JOHANNS v. LIVESTOCK MARKETING ASS'N: DEMISE OF FIRST AMENDMENT PROTECTION AGAINST COMPELLED COMMERCIAL SPEECH

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I. INTRODUCTION

On May 23, 2005, the United States Supreme Court in *Johanns v. Livestock Marketing Ass'n.*[529] (hereinafter referred to as *Livestock Marketing*) ruled that the United States Department of Agriculture (hereinafter referred to as USDA) did not violate the First Amendment rights of beef producers and ranchers by requiring them to contribute funds to support generic advertisements for beef,[530] because the generic advertisements in question constituted the Government's own speech.[531] Mandated by the Beef Promotion and Research Act,[532] the advertisements were funded through a $1 assessment fee per head of cattle sold.[533] Two associations of beef producers and several individuals who raise and sell cattle objected unsuccessfully to the assessment on the grounds that the beef advertisements violated their First Amendment,[534] because the

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[529] Johanns v. Livestock Marketing Ass'n, 125 S. Ct. 2055 (2005).
[530] *Id*. at 2066.
[531] *Id*. at 2058.
[532] *Id*. ("The statute directs the Secretary of Agriculture to implement this policy by issuing a Beef Promotion and Research Order (Beef Order or Order), § 2903, and specifies four key terms it must contain: The Secretary is to appoint a Cattlemen's Beef Promotion and Research Board (Beef Board or Board), whose members are to be a geographically representative group of beef producers and importers, nominated by trade associations. § 2904(1). The Beef Board is to convene an Operating Committee, composed of 10 Beef Board members and 10 representatives named by a federation of state beef councils. § 2904(4)(A). The Secretary is to impose a $1-per-head assessment (or "checkoff") on all sales or importation of cattle and a comparable assessment on imported beef products. § 2904(8). And the assessment is to be used to fund beef-related projects, including promotional campaigns, designed by the operating Committee and approved by the Secretary. §§ 904(4)(B), (C).")
[533] *Id.* Many of the advertisements used the trademarked slogan, "Beef. It's What's for Dinner." *Id*. at 2059.
[534] *Id*. at 2059-2060.

advertisements promoted beef as a generic commodity and interfered with their efforts to promote the superiority of particular types of beef.[535]

Livestock Marketing is the third disparate decision of the United States Supreme Court in the past eight years involving compelled commercial speech. Four years earlier, the United States Supreme Court ruled in *United States v. United Foods, Inc.* (hereinafter referred to as *United Foods*),[536] that the assessments imposed on mushroom growers to pay for generic advertisements promoting the mushroom industry under the Mushroom Promotion, Research, and Consumer Information Act of 1990[537] violated First Amendment protections against compelled speech[538] and compulsory financing of speech.[539] Four years before *United Foods*, the United States Supreme Court decided in *Glickman v. Wileman Bros. & Elliott, Inc.*[540] (hereinafter referred to as *Wileman Bros*.) that compulsory contributions to a generic advertising campaign promoting California tree fruits (nectarines, peaches and plums) did not violate the First Amendment rights of the fruit producers.[541]

In order to set the stage for the analysis of *Livestock Marketing*, section II of this article will briefly sketch the broad First Amendment background that provides a matrix for examining *Livestock Marketing*. More particularly, because the beef, mushroom and fruit producers objected that they were forced to be associated with, and to contribute financially to, commercial messages with which they disagreed, this article will examine the leading United States Supreme Court decisions providing First Amendment protection against compelled political speech and compulsory financing of political or ideological views. Likewise, the use of mandatory student fees to support student's publications containing expression to which some students object is analogous to mandatory contributions to advertisements to which the food producers objected. Hence this article will also consider the leading United States Supreme Court decisions that examined the First Amendment implications of state-related universities utilizing mandatory student fees to support student organizations and expression, and upheld the use of mandatory student fees to support student activities and publications. Part III of this article sketches the trajectory of the Supreme Court compelled commercial speech decisions culminating in *Livestock Marketing*, providing an analysis that assesses whether the First Amendment protections against compelled political or ideological speech and compelled financing of political or ideological speech continue to hold sway in the commercial speech arena.[542] Part IV of this article concludes that further attempts to apply First Amendment restrictions against compelled political speech to the commercial arena will be futile, and predicts that legitimate attempts to challenge advertising programs mandated by government agencies will be thwarted by the Court's endorsement of the defense of government speech.

[535] *Id*. ("Respondents noted that the advertising promotes beef as a generic commodity, which, they contended, impedes their efforts to promote the superiority of, *inter alia*, American beef, grain-fed beef, or certified Angus or Hereford beef.").
[536] United States v. United Foods, 121 S. Ct. 2334 (2001).
[537] Mushroom Promotion, Research and Consumer Information Act, 104 Stat. 3854, 7 U.S.C. § 6101.
[538] *United Foods* at 2341.
[539] *Id*. at 2338.
[540] Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997).
[541] *Id*. at 469.
[542] Much of the analysis found in parts II and III of the article is based upon research appearing in prior publications of the authors. *See* Edward J. Schoen and Margaret M. Hogan, Glickman v. Wileman Bros. & Elliott, Inc.: *A Nettle in the Fruit Patch*, 28 ACAD. OF LEGAL STUD. IN BUS. NAT'L PROC. 165-180 (1999); Edward J. Schoen et. al., Glickman v. Wileman Bros.: *California Fruit Marketing Orders Prune the First Amendment*, 10 WIDENER J. PUB. L., 21 (2000); and Edward J. Schoen et. al., *United Foods and Wileman Bros.: Protection Against Compelled Commercial Speech–Now You See It, Now You Don't*, 39 AMER. BUS. L. J. 467 (2002).

II. THE BACKGROUND

A. FIRST AMENDMENT PROTECTION AGAINST COMPELLED POLITICAL SPEECH

The fruit growers and mushroom and beef producers objected to being forced to pay for and be associated with advertisements promoting products they did not grow, produce or sell. The basis of their objections was the First Amendment protection not only to express and craft opinions and viewpoints, but also to avoid being associated with the viewpoints of others.

The United States Supreme Court has strongly endorsed First Amendment protections against compelled political or ideological speech on at least five occasions. In *West Virginia State Board of Education v. Barnette* (hereinafter referred to as *Barnette*),[543] the Court decided that compelling teachers and students to participate in salute-to-the-flag ceremonies violated the First Amendment,[544] because they were required to publicly demonstrate acceptance of the political ideas symbolized by the flag by saluting and pledging allegiance to it.[545] The Court emphatically struck down mandatory salute-to-the-flag ceremonies: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[546]

The United States Supreme Court reached the same conclusion in *Wooley v. Maynard* (hereinafter referred to as *Maynard*).[547] In *Maynard*, a married couple covered the state motto "Live Free or Die" on their New Hampshire license plate, because it was contrary to their religious and moral beliefs, and sought declaratory judgment that the statute mandating that the slogan appear on the license plate and making it a misdemeanor to obscure the state motto violated the First Amendment. The Court ruled that New Hampshire cannot constitutionally force an individual to display and disseminate an ideological message with which they disagree.[548] The rights of individuals "to avoid becoming the courier" of messages contrary to their beliefs outweighed any interest of the state to promote an appreciation of state history and to foment state pride.[549]

In *Riley v. National Federation of the Blind of N.C., Inc.* (hereinafter referred to as *Riley*),[550] the United States Supreme Court decided that the North Carolina Charitable Solicitations Act (hereinafter referred to as "the Solicitations Act") unconstitutionally infringed on free speech. The Solicitations Act required professional fundraisers to inform solicited donors of the percentage of gross of revenues retained in previous charitable solicitations.[551] Because the solicitation of charitable contributions is protected speech, state mandated disclosure requirements imposed on

[543] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[544] The punishment inflicted on students who refused to participate in salute-to-the-flag ceremonies was expulsion. Readmission was denied until the student complied with the policy. *Id* at 629.

[545] *Id*. at 633, 634. ("The "Bill of Rights which guards the individual's right to speak his own mind [does not permit] public authorities to compel him to utter what is not in his mind.").

[546] *Id.* at 641.

[547] Wooley v. Maynard, 430 U.S. 705 (1977).

[548] *Id.* at 713. This ruling was founded on the correlative propositions inherent in the right to speak:
> [T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind." [citations omitted]. *Id*. at 716-17.

[549] *Id.* at 715-17.

[550] Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781 (1988).

[551] *Id*. at 784.

fundraisers must pass muster under the First Amendment.[552] The Court in *Riley* struck down the mandated disclosure requirement, because the Solicitations Act required professional fundraisers to engage in "compelled speech" and North Carolina had not advanced a sufficient state interest to justify the required disclosure.[553]

In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston* (hereinafter referred to as *Hurley*),[554] the United States Supreme Court unanimously ruled that the South Boston Allied War Veterans Council (hereinafter referred to as the Veterans Council), an unincorporated association of individuals who organize the annual St. Patrick's-Evacuation Day Parade (hereinafter referred to as the parade), could not be compelled to allow the Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB), a social organization of homosexuals, bisexuals and their supporters, to march in the parade.[555] The Court noted that the First Amendment protects the rights of individuals to craft their own multifaceted message, and decided that the Veterans Council was entitled to such protection in selecting the contingents appearing in the parade.[556] The Court further held that applying the state's public accommodation law to the parade forced the Veterans Council "to alter the expressive content of their parade,"[557] and violated "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."[558]

Finally, in *Boy Scouts of America v. Dale*,[559] the United States Supreme Court ruled that the Boy Scouts of America (hereinafter referred to as the BSA) was not required by New Jersey's public accommodations law prohibiting discrimination on the basis of sexual orientation to reinstate an adult assistant scoutmaster,[560] who was an avowed homosexual and gay rights activist.[561] A private, nonprofit organization whose mission is to instill its system of values in young people[562] and to provide a positive moral code for living,[563] the BSA maintains that homosexual conduct is contrary to the moral values it promotes,[564] believes homosexuals do not provide a desirable role model consistent with its moral values,[565] and refuses to permit homosexuals to become members

[552] *Id*. at 789, citing Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) (invalidating a local ordinance requiring charitable solicitors to use, for charitable purposes 75% of the funds solicited), and Secretary of State of Md. v. Joseph H. Munson, Co., 467 U.S. 947 (1984) (invalidating statute prohibiting charitable solicitation contracts in which the fundraiser retained more than 25% of the money collected).

[553] *Riley* at 798 ("We believe, therefore, that North Carolina's content-based regulation is subject to exacting First Amendment scrutiny. The State asserts as its interest the importance of informing donors how the money they contribute is spent in order to dispel the alleged misperception that the money they give to a professional fundraisers go in greater-than-actual proportion to benefit charity. To achieve this goal, the State has adopted a prophylactic rule of compelled speech, applicable to all professional solicitations. We conclude that this interest is not as weighty as the State asserts, and that the means chosen to accomplish it are unduly burdensome and not narrowly tailored.")

[554] Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995).

[555] *Id*. at 560, 580-81.

[556] *Id.*

[557] *Id.* at 572-73.

[558] *Id*. at 573. The Court continued:
> Indeed, this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid, subject, perhaps, to the permissive law of defamation. Nor is the rule's benefit restricted to the press, being enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers. Its point is simply the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful. *Id.* at 573-74.

[559] Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

[560] *Id*. at 661.

[561] *Id.* at 644.

[562] *Id*. at 649.

[563] *Id*. at 650.

[564] *Id*. at 650-51.

[565] *Id*. at 652.

or leaders of the BSA.[566] The court decided that requiring the BSA to reinstate a community leader and gay rights activist to his position of assistant scout master "would, at the very least, force [the BSA] to send a message, both to the youth members and the world, that [the BSA] accepts homosexual conduct as a legitimate form of behavior,"[567] undermines the BSA's official position with respect to homosexual conduct,[568] and associates the BSA with a message it chooses not to send,[569] contrary to the First Amendment. In short, the First Amendment supports the BSA's refusal to be associated with a message or communication contrary to the organization's core values and mission.

The five United States Supreme Court opinions discussed above are remarkably dissimilar, each involving different messages and means of expression. In combination, however, the five cases give meaningful protection under the First Amendment to express and tailor views and opinions, to avoid association with expressions of others, and to "guarantee that no government official can proscribe orthodoxy in thought or opinion, or compel an individual by word or act to express, participate, or concur in the dissemination of the ideas or messages of others."[570]

B. First Amendment Protections Against Compelled Financing of Political Speech

Because the beef, mushroom and fruit producers protested that they were wrongfully forced to pay for advertisements for food products that they could not market or sell, it is useful to review United States Supreme Court decisions establishing significant First Amendment protection against compelled financing of political or ideological speech to ascertain whether those rights are transferable to the commercial arena.

In *International Association of Machinists v. Street* (hereinafter referred to as *Street*),[571] the Court ruled that, under the First Amendment, union dues could be used to support collective bargaining activities, but could not be used to finance the political campaigns of candidates for public office or to promote political causes, doctrines and ideas without the agreement of dues-paying members.[572]

In *Abood v. Detroit Board of Education* (hereinafter referred to as *Abood*),[573] the United States Supreme Court unanimously upheld a Michigan statute permitting union representation of local government employees under an "agency shop" arrangement, in which every employee was represented by the union and non-union members were required to pay a service charge equal in amount to union dues.[574] The assessment of such service charges to finance collective bargaining did not violate the First Amendment rights of the non-union members, but was justified by the labor relations system established by Congress.[575] Notably, however, the union was prohibited from requiring employees to contribute to the support of political or ideological causes they opposed as a condition of employment as public school teachers.[576] Using union members' compulsory contributions for political purposes violated their First Amendment rights,[577] because they were compelled to support a political viewpoint as a condition of public employment.[578]

In *Keller v. State Bar of California* (hereinafter referred to as *Keller*),[579] the United States Supreme Court unanimously held that requiring members of the State Bar of California (hereinafter referred to as the State Bar) to pay dues that are used to fund *political and ideological causes* with which lawyers disagreed, violated their First Amendment rights. Those expenditures were used to support lobbying, to file *amicus curiae* briefs, and to organize annual State Bar conferences,[580] and had nothing to do with regulating the legal profession or improving legal services.[581] The United States Supreme Court determined that the relationship between the lawyers and the State Bar was similar to that of union members and their unions.[582] This permitted the Court to apply the *Abood* analysis to the State Bar's use of member dues[583] and to determine that lawyers should be required to pay the cost of regulating the profession and improving the educational and ethical standards of its members,[584] but could not be compelled to support through their dues political or ideological activities unrelated to the purpose of regulating and improving the legal profession.[585]

Street, *Abood*, and *Keller* provide significant protection from compelled financing of political or ideological speech under the First Amendment. Union workers, public school teachers, and practicing lawyers cannot be required to pay dues to support political viewpoints with which they disagree, to contribute to causes they oppose as a condition of employment, or to disseminate ideas or positions unrelated to improving their profession. The First Amendment not only preserves freedom to express opinions and avoid association with the expressions of others, but also protects all individuals from being compelled to finance the viewpoints of others.[586]

C. Mandatory Student Fees to Support Extracurricular Activities and Publications

In *Livestock Marketing*, *United Foods*, and *Wileman Bros.*, the beef, mushroom and fruit producers objected to government-mandated contributions to support advertisements for food products they did not produce or were prohibited from producing. Analogously, the United States Supreme Court has twice ruled on the First Amendment implications of state-related universities'

[566] *Id*.
[567] *Id*. at 653.
[568] *Id*. at 655.
[569] *Id*. at 656.
[570] Schoen et al, *United Foods and Wileman Bros.: Protection Against Compelled Commercial Speech–Now You See It, Now You Don't*, *supra* note 14, at 475.
[571] Int'l Ass'n of Machinists v. Street, 367 U.S. 740 (1961).
[572] *Id*. at 746. 765, 767, 768. The funds could be used to defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes.
[573] Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).
[574] *Id*. at 220. *See* Donald M. Gillmor et al., Mass Communications Law: Cases and Comments, at 151 (5th ed. 1990).
[575] *Abood*, 431 U.S. at 221-22.
[576] *Id*.
[577] *Id.* at 235.
[578] *Id*. The Court's holding in *Abood* was reiterated in Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 520-21 (1991).
[579] Keller v. State Bar of Cal., 496 U.S. 1 (1990).
[580] *Id.*
[581] *Id.* at 5, 14-15.
[582] *Id.* at 12.
[583] *Id.* at 9, 13-14.
[584] *Id.* at 12-13.
[585] *Id.* at 13-14. The Court also notes that compliance with *Abood* and *Keller* is neither difficult nor burdensome. Rather, the constitutional requirements for the collection and use of fees are providing an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and an escrow for the amounts reasonably in dispute while such challenges are pending. *Id*. at 16. *See* Teachers v. Hudson, 475 U.S. 292 (1986).
[586] Additional support for this proposition exists in two United States Supreme Court decisions dealing with First Amendment protection of public utility political speech: Consol. Edison Co. of N.Y., Inc., v. Pub. Serv. Comm'n of New York, 447 U.S. 530, 544 (1980) (the order of the New York Public Service Commission that prohibits the inclusion of inserts discussing controversial issues of public policy in the monthly bills mailed to public utility companies to its customers violated the First Amendment); and Pacific Gas & Elec. Co. v. Publ. Utils. Comm'n of Cal., 475 U.S. 1, 543 (1986) (the order of the California Public Utilities Commission requiring Pacific Gas and Electric Company to include communications with ratepayers prepared by a public interest organization in its billing envelopes violated the First Amendment). Both of these decisions provide strong protection to the political speech of regulated utilities.

charging mandatory student activities fees to support student activities and publications. The First Amendment implications of mandatory student activity fees are best understood from two perspectives: (1) whether the university can refuse to fund certain publications from student activity fees because of the content or viewpoint of the publications; and (2) whether university students can insist that the student activity fees they pay can be withheld from supporting student publications with which they disagree.

The first perspective is provided by *Rosenberger v. Rector and Visitors of University of Virginia* (hereinafter referred to as *Rosenberger*),[587] in which the United States Supreme Court ruled that the University of Virginia violated the First Amendment by withholding payment authorization to an outside contractor for printing a student newspaper promoting Christian values and viewpoints.[588] The newspaper was produced by Wide Awake Productions, a student organization recognized and sanctioned by the university.[589] Under university guidelines, recognized student organizations were permitted to submit disbursement requests to pay outside contractors for expenses related to student news, information and opinion; however, expenses related to religious activities were excluded from the disbursement request program.[590] Wide Awake Publications submitted a disbursement request to pay its printer $5,862 for the cost of printing its newspaper,[591] but the university denied the request because of the religious perspective of the newspaper.[592]

The United States Supreme Court ruled that the University of Virginia's refusal to pay the publication costs of the student newspaper because it promoted Christianity constituted government-imposed viewpoint discrimination in violation of the First Amendment.[593] Having established a "limited public forum" for the expression of various student viewpoints through its disbursement request procedures,[594] the university was prohibited by the First Amendment from excluding Wide Awake Publications because of its advocacy of a Christian perspective.[595] Furthermore, the use of student fees to pay publication costs for a student newspaper promoting a Christian perspective does not violate the Establishment Clause, because the university's student activities fee, unlike taxes levied for direct support of a church or group of churches, was "neutral toward religion."[596]

The second perspective–whether university students can insist that the student activity fees they paid can be withheld from student publications with which they disagree–is provided *by Board of Regents of the University of Wisconsin System v. Southworth* (hereinafter referred to as *Southworth*).[597] In *Southworth*, the United States Supreme Court ruled that the First Amendment permits public universities to charge mandatory student activity fees to fund extracurricular student speech if the funds are allocated in a viewpoint-neutral manner.[598] The Court also ruled in *Southworth* that the university was not required to implement an optional payment or refund system to accommodate those students who complain that the student fees they paid support

[587] Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995).
[588] *Id.* at 845-46.
[589] *Id*. at 825-26.
[590] *Id*. at 824. A "religious activity" was defined as any activity that "primarily promotes or manifests a particular belief about a deity." *Id.* at 825.
[591] *Id*. at 827.
[592] *Id*.
[593] *Id*. at 828-29, 837.
[594] *Id*. at 829.
[595] *Id*. at 830-31. "The Guideline invoked by the University to deny third-party contractor payments on behalf of [Wide Awake Publications] effects a sweeping restriction on student thought and student inquiry in the context of University sponsored publications." *Id*. at 836.
[596] *Id*. at 840-41.
[597] *Bd. of Regents of the Univ. of Wis. System v. Southworth*, 529 U.S. 217 (2000).
[598] *Id*. at 234.

content or viewpoint to which they object, because the content and viewpoint neutrality requirement of the university is sufficient to protect the rights of the complaining students.[599]

Both *Rosenberger* and *Southworth* have bearing on the mandatory fees imposed by the USDA on the beef, mushroom and fruit producers to finance commercial messages to which the producers objected. The mandatory fees collected from students supported activities and publications that enhanced the education of university students; the mandatory fees collected from beef, mushrooms and fruit producers supported advertisements that enhanced public awareness of the value of food products. Likewise, in both instances, government agencies required university students or food producers respectively to pay fees that financed expression, and individuals paying the mandatory fees objected to being associated with the ensuing message. While *Rosenberger* and *Southworth* occurred in an educational setting and *Livestock Marketing*, *United Foods* and *Wileman Bros*. occurred in a commercial setting, all of the decisions involved government agencies that employed procedural or regulatory programs of compelled financing of speech. The main difference between *Rosenberger* and *Southworth* on the one hand, and *Livestock Marketing*, *United Foods* and *Wileman Bros*. on the other, is that the universities claimed they were not the speakers but merely supported and encouraged students' speech.[600] In contrast, food producers in *Livestock Marketing*, *United Foods* and *Wileman Bros*. were required to support financially generic advertisements that were government speech. In the former instance, the state-related universities cannot make content-based choices; in the latter instance, the government agency may make content-based choices.[601] Hence, under *Rosenberger* and *Southworth* the government may require food producers to pay mandatory fees to support advertisements for food products even if the government agency employs content or viewpoint discrimination.

III. COMPELLED COMMERCIAL SPEECH DECISIONS

A. ANALYSIS OF *WILEMAN BROS.*

In *Wileman Bros.*[602] the United States Supreme Court ruled that compelling growers and handlers of nectarines, peaches, and plums to contribute money to pay for an advertising campaign for California fruits constitutes a valid economic regulation within the Commerce Clause and does not violate the First Amendment.[603] The Court determined initially that the USDA regulatory scheme did not raise an issue of speech but constituted only an issue of economic regulation implemented through marketing orders.[604] In doing so, the Court emphasized three characteristics of the regulatory scheme: the marketing orders (1) did not stop any producer from communicating any message, (2) did not force anyone to engage in actual or symbolic speech, and (3) did not mandate any endorsement or financing of a political viewpoint.[605] Hence, because the advertisements did not trigger fundamental First Amendment implications, the Court concluded that the USDA marketing orders should be reviewed like other governmental regulatory

[599] *Id*. at 230.
[600] *Rosenberger*, 515 U.S. at 834-35; *Southworth*, 529 U.S. at 229.
[601] *Rosenberger* at 833 ("[W]hen the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message. . . . [W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. When the government disburses public funds to private entities to convey a government message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.")
[602] Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997).
[603] *Id*. at 469. *See* 8 ABA PREVIEW, July 8, 1997, at 63.
[604] *Id*. at 476.
[605] *Id*. at 469-70.

programs.[606] The Court also eschewed the fruit producers' and handlers' objections that they were forced to finance a generic advertising program in violation of the First Amendment.[607] Unfortunately, this conclusion is belied by the record before the Court, which demonstrates that the fruit producers strenuously objected to the advertising because it associated them with their competitors' products. Hence, the Court created an erroneous distinction that removed the fruit producers' and handlers' objections from the purview of the First Amendment and enabled the Court to decide that the USDA could make producers and growers pay for advertisements with which they did not want to be associated. The compelled speech was simply ancillary to a broader regulatory program. This distinction eliminates any need to evaluate the compulsory nature of the marketing orders under the First Amendment, and denigrates First Amendment protections against compelled speech.

B. ANALYSIS OF *UNITED FOODS*

In *United Foods*,[608] the United States Supreme Court decided that assessments imposed on the mushroom industry for generic advertising programs designed to promote the industry under the Mushroom Promotion, Research, and Consumer Information Act of 1990 (hereinafter "the Mushroom Act"),[609] violated the First Amendment. The Court determined that the assessments were not ancillary to a more comprehensive regulatory program; rather, the advertising in question was the main component of the regulatory scheme.[610]

The court initially noted that the First Amendment prevents the government from prohibiting speech, from compelling individuals to express certain views,[611] and from requiring individuals to subsidize speech to which they object.[612] The Court then applied those First Amendment protections to commercial speech:

> The fact that the speech is in aid of a commercial purpose does not deprive respondent of all First Amendment protection . . . . The subject matter of the speech may be of interest to but a small segment of the population; yet those whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important for them as it is for other discrete, little noticed groups in a society which values the freedom resulting from speech in all its diverse parts. First Amendment concerns apply here because of the requirement that producers subsidize speech with which they disagree.[613]

United Foods wanted to advertise its mushrooms as branded and superior in quality; the USDA advertising message promoted generic mushrooms.[614] Hence the USDA forced the mushroom producers to subsidize government speech with which the producers did not want to be associated. This compelled financial support of speech troubled the Court,[615] and, in order to escape its statement in *Wileman Bros*. that the marketing orders did not raise First Amendment concerns,[616] the Court attempted to distinguish *Wileman Bros.* and *United Foods*. In doing so, the Court focused on the regulatory nature of the marketing orders in *Wileman Bros.*, noting (1) that the California fruit advertising program was ancillary to a comprehensive USDA program,[617] and (2) that the mushroom advertising program in *United Foods* was a central component of the USDA's regulatory scheme.[618] Hence, the *Wileman Bros.* regulatory scheme required financial support of a comprehensive regulatory program, only a small part of which involved fruit advertisement.[619] The regulatory scheme in *United Foods*, however, devoted almost all of the collected funds for one purpose, generic advertising.[620]

Having so distinguished *Wileman Bros.* and *United Foods*, the Court applied *Street, Abood, and Keller* to invalidate the *United Foods* regulatory scheme as violative of the First Amendment.[621] The explicit attachment of First Amendment protections against compelled speech and compelled financing of speech to commercial speech is a First Amendment gain, though as noted below the constitutional victory may be hollow. Moreover, the Court backed away from its conclusion in *Wileman* that marketing orders do not force individuals to speak or endorse the speech of others, but merely mandates the financing of advertising,[622] and concluded that mandatory assessments improperly required the producers to support the speech of others.[623]

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[606] *Id.* at 469-70.

[607] *Id*. at 470-71. The Court stated:
> Our compelled speech case law . . . is clearly inapplicable to the regulatory scheme at issue here. The use of assessments to pay for advertising does not require respondents to repeat an objectionable message out of their own mouths, require them to use their own property to convey an antagonistic ideological message, force them to respond to a hostile message when they 'would prefer to remain silent,' . . . or require them to be publicly identified or associated with another's message . . . Respondents are not required themselves to speak, but are merely required to make contributions for advertising. With trivial exceptions on which the Court did not rely, none of the generic advertising conveys any message with which respondents disagree. Furthermore, the advertising is attributed not to them, but to the California Tree Fruit Agreement or California Summer Fruits [citations omitted].

[608] United States v. United Foods, Inc., 121 S. Ct. 2334 (2001).

[609] 7 U.S.C. § 6101.

[610] *United Foods*, 121 S. Ct. at 2341. In reaching its decision, the United States Supreme Court focused its attention on a narrow issue: "whether the government may underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, some of whom object to the idea being advanced." *Id*. By framing the issue this way, the Court indicated its receptiveness to the defense of government speech.

[611] *Id*. at 2338, citing Wooley v. Maynard, 430 U.S. 705 (1977) and W. Va. State Bd. of Ed. v. Barnette, 319 U.S. 624 (1943).

[612] *United Foods*, 121 S. Ct. at 2338, citing Abood v. Detroit Bd. of Ed., 431 U.S. 209 (1977), and Keller v. State Bar of Cal., 496 U.S. 1 (1990).

[613] *United Foods*, 121 S. Ct. at 2338.

[614] *Id*.

[615] *Id*. ("First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors; and there is no apparent principle which distinguishes out of hand minor debates about whether a branded mushroom is better than just any mushroom. As a consequence, the compelled funding for the advertising must pass First Amendment scrutiny.")

[616] *Wileman Bros*., 521 U.S. at 469.

[617] *United Foods*, 121 U.S. at 2339.

[618] *Id.*

[619] *Id.*

[620] *Id.* The Court agreed with the Sixth Circuit that "the mushroom growing business . . . is unregulated, except for the enforcement of a regional mushroom advertising program," and "the mushroom market has not been collectivized, exempted from antitrust laws, subjected to a uniform price, or otherwise subsidized through price supports or restrictions on supply." *Id.*

[621] *Id.*

[622] Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 470-71 (1997).

[623] United States v. United Foods, Inc., 121 S. Ct. 2334, 2340 (2001). The Court observed:
> It is true that the party who protests the assessment here is required simply to support speech by others, not to utter the speech itself. We conclude, however, that the mandated support is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity.

Unfortunately, these distinctions are so torturously drawn by the Court that *United Food*'s rationale is difficult to comprehend and apply.[624] In effect, First Amendment protections apply only if (1) an association member objects to the commercial speech, (2) the commercial speech is only indirectly related to the central purpose of the required association, and (3) the association itself is "part of a far broader regulatory system that is not principally concerned with the speech in question."[625] What that means may be anyone's guess. Hence, any First Amendment victory contained in *United Foods* is uncertain at best.

C. ANALYSIS OF *LIVESTOCK MARKETING*

In *Livestock Marketing*, the United States Supreme Court upheld a mandatory assessment of $1 per head of cattle sold or imported to finance market and food science research into the nutritional value of beef and promotional campaigns to market beef domestically and overseas.[626] Two beef producer associations and several beef ranchers objected to the assessment, because the promotional campaigns focused on beef as a generic product which impeded their efforts to promote the superiority of American beef, grain-fed beef, or certified Angus or Hereford beef.[627] In addressing the beef producers' First Amendment objection to the mandatory assessment program, the Court initially reiterated the holdings of *Barnette*, *Maynard*, *Keller*, and *Abood*, and acknowledged that those decisions led the Court in *United Foods* to "sustain a compelled subsidy challenge to an assessment very similar to the beef checkoff, imposed to fund mushroom advertising."[628] The Court emphasized, however, that its decision in *United Foods* was based on "the assumption that the advertising was private speech, not government speech."[629] Likewise, because the mushroom assessment in *United Foods* was not part of a "broader regulatory scheme" but was created solely to fund advertising for mushrooms, the nature of the program was purely compelled speech contrary to the First Amendment.[630]

Notably, the Government did not argue in either *Wileman Bros*. or *United Foods* that the use of mandatory assessments to fund generic advertisements was permissible government speech;[631] hence, the Court could not consider the defense of government speech in either decision.[632] The Government in *Livestock Marketing*, however, contended at trial and on appeal that the beef assessment "survives First Amendment scrutiny because it funds only government speech."[633] This permitted the United States Supreme Court to take an entirely new tack in resolving the compelled

[624] The compelled speech in *Wileman Bros.* was merely supportive of the highly regulated nature of the California fruit industry, and hence did not violate the First Amendment (just as union members cannot object to payments supporting the primary role of the union to represent the workers in the negotiating process). On the other hand, the compelled speech in *United Foods* did not promote collective "group action," except to "generate the very speech to which some handlers object," and compelled subsidies for speech should not be upheld if "their principal object is speech itself." Hence, the *Abood* rationale applies, and "the assessments are not permitted under the First Amendment."

[625] *Id*. at 2341.

[626] Johanns v. Livestock Marketing Ass'n., 125 S. Ct. 2055, 2059, 2066 (2005).

[627] *Id*. at 2060.

[628] *Id*. at 2061.

[629] *Id*.

[630] *Id*.

[631] *Id*. at 2061 note 3.

[632] The door to the government speech defense was opened in Keller v. State Bar of California, 496 U.S. 1, 12-13 (1990): "If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issue of great concern to the public would be limited to those in the public sector, and the process of government as we know it radically transformed.

[633] *Id*. at 2060.

speech aspects of the beef assessment program: classifying the assessment program as compelled government speech outside the purview of the First Amendment.[634]

The Court determined that the Federal Government itself effectively controlled the promotional beef campaign,[635] that the message contained in the beef promotion was established by the Federal Government,[636] that Congress and the Secretary of USDA specified the central message and its elements,[637] that the Secretary has final approval authority to control every word used in the promotional campaign,[638] and that the government set the overall message to be communicated and approved every word that is disseminated.[639] Because of the government's pervasive authority over the beef promotion, the Court had little difficulty in concluding that the government speech defense applied and eradicated the beef producers' First Amendment objections to the beef assessment program.[640]

IV. CONCLUSION: DEMISE OF FIRST AMENDMENT PROTECTION FROM COMPELLED COMMERCIAL SPEECH

As noted in section II, various United States Supreme Court decisions have established significant First Amendment protections against compelled political speech. The *Wooley v. Maynard*[641] decision held that one cannot be required to "participate in the dissemination of information . . . in a manner and for the express purpose that it be observed and read by the public."[642] In *Riley v. National Federation of the Blind of North Carolina, Inc.*,[643] the Court ruled that the imposition of a reasonable fee limitation on charitable solicitors was an unreasonable burden on protected speech and not narrowly tailored to the State's interest in preventing fraud.[644] In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*,[645] the Court ruled that a parade is not a public accommodation but an expression of speech,[646] and that parade organizers have the authority to choose the content of their own message, that is, they may choose the contingents permitted to parade, and hence pick and choose the ideas conveyed in the parade.[647] In *Boy Scouts of America v. Dale*, the Court ruled that compelling the BSA to reinstate an assistant scoutmaster who was an avowed homosexual and gay rights activist compromised the BSA's official policy of considering homosexual activity to be immoral, and that the BSA was

[634] *Id* at 2062. The Court noted:
'Compelled support of government'–even those programs of government one does not approve of–is of course perfectly constitutional, as every taxpayer must attest. And some government programs involve, or entirely consist of, advocating a position. 'The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.' We have generally assumed, though not yet squarely held, that compelled funding of government speech does not alone raise First Amendment concerns.

[635] *Id*.

[636] *Id*.

[637] *Id*. at 2063.

[638] *Id*.

[639] *Id*.

[640] *Id*. at 2066

[641] Wooley v. Maynard, 430 U.S. 705 (1977).

[642] *Id.* at 713.

[643] Riley v. Nat'l Fed'n. of the Blind, 487 U.S. 781 (1988).

[644] *Id.* at 789-90.

[645] *Supra* note 26.

[646] *Id.* at 568, 572-73.

[647] *Id*. at 573.

permitted to deny membership and leadership positions to individuals practicing lifestyles contrary to the BSA's organizational values and mission.[648]

Similarly, individuals have the right not to support or contribute to political or ideological causes with which they disagree, and not to have their organizational dues, fees and assessments applied to support causes with which they do not wish to be associated. This was affirmed in *Street, Abood,* and *Keller* reviewed above. Each of those decisions explicitly recognized the right of an organization to collect fees such as union dues or professional association dues for purposes connected with collective bargaining, contract administration, and professional regulation. Each of the decisions expressly prohibited the use of such fees to support a political or ideological cause to which the union member or professional member does not subscribe.

While those First Amendment protections are compelling, the United States Supreme Court has vacillated when asked to extend them to the arena of commercial speech. In *Wileman Bros*., the Court eschewed any expansion of those protections in instances involving compelled speech that were only a minor part of a broader regulatory scheme.

In *United Foods*, the Court unleashed a convoluted theory that provides First Amendment protections against compelled commercial speech and compelled financing of commercial speech when (1) the commercial speech is not directly related to or supportive of the purpose of the compelled association, and (2) the association is simply a part of a larger regulatory scheme not concerned principally with speech. These two torturously drawn elements are difficult to understand and appear to have little application beyond mandatory membership in associations strenuously regulated by the government. Hence any First Amendment protection delivered by *United Foods* is uncertain at best.

In *Livestock Marketing*, the Court readily used the government speech defense to squelch further attempts to extend protections against compelled political speech and compelled financing of political speech to the commercial arena, perhaps to foreclose a tumult of ensuing litigation. Generic ad campaigns have been litigated over "California tree fruits, mushrooms, beef, milk, avocados, grapes, apples, port, and alligators," and court dockets are "littered with these types of cases."[649] To the extent that the government sets the overall message to be communicated and approves the wording of the generic advertisements as part of an advertising assessment program to promote consumption of agricultural products and livestock, the government speech defense will cleanse dockets of First Amendment challenges to USDA marketing orders.

Unlike state-related universities which may assess student fees to support speech and expression but cannot engage in content or viewpoint discrimination, government agencies may assess fees to finance their own speech and freely engage in content and viewpoint discrimination. In both cases, individuals may be forced to be associated with and pay for messages with which they disagree.[650]

Following *Wileman Bros*., one commentator was concerned that "[i]t seems anomalous for the Court to protect advertising when the government tries to restrict it, but abandon it as nonspeech when the government compels it,"[651] and that:

[648] *Supra* note 31, at 656.

[649] Daniel L. Hudson. *Are Generic Beef Ads Examples of Unconstitutional Compelled Speech or Permissible Government Speech?*, 3 ABA PREVIEW 173, 175 (2004).

[650] This may not be so threatening as it may appear at first. To the extent government agencies assess fees to support speech and expression, the prohibition on government content and viewpoint discrimination protects free speech. Board of Regents of the Univ. of Wis. System v. Southworth, 529 U.S. 217, 230, 233 (2000). To the extent government agencies assess fees to support government speech, democratic processes check government overreach, and make government agencies accountable for the use of tax revenues to pay for government fostered messages. Johanns v. Livestock Marketing Ass'n, 125 S. Ct. 2055, 2064 (2005); Board of Regents of the Univ. of Wis. System v. Southworth, 529 U.S. 217, 235 (2000), and Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995).

[651] *Commercial Speech–Compelled Advertising*, 111 HARVARD L. REV. 319, 325 (1997).

> [G]overnment may have 'free rein' to 'force payment for a whole variety of expressive conduct that it could not restrict.' The danger is that instead of taking responsibility for messages that it wishes to foster -- and being held accountable by the public for using tax dollars to do so -- government can surreptitiously communicate its message through the pocketbooks of private speakers.[652]

Following *Livestock Marketing*, the concern may very well be that the government can compel commercial speech and its financing by structuring it as government speech. The pitfalls created by the defense of government speech are underscored by the highly regulated nature of various industries–e.g., energy, health care, and transportation–and the difficulty in drawing a clear line between commercial and political speech[653]–e.g., advertisements for nuclear energy, family planning, and hybrid vehicles. While the First Amendment may preclude the government from restricting such advertisements, *Livestock Marketing* may empower the government to compel companies to finance such advertisements.

In the authors' judgment, further attempts to apply First Amendment restrictions against compelled political speech and compelled financing of commercial speech to commercial speech are fruitless, because the defense of government speech trumps those claims. Without violating the First Amendment, government agencies may henceforth not only mandate advertising programs but freely employ content and viewpoint discrimination in crafting the advertisements. May First Amendment protection of compelled commercial speech rest in peace.

[652] *Id.* at 329.

[653] *See Commercial Speech–Compelled Advertising*, *supra* note 123 at 327-28 ("Lower Courts could read *Wileman Bros.* to foreclose First Amendment protection of nonpolitical or nonideological advertising even when there is actual disagreement about the advertising content. Increasingly advertisers are utilizing controversial, eye-catching imagery that–although not overtly political–may be equally objectionable. But if Justice Souter's interpretation of the majority's analysis–that the critical requirement is that speech must be political or ideological, regardless whether there is actual disagreement–is correct, then government may be constitutionally able to compel nonpolitical but clearly objectionable speech.").