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United States v. United Foods: United We Stand, Divided We Fall—Arguing the Constitutionality of Commodity Checkoff Programs

by

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I. INTRODUCTION

You sit in your favorite chair, watching the sitcom you never miss. The show goes to a commercial break and a sizzling plate full of grilled steak quickly flashes across the television screen while a fiery western tune plays in the background. In the span of thirty seconds, the television reveals several other dishes—beef fajita strips and peppers, a charcoal-grilled cheeseburger, filet mignon. The jazzy tune winds up, cymbals clash, and a warm, deep voice bellows "Beef. It's What's for Dinner."[1] As you resume watching your sitcom, ready to grill a steak as soon as it is over, you probably have no idea that the advertisement you just watched is part of a carefully crafted marketing campaign authorized by Congress,[2] funded by cattle ranchers, and now placed in jeopardy by a recent United States Supreme Court decision.

United States v. United Foods[3] involved a challenge to the mushroom marketing program,[4] which is similar to the beef promotion program that funded the "Beef. It's What's for Dinner" ads. These programs, commonly called "checkoff" pro-

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1. 2000 BEEF BD. ANN. REP. 4, 5 *at* http://www.beefboard.org/documents/00annual_report.pdf (last visited Mar. 24, 2003) (noting the success of the checkoff funded television advertising campaign entitled "Beef. It's What's for Dinner") [hereinafter BEEF BD. ANN. REP.].

2. 7 U.S.C. §§ 2901-2911 (1994).

3. 533 U.S. 405 (2001).

4. *Id.* at 408.

grams,[5] fund research and promotion projects designed to generate demand for a particular commodity by requiring farmers and other industry members to pay fees.[6] In *United Foods*, a mushroom producer challenged the mushroom checkoff program as a violation of its First Amendment right not to be compelled to pay money for speech to which it objected.[7] The Court agreed and held that the mushroom checkoff program violated the First Amendment because it was not "ancillary to a more comprehensive program restricting market autonomy."[8]

The *United Foods* decision will, at minimum, result in several lawsuits challenging the constitutionality of other commodity checkoff programs and, at most, could cause mandatory commodity promotion to cease altogether.[9] This note will discuss the First Amendment background to the Court's opinion and will trace elements of mandatory commodity promotion that will impact future decisions on the constitutionality of other checkoff programs. It will also identify the impact *United Foods* could have on other checkoff programs in general and the cotton and beef checkoff programs in particular. This note will further argue that checkoffs, such as the cotton and beef checkoffs, that spend some compelled-producer funds on non-promotional activities and that involve commodities in which government is highly involved, may still be constitutional under *United Foods*.

5. The term checkoff refers to the fee taken out of the check or proceeds a farmer receives when he sells his crop. U.S. GEN. ACCOUNTING OFFICE, FEDERALLY AUTHORIZED COMMODITY RESEARCH AND PROMOTION PROGRAMS 2-3 (Pub. No. RCED-94-63, 1993) (on file with the *Arkansas Law Review*) [hereinafter U.S. GEN. ACCOUNTING OFFICE]. Such fees are the principal method of funding research and promotion programs. *Id.* The fee is based on the quantity the farmer sells. *Id.*

6. STEVEN A. NEFF & GERALD E. PLATO, FEDERAL MARKETING ORDERS AND FEDERAL RESEARCH AND PROMOTION PROGRAMS: BACKGROUND FOR 1995 FARM LEGISLATION 7 (Economic Research Serv., USDA, Econ. Rep. No. 707, 1995).

7. 533 U.S. at 412-13.

8. *Id.* at 411 (distinguishing Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997)).

9. *See* Rod Smith, *Expert Says Beef, Pork, Most Checkoffs Not Affected by Court's Mushroom Ruling*, FEEDSTUFFS, July 2, 2001, at 1, 4 (discussing possible constitutional challenges to checkoff programs in light of *United Foods*).

II. STATUTORY, FACTUAL, AND PROCEDURAL HISTORY

A. Statutory History

In 1990, Congress enacted the Mushroom Promotion, Research, and Consumer Information Act ("Act")[10] to assist mushroom producers by expanding mushroom markets and, in the process, expanding mushroom sales.[11] Congress found that "cooperative development, financing, and implementation of a coordinated program of mushroom promotion, research, and consumer information are necessary to maintain and expand existing markets for mushrooms."[12] Pursuant to the Act, the Secretary of Agriculture ("Secretary") established a Mushroom Council to recommend projects to further mushroom promotion and research.[13] The Secretary must approve all Council recommended projects before the projects are implemented.[14] In accordance with the Act, the Council funded its programs via a $.001 cent assessment per pound of mushrooms produced or imported for the domestic fresh market.[15] Most of the money raised from the assessments was spent on generic advertising to stimulate mushroom sales.[16]

10. 7 U.S.C. §§ 6101-6112 (1994).

11. 7 U.S.C. § 6101(a)(5), (b).

12. 7 U.S.C. § 6101(a)(6).

13. 7 U.S.C. § 6104(b); *see* 7 C.F.R. Pt. 1209 (Mushroom Order); Brief for Petitioner at 6, United States v. United Foods, 533 U.S. 405 (2001) (No. 00-276). Before issuing an order establishing the Council, the Secretary conducted a referendum of all mushroom producers and importers as required by the Act. Eighty percent of those voting in the referendum supported the Council. *See Mushroom Indus. Votes to Continue Promotion Program* (Agric. Mktg. Serv., USDA, Release No. AMS-071-98, Mar. 20, 1998) (available on request from the USDA, Agric. Mktg. Serv.). The Council is composed of producers and importers nominated by their organizations and approved by the Secretary. 7 U.S.C. § 6104 (b)(1)(B).

14. 7 U.S.C. § 6104(d)(3).

15. 7 U.S.C. § 6104(g). The Act sets a maximum charge of one cent per pound of mushrooms. 7 U.S.C. § 6104(g). After *United States v. United Foods*, 533 U.S. 405 (2001), the USDA restricted the program to non-promotional activities and accordingly reduced the per pound assessment to $.001. *USDA Approves Mushroom Program Assessment Reduction* (Agric. Mktg. Serv., USDA, News Release No. 176-01, Aug. 3, 2001).

16. *United Foods*, 533 U.S. at 408.

B. Facts and Procedural History

United Foods, a multi-state grower and distributor of mushrooms,[17] began refusing to pay the per pound assessments in 1996.[18] While United Foods locally marketed its "Pictsweet" brand mushrooms as superior to other mushrooms,[19] the Council's advertising campaign touted the benefits of all mushrooms, branded or not.[20] United Foods contended that the Council's "if you've seen one mushroom, you've seen 'em all" approach was at odds with United Foods' message that Pictsweet mushrooms are superior.[21] The Council promoted its message through public relations programs entitled "Let Your Love Mushroom" and "The Mystique of Mushrooms."[22] Among other objections, United Foods disapproved of the Council's promotion of mushrooms as an aphrodisiac and as compatible with alcohol.[23]

Asserting that the mandatory subsidized generic advertising violated its First Amendment rights, on June 25, 1996, United Foods filed a petition with the Secretary objecting to the assessments.[24] The United States Department of Agriculture

17. *See* Brief for Respondent at 2, United States v. United Foods, 533 U.S. 405 (2001) (No. 00-276).

18. *United Foods*, 533 U.S. at 408-09.

19. Respondent's Brief at 3, *United Foods* (No. 00-276).

20. *See id.* at 11.

21. *See id.*

22. *See United Foods*, 533 U.S. at 430 (Breyer, J., dissenting) (attaching a copy of a brochure entitled "Let Your Love Mushroom!"); *In re* Donald B. Mills, Inc., 56 Agric. Dec. 1567, 1591 (1997). The Council pursued this advertising campaign by hiring a public relations director and outside consultants to study consumer opinion of mushrooms and to design and run advertisements. *In re Mills*, 56 Agric. Dec. at 1591-96. The Council communicated their public relations message to consumers through television, magazine, newspaper, radio advertisements, and interviews with spokesmen. *Id.* at 1591. The Council also promoted mushrooms through a retail merchandising kit designed to assist retailers in displaying mushrooms, a quarterly newsletter to supermarket chains, a mushroom education program for elementary school children, and recipe booklets. *Id.* at 1592-95. No funds appear to have been spent on research unrelated to generic promotion. *See id.* at 1590-95.

23. *See* Respondent's Brief at 11, *United Foods* (No. 00-276).

24. *United Foods*, 533 U.S. at 408-09; *In re* United Foods, Inc., 57 Agric. Dec. 329, 329 (1997). The Act authorizes those who pay the mushroom fees to file a petition with the Secretary "stating that the order, any provision of the order, or any obligation imposed in connection with the order, is not in accordance with law" and "requesting a modification of the order or an exemption of the order." 7 U.S.C. § 6106 (a)(1)(A), (B). Specifically, United Foods sought an exemption from assessments imposed in connection with the Mushroom Order along with a refund of past paid assessments under the Order. *In re United Foods*, 57 Agric. Dec. at 330.

("USDA") then sought to force United Foods to pay the assessments via an enforcement action in the United States District Court for the Western District of Tennessee.[25] In anticipation of the Supreme Court's decision in *Glickman v. Wileman Bros. & Elliott, Inc.*,[26] both actions were stayed.[27] The United States Supreme Court issued its opinion in *Wileman* on June 25, 1997, holding a generic promotion program for tree fruit constitutional because it was attached to a marketing order.[28] Finding *Wileman* "dispositive" of United Foods' claims, the USDA's Administrative Law Judge ("ALJ") rejected United Foods' petition,[29] and the USDA's Judicial Officer affirmed.[30]

United Foods then sought review of the Judicial Officer's decision in district court, and the district court consolidated that action with the USDA's enforcement action.[31] The district court agreed that *Wileman* was dispositive and granted the USDA's motion for summary judgment.[32] United Foods then appealed to the Sixth Circuit Court of Appeals.[33] The Sixth Circuit reversed, finding that the mushroom industry was not regulated to the ex-

25. *See United Foods*, 533 U.S. at 409. The Secretary is authorized to enforce the mushroom order and other USDA orders by instituting proceedings in the federal courts. 7 U.S.C. § 6107.

26. 521 U.S. 457 (1997).

27. *See United Foods*, 533 U.S. at 409; *see also Wileman*, 521 U.S. 457.

28. *Wileman*, 521 U.S. at 476-77.

29. *See United Foods*, 533 U.S. at 409; *see also In re United Foods*, 57 Agric. Dec. at 331. An Administrative Law Judge ("ALJ") is an officer within the USDA that conducts rulemaking and adjudicatory hearings on behalf of the Secretary of Agriculture. *See* USDA, Department Administration, Office of Administrative Law Judges, *at* http://www.usda.gov/da/oalj.htm (last visited Mar. 24, 2003). The USDA currently has three ALJs. *Id.* An ALJ conducts hearings in proceedings subject to the Administrative Procedure Act ("APA"), 5 U.S.C. § 551-559 (1994). *Id.* Approximately forty statutes administered by the USDA require APA hearings. *Id.* An ALJ issues initial decisions and orders in those proceedings, and the ALJ's decisions become final decisions of the Secretary unless appealed to the Secretary's Judicial Officer by a party to the proceedings. *Id.*

30. *In re United Foods*, 57 Agric. Dec. at 331; *see also United Foods*, 533 U.S. at 409. The Judicial Officer of the Department of Agriculture is delegated authority by the Secretary of Agriculture to act as the final deciding officer in USDA adjudicatory proceedings subject to 5 U.S.C. §§ 556, 557, and 7 C.F.R. § 2.35. USDA, Department Administration, Office of the Judicial Officer, *at* http://www.usda.gov/da/ojo.htm (last visited Mar. 24, 2003). The Judicial Officer's decisions are not reviewable within the USDA, but litigants may seek review of the Judicial Officer's decisions in federal court. *Id.*

31. *See United Foods*, 533 U.S. at 409.

32. *See id.*

33. United Foods, Inc. v. United States Dep't of Agric., 197 F.3d 221 (6th Cir. 1999).

tent necessary to permit mandatory subsidized promotion under *Wileman*.[34]

On appeal, the United States Supreme Court held that the Act violated United Foods' First Amendment rights by compelling it to pay money for speech to which it objected.[35] The Court reasoned that, unlike in *Wileman*, the forced producer assessments for advertising were not "ancillary to a more comprehensive [regulatory] program restricting marketing autonomy."[36]

III. HISTORICAL DEVELOPMENT AND BACKGROUND

Although proponents of checkoffs argue that *United States v. United Foods*[37] does not apply to other checkoff programs because the mushroom program is different, the courts will likely consider the constitutionality of the other programs in the next several years.[38] In the wake of *United Foods*, several producers and organizations have amended ongoing challenges to producer-assessment programs to include constitutional causes of action.[39] Understanding *United Foods*, appreciating the impact it will have on other commodity programs, and recognizing the argument that some checkoff programs may remain constitutional, require an understanding of the Court's compelled funding of speech cases and of the history of commodity promotion programs. Before evaluating the constitutionality of the cotton

34. *See id.* at 224-25.

35. *United Foods*, 533 U.S. at 412-13.

36. *Id.* at 411. Justice Kennedy authored the majority opinion in *United Foods*, with Justices Stevens and Thomas concurring and Justice Breyer dissenting. *Id.* at 407. The decision was 6-3. *Id.* Justice Breyer agreed with the district court that *Wileman* was controlling and argued that the promotion portions of the Mushroom Act were constitutional economic regulations. *Id.* at 419-23 (Breyer, J., dissenting).

37. 533 U.S. 405 (2001).

38. *See* Smith, *supra* note 9, at 1, 4. Some experts believe *United Foods* will destroy checkoff programs, while others believe checkoffs will survive. *Id.* Either way, constitutional challenges to the programs appear certain. *Id.*

39. Rod Smith, *LMA's Call for Constitutionality Ruling Could Put All Ag Checkoffs at Risk*, FEEDSTUFFS, Aug. 13, 2001, at 1, 4 (noting that the Livestock Marketing Association amended suit against Cattlemen's Beef and Promotion Board, which administers the beef checkoff program, to include a constitutional challenge); *see* David Moeller, Legal Battles over Commodity Checkoff Programs K-2-9, K-2-10 (2000) (unpublished manuscript on file with the *Arkansas Law Review*) (observing that a Minnesota federal district court granted the Campaign for Family Farms's motion to amend their suit against the Secretary of Agriculture for termination of Mandatory Pork Program to include a constitutional claim based on *United Foods*).

and beef research and promotion programs, it is also necessary to examine the regulatory framework applicable to the cotton and beef industries. Finally, the Court's opinion in *Glickman v. Wileman Bros. & Elliott, Inc.*,[40] which was discussed at length in the *United Foods* case,[41] must be examined.

A. First Amendment Concerns

Based on *United Foods*, the most important First Amendment issue to consider in cases involving mandatory funding of generic agricultural advertising is whether the advertising is "ancillary to a more comprehensive program restricting marketing autonomy."[42] In First Amendment terms, this statement means that an agricultural advertising program will be valid only if there is a purpose other than advertising that is sufficient enough to force producers to associate and pay dues.[43] Since the *United Foods* Court found that the mushroom checkoff forced mushroom producers to act cooperatively solely for advertising and not for any "overriding associational purpose," the Court concluded that the mushroom checkoff program automatically violated the First Amendment.[44] Therefore, in the context of checkoff programs, any historical analysis of the First Amendment should center on the Court's decisions regarding compelled funding of speech by associations.

In his dissent in *Wileman*, Justice Souter characterized the Court's view of compelled funding of speech as "corollary to the principle that what may not be suppressed may not be coerced."[45] The notion that a person may not be forced to express a particular view corresponds to the idea that a person may not be forced to pay for someone else's expression of a particular view.[46] In *Abood v. Detroit Board of Education*,[47] the Court ini-

40. 521 U.S. 457 (1997).
41. 533 U.S. at 411-17.
42. *Id.* at 411.
43. *Id.* at 411-16.
44. *Id.* at 413-14.
45. *Wileman*, 521 U.S. at 481 (Souter, J., dissenting).
46. *See id.* at 481-82 (Souter, J., dissenting); *see also* Katherine Earle Yanes, Glickman v. Wileman Bros. & Elliot, Inc., *Has the Supreme Court Lost its Way?*, 27 STETSON L. REV. 1461, 1475 (1998).
47. 431 U.S. 209 (1977).

tially recognized that compelling someone to pay for speech to which they object may violate the First Amendment.[48]

In *Abood*, several Detroit schoolteachers objected to a provision in a collective bargaining agreement between the school board and the teachers union which required all teachers to pay a service charge to the union.[49] Teachers were forced to pay this service charge even if they were not members of the union, and the charge was equivalent to union dues.[50] The teachers principally objected to the union's use of their money for social, political, economic, scientific, and religious activities unrelated to collective bargaining.[51]

Despite the teachers' First Amendment rights to freely associate with whomever they please, the Court held that the teachers could be forced to pay union dues because the dues were "justified by the legislative assessment of the important contribution of the union shop to the system of labor relations created by Congress."[52] Without such a valid associational purpose, dues could not have been compelled.[53] *Abood* further held that union dues could not be used for political purposes unrelated to the union's role as exclusive bargaining representative.[54]

The Court later clarified the *Abood* rule in *Keller v. State Bar*.[55] In *Keller*, members of the California State Bar Association sued the Association, alleging that the Association's use of mandatory attorney dues constituted compelled funding of speech in violation of the First Amendment.[56] The California Bar Association allegedly used dues to finance lobbying of the state legislature for gun-control and nuclear-weapons-freeze

48. *Wileman*, 521 U.S. at 482 (Souter, J., dissenting) (discussing *Abood*, 431 U.S. 209).

49. *Abood*, 431 U.S. at 212-13.

50. *Id.* at 212.

51. *Id.* at 213.

52. *Id.* at 222 (citing R.R. Employees' Dep't v. Hanson, 351 U.S. 225 (1956)); *see* Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 778 (1961) (Douglas, J., concurring).

53. *Abood*, 431 U.S. at 222-23.

54. *Id.* at 235-36; *see also* Lenhert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991). *Lenhert* applied the *Abood* rule to prohibit unions from using forced teacher service charges to fund the union's lobbying and litigation activities not related to collective bargaining and to prevent forced funding of "public relations expenditures designed to enhance the reputation of the teaching profession." 500 U.S. at 527-28.

55. 496 U.S. 1, 13-14 (1990).

56. *Id.* at 4.

causes, filing of amicus curiae briefs in pending cases, and speaking out against political candidates.[57] All California attorneys were required to belong to this "integrated" state bar association.[58] The Association also examined applicants for admission, formulated rules of professional conduct, disciplined members for misconduct, and engaged in other activities to improve the administration of justice.[59]

The Court found that the state could force payment of dues to a state bar association in order to "improv[e] the quality of the legal service available to the people of the [s]tate."[60] The Court described the *Abood* rule as requiring activities funded from mandatory dues to be germane "to the purpose for which the compelled association was justified."[61] Applying this rule, the Court held that the state bar could use mandatory dues of all members to fund disciplinary activities and the proposal of ethical codes, but could not fund lobbying efforts in favor of gun-control or nuclear-freeze initiatives.[62]

In *United Foods* and *Wileman*, the Court equated the "overriding associational purpose" present with the union in *Abood* and the state bar association in *Keller* with tree fruit marketing orders.[63] The associational purpose of the marketing orders passed constitutional muster because Congress has the power to set forth economic regulations pursuant to the Commerce Clause.[64] Congress's economic judgment that the "public will be best served by compelling cooperation among producers in making economic decisions" provided the associational requirement necessary to exempt the marketing orders from First Amendment scrutiny.[65] Additionally, the peach and nectarine

57. *Id.* at 5, 15.

58. *Id.* at 4-5.

59. *Id.* at 5 (citing Keller v. State Bar, 767 P.2d 1020, 1023-24 (1989)).

60. *Keller*, 496 U.S. at 14 (quoting Lathrop v. Donohue, 367 U.S. 820, 842-43 (1961)).

61. *Id.* at 13.

62. *Id.* at 16.

63. *United Foods*, 533 U.S. at 413-15; *Wileman*, 521 U.S. at 473. Marketing orders are authorized by Congress, and the USDA enforces congressional mandates that require producers or handlers to follow size, weight quality, or quantity limitations in raising or handling a particular commodity. *See infra* notes 202-19 and accompanying text.

64. *See Wileman*, 521 U.S. at 475-77; *see also* U.S. CONST. art. I, § 8, cl.3.

65. *Wileman*, 521 U.S. 475-76. Congress expressly determined that volatile agricultural markets justified marketing orders. *Id.*

advertising program was "unquestionably germane" to the overarching economic purpose of the marketing orders, which was to generate consumer demand for an agricultural product.[66] The Court also dismissed Wileman's argument that, because he preferred to issue a message distinguishing his particular peaches and nectarines and because he desired to spend less money on advertising, the marketing orders were the equivalent of compelled funding of political or ideological speech.[67] The Court distinguished the forbidden funding of political and ideological causes in *Abood* and *Keller* from the permissible funding of economic activities, such as the marketing orders.[68]

Although the central premise of the holding in *Wileman* was *Abood*'s requirement that mandatory funding be germane to a valid associational purpose, the Court also distinguished the marketing orders from other factual situations that raise First Amendment issues.[69] The Court noted that producers of peaches and nectarines were not restrained from communicating "any message to any audience."[70] The Court also stated that the marketing orders do not compel producers to "engage in any actual or symbolic speech."[71] "The First Amendment has never been construed to require heightened scrutiny of any financial burden that has the incidental effect of constraining the size of a firm's advertising budget."[72] These two distinctions set *Wileman* apart from cases in which the Court held unconstitutional laws pre-

66. *Id.* at 473, 475-76.

67. *Id.* at 470-74.

68. *Id.* at 473, 475-76.

69. *Wileman*, 521 U.S. at 470-71.

70. *Id.* The Court found that this principle distinguished *Wileman* from *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). In *Central Hudson*, the Supreme Court held unconstitutional a ban by the New York Service Commission on certain advertising by electricity companies. *Id.* at 561. *Central Hudson* set down the principles by which the Court examines "commercial speech," which is generally defined as "speech proposing a commercial transaction" or "expression related solely to the economic interests of the speaker and its audience." *Id.* at 561-62.

71. *Wileman*, 521 U.S. at 470. The Court found that this fact distinguished *Wileman* from compelled speech cases in which laws requiring students to pledge allegiance to the flag and laws requiring the display of state mottos on license plates were found to violate First Amendment rights to refrain from speaking. *Id.*; *see also* Wooley v. Maynard, 430 U.S. 705 (1977); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

72. *Wileman*, 521 U.S. at 470.

venting communication of commercial transactions and laws requiring citizens to display mottos on their license plates.[73]

Although *Wileman* recognized the important First Amendment concerns of whether a person is prevented from speaking or forced to speak, *Wileman* appeared to place more emphasis on the "germaneness" requirement.[74] Instead of finding a restraint on First Amendment freedoms in generic advertising funded from mandatory fees, the *Wileman* Court held the tree fruit promotion program germane to the justified associational purpose of economic regulation.[75] Accordingly, the tree fruit marketing order did not violate First Amendment freedom of association or freedom of speech principles.

The *United Foods* Court read *Abood*, *Keller*, and *Wileman* to require a valid associational purpose and ruled that advertising alone does not satisfy that associational purpose.[76] On the other hand, the tree fruit program at issue in *Wileman* satisfied the associational requirement because generic advertising existed alongside other forms of economic regulation embodied in the marketing order.[77] Since the mushroom checkoff only funded advertising, the compelled association of mushroom producers lacked the associational purpose required by the First Amendment.[78]

B. Commodity Promotion Programs

Understanding the effect of *United Foods* on other checkoff programs and recognizing the argument that some checkoffs may still be constitutional necessitates a review of the history of commodity promotion. Producer-funded research and promotion programs have existed since 1954, when the wool and mohair program was enacted by Congress.[79] The majority of mandatory producer assessment programs were created during the

73. *Id.*
74. *Id.* at 474.
75. *Id.* at 473.
76. *United Foods*, 533 U.S. at 410-16.
77. *Id.* at 412-15.
78. *Id.* at 411. On the other hand, Justice Breyer's dissent saw no reason to differentiate between a congressionally authorized, broad-based economic program with compelled funding of advertising as a component, and a congressionally authorized economic program with promotion as the principal objective. *Id.* at 420 (Breyer, J., dissenting).
79. U.S. GEN. ACCOUNTING OFFICE, *supra* note 5, at 2-3.

1980s and 1990s.[80] These "checkoff" programs aim to spur growth in sales and markets for a particular agricultural commodity.[81] Checkoffs fund promotion, research, consumer education, and industry information efforts by collecting fees from farmers on every unit of the commodity the farmer sells.[82] Each program is designed specifically for one commodity and authorized by Congress through separate legislation.[83]

Traditionally, checkoff programs begin when members of a commodity industry decide on the need for a program, agree on the program's purpose and structure, and propose the plan to Congress.[84] Therefore, each checkoff program may be considered voluntary even though governed by legislation. The funds collected from the fees are allocated and administered by a checkoff board.[85] Although the makeup of the checkoff boards differ from commodity to commodity, they are generally composed of some combination of producers, processors, handlers, importers, and public representatives.[86] Checkoff programs are currently active for the following fifteen commodities: beef, cotton, dairy, eggs, fluid milk, honey, blueberries, peanuts, popcorn, mushrooms, pork, potatoes, soybeans, watermelon, and wool and mohair.[87]

After Congress authorizes a checkoff program, the USDA works with the commodity industry to promulgate regulations to implement and govern the program.[88] The authorizing statutes provide that prior to or soon after a USDA regulation establishes a checkoff board, a referendum of all those who pay assessments

80. *Id.* at 3.
81. NEFF & PLATO, *supra* note 6, at 7.
82. *Id.*
83. *Id.*
84. U.S. GEN. ACCOUNTING OFFICE, *supra* note 5, at 2-3.
85. NEFF & PLATO, *supra* note 6, at 7.
86. U.S. GEN. ACCOUNTING OFFICE, *supra* note 5, at 3.
87. *Id.* at 4, 14-18, 23; *see also* NEFF & PLATO, *supra* note 6, at 10.
Twenty-two checkoff programs have been authorized by Congress, while wheat, limes, cut flowers and greens, kiwifruit, olive oil, pecans, and flowers and plants were inactive and not collecting funds in 2002. *See* USDA, Agric. Mktg. Serv., Research and Promotion Programs *available at* http://www.ams.usda.gov/repromo.htm. Checkoffs have also been proposed for Hass avocadoes, mangos, and lamb. *Id.*
88. U.S. GEN. ACCOUNTING OFFICE, *supra* note 5, at 3.

must be held.[89] Once the farmers and others paying the assessments approve the program, collection of the funds may begin.[90] The authorizing statute sets out who will be assessed, the rate of assessment, and the method to be used for collection of the funds.[91] The Agriculture Marketing Service ("AMS"), an agency within the USDA, monitors checkoff programs to ensure compliance with the administrative, collection, and expenditure provisions of the authorizing statute.[92] With the exception of wool and mohair, all checkoff programs reimburse AMS for oversight costs.[93]

Congress authorizes checkoff programs in part because they require very few, if any, expenditures from the Federal Government.[94] Checkoff programs have provided Congress with a low-cost way to attempt to stimulate agricultural demand without spending more money on direct subsidization of farmers.[95] Many producers and producer groups value checkoff programs as vital to the long-term growth of their commodity, which requires development of new and existing markets.[96]

Producers have historically turned to Congress to authorize commodity promotion programs in order to eliminate the "free rider problem."[97] If producer assessments were only voluntary, as opposed to mandatory, producers not paying their fair share of generic advertising and research costs would reap the benefits of increased demand and new technology at the expense of other paying producers.[98]

Checkoff programs engage in a variety of functions including advertising, promotion, market research, product development, nutrition education, information, and technical assis-

89. *Id.* Referendums may also be periodically called on order of the Secretary or upon a showing that a certain percentage of producers oppose the checkoff program. Opponents of the Pork Checkoff program, the National Pork Board, and the USDA have been engaged in lengthy litigation regarding a referendum held in August and September of 2000. Moeller, *supra* note 39, at K-2-5-10.

90. U.S. GEN. ACCOUNTING OFFICE, *supra* note 5, at 3.

91. NEFF & PLATO, *supra* note 6, at 7.

92. *Id.*

93. *Id.*

94. *Id.* at 10.

95. *See id.*

96. NEFF & PLATO, *supra* note 6, at 10.

97. *See id.*

98. *See id.*

tance.[99] All checkoff programs devote a sizable portion of their funds to generic advertising, which is designed to increase demand for the commodity in general and not for any particular brand.[100] For example, the mushroom checkoff touted the benefits of mushrooms in general and did not specifically promote Pictsweet mushrooms, which United Foods produced.[101]

Projects devoted to information may be considered related to generic advertising, and include industry and consumer information. Industry information aims to work with retailers or others through whom the commodity must pass before it reaches the consumer.[102] Consumer information seeks to inform the consumer of nutritional values and other information not directly tied to advertising.[103]

Checkoff programs also support research into new product uses, more cost effective ways of processing and handling the commodity, and which consumers are most likely to respond to advertising.[104] Several checkoff programs have export promotion activities, which conduct campaigns to stimulate demand for the commodity in export markets.[105] Often, checkoff programs assist restaurants and grocery stores in effectively using the products of that commodity.[106]

Although checkoffs are involved in a variety of activities, the majority of the producer assessments are used for promotion, and most of that goes to domestic advertising.[107] Sixty-four percent of the total funds spent by checkoffs in 1993 went to promotion as compared to 14% for research, 6% for consumer information, and 4% for industry information.[108] Prior to *United Foods*, the mushroom checkoff spent the highest percentage (97% of funds generated) on advertising.[109] The fifteen active

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99. *See id.* at 7.
100. *See id.*
101. *See* Respondent's Brief at 11, *United Foods* (No. 00-276).
102. U.S. GEN. ACCOUNTING OFFICE, *supra* note 5, at 6.
103. *Id.*
104. NEFF & PLATO, *supra* note 6, at 7.
105. *Id.*
106. *Id.*
107. U.S. GEN. ACCOUNTING OFFICE, *supra* note 5, at 3.
108. *Id.* at 5.
109. *See* Memorandum from James R. Frazier, Acting Associate Deputy Administrator, Fruit and Vegetable Programs, Agric. Mktg. Serv., USDA, to Martha B. Ransom, Chief, Research and Promotion Branch, Agric. Mktg. Serv., USDA (Dec. 7, 2000) (on file

research and promotion programs were expected to raise over $567 million in 2002.[110] The amounts expected to be raised for each individual commodity program ranged from $563,994 for the popcorn program to roughly $153 million for the dairy program.[111]

C. Cotton and Beef Research and Promotion Programs

Despite the prominence of advertising in every checkoff program, many programs, such as cotton and beef, devote sizable portions of their resources to non-promotional activities.[112] An examination of the expenditures of the beef and cotton checkoff programs reveals a variety of expenditures in comparison to the mushroom program.

1. *The Cotton Checkoff*

In fiscal year 2000, the Cotton Board spent 41% of funds on domestic consumer advertising, 28% on research, and 31% on marketing and information efforts directed towards retailers.[113] The majority of the $25 million spent on domestic con-

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with the *Arkansas Law Review*). AMS approved the Mushroom Council's fiscal year 2001 budget, which allocated $1,689,000. *Id.* Aside from a $50,000 appropriation for research into the health benefits of mushrooms and a $5000 appropriation to crisis management strategies for the industry, the remaining funds were spent on advertising and other projects geared towards expanding consumer and retail demand for mushrooms. *Id.*

110. *See* USDA, Agric. Mktg. Serv., Research and Promotion Programs (citing amounts each checkoff expects to raise from 2002 producer assessments) (available on request from the USDA, Agric. Mktg. Serv.); *see also* U.S. GEN. ACCOUNTING OFFICE, *supra* note 5, at 3.

111. *See* USDA, Agric. Mktg. Serv., Popcorn Research and Promotion Program (noting amount raised from producer assessments in 2001) (available on request from the USDA, Agric. Mktg. Serv.); USDA, Agric. Mktg. Serv., Dairy Research and Promotion Program (noting amount raised in 1996) (available on request from the USDA, Agric. Mktg. Serv.); *see also* U.S. GEN. ACCOUNTING OFFICE, *supra* note 5, at 3.

112. U.S. GEN. ACCOUNTING OFFICE, *supra* note 5, at 5-6.

113. 2000 COTTON, INC. ANN. REP. 21 (on file with the *Arkansas Law Review*) [hereinafter COTTON, INC. ANN. REP.]. The Cotton Board is authorized by the Cotton Research and Promotion Act and is similar in administrative structure to the other commodity checkoff programs described *supra*. *See* 7 U.S.C. §§ 2101-2118 (1994). The Cotton Board consists of thirty cotton producers and importer representatives nominated by certified cotton producer and importer organizations and appointed by the Secretary. 7 U.S.C. § 2106 (b) (authorizing the Secretary to appoint organization-nominated representatives); 7 U.S.C. § 2113 (providing grounds for determining the cotton producer organizations which may submit nominations to the Secretary); *see also* Cotton Research and Promotion Order, 56 Fed. Reg. 237, 64470-75 (Dec. 10, 1991). As authorized by the Cotton Research and Pro-

sumer advertising was devoted to Cotton's "the fabric of our lives" advertising campaign, which seeks to persuade consumers to purchase cotton goods by featuring cotton products and by promoting awareness of the seal of cotton.[114] Checkoff dollars funded the proliferation of "the fabric of our lives" ads on network and cable television as well as in magazines.[115]

The Cotton Board spent another $18 million on non-consumer marketing.[116] These funds supported the following initiatives: domestic global product marketing aimed at working with textile mills to solve problems with current cotton production and to generate production of more cotton goods;[117] international global marketing intended to stimulate growth of new textile mills abroad;[118] retail marketing designed to forge partnerships with catalogs, retail stores, and malls to stimulate the purchase of cotton products;[119] fashion marketing, in which three teams keep mills, manufacturers, retailers, and others abreast of the latest fashion developments;[120] and strategic planning, which compiles economic and focus group research into a roadmap for dealing with major cotton market trends.[121] Finally, the Cotton Board appropriated $16 million to various agricultural, fiber quality, fiber management, and textile research endeavors.[122] Among other projects, these dollars funded the Boll Weevil Eradication Program, which seeks to exterminate an insect that has historically ravaged cotton fields, as well as dye-

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motion Act, the Cotton Board contracts with Cotton Incorporated to develop and establish research and promotion programs. *See* 7 U.S.C. § 2106 (g); *see also* Cotton Program, Research and Promotion, Agric. Mktg. Serv., USDA, *at* http://www.ams.usda.gov/cotton/ctnR&P.htm (last visited Mar. 24, 2003). Cotton Incorporated is governed by a board of directors selected by the same certified cotton producer organizations which submit Cotton Board nominations. *Id.*

114. COTTON, INC. ANN. REP., *supra* note 113, at 16, 21.

115. *See* COTTON BOARD, *There is a Difference*, *at* http://www.cottonboard.org/index.cfm/4,318,62.html (last visited Mar. 24, 2003); Cotton Board, *Speaking Out for Cotton*, *at* http://www.cottonboard.org/index.cfm/4,0,62,54.html (last visited Mar. 24, 2003).

116. COTTON, INC. ANN. REP., *supra* note 113, at 21.

117. *Id.* at 14, 21.

118. *Id.*

119. *Id.* at 18, 21.

120. *Id.*

121. COTTON, INC. ANN. REP., *supra* note 113, at 6, 21.

122. *Id.* at 21.

ing and finishing efforts aimed to create cotton products that maintain their color after several washings.[123]

2. *The Beef Checkoff*

The Beef Board also devoted a sizable portion of money to non-promotional activities, spending almost $20 million on research, consumer information, industry information, foreign marketing, and other projects.[124] The Beef Board allocated 59% of its revenues to promotion, 9% to research, 14% to consumer information, 4% to industry information, 10% to foreign marketing, and 4% to producer communications.[125] In addition to the "Beef. It's What's for Dinner" ads,[126] promotion projects included new product development teams, which have created new products such as "Today's Roast," complete with its own pop-up timer;[127] the Beef Made Easy Program, which helps retailers organize meat displays by cooking method;[128] and marketing efforts to show restaurateurs that value-added beef items save time, labor, and money.[129]

Beef checkoff research dollars fund projects to provide more evidence that a natural beef fatty acid helps reduce the risk of developing cancer and heart disease.[130] Beef checkoff research projects also include new uses for lesser-used beef cuts,[131] and improvements to food safety systems in meat pack-

123. *Id.* at 9, 13, 21.

124. BEEF BD. ANN. REP., *supra* note 1, at 13. The Beef Board is authorized by the Beef Promotion and Research Act of 1985, which was passed as part of the 1985 Farm Bill. 7 U.S.C. §§ 2901-2911 (1994). The Board is composed of cattle producers and importers nominated by eligible organizations and appointed by the Secretary. 7 U.S.C. § 2904 (1) (setting forth composition of the Beef Board); 7 U.S.C. § 2905 (providing for certification of organizations eligible to nominate Beef Board members). As with the Cotton Board, the Beef Board contracts with national and state non-profit beef and cattle organizations to carry out research and promotion projects. BEEF BD. ANN. REP., *supra* note 1, at 14; *see* 7 U.S.C. § 2904 (6); *see also* Beef, Research and Promotion Programs, Agric. Mktg. Serv, USDA *at* http://www.ams.usda.gov/lsg/mpb/beef/beefchk.htm (last visited Mar. 24, 2003).

125. BEEF BD. ANN. REP., *supra* note 1, at 13.

126. *See id.* at 5. The "Beef. It's What's for Dinner" ads appear on television and in magazines. *Id.*

127. *Id.*

128. *Id.* at 6.

129. BEEF BD. ANN. REP., *supra* note 1, at 6.

130. *Id.* at 8.

131. *Id*

ing plants.[132] Foreign marketing efforts seek to generate greater beef demand abroad by, among other projects, hosting beef cooking classes and supermarket promotions in foreign cities.[133] Consumer and industry information monies also fund beef articles and recipes in culinary and other national magazines, in newspapers, and on television.[134]

As is evident from the description of the activities to which beef and cotton checkoff proceeds are distributed, the beef and cotton programs differ from the mushroom program in that they spend significant amounts of money on non-promotional activities.

D. Cotton and Beef Industry Background

When analyzing the constitutionality of the mushroom program, the Court in *United Foods* emphasized that the mushroom industry is an "'unregulated'" industry in comparison to an industry with marketing orders.[135] Therefore, the regulatory framework of the cotton and beef industries must be considered in evaluating their constitutionality.

1. *Government Support of the Cotton Industry*

Congress supports most cotton farmers[136] through several types of payments intended to bolster the farmer's income and

132. *Id.*

133. *Id.* at 6-7.

134. BEEF BD. ANN. REP., *supra* note 1, at 7.

135. 533 U.S. at 413 (quoting *United Foods*, 197 F.3d at 222). The Court commented that "'the mushroom growing business . . . is unregulated, except for the enforcement of a regional mushroom growing 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.* (quoting *United Foods*, 197 F.3d at 222-23). In addition to the Mushroom Promotion program, the Federal Government's involvement in the mushroom industry extends only to granting them Noninsured Crop Disaster Assistance and protection from fraudulent practices in the shipping of mushrooms in interstate commerce under the Perishable Agricultural Commodities Act 1930 ("PACA"). *See* USDA, Farm Service Agency, Disaster Assistance, Noninsured Crop Disaster Assistance Program, *at* http://www.fsa.usda.gov/pas/disaster/nap.htm (last visited Mar. 24, 2003); *see also* 7 U.S.C. § 499. Mushrooms have not been included in formal crop insurance programs. *See* USDA, Risk Management Agency, *at* http://www.rma.usda.gov (last visited Mar. 24, 2003). The PACA apparently covers mushrooms, since it covers sellers of highly perishable commodities.

136. Support programs for Upland Cotton and Extra Long Staple Cotton differ. *See* Upland Cotton, Fact Sheet, Farm Service Agency, USDA (June 2001); Extra Long Staple

guarantee that the farmer receives an adequate price for the cotton he produces.[137] Since the 1930s,[138] commodity support programs, including the programs supporting cotton producers, have been authorized and funded by Congress under the theory that farmers need assistance to confront the uncertainties of weather and commodity prices.[139]

Currently, cotton farmers receive the majority of their support from production flexibility contracts, market loss assistance, the commodity loan program, and subsidized crop and revenue insurance.[140] All of these programs are voluntary.[141] Congress created production flexibility contracts ("PFCs") as part of the 1996 FAIR Act.[142] PFCs replaced supply control programs which had existed since the 1930s and which conditioned payments on farmers' participation in acreage reduction programs.[143] Supply control programs reacted to periods of low prices by requiring a farmer to plant fewer acres of a particular

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Cotton, Fact Sheet, Farm Service Agency, USDA (June 2001), both *at* http://www.fsa.usda.gov/pas/publications/facts/pubfacts.htm (last visited Mar. 24, 2003). This note will discuss support programs for upland cotton, which represents the vast majority of cotton grown in the United States. *See* USDA, National Agricultural Statistics Service, 2001 Agricultural Statistics, *at* http://www.usda.gov/nass/pubs/agr01/01_ch2.pdf (last visited Mar. 24, 2003).

137. *See* Christopher R. Kelley, *Recent Federal Farm Program Developments*, 4 DRAKE J. AGRIC. L. 93, 93-119 (1999) (providing a detailed explanation of domestic commodity programs applicable to cotton and other crops) [hereinafter Kelley, *Farm Programs*]; *see also* LESLIE MEYER & STEPHEN MACDONALD, COTTON: BACKGROUND AND ISSUES FOR FARM LEGISLATION 8-10 (Economic Research Serv., USDA, Econ. Rep. No. CWS-0601-01, July 2001) (on file with the *Arkansas Law Review*).

138. *See* Kelley, *Farm Programs*, *supra* note 137, at 101, 111.

139. *See* J.W. Looney, *The Changing Focus of Government Regulation of Agriculture in the United States*, 44 MERCER L. REV. 763, 767-68 (1993).

140. *See* MEYER & MACDONALD, *supra* note 137, at 8.

141. *See* Kelley, *Farm Programs*, *supra* note 137, at 99-113 (noting that production flexibility contracts, market loss assistance, and loan deficiency payments are voluntary); *see also* Christopher R. Kelley, *The Agricultural Risk Protection Act of 2000: Federal Crop Insurance, the Non-Insured Crop Disaster Assistance Program, and the Domestic Commodity and Other Farm Programs*, 6 DRAKE J. AGRIC. L. 141, 145 (2001) (observing that the lowest level of crop insurance was required in 1995 for participation in federal commodity programs but since 1995 a participant in commodity programs could waive any claim to emergency crop loss assistance rather than obtain crop insurance) [hereinafter Kelley, *Risk Protection*].

142. *See* Federal Agricultural Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888 (codified in sections of Title 7 of the United States Code) *available at* http://www.nationalaglawcenter.org/farmstat.htm; *see* Kelley, *Farm Programs*, *supra* note 137, at 96-97.

143. *See* Kelley, *Farm Programs*, *supra* note 137, at 96-100.

crop in exchange for payments intended to make up the difference between the low commodity prices and the farmer's cost of producing the crop.[144] The program operated on the premise that reducing acreage would reduce supply of that crop, thereby raising prices.[145]

The FAIR Act eliminated supply control programs with the goal of moving toward a more flexible, market-oriented agricultural policy.[146] Some proponents of the FAIR Act criticized supply control programs for restricting the amount of each crop a farmer could plant.[147] Instead of imposing supply control restrictions, PFCs deliver income support to farmers through statutorily set payments that do not impose limits on the amount of a crop that a farmer can plant.[148] Additionally, payments are provided regardless of whether commodity prices are high or low.[149] In 1996, approximately 99% of the eligible acres of cotton received PFC payments.[150]

Cotton farmers also receive support from the commodity loan program and from subsidized crop insurance.[151] The commodity loan program ensures that the farmer will receive the loan rate for every pound of cotton he produces.[152] When prices

144. *See id.* at 96; *see also* MEYER & MACDONALD, *supra* note 137, at 10.

145. *See* Looney, *supra* note 139, at 781-83.

146. *See* Kelley, *Farm Programs*, *supra* note 137, at 97-98 n.21; *see also* MEYER & MACDONALD, *supra* note 137, at 8.

147. *See* Charles E. Grassley and James J. Jochum, *The Federal Agriculture Improvement and Reform Act of 1996: Reflections on the 1996 Farm Bill*, 1 DRAKE J. AGRIC. L. 1, 3 (1996).

148. *See* Kelley, *Farm Programs*, *supra* note 137, at 96-104; *see also* MEYER & MACDONALD, *supra* note 137, at 8.

149. *See* Kelley, *Farm Programs*, *supra* note 137, at 96-104. In response to low prices, low yields, and rising costs of production, Congress passed supplemental PFC payments in 1998, 1999, and 2000. These payments effectively doubled the amount of money farmers would have received had the supplemental payments not been enacted. *See* Kelley, *Risk Protection*, *supra* note 141, at 164; *see also* 7 U.S.C. § 1421 (1994); Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, § 1111, 112 Stat. 2681, 2681-44 to -45.

150. MEYER & MACDONALD, *supra* note 137, at 8.

151. *Id.*; *see* 7 U.S.C. §§ 7232-35 (1997).

152. *See* MEYER & MACDONALD, *supra* note 137, at 8; *see also* 7 U.S.C. § 1308; *see* Kelley, *Farm Programs*, *supra* note 137, at 110-11. Loan rates are adjusted based on the marketing year and the quality and location of the commodity. *See* Kelley, *Farm Programs*, *supra* note 137, at 111. The resulting rates, stated in per-unit sums (i.e., per pound of cotton), are the rates at which loans are made. *Id.* The current loan rate for cotton in most counties of Arkansas is $52.30 cents per pound of cotton. *See* USDA, Farm Service Agency, 2001 Crop Upland Cotton Warehouse Loan Rates, *at*

are above the loan rate, as they were from 1994 until 1998, the farmer receives no revenue gain from the commodity loan program.[153] However, when prices drop below the loan rate, as they did from 1998 until 2001, the Government provides the farmer the difference between the price of cotton and the loan rate.[154]

The commodity loan program allows farmers to realize this loan rate through one of two options. First, nonrecourse loans allow farmers to pledge their cotton production as collateral in exchange for a loan to cover the cost of producing that crop.[155] The farmer receives the value of the cotton he has produced based on the loan rate.[156] To pay off the loan, the farmer may either forfeit his cotton or pay the loan back at a rate roughly equivalent to the price he receives on the market.[157] Second, Loan Deficiency Payments ("LDPs") provide a lump sum payment to producers who chose not to take out a nonrecourse loan.[158] Generally, LDPs for cotton are only paid when the price of cotton drops below the loan rate.[159] LDPs then pay the farmer the difference between the price of cotton and the loan rate.[160]

In addition to PFCs and the commodity loan program, farmers can also purchase federally subsidized crop insurance against price drops and production losses, which may occur because of adverse weather, insect infestations, or other natural disasters.[161] The USDA pays part of the producer's premiums and some of the costs private insurers incur in providing agricultural insurance.[162] Farmers are required to purchase the mini-

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http://www.fsa.usda.gov/dafp/psd/2001UplandCotton.pdf (last visited Mar. 24, 2003) (including loan rates for cotton in every county in which cotton is grown).

153. *See* Kelley, *Farm Programs*, *supra* note 137, at 110-13.

154. *Id.*

155. *See id.*; *see also* 7 C.F.R. § 1421.4(4) (1999).

156. *See* Kelley, *Farm Programs*, *supra* note 137, at 110-13.

157. *See* 7 U.S.C. §§ 7284(a), 7234; 7 C.F.R. § 1421.9; *see also* Kelley, *Farm Programs*, *supra* note 137, at 110-13.

158. *See* 7 U.S.C. § 7235(a); 7 C.F.R. §§ 1421.29, 1427.23; *see also* Kelley, *Farm Programs*, *supra* note 137, at 110-13.

159. *See* MEYER & MACDONALD, *supra* note 137, at 8.

160. *Id.*; *see* 7 U.S.C. 7235(a).

161. *Id.*; *see also* Kelley, *Risk Protection*, *supra* note 141, at 142-45 (giving a detailed explanation of federal crop insurance programs).

162. *See* MEYER & MACDONALD, *supra* note 137, at 8.

mum level of crop insurance to participate in the PFC and commodity loan programs.[163] In 1999, 90% of all cotton grown in the United States was covered by some level of crop insurance.[164] Most cotton farmers rely on PFCs, the commodity loan program, and crop insurance for security and assistance in dealing with the quality, price, weather, and cost of production factors at play in the cotton growing environment.[165]

2. *Regulatory Framework of the Beef Industry*

Unlike regulation of the cotton industry, regulation of the beef industry centers on protecting cattle producers from anticompetitive and discriminatory cattle buying practices.[166] Most cattle industry regulations spring from the Packers and Stockyards Act ("PSA"),[167] which has been called "one of the most comprehensive regulatory measures ever enacted."[168] The PSA grants the Secretary the "jurisdiction to deal with 'every unjust, unreasonable, or discriminatory regulation or practice' involved in the marketing of livestock."[169]

Very broad in scope, the PSA covers most aspects of the conduct of business between buyers and sellers of cattle.[170] The PSA regulates the transfer of cattle from farmers, who breed and raise cattle to stockyards, which may feed, water, hold, handle,

163. *See* Kelley, *Farm Programs*, *supra* note 137, at 107-08.

164. *See* MEYER & MACDONALD, *supra* note 137, at 8.

165. *See id.* Cotton producers also benefit from the cotton classing service provided by the USDA. *See* USDA, Agric. Mktg. Serv., Cotton Program. History and Scope, *at* http://www.ams.usda.gov/cotton/cdhist.htm (last visited Mar. 24, 2003) [hereinafter Agric. Mktg. Serv., Cotton Program]. Congress authorized the USDA to develop cotton grading standards and classify cotton in accordance with those standards. *Id.* Cotton classing aims to "eliminate price differences between markets" and place the farmer in a better bargaining position. *Id.* While cotton classification is not mandatory, nearly all cotton grown in the United States is classed. *Id.* Farmers typically find cotton classing necessary to market their crop. *Id.*

166. *See* Christopher R. Kelley, *The Packers and Stockyards Act: An Overview* (Jan. 6, 1996) (unpublished manuscript on file with the *Arkansas Law Review*) [hereinafter Kelley, *PSA*]; *see also* Looney, *supra* note 139, at 774-75.

167. 7 U.S.C. §§ 181-231 (2001).

168. Donald A. Campbell, *The Packers and Stockyards Act Regulatory Program*, 1 AGRIC. L. § 3.01, at 184-85 (John Davidson ed., 1981).

169. Rice v. Wilcox, 630 F.2d 586, 590 (8th Cir. 1980) (quoting 7 U.S.C. § 208(a) (1994)).

170. *See* Campbell, *supra* note 168, at 184-85.

or ship cattle.[171] Also covered under the PSA is the transfer of cattle to packers who may buy livestock for slaughter, manufacture meat products, or market meat products.[172] Market agencies and dealers, who also buy and sell cattle, are covered under the PSA as well.[173]

Specifically, the PSA protects the financial interests of cattle producers by making it illegal for packers, stockyards, market agencies, and dealers to engage in collusion, price manipulation, or any other anti-competitive or monopolistic practices.[174] Among other practices, the PSA prohibits: giving undue preferences to particular persons or localities engaged in the cattle business,[175] charging unfair rates for feeding,[176] or manipulating or controlling prices.[177]

USDA regulations promulgated in accordance with the PSA prevent the circulation of misleading market condition reports;[178] restrict the relationships packers, stockyards, dealers, and market agencies can have with each other;[179] and prevent the charging of commissions on livestock sales.[180] Standards for scales and weighing of livestock are set under these regulations.[181] Courts have interpreted the PSA to prevent discriminatory pricing,[182] predatory pricing,[183] deceptive advertising,[184] conspiracy to force auction stockyards to alter sale terms,[185] and false weighing.[186] Buyers must also promptly pay sellers before

171. *See* 7 U.S.C. § 201(a), (b) (2001); 7 U.S.C. § 202(a) (2001)).
172. *See* 7 U.S.C. § 191 (2001).
173. *See* 7 U.S.C. § 201(c), (b) (2001).
174. *See* 7 U.S.C. § 192 (2001).
175. *See* 7 U.S.C. § 192 (b) (1994).
176. *See* 7 U.S.C. § 201 (1994).
177. *See* 7 U.S.C. § 192 (d), (e) (1994).
178. *See* 9 C.F.R. § 201.53 (2002).
179. *See* 9 C.F.R. §§ 201.70, 201.61 (2002).
180. *See* 9 C.F.R. §§ 201.98, 201.67, 201.19 (2002).
181. *See* 9 C.F.R. §§ 201.71-.82 (2002).
182. *See* Swift & Co. v. United States, 347 F.2d 53 (7th Cir. 1963).
183. *See* Wilson & Co. v. Benson, 286 F.2d 891 (7th Cir. 1961).
184. *See* Bruhn's Freezer Meats v. United States Dep't of Agric., 438 F.2d 1332 (8th Cir. 1971).
185. *See* DeJong Packing Co. v. United States Dep't of Agric., 618 F.2d 1329 (9th Cir. 1980), *cert. denied*, 449 U.S. 1061 (1980).
186. *See* Burrus v. United States Dep't of Agric., 575 F.2d 1258 (8th Cir. 1978).

the close of business the day following the transfer of possession of the cattle.[187]

To enforce these requirements, the PSA gives the Secretary the power to commence formal administrative adjudicatory proceedings against the party accused of committing the infraction.[188] These proceedings may result in a cease and desist order against the business,[189] civil monetary penalties,[190] or an injunction.[191] Additionally, persons harmed by the illegal conduct may seek damages in federal district court.[192] In all cases except for those involving packers, harmed entities may initiate reparation proceedings with the Secretary to seek money damages.[193]

The PSA encompasses a broad array of regulations covering virtually every aspect of the cattle industry with the aim of protecting cattle producers from unfair market practices.[194] Cotton subsidies and subsidized insurance support cotton producers with the aim of maintaining America's fiber production capacity. Although very different, the statutory and regulatory frameworks affecting the cotton and beef industries seek to assist farmers and ranchers with the uncertainties or perils of the marketplace. These laws form the backdrop from which the constitutionality of the cotton and beef checkoff programs must be considered.

E. Marketing Orders and *Glickman v. Wileman*

The Supreme Court devoted most of its opinion in *United Foods* to distinguishing *Wileman*, an earlier case which upheld the advertising portion of the USDA's tree fruit marketing order program.[195] In *Wileman*, a large producer of nectarines, plums, and peaches refused to pay its mandatory assessments under two marketing orders and challenged those orders on First Amend-

187. *See* 7 U.S.C. § 228b(a) (1994).
188. *See* 7 U.S.C. § 193(a) (1994).
189. *See* 7 U.S.C. § 193(b) (1994).
190. *See* 7 U.S.C. § 193(b).
191. *See* 7 U.S.C. §§ 216, 228 (1994).
192. *See* 7 U.S.C. § 209 (1994).
193. *See* 7 U.S.C. § 209(a), (b).
194. *See* Campbell, *supra* note 168, at 184-85; Kelley, *PSA*, *supra* note 166, at 1; Looney, *supra* note 139, at 774.
195. *Wileman*, 521 U.S. at 463.

ment grounds.[196] The Court opined that the mandatory producer assessments used to fund generic promotional programs, volume controls, and quality standards for tree fruits did not violate the First Amendment.[197] Since the tree fruit producer assessments and promotional programs were part of a marketing order and thus germane to the justified associational purpose of economic regulation, the Court held that mandatory funding of tree fruit promotions did not even raise a constitutional issue.[198]

In other words, the *Wileman* Court reasoned that Congress may attach a mandatory producer assessment promotional program to an economic regulatory program, in this case, the marketing order.[199] In *United Foods*, the Court referred to the tree fruit marketing order as a "comprehensive program restricting market autonomy."[200] Since the Court in *United Foods* held the mushroom advertising program invalid because it was not "ancillary to a comprehensive program restricting market autonomy,"[201] the difference between the tree fruit marketing order in *Wileman* and the mushroom checkoff program in *United Foods* is pivotal.

Marketing orders aim to stabilize farm prices for a particular commodity by controlling the supply of a commodity, by enforcing quality standards, and by conducting research and market development programs,[202] often including generic advertising.[203] Congress specifically limited marketing orders to certain commodities[204] in smaller production areas of the coun-

196. *Id.*

197. *Id.* at 469-70.

198. *Id.* at 469.

199. *Id.*

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

201. *Id.*

202. NEFF & PLATO, *supra* note 6, at 3; Nicholas J. Powers, *Federal Marketing Orders for Fruits, Vegetables, Nuts, and Specialty Crops* 1 (Economic Research Service, USDA, Econ. Rep. No. 629, 1990).

203. Powers, *supra* note 202, at 1.

204. 7 U.S.C. § 608(c)(2) (1994). Unlike checkoff programs, marketing orders do not apply to every producer of a crop in every area of the country. However, over ninety percent of the annual farm value of domestic crops and imports of California-Arizona lemons, cranberries, California kiwifruit, California nectarines, California prunes, California raisins, California almonds, and California walnuts are covered by marketing orders. Powers, *supra* note 202, at 14. Marketing orders are more effective for crops grown in isolated regions because smaller markets run less risk of interference from outside suppliers. *Id.* at 4.

try.[205] Marketing orders may require all handlers of a commodity to observe limits on how much of a commodity they can sell, when they can sell the commodity, and the grade and size at which the commodity can be sold.[206] The theory behind marketing orders is that all producers receive higher prices by shipping only high quality produce and by preventing an oversupply of the commodity.[207]

For instance, if one peach producer sold low quality peaches in a particular area, consumers who bought his peaches might not buy peaches from anyone for a period of time.[208] Additionally, if producers shipped peaches to areas irregularly (as would happen in some areas without marketing orders), consumers might become frustrated with the availability of peaches and cease to buy them.[209] Marketing orders provide a solution to these problems by imposing uniformity.

To achieve the goals of higher prices, higher quality, and consumer confidence, marketing orders function as cartels: if a handler does not pay the mandatory assessments or violates the quality and quantity restrictions, the Secretary will impose fines on that producer.[210] In fact, Congress expressly exempted marketing orders from antitrust laws.[211] Many collective activities facilitated through marketing orders probably would not be legal in other industries due to antitrust laws.[212]

Like checkoff programs, marketing orders began as voluntary programs.[213] When non-participating producers began to receive higher prices without adhering to quality and supply limiting requirements, participating producers sought to make the programs mandatory.[214] This "free rider" problem, which is virtually identical to the problems which gave rise to mandatory checkoff programs,[215] may best be described as the unwilling

205. 7 U.S.C. § 608(c)(11)(B) (1994).
206. NEFF & PLATO, *supra* note 6, at 3.
207. Powers, *supra* note 202, at 1, 4.
208. *See* Leon Garoyan, *Marketing Orders*, 23 U.C. DAVIS L. REV. 697, 698 (1990).
209. *See id.*
210. *Id.* at 697.
211. 7 U.S.C. § 608b(a) (2000).
212. Garoyan, *supra* note 208, at 697.
213. *Id.*
214. *Id.*
215. *See id.*; NEFF & PLATO, *supra* note 6, at 7.

few making money on the backs of the many who adhered to the beneficial standards. To combat this problem, producer groups prevailed upon Congress to authorize mandatory marketing orders[216] in the Agricultural Marketing Agreement Act of 1937 ("AMAA").[217]

As with checkoff programs, marketing orders must be approved by a vote of producers of the commodity, and the orders are implemented by committees of producers appointed by the Secretary.[218] These committees recommend quantity limitations, quality standards, and research and promotion programs to be funded by mandatory producer assessments, set by the committees.[219] Pursuant to the AMAA's process, the nectarine, peach, and pear committees promulgated the marketing orders containing the generic marketing programs to which Wileman objected and which the Supreme Court found to be constitutional.

IV. ANALYSIS

Since *United States v. United Foods*[220] held the mushroom checkoff program unconstitutional,[221] the case holds indisputable importance for other checkoff programs. In light of *United Foods*, an analysis of the constitutionality of beef, cotton, and other checkoff programs faces two ends of a spectrum. On the one hand, compelling producers to fund generic commodity advertising is unconstitutional when the sole reason for compelling

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216. Powers, *supra* note 202, at 1, 4.

217. 7 U.S.C. §§ 601-626. The Agricultural Marketing Agreement Act ("AMAA") authorizes several other commodity programs in addition to marketing orders. 7 U.S.C. §§ 601-626. Passed in 1937, the AMAA was a continuation of the New Deal farm legislation. NEFF & PLATO, *supra* note 6, at 3. The Roosevelt Administration sought to ensure stable farm income to bolster the country's economy, a large part of which was rural. *Id.* The stable prices which marketing orders were created to attain are described in the AMAA as "parity prices." *Id.* Parity prices aimed to achieve stable income for farmers by placing commodity selling prices on par with the prices of a specific historical period. *Id.*; *see also* Deborah K. Boyett, *The Effect of* Glickman v. Wileman Brothers & Elliott, Inc. *on Nongeneric Commodities: A Narrow Focus on a Broad Rule*, 9 SAN JOAQUIN AGRIC. L. REV. 95, 98-100 (1999).

218. *Wileman*, 521 U.S. at 461-62. Either two-thirds of the affected producers or two-thirds of producers representing two-thirds of the volume of the commodity must approve a marketing order. *Id.*

219. *Id.*

220. 533 U.S. 405 (2001).

221. *Id.* at 416.

the funding is for the advertising itself and when the Government is minimally involved in that commodity industry.[222] On the other hand, compelled producer funding of generic commodity advertising is constitutional as a component of marketing orders, in which producers are required to make collective decisions regarding almost all aspects of the sale of a commodity.[223]

Most checkoff programs, including the beef and cotton programs, neither exist solely for advertising nor require cooperative decisions on all aspects of commodity marketing.[224] Therefore, the fate of beef, cotton, and other checkoffs is uncertain because they fall somewhere in the middle of this spectrum. Despite the differences between the mushroom checkoff and other generic commodity promotion programs, many commentators have declared that *United Foods* spells the end for all checkoffs.[225] While *United Foods* is susceptible to such a reading, this analysis will argue that some checkoff programs are constitutional under the Court's opinion.

United Foods held the mushroom checkoff unconstitutional because, unlike the marketing and promotion order at issue in *Glickman v. Wileman Bros. & Elliott, Inc.*,[226] the mushroom program was not "ancillary to a more comprehensive program restricting marketing autonomy."[227] Concededly, the simplest interpretation of this phrase is that all checkoff programs that are not a part of a marketing order are unconstitutional because they do not compel cooperative action on all aspects of a commodity industry. However, three lines of reasoning in the Court's opinion contravene this reading. First, the Court did not draw a bright line between unconstitutional checkoff programs and constitutional checkoffs ancillary to marketing orders.[228] Second, the Court emphasized that the sole focus of the mushroom checkoff program was on generic advertising and that no money was spent on other programs.[229] Third, the Court supported its decision by noting that the mushroom industry was unregulated

222. *Id.* at 410-12, 415.
223. *Id.* at 412 (citing *Wileman*, 521 U.S. at 469).
224. *See supra* notes 99-106 and accompanying text.
225. *See* Smith, *supra* note 9, at 1, 4.
226. 521 U.S. 457 (1997).
227. *United Foods*, 533 U.S. at 410.
228. *See id.* at 410-16.
229. *See id.*

and not at all comparable to the extensive regulation present with marketing orders.[230] After considering these three aspects of the Court's decision, *United Foods* may be read to permit the constitutionality of checkoff programs that spend significant amounts of money on non-promotional activities and that involve highly regulated commodities.

A. The Court Did Not Draw a Bright Line Between Unconstitutional Checkoff Programs and Constitutional Marketing Orders

Although the Court ruled that compelled funding of generic commodity promotion must be "ancillary to a more comprehensive program restricting marketing autonomy," the Court did not expressly limit the constitutionality of promotion programs to marketing orders.[231] The Court could have specifically limited its ruling to marketing orders, but it chose not to draw such a rigid distinction.[232] Of course, the Court considered the marketing order at issue in *Wileman* as one example of promotion which is ancillary to a program restricting marketing autonomy.[233] However, by refusing to firmly rule that generic commodity promotion must be attached to a marketing order, the Court implied that generic commodity promotion may be constitutional if ancillary to some other form of government action that restricts marketing autonomy.

Support for this reading may be found in the precise wording of the Court's opinion. Pared down to its dictionary meaning, "restricting marketing autonomy" translates to "keeping within limits" or "confining the independence" of buying and selling in the marketplace.[234] In explicating this phrase, the Court's opinion describes how *Wileman*'s marketing orders regulated production and sale, contained an antitrust exemption, and "prevent[ed] producers from making their own marketing decisions."[235] Marketing orders, which require producers to ad-

230. *See id.*
231. *Id.* at 411-12.
232. *See United Foods*, 533 U.S. at 411-12.
233. *See id.*
234. THE AMERICAN HERITAGE DICTIONARY 143, 767, 1054 (2d college ed. 1991).
235. *United Foods*, 533 U.S. at 412.

here to size, weight, quality, and quantity restrictions,[236] easily qualify as laws limiting the independence of buying and selling in the marketplace. This much is clear from the Court's opinion.[237]

Although the Court emphasized *Wileman* and marketing orders in explaining the meaning of "restricting marketing autonomy,"[238] the Court appeared to believe that there are other ways that the Government can limit the independence of buying and selling in the agricultural marketplace. The Court required a "*more comprehensive* program restricting marketing autonomy."[239] This wording begs the question: more comprehensive than what? In the following sentence, the Court comments, "[h]ere . . . the advertising itself, far from being ancillary, is the principal object of the regulatory scheme."[240] The Court also noted that the "mushroom growing business . . . is unregulated, except for the enforcement of a regional mushroom advertising program."[241] The Court appears to be saying that the First Amendment requires a program restricting marketing autonomy that is more comprehensive than the mushroom promotion program. For compelled funding of promotion to meet constitutional standards, the Court evidently requires a program that limits the independence of buying and selling in the marketplace in ways which are, at a minimum, more comprehensive than compelling producers to pay fees solely for advertising.

B. *United Foods* Permits Checkoff-Funded Promotion When Non-Promotional Programs Are Significantly Funded

The Court's rule, as described above, implies that programs in which mandated fees are spent on promotional *and* on non-promotional efforts are constitutional because they possess an additional limitation on the independence of buying and selling in the marketplace.[242] For example, when a significant amount

236. *See supra* notes 201-12 and accompanying text.
237. *See United Foods*, 533 U.S. at 412 (citing *Wileman*, 521 U.S. at 469).
238. *Id.*
239. *Id.* at 411 (emphasis added).
240. *Id.* at 411-12.
241. *Id.* at 413 (quoting *United Foods*, 197 F.3d at 222-23).
242. *See United Foods*, 533 U.S. at 410-16.

of compelled funds are spent on advertising and on research, a producer's independence is significantly curtailed in ways not related to advertising. The producer is forced to cooperate with other producers for research efforts. The Court stated that "we have not upheld compelled subsidies for speech in the context of a program where the principal object is speech itself."[243] The mushroom program was invalid because "almost all of the funds collected under the mandatory assessments [were] for one purpose: generic advertising."[244] Mushroom producers were not "forced to associate as a group [to] make cooperative decisions" on issues other than advertising.[245] However, where compelled fees are spent on promotion and non-promotion programs, a producer's independence is limited in ways other than the making of advertising decisions.

Obviously, a program in which 97% of funds generated are spent on promotion is a program in which speech is the "principal object."[246] This was the case with the mushroom program in *United Foods*. The crucial question for other checkoffs is how much compelled funding must be spent on non-promotional activities for speech not to be the "principal object" of the producer assessments. When close to half of checkoff funds are spent on other purposes, the promotion objectives might not be considered "principal" objects, but may be objects roughly equivalent in importance to the research, consumer information, and industry information on which the rest of the checkoff dollars are spent.[247] Producers in such programs make collective decisions as to which research projects and which consumer or industry information efforts are worthy of investment.[248]

Under this reading of the Court's opinion, mandatory assessments on cotton and beef producers to support their respective promotion programs satisfy constitutional requirements. Both checkoffs spend considerable amounts of money on generic advertising and considerable amounts on research.[249] In

243. *Id.* at 415.
244. *Id.* at 412.
245. *Id.* at 413.
246. *See id.* at 411-12; *see supra* note 109 and accompanying text.
247. For more information on the expenditures of research and promotion programs in general, see *supra* notes 99-106 and accompanying text.
248. *See supra* notes 85-86 and accompanying text.
249. *See supra* notes 114, 122-25 and accompanying text.

2000, the Cotton Board spent $25 million, or 41% of its funds, on domestic consumer advertising, and the Beef Board spent $29 million, or 59% of its funds, on advertising and other generic promotion activities.[250] Additionally, the Cotton Board spent $16 million, or 28%, and the Beef Board spent $4 million, or 9%, on research.[251] Both Boards spent most of the rest of their money on information efforts, with the Cotton Board spending $18 million, or 31%, on marketing and information efforts directed towards retailers and the Beef Board spending $9 million, or 18%, on consumer and industry information.[252]

The advertising programs on which both checkoffs spent most of their funds are comparable to the projects on which the Mushroom Council spent 98% of its money.[253] The Mushroom Council, the Beef Board, and the Cotton Board all designed their advertising projects to promote greater consumption of their particular commodity through public relations campaigns.[254] Since the Mushroom Council spent no funds on research unrelated to advertising, the research dollars spent by the Cotton and Beef Boards distinguish those checkoffs.[255] Those who pay the beef and cotton assessments are therefore forced to associate for a reason other than generic advertising. They are compelled to collectively act for a variety of research efforts.[256] The fact that both Boards spend funds on non-promotion activities differentiates the cotton and beef programs from the mushroom program, in which advertising was the sole object of the compelled funding.

In arguing that producers are forced to spend money on non-promotional activities, the Cotton and Beef Board's positions would greatly improve if they could argue that their respective information efforts constituted non-promotional activi-

250. *See supra* notes 114, 122-25 and accompanying text.
251. *See supra* notes 114, 122-25 and accompanying text.
252. *See supra* notes 113, 125 and accompanying text.
253. *See supra* notes 21-22, 114-15 and accompanying text.
254. *See supra* notes 15-16, 112-34 and accompanying text.
255. *See supra* note 22; *see also supra* notes 112-34 and accompanying text.
256. The Cotton Board appears to be in a better constitutional position than the Beef Board because a larger portion of cotton assessments are spent on research. Due to the Court's statement that speech cannot be the "principal object" of the compelled funds, the more a checkoff program spends on purely non-advertising efforts, such as research, the better a constitutional argument that checkoff could make that speech is not a principal object. *United Foods*, 533 U.S. at 415.

ties. This argument is a very difficult one to make because the Court described similar programs by the Mushroom Council as "generic advertising."[257] The Mushroom Council, the Cotton Board, and the Beef Board all work with magazine editors to gain notoriety for and publicize uses of their commodity.[258] The Court apparently considers these informational efforts to be generic advertising since they promote sales.[259] The Court's approach to informational programs somewhat hampers the argument that the Cotton and Beef Boards spend significantly on non-promotion programs. As implied in *United Foods*, checkoff programs probably cannot count information projects as non-promotion efforts on which producers are compelled to cooperate.[260]

Nevertheless, both the cotton and beef industries spend a great deal more on non-generic advertising activities than the mushroom program.[261] In other words, the cotton and beef checkoffs compel cooperation in pursuit of significant non-promotional efforts. Research uses of beef and cotton have not only been authorized, as was done in the mushroom statute,[262] but have been funded by beef and cotton producers under the collective decision-making process.[263] Quite unlike the dominance of advertising in the mushroom program, cattle and cotton producers, through compelled associations, have chosen to spend tens of millions of dollars in checkoff funds on research. By itself, this difference between more diverse checkoff programs and the mushroom checkoff could place the diversified checkoffs in a different constitutional league.

C. Checkoff Programs in Regulated Industries are Constitutional Under *United Foods*

Although the Court dwelled on promotion programs ancillary to marketing orders as an example of constitutional eco-

257. *See id.* at 408.
258. *See supra* notes 22, 115, 126 and accompanying text.
259. *See United Foods*, 533 U.S. at 408.
260. *Id.* (referencing 7 U.S.C.A. § 6104(c)(4)).
261. *See supra* notes 112-34 and accompanying text. *See generally In re Mills*, 56 Agric. Dec. 1567.
262. *See United Foods*, 533 U.S. at 421 (Breyer, J., dissenting).
263. *See supra* notes 85-86, 113, 124 and accompanying text.

nomic regulation,[264] the Court's wording indicates that other forms of economic regulation may also satisfy the "ancillariness" requirement. The Court's opinion emphasized "the importance of the statutory context in which [the commodity promotion program] arises."[265] The Court criticized the mushroom industry for being "unregulated," except for the advertising program, and for not having any price support subsidization or supply restrictions.[266] Furthermore, the Court stated that the mandated participation in advertising in *Wileman* was constitutional because it was the "logical concomitant" of a valid scheme of economic regulation.[267]

Even though subsidies for cotton farmers and the PSA may not be equivalent to marketing orders, they demonstrate government involvement in the cotton and beef industries in a far greater manner than was present in the mushroom industry. Congress has chosen to pass regulatory measures in the cotton and beef industries when it did not choose to do so in the mushroom industry. This greater government involvement may provide enough economic regulation for an attached promotion program to pass constitutional muster.

Unlike the mushroom industry, in which the only form of regulation found by the Court was mandated speech, the cotton industry is supported by production flexibility contracts, the commodity loan program, and crop insurance.[268] While the 1996 Farm Bill shifted the emphasis of federal support of cotton from supply restrictions, price and income support for farmers remains an integral part of farm programs.[269] The Government does not establish a market price for cotton or legislate how much cotton may be produced, but it does attempt to supplement the farmer's income so that his cost of production may be met.[270] Production flexibility contracts, crop insurance, and marketing loans seek to ensure that the farmer will be protected

264. *See United Foods*, 533 U.S. at 411-15.
265. *Id.* at 412 (quoting *Wileman*, 521 U.S. at 469).
266. *Id.* at 413.
267. *Id.* at 412.
268. *See supra* notes 136-65 and accompanying text.
269. *See United Foods*, 533 U.S. at 412.
270. *See id.*

from price, weather, and yield uncertainties which are ever-present in the agricultural marketplace.[271]

The beef statutory and regulatory framework also demonstrates a high level of government involvement in the beef industry. Cattle laws and regulations have several characteristics which "displace[] many aspects of independent business activity."[272] The PSA restricts the amount of cooperation packers, stockyards, marketing agencies, and dealers may have with each other.[273] Because of the PSA, concentration and competition in the marketplace are monitored and may be prevented.[274] These restrictive provisions of the PSA prevent side agreements which might otherwise develop between a buyer and a seller, and contracting decisions which might occur in other industries do not occur in the cattle industry.[275] The Federal Government's regulations on weights and scales to be used for weighing cattle and the requirements that packers pay sellers within one business day further demonstrate the extent to which the PSA sets the terms on which the cattle marketplace must operate.[276]

Cotton support programs and the PSA demonstrate the Federal Government's commitment to keeping cotton farmers and cattle ranchers in business.[277] Were it not for loan deficiency payments, production flexibility contracts, and crop insurance,

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271. *See id*; *see also* Looney, *supra* note 139, at 765-68. Furthermore, the voluntary cotton classing system, similar to the grading requirements of marketing orders, facilitates the standardization of cotton in the marketplace. *See* Agric. Mktg. Serv., Cotton Program, *supra* note 165.

272. *United Foods*, 533 U.S. at 412 (quoting *Wileman*, 521 U.S. at 469).

273. *See supra* notes 166-93 and accompanying text.

274. *See supra* notes 174-93 and accompanying text.

275. *See supra* notes 174-93 and accompanying text.

276. *See supra* notes 186-87 and accompanying text.

277 *See* 7 U.S.C. 7201(b) (1994) (stating that the purpose of production flexibility contracts is "to support farming certainty and flexibility"); *see also* President William J. Clinton, Statement by the President on Emergency Agriculture Assistance, Oct. 29, 1999, *available at* 1999 WL 982823 (dedicating emergency assistance to help farmers recover "from the second year in a row of low commodity prices, and . . . crop livestock losses from severe drought and flooding"); President William J. Clinton, Statement by the President on Agriculture Assistance, Oct. 23, 1998, *available at* 1998 WL 743761 ("I am pleased today to designate an additional $4.2 billion in emergency assistance to our Nation's farmers and ranchers, to help them recover from the worst agricultural crisis in a decade."); President William J. Clinton, Statement at Signing of Emergency Farm Financial Relief Act, Aug. 12, 1998, *available at* 1998 WL 470459 ("This legislation is necessary in a year marked by low crop prices, a series of natural disasters, and other financial strains in agricultural markets.").

thousands of cotton farmers would go out of business in times of low prices.[278] If the cotton market were completely unsupported and autonomous, the boom and bust cycle of agriculture would result in a very, very small number of wealthy, large cotton farmers who are able to withstand the ups and downs.[279]

Instead of allowing the inherent uncertainties of the agricultural marketplace (price, weather, and input costs) to naturally affect the cotton industry, the Government has chosen to displace free market competitive forces by providing income support to cotton farmers. If farm income were not supported, the agricultural landscape would look very different. Were it not for the PSA's provisions preventing price manipulation and collusion among packers, monopolies would devastate cattle producers cattle producers' efforts to sell beef. Though not like a marketing order, the Government's involvement in the cotton and beef industries represents vastly more involvement than was present in the mushroom industry.

Concededly, neither the regulatory framework for cotton nor the regulatory framework for cattle restricts autonomy in the same ways as marketing orders. The single biggest difference between marketing orders and current cotton and beef programs is the lack of forced collective action on individual decisions. At the present time, cotton farmers are not forced to cooperate in planting decisions so that only certain number of acres are planted.[280] Beef producers are not collectively ordered to raise only a certain number of cattle or to sell only to certain packers.[281] Even though cotton and beef programs are not identical to marketing orders in this respect, the mechanisms through which Congress has chosen to intervene in the cotton and beef industries affect day-to-day decisions by producers about the buying and selling of cotton and beef. But for cotton programs and the PSA, a cotton or beef producer would face a vastly dif-

278. *See* MEYER & MACDONALD, *supra* note 137, at 1, 6-8 (observing that cotton producers have faced low commodity prices, declining crop yields, and rising cost of production since 1996, and that Government payments "have been critical for cotton producers to show a profit during the past decade").

279. *See id.* at 1-2, 6-7 (noting that the number of cotton producers have fallen in the last decade and that cotton producers have also experienced difficult economic times with low prices, low yields, and high costs of production).

280. *See supra* notes 142-46 and accompanying text.

281. *See supra* notes 166-94 and accompanying text.

ferent landscape in deciding to buy or sell his crop. Though not like marketing orders, the Government's involvement in the cotton and beef industries "restricts marketing autonomy" by affecting individual decisions. Furthermore, the Government's choice to intervene in the cotton and beef industries in ways other than generic promotion demonstrates a level of economic regulation to which Congress has traditionally been given deference under the Commerce Clause.[282]

Despite the fact that the cotton and beef programs lack collective action, they are still similar enough to the tree fruit marketing orders to validate their respective promotion programs. There is virtually no difference between the congressional decision to support tree fruit producers with marketing orders and the congressional decisions to support cotton and beef producers with cotton programs and the PSA. Marketing orders were authorized, along with several other agricultural programs, to ensure stable farm income and to bolster the agricultural economy.[283] The same reasons underlie production flexibility contracts, marketing loan payments, and crop insurance.[284]

In pursuit of a somewhat similar goal, the PSA aims to maintain stability for cattle producers when they sell beef to packers.[285] Congress seeks to ensure agricultural stability in the tree fruit, beef, and cotton marketplaces where it did not in the "unregulated" and unsubsidized mushroom industry. Since the goals of the Government's involvement in the tree fruit, beef, and cotton industries are the same, they are all three "valid scheme[s] of economic regulation." Promotion programs, then, are the "logical concomitant" of the beef and cotton programs in the same way as the tree fruit promotion program was the "logical concomitant" of *Wileman*'s marketing orders.

V. CONCLUSION

Whether checkoff-funded promotion continues hinges on the interpretation of *United States v. United Foods*.[286] If all

282. *See* U.S. CONST. art. 1, § 8(3); *United Foods*, 533 U.S. at 422-28 (Breyer, J., dissenting).

283. *See supra* notes 207, 223 and accompanying text.

284. *See* Looney, *supra* note 139.

285. *See supra* notes 166-94 and accompanying text.

286. 533 U.S. 405 (2001).

checkoff programs are found constitutionally similar to the mushroom checkoff, mandatory producer funding of generic commodity promotion is doomed. If, on the other hand, checkoff programs are found different from the mushroom checkoff in constitutionally significant ways, sitcom viewers will continue to see "Beef. It's What's for Dinner" ads paid for by cattle producers. As this note has argued, checkoffs that commit a significant portion of their funds to non-promotional activities, and which involve commodities for which Congress chose to provide high levels of regulation and support, may satisfy the constitutional standards set forth in *United Foods*.

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