

GOVERNMENT SPEECH. IT'S WHAT'S FOR DINNER: NAVIGATING FIRST AMENDMENT ASSERTIONS AND GENERIC COMMERCIAL ADVERTISEMENTS FUNDED BY CHECKOFF SUBSIDIES

I. INTRODUCTION

In the last eight years, the United States Supreme Court has heard three factually similar cases and has reached three different conclusions.¹ Until the most recent ruling in *Johanns v. Livestock Marketing Ass'n*,² no bright-line rule had been developed regarding the use of checkoff dollars³ to subsidize generic commercial advertising when those funding the advertising asserted a First Amendment violation.⁴ Even in deciding *Livestock Marketing*, the Court remarked that the issue of federal programs financing generic advertisements to promote agricultural products has been visited several times within the last eight years on First Amendment challenges.⁵ Examples of familiar generic commercial advertising campaigns include “Beef. It’s What’s for Dinner,”⁶ “Got Milk?,”⁷ or “Pork: the Other White

1. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559 (2005); *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001); *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 477 (1997).

2. 544 U.S. 550 (2005).

3. U.S. GEN. ACCOUNTING OFFICE, FEDERALLY AUTHORIZED COMMODITY RESEARCH AND PROMOTION PROGRAMS 2-3 (1993) [hereinafter U.S. GEN. ACCOUNTING OFFICE]. A checkoff program refers to a fixed fee assessed to a farmer or producer based on the sale of a product. William Conner Elridge, Note, *United States v. United Foods: United We Stand, Divided We Fall—Arguing the Constitutionality of Commodity Checkoff Programs*, 56 ARK. L. REV. 147, 147-148 nn.1 & 5, 183 (2003). Such fees are implemented by the government at the behest of producer associations in order to fund promotional materials, generic advertising, research, consumer education, and industry information. *Id.* at 158.

4. See Ian Heath Gershengorn, *Lingering Uncertainty*, NAT'L L.J., Aug. 3, 2005, at 8 (predicting that the *Livestock Marketing* Court has effectively established a bright-line rule of constitutionality that will preclude further First Amendment challenges regarding checkoff fees).

5. *Livestock Mktg.*, 544 U.S. at 553; see *United Foods*, 533 U.S. at 415 (involving the second major challenge to mandatory checkoff fees under the First Amendment); *Wileman*, 521 U.S. at 488 (Souter, J., dissenting) (remarking that *Wileman* represented “the first commercial-speech subsidy case”); Bret Fox, Note, *First Amendment Review of Beef Checkoff Assessments: Beef May Be for Dinner, But May Producers Be Compelled to Say So?* *Livestock Mktg. Ass'n v. U.S. Dep't of Agric.*, 335 F.3d 711 (8th Cir. 2003), 4 WYO. L. REV. 397, 426 (2004) (noting that “[t]here is ample evidence that the Supreme Court itself is still searching for the correct approach in this emergent area of First Amendment jurisprudence”).

6. See 2000 BEEF BD. ANN. REP. 4-5 (2000), available at [http://www. Beefboard.org/finapreviousyears.aspx](http://www.Beefboard.org/finapreviousyears.aspx) [hereinafter 2000 BEEF BD. ANN. REP.] (follow “2000 Annual Report (PDF format)” hyperlink) (last visited June 9, 2006) (noting the success of the advertising

Meat.”⁸ These generic advertisements are funded by checkoff dollars exacted from members of their respective trade associations.⁹

Members of such associations should be aware of their rights regarding the funding of messages with which they do not agree, since their autonomy as producers may already be limited by their participation in the trade organization.¹⁰ Producers are already constrained by internal regulatory schemes in light of the fact that many producers exchange their freedom to act independently for the protections afforded by their membership in a broad collective enterprise.¹¹ Producers, farmers, and commodity associations should be especially concerned with the possibility that the organization of a checkoff program may have free speech implications.¹² For instance, producers in *United States v. United Foods, Inc.*¹³ objected to the generic advertising message, which favored the majority of mushroom producers because the challenging producers wanted to convey the message that their own brands were superior to those grown by others.¹⁴ Similarly, cattle ranchers in *Livestock Marketing* objected to the generic advertising implication that all beef was good and wanted to distinguish their own American grain-fed beef from the allegedly inferior grass-fed, imported beef.¹⁵ Such generic advertising is funded by assessments on the producers, regardless of whether the producers agree with the message, and this has caused some producers to claim a First Amendment violation of their freedom of speech.¹⁶ The organization of the checkoff program determines the speaker of the advertised message and the associated First Amendment protection afforded to the generic advertising.¹⁷

campaign at issue in *Livestock Marketing*); see also Elridge, *supra* note 3, at 147 n.1, 184 (describing the advertising campaign).

7. See *Cochran v. Veneman*, 359 F.3d 263, 266 (3d Cir. 2004) (noting the familiarity of the milk marketing program through advertisements on television and in printed media).

8. See *Mich. Pork Producers Ass’n v. Veneman*, 348 F.3d 157, 162 (6th Cir. 2003) (noting that the pork promotion program was one of the most recognizable advertising campaigns).

9. *Cochran*, 359 F.3d at 270; *Mich. Pork Producers*, 348 F.3d at 159.

10. See, e.g., *Wileman*, 521 U.S. at 469 (stressing the importance of reviewing checkoff assessments with heightened scrutiny under the First Amendment).

11. *Id.*

12. *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001); *Wileman*, 521 U.S. at 469.

13. 533 U.S. 405 (2001).

14. *United Foods*, 533 U.S. at 411.

15. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 556 (2005).

16. See *id.* (noting that the cattle ranchers asserted that the assessments were a compelled subsidy of a message that was disagreeable, which conflicted with their First Amendment freedom of speech); *United Foods*, 533 U.S. at 409 (noting that the producers contended that the forced subsidy for generic advertising was a violation of the First Amendment).

17. See *Livestock Mktg.*, 544 U.S. at 560-61 (holding that government-compelled subsidy of commercial speech is constitutionally protected as government speech, because the government controls and regulates both the organization of the program and the final message of the program,

This note attempts to navigate the three Supreme Court cases involving the mandatory use of checkoff dollars to subsidize generic advertising, where producers claimed abridgement of their First Amendment rights by being compelled to fund generic advertising messages with which they disagreed.¹⁸ Part II of this note will address the organization and process of creating checkoff programs, with an emphasis on government involvement. Part III provides a general overview of First Amendment challenges concerning commercial speech and advertising. Part III then speaks specifically to First Amendment issues as applied to checkoff dollars and advertising. Part IV offers a synopsis of the three Supreme Court decisions in this area. Part V addresses whether there is a governing principle derived from each case and attempts to define checkoff programs that will pass constitutional muster.

II. OVERVIEW AND BACKGROUND OF CHECKOFF PROGRAMS

A. CHECKOFF DOLLARS EXPLAINED

The term “checkoff” refers to a fixed fee assessed to farmers or producers on the sale of a product.¹⁹ Primarily, checkoff fees are the main source of funding for generic advertising, research, and promotional programs within a particular product industry or trade association.²⁰ The fees are approved and enacted by the federal government and implemented by a voting majority of producers within an association.²¹

such that the message is the government’s own); *United Foods*, 533 U.S. at 411, 415 (holding that the checkoff program was unconstitutional because the compelled funding of speech was not germane to the association nor regulated by a comprehensive regulatory program); *Wileman*, 521 U.S. at 476-77 (ruling that a First Amendment violation did not occur and that the program qualified as economic regulation).

18. See *Livestock Mktg.*, 544 U.S. at 554-56, 559 (noting that a First Amendment challenge required the producers to show that the checkoff dollars paid for the objectionable speech); *United Foods*, 533 U.S. at 410-11 (determining that First Amendment concerns applied because the producers were required to subsidize objectionable speech); *Wileman*, 521 U.S. at 460-61, 467 (determining whether First Amendment abridgement of speech occurred when producers funded generic advertising with which they disagreed).

19. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 3, at 2-3 (defining and explaining checkoff fees and programs). For example, under the Beef Act, cattle ranchers must pay a checkoff fee of \$1 per head of cattle that is sold. The Beef Promotion and Research Act, 7 U.S.C. § 2904(8)(c) (2000); *Livestock Mktg.*, 544 U.S. at 554.

20. See, e.g., 7 U.S.C. § 7411(a) (2000) (stating that producers pay for the generic advertising, which benefits both the industry and consumers); see also U.S. GEN. ACCOUNTING OFFICE, *supra* note 3, at 2-3 (explaining checkoff programs); Elridge, *supra* note 3, at 158 (explaining the structure of checkoff programs).

21. U.S. GEN. ACCOUNTING OFFICE, *supra* note 3, at 2-3; U.S. DEP’T AGRIC. (USDA), AGRICULTURAL MARKETING SERVICE (AMS), RESEARCH AND PROMOTION PROGRAMS, <http://www.ams.usda.gov/lsg/mpb/generic/generic.htm> [hereinafter USDA RESEARCH AND PROMOTION PROGRAMS] (last visited Sept. 11, 2005); Elridge, *supra* note 3, at 158-59.

Checkoff programs control producer-funded research and generic advertising campaigns intended to benefit the collective association.²² The generic advertising is not attributed to any single producer or product, yet individual producers may still advertise their own products in addition to the generic advertising.²³ A mandatory checkoff keeps any “free rider” producers out of the program who stand to gain benefits from the advertising and research, but do not pay the checkoff fees.²⁴ The checkoff programs examined in this note include checkoff fees assessed for the generic advertising of California tree fruits,²⁵ mushrooms,²⁶ and beef.²⁷

Checkoff program assessments fund generic advertising, research programs, and promotional activities.²⁸ Promotional activities may not be

22. STEVEN A. NEFF & GERALD E. PLATO, FEDERAL MARKETING ORDERS AND FEDERAL RESEARCH AND PROMOTION PROGRAMS: BACKGROUND FOR 1995 FARM LEGISLATION 7, 10 (1995). Active checkoff programs include: beef, cotton, dairy, eggs, fluid milk, honey, blueberries, peanuts, popcorn, mushrooms, pork, potatoes, soybeans, watermelon, wool, and mohair. U.S. GEN. ACCOUNTING OFFICE, *supra* note 3, at 3; Elridge, *supra* note 3, at 160.

23. *See Wileman*, 521 U.S. at 469 (stating that the marketing orders did not restrain producers from communicating their own message to any audience).

24. *See NEFF & PLATO*, *supra* note 22, at 10 (explaining how checkoff programs eliminate free riders who benefit from the program advertising without paying any of the cost to support such a program); Elridge, *supra* note 3, at 159 (quoting the words “free rider”).

25. *See Wileman*, 521 U.S. at 462 (ruling on the First Amendment challenge of California tree fruit producers). The producers’ claims stemmed from the Agricultural Marketing Agreement Act, 7 U.S.C. §§ 601-626 (1994), and the corresponding Marketing Orders, 7 CFR §§ 916.31(c), 917.35(f) (1997). *Wileman*, 521 U.S. at 461-62. “California Summer Fruits” included peaches, nectarines, and plums, which were touted in a generic advertising campaign as being wholesome, delicious, and attractive to shoppers. *Id.* at 462. Other promotional campaigns included “California nectarines are the juiciest” and “How to make a peach pie with California peaches.” Brief for the Petitioner at 7 n.6, *Wileman*, 521 U.S. 457 (No. 95-1184).

26. *See United States v. United Foods, Inc.*, 533 U.S. 405, 415 (2001) (ruling on mushroom producers’ claims of First Amendment violation). The Act at issue in *United Foods* was the Mushroom Promotion, Research, and Consumer Information Act, 7 U.S.C. §§ 6101-6112 (1994). *United Foods*, 533 U.S. at 408. A Valentine’s Day advertising campaign entitled “Let Your Love Mushroom!” bombarded consumers with mushroom recipes hinting at the aphrodisiac qualities of mushrooms. *In re Donald B. Mills, Inc.*, 56 Agric. Dec. 1567, 1591 (1997). No funds appeared to be spent on research unrelated to generic promotion. *Id.* at 1590-95; *see also* Elridge, *supra* note 3, at 160, 160 n.109, 161 (reporting that 97% of funds generated by the mushroom checkoff were spent on generic advertising).

27. *See Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 558 (2005) (ruling on beef producers’ claims of a First Amendment violation). The Act at issue was the Beef Promotion and Research Act 7 U.S.C. §§ 2901-2911 (2000). *Livestock Mktg.*, 544 U.S. at 553. In 2000, \$29 million was spent on domestic generic advertising such as the television advertising campaign entitled “Beef. It’s What’s for Dinner.” *Id.* at 554; *see also* 2000 BEEF BD. ANN. REP., *supra* note 6, at 4-5, 13-14 (noting the success of the beef advertising); USDA RESEARCH AND PROMOTION PROGRAMS, *supra* note 21 (providing information regarding the history, structure, and evaluation of the beef checkoff program).

28. NEFF & PLATO, *supra* note 22, at 8; *see* Elridge, *supra* note 3, at 160 (noting that a sizeable portion of the funds goes to generic advertising). A typical percentage distribution of checkoff funds includes: 64% for promotion, 14% for research, 6% for consumer info, and 4% for industry information. U.S. GEN. ACCOUNTING OFFICE, *supra* note 3, at 2-3; Elridge, *supra* note 3, at 148 n.5, 159, 160 nn.107-08.

directly related to advertising, such as nutritional labels or product recipes, because advertising may not pass some necessary information to consumers.²⁹ Research funded by checkoff dollars often includes finding new product uses, developing more cost efficient ways to process products, and determining which consumers respond best to product advertising.³⁰

B. ORGANIZATION AND CREATION OF CHECKOFF PROGRAMS

To create a checkoff program for a specific association or product, the members of an association must establish a purpose for a checkoff program and propose the need to Congress or to the Agricultural Marketing Service (AMS), a division of the United States Department of Agriculture (USDA).³¹ Despite governmental involvement even at early stages, the checkoff programs are voluntarily created by association members who propose the need for and structure of the program.³²

Generally, Congress approves checkoff programs because the programs require little federal money to implement and serve as a low cost alternative to stimulating agricultural demand without directly subsidizing farmers.³³ Congress authorizes and enacts each checkoff program by passing an act which determines who will be assessed fees, the amount of the assessment, and the method to collect assessments.³⁴ Next, the USDA and the commodity industry form working rules and regulations by which the checkoff program will operate.³⁵

At a referendum, a two-thirds majority vote of all affected members of an association is necessary to approve the proposed rules to govern the checkoff program.³⁶ Referendums are organized by the Secretary of Agriculture either at his discretion or upon a showing of a certain percentage of producers who oppose the checkoff program.³⁷ Producer associations and

29. NEFF & PLATO, *supra* note 22, at 10.

30. NEFF & PLATO, *supra* note 22, at 7; Elridge, *supra* note 3, at 160.

31. U.S. GEN. ACCOUNTING OFFICE, *supra* note 3, at 2-3; Elridge, *supra* note 3, at 158 n.84; *see* USDA RESEARCH AND PROMOTION PROGRAMS, *supra* note 21 (describing the process required to implement a checkoff program).

32. U.S. GEN. ACCOUNTING OFFICE, *supra* note 3, at 2-3.

33. NEFF & PLATO, *supra* note 22, at 2, 10; Elridge, *supra* note 3, at 159.

34. *See* 7 U.S.C. §§ 601-626 (2000 & Supp. 2003) (governing the checkoff program for California tree fruit producers); 7 U.S.C. §§ 7411-7425 (2000) (issuing orders for promoting agricultural commodities); *see also*, 7 U.S.C. §§ 2904-2911 (2000) (authorizing assessments to beef producers based on the sale per head of cattle). *See generally* NEFF & PLATO, *supra* note 22, at 2 (describing the functions of marketing orders in general).

35. U.S. GEN. ACCOUNTING OFFICE, *supra* note 3, at 2-3.

36. NEFF & PLATO, *supra* note 22, at 2.

37. *Id.*; Elridge, *supra* note 3, at 159 n.89.

producers value checkoff programs because they are important in creating long-term growth and demand for the product.³⁸

Once the majority of producers vote to approve the checkoff program, the producers implement the legislation by developing regulations for operational procedures, collection of assessments, and enforcing compliance with the legislation.³⁹ The Secretary of Agriculture appoints association members to a governing board, based on industry and association nominations.⁴⁰ Next, the board oversees and governs the planning, direction, and evaluation of the checkoff program, with the AMS governing compliance by the board.⁴¹ The board may also create various committees to oversee advertising, research, or promotion.⁴² Once implemented, the AMS monitors the checkoff programs for compliance with the act.⁴³

C. IMPLICATIONS OF CHECKOFF PROGRAMS

The checkoff programs are voluntarily implemented by each association and the corresponding membership majority.⁴⁴ However, the government assumes a large role in creating and implementing the checkoff programs, beginning with approval of a checkoff plan and often ending with veto power over the final advertising message.⁴⁵ Additionally, the government controls appointment to the governing association board, so that in effect, the federal government controls the associations.⁴⁶

A two-thirds majority vote in favor of implementing a checkoff program is required for democratic purposes, which presumably should allow association members to air concerns and vote with their consciences.⁴⁷ Because board members are nominated by the trade industry, and larger and wealthier producers are presumed to be the better-known producers who are

38. NEFF & PLATO, *supra* note 22, at 10; Elridge, *supra* note 3, at 159.

39. U.S. GEN. ACCOUNTING OFFICE, *supra* note 3, at 3.

40. USDA RESEARCH AND PROMOTION PROGRAMS, *supra* note 21.

41. *Id.*

42. *See, e.g.,* *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005) (explaining the formation of both the Beef Board and the Operating Committee).

43. USDA RESEARCH AND PROMOTION PROGRAMS, *supra* note 21.

44. Elridge, *supra* note 3, at 158.

45. *See, e.g., Livestock Mktg.*, 544 U.S. at 561-62 (noting that the Secretary of Agriculture approved any final advertising message paid for with checkoff funds, essentially making this government speech).

46. *Id.* at 560; *see* USDA RESEARCH AND PROMOTION PROGRAMS, *supra* note 21 (explaining how the Secretary of Agriculture controls the associations); Elridge, *supra* note 3, at 158 (noting that checkoff programs are voluntary, although governed by federal legislation).

47. U.S. GEN. ACCOUNTING OFFICE, *supra* note 3, at 2-3; NEFF & PLATO, *supra* note 22, at 3. For instance, the association in *Wileman* required a two-thirds majority vote of members in order to implement assessments. 7 U.S.C. § 608c(9)(B) (1994); *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 461-62 (1997).

nominated to the board, the smaller and less-established minority members of the trade may never have a strong voice in the direction and assessment of the checkoff funds.⁴⁸ While the process of nominating board members implicates democratic governance, the fact that some producers may be compelled to pay for messages with which they disagree is troubling because First Amendment rights may be at stake depending on the structure of the checkoff program.⁴⁹

III. FIRST AMENDMENT CHALLENGES ASSERTED AGAINST GENERIC ADVERTISING FUNDED BY CHECKOFF FEES

Advertising is a form of commercial speech, which has gained gradual First Amendment protection.⁵⁰ The generic advertising at issue in the principal cases was funded by checkoff fees assessed to producers.⁵¹ Some of the producers disagreed with the messages proposed by the advertising and resented being compelled to fund objectionable messages.⁵² The producers claimed that to be compelled to fund advertising with which they disagreed amounted to an abridgement of their First Amendment freedom of speech.⁵³

48. See *Legal News, Supreme Court Beef Promotion Ruling Emboldens USDA as Critics Digest Case*, U.S.L.W., May 31, 2005, at 2707 [hereinafter *Legal News*] (noting that the larger beef producers have controlled the “tenor of the advertising” and stating that all producers’ concerns should be taken into account).

49. See *Livestock Mktg.*, 544 U.S. at 470-71, 578-79 (Souter, J., dissenting) (noting that the producers argued that promoting all beef with “Beef. It’s What’s for Dinner” was a generic message that “[all] beef is good,” a message with which the ranchers disagreed). The brief in support of the producers stated, “This message, the ranchers say, ignores the fact that not all beef is the same; the ads fail to distinguish, for example, the American ranchers’ grain-fed beef from the grass-fed beef predominant in the imports, which the Americans consider inferior.” Brief for the Respondents at 1, *Livestock Mktg.*, 544 U.S. 550 (No. 03-1164). The Court resolved this argument under the government speech doctrine, stating, “‘Compelled support of government’—even those programs of government one does not approve—is of course perfectly constitutional, as every taxpayer must attest.” *Livestock Mktg.*, 544 U.S. at 559. The Court also stated that the government may advocate a certain idea or position such that compelled support through taxes or other exactions is binding on protesting parties. *Id.* (citing *Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000)). Inevitably, the government may raise funds for speech to advocate its own positions or policies despite protests, just as taxes are levied against taxpayers despite protest. *Id.*

50. See *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995) (stating that advertising is commercial speech within First Amendment protections). Compare *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (declining constitutional protection for commercial speech), with *44 Liquormart v. Rhode Island*, 517 U.S. 484, 516 (1996) (granting First Amendment protection to commercial speech).

51. *Livestock Mktg.*, 544 U.S. at 554-55; *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001).

52. *Livestock Mktg.*, 544 U.S. at 556; *United Foods*, 533 U.S. at 411.

53. *Livestock Mktg.*, 544 U.S. at 556; *United Foods*, 533 U.S. at 411; *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 460-61 (1997).

The producers' claims later evolved into compelled speech and subsidy claims, which are associated with freedom of speech.⁵⁴

A. COMMERCIAL SPEECH

Commercial speech has been referred to as an “expression related solely to the economic interests of the speaker and its audience,” or speech proposing a commercial transaction.⁵⁵ The United States Supreme Court first used the phrase commercial speech in 1973.⁵⁶ Essentially, commercial speech is advertising in various media forms.⁵⁷

Commercial speech did not originally receive constitutional protection.⁵⁸ However, commercial speech now warrants the same protection as other speech.⁵⁹ Commercial speech is implicated in checkoff programs because generic advertising constitutes commercial speech, which is granted First Amendment protection, but is subject to governmental regulation as well.⁶⁰

1. *Development of Commercial Speech and Constitutional Protection*

While relatively new in comparison to other categories of constitutionally protected speech, commercial speech has a confusing and varied history of constitutional protection.⁶¹ Originally, commercial speech was considered to be outside the province of First Amendment protection

54. See *Livestock Mktg.*, 544 U.S. at 556-57 (explaining that the reasoning for protecting compelled speech is the same as that for protecting compelled subsidy in certain cases); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977) (protecting individuals from being compelled to subsidize a message is a valid First Amendment protection relating to freedom of speech).

55. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561-62 (1980).

56. *Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations*, 413 U.S. 376, 384 (1973).

57. See *Fla. Bar v. Went For It, Inc.*, 515 U.S. at 623 (stating that advertising is commercial speech within First Amendment protections).

58. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

59. *44 Liquormart v. Rhode Island*, 517 U.S. 484, 516 (1996).

60. See *id.* (holding that commercial speech warrants the same protections as other speech); *Cent. Hudson*, 447 U.S. at 563-66 (prohibiting the government from restricting speech without meeting the four-step analysis first). But see *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) (reasoning that *Central Hudson* did not apply because the issue involved the funding of speech and not the restriction of commercial speech); *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 469 n.12, 474 (1997) (declaring that the *Central Hudson* test did not apply).

61. Compare *Valentine*, 316 U.S. at 54 (declining constitutional protection for commercial speech), with *44 Liquormart*, 517 U.S. at 516 (granting First Amendment protection to commercial speech).

because of its solely commercial content.⁶² Since 1975, however, commercial speech has held enough value to protect it from unwarranted government regulation, but at the same time, it possesses less value than other types of speech based on “common sense differences.”⁶³ Because commercial speech is economically driven, it is perceived as hardier, more durable, and more objectively verifiable than other speech, and therefore warrants less protection.⁶⁴ However, commercial speech is not “so far removed from any ‘exposition of ideas’ and from ‘truth, science, morality, and arts in general’” that it lacks all protection.⁶⁵ Even speech proposing nothing beyond a commercial transaction will enjoy some constitutional protection, due to political value, social value, and value within the marketplace of ideas.⁶⁶

Courts have struggled in determining the proper amount of constitutional protection to grant to commercial speech and which level of scrutiny to apply.⁶⁷ To determine the level of scrutiny that commercial speech was warranted, the Supreme Court established a four-prong test in *Central Hudson v. Public Service Commission of New York*⁶⁸: (1) the activity that the commercial speech supports must be a lawful activity and the advertising speech must not be misleading; (2) the government must hold a substantial interest in regulating the speech; (3) governmental regulation must

62. See *Valentine*, 316 U.S. at 54 (giving no protection from government regulation since a ban on handbills was viewed as a regulation of a business activity rather than protected political commercial speech).

63. See *44 Liquormart*, 517 U.S. at 522, 524 (Thomas, J., concurring) (stating that neither philosophy nor history suggests different First Amendment values for commercial speech); *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975) (holding that while the advertisement had a commercial purpose, the activity was also valuable to the marketplace of ideas, and the advertising material was of clear “public interest” or held social significance). But see *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 771 n.24 (1976) (relying on “commonsense differences”).

64. *Va. State Bd. of Pharmacy*, 425 U.S. at 771 n.24.

65. *Id.* at 762 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *Roth v. United States*, 354 U.S. 476, 484 (1957)).

66. *Bigelow*, 421 U.S. at 826; see *N.Y. Times Co. v. Sullivan*, 376 U.S. 255, 256-57, 266 (1964) (extending full First Amendment protection based on public and social values, despite the commercial value of the speech); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (explaining that regulation of dissident speech is impermissible because the free speech clause of the First Amendment recognizes “the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market”); *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (arguing that labor regulation was permissible because the liberty clause of the Fourteenth Amendment does not “embody a particular economic theory” of free trade).

67. See Laura Jackson, Note, *Commercial Speech: The Constitution—It’s What’s for Dinner*, *United States v. United Foods*, 121 S. Ct. 2334 (2001), 2 WYO. L. REV. 617, 623 (2002) (noting that despite the clear test in *Central Hudson*, subsequent commercial speech decisions that applied the scrutiny were “convoluted”).

68. 447 U.S. 557 (1980).

directly advance the government interest asserted; and (4) the regulation cannot be more extensive than necessary to serve the governmental interest.⁶⁹ What emerged from the *Central Hudson* test was that the protection afforded commercial speech appeared to be a mix of intermediate scrutiny and strict scrutiny, requiring a substantial government interest in the second prong, but a narrowly tailored approach to regulating the interest in the fourth prong.⁷⁰ Essentially, while *Central Hudson*'s four-pronged test appeared to determine the protections applied to commercial speech, later cases struggled to apply the mixed scrutiny.⁷¹

In *44 Liquormart v. Rhode Island*,⁷² the Supreme Court sought to resolve any confusion over *Central Hudson*'s mixed scrutiny by holding that commercial speech shared the same protection as other speech, but the Court did not overrule *Central Hudson*.⁷³ While some justices have advocated that commercial speech deserves higher scrutiny and should be treated like other speech, the Court appears reluctant to overrule *Central Hudson*, which still requires a mixed scrutiny.⁷⁴ Additionally, while *Central Hudson* remains the governing test for determining whether regulation of commercial speech is valid under the First Amendment, the test has often been questioned, and decisions remain confusing and unpredictable.⁷⁵

69. *Cent. Hudson*, 447 U.S. at 563-66. The test is sometimes referred to as a three-prong test, using the last three prongs from *Central Hudson*. See, e.g., *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 491-92 (1997) (Souter, J., dissenting) (referring to only three prongs).

70. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 582 (2001) (noting that strict scrutiny must be met by a narrowly tailored government ban on advertisement). But see *United States v. Virginia*, 518 U.S. 515, 573 (1996) (Scalia, J., dissenting) (requiring a substantial government interest in classifying by gender to meet intermediate scrutiny); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 618 (1995) (citing *Cent. Hudson*, 447 U.S. at 564-65) (explaining that where the government asserts a substantial interest, intermediate scrutiny protection is granted).

71. See *44 Liquormart v. Rhode Island*, 517 U.S. 484, 518 (1996) (Thomas, J., concurring) (referencing the Court's application of *Posadas* which essentially conferred heightened scrutiny protection afforded to all speech, including commercial speech); *Bd. of Trs. State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (determining that the narrow tailoring of *Central Hudson* requires the government to achieve its interests through the least restrictive means necessary); *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 341-42 (1986) (applying heightened scrutiny through the *Central Hudson* test).

72. 517 U.S. 484 (1996).

73. *44 Liquormart*, 517 U.S. at 518 (Scalia, J., dissenting) (explaining that the Court does not have "the wherewithal to declare *Central Hudson* wrong").

74. See *id.* (opting not to overrule *Central Hudson*, but declining to apply the *Central Hudson* four-prong balancing test). Justice Thomas stated that commercial speech should not hold a "lower value" than noncommercial speech. *Id.* at 522 (Thomas, J., concurring).

75. See *Fox*, 492 U.S. at 480 (asserting that the interest furthered by a restriction need not be a perfect connection, but only a reasonable connection); *Posadas*, 478 U.S. at 344 (noting that the legislative branch should decide the fit between the asserted government interest and the regulation). See generally Katherine Earle Yanes, *Glickman v. Wileman Bros. & Elliot, Inc.: Has the Supreme Court Lost Its Way?*, 27 STETSON L. REV. 1461, 1467-69 (1998) (reviewing commercial speech in depth).

2. *Implications of Commercial Speech for Checkoff Program Advertisements*

While commercial speech may be constitutionally protected activity, holding social or political value or value within the marketplace of ideas, checkoff programs that promote products through generic advertising are still subject to government regulation.⁷⁶ In *Glickman v. Wileman Bros. & Elliot, Inc.*,⁷⁷ the first commercial speech case before the Supreme Court since *44 Liquormart*, the Court ruled that the *Central Hudson* test did not apply because the restriction of speech was not at issue, but rather the funding of the speech.⁷⁸ Later cases in the commercial speech subsidy line also declined to apply the *Central Hudson* test and found no government restriction on the commercial speech, but instead considered whether a First Amendment violation had occurred through compelled speech or compelled subsidy.⁷⁹

B. COMPELLED SPEECH

While governmental restriction of speech is normally suspect under the First Amendment, compelled speech is also granted First Amendment protection.⁸⁰ Simply put, neither speech nor silence can be compelled.⁸¹ An individual enjoys the “freedom to maintain . . . beliefs without public disclosure,” so that one is neither burdened nor compelled to identify or respond to objectionable messages.⁸² Additionally, even messages that are

76. See *44 Liquormart*, 517 U.S. at 518 (acknowledging that commercial speech receives the same constitutional protection as other speech); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564 (1980) (protecting commercial speech from government regulation); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 760 (1976) (noting that informational commercial speech sometimes lacks political or social value, yet value may lie in *Abrams’* “marketplace of ideas”).

77. 521 U.S. 457 (1997).

78. *Wileman*, 521 U.S. at 474-75.

79. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 580 n.10 (2005); *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001).

80. See *Wooley v. Maynard*, 430 U.S. 705, 716-17 (1977) (applying strict scrutiny to compelled speech).

81. See *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 570 (1995) (establishing that being compelled to remain silent is a First Amendment violation); *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 792 (1988) (noting that while a difference exists between compelled speech and compelled silence, the First Amendment protects both what to say and what not to say); *Pac. Gas & Elec. Co. v. Pub. Util. Comm’n of Cal.*, 475 U.S. 1, 8 (1986) (extending protection from compelled speech or silence to both corporations and individuals); *Wooley*, 430 U.S. at 713-14 (stating that individuals should not be forced to endorse a message with which they disagree).

82. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 242 (1977); see *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 100 (1980) (Powell, J., concurring) (quoting *Abood*, 431 U.S. at 242) (stating that a public property owner should not be forced to identify and respond to objectionable

attributed to individuals without compelling a response may create First Amendment concerns.⁸³

Compelled speech has enjoyed constitutional protection since the 1940s.⁸⁴ In 1943, the Supreme Court stated, “[I]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”⁸⁵ Similarly, the Court affirmed and expanded upon this principle in *Wooley v. Maynard*,⁸⁶ stating that the “right to speak and the right to refrain from speaking” appear to be complementary and broader concepts of an “individual freedom of mind.”⁸⁷

In *Wileman*, producers first raised claims that the generic advertising of the checkoff programs was unconstitutionally compelled speech.⁸⁸ However, the Supreme Court readily determined that no compelled speech violation had occurred because there was no First Amendment violation.⁸⁹ The later cases of *United Foods* and *Livestock Marketing* did not focus on compelled speech, but rather took a narrower compelled subsidy approach.⁹⁰

messages in order to enjoy such First Amendment values as the freedom to maintain beliefs without public disclosure).

83. *Id.*; see *Livestock Mktg.*, 544 U.S. at 564-65 (noting that an as-applied First Amendment challenge of compelled speech may be valid if the advertisements are attributed to individual producers).

84. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943).

85. *Id.* at 642. Forcing students to recite the Pledge of Allegiance “requires affirmation of a belief and an attitude of mind,” which was unconstitutional as compelled speech. *Id.* at 633.

86. 430 U.S. 705 (1977).

87. See *Wooley*, 430 U.S. at 713-14 (quoting *Barnette*, 319 U.S. at 633-34) (ruling that requiring the state motto “Live Free or Die” on a personal auto license plate was an unconstitutional compulsion of speech to convey a government message).

88. See *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 471 (1997) (holding that the advertising message need not pass the *Central Hudson* commercial speech test, and that the claim was not a First Amendment violation because the marketing orders were economic regulation within the checkoff program). In *Wileman*, there was no compelled speech claim because the marketing order did not force producers to repeat objectionable messages from their own mouths, to use their own property to convey an antagonistic ideological message, or to respond to a hostile message instead of remaining silent. *Id.* The Court also negated compelled subsidy claims with reliance on *Abood v. Detroit Board of Education*, 431 U.S. 209, 232 (1977). *Wileman*, 521 U.S. at 471-72; see *Livestock Mktg.*, 544 U.S. at 558 (noting that the issue was defined more as a compelled subsidy claim like *United Foods*, but instead ruling in favor of the government, deeming the checkoff fees to be government speech); *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) (determining that the mandatory checkoff fees created a compelled subsidy issue).

89. See *Wileman*, 521 U.S. at 471 (concluding that because no First Amendment claim existed, a compelled speech claim was lacking on the basis that there was no compulsion of speech nor was the message publicly attributed to the producers).

90. See *Livestock Mktg.*, 544 U.S. at 559 (finding that no compelled subsidy First Amendment challenge is allowed in cases of government speech); *United Foods*, 533 U.S. at 415 (finding compelled subsidy of generic advertising to be unconstitutional when there is no broad regulatory program with a germane purpose beyond advertising).

C. COMPELLED SUBSIDY

Just as a person cannot be forced to make a statement or remain silent, a person may not be compelled to pay for another person to make the same statement.⁹¹ In that sense, compelled subsidy is similar to compelled speech.⁹² Compelled subsidy has been defined as a governmental entity requiring an individual to subsidize a private message.⁹³

Producers in *Wileman*, *United Foods*, and *Livestock Marketing* all relied on *Abood v. Detroit Board of Education*,⁹⁴ which is the leading case from which compelled subsidy authority originated.⁹⁵ *Abood* required that any compelled payment of a message must be “germane” to the purpose of the association or organization.⁹⁶ Mandatory fees cannot support political, ideological, or expressive beliefs unrelated to the purpose of the association.⁹⁷ The Court specifically ruled that being compelled to pay fees to support a message is no different than prohibiting one’s message.⁹⁸

Essentially, checkoff programs should identify the speaker of the message in order to determine if a compelled subsidy claim is available.⁹⁹ Compelled support of a private speaker is fundamentally different from

91. See *Wileman*, 521 U.S. at 481 (Souter, J., dissenting) (explaining that mandatory funding of expressive activity is “corollary to the principle that what may not be suppressed may not be coerced”); see also *Yanes*, *supra* note 75, at 1475 (explaining the principle of compelled subsidy).

92. See *Livestock Mktg.*, 544 U.S. at 557 (stating that the same reasoning exists to protect compelled subsidy as compelled speech in certain cases); *Yanes*, *supra* note 75, at 1475 (noting the similarities between compelled speech and compelled subsidy).

93. See *Livestock Mktg.*, 544 U.S. at 560 (defining compelled subsidy and distinguishing that while the government cannot compel individuals to pay for a private message, the government may constitutionally compel a government message); *United Foods*, 533 U.S. at 415-16 (holding that the First Amendment prevents the government from compelling subsidies from individuals who object to the speech); see, e.g., *Keller v. State Bar of Cal.*, 496 U.S. 1, 13-14 (1990) (finding that funding of speech germane to the activities of an association is constitutional, while funding of ideological activities is not); *Abood*, 431 U.S. 209, 234 (holding that mandatory assessments must be germane to the activities of the association and justified by vital policy interests).

94. 431 U.S. 209 (1977).

95. See *Abood*, 431 U.S. at 234 (ruling that mandatory membership in a trade union, including payment of union dues, was constitutional, but mandating fees to contribute to political or ideological matters unrelated to collective bargaining of the union was unconstitutional); see also *Livestock Mktg.*, 544 U.S. at 560 (holding that compelled support of private speech is unconstitutional, while compelled support of government speech is constitutional); *United Foods*, 533 U.S. at 415-16 (holding that compelled contributions to subsidize advertising in an *unregulated* industry are unconstitutional) (emphasis added); *Wileman*, 521 U.S. at 466 (explaining that commercial speech in the form of generic advertising warrants less protection not because of the restriction of the commercial speech, but because of the funding of the speech).

96. *Abood*, 431 U.S. at 234.

97. *Id.*

98. *Id.*

99. See *Livestock Mktg.*, 544 U.S. at 558 (noting that the prior cases which invalidated checkoff fees to subsidize commercial speech involved speech belonging to entities other than the government).

compelled support of government speech; whereas compelled support of a private message is unconstitutional, compelled support of a government message has been allowed, and in *Livestock Marketing*, was squarely held to be constitutional.¹⁰⁰

IV. CASES AND DEVELOPMENT OF THE LAW

The case law involving First Amendment claims stemming from compelled checkoff dollars that fund generic advertising began with *Wileman* in 1996, and came full circle in 2005 with *Livestock Marketing*. Associations may now use the *Livestock Marketing* bright-line rule in defining similar checkoff programs as government speech.¹⁰¹ However, while the bright-line rule may appear to resolve First Amendment challenges involving compelled checkoff dollars, it is uncertain how the government speech doctrine will prevail as a defense in other contexts.¹⁰²

Wileman, *United Foods*, and *Livestock Marketing* all involved federal acts that compelled funding of generic advertising.¹⁰³ The *Wileman* Court found no First Amendment violation for the California tree fruit producers, and instead upheld the marketing orders as constitutional and representative of the association's own internal economic regulation and comprehensive marketing scheme.¹⁰⁴

100. *See id.* (citing *Abood*, 431 U.S. at 259 n.13) (reasoning that compelled support of private speech is unconstitutional, but compelled support of government speech may be permissible). The *Livestock Marketing* Court stated, "We have generally assumed, though not squarely held, that compelled funding of government speech does not alone raise First Amendment concerns." *Id.* at 559; *see Keller v. State Bar of Cal.*, 496 U.S. 1, 12-13 (1990) (holding that compelled support of a private message is unconstitutional); *Wooley v. Maynard*, 430 U.S. 705, 721 (1977) (Rehnquist, J., dissenting) (explaining that state citizens compelled to fund a government slogan would be instruments in fostering a government message for which First Amendment implications arise only if the citizens are forced to profess affirmation or assert the slogan is true).

101. *See Gershengorn*, *supra* note 4, at 8 (referring to the *Livestock Marketing* decision as an effectively established bright-line rule).

102. *See id.* (predicting that the consequences of using the government speech doctrine as a defense in other areas of law are less certain); *see also* discussion *infra* Part V (noting that while *Livestock Marketing* has helped establish checkoff programs as government speech, future use of the government speech doctrine in other contexts is less clear).

103. *See Livestock Mktg.*, 544 U.S. at 553 (referring to the Beef Promotion and Research Act, 7 U.S.C. §§ 2901-2911 (2000), which compelled checkoff assessments to cattle ranchers); *United States v. United Foods, Inc.*, 533 U.S. 405, 408 (2001) (referring to the Mushroom Promotion, Research, and Consumer Information Act, 7 U.S.C. §§ 6101-6112 (1994), which compelled checkoff assessments to mushroom growers); *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 461 (1997) (referring to the Agricultural Marketing Agreement Act, 7 U.S.C. §§ 601-626 (1994), which compelled assessments from California tree fruit growers of nectarines, peaches, and plums).

104. *Wileman*, 521 U.S. at 469-70.

In *United Foods*, the Court found that the Mushroom Promotion, Research, and Consumer Information Act unconstitutionally compelled fees for mushrooms, since the associational program was largely an unregulated industry, unlike the highly regulated industry in *Wileman*.¹⁰⁵ Relying on *Abood*, the *United Foods* Court found that the advertising at issue was not germane to the association's broader purposes.¹⁰⁶ In fact, the only purpose for compelling fees was to fund the generic advertising.¹⁰⁷ To compel funding of generic advertising, the association must have a broader purpose for compelling fees beyond advertising alone.¹⁰⁸

In 2005, the *Livestock Marketing* Court concluded that The Beef Act, which compelled fees for generic advertising, was constitutional as government speech despite First Amendment challenges.¹⁰⁹ In effect, *Livestock Marketing*, like *Wileman*, upheld the marketing orders as constitutional.¹¹⁰ However, the analysis varies widely between the two cases.¹¹¹ The *Livestock Marketing* and *United Foods* Courts faced almost identical regulatory programs, yet arrived at different conclusions regarding the constitutionality of the Acts at issue.¹¹² Each of these three major Supreme Court cases will be examined in chronological order in an attempt to reconcile the rulings.

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

106. *Id.* at 413.

107. *Id.* at 415.

108. *See id.* (noting that constitutional protection in compelled subsidy claims extends to programs that require funding for more than just generic advertising as part of a broader regulatory scheme).

109. *See* *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559 (2005) (holding that government speech will overcome protests of infringement of First Amendment rights).

110. *Id.* at 561-63.

111. *Compare* *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 469 (1997) (holding that neither commercial speech claims nor any speech violations existed), *with* *Livestock Mktg.*, 544 U.S. at 559-60 (acknowledging that a First Amendment claim exists in cases of compelled subsidy of private speech, but ruling the Act at issue was permissible under the government speech doctrine).

112. *Compare* *United Foods*, 533 U.S. at 415 (ruling that the Act was unconstitutional because there was no other regulatory purpose beyond advertising), *with* *Livestock Mktg.*, 544 U.S. at 2061 (noting the similarities between the assessment program at issue and the unconstitutional assessment program in *United Foods*, but holding that the Act in *Livestock Marketing* was permissible as government speech).

A. GLICKMAN V. WILEMAN BROS. & ELLIOT, INC.

1. *Facts and Issue*

As the first commercial speech case before the Supreme Court since the 44 *Liquormart* ruling, *Wileman* involved a First Amendment compelled speech challenge to generic advertising funded by checkoff fees assessed to the growers, handlers, and processors of California tree fruits.¹¹³ Producers challenged assessments to pay for generic advertising under marketing orders promulgated by the Secretary of Agriculture, Dan Glickman, pursuant to the Agricultural Marketing Agreement Act of 1937 (AMAA).¹¹⁴ The AMAA orders were created to displace competition in favor of collective action in regulated markets, and expressly exempted the program from antitrust laws by mandating prices, size restrictions of fruits, quality and grade of marketed fruits, and product packaging of fruits.¹¹⁵ Marketing orders implemented under the Act required approval by at least a two-thirds majority of producers.¹¹⁶

The *Wileman* Court determined that the marketing orders were either the result of economic regulation and therefore subject to less scrutiny, or were subject to strict scrutiny as a First Amendment claim.¹¹⁷ The Court noted that the detailed marketing orders displaced much of the independent business activity that antitrust laws protect, thus exempting the producers from antitrust claims.¹¹⁸ Therefore, the producers' autonomy was limited as members of a broader collective enterprise.¹¹⁹ The Court examined the First Amendment claims in light of the fact that the producers gave up autonomy for the benefits of a broad collective marketing scheme.¹²⁰

2. *Holding and Analysis*

The *Wileman* Court determined that there was no abridgement of the producers' freedom of speech for the following reasons: (1) there was no

113. *Wileman*, 521 U.S. at 460-61.

114. Agriculture Marketing Agreement Act, 7 U.S.C. §§ 601-626 (1994). This statute was enacted by Congress to establish and maintain fair prices, to create orderly marketing conditions for commodities, to ensure anti-trust competition within the small sector of tree fruit producers, and to ensure product standards and prices are set for the collective benefit of the association. *Wileman*, 521 U.S. at 461.

115. 7 U.S.C. §§ 601-626.

116. 7 U.S.C. § 608c(9)(B); *Wileman*, 521 U.S. at 461-62.

117. *Wileman*, 521 U.S. at 469.

118. *Id.*

119. *Id.*

120. *Id.*

restraint on the producers' freedom to communicate any message to any audience, so there was neither First Amendment infringement nor commercial speech restriction;¹²¹ (2) there was no compelled speech at issue;¹²² and (3) there was no compelled subsidy at issue.¹²³ Rather, the Court claimed that the producers took issue with the internal economic regulation of the association, which must merely pass rational basis scrutiny.¹²⁴ Therefore, the Court found that requiring the producers to finance the generic advertising did not abridge their freedom of speech.¹²⁵

a. First Amendment Challenge

The producers asserted numerous reasons why the program impinged on their freedom of speech, varying from the fact that the marketing orders affected their individual advertising budgets to the fact that individual advertising may earn more money in an unregulated market.¹²⁶ The Court brushed aside these arguments by explaining that indirectly linking the economic regulation of the marketing orders to a handler's individual advertising budget does not trigger First Amendment protection.¹²⁷

The Court expressed concern that the handlers misunderstood the First Amendment protections, reasoning that there was "no basis for concluding that the factually accurate advertising constitutes an abridgement of anybody's right to speak freely."¹²⁸ Instead, the Court stated that the handlers had concerns regarding the operation of the association.¹²⁹ Even if the program had been faulty in producing disagreeable advertising, it was at the

121. *Id.* at 469. This means that *44 Liquormart v. Rhode Island*, 517 U.S. 484, 518 (1996); *Cent. Hudson v. Public Service Commission of New York*, 447 U.S. 557, 563-66 (1980); and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976); do not apply to the commercial message without a First Amendment claim, where the government is restricting commercial advertisements. *Wileman*, 521 U.S. at 469 n.12.

122. *Wileman*, 521 U.S. at 469. The Court determined that *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 570 (1995); *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 792 (1988); *Wooley v. Maynard*, 430 U.S. 705, 713-14 (1977); and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 632 (1943); did not apply because there was no compelled speech claim. *Wileman*, 521 U.S. at 470 n.13.

123. *Wileman*, 521 U.S. at 470. The Court determined that *Keller v. State Bar of California*, 496 U.S. 1, 13-14 (1990), and *Abood v. Detroit Board of Education*, 431 U.S. 209, 234 (1977), did not apply either because there was no compelled subsidy claim. *Wileman*, 521 U.S. at 469 n.14.

124. *Wileman*, 521 U.S. at 468-69.

125. *Id.* at 476.

126. *Id.* at 468-69, 474-75.

127. *Id.* at 468-69.

128. *Id.* at 473-74.

129. *Id.* at 474-75.

hands of a poorly governed association board.¹³⁰ Thus, there was no First Amendment impingement.¹³¹

The Supreme Court continued by noting that the purpose of the AMAA and marketing orders was to further the economic interests of the producers as a group.¹³² Because the association was a collective effort in which members had a voice regarding the implementation of the orders, the Court could not criticize the way the program operated.¹³³ According to the Court, second guessing the policy judgments of an internal economic regulatory program was not within the purview of its duties, which implied that the marketing orders needed only to pass rational basis scrutiny.¹³⁴ The Court ruled that the handlers experienced no restriction on their freedom to communicate any message to any audience by their own means.¹³⁵ Essentially, there was no infringement of the producers' freedom of speech, but rather the producers took issue with the internal regulation and administration of the association.¹³⁶

b. *Central Hudson* Test Did Not Apply

The Court stated that to apply the *Central Hudson* test would be inconsistent, because *Central Hudson* involved a restriction of commercial speech, while this case involved an association's economic regulation and not a restriction.¹³⁷ Even if the claim involved a compelled subsidy challenge, the *Central Hudson* test would still be inapplicable, since it regulated restrictions on commercial speech and not funding of commercial speech.¹³⁸

c. Compelled Speech Challenge

Furthermore, the *Wileman* Court found that there was not a valid compelled speech claim in the case, reasoning that the use of assessments: (1) did not require handlers to repeat objectionable messages from their own mouths;¹³⁹ (2) did not require producers to use their own personal property to convey an "antagonistic ideological message¹⁴⁰"; (3) did not

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 474.

135. *Id.* at 470-71.

136. *Id.* at 474, 476.

137. *Id.* at 469.

138. *Id.*

139. *Id.* at 471 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943)).

140. *Id.* (citations omitted).

force producers to respond to a hostile message when remaining silent was more appealing;¹⁴¹ or (4) did not publicly attribute the message with the producers or identify the producers as being associated with another's speech.¹⁴²

While the *Wileman* Court relied upon past compelled speech cases, it is troubling that the Court trivialized the handlers' First Amendment claims by asserting that disagreement with a message is too trivial to warrant First Amendment protection.¹⁴³ Interestingly, generic advertising challengers in later cases did not raise many compelled speech claims, but instead narrowed the scope of their claims to involve compelled subsidy.¹⁴⁴

d. Compelled Subsidy Challenge

While the *Wileman* Court found neither a valid First Amendment challenge nor a valid compelled subsidy challenge, the Court stated that rendering "financial support of *others'* speech" may be constitutional in certain circumstances.¹⁴⁵ The distinction was that compelled funding for *any organization's* expressive activities is too broad and is unconstitutional, but being compelled to subsidize expressive activities that conflict with *one's* "freedom of belief" will trigger heightened protection.¹⁴⁶

The Court reasoned that compelled contributions for political purposes unrelated to the association's interest trigger First Amendment protection.¹⁴⁷ The Court stated that in this case, there was not a political purpose for compelling fees because there was no "crisis of conscience."¹⁴⁸ A "crisis of conscience" stems from political or ideological disagreement with the message and triggers First Amendment protection from compelled subsidy of the advertising.¹⁴⁹ The *Wileman* Court stated, "The *mere* fact that objectors believe their money [was] not being well spent does not mean

141. *Id.* (citing *Wooley v. Maynard*, 430 U.S. 705, 713-14 (1970)).

142. *Id.* (citing *PruneYard Shopping Ctr. v. Robbins*, 447 U.S. 74, 88 (1980)).

143. *See id.* (stating that "[producers] are not required themselves to speak, but are *merely* required to make contributions for advertising") (emphasis added). The Court also noted that the producers had *trivial* disagreements with the operation of the program and the content of the advertising message. *Id.*

144. *Id.* at 471-72.

145. *Id.* (emphasis added).

146. *Id.* (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977)) (emphasis added).

147. *See id.* at 472 (citing *Abood*, 431 U.S. at 234-35) (stating 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").

148. *Id.*

149. *Id.* at 472.

[that] they have a First Amendment complaint.”¹⁵⁰ The Court implied that the producers’ belief that the money is not well spent did not create a crisis of conscience or indicate political or ideological disagreement with the message, and therefore, was not subject to First Amendment protection.¹⁵¹

The *Wileman* Court found that the generic advertising of the California tree fruits was “unquestionably germane” to the association’s purposes for implementing the marketing orders.¹⁵² Additionally, the assessments were not funding any ideological messages which would trigger a crisis of conscience.¹⁵³ Thus, the marketing orders were constitutional under a compelled subsidy analysis, despite the fact that the Court ruled that no First Amendment claim even existed, because the marketing orders were economic regulation as part of a comprehensive marketing program.¹⁵⁴ The Court concluded that the mere fact that the producers “[did] not wish to foster” the generic advertising was not enough to justify “overriding the judgment of the majority of market participants . . . and legislators who have concluded” that such messages and programs are collectively beneficial.¹⁵⁵

3. *Justice Thomas’s Dissent*

Justice Thomas’s dissent in *Wileman* has proven to be interesting in hindsight, especially since the Court later ruled in *Livestock Marketing* that checkoff programs might raise First Amendment concerns.¹⁵⁶ Justice Thomas characterized the majority ruling in *Wileman* as illogical, because in order to ignore First Amendment claims, one must determine either that (1) paying for advertising is not speech; or (2) compelling payment for third-party messages does not trigger First Amendment protection under *Abood*.¹⁵⁷ Justice Thomas argued that just as draft card burning, flag burning, armband wearing, public sleeping, and nude dancing are all forms of speech protected by the First Amendment, so too should payment of commercial advertisements be protected as compelled expressive activity.¹⁵⁸

150. *Id.* (quoting *Ellis v. Ry. Clerks*, 466 U.S. 435, 456 (1984)).

151. *Id.*

152. *Id.* at 473.

153. *See id.* (meeting the *Abood* and *Keller* requirements that the regulation must be vital to the policy interests of the association, as well as germane to the association’s activities).

154. *Id.* at 474.

155. *Id.* at 477.

156. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 566-67 (2005).

157. *Wileman*, 521 U.S. at 506 (Thomas, J., dissenting).

158. *Id.*; *see Texas v. Johnson*, 491 U.S. 397, 399 (1989) (referring to flag burning as a protected expressive activity); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (stating that city ordinances which prohibit sleeping in the park trigger First Amendment

According to Justice Thomas, where the law protects so many other forms of expressive conduct, to not recognize the speech implications in this case would be akin to allowing the government to force payment for other expressive conduct that it cannot restrict.¹⁵⁹

4. *Implications of Wileman*

In light of *Wileman*, it appeared that the Supreme Court was approaching dangerous precedent by allowing the government to communicate messages at the expense of private speakers under the guise of economic regulation, despite protest.¹⁶⁰ In terms of commercial speech, the Court awarded less protection to commercial speech in *Wileman* than is generally afforded to other constitutionally protected speech—not because of the restrictions on the speech, but rather because the funding of the speech was an economic regulation within the marketing scheme.¹⁶¹ Similarly, in the context of compelled speech, the Court saw no violation since there were no restrictions prohibiting the producers from advertising on their own outside of the collective association.¹⁶²

The *Wileman* Court failed to apply *Abood* since there was no political or ideological disagreement with the message at issue, despite the fact that the compelled subsidy of speech appeared to be obvious.¹⁶³ However, *Abood* did not require disagreement to trigger First Amendment protection.¹⁶⁴ What is troubling is that in order to receive constitutional protection, disagreement can only stem from political or ideological disagreement, which is inconsistent with the spirit of *Abood*.¹⁶⁵ *Abood* stated that the values lying at the “heart of the First Amendment” pertain to individual freedom to shape a message with one’s conscience, and individuals must

issues); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76-77 (1981) (referring to nude dancing as being protected by the First Amendment); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507-14 (1969) (referring to armbands as expressive conduct); *United States v. O’Brien*, 391 U.S. 367, 369 (1968) (referring to burning draft cards or Selective Service registration certificates as protected expressive conduct).

159. See *Wileman*, 521 U.S. at 506 (Thomas, J., dissenting) (stating that to follow the majority means that “surely we have lost our way”).

160. See Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 1055-57 (2005) (predicting danger in allowing the government to communicate messages at others’ expense when the government has not identified itself as the speaker, and defining such acts as part of the doctrine of transparency); *The Supreme Court, 1996 Term: Leading Cases*, 111 HARV. L. REV. 197, 319-29 (1997) (warning that danger lies in the government surreptitiously communicating messages through the wallets of private speakers).

161. *Wileman*, 521 U.S. at 477.

162. *Id.* at 469.

163. *Id.* at 471.

164. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977).

165. *Id.*

not be coerced to support a state's message if it conflicts with their "freedom of belief."¹⁶⁶ To require disagreement before allowing constitutional protection of compelled subsidy would be inconsistent with the values of the First Amendment, which protects the right to speak or the right not to speak at all.¹⁶⁷ Generally, *Wileman* has received lukewarm approval, especially in light of the subsequent cases, *United Foods* and *Livestock Marketing*.¹⁶⁸

B. *UNITED STATES V. UNITED FOODS, INC.*

Just four years after *Wileman*, the Supreme Court considered *United Foods*, which involved a similar factual scenario.¹⁶⁹ In *United Foods*, the Mushroom Promotion, Research, and Consumer Information Act (Mushroom Act) exacted fees from producers to subsidize generic advertising to promote more mushroom consumption.¹⁷⁰ The Court distinguished *United Foods* from *Wileman* and ruled that the Mushroom Act at issue was unconstitutional.¹⁷¹

1. *Facts and Issue*

Mushroom growers approached the USDA objecting to the Mushroom Act's compelled subsidy for generic advertising under the First Amendment.¹⁷² The producers wanted to convey the message that their mushrooms were superior to those of other producers.¹⁷³

The *United Foods* Court questioned whether the generic advertising was commercial speech where compelled subsidy of such speech violated the First Amendment rights of the mushroom growers.¹⁷⁴ The Court even inserted the government into the issue by asking, "whether the *government* may underwrite and sponsor speech with a certain point of view using special subsidies exacted from a designated class of persons, some of whom

166. *Id.*

167. *Wileman*, 521 U.S. at 472.

168. See Nicole B. Cesarez, *Don't Tell Me What to Say: Compelled Commercial Speech and the First Amendment*, 63 MO. L. REV. 929, 969 (1998) (finding faulty reasoning in the *Wileman* decision because of the emphasis placed on the regulatory nature of the association); Dave Smith, Note, *Forced Advertising: Free Speech or Not Even?* Glickman v. Wileman Bros. & Elliot, Inc., 117 S. Ct. 2130 (1997), 33 LAND & WATER L. REV. 779, 795 (1998) (referring to *Wileman* as a loaded weapon).

169. *United States v. United Foods, Inc.*, 533 U.S. 405, 413 (2001).

170. Mushroom Promotion, Research, and Consumer Information Act, 7 U.S.C. §§ 6101-6112 (1994).

171. *United Foods*, 533 U.S. at 411.

172. *Id.* at 409.

173. *Id.* at 413.

174. *Id.* at 410.

object to the idea being advanced.”¹⁷⁵ Additionally, the Court considered the issue of compelled subsidy under *Abood*, concluding that disagreement with the message was important.¹⁷⁶

2. *Holding and Analysis*

First, the Court asserted that the speech, even though it was commercially driven, did not warrant less protection than other forms of speech under the First Amendment.¹⁷⁷ Just as the government cannot prohibit individuals from speaking, the government cannot compel others to express or pay for certain views with which they disagree.¹⁷⁸ The Court ruled in favor of the mushroom producers under *Abood* and carefully distinguished *Wileman* so as not to overturn it, but rather to sidestep it.¹⁷⁹

Next, the *United Foods* Court distinguished the assessment program at issue from the protected program in *Wileman*, noting that the mandatory assessments here were not ancillary to a more comprehensive program that restricted marketing autonomy.¹⁸⁰ Yet, as in *Wileman*, the Court was careful to note that the *Central Hudson* test did not apply because the claim involved a compelled subsidy challenge and not a challenge to restrictions on commercial speech.¹⁸¹ The *United Foods* Court warned that constitutional values are at serious risk if the government compels individuals to pay special subsidies for speech that the government favors.¹⁸²

175. *Id.* (emphasis added). It was important that the Court expressly named the governmental role in this case, because as the *Livestock Marketing* Court found, the governmental role in marketing orders defines the speaker of the commercial message. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560-61 (2005). In turn, the speaker of the message defines the type of constitutional protection awarded. *Id.* If a private entity compels fees for generic advertising, First Amendment rights are implicated. *Id.* However, if the generic advertising message belongs to the government, no constitutional protection is awarded under the government speech doctrine, as in *Livestock Marketing. Id.*

176. *United Foods*, 533 U.S. at 410. *But see* *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 472 (1997) (stating that under *Abood*, disagreement is not required unless it is political or ideological disagreement).

177. *See United Foods*, 533 U.S. at 410 (reaffirming the view that commercial speech warrants the same protection as other speech). *But see Wileman*, 521 U.S. at 469 (finding that because the generic advertising did not qualify as an impingement on the freedom of speech, the level of scrutiny did not even need to be addressed).

178. *United Foods*, 533 U.S. at 410.

179. *Id.* at 415.

180. *Id.* at 411.

181. *Id.* at 410.

182. *Id.* at 411. However, the *United Foods* Court never entertained the government speech doctrine that prevailed in *Livestock Marketing. Id.* at 416. The government submitted a brief asserting the government speech doctrine, but the Court refused to consider the issue since the doctrine was not raised in a timely manner at the appellate level. *Id.* By not allowing this claim, the Court failed to consider the issue of compelled funding by the government, but hinted that the government speech issue might be raised in a similar case. *Id.* at 416-17.

a. First Amendment Challenge

In considering the producers' First Amendment challenge, the Court viewed the checkoff program in its entirety.¹⁸³ The *United Foods* Court found a First Amendment violation on the basis that the marketing orders lacked a broad regulatory purpose, such that to compel subsidy directly conflicted with *Abood*.¹⁸⁴ What differed from *Wileman* was that the entire regulatory program in that case controlled so many different aspects of growing, producing, and marketing products that the tree fruit producers had given up their autonomy, despite their ability to communicate their own advertising in addition to the generic advertising.¹⁸⁵ In *Wileman*, there were no First Amendment violations because the Court viewed the checkoff assessments as internal economic regulation.¹⁸⁶ Here, the marketing orders did not regulate anything other than the generic advertising, so the assessments were not germane to the association's activities and conflicted with *Abood*.¹⁸⁷ Therefore, the checkoff assessments were in violation of the First Amendment's protection against compelled subsidy.¹⁸⁸

b. Compelled Subsidy Challenge

In contrast to *Wileman*, it is interesting to note that the *United Foods* Court skipped consideration of a compelled speech challenge and defined the issue as a compelled subsidy challenge.¹⁸⁹ In a simple and short analysis under *Abood*, the Court questioned whether the government imposed membership in the mushroom association.¹⁹⁰ Citing *Abood*, the Court said that compelled funding is allowed only for "overriding associational purposes."¹⁹¹ Here, the Court stated that membership in the association served only one interest, the funding of generic advertising.¹⁹² The Court found that assessments that arise for the very purpose of compelling speech directly conflict with *Abood*.¹⁹³ In continuing with its analysis, the Court reasoned that to say that the generic advertising was germane to itself is

183. *Id.* at 412.

184. *Id.* at 413-15.

185. *Id.* *But see* Glickman v. Wileman Bros. & Elliot, Inc., 521 U.S. 457, 462 (1997) (noting that the marketing orders at issue controlled the size, grade, and packaging of the products, as well as generic advertisements).

186. *Wileman*, 521 U.S. at 469-70.

187. *United Foods*, 533 U.S. at 412.

188. *Id.* at 409.

189. *Id.*

190. *Id.* at 412-13.

191. *Id.*

192. *Id.*

193. *Id.* at 413; *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977).

cyclical and wrong under *Abood*.¹⁹⁴ Instead, the Court found that the generic advertising was not even germane to the association's purpose independent of the advertising, because no other reason existed for compelling fees or membership beyond funding generic advertising.¹⁹⁵ The Court further hinted that a rare and permissible non-germane reason for compelling funding might be to prevent deception of consumers, but there was no indication of that situation here.¹⁹⁶

Ultimately, the *United Foods* Court struck down the checkoff program because the subsidized speech was not germane to the larger purpose used to justify the association.¹⁹⁷ Here, it was only the associational purpose that allowed the compelled subsidy for the commercial speech in the first place.¹⁹⁸ The marketing orders directly conflicted with *Abood* because the compelled subsidy was not germane to other purposes of the association aside from advertising.¹⁹⁹ Therefore, the marketing orders were unconstitutional under *Abood*.²⁰⁰

3. Justice Breyer's Dissent

In dissent, Justice Breyer argued that this case was no different than *Wileman* because the marketing orders did not restrain the producers' freedom to advertise on their own.²⁰¹ Thus, there was neither a First Amendment violation nor a commercial speech restriction.²⁰² Additionally, there was no speech physically compelled from the producers' own mouths, nor were the producers forced to endorse or finance political or ideological speech.²⁰³

Furthermore, Justice Breyer argued that the amount of government regulation, as part of the comprehensive marketing program, should not be

194. *United Foods*, 533 U.S. at 415-16; see *Keller v. State Bar of Cal.*, 496 U.S. 1, 13-14 (1990) (compelling dues for the state legal bar was constitutional because the dues were germane to the purposes of the bar program); *Abood*, 431 U.S. at 234-35 (compelling teachers to pay union dues which supported objectives outside the realm of the union was unconstitutional, although the mandatory membership and corresponding dues that were germane to the membership were permissible).

195. *United Foods*, 533 U.S. at 415-16.

196. *Id.* at 416 (citing *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985)).

197. *Id.* at 413.

198. *Id.*

199. *Id.* at 415-16.

200. *Id.*

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

202. *Id.*

203. *Id.* at 419.

a determinative factor that is so critical to the outcome of the case.²⁰⁴ The *Wileman* Court did not find compelled speech claims, and did not determine the level of government control of the association.²⁰⁵ Justice Breyer argued that without determining governmental control and regulation in *United Foods*, as in *Wileman*, there could be no compulsion through regulation.²⁰⁶ The *Wileman* Court found that the Act was constitutional as an economic regulation for which the association members voted.²⁰⁷ According to Justice Breyer, the Act at issue in *United Foods* was also constitutional, because the only significant difference between the programs of *Wileman* and *United Foods* was the degree of government regulation.²⁰⁸ Justice Breyer maintained that such differences in the degree of government regulation did not amount to impingement of the freedom of speech, but rather the regulation at issue amounted to economic regulation similar to the constitutionally protected program in *Wileman*.²⁰⁹

4. *Implications of United Foods*

The *United Foods* ruling effectively hinted that compelled subsidy is permissible in two cases: (1) as an element of a valid regulatory scheme like *Wileman* or (2) if germane to the association's purpose.²¹⁰ To constitutionally compel checkoffs and assessments, the fees should go toward more than just advertising the product, but rather should be part of a broad regulatory scheme for marketing the product.²¹¹ To be permissible under *Abood* as compelled subsidy of speech, the speech must be germane to the purposes of the association, and the funding of such speech may only be compelled if the fees fund more than advertising alone.²¹²

While the *United Foods* Court declined to rule on the government's assertion of the government speech doctrine because the issue was not raised on appeal, the Court effectively spelled out the terms for a compelled subsidy program that complies with *Abood* without First Amendment

204. *Id.* at 428.

205. *Id.*

206. *Id.*

207. *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 476 (1997).

208. *United Foods*, 533 U.S. at 421-22 (Breyer, J., dissenting).

209. *Id.* at 428.

210. *Id.* at 415 (majority opinion); see *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 571 (2005) (Souter, J., dissenting) (stating that compelled subsidy will only be permissible as part of a valid regulatory scheme similar to the scheme in *Wileman* or as government speech like the speech in *Livestock Marketing*).

211. *United Foods*, 533 U.S. at 413.

212. *Id.*

protections.²¹³ The federal government in *Livestock Marketing* took advantage of the opportunity to raise the government speech defense and expanded on the issue.²¹⁴

C. *JOHANNIS V. LIVESTOCK MARKETING ASS'N*

1. *Facts and Issue*

Under almost identical circumstances as the mushroom growers in *United Foods*,²¹⁵ beef cattle ranchers in *Livestock Marketing* opposed the use of checkoff funds of \$1.00 per head of cattle sold under the Beef Act.²¹⁶ The producers asserted that the generic advertising campaign “Beef. It’s What’s for Dinner,” which was funded by checkoff assessments, did not effectively distinguish American grain-fed beef from the allegedly inferior grass-fed, imported beef.²¹⁷ The Court determined that the producers’ First Amendment claim involved compelled subsidy by a government entity.²¹⁸

2. *Holding and Analysis*

In *Livestock Marketing*, the Supreme Court held that the beef checkoff funded the government’s own speech, such that a First Amendment compelled subsidy challenge was not necessary.²¹⁹ Additionally, the Court distinguished both *Wileman* and *United Foods* from *Livestock Marketing* and held that they were not controlling.²²⁰ In distinguishing *Wileman* and *United Foods*, the *Livestock Marketing* Court found that the First Amendment would be implicated with compelled subsidy of *private* speech.²²¹

a. The Government Speech Doctrine Prevailed

“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

213. *Id.* at 416; Brief for the Respondents at 32 n.19, 32-37, *United Foods*, 533 U.S. 405 (No. 95-1184).

214. *Livestock Mktg.*, 544 U.S. at 559.

215. *See id.* at 558-59 (quoting *Livestock Mktg. Ass’n v. USDA*, 335 F.3d 711, 717 (8th Cir. 2003)) (stating its agreement with the Eighth Circuit that the beef checkoff was identical to the mushroom checkoff in *United Foods*).

216. Beef Promotion and Research Act, 7 U.S.C §§ 2901-2911 (2000).

217. *Livestock Mktg.*, 544 U.S. at 555-56.

218. *Id.* at 556-60.

219. *Id.* at 559-61.

220. *Id.* at 558, 558 n.3.

221. *Id.*

government itself.”²²² The Court echoed *Abood*, stating that fundamental differences lie between compelled support of private entities and compelled support of government.²²³ Until now, while not squarely held, the Court had assumed that government speech alone would not raise a First Amendment violation.²²⁴

The *Livestock Marketing* Court wrote that from “beginning to end,” the message set out in the beef promotions was the federal government’s own message.²²⁵ Congress and the Secretary of Agriculture controlled and approved the message.²²⁶ Any part of the regulatory process not directly involving Congress or the Secretary was controlled by an entity that was answerable to the Secretary.²²⁷ While the producers asserted that some of the entities involved in the marketing program were not governmental entities, the Court disagreed and stood by the government’s claiming of the message.²²⁸ The government is not precluded from asserting the government speech doctrine merely because it solicits assistance from outside sources to develop the advertising message.²²⁹ The government speech doctrine is warranted when the government sets the overall message, appoints board members, and holds the ability to veto advertising messages.²³⁰

Overall, the *Livestock Marketing* Court developed a bright-line rule that when a federal program finances generic advertising to promote a product, and the financing comes from the compelled subsidy of the sale of the product, the generic advertising will qualify as government speech.²³¹ Heightened scrutiny does not apply in cases involving government speech, and the checkoff fees only need to pass the rational basis test.²³²

222. *Id.* at 559 (citing *United States v. United Foods, Inc.*, 533 U.S. 405, 416-17 (2001); *Keller v. State Bar of Cal.*, 496 U.S. 1, 15-16 (1990); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 212-13 (1977)); *see Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229-30 (2000) (explaining that inevitably, funds raised by the government will be spent on government speech and defense of government policies).

223. *Livestock Mktg.*, 544 U.S. at 558; *Abood*, 431 U.S. at 259 n.13.

224. *Livestock Mktg.*, 544 U.S. at 559.

225. *Id.* at 560.

226. *Id.* at 561.

227. *Id.*

228. *Id.*

229. *See id.* at 560, 560 n.4, 561 (responding to producers’ claims that the Operating Committee was controlled by a non-governmental entity, such that the governmental speech doctrine should fail).

230. *Id.*

231. *Id.* at 559-60.

232. *See id.* at 553 (stating that the dispositive question was whether government speech is exempt from First Amendment scrutiny).

b. Distinguish from *Wileman*

The *Livestock Marketing* Court reasoned that *Wileman* did not control.²³³ The compelled support at issue in *Wileman* was a legitimate part of a collective and broad regulatory scheme, where aspects of the program were wholly unrelated to marketing or commercial speech through advertising.²³⁴ The Beef Act in *Livestock Marketing* appeared to regulate little beyond the compelled subsidy of advertising.²³⁵ Additionally, while the government in *Wileman* waived any argument for the government speech defense, the government in *Livestock Marketing* raised the defense, which effectively prevented the assessment program from being unconstitutional.²³⁶ The *Livestock Marketing* Court reasoned that the *Wileman* decision was distinguishable because of the comprehensive marketing scheme at issue in that case.²³⁷ Essentially, the *Wileman* producers gave up autonomy and the right to protest the messages in exchange for benefits under a broad economic regulatory scheme.²³⁸ In *Livestock Marketing*, on the other hand, there was a regulatory program in place, but it was not economic regulation.²³⁹ Instead, it was the government's own message being advertised.²⁴⁰

c. Distinguish from *United Foods*

The Court held that *United Foods* did not control either, because in that case, the compelled fees were unconstitutional since the only existing regulatory purpose was to fund the generic advertising.²⁴¹ Most importantly, the *Livestock Marketing* Court stated its presumption that the speech

233. *Id.* at 559 n.3.

234. *See id.* (explaining that as in *United Foods*, the *Wileman* holding did not apply because that decision rested on the internal regulatory nature of the association); *United States v. United Foods, Inc.*, 533 U.S. 402, 415 (2001) (noting that *Wileman* did not apply because it involved internal economic regulation, while *United Foods* involved nothing germane to the association's activities beyond generic advertising).

235. *See Livestock Mktg.*, 544 U.S. at 555-56 (stating that the program at issue in *United Foods* was nearly identical to the program at issue in *Livestock Marketing*, which implied that there was little regulation of the beef association beyond advertising).

236. *See id.* at 559-60 (allowing the government speech doctrine as a valid defense of compelled subsidy); *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 482 n.2 (1997) (Souter, J., dissenting) (noting that the government speech doctrine was waived).

237. *Livestock Mktg.*, 544 U.S. at 559 n.3.

238. *Wileman*, 521 U.S. at 476.

239. *Livestock Mktg.*, 544 U.S. at 559-60.

240. *Id.* at 560.

241. *United States v. United Foods, Inc.*, 533 U.S. 405, 413, 415-16 (2001).

in *United Foods* was private, which directly conflicted with *Abood*.²⁴² In *Livestock Marketing*, the government defended the speech as being its own, which is protected under the government speech doctrine.²⁴³ The Court stated, “We have generally assumed, though not yet squarely held, that compelled funding of *government* speech does not alone raise First Amendment concerns.”²⁴⁴ The *Livestock Marketing* Court distinguished this case from *United Foods* on the basis that *United Foods* involved compelled subsidy of presumably private speech, while *Livestock Marketing* involved compelled subsidy of government speech.²⁴⁵

d. No Compelled Speech Challenge

Additionally, the *Livestock Marketing* Court rejected the producers’ compelled speech claims.²⁴⁶ The Court stated that the First Amendment does not allow public authority to compel an individual to utter a message with which he does not agree.²⁴⁷ The Court further stated that the government cannot oblige people to use personal property to express a message with which they disagree, because such actions amount to impermissible compelled expression.²⁴⁸ In this case, no rancher was forced to utter or to use personal property to display an objectionable message, which would implicate compelled speech.²⁴⁹

The ranchers argued that the ads were attributed to “America’s Beef Producers” not only through the impermissible funding of the ads, but also through an implied endorsement of the objectionable message.²⁵⁰ The Court shuffled aside this argument, determining that it would only be valid as applied in the situation where the advertisements were attributed to each individual rancher.²⁵¹ Yet, the Court hinted that the producers might have a valid compelled speech claim if they could prove that as individual cattle

242. *Id.* at 416-17. The *Livestock Marketing* Court presumed that the speech in *United Foods*, if not government speech, was private speech unenforceable by compelled subsidy. *Livestock Mktg.*, 544 U.S. at 557-58.

243. *Livestock Mktg.*, 544 U.S. at 559.

244. *Id.* (emphasis added).

245. *Id.* at 559 n.3.

246. *Id.* at 557.

247. *Id.* (citing *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943)).

248. *Id.* (citing *Wooley v. Maynard*, 430 U.S. 705, 715 (1977)).

249. *Id.* at 565.

250. *Id.* at 564.

251. *See id.* at 565 n.8 (noting that there are distinctions between a compelled subsidy claim and a compelled speech claim, such that being forced to pay for another’s private speech is unconstitutional, but a valid compelled speech claim would require the speech to be attributed to the individual producers). The producers took issue with the funding of the speech, but not the speech itself. *Id.* at 555-56.

ranchers, the message was attributed to them personally as “America’s Beef Producers.”²⁵² However, the Beef Act did not require attribution of the message to any single producer, so the Act itself was not a violation of First Amendment compelled speech principles.²⁵³

e. No Compelled Subsidy Challenge

In every prior compelled subsidy case, *Abood* controlled the determination of whether First Amendment rights were impinged.²⁵⁴ This case was no different, as the Court acknowledged that the use of fees to fund political matters was invalid if the use was not germane to the association’s purposes.²⁵⁵ The *Livestock Marketing* compelled subsidy analysis was similar to that of *United Foods*, and was distinguishable only in that the Beef Act was essentially government speech, whereas the Mushroom Act was presumed to be private speech.²⁵⁶ However, as government speech, compelled subsidy of the government’s message in *Livestock Marketing* did not violate the First Amendment.²⁵⁷

3. Justice Souter’s Dissent

In dissent, Justice Souter’s primary disagreement with the majority rested in that *Livestock Marketing* was no different from the factual scenario in *United Foods*.²⁵⁸ Justice Souter argued that to assert the government speech doctrine as a defense, the government should identify the message as its own.²⁵⁹ By identifying the speech as the government’s own, the government makes itself politically accountable to producers and taxpayers.²⁶⁰ Such political accountability is necessary as a political check on government.²⁶¹ Justice Souter argued that the government speech doctrine is relatively new, and thus, imprecise.²⁶² Essentially, according to

252. *See id.* at 567 n.11 (indicating that if the advertisements had attributed the messages to individual beef producers, a compelled speech claim might arise).

253. *Id.*

254. *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001); *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 473 (1997).

255. *Livestock Mktg.*, 544 U.S. at 558.

256. *See id.* (describing how the compelled subsidy case law was mirrored in both *United Foods* and *Livestock Marketing*, but the similarities ended with assertion of the government speech doctrine in *Livestock Marketing*).

257. *Id.* at 559.

258. *Id.* at 571 (Souter, J., dissenting).

259. *Id.*

260. *Id.*

261. *Id.* at 575; *see Lee, supra* note 160, at 1055-57 (predicting danger in the transparency of government speech where the government does not identify itself as the speaker).

262. *Livestock Mktg.*, 544 U.S. at 574 (Souter, J., dissenting).

Justice Souter, to assert such a defense without requiring the government to embrace the message as its own is unwise.²⁶³

4. *Implications of Livestock Marketing*

In *Livestock Marketing*, seeking the government's approval of the message compelled by checkoff fees was not simply *pro forma*, as the producers claimed in *United Foods*.²⁶⁴ Instead, government approval was necessary because the speech belonged to the government, where the speech was identifiable as the government's own by the degree of government control.²⁶⁵ Overall, it appears that as long as the speech is controlled by the government, checkoff programs like the one at issue in *Livestock Marketing* will meet the requirements of the government speech doctrine.²⁶⁶

a. Government Speech

Government speech is protected from First Amendment scrutiny if unique qualities of the speech are present, as in *Livestock Marketing*.²⁶⁷ First, the association should be acting as an arm of the government when it restricts private speech.²⁶⁸ When the government, through special law, creates an entity to further government objectives, while still retaining authority over the entity, the entity is part of the government for purposes of the First Amendment.²⁶⁹ With the Beef Act, Congress authorized the Act, while the Secretary of Agriculture appointed board and committee members and retained authority over the final message.²⁷⁰

263. *Id.* at 578-80; see *United States v. United Foods, Inc.*, 533 U.S. 405, 428 (2001) (Breyer, J., dissenting) (observing that uncertainty exists in determining how much government control will satisfy the requirements of the government speech defense).

264. See *United Foods*, 533 U.S. at 417 (stating that the producers claimed that seeking government involvement in implementing and authorizing a checkoff program is *pro forma*, a formality or technicality, and essentially did not amount to government speech).

265. *Livestock Mktg.*, 544 U.S. at 559-60.

266. *Id.*

267. See *id.* at 561 (observing that final authority over and ownership of the advertisement rests with the Secretary of Agriculture, which effectively makes the advertisement the government's own speech); *United Foods*, 533 U.S. at 416 (noting the untimely submission of the government speech defense at the appellate level, thus denying the Supreme Court the opportunity to review the defense).

268. See *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 382-83, 387-89 (1985) (identifying several characteristics that define government speech); see also Brief for the Petitioners at 34, *United Foods*, 533 U.S. 405 (No. 00-276) (determining that some qualities of the government speech defense were met).

269. *Lebron*, 513 U.S. at 400.

270. *Livestock Mktg.*, 544 U.S. at 560.

A second characteristic of government speech specifically requires that the association be established to further governmental objectives.²⁷¹ The Beef Board was created by federal legislation in order to promote more consumption of beef and to educate the public about the nutritional aspects of a diet that includes beef.²⁷² These objectives were met through the Beef Act and its generic advertising campaign.²⁷³

Another characteristic of government speech involves the appointment of a majority of an association's board members by a government figure.²⁷⁴ For the beef assessment, the Secretary of Agriculture appointed board members, but they were subject to removal at the Secretary's discretion.²⁷⁵

Furthermore, another consideration relevant to defining government speech includes the fact that legal proceedings are instituted against governmental entities, such as in *Livestock Marketing*, where the Secretary of Agriculture was a government entity named as a party.²⁷⁶ Additionally, it is relevant whether political controls exist to assure that the program serves the needs of those who are required to fund it.²⁷⁷ Referendum and majority votes are required before a checkoff program is implemented, and politically accountable officials like the Secretary preside over implementation of the program.²⁷⁸

In an analysis to determine whether the government speech defense is available, it may be helpful to determine who is speaking the message in order to identify whether a First Amendment violation has occurred.²⁷⁹ The

271. *Lebron*, 513 U.S. at 400.

272. *Livestock Mktg.*, 544 U.S. at 554.

273. *Id.*

274. *Lebron*, 513 U.S. at 400.

275. *See Livestock Mktg.*, 544 U.S. at 554 (referring to the amount of control that the Secretary of Agriculture holds over the Beef Board); 7 C.F.R. § 1260.213 (2004) (authorizing the Secretary of Agriculture to remove board members).

276. Brief for the Petitioners at 38, *United States v. United Foods, Inc.*, 533 U.S. 405 (2001) (No. 00-276).

277. *Livestock Mktg.*, 544 U.S. at 563-64.

278. *Id.* at 563. The Court stated:

Here, the beef advertisements are subject to political safeguards more than adequate to set them apart from private messages. The program is authorized and the basic message prescribed by federal statute, and specific requirements for the promotions' content are imposed by federal regulations promulgated after notice and comment. The Secretary of Agriculture, a politically accountable official, oversees the program, appoints and dismisses the key personnel, and retains absolute veto power over the advertisement's content, right down to the wording. And Congress, of course, retains oversight authority, not to mention the ability to reform the program at any time. No more is required.

Id.

279. *See id.* at 579 n.9 (Souter, J., dissenting) (requesting that the government identify itself as the speaker).

amount of government control determines the speaker of the message.²⁸⁰ However, it is yet undetermined how much government control will result in deeming the speech as the government's own.²⁸¹

b. Reconcile *Livestock Marketing* with Compelled Subsidy Cases

The government speech doctrine still peaceably resides with *Abood* and other compelled subsidy cases, because *Abood* has always signified that compelled support of the government differs from compelled support of private organizations.²⁸² A recent Supreme Court case, *University of Wisconsin Systems v. Southworth*,²⁸³ suggested that where government speech exists, the only question remaining is “whether traditional political controls [exist] to ensure responsible government action.”²⁸⁴ Political controls and accountability appear to have been present in *Livestock Marketing*.²⁸⁵ Thus, compelled subsidy of private speech is still unconstitutional, and government speech exists only with government accountability, which would make the speech the government's own.²⁸⁶

D. SUMMARY OF PRINCIPAL SUPREME COURT DECISIONS

In *Wileman*, the Supreme Court held that the checkoff assessments at issue were permissible as part of economic regulation within a broad comprehensive marketing scheme.²⁸⁷ The *Wileman* Court failed to find First Amendment violations, compelled speech violations, or compelled subsidy violations because the checkoff assessments were implemented as

280. See *id.* at 561 (majority opinion) (determining that the degree of government control distinguished *United Foods* from *Keller*); *United Foods*, 533 U.S. at 428 (Breyer, J., dissenting) (classifying *United Foods* as a common example of government intervention); see also Lee, *supra* note 160, at 1044 (stating that the proper classification of promotional messages as government speech turns on the degree of government control).

281. See *United Foods*, 533 U.S. at 428 (Breyer, J., dissenting) (observing that uncertainty exists in determining how much government control will satisfy the requirements of the government speech defense); Lee, *supra* note 160, at 1044 (noting that the degree of government control determines the speaker of a message).

282. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 259 n.13 (1977) (Powell, J., concurring) (stating that “[c]ompelled support of a private association is fundamentally different from compelled support of government”); see also Brief for the Petitioner at 40, *United Foods*, 533 U.S. 405 (No. 00-276) (stating that the government speech doctrine cannot be used as a defense when private speakers are compelling subsidy to support a private message).

283. 529 U.S. 217 (2000).

284. *Southworth*, 529 U.S. at 229.

285. See *Livestock Mktg.*, 544 U.S. at 564 nn.6-7 (explaining that the political safeguards present in the Beef Act match those of the government speech doctrine).

286. *Livestock Mktg.*, 544 U.S. at 559.

287. *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 470, 475 (1997).

economic regulation within the association.²⁸⁸ In *United Foods*, the Court struck down a checkoff program, basing its decision primarily on the fact that the checkoff assessments lacked the internal economic regulation found in *Wileman*, and that the assessments were not germane to the association's activities beyond generic advertising.²⁸⁹ Finally, the *Livestock Marketing* Court determined that although the Beef Act was identical in nature to the Act at issue in *United Foods*, the checkoff assessments were permissible as government speech, presuming the *United Foods* advertisement to be private speech.²⁹⁰

V. SYNTHESIZING THE THREE PRINCIPAL CASES

Livestock Marketing now appears to be the governing case for potential challengers of commodity programs to follow in order to seek First Amendment protection from compelled checkoff assessments.²⁹¹ The organization of such programs must be constitutional either as a regulatory program like *Wileman*, or as a program protected as government speech like *Livestock Marketing*, or else the assessments must be germane to the association's purposes beyond advertising alone.²⁹²

A. GOVERNING CASE?

The holding in *Livestock Marketing* provides a bright-line rule for producers who claim First Amendment violations when compelled by an association to pay for generic advertising.²⁹³ Under *Livestock Marketing*, marketing orders and checkoff fees will be constitutional pending the amount of governmental involvement in implementing and regulating the association.²⁹⁴ With enough government regulation, such as appointment of association board members and final authority over the advertised message, such speech will be considered government speech and should prevail over First Amendment challenges.²⁹⁵

288. *Id.*

289. *United States v. United Foods, Inc.*, 533 U.S. 405, 413 (2001).

290. *Livestock Mktg.*, 544 U.S. at 557-60.

291. Gershengorn, *supra* note 4, at 8; *see Legal News*, *supra* note 48, at 2707 (reporting that the government expects other commodity checkoff programs to be constitutional as government speech).

292. *Livestock Mktg.*, 544 U.S. at 559-60; *United Foods*, 533 U.S. at 415; *Wileman*, 521 U.S. at 470.

293. Gershengorn, *supra* note 4, at 8.

294. *Livestock Mktg.*, 544 U.S. at 559-61.

295. *Id.*

It also appears that *United Foods* served only as a segue between *Wileman* and *Livestock Marketing*.²⁹⁶ *United Foods* introduced the concept of government speech, which the government in *Livestock Marketing* argued successfully.²⁹⁷ However, *United Foods* is still good law because it fell under *Abood*'s umbrella of protection from compelled subsidy where the assessment is not germane to the association's activities.²⁹⁸

Finally, the Court has not yet overturned *Wileman*, hinting that some checkoff assessments may be constitutional not only as government speech, but as economic regulation within an industry.²⁹⁹ As part of the economic regulation within an industry, producers might exchange autonomy in the free market economy for benefits gained from collectivized group regulation.³⁰⁰ Despite the general scholarly disapproval of *Wileman*, it is still presently binding.³⁰¹

B. DEFINING CHECKOFF PROGRAMS THAT ARE CONSTITUTIONAL

Generally, a checkoff program will be constitutional if it is part of a broad, collective, comprehensive marketing scheme ancillary to generic advertising, especially where individual producers have given up autonomy in exchange for collective benefits.³⁰² This is the same scenario that the Court approved in *Wileman*, although in light of *Livestock Marketing*, it appears dubious that a congressionally approved checkoff program controlled by the government will now be found to be anything other than government speech.³⁰³

Additionally, any checkoff program seeking government involvement, where the involvement continues from the beginning of the plan, through congressional authorization, to final veto power over a message, appears to be constitutional, as it will be deemed government speech.³⁰⁴ This remains true as long as political safeguards, such as referendums and majority votes, are in place to protect association members from an unconstitutional

296. See *United Foods*, 533 U.S. at 413, 416 (finding that *Wileman* did not control, yet entertaining the idea of asserting the government speech doctrine as a defense).

297. *Id.*

298. *Id.* at 416-17.

299. *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 469-70 (1997).

300. *Id.*

301. See articles cited *supra* note 168 (referring to law review articles that find fault with the *Wileman* ruling).

302. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559-60 (2005).

303. *Id.* at 561; see *Legal News*, *supra* note 48, at 2707 (referring to the government's expectation that similar programs will be constitutional).

304. *Livestock Mktg.*, 544 U.S. at 560-61.

compelled subsidy of generic advertising with which members disagree.³⁰⁵ This premise rests in the *Livestock Marketing* ruling.³⁰⁶

As an additional safeguard, a tag line added to the advertisement attributing the message to the government, like the USDA, through the efforts of the association, like America's Beef Producers, will likely preclude any further First Amendment claims, since the message is being identified as the government's speech.³⁰⁷ What remains uncertain after the *Livestock Marketing* ruling is the amount of government involvement that is required to satisfy the government speech doctrine.³⁰⁸

Furthermore, as associations implement programs designed to adapt to the government speech doctrine, there is a danger that they will unnecessarily increase government involvement, and thus increase the degree of the program's restrictiveness to the point of unconstitutionality in other areas.³⁰⁹ In these circumstances, associations will likely become smaller, more particularized, and more restrictive in their membership in an effort to stay true to the members' intent in promoting the commercial message.³¹⁰

Finally, in certain cases like *United Foods*, where the association compels fees for generic advertising alone, the program will only be constitutional if it passes muster under *Abood*.³¹¹ The checkoff program must be germane to the group's purpose and justified by vital policy interests.³¹² Therefore, compelling fees for the sole purpose of advertising a product will not be constitutional.³¹³ However, programs that use checkoff fees for research and promotional campaigns, in addition to generic advertising, will likely pass *Abood*'s test.³¹⁴

C. SPEECH REMAINS PROTECTED UNDER FIRST AMENDMENT STRICT SCRUTINY, UNLESS IT IS GOVERNMENT SPEECH

The First Amendment right to freedom of speech still retains heightened scrutiny protection, yet if the government is speaking, producers

305. *Id.*

306. *Id.* at 560-62.

307. *Id.* at 571 (Souter, J., dissenting); see also Lee, *supra* note 160, at 1048 (offering the solution that the government should ensure that the message appears to be the government's own).

308. *United States v. United Foods, Inc.*, 533 U.S. 405, 428 (2001) (Breyer, J., dissenting).

309. *Id.* at 429.

310. See Paul M. Schoenhard, Note, *Recent Development: The United States Supreme Court 2000 & 2001 Terms: The End of Compelled Contributions for Subsidized Advertising?*; *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), 25 HARV. J.L. & PUB. POL'Y 1185, 1197 (2002) (predicting the implications resulting from the *Livestock Marketing* ruling).

311. *United Foods*, 533 U.S. at 415-16.

312. *Id.* at 415.

313. *Id.*

314. *Id.*

may be compelled to support the message despite protests.³¹⁵ This idea has been analogized with taxpayers paying taxes under protest.³¹⁶ It is uncertain how this doctrine will fare when litigants or the government seek to apply the government speech doctrine in other contexts.³¹⁷ Ironically, although *Livestock Marketing* established a reliable bright-line rule, it may be the rule that generates the most uncertainty in other contexts beyond generic advertising.³¹⁸

VI. CONCLUSION

After deciding three major cases, the Supreme Court has hopefully put to rest many similar generic advertising challenges that were previously decided on a case-by-case basis.³¹⁹ Showing a reluctance to become an agriculture court of appeals, the Court has now limited generic advertising challenges with *Livestock Marketing*'s bright-line rule by permitting the government speech defense.³²⁰ Many checkoff cases still pending after the *Livestock Marketing* ruling involve products such as milk, apples, grapes, pork, dairy products, citrus fruits, cotton products, and even alligator products.³²¹ In these types of cases involving compelled subsidy of generic advertising, *Livestock Marketing* will likely remain the governing case for future First Amendment challenges.³²²

*Kara O'Conner Gansmann**

315. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 559 (2005).

316. *Id.* at 559.

317. Gershengorn, *supra* note 4, at 8. For example, in situations where the government chooses to justify greater restrictions on recipients of federal government grants, the government speech doctrine is unpredictable. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. *See id.* (referring to the many commodity programs that will be affected by the *Livestock Marketing* ruling).

322. *Id.*

*J.D. candidate at the University of North Dakota School of Law. I thank my loving husband, Mike Gansmann, for his support throughout law school and for encouraging me to surpass my goals. I also add thanks to our parents and families for never ceasing to believe in me.