff*. University of Florida and the Cattlemen’s Beef Promotion and Research Board, 2001. Gainesville, FL. Page 43.

²⁷ Ward 43.

particular). For instance, in 2003 the Pork Board published a brochure stating that funds were used to market the McDonald's McRib pork sandwich as well as to get pork items on the menu at Taco Bell, T.G.I. Friday's, McDonalds, Burger King, Applebee's and other restaurants.²⁸ The dairy checkoff program has helped Pizza Hut with menu development, including the "Insider Pizza" which contains one pound of cheese per pizza.²⁹ If the programs are successful in driving demand, as the previously mentioned economic studies strongly support, then the government is driving demand for some products that can lead to obesity and further health problems.

Although these issues may seem unrelated to compelled speech, they are, in fact, among the issues that make this type of compelled subsidization so political. Concerns about obesity and health have led to policy changes and campaigns ranging from posting calories on menu items to reassessing school food. These changes are far from neutral and are political in their very nature.

According to the most recent figures on individual programs, checkoff programs range in funding received from assessments around \$600,000 (popcorn in 2011) to \$107.2 million (fluid milk in 2008).³⁰ When compared to government promotion of healthy eating, the promotion programs hold a strong advantage over other campaigns. For instance, the budget for the "5-A-Day" campaign to increase the consumption of fruits and vegetables was just \$1 million dollars in 2002.³¹ In some cases, the boards get directly involved in health campaigns, such as the Dairy Board's involvement in "Fuel Up To Play 60." This in-school program encourages

²⁸ Cawley, John, and Barrett Kirwan. "Agricultural Policy and Childhood Obesity." In John Cawley (editor), *Handbook of the Social Science of Obesity*, (Oxford University Press: New York). Page 488. In press, forthcoming 2011.

²⁹ Cawley 488.

³⁰ "Research and Promotion Programs."

³¹ Nestle, Marion. *Food Politics: How the Food Industry Influences Nutrition and Health*. Berkeley: University of California, 2007. Print.

“consumption of nutrient rich foods”³² as well as physical activity. The National Dairy Council (part of the checkoff program) and the NFL founded the program. Kellogg’s is also a sponsor. While industry involvement in these programs admirable on some levels, product councils’ involvement with health campaigns, particularly in schools, entangles the issues of promoting healthy habits with increasing the demand for a product. This may or may not hold the citizens’ best interests in the forefront.

In another example of health and environmental concerns, the National Pork Board paid the fine that was imposed on any pork farms that violated United States Environmental Protection Agency (EPA) limitations on air pollution from animal feeding operations (AFOs).³³ This meant that there was no incentive to scale back pollution for farms that violated the regulations, as they did not pay any fines out of pocket. Instead, these fines were covered by the checkoff tax, a tax that many farmers in EPA compliance must also pay. In 2006 a coalition of groups know as the Campaign for Family Farms challenged the use of the funds. Although a USDA administrative judge ruled in their favor, a motion for an injunction against the spending of the funds was denied until the appeal was resolved. The checkoff funds were spent before this could occur. Although this case did not proceed further, it is an example of checkoff programs compelling the subsidization of speech that is clearly politically objectionable to many producers.

It must be noted, however, that the funds collected by checkoff programs are subject to legal constraints. In almost every program, using the funds in order to influence government policy is prohibited, which means that the funds cannot be used to lobby for a bill to be passed or

³² "Fuel Up to Play 60." *Fuel Up to Play 60 for Supporters | For Supporters*. Web. 30 Mar. 2011. <<http://supporters.fueluptoplay60.com/>>.

³³ Becker 6

to support partisan candidates. Still, a number of the programs find ways around this. For example, some programs advertise heavily in Washington D.C. publications. In some cases, the program is even housed in the same office as that commodity's trade association, which employs its lobbyists.³⁴

RELEVANT AGRICULTURAL CHECKOFF PROGRAMS

The California Tree fruit Agreement

The California Tree Fruit Agreement (CTFA) began in 1933 but became a federally mandated marketing order through the Agricultural Marketing Agreement Act of 1937. The CTFA administers marketing order programs for California's peach, plum and nectarine farmers.³⁵ This program differs slightly from other checkoff programs because of its operation as a marketing order. Marketing orders are distinguished because they are "legal instruments issued by the USDA Secretary that are designed to stabilize market conditions for certain agricultural commodities by regulation of the handling of those commodities in interstate or foreign commerce."³⁶ In other words, these orders regulate commodities more broadly through requirements for the standardization of quality, packaging and authorized advertising, in addition to funding promotion and research. Although marketing orders do not control pricing or production directly, they are binding on the entire industry, and compliance with them is exempt from antitrust laws that prohibit collusive business practices. The marketing order in question,

³⁴ Becker 5

³⁵ "Get To Know Us: All about the California Tree Fruit Agreement (CTFA) and Growers of Fresh California Peaches, Plums and Nectarines." *California Peaches, Plums and Nectarines with Recipes and Nutrition Facts from the California Tree Fruit Agreement*. Web. 27 Nov. 2010.

³⁶ "Reading Rooms - The National Agricultural Law Center." *The National Agricultural Law Center*. Nov. 2010. Web. 22 Nov. 2010.

<http://www.nationalaglawcenter.org/readingrooms/marketing/>

implemented by the CTFA, is administered through committees of elected representatives, all producers, who direct marketing order-related activities. These activities include production and marketing research, quality control and market development functions. State and federal agricultural departments oversee all actions.

The CTFA applies to more than 900 producers of peaches, plums and nectarines, but the Agreement technically involves three separate marketing orders creating boards regulating the tree fruit industry: the Peach Commodity Committee and Nectarine Administrative Committee, both federal programs, and the California Plum Marketing Board, a state program. All the marketing orders impose a per-box mandatory assessment on all fruit sold. Committees and subcommittees made up of volunteer producers and grower representatives direct the different programs within CTFA. The head committee, known as the Executive Committee, is comprised of the chairperson of each commodity board and the chairpersons of various subcommittees. According to the CFTA website, “the Executive Committee meets monthly and oversees short and intermediate-term decisions and operations.”³⁷ The Executive Committee also makes member appointments to the subcommittees.

Each of the three committees that handle the operations of the CTFA is comprised of thirteen members and thirteen alternates, each who represent a growing district in California. For the Peach Commodity Committee (PCC), members are nominated by each district and must be producers or employees of producers of peaches. Each term on the committee lasts two years and no representative may serve more than three consecutive terms. The PCC oversees the marketing order that authorizes grade, size, container and packing requirements for peaches

³⁷ "CTFA Committee & Subcommittee Functions." *California Peaches, Plums and Nectarines with Recipes and Nutrition Facts from the California Tree Fruit Agreement*. Web. 28 Mar. 2011. <http://www.eatcaliforniafruit.com/about/committees.asp>

grown in California. It also oversees research and development programs. The Nectarine Administrative Committee (NAC) is structured identically for the producers of nectarines. The California Plum Marketing Board (CPMB) has a few differences. Although it is comprised of thirteen members and thirteen alternates, just like the PCC and the NAC, seven of the members and seven of the alternates must be “pure growers.”³⁸ That is, they cannot be part of a commercial packing operation “in which outside growers make up a substantial portion of their pack.”³⁹ Additionally, while the term limits and requirements are the same, the CPMB staggers their terms so that about half the board is replaced each year.

Although the CTFA withstood First Amendment scrutiny in *Glickman*, the past two continuance referenda have failed. In the last referendum in 2003, 60.6% of nectarine producers and 60.7% of peach producers voted to continue the CTFA programs, short of the two-thirds support needed to continue them. However, the only section that was shutdown was domestic marketing. In the referenda results most recently released in late March 2011, 63% of nectarine producers and 62% of peach growers voted to continue the marketing orders. These amounts fell just shy of the two-thirds producer approval required for the marketing orders to continue. Although the support appears to have increased since the last referenda, it is unlikely that Agriculture Secretary Tom Vilsack will extend the programs again. The plum marketing order will not be voted on for another three years but the plum board will be meeting April 8 to discuss the continuance of the program. The termination of the orders means that CTFA will no longer fund research, international marketing programs, annual volume estimates, packout tracking, or

³⁸ "CTFA Committee & Subcommittee Functions."

³⁹ "CTFA Committee & Subcommittee Functions."

category analysis.⁴⁰ These referenda results also suggest that there is indeed division in the ranks of producers about the desirability of checkoff programs.

The Mushroom Promotion, Research and Consumer Information Order

The Mushroom Promotion, Research and Consumer Information Order was authorized by the Mushroom Promotion, Research and Consumer Information Act of 1990. Before the program was implemented, a referendum was held in which both producers and importers voted. After approval in the referendum, the order was implemented on January 8, 1993. A head Council oversees the program. The Council is composed of nine council members, each which represents one of the three production regions in the United States that produce more than fifty million pounds of mushrooms per year. Producers and importers within a region nominate the members of the Council, but the Secretary of Agriculture chooses from these nominations and designates Council membership. Each of the three production regions is entitled to at least one representative. However, the regions may gain or lose members on the council based on the amount of their annual production.

The Council is indirectly in charge of collecting the assessment, which is currently .005 cents per pound, from producers and importers who produce or import over 500,000 pounds of fresh mushrooms annually. The assessment, however, is allowed by the program to be any amount that does not exceed one cent per pound of mushrooms produced or imported. The amount is set each year. Generally, handlers will collect the assessments and deliver them to the Council, but in the case of importers, the assessments are collected by United States customs

⁴⁰ Schrack, Don. "Future of California Tree Fruit Agreement in Jeopardy." *The Packer*. 30 March 2011. Web. 30 Mar. 2011. <<http://thepacker.com/Future-of-California-Tree-Fruit-Agreement-in-jeopardy/Article.aspx?oid=1315096&fid=PACKER-TOP-STORIES&aid=676>>.

officials and then handed over to the Council. While the funds collected from the assessment can be used for "projects of mushroom promotion, research, consumer information, and industry information,"⁴¹ it is undisputed that the majority of the money is spent on generic advertising to promote the sale of mushrooms.

In the early spring of 1998 a continuance referendum was held for the mushroom checkoff program. 80% of the producers and/or importers who voted wanted to keep the program. This 80% represent 70% percent of the total population of producers or importers affected by the program. While this may seem like a large percentage, it means that there were still a substantial number of producers or importers who did not support the program and wished to end it. Some of these producers may have been involved in the *United Foods* case that struck down the generic advertising portion of the program in 2001. From 2001 until the ruling in *Johanns* in 2006, the mushroom checkoff program operated as a mandatory program only to fund research. Contributions for marketing or advertising were completely voluntary. After *Johanns* classified most, if not all, Federal Farm Promotion Programs as government speech, however, the program was able to make assessments for marketing mandatory again. According to the American Marketing Service, the branch of the USDA that oversees the program, the 2011 budget for research and promotion is around \$3.4 million.⁴²

Beef Promotion and Research Order

The Beef Promotion and Research Order, the most recently challenged checkoff program, is authorized by the Beef Promotion and Research Act of 1985 [7 U.S.C. 2901-2918]. The Act was

⁴¹ "Mushroom Promotion, Research, and Consumer Information Act of 1990." (7 U.S.C. 6101 note.) Sec. 1925. Required Terms in Orders. (c)(4)

⁴² "Research and Promotion Programs."

passed as part of the 1985 Farm Bill, which formed several of the Federal Farm Promotion Programs currently in use today. The beef program officially began on July 18, 1986 and assessments began three months later on October 1, 1986. Under the program, anyone selling cattle for meat production (including calves and culled cows from dairy farms) must pay one dollar per head in order to promote the sale of beef, as well as to further the board's research goals. This tax is also collected on all imported cattle and beef products. The dollar amount was established by the original act in 1986 and was approved by 79% of beef producers at the initiation of the program.⁴³ The program that the producers voted on and that the Beef Promotion and Research Act established, however, was originally intended to only to be temporary. In 1988, a majority of producers voted in a referendum to continue it.⁴⁴

The program is overseen by the Cattlemen's Beef Promotion and Research Board, more commonly known as the Cattlemen's Beef Board (CBB). The CBB is supervised by the United States Department of Agriculture and it acts as the head supervisor for the collection of the dollar tax, as well as the distribution of all assessments collected. The CBB also certifies Qualified State Beef Councils (QSBCs) in the forty-five states that currently have them, who then collect the dollar on sales within their state for the CBB. These QSBCs may keep up to fifty cents of each dollar collected in their state; but in states in which there are not QSBCs, the entire dollar must be sent directly to the CBB. Within the CBB, the Beef Promotion Operating Committee approves specific projects and funding.⁴⁵ It is this committee that decides how much money is

⁴³ "Beef Checkoff Questions And Answers." *Cattlemen's Beef Promotion and Research Board - MyBeefCheckoff.com*. Web. 03 Oct. 2010.

⁴⁴ *National Cattlemen's Beef Association*. Web. 03 Oct. 2010.
<http://www.beefusa.org/theanationalcattlemen_sassociation.aspx>.

⁴⁵ "Who We Are - Cattlemen's Beef Board." *Cattlemen's Beef Promotion and Research Board - MyBeefCheckoff.com*. Web. 03 Oct. 2010. <<http://www.beefboard.org/about/whoweare.asp>>.

allotted for generic advertising. The committee is composed of twenty members, ten elected from the CBB and ten producers elected by a federation that includes members of the QSBCs. According to the statute, “the producers elected by the federation shall be certified by the Secretary as producers that are directors of a qualified state beef council.”⁴⁶

One of the generic advertising projects approved by the Beef Promotion Operating Committee was a campaign that was contracted out to a new association, the National Cattlemen’s Beef Association (NCBA). The NCBA was formed by uniting several organizations that had previously operated independently.⁴⁷ There were limitations on how the campaign could be run, since the beef checkoff is designed simply to promote beef generically. The checkoff program cannot promote a particular breed or production type (such as grain-fed versus grass-fed).⁴⁸ With this in mind, the NCBA launched a generic advertising campaign, “Beef, It’s What’s For Dinner,” in 1992. The campaign uses more than half of the total remittances collected by the checkoff program, including the money collected on the state level by QSBCs.⁴⁹ On nearly all of the ads are the words “Funded by America’s Beef Producers.” In the *Johanns* case, the Court refused to address the argument that this wording amounted to attribution to the farmers or producers. The Justices argued that this label was not required and that there was “no evidence from which to conclude that the ads’ message would be associated with respondents.”⁵⁰ Since it seems that most consumers are unaware of these councils, it would be worth asking the Court whom, in that case, they think the ads would be associated with.

⁴⁶ “Beef Research and Information Act.” (7 U.S.C. 2901 note.) Sec. 5. Required Terms in Orders. (4)(a)

⁴⁷ *National Cattlemen's Beef Association*.

⁴⁸ "Beef Checkoff Questions And Answers."

⁴⁹ "Who We Are - Cattlemen's Beef Board."

⁵⁰ *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005)

OVERVIEW OF RELEVANT FIRST AMENDMENT LAW

There have been three main cases that the Court has repeatedly turned to when examining the compelled subsidization of speech, *Abood v. Detroit Bd. of Ed.* (1977), *Keller v. State Bar of Cal.* (1990), and *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.* 1980. Both *Abood* and *Keller* address issues of associations that are neither fully private nor fully public; a teacher's union in the first and the California State Bar Association in the second. Considering the structure of the Federal Farm Promotion Programs, mandatory membership and contributions by private producers that are overseen by the federal government, the use of these two cases seems to be appropriate. Both of these cases examined whether or not the speech in question was private or governmental, the main question addressed in *Johanns*. The Court, however, also uses *Central Hudson*, which considers the First Amendment rights of commercial speech and weighs the rights of commercial versus political speech to analyze the speech issues in these cases. Because of the structure of checkoff programs, lower courts, as well as the Supreme Court, have at one point or another used all of these precedents in ruling on Federal Farm Promotion Programs.

Abood v. Detroit Bd. of Ed., (1977)

Abood v. Detroit Board of Education is a precedent that the courts rely on heavily when considering cases of compelled speech. The case began in Michigan, which had a statute that allowed local government employees to have union representation and also permitted what is known as an "agency shop" arrangement. "Agency shops" require that any employee whose interests would be represented by a union, even if the employee opted out of membership, must pay the union a "service charge equal in amount to union dues" as a "condition of

employment.”⁵¹ In 1969, teachers filed actions in state court against the Detroit Board of Education as well as the teachers’ union because they felt that this charge infringed upon their freedoms of association as protected by the First and Fourteenth Amendment. More specifically, the appellants either were broadly opposed to “collective bargaining in the public sector” or felt that the Union “was engaged in various political and other ideological activities that appellants did not approve of that were not collective bargaining activities.”⁵² The actions were dismissed in trial court for “failure to state a claim upon which relief could be granted.”⁵³ The Court of Appeals reversed and remanded, largely due to a related decision from the Michigan Supreme Court (*Smigel v. Southgate Community School Dist.*, 1972). The court upheld the constitutionality of the agency shop design for unions; but it agreed, “the expenditure of compulsory service charges to further ‘political purposes’ unrelated to collective bargaining could violate appellants’ First and Fourteenth Amendment rights.”⁵⁴ The court, however, felt that “since the complaints had failed to allege that appellants had notified the Union as to those causes and candidates to which they objected, appellants were not entitled to restitution of any portion of the service charges.”⁵⁵

In 1977 the Supreme Court granted certiorari. Justice Potter Stewart delivered the opinion of the Court. Justices William Brennan, Byron White, Thurgood Marshall, William Rehnquist and John Paul Stevens joined him. Justice Lewis Powell wrote an opinion concurring in the judgment joined by Chief Justice Warren Burger and Justice Harry Blackmun. In regard to the judgment, the Court was unanimous in agreeing that, “To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment

⁵¹ *Abood v. Detroit Board Of Education*, 431 U.S. 209, 211 (1977)

⁵² *Abood*, 431 U.S. at 209

⁵³ *Abood*, 431 U.S. at 209

⁵⁴ *Abood*, 431 U.S. at 209

⁵⁵ *Abood*, 431 U.S. at 209

interests.”⁵⁶ There are many examples in which an employee may have political, moral or religious differences with something for which the Union negotiates. But based on precedents (*Railway Employees' Dept. v. Hanson*, 1977 and *Machinists v. Street*, 1961), the Court felt that interference with an employee’s “freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit”⁵⁷ was not so great as to render agency clauses unconstitutional. The Justices stated that interference can be “constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.”⁵⁸

Just because this labor system can often be justified, however, does not mean that it always is. The appellants argued that their government employment ensured them constitutional protections that may not have been as strong in the cases of private sector employees who made similar claims in the past. Second, the appellants argued that collective bargaining within the public sector is inherently political, so that the forced “ideological conformity”⁵⁹ lacking in previous cases (such as *Hanson*) could be found here.

The Court rejected both of these arguments. First, the justices said the reasoning in *Hanson* stemmed not from a lack of governmental action, but from the fact that the Court found no First Amendment violation at all. Next, the Court argued that regardless of the political significance of their work, public employees have no more First Amendment interests than private employees in “not being compelled to contribute to the costs of exclusive union representation.”⁶⁰ In other words, the “uniqueness of public employment is *not in the employees*

⁵⁶ *Abood*, 431 U.S. at 222

⁵⁷ *Abood*, 431 U.S. at 222

⁵⁸ *Abood*, 431 U.S. at 222

⁵⁹ *Abood*, 431 U.S. at 219

⁶⁰ *Abood*, 431 U.S. at 229

nor in the work performed; the uniqueness is in the special character of the employer.”⁶¹ The Court insisted that public employees can still openly disagree with their union and are free to vote as they wish and to participate in all forms of political expression. While it granted that public employee unions are technically political, the Court held that the members and contributing non-members are not denied First Amendment rights by agency shop arrangements because they are still allowed to engage in open political discussion and action.

Nonetheless, the Court did perceive an important First Amendment issue in this case. Justice Stewart wrote that the Michigan State Court’s ruling “avoid[s] facing the constitutional issues presented by the use of union-shop dues for political and ideological purposes unrelated to collective bargaining.”⁶² A portion of the complaint regarded not the service fee itself, but the fact that the service fee was going towards political candidates and political views that were not part of any collective bargaining positions. The Supreme Court examined such use of the fee separately and found it to be unconstitutional. Justice Stewart stated:

The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is 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.

Here, the Court clearly rules that while a union can support or express political views, candidates and ideological causes that do not directly relate to its duty of collective bargaining, the funds to support these things must come from those employees who do not object to these ideas and who

⁶¹ Summers, *Public Sector Bargaining: Problems of Governmental Decision-making*, 44 U.Cin.L.Rev. 669, 670 (1975) (emphasis added) as quoted in *Abood* 431 U.S. 230

⁶² *Abood*, 431 U.S. at 222

were not compelled nor coerced into supporting these activities.

Although the Court holds this to be true, it also notes: “dissent is not to be presumed.”⁶³ Once employees complain, they should receive back the percentage of their fees that is equal to the percentage of the union budget spent on political activities, in keeping with that precedent found in *Street*. But employees must complain for such activities to be deemed improper. This ruling means that while employees can be compelled to pay expenses directly related to collective bargaining, they are constitutionally protected from contributing to political activities that are unrelated to the bargaining representation, if they assert their rights not to do so. Two separate concurring opinions express concern about the Court’s ruling that public employees are no different from private employees in regard to political expression and can be compelled to support collective bargaining. Justice Powell says, “such a sweeping limitation of First Amendment rights by the Court is not only unnecessary on this record; it is, in my view, unsupported by either precedent or reason.”⁶⁴ Although the decision was unanimous, the details of compelled speech are less settled.

Kellerv. State Bar of Cal., 496 U. S. 1 (1990)

Keller v. State Bar of California began in 1982, when California State Bar members made a complaint regarding their “integrated bar” system. Both State Bar membership and dues were required in order to practice law in California. The dues were (and are) used for two things. First, they contribute to self-regulating functions by Bar members (such as rule making and disciplinary actions). Second, the funds are used to “lobby the legislature and other

⁶³ *Abood*, 431 U.S. at 238

⁶⁴ *Abood*, 431 U.S. at 245 (Powell, L., concurring)

governmental agencies, file *amicus curiae* briefs in pending cases, hold an annual delegates conference for the debate of current issues and the approval of resolutions, and engage in educational programs.”⁶⁵ Petitioners claimed that the second use of funds advanced political and ideological causes that they did not agree with and therefore the integrated bar was in violation of both the First and the Fourteenth Amendments. The court granted a summary judgment to the Bar, reasoning that as a government agency, the Bar was allowed to engage in challenged activities under the First Amendment. This classification, however, was less clear than the court made it seem. The status of the Bar is actually not strictly governmental, as it is a partially private and partially public entity. The ruling was challenged and the Court of Appeals reversed, “holding that, while the Bar's regulatory activities were similar to those of a government agency, its ‘administration-of-justice’ functions were more akin to the activities of a labor union.”⁶⁶ This decision was based upon the precedent set in *Abood v. Detroit Board of Education*. The court clarified that mandatory dues could finance the Bar’s secondary activities if and only if the action served a state interest that was greater than the interference with the appellants’ First Amendment rights.

The State Supreme Court reversed the decision. It claimed that the Bar was a government agency and therefore, to limit what it could do under the First Amendment would place an “extraordinary burden” on the organization. The Court held that because of this, the State Bar “may use dues for any purpose within the scope of its statutory authority.”⁶⁷ The Court went on to opine that all the challenged activity fell within the Bar’s statutory authority, with the exception of election campaigning. In fact, the California Supreme Court went to

⁶⁵ *Keller v. State Bar of California*, 496 U.S. 1 (1990)

⁶⁶ *Keller*, 496 U.S. at 1

⁶⁷ *Keller*, 496 U.S. at 7

extremes in its decision. While other federal and state courts have used the *Abood* precedent when examining integrated public/private associations, such as the California State Bar, the California Supreme Court argued that *Abood* did not apply because the Bar was a regulated state agency and therefore “exempt from any constitutional constraints on the use of its dues.”⁶⁸ The Court went so far as to say, “If the bar is considered a governmental agency, then the distinction between revenue derived from mandatory dues and revenue from other sources is immaterial. A governmental agency may use unrestricted revenue, whether derived from taxes, dues, fees, tolls, tuition, donation, or other sources, for any purposes within its authority.”⁶⁹ Here, the Court invoked the relatively novel “government speech” doctrine, which states: “The government must take substantive positions and decide disputed issues to govern. . . . So long as it bases its actions on legitimate goals, government may speak despite citizen disagreement with its message, for government is not required to be content-neutral.”⁷⁰

In 1990 the Supreme Court granted certiorari and reversed the decision yet again. Chief Justice Rehnquist delivered the unanimous opinion the Court. He stated that while “we agree that lawyers admitted to practice in the State may be required to join and pay dues to the State Bar, [we] disagree as to the scope of permissible dues-financed activities in which respondent may engage.”⁷¹ The Court points out that while the State Bar may be a governmental agency in certain respects, it also is fundamentally different than most other agencies. It receives the majority of its funding from dues rather than appropriations; lawyers must be members and only lawyers can be members; and according to California law, the Bar can only play an advisory role on who is admitted, who is suspended, who is disbarred and what the proper ethical code of

⁶⁸ *Keller*, 496 U.S. at 10

⁶⁹ California Supreme Court decision as quoted in *Keller*, 496 U.S. at 10

⁷⁰ *Keller*, 496 U.S. at 10

⁷¹ *Keller*, 496 U.S. at 4

conduct should be. These decisions ultimately lie with the California Supreme Court. The Court then goes on to point out that while the analogy between the Bar and government agencies is weak in important respects, the comparison between State Bar members and union members is much stronger. Therefore, the Court feels justified in applying the *Abood* precedent.

The Court states that according to *Abood*, a union “could not expend a dissenting individual's dues for ideological activities not ‘germane’ to the purpose for which compelled association was justified: collective bargaining.”⁷² In regard to the State Bar, the Court said that compelled association was justified because the State has an interest in overseeing and improving the legal profession and services. So long as dues are spent on activities germane to that goal, there can be no constitutional challenge. If the spending falls outside of this goal, however, lawyers may be entitled to a refund of a percentage of their dues, if they let their dissent be known.

In response to the California State Supreme Court’s belief that the use of *Abood* would result in an “extraordinary burden”⁷³ on the Bar and the State, the Court acknowledges that there is no current example of procedures to adopt in order to limit this burden. The Justices also believe, however, that other cases (such as *Chicago Teachers Union v. Hudson, 1986*) could offer guidance. The attitude of the Court is that it is up to the State Bar to create procedures to fulfill their constitutional obligations.

The Court’s reasoning to apply *Abood* to decide *Keller* further suggested that these cases would be appropriate to examine the compelled subsidization of speech issues raised by checkoff programs. Much like Union or State Bar members, agricultural producers are required to contribute to entities that are overseen by the government and that are supposed to represent their

⁷² *Keller*, 496 U.S. at 13

⁷³ California Supreme Court decision as quoted in *Keller*, 496 U.S. at 7

best interests. However, when ideological differences arise in unions or Bars, the members (or contributing non-members) have been granted the constitutional right to opt out of such programs. It seems reasonable that the same logic could be applied to producers. Instead of this logic, however, the Court subsequently chose to interpret the checkoff programs in *Johanns* as subject to greater governmental authority to classify the speech as strictly governmental, and therefore to treat *Abood* and *Keller* as irrelevant.

Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y., (1980)

Intervening between these two similar decisions was another case that the courts have also turned to in deciding cases related to Federal Farm Promotion Programs. In *Central Hudson Gas and Electric Corporation v. Public Service Commission* (1980), the Court lays out a four-part test, now referred to as the “Central Hudson Test.” It determines when restrictions of commercial speech violate the First Amendment. The test asks:

1. Whether the commercial speech at issue concerns lawful activity and is not misleading, conditions necessary for it to be entitled to First Amendment protection.
2. Whether or not the government interest in regulating the speech is substantial.
3. Whether the regulation in question directly advances the governmental interest asserted.
4. Whether the regulation is no more extensive than necessary to serve that interest.

Central Hudson began in December 1973 when the New York Public Service Commission ordered electric utility companies in the state to stop advertising to encourage the use of electricity. Institutional and informational advertising were still allowed, that is,

advertising “not clearly intended to promote sales.”⁷⁴ All advertising “intended to stimulate the purchase of utility services,”⁷⁵ however, was banned. The Commission’s order was a reaction to a shortage of supplies to meet demand for that winter, shortages severely compounded by the OPEC oil embargo that year. Neither oil producers nor suppliers were similarly restricted. Furthermore, the ban was intended to last beyond the foreseen winter shortage and extended to times of low demand as well. The electric company, Central Hudson Gas and Electric, challenged the order in the New York state court, claiming that it violated its First Amendment rights by excessively limiting commercial speech. The order was upheld in trial court, the intermediate appellate level court, and the state Court of Appeals. These rulings were largely based upon the fact that Central Hudson held a monopoly over the sale of electricity in the region. The courts reasoned that a “noncompetitive market” did not require an open flow of commercial information, as there was no need for information to sway already captive consumers. The court also felt that the state’s interest in limiting demand for electricity was substantial.

In 1980, the Supreme Court granted certiorari and reversed. Justice Powell wrote for the majority. Concurring opinions came from Justices Brennan, Blackmun and Stevens. Justice Rehnquist was the only dissenter. Justice Powell defined commercial speech as “expression related solely to the economic interests of the speaker and its audience.”⁷⁶ Under the First Amendment (as applied to the states through the Fourteenth Amendment), this type of speech, though not an absolute right, is protected from “unwarranted governmental regulation.”⁷⁷ This

⁷⁴ *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 559 (1980)

⁷⁵ *Central Hudson*, 447 U.S. at 559

⁷⁶ *Central Hudson*, 447 U.S. at 561

⁷⁷ *Central Hudson*, 447 U.S. at 561

protection stems from the Court's belief that access to information, even advertisements that amount to no more than proposals for economic transactions is better than closing all access. Justice Powell, however, also points out that the Court "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation."⁷⁸ Still, as long as the commercial speech is not misleading and not related to unlawful activity, the government must have a substantial interest to restrict it, and the restriction must directly serve that interest. According to precedents, "the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." Furthermore, "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive."⁷⁹ These propositions provide the key components of the test outlined above.

The Court rejected the New York Court of Appeals' decision to uphold the restrictions based on the fact that Central Hudson has a monopoly on electricity. As the Court points out, electric companies must still compete with other energy suppliers (oil and natural gas), and advertising can influence a consumer's choice over which energy method to choose. Furthermore, a monopoly enterprise may have reason to advertise new services or developments, and consumers may find this information useful. Just because Central Hudson has a monopoly over the supply of electricity does not mean that it no longer has any First Amendment protection for its commercial speech.

Justice Powell's opinion did accept that the state of New York had substantial interests in conserving energy and in keeping rates fair and efficient. He believed, however, that the

⁷⁸ *Central Hudson*, 447 U.S. at 563

⁷⁹ *Central Hudson*, 447 U.S. at 564

complete restriction of this commercial speech by the state was not narrowly tailored enough to serve only these goals. Justice Powell concluded, “In the absence of a showing that more limited speech regulation would be ineffective, we cannot approve the complete suppression of Central Hudson's advertising.”⁸⁰

Because the Central Hudson Test was devised to determine when commercial speech would receive First Amendment protection, it is not entirely appropriate when considering checkoff programs. These programs involve speech that is undeniably commercial, but it is also political, something that the courts have repeatedly failed to acknowledge. *Central Hudson* provides a test that requires regulations to survive intermediate scrutiny, a bar that is not high enough to protect producers from being required to finance speech that is political in nature and which is being attributed back to them. Even so, *Central Hudson* does justify some heightened scrutiny of these programs due to commercial speech concerns alone. Recently, the Court has instead used its new “government speech” doctrine to exempt the programs almost entirely from any kind of close judicial scrutiny.

CASE HISTORY OF CHECKOFF PROGRAMS

In the past thirteen years, the Supreme Court has granted certiorari to eight cases that deal with the issue of “the compelled subsidization of speech.”⁸¹ These cases have all examined checkoff programs, but each one has offered a different logic on how to address these programs. The Court has examined the three cases it did not remand, *Glickman v Wileman Bros. & Elliott* (1997), *United States v United Foods, Inc.* (2001), and *Johanns v. Livestock Marketing Assn.* (2005), quite differently. The *Glickman* program was seen as permissible due to its broader

⁸⁰ *Central Hudson*, 447 U.S. at 571

⁸¹ Post 175

regulatory oversight. The program in *United Foods* was struck down because the assessments went almost exclusively to subsidizing generic advertising (speech), rather than to fund other regulations. The standing precedent, however, is *Johanns*, which for the first time focused on whether or not the generic ads were “government speech.” The Court ruled that they were, and it therefore sharply limited the amount of protection that producers have against the compelled subsidization of such speech. This ruling has contributed significantly to the emerging doctrine of government speech, but it is questionable whether this was an appropriate categorization of these programs.

Glickman v Wileman Bros. & Elliott (1997)

The Agricultural Marketing Agreement Act of 1937 established the marketing order for California peaches, nectarines and plums. The California Tree Fruit Agreement, which handled the administration of the order, had run on the state level since 1933. As previously noted, the CTFA provided for a variety of regulatory actions, including controlling the quality and/or quantity of the products marketed, creating and applying grade and size standards for the fruits, handling surpluses, standardizing packing, and research and development. Before being implemented, the program needed the approval of producers who collectively marketed at least two-thirds the volume of these California tree fruits, as they would be responsible for paying the checkoff tax. From there, a committee selected by the Secretary of Agriculture would run the program. The marketing orders and their promotional activities/generic advertising were intended to serve the producers’ common interest.

The case originated in 1987 when the eventual respondent, Wileman Bros & Elliott, refused to pay the assessment due to problems meeting the maturity and minimum size standards

of the orders for some of the fruit varieties they were growing. The company petitioned the Secretary and did so again the following year, arguing that they should not be compelled to pay the assessments for a program that is thought imposed inappropriate requirements. The second time, the company added complaints regarding the generic advertising program. The complaints were that “less than fifty percent of the advertising assessments were used for generic ‘eat California fruit’ advertising, while more than fifty percent of the advertising assessments were used to promote specific varieties of fruits that benefited only a limited number of handlers.”⁸² The respondents also argued that the advertisements from the CTFA were misleading because they “implied that there were no differences in taste and quality among different varieties of fruit” and often only promoted varieties of the fruit that the members on the committees produced.⁸³ The company also pointed out that although around half of the states in America produce nectarines, peaches or plums, that California farmers were the only ones required to pay mandatory checkoff assessments. Lastly, the producers protested the content of an ad that they felt contained a sexually subliminal message of a young girl in a wet bathing suit. This last concern, by far the most political, demonstrates that producers were being compelled to subsidize speech with which they ideologically disagreed. In two separate decisions, the Administrative Law Judge ruled in Wileman’s favor but without resolving the First Amendment claim. A Judicial Officer of the Department of Agriculture reversed this decision. Wileman then filed a challenge in a federal District Court, which upheld both marketing orders and ordered \$3.1million in past due assessments be paid.

⁸² Schoen, Edward J. et al., Glick v. Wileman Bros. & Elliott: *California Fruit Marketing Orders Prune the First Amendment*, 10 Widener J. Pub. L. 21 (2000). Page 27.

⁸³ Schoen 27

Wileman appealed this decision, arguing that the generic advertising program violated both the Administrative Procedure Act and the First Amendment. The court rejected these claims, reasoning that the committee that decided on the generic advertising was representative of its industry and would not seek to disadvantage it. The Court of Appeals did recognize that the committee might not represent each and every producer, but it claimed that the “Supreme Court ‘upheld the constitutionality of the system despite the fact that it may produce results with which some growers or handlers will disagree.’”⁸⁴ The Court of Appeals did conclude, however, that government-enforced contributions to pay for generic advertising violated the First Amendment rights of the handlers. It did not believe that the program could withstand the Central Hudson Test from *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.* Although the court accepted that the program involved lawful commercial speech and that the government had a substantial interest in regulating the speech, the judges thought it failed to satisfy the remaining prongs of the Central Hudson test. The government’s interest was not very directly served, and the infringements on free speech rights resulting from mandatory payments for generic advertising were more strict than necessary. Although this advertising had a positive impact on fruit sales, the government could not prove that it was more effective than un-coerced private advertising would have been. Additionally, the program could not be considered narrowly tailored. Therefore, the ruling that reached the Supreme Court was not about the content of the message per se, but about its effectiveness in advancing public goals.

The Supreme Court used this as a reason to reverse the decision. The majority felt that the First Amendment did not bar Congress and the Executive from deciding that the compelled

⁸⁴ *Saulsbury Orchards and Almond Processing, Inc. v. Yeutter*, 917 F. 2d 1190, 1197 (9th Cir. 1990) as quoted in *Glickman*, 521 US 465

contribution to the marketing order did serve a substantial governmental interest in the flourishing of the fruit industry. In its 5-4 decision, the Supreme Court rejected the way the legal issues had been framed by the Third Circuit Court of Appeals. The justices in the majority stated that they neither

Accept nor reject the factual assumption underlying the Court of Appeals' invalidation of the program—namely that generic advertising may not be the most effective method of promoting the sale of these commodities. The legal question that we address is whether being compelled to fund this advertising raises a First Amendment issue for us to resolve, or rather is simply a question of economic policy for Congress and the Executive to resolve.”⁸⁵

The Court denied that there was a First Amendment issue by stressing that the speech was a small part of a statutory program that included regulation of much more than just generic advertising. Therefore, the Court reasoned that the producers' pertinent economic activities and expenditures were already constrained under a broader regulatory scheme. Furthermore, the majority rejected the Court of Appeals' reasoning that protected speech can nonetheless exist within such a broad regulatory scheme. This was the first checkoff program case to reach the Supreme Court, but the majority was already unreceptive to the idea that this type of speech deserves protection. By classifying the concerns as issues of economic policy properly decided by the other branches of government, the Court failed to recognize the political nature of this compelled speech.

The decision, delivered by Justice Stevens, indicated that regulatory schemes raise distinctive kinds of First Amendment issues when they raise First Amendment issues at all, and

⁸⁵ *Glickman*, 521 U.S. at 468

that the Court has been known to uphold abridgments of the freedom of speech in some of these cases. The type of regulatory scheme involved in this case—marketing orders—differed from many other Federal Farm Promotion Programs, because they broadly regulated the entire industry involved. They were expressly exempt from antitrust laws precisely because they were more all-encompassing than programs designed just around promotion and research. Justice Stevens then identified three reasons why the program’s marketing orders did not violate the First Amendment. First, these programs “impose no restraint on the freedom of any producer to communicate any message to any audience.”⁸⁶ The Court does not generally recognize the imposition of economic costs as raising First Amendment concerns. Although there are many burdens imposed by such marketing orders and taxes, none require heightened scrutiny by the Court. Second, the acts do not “compel any person to engage in an actual or symbolic speech.”⁸⁷ Lastly, “they do not compel the producers to endorse or finance any political or ideological views.”⁸⁸

All three of these defenses are problematic. First, although it is true that producers are still free to communicate other messages, they are nonetheless compelled to divert resources that they might use to pay for communications expressing their own views in order to pay for speech that in contrary to their beliefs. This does seem to be a burden on their freedom to communicate. Second, the Court goes on to further address attribution, arguing that “respondents are not required themselves to speak, but are merely required to make contributions for advertising” and “the advertising is attributed not to them, but to the California Tree Fruit Agreement or

⁸⁶ *Glickman*, 521 U.S. at 469

⁸⁷ *Glickman*, 521 U.S. at 469

⁸⁸ *Glickman*, 521 U.S. at 469-470

‘California Summer Fruits.’”⁸⁹ It seems likely, however, the most consumers are more likely to connect “California Summer Fruits” with fruit producers than they are with the government. However, even if the advertisements were attributed to the U.S. Government or the USDA, this would not change the largest problem with these programs. While attribution is a major concern, even clearer ascription to the government would still result in a program in which producers would be forced to fund speech with which they fundamentally disagree. And lastly, and perhaps most importantly, the speech is clearly in part political, contrary to the insistence of the government and Justice Stevens that none of the views conveyed by the ads can be seen as political or ideological. Food, however, has been becoming increasingly politicized since the 1980s, if not earlier. There are health concerns, malnutrition concerns, obesity concerns, worker concerns and environmental concerns about food production, and not all California fruit producers have the same views on these issues or on the production practices of many of their fellow growers. It is not so hard to believe that some producers may ideologically object to the speech or the goals pursued by the national boards to which they are forced to contribute, especially when the expression in question helps to enrich members of the industry engaged in practices that these producer believe to be contrary to the public interest, not simply their own interests.

United States v United Foods, Inc. (2001)

Just four years later, the Supreme Court heard a similar case, *United States v. United Foods, Inc.* (2001). United Foods, Inc., a company in Tennessee, refused to pay an assessment required under the Mushroom Promotion, Research, and Consumer Information Act. The

⁸⁹ *Glickman*, 521 U.S. at 471

company argued that the forced subsidization for generic advertising violated its First Amendment rights. When United Foods sought review in the District Court, the government was granted a favorable summary judgment. The decision to uphold the program was based on *Glickman v Wileman Bros & Elliott*. The Sixth Circuit Court of Appeals reversed, holding that the mushroom program was not “part of a comprehensive statutory agricultural marketing program”⁹⁰ and therefore, the *Glickman* decision could not be applied. The main difference in the programs was that the California Tree Fruit program in *Glickman* existed under strict marketing orders that controlled competition “to such an extent that they had an antitrust exemption.”⁹¹ The mushroom program was significantly different. For example, “there are no marketing orders regulating mushroom production and sales, no antitrust exemption, and nothing preventing individual producers from making their own marketing decisions. Mushroom growers are not forced to associate as a group that makes cooperative decisions.”⁹² In other words, members who were compelled to join the California Tree Fruit Marketing Program were funding not just generic advertising, but other regulatory functions as well. The mushroom producers, on the other hand, were required to support a program that had as its only real purpose the generic advertising that they opposed.

In a surprising 6-3 decision, the Supreme Court upheld the ruling from the Sixth Circuit Court of Appeals. Justice Kennedy wrote for the Court and opened by immediately differentiating this case from *Glickman*. He recognized that “the assessments can be used for ‘projects of mushroom promotion, research, consumer information, and industry information,’” but stressed that “it is undisputed, though, that most monies raised by the assessments are spent

⁹⁰ Sixth Circuit Court of Appeals from *United States*, 533 U.S. at 405

⁹¹ *United Foods*, 533 U.S. at 405

⁹² *United Foods*, 533 U.S. at 408

for generic advertising to promote mushroom sales.”⁹³ This statement, at the very opening of the decision, seeks to depart from *Glickman* and redefine the mushroom checkoff program as not part of a broader regulatory scheme and as a program whose main purpose is speech. This distinction preserved the Court’s decision in *Glickman* and allowed the government still to compel the funding of speech whenever that requirement is connected to a broad, regulatory scheme.

Justice Kennedy next defended the Court’s protection of this speech despite its commercial nature. His opinion affirms that commercial speech, or “speech that does no more than propose a commercial transaction, is protected by the First Amendment,” although it is less protected than other types of speech.⁹⁴ Even with this lowered scrutiny, however, the Court finds this program to be unconstitutional. Moreover, Justice Kennedy and the Court deem it unnecessary to analyze the program under *Central Hudson* because the government did not rely on that test. Instead, the Court claims that the real consideration here 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.” The very clear answer from the Court at this time is no, though *Johanns* would soon produce a different result. In this case, however, Justice Kennedy states “just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views or from compelling certain individuals to pay subsidies for speech to which they object.”⁹⁵ Here, the Court feels that the government has

⁹³ *United Foods*, 533 U.S. at 408

⁹⁴ *United Foods*, 533 U.S. at 409

⁹⁵ *United Foods*, 533 U.S. at 410

no substantial interest in whether or not a branded mushroom is better or worse than a generic one, and without this interest the program's compelled expression cannot survive.

In this case, as in *Glickman*, the Court observes "the party who protests the assessment here is required simply to support speech by others, not to utter the speech itself."⁹⁶ Still, the Court concludes 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."⁹⁷ While the final ruling seems appropriate here, it is surprising that the Court continues to insist that the speech is not attributed to the producers. Even more disappointing is that the Court continues to stress, following *Abood* that "speech need not be characterized as political before it receives First Amendment protection."⁹⁸ That position permits the Court to fail to confront whether this expression really is political speech, at least in part.

In his closing, Justice Kennedy unequivocally states that the Court is not classifying these advertisements as government speech, but neither is it rejecting the possibility that such ads could be so classified in the future. This is because in this case, the government attempted to make the "government speech" argument for the first time in front of the Supreme Court, without having introduced the argument in any of the lower courts. Often, the Court declines to consider on appeal new doctrinal claims, such as this one, that may change the outcome of a case. It is worth noting, however, that the government speech argument had been made in *Keller* and dismissed because the State Bar did not have enough of the characteristics of a government agency. Nonetheless, the attitude from the Court that this strictly commercial speech is nearly as

⁹⁶ *United Foods*, 533 U.S. at 413

⁹⁷ *United Foods*, 533 U.S. at 413

⁹⁸ *United Foods*, 533 U.S. at 413

damaging to the First Amendment protection of producers as the characterization of the advertisements as “government speech” would be. The Court continues to fail to recognize that speech regarding food and how food is produced is inherently political and therefore deserves a heightened level of scrutiny.

Johanns v. Livestock Marketing Association (2005)

In 2005 the Supreme Court ruled in *Johanns v. Livestock Marketing Association* that a checkoff program that required a one-dollar per head of cattle mandatory tax used to finance generic advertising was constitutional. The 6-3 decision upheld the Beef Act which imposed the tax and said that the congressionally mandated funding requirement did not violate constitutional protections against coerced speech, since the advertising could fall under the category of government speech. This was the first of the three cases in which the Court considered this classification in any detail and its use meant that the precedent set in *United Foods* was effectively overturned. This new approach further limited the rights and protections of producers against subsidizing speech to which they are opposed.

The respondents, the Livestock Marketing Association, the Western Organization of Resource Councils, and several independent cattle farmers, first petitioned the United States Department of Agriculture (USDA) and the CBB in 2000, seeking another referendum to vote on the continuation of the checkoff program. In response to the petition, the CBB issued a statement that said rather defiantly that it would “significantly increase the expenditures on producer communications, or political messages supporting the checkoff and discouraging cattle producers from supporting a referendum.”⁹⁹ When the actual suit was filed, it was fourteen

⁹⁹ Brief for Respondents in Opposition, supra note 21, at 8-9. As quoted by Marshall at 368

months after the petition and there was still no referendum scheduled. The original suit challenged only the government's administration of the Beef Act and said that the CBB used checkoff funds to send communications to beef producers that promoted the beef program.¹⁰⁰ The original case made no claims regarding free speech per se. These were added and addressed in the lower courts only after the Court ruled in *United Foods*.

With the *United Foods* decision to strike down a similar program on its side, the Livestock Marketing Association decided to broaden its complaint to include a claim that the checkoff program and the "Beef, It's What's For Dinner" advertising campaign violated their free speech rights through the tax that funded generic advertising. Their main claim was that the promotion of beef as a generic commodity impeded their ability to promote American raised cattle since the campaign made no distinctions about where cattle were raised. In fact, an officer on the Beef Board said, "Consumers might actually have a preference for American beef. That would be irrational. We don't want that."¹⁰¹ The generic advertising of beef benefited imported beef as well; but many beef producers felt that they should be able to feature their American raised cattle, appealing to national pride and to the desires of many consumers to purchase in ways that benefit the American economy. The protection of American interests has long been a political debate and many producers fundamentally believe that American goods (even cattle) should be favored when in competition with foreign goods. The beef producers felt that they were not being given this chance.

The Federal District Court in South Dakota decided in favor of the Livestock Marketing Association, ruling only on the First Amendment Claim without addressing the administration

¹⁰⁰ Marshall

¹⁰¹ Transcript of Record at 32, *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005) (No. 03-1164).

claims made under the Administrative Procedure Act (APA). Therefore, the higher courts' rulings were based strictly on the First Amendment. The court said that the checkoff program was unconstitutional because it compelled farmers to finance speech with which they might not agree, the precedent handed down from *United Foods*. Furthermore, the court dismissed the claim that the program survived First Amendment scrutiny by being government speech. It stressed that the advertising funds were derived from targeted checkoffs rather than general tax revenue. Therefore, it could not be said that the producers were not distinctively burdened to support the expression with which they disagreed. The court held that even the classification of government speech should not prevent First Amendment scrutiny in cases of such specifically compelled speech. Lastly, the court pointed out that while the government may have oversight of the boards and the advertisements that they produced, the boards themselves were made up of private individuals, not government employees. The decision issued a permanent injunction that prohibited any future collection of the checkoff, even voluntary payments.

The government appealed and the case went to the Court of Appeals for the Eighth Circuit. The Eighth Circuit Court affirmed the previous ruling but did not say that the ads could not qualify as government speech. Instead, they ruled that, "government speech status is relevant only to First Amendment challenges to the speech's content, not to challenges to its compelled funding."¹⁰² The court additionally stated that, "Compelled funding of speech may violate the First Amendment even when it is the government's speech."¹⁰³ Moreover, the Court said, "Central Hudson's intermediate scrutiny standard provides the appropriate framework for assessing the constitutionality of such compelled funding."¹⁰⁴ The use of this test, however,

¹⁰² *Johanns*, 544 U.S. at 556

¹⁰³ *Johanns*, 544 U.S. at 550

¹⁰⁴ Federal Petitioners' Brief, *supra* note 18, at 10. As quoted by Marshall at 370

implies that the court categorized the speech in question as commercial. The Court's reason for doing so was likely that it felt that, "the Beef Act is, in all material respects, identical to the Mushroom Act at issue in *United Foods*, and its principal object is speech itself."¹⁰⁵ Again, however, the Court did not recognize the political dimension of the speech in question.

In its ruling the Eighth Circuit disregarded the doctrine formed by *United Foods, Inc* that had prompted a great number of lower-court decisions. The doctrine, which Robert Post calls the "compelled subsidization of speech doctrine," asserts that "First Amendment scrutiny is triggered whenever someone is forced to pay for speech that she finds objectionable."¹⁰⁶ Seeing the radical suggestion in this doctrine that "constitutional scrutiny is required every time a tax payer disagrees with government messages supported by her tax dollars,"¹⁰⁷ the Eighth Circuit refused to use it. Nonetheless, it held that "government speech does not preclude First Amendment scrutiny in the compelled speech context."¹⁰⁸ The decision to strike down the program on these new grounds drew immediate attention and the Supreme Court granted certiorari when the government appealed the decision from the Eighth Circuit.

In a 6-3 decision, the Supreme Court reversed the decision of the previous two courts. Justice Antonin Scalia wrote the opinion for the Court and was joined by Chief Justice Rehnquist and Justice O'Connor while Justice Thomas wrote a concurring opinion that was joined by Justice Breyer. Justice Ginsberg also wrote a concurring opinion. Justice Souter filed a dissenting opinion and was joined by Justices Stevens and Kennedy. Justice Scalia wrote that this was the first time that the Court had examined if government compelled financing of

¹⁰⁵ Brief for Respondents in Opposition, *supra* note 21, at 9-10. As quoted by Marshall at 370

¹⁰⁶ Post 196

¹⁰⁷ Post 196

¹⁰⁸ Post 197

government speech could be constitutional.¹⁰⁹

Justice Scalia wrote that this was the first time that the Court had examined whether government-compelled financing of government speech could be constitutional. He noted that the Court had, however, previously heard cases on “compelled speech” (such as forcing someone to recite the Pledge of Allegiance) and “compelled subsidy” (such as required fees that would pay for political messages) and it had ruled both to be unconstitutional. Justice Scalia acknowledges that the Court also struck down a similar checkoff program in *United Foods*. He says, however, that in “all of the cases invalidating exactions to subsidize speech, the speech was, or was presumed to be, that of an entity other than the government itself.”¹¹⁰ Justice Scalia goes on to contend that as general taxes prove, the government has long used compelled funds to put out messages with which some taxpayers may not agree. Therefore, the real distinction made in this case was that of compelled private speech versus compelled government speech, rather than the distinction between commercial and political speech that was used in *United Foods*. This argument fails to address, however, that in this case, the speech is financed by a specific, targeted group, not general taxpayers. This makes the application of the “government speech” doctrine especially suspect in *Johanns*.

These distinctions between commercial and private speech and governmental and political speech are logical and worthwhile ones to make in many contexts, but the here Court fails to acknowledge that speech may not be completely one or the other. The classification of speech largely occurs on a sliding scale. The CBB’s expression, for instance, could be considered “semi-private” and partly political speech, as could the speech addressed in both *Aboud* and *Keller*. The court dismissed these possibilities by arguing that the campaign was still

¹⁰⁹ *Johanns*, 544 U.S. at 550

¹¹⁰ *Johanns*, 544 U.S. at 559

government controlled. The fact that the advertisements were paid for by targeted fees and not general revenue was irrelevant to the Court because it claimed that the compelled subsidy analysis it uses is unaffected by the differentiation of general and targeted taxes. The majority opinion goes so far as to say "respondents enjoy no right not to fund government speech-whether by broad-based taxes or targeted assessments, and [regardless of] whether or not the reasonable viewer would identify the speech as the government's."¹¹¹ This debatable claim about the "reasonable viewer" is soon treated as irrelevant, however, because Justice Scalia goes on to say, "Since neither the Beef Act nor the Beef Order *requires* attribution, neither can be the cause of any possible First Amendment harm."¹¹² The problem with Justice Scalia's argument is that the lack of a legal requirement for such attribution does not change the reality that the attribution is occurring either directly or through implication. Regardless of whether there is a legal requirement for the attribution, it is happening and the practice should be recognized as a valid concern.

The Supreme Court's *Johanns* ruling also directly rejects the Court of Appeals' view that the case is fundamentally similar to *United Foods*. Justice Scalia claims that *United Foods* assumed that the speech being compelled was private, not the government's. He also notes that the *Abood* and *Keller* precedents held that a compelled subsidy could only be constitutional if it was "'germane' to a 'broader regulatory scheme.'" Because the mushroom checkoff failed the germaneness test, it was struck down. Therefore, Justice Scalia concludes, the Court's "compelled-subsidy cases have consistently respected the principle that '[c]ompelled support of a

¹¹¹ *Johanns*, 544 U.S. at 564

¹¹² *Johanns*, 544 U.S. at 565. Emphasis in original.

private association is fundamentally different from compelled support of government."¹¹³ Here, he insists, it is compelled support of government and government speech that is in question.

Scalia's argument is, however, really about the changed arguments and changed interpretations concerning the First Amendment in these cases, not about any fundamental differences between the checkoff programs. The programs themselves are nearly identical. The Court repeatedly defends the compelled subsidization of *government* speech, which is why these cases comprise pillars of the emerging government speech doctrine. Again, however, it is worth questioning whether or not this government classification is appropriate for Federal Farm Promotion Programs, both because of the attribution and financing of the speech and, despite the Court's denial, because of the political and ideological implications of the speech being compelled.

As Justice Souter points out in his dissent, the ranchers disagree with the advertising campaign because it "ignores the fact that not all beef is the same."¹¹⁴ He goes on to say that this case does align quite well with *United Foods*, in which the Court

left open the possibility that a compelled subsidy would be justifiable not only as one element of an otherwise valid regulatory scheme, but also as speech of the Government itself, which the Government may pay for with revenue (usually from taxes) exacted from those who dissent from the message as well as from those who agree with it or do not care about it.¹¹⁵

In this case, the government did indeed claim this ad campaign as its own speech.

¹¹³ *Johanns*, 544 U.S. at 559

¹¹⁴ *Johanns* 544 U.S. at 571 (Souter, D., dissenting)

¹¹⁵ *Johanns* 544 U.S. at 571 (Souter, D., dissenting)

But Justice Souter disagreed that “government speech” status alone was sufficient to legitimate the compulsory subsidization of the expression in question. He wrote, “The Court accepts the defense unwisely. The error is not that government speech can never justify compelling a subsidy, but that a compelled subsidy should not be justifiable by speech unless the government must put that speech forward as its own.”¹¹⁶ Justice Souter goes on to say that if the government wishes to compel a subsidy for speech, they must also be willing to accept political responsibility for the speech in question and claim its message as the government’s own. Attribution seems to be the main issue that Justice Souter would need to see changed in order for him to have joined the Court’s decision.

Justice Souter’s dissent then criticizes how the Court invokes the government speech doctrine, which he claims only has two points in this early stage of its development. First, the doctrine holds that the government has a right, and sometimes a need, to produce speech that some of its citizens dispute. Second, the doctrine holds “that the First Amendment interest in avoiding forced subsidies is served, though not necessarily satisfied, by the political process as a check on what government chooses to say.”¹¹⁷ Justice Souter points out, however, that the democratic checks of the political process do not apply in the case of targeted tax assessments because unlike the mass of general taxpayers, the groups assessed are often too small to be able to hold the government politically accountable through their votes. Additionally, the attribution of the speech gives other citizens no reason to believe that these ads are government speech or to become politically engaged in challenging the programs. As Justice Souter asks, “why would a person reading a beef ad think Uncle Sam was trying to make him eat more steak?”¹¹⁸ He goes

¹¹⁶ *Johanns* 544 U.S. at 571 (Souter, D., dissenting)

¹¹⁷ *Johanns* 544 U.S. at 575 (Souter, D., dissenting)

¹¹⁸ *Johanns* 544 U.S. at 577-578 (Souter, D., dissenting)

on to say, “Given the circumstances, it is hard to see why anyone would suspect the Government was behind the message unless the message came out and said so.”¹¹⁹ Although the rest of the Court believes that the need for democratic accountability is met through government oversight, Justice Souter clearly feels that taxpayers do not realize that they should even be holding the government accountable for these ads.

ARGUMENTS AND CONCLUSIONS

Post’s focus on CSSD, Marshall’s desire to reclassify the speech as commercial, and Justice Souter’s belief that the key to invoking the government speech doctrine is attribution and accountability, are all arguments that address the Court’s problematic ruling in *Johanns*. Each of these arguments fails, however, to recognize one fundamental issue at play. As indicated throughout this analysis, over the past few decades, food has become an increasingly political issue. The popular news website and content aggregating blog, The Huffington Post, now has a page entitled *Food Politics* with the subtitle “some news is so big it needs its own page.”¹²⁰ Additionally, Michael Pollan, a professor at the University of California, Berkeley and author of well-known books *The Omnivore’s Dilemma* and *In Defense of Food: A Eater’s Manifesto*, also published an article entitled “The Food Movement, Rising” in the *New York Review of Books* that reviewed five books about food politics. As Marion Nestle, fellow author and professor at New York University, points out: “the fact that the New York Review of Books thinks the food revolution is worth writing about is an indication of how far this movement has come.”¹²¹ What

¹¹⁹ *Johanns* 544 U.S. at 578 (Souter, D., dissenting)

¹²⁰ “Food Politics : Pictures, Videos, Breaking News.” *Breaking News and Opinion on The Huffington Post*. Web. 05 Apr. 2011. <<http://www.huffingtonpost.com/news/politics-of-food>>.

¹²¹ Nestle, Marion. “Food Politics » Michael Pollan Writes about the Food Revolution.” *Food Politics*. 23 May 2010. Web. 06 Apr. 2011. <http://www.foodpolitics.com/2010/05/michael-pollan-writes-about-the-food-revolution/>.

consumers buy, along with what producers grow and advertise, are much more heavily freighted with political implications than these matters used to be. The emergence of terms like “locavore,” “fairtrade,” “gmo free,” and “organic” indicate that there is even more of a growing awareness about where our food comes from, how it got to us and the consequences of our food purchasing patterns for health, worker welfare, animal rights, and the environment.

Therefore, while the critical arguments made by Justice Souter and these scholars, examined in greater detail below, are all valid claims, they do not recognize speech about food in the new way that it has appeared in America— as expression concerned with highly political issues that deserves the classification of political speech. Despite Justice Steven’s claim in *Glickman* that checkoff programs “do not compel the producers to endorse or finance any political or ideological views,”¹²² many producers do oppose the goals of the councils for political or ethical reasons. In today’s food culture it is not so hard to picture a pork farmer who opposes the council’s practice of paying fines for EPA violations, a dairy farmer who does not want to contribute to marketing to fast food restaurants, or a beef farmer who believes that protecting American interest should allow him to advertise American beef as superior. The boards that run these checkoff programs often work towards goals that are in direct opposition of those beliefs; yet, the producers, regardless of their personal beliefs, are compelled to fund these boards as well as their promotional programs. This can be seen most clearly in *Johanns* when the producers bringing suit wanted the freedom to put their funds towards American-raised cattle, as they were proud to be raising and selling American beef.

The ruling handed down in *Johanns* strengthened the Court’s stance that a producer’s only protections against compelled speech under the First Amendment are the limited restrictions

¹²² *Glickman v Wileman Bros. & Elliott*, 521 U.S. 457 (1997)

against compelled subsidization of private speech. It is hard to imagine, however, in what instance the Court would be willing to recognize this speech as private, much less as politically significant when the majority fails to do so either in *Johanns* or in earlier cases (even *United Foods* where the program was actually struck down). Yet to call the expression government speech appears to exempt it from the First Amendment scrutiny altogether. Robert Post rightfully asks: “Exactly what kind of interests would require stringent First Amendment scrutiny to prevent the compelled subsidization of the expression of private parties, but no scrutiny at all to prevent the compelled subsidization of government speech?”¹²³ In other words, what is the nature of this supposed First Amendment protection that the Compelled Subsidization of Speech Doctrine (CSSD) offers, if it fails completely to protect against compelled government speech? Furthermore, Post observes that the cases that Justice Scalia cites in his majority opinion for *United Foods* (*Abood* and *Keller*) are both cases in which “the relevant message was composed by the government,” and in both cases individuals were protected from being forced to support speech with which they did not agree, despite this apparent “government speech” status. The failure to recognize the government’s similar role in the formation of the generic advertising involved in *Johanns* and other checkoff cases seems illogical.

Again, reliance on *Abood* and *Keller*, both of which the Court used when considering *Glickman*, *United Foods*, and *Johanns*, seem fitting for checkoff programs. Much like unions or Bar Associations, memberships in these programs are mandatory, as are the contributions to fund their goals. The Court fails to provide convincing grounds for ruling that there is a fundamental difference between these programs and that of a union or a bar association. Instead, Justice Scalia simply makes the claim that the degree of governmental control is greater in *Johanns* than

¹²³ Post 208

in *Keller* because the messages in *Keller* were not outlined nor prescribed by law. In other words, because Congress and the Secretary of Agriculture have outlined the content of the generic advertising in *Johanns*, and because all the members of the Council answer to the Secretary (although only half are appointed by him), the expression in these ads is seen to be more governmental than that of the lobby in *Keller* was. Scalia's argument implies that there are degrees of governmental speech, a possibility that only further reinforces the case for recognizing that these categories of speech can be also at least partially private. The more that is the case, the more constraints upon speech should be examined with heightened scrutiny.

Another argument that Post makes is that the Court is unclear how speech itself, which cannot be compelled, is really so much different from the subsidization of speech, which under the Court's reasoning can be compelled by the government. Post sees Justice Souter's dissent in *Johanns* as being "[logically] faithful to the structure of CSSD as set forth in *United Foods*."¹²⁴ The problem, says Post, is that CSSD is not a structurally sound doctrine. To support this claim, Post examines the case of *Banning v. Newdow* (2004)¹²⁵ in which Newdow refused to pay the attorney's fees of his opponent. According to Newdow, forcing him to pay to subsidize speech that he vehemently disagreed with was contradictory to CSSD and deserved First Amendment review. Post extends Newdow's argument to contend that if CSSD were applied with logical consistency, everything from needing to pay to certify immunization records in order to enroll a child in school to paying a mechanic in order to certify smog emission standards before registering a car would be subject to strict First Amendment scrutiny. In order for a doctrine to be fundamentally sound, it must be able to be extended to the extreme. CSSD fails this test.

Because he believes that CSSD is not structurally sound, Post claims that it is not the

¹²⁴ Post 210

¹²⁵ *Banning v. Newdow*, 14 Cal Rptr 3d 447 (Ct App 2004).

doctrine the Court should use. “Just as the First Amendment is not triggered by all restrictions on speech, so the First Amendment is not triggered by all government compulsions to speak.”¹²⁶ Given that people are forced everyday to engage in acts of speech with which they disagree, such as testifying before a court, or reporting a traffic incident, Post argues they can certainly also be compelled to subsidize speech in many instances. Post goes on to say, however, that while these mandatory subsidies do not “*automatically* arouse First Amendment concerns,” the sometimes may do so. “No doubt constitutional scrutiny can be triggered, and easily triggered, depending upon a variety of factors, including the nature of the speech, the context of the regulation, and so forth.”¹²⁷ Despite Post’s claims that Justice Souter’s views accord with the CSSD doctrine that Post is criticizing, this argument that scrutiny is triggered by specific concerns is not so different from Justice Souter’s argument that compelled subsidization is a concern whenever the government does not openly claim the speech. It is worth exploring, however, in which cases Post believes that scrutiny should be “easily triggered”¹²⁸ and in which ones such scrutiny is unnecessary (those which CSSD would trigger).

The examples that Post discusses in his argument against CSSD are ones that differ greatly from being forced to make, or pay for, political statements with which one disagrees. Some of Post’s cases include a citizen being compelled to testify in court or being compelled to report a traffic incident, or a government official being compelled to support publicly something with which he or she privately disagrees. The first two examples both fall into an interesting category that is arguably only partially compelled speech. In both cases, people may disagree with having to speak, but they are stating what they regard as facts. While the acts themselves

¹²⁶ Post 213

¹²⁷ Post 217

¹²⁸ Post 217

may hold political significance, the contents of their messages are not political or opinion based. The citizens are not being compelled to promote a message they disagree with in substance, making this expression different from the types of speech that the First Amendment litigation often seeks to protect. Post's other example involves a government employee. In this case the person serves as a representative of the government, and therefore this speech can very reasonably be classified as government speech rather than as compelled private or semi-private speech. It is, by the same token, not political speech attributable to any private person or persons. Although it seems to me that the government employee case should still trigger First Amendment review, regardless, it differs significantly from private producers who are not government employees being forced to pay for a message with which they disagree.

While this part of Post's argument is questionable, I agree that it is necessary to set new, and clearer guidelines for when the compelled subsidization of speech should result in First Amendment review and heightened scrutiny. Post's solution is reasonable, though incomplete, as he overlooks some of the key reasons that *Johanns* sets such a disturbing precedent. To solve the problem of when the compelled subsidization of speech deserved First Amendment scrutiny, Post suggest using two principles, which he calls the Non-Endorsement Principle and the Symmetry Principle. According to Post, "The Non-Endorsement Principle is activated whenever subsidizing objectionable speech puts an individual in the position of appearing to endorse that speech."¹²⁹ If this applies, review is triggered. This principle seems to fit well with the attribution concerns that may arise in cases of compelled subsidization of speech. That is, ascribing speech to someone who was actually forced to fund it should raise scrutiny. This principle is also in line with Justice Souter's dissenting opinion in *Johanns*, which argued that

¹²⁹ Post 218

the government speech doctrine should only be used to justify the subsidization of speech when the government also claimed the speech as its own. For Souter's position to have any force against government speech, however, it is necessary to reject the Court's reply that any attribution of expression to a private party must be specified in the statute authorizing the government's role in advancing the speech in question.

While Post's two principles are valuable as far as they go, they do not go far enough, nor are they specific enough, to protect private political expression as fully as the First Amendment demands. The focus of his first principle on whether an individual is put in the position of "appearing to endorse that speech"¹³⁰ that the person finds objectionable is very general—and yet it encompasses only some of the issues raised when members of a specific group, rather than taxpayers as a whole, are compelled to subsidize speech to which they object. Post's principle fails to highlight the specifically political or ideological nature of the speech many find objectionable in checkoff programs. Political speech that has to be funded by a targeted group should be seen as constitutionally problematic even when it is not attributed to that group, and even when they may not appear to endorse it, because its members are still bearing special burdens of supporting expression with which they disagree.

Next, Post explains his second precept, the Symmetry Principle, which is a two-part test. The first part states that, "if state restrictions on the ability of persons to pay for the speech of another do not raise First Amendment questions, so also state compulsions to pay for the speech of another will not, in the absence of special circumstances like a violation of the Non-Endorsement Principle, raise First Amendment questions." States can, for example, ban cigarette ads, and therefore they can also require tobacco companies to subsidize ads explaining the health

¹³⁰ Post 218

hazards of cigarettes. The second part goes on to say that “if state restrictions on the ability of persons to pay for the speech of another do raise First Amendment questions, state requirements that persons affirmatively provide such support will likely trigger First Amendment review.”¹³¹ States cannot prevent people from giving donations to pay for their favorite preacher’s appearances, nor can states require people to do so. This test attempts to serve as a balancing measure that can create a standard method for assessing when restricting or compelling speech should trigger First Amendment review. Here, Post tries to create a broad, all-encompassing solution for when First Amendment scrutiny should be triggered and it is one that does encompass political speech: ordinarily, a state cannot prevent individuals from paying to support political expression, and so ordinarily states cannot require individuals to subsidize political expression.

But this approach does not explicitly surface the relationship of political speech to the “government speech” doctrine, an important limitation, since all government speech can reasonably be seen as political speech. Hence, more is needed than Post’s Symmetry Principle to indicate why the expression funded by checkoff programs is not made immune to First Amendment scrutiny by calling it “government speech.” A more effective solution requires defining “government speech” more clearly and addressing the government speech doctrine more specifically.

Andrew Marshall and Justice Souter both focus more on the problems raised by defining “government speech” too broadly. But their solutions are either to redefine checkoff programs as commercial speech (Marshall), or to require the government to claim responsibility openly for the speech that it compels (Souter). Both of these steps do need to happen when examining

¹³¹ Post 221

compelled speech, but neither requires the Court to examine fully all the First Amendment concerns that arise in *Glickman*, *United Foods*, and *Johanns*. Marshall's approach seems particularly inadequate because the intermediate scrutiny that *Central Hudson* provides when examining commercial speech falls short of the strict scrutiny that burdens on political expression properly invoke.

Marshall's first criticism of the decision in *Johanns*, that the Court incorrectly fails to differentiate targeted taxes from general taxes, is an argument that Justice Souter relies on heavily in his dissent. The argument made by Justice Souter, which Marshall follows, is that the Court ignored the direction set out by *Massachusetts v. Mellon* (1923). In *Mellon*, general taxation is clearly distinguished from targeted taxation. Instead, the Court relied on *United States v. Lee* (1982), which erroneously creates a parallel between the Social Security Act, for which the government clearly has responsibility, and the Federal Farm Promotion Programs, in which the government role is unclear from the outside. The distinction between the two taxes needs to be made, Marshall argues, because general taxation means that all citizens are more or less equally affected. As Marshall states, quoting Justice Souter's, "when government funds its speech with general tax revenue ... no individual taxpayer or group of taxpayers can lay claim to a special, or even a particularly strong, connection to the money spent (and hence to the speech funded)."¹³² Furthermore, larger groups of citizens are more able to form large voting blocs to hold the government politically accountable when they disagree with the speech being put forth.

Like Post and Justice Souter, Marshall also feels that attribution is a serious problem in *Johanns* because many, though not all, of the ads involved in the case say "Funded by America's Beef Producers." As Marshall states, "No one disputes that at times the government has a right

¹³² *Johanns* 544 U.S. at 575 (Souter, D., dissenting) as quoted by Marshall

to levy taxes even to fund objectionable speech. The caveat, however, is that the government must be politically accountable.”¹³³ But a small group of citizens may well be unable to hold the government responsible, and by attributing the advertisements to beef producers, the government seems to be seeking to evade political accountability for them. As Marshall points out, the beef farmers were unable to force a referendum to challenge the program, and indeed, funds from the checkoff program were used to help shut their protests down. The behavior of the Secretary of Agriculture is not likely to be shaped by the votes of such a small group, especially since this Cabinet official, appointed by the President and confirmed by the Senate, is only indirectly accountable to the electorate. Marshall reasons that since the producers are unable to force accountability on the government, its officials may be tempted to avoid any blame for the expression by attributing it to the producers. Marshall argues that the government speech doctrine should therefore be specified to only protect "purposeful action by [the] government, expressing its own distinct message, which is understood by those who receive it to be the government's message."¹³⁴

Next, Marshall harshly criticizes the Court for first establishing confusing, opposing precedents in *Glickman* and *United Foods*, and then “the Court further obscured matters by simply holding that the government can readily invoke the government speech doctrine whenever it desires, without giving even the slightest notice to the First Amendment protections typically accorded to speech.”¹³⁵ As a solution, Marshall suggests applying a modified version of *Central Hudson*. He suggests “the Court would have likely found that the government interest, though substantial, was not substantial enough to outweigh the appellees' First

¹³³ Marshall 391

¹³⁴ Marshall 392

¹³⁵ Marshall 394

Amendment free speech rights and was more extensive than necessary to serve the government's interests in advertising beef.”¹³⁶ He goes on to say that the germaneness test may have been even more appropriate in deciding *Johanns* because it would be a stronger precedent than a modified version of the Central Hudson test.

Although Marshall disputes the classification of speech in *Johanns* as “government speech,” he thinks that the economic goals of the checkoff programs can be pursued by other means, observing “there are so many readily available ways to regulate economic activities without risking First Amendment infringement.”¹³⁷ He does not address, however, the possibility that the right classification for this speech is neither government speech nor commercial speech. Arguably, his analysis of the relationship of commercial speech to government speech is not necessary to resolve the issues in *Johanns* because while this speech may be partially commercial, it is also partially private, and most importantly, it is significantly political. Therefore, while Marshall highlights well how the Court in *Johanns* broadens the government speech doctrine to a disturbing extent, he does not see that his misclassification could have a similarly wider reaching impact that intended. For instance, using Marshall’s commercial speech analysis, the justices in the majority could have still justified the mushroom program to restart its mandatory assessments.

For its part, the Court seems to take for granted not only that it is constitutional to compel the subsidization of government speech, but also that it is appropriate to classify these ads as government speech. But these cases, *Glickman*, *United Foods*, and *Johanns* are some of the very cases in which this doctrine originates and so it is important to analyze critically the Court’s use of these cases in the emergence of this doctrine. It is not the Court’s decision to permit the

¹³⁶ Marshall 395

¹³⁷ Marshall 393

compelled subsidization of government speech that I question, but rather whether or not it is right to call the generic advertising in these programs government speech, rather than speech that is either directly attributed to a particular group or that it is, due to its funding, speech that is in reality derived from a particular group, not from the general public the government is supposed to represent. The reconsideration of this classification would allow producers the First Amendment protection that they deserve, instead of being required to pay for speech that they disagree with on political or ideological grounds.

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