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Comment: Preservation of the Commercial Speech Doctrine: Applying the *Central Hudson* Test to Compelled Monetary Assessments for Generic Agricultural Advertising

by

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PRESERVATION OF THE COMMERCIAL SPEECH DOCTRINE: APPLYING THE *CENTRAL HUDSON* TEST TO COMPELLED MONETARY ASSESSMENTS FOR GENERIC AGRICULTURAL ADVERTISING

Kristine M. H. Huether[1]

I. INTRODUCTION

Recent research assigned valuation of the Coca-Cola® brand at $68.9 billion, the Budweiser® brand at $10.8 billion, the Gap® brand at $8.7 billion and the Kellogg's® brand at $7.0 billion.[2] Because of the significant investment these companies spend on brand advertising, it would be inconceivable to expect them to pay for the advertising of their competitors, namely that of generic soda, generic beer, generic jeans or generic cereal. Yet, this is exactly what the Federal Government requires of the Driscoll's® company, and companies like it, where the government forces Driscoll's® to pay a monetary assessment to promote generic advertising for blueberries.[3]

Successful brand development differentiates a product from its competitors, builds consumer loyalty, enhances profitability and can ensure the survival of a

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[1] Candidate for Juris Doctor, Hamline University School of Law, May 2004 and Masters of Business Administration, University of St. Thomas, May 2004. My appreciation goes to Shane for his support, patience and never-ending encouragement, and Elizabeth, for her humor and inspiration. I would also like to thank Joe White for his tireless editing efforts and Anne Moore for her helpful direction.

[2] *The 100 Top Bands,* BUS. WK., Aug. 6, 2001, at 60, 60-61. As a percentage of market capitalization, the brand valuations are sixty-one percent, twenty-eight percent, four percent, and fifty-eight percent respectively, suggesting the worth of the brand in the marketplace. *World's Most Valuable Brands Ranked by Interbrand 2001, available at* <www.brandchannel.com/features_effect.asp?id=48> (last visited Oct. 10, 2001). In the past, internal managers and external analysts have had difficulty determining a brand's value because it is an intangible asset, which the balance sheet does not represent. *The 100 Top Brands, supra* note 2, at 54; *see also The Importance of Brands in Reporting True Corporate Value*, BRAND STRATEGY, October 26, 1998, *available at* 2001 WL 10842244 (arguing that accounting practices, which represent past performance, are poor indicators of brand strength as compared to the financial markets which represent future prospects). However, similar to patents and customer lists, companies are finding that placing valuations on intangible assets are key to success in the "knowledge economy." *The 100 Top Brands, supra* note 2, at 54. Interbrand, Inc. developed the financial model used in the *Business Week* article that determined and ranked the brand valuation for 100 global companies. *Id.* at 60-62; Interbrand World's Most Valuable Brand's 2001 Methodology, *available at* <http://www.brandchannel.com/images/home/ ranking_methodology.pdf > (last visited Oct. 10, 2001). *See also* David Haigh, *How to Win Over the Unbelievers,* BRAND STRATEGY, July 1, 2001, *available at* 2001 WL 14091042 (demonstrating another method of brand valuation).

[3] *See* 7 C.F.R. §§ 1218.1-1218.107 (2001) (authorizing the annual assessment of $12 per ton of blueberries sold to producers and importers who sell more than 2,000 tons of blueberries annually for the purpose of generic consumer and industrial development). ConAgra Foods® must pay a monetary assessment to promote generic advertising for popcorn. *See* 7 U.S.C. § 7484 (Supp. V 2000) (authorizing the annual assessment of $ .08 per hundredweight of popcorn sold to producers and importers who sell more than four million pounds of popcorn annually for the purpose of generic promotion, consumer information, and market research). Sun-Maid® company must pay a monetary assessment to promote generic advertising for raisins. *See* 7 U.S.C. § 608(c)(6)(I) (1994) (authorizing an annual assessment on shipments of raisins produced from grapes grown in California).

company in an economic downturn.[4] Knowing what a crucial role branding plays in a company's survival, it seems absurd that the government would compel some agricultural companies to pay for generic advertising that essentially promotes their competitor's product. The Federal Government authorizes these assessments through a scheme of legislation called Agricultural Marketing Orders.[5] There is a strong argument that these agricultural marketing orders violate the First Amendment and are unconstitutional within the Commercial Speech Doctrine.[6]

This question has been brought before the Supreme Court on two occasions in the recent past, in *Glickman v. Wileman Brothers & Elliott, Inc.*[7] and in *United States v. United Foods, Inc.*[8] These two cases seem irreconcilable in that they arrive at contrary conclusions and deviate from the *Central Hudson* test, which is the long-standing method of determining constitutional commercial speech protection.[9] While often applied in commercial speech cases, the Supreme Court has avoided applying the *Central Hudson* test when analyzing compelled monetary assessments for

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4 *See generally* Gerry Khermouch, Stanley Holmes & Moon Ihlwan, *The Best Global Brands*, BUS. WK., Aug. 6, 2001, at 50, 51-57; Leslie de Chernatony, *Build Brands that You Can Believe In*, BRAND STRATEGY, June 1, 2001, *available at* 2001 WL 14091022 (remarking that a powerful brand will benefit a company internally by providing a purpose and direction for employees); *Making your mark Online: Book Excerpt: Good Branding is A Matter of Applying Heat, Pressure Over Time*, ADVERTISING AGE, Oct. 9, 2000, *available at* 2000 WL 22895149 (asserting that deep brands are indicative of customer preference and loyalty, and reflect directly on a company's margins and return on investment).

5 7 U.S.C. § 602(3) (1994). This statute, passed as the Agricultural Marketing Agreement Act of 1937, authorized the Secretary of Agriculture to establish and maintain production research, marketing research and development projects for various agricultural commodities. *Id.* Under an affected commodity's marketing order, assessments to producers and importers pay for the promotional projects of the agricultural programs. *Id.* § 608(c)(6)(I). The agricultural marketing orders manage specific agricultural commodities. *Id.* § 602(1).

6 *See infra* notes 145-192 and accompanying text. The term "commercial speech" in this Comment refers to speech by a commercial enterprise commonly in the form of advertising or marketing. BLACK'S LAW DICTIONARY 587 (Bryan A. Garner ed., pocket ed., West 1996).

7 521 U.S. 457 (1997). The Court held that the compelled monetary assessments for generic advertising under the California tree fruit marketing order did not violate the First Amendment. *Id.* at 477. The Court reasoned that the marketing order was part of a comprehensive regulation where the producer was already "constrained by the regulatory scheme." *Id.* at 469. In addition, the Court found that generic advertising was germane to the marketing order's purpose and did not violate free speech because the generic advertising was factually accurate. *Id.* at 474.

8 121 S. Ct. 2334 (2001). The Court held that the compelled monetary assessments for generic advertising under the Mushroom Act marketing order did violate the First Amendment. *Id.* at 2341. The Court distinguished *Wileman* and found that generic advertising under the Mushroom Act was not a part of a comprehensive regulatory program, but was the principle purpose of the statute itself. *Id.* at 2338-39.

9 Central Hudson Gas & Electric Corporation v. Public Service Commission of New York, 447 U.S. 557, 571 (1980) (holding that a New York order which suppressed an electric utility from promotional advertising was unconstitutional). The *Central Hudson* test is a four-part test. *Id.* at 566. First, the judiciary should determine whether the First Amendment protects the speech; it must be a lawful activity and not misleading. *Id.* Second, the judiciary should determine whether the government's interest is substantial. *Id.* If both of these inquiries yield a positive response, the judiciary should then determine whether the "regulation directly advances the governmental interest." *Id.* If the interest is directly advanced, the judiciary should then determine whether the regulation itself is narrow enough to protect only that interest. *Id.*

generic agricultural advertising.[10] This Comment will survey the application of the *Central Hudson* test within the context of agricultural marketing orders.[11]

Part II of this Comment will study the development of the Commercial Speech Doctrine through significant commercial speech cases and examine other important non-commercial free speech cases.[12] Part II will next discuss agricultural marketing order legislation and its potential to restrict the speech of an individual agricultural producer.[13] Finally, Part II will examine the Court's judgment and reasoning in *Wileman* and *United Foods*.[14] Part III of this Comment will begin by analyzing the benefits and the drawbacks of the *Central Hudson* test and argue that the judiciary should apply the *Central Hudson* test to agricultural marketing orders.[15] Next, Part III will apply the *Central Hudson* test and argue that the First Amendment protects the expression of compelled monetary assessments for generic advertising, that the government's interest in maintaining the viability of agricultural commodities is substantial, that under most marketing orders, generic advertising does not directly advance the government's interest, and conclude that marketing order regulations are excessive.[16] Part III will close by recommending solutions to resolve the commercial speech infringement.[17]

II. BACKGROUND

A. The Development of the Commercial Speech Doctrine

The Bill of Rights is based upon the proposition that constitutional rights are paramount to legislative laws where "the great and essential rights of the people are secured against legislative as well as against executive ambition."[18] From the dawning of America, the right of free speech "contributed greatly to the development and well-being of our free society," and was "indispensable" to our nation's future.[19]

Despite the strong foundation for individual free speech, corporate speech did not enjoy similar freedom, as Chief Justice Marshall wrote in 1819, "[a] corporation is an artificial being . . . [that] possesses only those properties which the charter of creation confers upon it."[20] For many years the Court supported the broad

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10 In *Wileman*, the Court never approached the *Central Hudson* test because it determined that the content of the advertising message was an administrative concern, not a constitutional one. *Wileman*, 521 U.S. at 467. In *United Foods*, the Court did not apply the *Central Hudson* test because the government did not rely on that analysis in its petition to the Supreme Court. *United Foods*, 121 S. Ct. at 2338.

11 *See infra* notes 108-198 and accompanying text.

12 *See infra* notes 18-78 and accompanying text.

13 *See infra* notes 79-88 and accompanying text.

14 *See infra* notes 89-107 and accompanying text.

15 *See infra* notes 108-144 and accompanying text.

16 *See infra* notes 145-192 and accompanying text.

17 *See infra* notes 193-198 and accompanying text.

18 Near v. State of Minnesota, 283 U.S. 697, 714 (1931) (quoting James Madison, *Report on the Virginia Resolutions*, MADISON'S WORKS, vol. IV, p 543). The First Amendment to the United States Constitution guarantees the right to free speech as "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

19 Roth v. United States, 354 U.S. 476, 488 (1957) (citing *Madison's Report on the Virginia Resolutions*, 4 EILLIOT'S DEBATES 571).

20 First National Bank of Boston v. Bellotti, 435 U.S. 765, 823 (1978) (Rehnquist, J. dissenting) (quoting Dartmouth College v. Woodward, 4 Wheat. 518, 636 (1819)). This quote expressed Rehnquist's

rule laid out in *Valentine v. Chrestensen* that the First Amendment does not protect "purely commercial advertising,"[21] but the Court softened its view in *Biglow v. Virginia*, finding that commercial speech, concerning products or services, is not "valueless in the marketplace of ideas."[22] Then, only twenty-five years ago, the Court directly confronted commercial speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[23]

B. Virginia Pharmacy and its Progeny

1. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.

The Supreme Court in *Virginia Pharmacy* struck down a Virginia statute that restricted pharmacists from advertising the prices of prescription drugs, explaining that the First Amendment protects speech that does "no more than propose a commercial transaction."[24] Dismissing Virginia's argument as paternalistic, the Court found that Virginia did not need to protect its citizens from drug price information and reasoned that people will make the best choice for themselves when they are well informed.[25] Justice Blackmun, writing for the Court, reasoned that the First Amendment allows states to protect against the dangers of information misuse, yet balances the interests of the speaker to communicate such that the government may suppress speech if it serves a "significant governmental

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argument that governmental restrictions on a business' political activities are desirable and constitutionally permissible. *Id.* at 822-23.

[21] Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (holding that the Constitution permits a city to prohibit the distribution of handbills for commercial advertising on city streets).

[22] Bigelow v. Virginia, 421 U.S. 809, 826 (1975) (reasoning that a commercial activity, advertising in this case, is one factor to consider when deciding on a First Amendment issue). The Court halted its analysis before deciding the "precise extent to which the First Amendment permits regulation of advertising." *Id.* at 825.

[23] *See infra* notes 24-26 and accompanying text.

[24] Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976). The Court accepted as propositions to this case that the First Amendment protects speech (1) when the speaker pays for its projection, (2) when it is carried in a form which is sold for profit, and (3) when the speech involves a solicitation. *Id.* at 761. The Court found this to be a purely commercial speech case because the speaker did not speak to any cultural or philosophical subject and only wished to advertise, "I will sell you the X prescription drug at Y price." *Id.* Justice Blackmun found that consumers and the general public have an interest in commercial information even if the speaker's interest is a purely economic one and that First Amendment protection extends to both "its source and to its recipients." *Id.* at 756. The Court stressed that advertising poses a difficult analysis because no line between "publicly 'interesting' or 'important' commercial advertising and the opposite kind could ever be drawn." *Id.* at 765. Blackmun emphasized that there may be personal taste disagreements as to various advertising, but as long as the United States supports a free market economy and resources are primarily allocated through the private sector, the "free flow of commercial information is indispensable." *Id.* The Virginia Statute's stated purpose was to maintain the "quality, quantity, integrity, safety and efficacy of drugs or devices distributed, dispensed or administered" and "maintain the integrity of, and public confidence in the profession and improving the delivery of quality pharmaceutical services to the citizens of Virginia." *Virginia Pharmacy*, 425 U.S. at 751 (citing Va.Code Ann. §§ 54-524.16(a), (d) (1974)). Turning to Virginia's interests, the Court found that Virginia had an interest in ensuring the professional quality and safety of the pharmaceutical industry, but ultimately finding the regulation overly paternalistic. *Id.* at 766-67, 770.

[25] *Id.* at 770. Emphasizing freedom of choice, the Court reasoned that it is "precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Id.*

interest" and is narrow enough as to the "time, place and manner restriction," or if the speech is untruthful.[26]

2. *First National Bank of Boston v. Bellotti*

The *First National* Court held unconstitutional a Massachusetts statute prohibiting corporations from making contributions or expenditures on an issue of a public vote unless that issue concerned the corporation's property or business.[27] In writing for the Court, Justice Powell explained that whether the Constitution guarantees a right only to individuals or to corporations as well depends upon the nature, history and purpose of that right.[28] Regardless of the source of the speech, whether from a "corporation, association, union or individual," the Court stated that it is valuable simply because it informs the public.[29]

After determining that the First Amendment protected such commercial speech, the Court found no substantial governmental interest even though, in the absence of the statute, the corporation might wield influence over voting.[30] Justice

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[26] *Id.* at 770-72. Blackmun explained that the truth of commercial speech is easily verified and that state regulations that require disclosure information, warnings or disclaimers are permissible. *Virginia Pharmacy*, 425 U.S. at 772 n.24. In his dissent, Justice Rehnquist prognosticated that the Court's holding would open the door to future prescription drug advertisements aimed directly at consumers. *Id.* at 788. Rehnquist was concerned with poor public policy whereby the advertising of prescription drugs might encourage use and might apply pressure to physicians to prescribe the drugs. *Id.* at 788-89. Rehnquist opined that the First Amendment does not protect pharmacists because no "ideological content" is at stake and the public could easily attain the advertised information simply by calling the pharmacy. *Id.* at 781-82.

[27] *First National*, 435 U.S. at 765 (1978). The Massachusetts statute at issue prohibited corporations from making contributions or expenditures for the purpose of influencing a public vote on any issue "other than one materially affecting any of the property, business or assets of the corporation," emphasizing that any taxation referenda were not included in the materiality exception. *Id.* at 767-68 (quoting MASS. GEN. LAWS ANN., ch. 55, § 8 (West Supp. 1977)). In 1976, Massachusetts put to a public vote a proposed constitutional amendment that would permit the legislature to impose a graduated tax on individual income. *Id.* at 769. First National and other banking organizations wished to make advertising expenditures to express their opposition to the proposed amendment and sought to have the Massachusetts statute declared unconstitutional. *Id.* While the court expedited the case in order to settle the question before the election, the U.S. Supreme Court ultimately reversed the Massachusetts Supreme Court, but after the constitutional amendment vote occurred and after it failed in the general vote. *Id.* at 769, 774.

[28] *Id.* at 778 n.14. The Court explored the differences between rights guaranteed solely to individuals or corporations as well, finding that the right against compulsory self-incrimination and the right of privacy are solely individual rights, but that free speech applied to corporations as well. *First National*, 435 U.S. at 778 n.14 (finding that it is not definitive that corporate speech is unprotected through review of prior cases where the denial of First Amendment protection was not because the speaker was a corporation); *see generally* Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973); Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957). Powell explained that freedom of speech is fundamental, reasoning that if the Massachusetts's statute restricted an individual, "no one would suggest that the State could silence their proposed speech." *Id.* at 777.

[29] *Id.* at 777. The Court rejected Massachusetts's argument that the First Amendment should not protect a corporation when the speech does not materially affect the corporation's business or property because the legislature is "constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *Id.* at 784-85. Powell opined that to decide otherwise would plainly offend the First Amendment because the government would then be able to limit speech by other "corporations – religious, charitable or civic." *Id.* at 785.

[30] *Id.* at 790. Powell rejected Massachusetts's assumption that a corporation could exert undue influence and destroy public confidence in the democratic process because no evidentiary or legislative basis supported this assumption. *First National*, 435 U.S. at 789. While stating that the intended purpose of advertising is to influence a public vote, the Court found that persuasion of the "electorate is hardly a

Powell found the Massachusetts's law to be paternalistic and stated that the electorate is entrusted with the opportunity and ability to consider the credibility and the source of conflicting arguments.[31]

3. *Consolidated Edison Co. of New York, Inc. v. Public Service Comm'n of New York*

In *Consolidated Edison*, the Court found unconstitutional a New York order that prohibited the inclusion of informational inserts on controversial topics within monthly electric bills.[32] Justice Powell, writing for the Court, reasoned that the First Amendment protects Consolidated Edison's speech because the "speech of heavily regulated businesses may enjoy constitutional protection" including that of regulated monopolies.[33] Powell concluded that the governmental interests involved were insubstantial.[34]

4. *Central Hudson Gas & Electric Corp. v. Public Service Commn. of New York*

In *Central Hudson*, the Court held unconstitutional a New York statute that completely banned promotional advertising by an electrical utility.[35] Writing for the

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reason to suppress" speech. *Id.* at 790. *But see id.* at 809 (dissenting, Justice White argued that because of the "special status of corporations," they are in positions of economic power that could possibly "dominate not only the economy but also the very heart of our democracy, the electoral process").

[31] *Id.* at 791-92. The Court found that the Framers of the First Amendment contemplated the risk that the electorate would be unable to evaluate and judge for themselves a speaker's bias when they created the Bill of Rights. *Id.*

[32] Consolidated Edison Co. of New York, Inc. v. Public Service Comm'n. of New York, 447 U.S. 530 (1980). The electric company's bill insert depicted the company's view that the benefits of nuclear power outweigh the risks and that nuclear power reduces America's dependence on foreign energy sources. *Id.* at 532. The Public Service Commission of the State of New York then prohibited Consolidated Edison from including any bill inserts on topics that are controversial to public policy. *Id.* at 533. The U.S. Supreme Court reversed the New York Court of Appeals which had reasoned that the Public Service Commission's order was constitutional because it was a "valid time, place, and manner regulation" designed to protect consumer privacy. *Id.*

[33] *Id.* at 534 n.1; *see also* Friedman v. Rogers, 440 U.S. 1 (1979); Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); Public Media Center v. FCC, 190 U.S. App. D.C. 425 (1978); Pacific Gas & Electric Co. v. City of Berkeley, 60 Cal. App. 3d. 123 (1976).

[34] *Consolidated Edison*, 447 U.S. at 535-43. The Court considered three theories: "whether the prohibition is (i) a reasonable time, place or manner restriction, (ii) a permissible subject-matter regulation, or (iii) a narrowly tailored means of serving a compelling state interest." *Id.* at 535. First, the Court found that since the regulation focused on the content of the speech, the regulation was unreasonable in its time, place or manner restriction. *Id.* at 536. Second, the Court found the government's interests intolerable because the statute not only prohibited particular viewpoints, but also prohibited discussion of the entire topic. *Id.* at 537. Finally, the Court rejected the government's argument that consumer privacy needed protection because the consumers have the power to transfer the insert "from envelope to wastebasket" if they so chose. *Id.* at 542. In addition, in the record before the court, the government had not shown that ratepayers would subsidize the cost of the bill inserts or that they would not receive the message in other ways. *Id.* at 543.

[35] *Central Hudson*, 447 U.S. at 557. The Court decided both *Central Hudson* and *Consolidated Edison* the same day, June 20, 1980. *Id.*; *Consolidated Edison*, 447 U.S. at 530. In *Central Hudson*, due to serious fuel shortages, the New York Public Service Commission issued a ban on all electricity advertising in 1973. *Central Hudson*, 447 U.S. at 558-59. Three years later, when the shortages had improved, the Commission continued the advertising ban, except in cases where the advertising was for informational purposes to encourage shifting energy consumption to off-peak hours. *Id.* at 559-60. The U.S. Supreme Court reversed the New York Court of Appeals which had reasoned that the Public Service Commission's order was constitutional because Central Hudson was a monopoly and there was no

Court, Justice Powell emphasized that commercial speech requires less protection than non-commercial speech and that the level of protection turns on the nature of the expression and the governmental interests served by the regulation.[36]

Drawing on commercial speech jurisprudence, the Court established a four-part test for determining what constitutional protections the First Amendment should afford commercial speech.[37] First, the judiciary should determine whether the First Amendment protects the speech: The speech must be a lawful activity and not misleading.[38] Second, the judiciary should determine whether the government's interest is substantial.[39] If both of these inquiries yield a positive response, the judiciary should then determine whether the "regulation directly advances the

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purchasing choice for consumers, advertising would only encourage consumption and then the public, as the receiver of the advertising, would receive no benefit. *Id.* at 561. In its reasoning, the Court first found the utility company's advertising protected because there was no claim of unlawful activity or inaccurate information and the company's status as a monopoly did not affect its First Amendment rights because even regulated monopolies "are unlikely to underwrite promotional advertising that is of no interest or use to consumers." *Id.* at 566-67. Second, the Court reasoned that there was a substantial governmental interest in the advertising because of public concern for energy conservation, and concern for fair and efficient electricity rates. *Id.* at 568-69. Next, the Court found that the government's ban on advertising did directly advance the government's interest of energy conservation because advertising stimulates demand. *Id.* at 569. However, in the end, the Court found the regulation unconstitutional because it was too broad; it was not limited in format or content. *Central Hudson*, 447 U.S. at 570-71. Powell found the utility company's case persuasive, which argued that the regulation was overbroad because it banned promotion of all electrical services and products, even those that would decrease consumption. *Id.* The Court noted that at the time of the order's original promulgation there was an energy crisis that had vanished by the time of this case and the Court did not address the question of constitutionality under a time of crisis. *Id.* at 572 n.15.

[36] *Id.* at 563. The Court highlighted two commercial speech features for permitting the regulation. *Id.* at 564 n.6. First, because the commercial speaker is in the best position to understand their marketplace and products, that speaker can best "evaluate the accuracy of their messages and the lawfulness of the underlying activity." *Id.* (citing Bates v. State Bar of Arizona, 433 U.S. 350, 381 (1977)). Second, within commercial speech, there is an inherent economic self-interest, so commercial speech is not likely to be susceptible to "being crushed by overbroad regulation." *Central Hudson*, 447 U.S. at 564 n.6.; *see also* Caren Schmulen Sweetland, *The Demise of a Workable Commercial Speech Doctrine: Dangers of Extending First Amendment Protection to Commercial Disclosure Requirements*, 76 Tex. L. Rev. 471, 490-91 (1997) (arguing that commercial speech is unworthy of higher scrutiny because the profit motive "breaks the crucial link between the real beliefs of the producer or advertiser and his speech").

[37] *Central Hudson*, 447 U.S. at 566. The Court based its reasoning on the "commonsense" distinction between commercial and noncommercial speech where commercial speech accords lesser constitutional protection because speech involving a commercial transaction has "traditionally [been] subject to government regulation." *Id.* at 562-63; *see also* Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 455-56 (1978), Bates v. State Bar of Arizona, 343 U.S. 350, 381 (1977). Further, since commercial speech has been a function of advertising, the Court found no protection when it is inaccurate, deceptive or refers to an illegal activity. *Central Hudson*, 477 U.S. at 563-64 (citing *First National*, 435 U.S. at 783, Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 388 (1973)).

[38] *Id.* at 566. The Court noted that commercial speech serves the "economic interest of the speaker" and "and also assists consumers" in distribution of information. *Id.* at 561. The Court instructed that even in a monopoly market, the First Amendment protects commercial speech because "the suppression of advertising reduces the information available for consumer decisions and thereby defeats the purpose of the First Amendment." *Id.* at 567.

[39] *Central Hudson*, 447 U.S. at 566. In prior commercial speech cases, the Court has rejected highly paternalistic regulations, opting instead for dissemination of information so that people make well-informed decisions even where the information is incomplete, as long as it is accurate. *Id.* at 562. The Court instructed that if the commercial speech is accurate and legal, then the government must assert a "substantial interest to be achieved by regulating the speech." *Id.* at 564.

governmental interest."[40] If the interest is directly advanced, the judiciary should then determine whether the regulation itself is narrow enough to protect only that interest.[41]

Justice Rehnquist dissented in *Central Hudson,* arguing that the utility company should not be entitled to traditional First Amendment protections because it was a state-created monopoly.[42] Rehnquist opined that the statute was a form of economic regulation and should take a "subordinate position in the hierarchy of First Amendment values."[43]

5. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*

In *Zauderer*, the Court applied the *Central Hudson* test to a disciplinary ruling against an attorney for various advertising infractions, finding that the advertisements were protected commercial speech because under a common-sense distinction the advertisements proposed a commercial transaction.[44] While the Court

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[40] *Id.* at 556. The Court instructed that the government's regulatory method of control over commercial speech must be proportional to the government's interest and must "be designed carefully to achieve the State's goal." *Id.* at 564. Unless a regulation directly advances the government's interest, the Court stated, "the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." *Id.*

[41] *Central Hudson*, 447 U.S. at 556. The Court warned that a "regulatory technique may extend only as far as the interest it serves" and the government "cannot regulate speech that poses no danger to the asserted state interest." *Id.* at 565. In addition, the court reasoned that only narrowly crafted regulations are constitutional and that "excessive restrictions cannot survive." *Id.* at 564.

[42] *Id.* at 585-88. Rehnquist argued that because a utility serves a special function for the public, it is most effective to create a "natural monopoly." *Id.* at 587. Because of the extensive regulations concerning natural monopolies, Rehnquist argued that for purposes of a First Amendment analysis, the "State has broad discretion in determining the statements that a utility may make." *Id.*

[43] *Central Hudson*, 447 U.S. at 584. Rehnquist highlighted his argument by comparing commercial speech to political speech, and argued that political speech requires the clear-and-present danger test, but that commercial or economic speech does not. *Id.* at 596-97. Rehnquist argued that political speech requires strict scrutiny because political speech is "essential to our system of self-government," but that economic speech does not require strict scrutiny because "the economic is subordinate to the political." *Id.* at 598-99. *But see* Aaron A. Goach, *Free Speech and Freer Speech: Glickman v. Wileman Bros. & Elliott, Inc., 117 S. Ct. 2130 (1997)*, 21 Harv. J.L. & Pub. Pol'y 623, 634 (1998) (arguing that the analysis cannot merely include political speech as protected by strict scrutiny otherwise "pornography and flag burning, would lose their First Amendment status"). Under a constitutional 'strict scrutiny' analysis, the government must establish that it has a "compelling interest that justifies and necessitates the law in question. BLACK'S LAW DICTIONARY 598 (Bryan A. Garner ed., pocket ed., West 1996). Under an 'intermediate scrutiny' analysis, the government must only establish that the regulation is "substantially related to the achievement of important governmental objectives." *Id.* at 331. Specifically addressing free speech issues, Justice Holmes first explained that when the judiciary examines the strict scrutiny test of clear-and-present danger, it must examine whether the speech under the circumstances would "bring about the substantive evils that Congress has a right to prevent," and emphasized that it is a "question of the proximity and degree." Schenck v. U.S., 249 U.S. 47, 52 (1919).

[44] Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 637 (1985). Zauderer, an attorney, bought newspaper space advertising his services on a contingency-fee basis for clients in drunk driving cases. *Id.* at 629-30. He withdrew the advertisement after learning that the Ohio Code prohibited representation of criminal defendants on a contingency-fee basis. *Id.* at 630. Later, Zauderer bought newspaper space offering to represent women in civil litigation who had suffered injuries from the "Dalkon Shield Intrauterine Device." *Id.* The advertisement carried an illustration of the contraceptive device and stated that Zauderer was already representing women in this case on a contingency-fee basis. *Id.* at 630-31. The Ohio Board of Commissioners on Grievances and Discipline found that Zauderer's drunk driving advertisement was deceptive because the advertisement did not mention plea-bargaining. *Id.* at 634. Next, the Board found that the IUD illustration violated an express Ohio Disciplinary rule that required illustrations in attorney's advertisements to be dignified. *Zauderer*,

found Ohio's restrictions banning advertisements containing advice[45] and Ohio's restrictions on advertisement illustrations to be unconstitutional,[46] the Court found Ohio's contingency fee disclosure requirements to be constitutional.[47] Justice White, writing for the Court, found that warnings or disclaimers are acceptable to reduce the possibility of consumer confusion or deception because a disclosure requirement is narrower than a complete ban on the advertiser's speech.[48] White instructed that as long as the advertising regulations reasonably related to the State's interest in "preventing deception of consumers," those regulations served a governmental purpose and were constitutional.[49]

6. *Edenfield v. Fane*

In *Edenfield*, the Court held unconstitutional a Florida regulation that restricted a Certified Public Accountant (CPA) from soliciting potential clients in person, when the communication was truthful and non-deceptive.[50] Writing for the Court, Justice Kennedy reasoned that the CPA had a free speech interest because the commercial marketplace, "like other spheres of our social and cultural life, provides a forum where ideas and information flourish."[51] The Court also found substantial

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471 U.S. at 632, 634-35 (finding that the illustration violated Ohio Disciplinary Rule 2-101(b)). The Board also found that the IUD advertisements violated an express Ohio Disciplinary rule that required disclosure of computation percentages when the advertisement suggests representation via a contingency fee. *Id.* at 633-35 (finding that the advertisement violated Ohio Disciplinary Rule 2-101(A) and 2-101(B)(15)). The Supreme Court reversed the Supreme Court of Ohio's adoption of the Board's findings that Ohio's Disciplinary Rules did not violate the First Amendment. *Id.* at 635-36.

[45] *Id.* at 639. The Court reasoned that Zauderer's advertisements were not misleading and were accurate. *See id.* The Court rejected Ohio's argument that restricted advertising protected consumers, and found unpersuasive Ohio's argument that legal services advertising needed to be restricted in order to discourage litigation. *Id.* at 641-43.

[46] *Zauderer*, 471 U.S. at 647. Justice White found that because the commercial illustrations serve to convey a message and give direct information, the First Amendment protected the illustrations in the same way as verbal commercial speech. *Id.* The illustrations passed the first part of the *Central Hudson* test because they have "no features that are likely to deceive, mislead, or confuse the reader." *Id.* Ohio's argument that it should ban the illustrations because they were undignified did not persuade the Court. *Id.* at 648. The Court suggested that even if the illustration is embarrassing to some, there is no authority to reject the free speech rights of the illustration. *Id.* at 648-49.

[47] *Id.* at 651. Ohio's disclosure requirements required an attorney to offer "more information" than he would have otherwise concerning consequences of a contingency fee based litigation. *Zauderer*, 471 U.S. at 650. White reasoned that while speech compulsion has the same protections as suppression of speech, regulating advertising serves a legitimate governmental interest. *Id.* at 650-51.

[48] *Id.* at 651. The Court found that Ohio's disclaimer regulation served a governmental interest in that it only required "purely factual and uncontroversial information about the terms under which [the attorney's] services will be available." *Id.*

[49] *Id.* In addition, White noted that often the government is "entitled to attack problems piecemeal, save where their policies implicate rights so fundamental that strict scrutiny must be applied." *Id.* at 651-52 & n.14 (citing *inter alia* Zablocki v. Redhail, 434 U.S. 374, 390 (1978)).

[50] Edenfield v. Fane, 507 U.S. 761 (1993). Fane, a CPA working in a Florida solo practice, desired to contact small and medium-sized businesses through unsolicited telephone and in-person calls to sell his accounting services. *Id.* at 763. The Florida Board of Accountancy had an explicit ban on CPA's engaging in direct, personal solicitation. *Id.* at 763-64 (citing Fla.Admin.Code §21A-24.002(2)(c) (1992)). Because Fane had successfully used this sales method in New Jersey, he brought an action against the Florida Board for declaratory and injunctive relief. *Id.* at 764. The Supreme Court applied the *Central Hudson* test in affirming both the Court of Appeals for the Eleventh Circuit and the United States District Court for the Northern District of Florida. *Id.* at 765, 767.

[51] *Id.* at 767. Under the first prong of the *Central Hudson* test, the Court found a baseline First Amendment protection of direct, personal CPA solicitation because it proposes a commercial transaction.

governmental interests in ensuring accuracy of commercial information, protecting a potential client's privacy, and maintaining ethical standards of licensed CPA's.[52] However, White found Florida's "blanket prohibition" on the CPA's solicitation unacceptable because it failed to advance the governmental interests in a direct or material way.[53] The Court warned that "broad prophylactic" regulations are suspect and that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms."[54]

7. *Florida Bar v. Went For It, Inc.*

In *Went For It*, the Court upheld a Florida restriction that prohibited attorneys from soliciting clients for personal injury or wrongful death lawsuits within thirty days of such an event.[55] Justice O'Connor, writing for the Court, found that although the solicitation was neither unlawful nor misleading, the government

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Edenfield, 507 U.S. at 767. Further, the Court reasoned that within the commercial context, solicitation has value because it allows a seller to educate consumers and stimulate demand for his product or service, allows for an interchange that would be less likely to occur if the buyer had to initiate contact and allows the buyer to compare alternative products and services. *Id.* at 766. In addition, where a service is client specific, such as a CPA service, the Court reasoned that the solicitation benefits are significant. *Id.*

[52] *Id.* at 768-70. Under the second prong of the *Central Hudson* test, the Court found that Florida had a substantial interest in preventing fraudulent, deceptive or coercive advertising by CPA's because the Supreme Court's past cases make clear that banning fraudulent or deceptive advertising is definitively constitutional. *Id.* at 768 (citing *e.g. Central Hudson*, 447 U.S. at 563-64; In re R.M.J., 455 U.S. 191, 203 (1982); Metromedia, Inc. v. San Diego, 453 U.S. 490, 507 (1981)). Also, White found that Florida had a substantial interest in protecting potential clients because even where advertising is truthful, it may be banned if it is "pressed with such frequency or vehemence as to intimidate, vex, or harass the recipient." *Id.* at 769. Finally, because a CPA reviews a company's financial records and attests that they are a fair and accurate representation of the company's financial health, the Court found that Florida had a substantial interest in preserving the CPA's independence and guarding against possible conflicts of interest. *Edenfield*, 507 U.S. at 769-70.

[53] *Id.* at 770-71. Under the third prong of the *Central Hudson* test, the Court found the regulation did not directly advance Florida's interests because Florida did not sustain its burden of proof as it provided only speculation and conjecture and no direct or material evidence. *Id.* at 771 (stating that Florida did not present any studies or anecdotal evidence to support its interests). White rejected Florida's assertion that uninvited solicitation may compromise a CPA's independence because other evidence suggests that this danger most often arises when a CPA firm is "too dependent upon, or involved with, a long standing client." *Id.* at 772.

[54] *Id.* at 777. Under the forth prong of the *Central Hudson* test, the Court rejected Florida's argument that a prophylactic ban on CPA solicitation is beneficial in order to regulate private office solicitation. *Id.* at 773-74. White stated that the constitutionality of a solicitation ban depends upon the identity of the parties and the circumstances of the solicitation. *Edenfield*, 507 U.S. at 774-75 (citing Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (distinguishing the *Ohralik* holding as narrow, where Ohio could constitutionally ban an attorney from personal solicitation of a potential client who was an unsophisticated, injured or distressed lay person because this action is intrusive and an invasion of the individual's privacy).

[55] Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995). In 1990, the Florida Supreme Court changed its professional conduct rules such that a lawyer could not directly or indirectly via a referral service contact accident victims or their relatives in order to solicit business within thirty days after an accident. *Id.* at 620-21 (citing The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar-Advertising Issues, 571 So.2d 451 (Fla. 1990)). Went For It, a Florida lawyer referral service, desired to send direct targeted solicitations to accident victims within thirty days after an accident and then refer those potential clients to participating Florida lawyers, so it filed the action for declaratory and injunctive relief. *Id.* at 621. The United States Supreme Court applied the *Central Hudson* test when it reversed the Eleventh Circuit's holding that the Florida rule was unconstitutional. *Id.* at 622.

had a substantial interest in protecting the potential client's privacy.[56] O'Connor also reasoned that the regulation directly and materially advanced the state's interest because statistical and anecdotal evidence showed that solicitation after an accident was intrusive and reflected poorly on the profession.[57] Finally, the Court held that the thirty-day ban on target solicitation was sufficiently narrow because many alternative channels for attorney communication existed.[58]

C. *Non-Commercial Free Speech Law*

1. *West Virginia State Board of Education v. Barnette*

In *Barnette*, the Court found unconstitutional a West Virginia regulation that required school children attending public schools to salute the American flag and recite the "pledge of allegiance."[59] Writing for the Court, Justice Jackson found the flag salute to be a form of utterance and symbolism, which conveyed an idea or belief.[60] The Court instructed that suppressing an individual's speech is only tolerated when there is a "clear and present danger" of a result that the "State is empowered to prevent and punish."[61] Jackson emphasized that "[t]he purpose of the

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[56] *Id.* at 623-25. Under the first prong of the *Central Hudson* test, the Court stated that attorney advertising is commercial speech and that the First Amendment affords it intermediate scrutiny. *Id.* at 623; *see, e.g.*, Shapero v. Kentucky Bar Assn., 486 U.S. 466, 472 (1988); *Zauderer*, 471 U.S. at 637; *In re R. M. J.*, 455 U.S. at 199. Under the second prong of the *Central Hudson* test, the Court agreed with the Florida Bar that it needed to protect the privacy of personal injury victims and to preserve the integrity of the legal profession because the public viewed direct-mail solicitations as intrusive, "deplorable and beneath common decency." *Went for It*, 515 U.S. at 625.

[57] *Id.* at 626-27. O'Connor found a two-year Florida Bar study of attorney advertising persuasive evidence of the public's view that direct-mail solicitation after an accident was intrusive and reflected poorly on the legal profession. *Id.* at 626. The study found that forty percent of annual attorney mailings were sent to accident victims or their survivors and of those that received mailings, forty-five percent thought the solicitations were designed to take advantage of gullible people, thirty-four percent thought they were annoying and twenty-seven percent had a lower opinion of the judicial process and the legal profession as a result of the mailings. *Id.* at 627.

[58] *Id.* at 633-34 (reasoning that other channels were available including television, radio, newspapers, billboards, untargeted mailed letters and telephone directories). The Court rejected Went For It's argument that without solicitations injured people would not seek legal advice, because the record showed that citizens have "little difficulty finding a lawyer when they need one." *Id.* at 634.

[59] West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943). In 1940, the West Virginia legislature passed a statute to require all schools to teach United States history and the U.S. and West Virginia Constitutions to foster the "ideals, principles and spirit of Americanism." *Id.* at 625. In the same fashion, the Virginia Board of Education passed a resolution requiring the salute of the flag and recital of the Pledge of Allegiance. *Id.* at 626. The Board of Education judged Children who refused as insubordinate and expelled them, and because the Board classified the expulsion as unlawfully absent, the parents were liable for prosecution. *Id.* at 629-30. The plaintiffs brought this action for injunction from the resolution because they were of the Jehovah Witness faith and believed the pledge violated their religious beliefs. *Id.* at 629. The United States Supreme Court affirmed the lower court's decision to grant the plaintiff's injunction. *Id.* at 642.

[60] *Barnette*, 319 U.S. at 632-33. The Court listed various symbols a flag can represent including a system, an idea, an institution, or a political association, which can convey a political or theological belief. *Id.* at 632. Jackson opined that a gesture will often accompany a symbol and that an individual "gets from a symbol the meaning he puts into it . . . ." *Id.* at 632-33.

[61] *Id.* at 633. Even though the purpose of the salute ritual was intrinsically beneficial to the United States and served to build national unity, the Court found no evidence that silence would present a clear and present danger. *Id.* at 633-34. The Court reasoned that if it were to accept West Virginia's argument, the outcome would be contrary to the goal of the Bill of Rights because it would allow public authorities to compel an individual to "utter what is not in his mind." *Id.* at 634.

Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy" and to ensure their safety from majorities, officials and elections.[62] The Court reasoned that free speech rights are not dependent upon the content of the speech, because judicial analysis does not depend upon whether the speech is "good, bad, or merely innocuous."[63]

2. *Wooley v. Maynard*

In *Wooley*, the Court struck down a New Hampshire statute that compelled citizens to display the ideological message "Live Free or Die" on their license plates.[64] Chief Justice Burger, writing for the Court, found that the First Amendment protects not only the right to speak, but also the right to refrain from speaking.[65] Analogizing to *Barnette*, Burger found that the license plate requirement was similar to the flag salute requirement because the license plate was in public view and fostered an "ideological" viewpoint that some citizens found unacceptable.[66] Although it distinguished between the passive act of displaying a motto on a license plate and the affirmative act of saluting the flag in *Barnette*, the Court concluded that the required display of the motto was still a violation of free speech.[67] Burger found that the government's interest in displaying the motto on non-commercial vehicles to

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[62] *Barnette*, 319 U.S. at 638. The Court stated that the basic rights proscribed in the Bill of Rights "may not be submitted to vote; they depend on the outcome of no elections." *Id.* Jackson warned that "[a]s governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be," and explained that history has shown that "[t]hose who begin coercive elimination of dissent soon find themselves exterminating dissenters." *Id.* at 640-41 (providing historical examples of the Roman and Russian drives to wipe out dissenters who were Christians and Siberians, respectively).

[63] *Id.* at 634. The Court noted that the judiciary must independently consider the question of whether the government has the power to compel the speech from the utility of the speech. *Id.*

[64] Wooley v. Maynard, 430 U.S. 705, 713 (1977). New Hampshire law required noncommercial vehicles' license plates to bear the state motto "Live Free or Die" and made it a misdemeanor to knowingly obscure a license plate. *Id.* at 707 (citing N.H. REV. STAT. ANN. § 263:1 (Supp. 1975); N.H. REV. STAT. ANN. § 262:27-c (Supp. 1975)). The plaintiffs in this case were of the Jehovah Witness faith and believed the state motto was "repugnant to their moral, religious, and political beliefs" so they covered up the motto on their license plates. *Id.* at 707-08. After several citations, fines and serving fifteen days in jail, the plaintiffs brought this action for injunctive and declaratory relief. *Id.* at 708-09.

[65] *Id.* at 714. Burger observed that the right to speak and the right to refrain from speaking are "complementary components of the broader concept of 'individual freedom of mind.'" *Id.* at 714 (quoting *Barnette*, 319 U.S. at 637).

[66] *Wooley*, 430 U.S. at 715. Additionally, the Court noted that regardless of the number of people who agree with the motto, "[t]he First Amendment protects the right of individuals to hold a point of view different form the majority . . . ." *Id.*

[67] *Id.* The Court reasoned that the forced recital of the Pledge of Allegiance compelled an affirmative act and was therefore a "more serious infringement on personal liberties than the passive act of carrying the state motto on a license plate . . . ." *Id.* However, Burger articulated, regardless of the degree of infringement, both forced an individual to foster a "public adherence to an ideological point of view he finds unacceptable." *Id.* In his dissent, Justice Rehnquist hypothesized an unsound result from this holding, reasoning that federal laws which proscribe defacement of United States currency may be found unconstitutional because an atheist may object to the terms "In God We Trust" or "*E Pluribus Unum*." *Wooley*, 430 U.S. at 722. The majority disagreed and reasoned that currency is different from an automobile because people commonly transfer currency, whereas an automobile is "readily associated with its operator." *Id.* at 717 n.15. However, in an ironic twist of fate, the United States Mint, as a part of the "50 State Quarters Program," released a collector quarter in 2000 for the state of New Hampshire with the motto "Live Free or Die," *available at* <www.usmint.gov/mint_programs/50sq_program/ states/nh> (last visited Oct. 18, 2001).

improve law enforcement efficiency was not significant because there was another readily available method to ensure efficiency.[68]

3. *Abood v. Detroit Board of Education*

In *Abood*, the Supreme Court upheld a union's agency shop agreement requiring non-union teachers to pay service fees equivalent to union dues.[69] Writing for the Court, Justice Stewart reasoned that a service fee could be used for collective bargaining activities, contract administration and grievance adjustment because an agency shop agreement promotes peaceful labor relations and avoids a free-rider problem by fairly distributing the cost of union activities.[70] However, the Court found the fee unconstitutional when used for ideological causes with which a teacher disagrees.[71] Stewart reasoned that a union could spend such funds on political or ideological causes that are "not germane to its duties as collective-bargaining representative," but stated that if a non-union employee objects, the funds cannot be "coerced" from that employee.[72]

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[68] *Wooley*, 430 U.S. at 716-17. The Court explained that the other method was to configure the letters and numbers differently on the commercial and non-commercial license plates. *Id.* at 716. In addition, the Court rejected New Hampshire's argument that the license plate showed an appreciation for state history and pride because New Hampshire never explained why the governor, state supreme court justices and members of state congress are not required to display the motto on their license plates. *Id.* at 717 n.14.

[69] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 242 (1977). Under the agency shop agreement, public school teachers who chose not to become members of the union were still required to pay a service fee that was equal in amount to union dues in order to avoid a free-rider problem. *Id.* at 211. A free-rider is a person or entity that attains an economic benefit without paying for that benefit. BLACK'S LAW DICTIONARY 269 (Bryan A. Garner ed., pocket ed., West 1996). The Court emphasized that the balanced system of U.S. government obligated the Judiciary to determine whether statutory laws are constitutional, while the Legislature determines policy. *Id.* at 225 n.20. The Court stressed that Congress has this policy-making power because, as here, the issues are often complex and numerous, and if the public disagrees with Congress' policies, it can make changes at the next election. *Id.*

[70] *Id.* at 224-26. By analogizing to federal labor law, Stewart found a governmental interest because if "rival teachers' unions [held different views] as to proper class hours, class sizes, holidays, tenure provisions, and grievance procedures," there would be no labor peace and there would be a risk that some teachers would benefit from collective bargaining without contributing. *Id.* at 224.

[71] *Abood*, 431 U.S. at 235-36. In an economic analysis, the Court reasoned that both employees of both private and public employers had an equal First Amendment interest. *Id.* at 227-34. Stewart highlighted that profit does not motivate a public employer, and so market constraints do not affect a public employer. *Id.* at 227-28. Stewart explained that since the public considers public services essential, prices are "often price-inelastic," and a public employer is not constrained by the marketplace such that a "public-sector union" is less concerned that "high prices due to costly wage demands will decrease output and hence employment." *Id.* at 228. The Court resolved that there is no weightier First Amendment interest for a public employee, but nonetheless "the government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment." *Id.* at 234. In addition, the Court reasoned that the content of the speech is irrelevant and that it is only important that, when an employee disagrees with the non-collective-bargaining activities, the compelled payment for those activities is unconstitutional. *Id.* at 231-32.

[72] *Abood*, 431 U.S. at 235-36. The Court stated that the First Amendment "requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of government employment." *Id.* While deferring the issue of a remedy for further judicial proceedings, the Court suggested that the union pay proportional moneys back to the complaining employee for non-collective-bargaining activities. *Id.* at 237-38, 242 (explaining that the objective is to devise a system to prevent "compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities").

4. *Lehnert v. Ferris Faculty Association*

In *Lehnert*, the Court extended its reasoning in *Abood*, concluding that political lobbying was an unconstitutional use of compelled union funds when the lobbying focused on issues outside of contract ratification or implementation.[73] Justice Blackmun, writing for the Court, found that political lobbying advanced neither of the union's expressed interests and interfered with the employee's free speech rights.[74] Blackmun explained that when compelled speech such as political lobbying takes place in a public forum, it heightens the risk of constitutional infringement.[75]

5. *Keller v. State Bar of California*

In *Keller*, the Court unanimously rejected the California State Bar Association's efforts to utilize compulsory dues to finance political and ideological activities favored by less than the majority of its members.[76] Following the rules set forth in *Abood*, the Court concluded that the bar association may only fund activities from mandatory member dues that are "germane to those goals" of the bar.[77] The Court noted that discerning what is germane will be difficult, but that the "extreme ends of the spectrum are clear."[78]

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[73] Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 522 (1991). The Court found the following programs constitutional because they concerned collective-bargaining activities: expenditures which indirectly benefit the employees, a publication which concerns teaching and education generally, expenses for local representatives to attend a convention, and strike preparation costs as long as not an illegal strike. *Id.* at 527, 529-31. The Court found the following programs unconstitutional because they did not concern collective-bargaining activities: a publication which reported on lobbying efforts, litigation not concerning the dissenting party's bargaining unit, and public relations expenditures which entail speech of a political nature in a public forum. *Id.* at 527-29. Blackmun explained that the union bears the burden of showing that the activities are germane to the union's duties and that the "union bears the burden of proving the proportion of chargeable expenses to total expenses." *Id.* at 524 (citing Teachers v. Hudson, 475 U.S. 292, 306 (1986)) (citations omitted).

[74] *Id.* at 520-21. Blackmun noted that the union's expressed interests were to reduce the free-rider problem and promote labor peace. *Id.* Because political lobbying did not advance the union's interests, and thus did not advance the employees' interests, it was unconstitutional to charge an employee for those activities. *Lehnert*, 500 U.S. at 521.

[75] *Id.* at 522. Since political lobbying attempts to influence governmental affairs, where an employee disagrees with that message, the Court emphasized that the First Amendment protects the individual from "precisely this type of invasion." *Id.*

[76] Keller v. State Bar of California, 496 U.S. 1, 17 (1990). Writing for the Court, Chief Justice Rehnquist rejected the California Supreme Court's finding that the state bar association could not be considered government agency because its principle funding came from membership dues, not from legislative appropriations and because only practicing attorneys in California are members and membership is required to practice law. *Id.* at 11. Also, the state bar was not a governmental agency because it provided advisory duties and did not have the power to admit anyone to practice law, did not have the power to suspend or disbar anyone and did not establish the ethical codes of conduct – all of this was done by the State Supreme Court. *Id.*

[77] *Id.* at 14. The Court found that the state bar resembled a union, in that each prevents free-rider problems. *Id.* at 12. Rehnquist reasoned that practicing attorneys who benefit from bar association activities should be "called upon to pay a fair share of the cost," similar to the compulsory fee a union employee pays when that employee benefits from the collective bargaining activities. *Id.*

[78] *Keller*, 496 U.S. at 15. In this case, the Court found that regulating the legal profession and improving the quality of legal services were germane and so the Court found that compelled assessments for these activities constitutional. *Id.* at 14 (citing Lanthrop v. Donohue, 367 U.S. 820, 843 (1961)).

D. Agricultural Marketing Order Legislation

Congress passed the Agricultural Marketing Agreement Act of 1937 ("AMAA") to "establish and maintain orderly marketing conditions and fair prices for agricultural commodities."[79] Through collective action, the purpose of the AMAA has been to ensure the viability of certain commodities by controlling supply, pricing, quality, and quantity.[80] The intention of the AMAA and subsequent marketing orders has been to put in some controls "in the volatile markets for agricultural commodities" in order to best serve the public "by compelling cooperation among producers in making economic decisions that would be made independently in a free market."[81]

In order to further these broad goals, the AMAA gave Congress the authority to enact marketing orders that in turn authorize the Secretary of Agriculture to research; advertise; develop marketing projects; and endorse quality standards.[82] A marketing order compels the Secretary of Agriculture to appoint a committee of commodity producers and handlers, nominated by the affected industry, which formulates recommendations regarding the commodity and communicates the

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[79] *Wileman*, 521 U.S. 457, 461 (1997) (citing 7 U.S.C. § 602(1) (1997)). As a form of economic regulation, agricultural commodities that are exempt from antitrust laws fall under this act. 7 U.S.C. § 608b (1994). Congress expanded the AMAA in 1996, by authorizing the implementation of national marketing orders, whereas prior marketing orders were only regional in scope. 7 U.S.C. §§ 7401-7425 (Supp. V 2000). Passed in 2000, the Blueberry Promotion, Research and Information Order is an example of a nation-wide marketing order as it established a national blueberry board, compels monetary assessments from producers and importers in all fifty states, the District of Columbia and Puerto Rico, and utilizes those funds for generic consumer and industrial market development. 7 C.F.R. §§ 1218.1-1218.107 (2001).

[80] 7 U.S.C. §§ 602(4), 608c(6)(A) (1994). In 1937, Congress enacted the AMAA to place restrictions on quantities of a commodity, handler allocations, distribution of surplus and maintaining reserve supplies. *Wileman*, 521 U.S. at 496 n.9 (citing 7 U.S.C. § 608(c)(6) (1934 ed., Supp. III)). In 1954, Congress amended the AMAA to permit marketing orders that would fund research and development and promote the marketing, distribution and consumption of a commodity. *Id.* (citing 68 Stat. 906; 7 U.S.C. § 608c(6)(I) (1997)).

[81] *Id.* at 475. The AMAA compelled payments for generic advertising from the producers and importers who "reap the benefits of such activities" and thus avoided a free-rider problem. 7 U.S.C. § 7411(a)(5) (Supp. V 2000). Judge Richard Posner has suggested an economic argument for industries to form "cartels" in order to effectively impact legislation and reduce the free-rider problem where someone within the protective scope of legislation benefits from its enactment whether or not that party contributes to its enactment. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 572 (5th ed. Aspen Law & Business) (1998). Further, Posner notes that monopolistic regulations are common in the agricultural industry because with the sheer number of producers and importers it is inefficient for them to create their own "private cartelization" and thus Congress, through legislation, imposes regulations to reduce the free-rider problem in the agricultural industry. *Id.* at 573.

[82] 7 U.S.C. § 602(3) (1994). The marketing order provision provides in part that:

> Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such production research, marketing research, and development projects provided in section 608c(6)(I) of this title, such container and pack requirements provided in section 608c(6)(H) of this title such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c(2) of this title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest.

Id.

recommendations to the Secretary.[83] Monetary assessments on the producers and handlers fund the entire program, including administration, inspection, research, advertising and promotion.[84] In general, an agricultural council utilizes the funds for generic advertising because it serves "the producers' common interest in disposing of their output on favorable terms."[85] Congress intended generic advertising to serve "the national public interest" because the commodities were "vital to the welfare" of the U.S. agricultural economy and because the collective program provided "economies of scale," while emphasizing that the marketing orders did not prohibit producers from promoting their own brand.[86]

One such example of an AMAA marketing order is the Mushroom Promotion, Research, and Consumer Information Act of 1990 ("Mushroom Act"), which authorizes producers and importers to nominate a Mushroom Council that

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[83] *Wileman*, 521 U.S at 461-62. Marketing orders provide that either two-thirds of the producers or producers who market at least two-thirds of the volume of the commodity must approve the marketing orders. 7 U.S.C. § 608(c)(9)(B) (1994).

[84] *Wileman*, 521 U.S at 462. The AMAA defines commodity promotion as "a combination of promotion, research, industry information, or consumer information activities" funded by mandatory assessments to producers or processors and designed to maintain or expand the commodity's marketplace. 7 U.S.C. § 7401(a) (Supp. V 2000). In this title, the Commodity Promotion and Evaluation Law lists effected commodity products. *Id.* §§ 7401(a)(1)-(18) (Supp. V 2000). These include almonds, filberts, California-grown peaches, cherries, papayas, carrots, citrus fruits, onions, Tokay grapes, pears, dates, plums, nectarines, celery, sweet corn, limes, olives, pecans, eggs, avocados, apples, raisins, walnuts, tomatoes and Florida-grown strawberries (7 U.S.C. § 608(c)(6)(I) (1994)); cotton (7 U.S.C. §§ 2101-2119 (1994)); potatoes (7 U.S.C. §§ 2611-2627 (1994)); eggs (7 U.S.C. §§ 2701-2718 (1994)); beef (7 U.S.C. §§ 2901-2911 (1994)); dairy products (7 U.S.C. §§ 4501-4538 (1994)); honey and honey products (7 U.S.C. §§ 4601-4613 (1994)); pork and pork products (7 U.S.C. §§ 4801-4819(1994)); watermelons (7 U.S.C. §§ 4901-4916 (1994)); mushrooms (7 U.S.C. §§ 6101-6112 (1994)); soybeans and soybean products (7 U.S.C. §§ 6301-6311 (1994)); milk (7 U.S.C. §§ 6401-6417 (1994)); fresh cut flowers and fresh cut greens (7 U.S.C. §§ 6801-6814 (1994)); sheep and sheep products (7 U.S.C. §§ 7101-7111 (1994)); canola and rapeseed (7 U.S.C. §§ 7441-7452 (Supp. V 2000)); kiwifruit (7 U.S.C §§ 7461-7473 (Supp. V 2000)); popcorn (7 U.S.C. §§ 7481-7491 (Supp. V 2000)). In *United Foods'* oral arguments, Professor Lawrence Tribe, representing United Foods, addressed the list of commodities above and argued that marketing orders are haphazard because certain commodities are included while many others are not, and pointed to the discriminating nature of the marketing orders by illustrating that Congress passed a canola marketing order because it was "important to the survival of the economy and yet no canola program was put in place." U.S. Oral Arg., Apr. 17, 2001, at 26:11-20, *available at* 2001 WL 417678 (Prof. Lawrence H. Tribe).

[85] *Wileman*, 521 U.S. at 462. The statutory findings indicate that the "generic commodity promotion programs are of particular benefit to small producers who often lack the resources or market power to advertise on their own and who are otherwise often unable to benefit from the economies of scale available in promotion and adverting." 7 U.S.C. § 7401(b)(10) (Supp. V 2000). Under the statute, the legislative findings emphasize that the promotions' goals are to maintain and increase the overall demand of the commodity market, not to affect the market share of an individual producer. *Id.* §§ 7401(b)(5), (6) (Supp. V 2000).

[86] *Id.* §§ 7401(b)(1), (b)(4), (b)(10) (Supp. V 2000). The Secretary of Agriculture supervises the generic advertising programs, which serve to "further specific national governmental goals, as established by Congress." *Id.* § 7401(b)(8)(A) (Supp. V 2000). The statute gives Congress the authority to issue new marketing orders with credit programs depending upon the congressional purpose. *Id.* § 7401(b)(9) (Supp. V 2000). A credit program allows an individual producer who chooses to promote its own product to receive back some or all of that producer's marketing assessments. *Id.* § 7401(b)(9) (Supp. V 2000). Where a credit program exists, the credits may be provided against assessments for "those individuals who contribute to other similar generic research, promotion, and information programs at the State, regional or local level." 7 U.S.C. § 7415(e)(1) (Supp. V 2000).

serves to develop the mushroom industry.[87] The Mushroom Act authorizes a mandatory assessment on producers and importers, which funds "projects of mushroom promotion, research, consumer information, and industry information," although most of the funding is spent on generic advertising.[88]

E. Agricultural Marketing Order Jurisprudence

1. Glickman v. Wileman Brothers & Elliott, Inc.

a. Majority Opinion

In *Wileman*, the United States Supreme Court held it constitutional to compel monetary assessments from California tree fruit growers, handlers and producers for generic advertising.[89] Writing for the five-member majority, Justice Stevens reasoned that the *Central Hudson* test was inapplicable in this case because he found that the statutory scheme of California tree fruits was more a question of economic policy than free speech.[90]

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[87] 7 U.S.C. §§ 6101-6112 (1994). Under the Mushroom Act, Congress found that mushrooms are an important food in the human diet and that mushroom production supported the economy, benefited the environment and affected interstate commerce. 7 U.S.C. §§ 6101(a)(1), (a)(2), (a)(3), (a)(7) (1994).

[88] 7 U.S.C. §§ 6104(c)(4), 6104(g) (1994). The Mushroom Act provided in part, that producers and importers who produce and import less than 500,000 pounds of mushrooms annually are exempt from the assessment. *Id.* §§ 6102(6), (11) (1994). The Mushroom Act limits the assessment to never exceed one cent per pound of mushrooms. *Id.* § 6104(g)(2) (1994); *see also United Foods*, 121 S. Ct. at 2337 (writing for the Court, Justice Kennedy stated that "[i]t is undisputed ... that most monies raised by the assessments are spent for generic advertising to promote mushroom sales"). The United States Department of Agriculture expected to receive $273,000 in mandatory assessments from mushroom producers and importers in the last five months of 2001. Mushroom Promotion, Research, and Consumer Information Order, *available at* <http://www.ams.usda.gov/fv/rpmushroom.html> (last visited Oct. 10, 2001).

[89] *Wileman*, 521 U.S. at 457. Justice Stevens wrote the opinion of the Court, joined by Justices O'Connor, Kennedy, Ginsburg and Breyer. *Id.* at 459. This case concerned fruits designated as "California Summer Fruits," including nectarines, plums and peaches. *Id.* at 460. The content of the generic message was that these fruits are "wholesome, delicious and attractive." *Id.* at 462. The plaintiffs, Wileman Bros. & Elliott, Inc. challenged the marketing order's monetary assessments by filing a petition with the Secretary of Agriculture (Dan Glickman), which eventually led to the federal district court's summary judgement for Glickman. *Id.* at 463-64. The Ninth Circuit Court of Appeals applied the *Central Hudson* test and found the marketing order unconstitutional because it was too broad since it failed to give handlers credit for brand advertising, applied only to California, and the government failed to show that generic advertising was more effective than individualized advertising. *Id.* at 466. The United States Supreme Court granted certiorari because of a split in the circuits and reversed the Ninth Circuit. *Wileman*, 521 U.S. at 466-67 (noting that the Court of Appeals for the Third Circuit found constitutional a similar marketing order for beef).

[90] *Id.* at 467-69. The Court reasoned that a disagreement in the content of the advertising message is an administrative concern best handled by working with the agricultural council and the Secretary of Agriculture. *Id.* Stevens found the generic advertising program to be a part of a broader economic policy whereby the producer's freedom to act independently was "already constrained by the regulatory scheme." *Id.* at 469. The Court found three statutory characteristics that showed that it was not protected by the First Amendment. *Id.* at 469-70. First, the Court found no constraint on a producer to communicate its own message. *Id.* (rejecting Wileman's argument that the assessment reduced the funds available for branded advertising because there has never been a "heightened scrutiny of any financial burden that has the incidental effect of constraining the size of a firm's advertising budget"). Second, the Court found that the marketing order did not compel actual or symbolic speech because unlike *Barnette* or *Wooley*, the businesses are only required to make contributions to advertising and the message is not attributed to them, but to "California Summer Fruits." *Wileman*, 521 U.S. at 469-71 (distinguishing the requirement to

Wileman argued that this case involved a commercial speech issue because Wileman Brothers disagreed with the content of the generic advertising message, but Stevens rejected this argument, reasoning that since the generic advertising was factually accurate, it did not violate free speech.[91] The Court found it irrelevant whether generic or independent advertising would be more effective, reasoning that in a regulated market, the issue is a policy concern, not a constitutional concern.[92]

b. Souter Dissent

In a twenty-eight page dissent, Justice Souter reasoned that the compelled payments for commercial speech should receive the "same level of judicial scrutiny" as other commercial speech, beginning with the premise that speech which conveys ideas that have "even the slightest redeeming social importance [should have] full protection."[93]

Justice Souter argued that the line of commercial speech cases since *Abood* show that the government may compel speech only when the speech is germane to the regulatory scheme and when the speech is vital to government policy interests.[94] Similar to *Lehnert*, where the Court found that the teachers' union could negotiate a contract for the benefit of the entire labor force without "espousing the virtues of teachers," Souter analogized that the government should be able to regulate the stability and growth of a commodity without "espousing the virtues of fruit."[95]

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recite a message themselves in *Barnette* and the requirement to use their own property to convey an ideological message in *Wooley*). Finally, the Court found that the marketing order did not compel the producers to endorse or finance political or ideological views. *Id.* at 469-70.

[91] *Id.* at 474. The Court stated that it is "fair to presume" that all businesses engaged in "the business of marketing California nectarines, plums and peaches" would agree with the generic advertising message. *Id.* at 470. The Court believed that generic advertising is "unquestionably germane to the purposes of the marketing orders," and that "in any event, the assessments are not used to fund ideological activities." *Id.* at 473. In this line of reasoning, the Court distinguished *Abood* because in *Abood*, an employee was compelled to contribute to activities that were in conflict with "one's 'freedom of belief'" whereas here, the producers are merely asked to support generic advertising of fruit that was not a "crisis of conscience." *Id.* at 471-72.

[92] *Wileman*, 521 U.S. at 475-76. The Court reasoned that "[i]f there were no marketing orders at all to set maturity levels, size, quantity, and other features, competition might well generate greater production of nectarines, peaches, and plums." *Id.* at 475. However, the Court reasoned the purpose of generic advertising in a regulated market was to promote the entire commodity, which was consistent with the overall regulatory goals as compared to branded advertising that promotes just the individual brand. *Id.* at 476. The Court reasoned that since the primary purpose of the marketing order is cooperative marketing to best serve the public in a volatile agricultural market, it was "illogical . . . to criticize any cooperative program . . . on the ground that competition would provide greater benefits than joint action." *Id.* at 475.

[93] *Id.* at 478-79. Chief Justice Rehnquist and Justices Scalia and Thomas joined Souter's dissent. *Id.* at 477. Souter argued that modern day advertising does more than promote a commercial transaction as advertising uses "symbolic and emotional techniques" to persuade, which is an "essential ingredient of the competition that our public law promotes." *Wileman*, 521 U.S. at 479-80. In addition, Souter highlighted that the First Amendment protects compelled speech in the same way it protects suppressed speech. *Id.* at 481.

[94] *Id.* at 485. Souter criticized the Court's interpretation of *Abood*, finding that *Abood* stood for the principle that the government may regulate a commercial transaction even though there are "elements of speech" inherent in the transaction only where the speech is "part and parcel of the very economic transactions . . . that Congress can regulate." *Id.* at 484.

[95] *Id.* at 486. Souter highlighted the fact that no case before this one limited commercial or non-ideological speech just because that speech did not reflect a political or ideological view. *Id.* at 488. Souter also believed that the Court was mistaken when it emphasized that the producers did not disagree

Souter believed that the compelled speech involved here was commercial speech and applied the *Central Hudson* test, finding that the AMAA's marketing orders for advertising were random, ambiguous and contained no criteria for determining which products should have promotional advertising and which should not.[96] Souter reasoned that a regulation may effectively manage an economic activity, but when freedom of speech is at issue, the "government fails to carry its burden of showing a substantial interest when it does nothing more than refer to a 'consensus' within a limited interest group that wants the regulation."[97] Souter suggested that a credit system, which would offer credits back to producers who advertise, would be a "far less restrictive and more precise" way to achieve the Government's stated interest, and it would eliminate the speech burden "without diminishing the total amount of advertising."[98]

c. Thomas Dissent

Justice Thomas disagreed with Justice Souter's use of the *Central Hudson* test because in general, Thomas disagreed with "the discounted weight given to commercial speech."[99] Based upon free speech jurisprudence, Thomas found it

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with the purpose of a generic message because whether or not the producers disagree is not important, what is critical is whether the producers denied that any general message is "valuable and worthy of their support." *Wileman*, 521 U.S. at 489.

[96] *Id.* at 491-94. Under the *Central Hudson* test, Souter reasoned that agricultural marketing orders have a substantial governmental interest where the stated purpose is to maintain and expand a commodity's marketplace, so long as there were no doubt of the marketplace volatility. *Id.* at 492-93. Souter suggested that where there is marketplace volatility and where the marketing order addresses an interstate market, the only question would be whether the regulation is too broad to serve that purpose. *Id.* at 493. However, Souter argued that where a marketing order "targets expression in only a narrow band of a broad spectrum of similar market activities," the question of whether this constitutes a substantial governmental interest must be addressed under the *Central Hudson* test. *Id.* Addressing the California fruit tree marketing order specifically, Souter maintained that the "AMAA's authorization of compelled advertising programs is so random and so randomly implemented, . . . as to unsettle any inference that the Government's asserted interest is either substantial or even real." *Id.* at 494. Souter asserted that the choice of selected commodities is "puzzling" because it "includes onions but not garlic, tomatoes but not cucumbers, Tokay grapes but not other grapes." *Wileman*, 521 U.S. at 494. Souter suggested that this "erratic pattern" of "piecemeal legislation" is due to the "priorities of particular interest groups" rather than a significant governmental interest. *Id.* at 496. In addition, Souter pointed out the random characteristic of agricultural marketing orders where the regulations tend to occur in geographically limited areas. *Id.* at 497 (emphasizing that the regulation at issue here concerns California grown fruit, but not that grown in other states).

[97] *Id.* at 496. Souter reasoned that although two-thirds of producers must agree to the advertising, a "majority is never enough to compel dissenters to pay for private or quasi-private speech whose message they do not wish to foster." *Id.* at 497 n.11. Souter explained that the government does not sustain the burden of showing factual justification for the marketing orders because it is unknown what would happen without the generic advertising. *Id.* at 501.

[98] *Wileman*, 521 U.S. at 502. Pointing to the arbitrary and incompatible nature of the various marketing orders, Souter noted that the AMAA provides for credits for some commodities including "almonds, filberts, raisins, walnuts, olives, and Florida Indian River grapefruit, but not for other commodities." *Id.* Souter remarked that the government did not explain the arbitrary nature of the AMAA, and he commented that the legislative and regulatory history offers no answer as well. *Id.* at 502, 503 n.15.

[99] *Id.* at 504. Thomas referred back to his concurrence in *44 Liquormart v. Rhode Island*, where he criticized the *Central Hudson* test, rejecting the use of the test and advocating strict scrutiny because the balancing test is difficult to apply with uniformity, is "unaccompanied by any categorical rules," and there is a danger that "individual judicial preferences will govern application of the test." 44 Liquormart v. Rhode Island, 517 U.S. 484, 527 (1996); *see also* Goach, *Free Speech and Freer Speech: Glickman v.*

"incongruous" that the Court did not find a First Amendment implication in this case.[100]

2. *United States v. United Foods, Inc.*

a. *Majority Opinion*

In *United Foods*, the Court held that compelled monetary assessments for generic advertising under the Mushroom Act were unconstitutional.[101] The Court found that the generic advertising implicated the First Amendment because the Mushroom Act required that some producers subsidize "speech with which they disagree."[102] Justice Kennedy, writing for the Court, distinguished *Wileman* because in *Wileman* the advertising assessments were ancillary to a "comprehensive program restricting marketing autonomy," whereas here, the advertising "is the principal object of the regulatory scheme."[103] Kennedy found an implication of First

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Wileman Bros. & Elliott, Inc., 117 S. Ct. 2130 (1997) 21 Harv. J.L. & Pub. Pol'y at 633-35 (arguing that the judiciary should apply strict scrutiny to commercial speech cases because while proponents of intermediate scrutiny argue it is necessary for the government to protect against fraud, this theory ignores counterspeech where alternative speech proliferates).

[100] *Wileman*, 521 U.S. at 505. Thomas reasoned that compelled monetary assessments implicate free speech because the Court has recognized that advertising involves speech and that compelled speech is just as protected as restricted speech. *Id.; see also Central Hudson*, 447 U.S. at 557; *First National*, 435 U.S. at 765; *Abood*, 431 U.S. at 209; Buckley v. Valeo, 424 U.S. 1 (1976) (recognizing the principle that paying money for advertising involves protected speech); Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997); Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal., 475 U.S. 1 (1986); PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980); *Abood*, 431 U.S. at 209; *Wooley*, 430 U.S. at 705; Miami Herald Publishing Co. v. Tornillo, 418 U.S. at 241 (1974); *Barnette*, 319 U.S. at 624 (recognizing the principle that the First Amendment protects compelled speech).

[101] *United Foods*, 121 S. Ct. at 2334. Justice Kennedy wrote the opinion for the Court, which Chief Justice Rehnquist, Justices Stevens, Scalia, Souter and Thomas joined. *Id.* at 2336. At the outset, the Court avoided the *Central Hudson* test because the Government did not rely on that analysis in its petition to the Supreme Court. *Id.* at 2338 (citing Reply Brief for Petitioners at 9 n.7).

[102] *United Foods*, 121 S. Ct. at 2338. As the start of its analysis, the Court pointed to precedent indicating that the First Amendment prohibits the government from compelling expressed speech and prohibits the government from compelling subsidized speech. *Id.* at 2338; *see also Wooley*, 430 U.S. at 714, *Barnette*, 319 U.S. at 624 (prohibiting the "government from compelling individuals to express certain views"); *Abood*, 431 U.S. at 209; *Keller*, 496 U.S. at 1 (prohibiting the government from "compelling certain individuals to pay subsidies for speech to which they object"). The Court emphasized that speech for a "commercial purpose does not deprive respondent of all First Amendment protection" and that the First Amendment protects speech even when it is of "interest to but a small segment of the population." *United Foods*, 121 S. Ct. at 2338. Thus, the Court reasoned that while the issue of whether a branded mushroom is better than a generic mushroom may be minor, First Amendment protections are implicated when the government compels an individual or group to subsidize speech it disfavors. *United Foods*, 121 S. Ct. at 2338. During the *United Foods* oral arguments, Justice Scalia commented on a preceding discussion (27:21-29:12) concerning whether assessing a fee from museums for advertising museums to inner city citizens or assessing a tax on cigarettes to advertise that they are harmful are similar to the case at issue. U.S. Oral Arg., Apr. 17, 2001, at 36:19-37:3, *available at* 2001 WL 417678 (Scalia, J.).

[103] *United Foods*, 121 S. Ct. at 2338-39. Taking its cue from *Wileman*, the Court instructed that the judiciary must consider the entire regulatory program when determining whether there is a free speech concern. *Id.* at 2339. The Court then explained that almost all of the Mushroom Act's funding went to generic advertising, that it did not regulate production or sales of mushrooms, that there was no exemption from anti-trust laws, that the producers made their own marketing decisions, and that producers were not forced to make cooperative decisions. *Id.*

Amendment principles when the protesting party is simply required to support other's speech and not to utter the speech themselves.[104]

b. Breyer Dissent

Justice Breyer argued that the Mushroom Act marketing order was similar to the *Wileman* marketing order and reasoned that the regulatory program was an economic regulation that did not warrant special free speech scrutiny.[105] Breyer criticized the Court for its lack of direction and predicted that the Court's decision would make it difficult to determine what level of regulatory control violates commercial speech.[106] Breyer added that the Court's decision might create an

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[104] *United Foods*, 121 S. Ct. at 2339-40. The Court concluded that it is unconstitutional to compel monetary assessments that fund speech where persons who must remain members of a group by law or necessity object to that speech. *Id.* at 2339. Instructing that the threshold inquiry is whether the "group membership is less than voluntary," the Court found *Abood* helpful where by law, employees were required to pay a service fee for union activities even if they were not members of the union. *Id.* at 2340. In *United Foods*, the law required mushroom producers to pay for mushroom council activities simply because of their livelihood. *Id.* Dissimilar to *Wileman* and similar to *Keller*, the Court emphasized that the monetary assessments required under the Mushroom Act were "not germane to a purpose related to an association independent from the speech itself." *Id.* at 2340-41 (reasoning that this case differs from *Wileman* because in *Wileman* the speech concerned a broad regulatory system and reasoning that this case is similar to *Keller* where the Court found it unconstitutional for the state bar to charge speech subsidies to objecting members when the speech concerned "matters not germane to the larger regulatory purpose"). Further, the Court found this situation analogous to *Zauderer*, because the disclosure requirements were designed to protect consumers, a valid state interest; in *United Foods* there was no indication that a mandatory assessment was necessary to protect consumers from misleading advertisements. *Id.* at 2341. In response to the Court's decision, on August 3, 2001 the United States Department of Agriculture announced that mandatory monetary assessments under the Mushroom Act will no longer be used for promotional activities. Press Release, USDA, USDA Approves Mushroom Program Assessment Reduction (Aug. 2, 2001), *available at* <http://www.ams.usda.gov/news/176-01.htm> (last visited Oct. 30, 2001). The USDA also established an advisory committee which will:

> examine the full spectrum of issues faced by the fruit and vegetable industry and offer the secretary of agriculture advice on how USDA can tailor its programs to meet the fruit and vegetable industry's needs. The exchange of views and information between the industry and government is intended to improve understanding of the effect of USDA programs on the industry, and to contribute to those programs' effective and efficient administration.

Press Release, USDA, USDA Creates Fruit and Vegetable Industry Advisory Committee (Aug. 22, 2001), *available at* <www.ams.usda.gov/news/192-01.htm> (last visited Oct. 30, 2001).

[105] *United Foods*, 121 S. Ct. at 2342-46. Breyer believed that the marketing orders in both *Wileman* and here authorized the Secretary of Agriculture "to promulgate price and supply regulations," but in "neither case has she actually done so." *Id.* at 2343. Breyer studied the Mushroom Act's legislative hearings and reasoned that there were public benefits to promoting consumption of mushrooms, that in order to avoid free-riders a compelled assessment was necessary, and that voluntary programs had not worked. *Id.* at 2344. Breyer argued that the payment of money did not compel speech, as "money and speech are not identical." *Id.* at 2346 (citing Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 388-89 (2000)). Justice Breyer highlighted that the generic advertising was successful as sales growth of mushrooms increased by 2.1% for every million dollars spent. *Id.* at 2348 (citing Food Marketing & Economics Group, Mushroom Council Program Effectiveness Review, 1999, p. 6 (Feb. 2000)). Further, Breyer argued that this marketing order furthers commercial speech because it did not suppress an individual producer's right to advertise and it promoted truthful information to consumers. *Id.* at 2346-47. Finally, Breyer argued that since the program did not censor speech, there was little risk of speech-related harm, such as harming "an individual's conscience." *United Foods*, 121 S. Ct. at 2347.

[106] *Id.* at 2347-48.

incentive, for those hoping to pass First Amendment scrutiny, to develop more strict and comprehensive regulatory programs.[107]

III. ANALYSIS

The Supreme Court should protect freedom of speech with "[c]easeless vigilance" in order to prevent its "erosion by Congress or by the States."[108] The Court ultimately failed to use ceaseless vigilance to protect the free speech of commercial agricultural producers by permitting the use of agricultural marketing orders that compel monetary assessments for generic advertising. Although the *United Foods* Court reached the proper conclusion in finding the Mushroom Act's compelled assessments unconstitutional, the Court failed to apply the constitutional *Central Hudson* test, opting instead to decide the case on a purely economic analysis of the regulation.[109]

In *Wileman*, and later in *United Foods*, the Court diverged from a long line of precedent in which it had applied the *Central Hudson* test; thus, in *Wileman* and *United Foods*, the Court inappropriately neglected the opportunity to address the constitutional question.[110] While the *Central Hudson* test has been criticized, it remains the best alternative, promoting a balance of governmental regulatory interests and constitutional freedoms.[111]

On a broad scale, this Comment argues that the Court should apply the *Central Hudson* test to questions involving agricultural marketing orders. Part A argues that the *Central Hudson* test remains a viable standard for commercial speech analysis because it provides a fair balancing test and is consistent with both commercial and non-commercial speech jurisprudence.[112] Part B continues this analysis by applying the four-prong *Central Hudson* test to the agricultural marketing orders' compelled monetary assessments for generic advertising.[113] Under the first prong of the *Central Hudson* test, Part B.1 argues that compelled monetary assessments for generic advertising are expressions and are protected by the First

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107 *Id.* at 2348. Justice Breyer determined that even if the compelled payments were classified as commercial speech, there would still be a significant governmental interest. *Id.* at 2348. In concurring, Justice Stevens addressed this aspect of Breyer's dissent, and found that since there was no larger statutory scheme, financing the benefit of one's competitors was an insufficient reason for compelling a subsidy, reasoning that a compelled subsidy was only permissible when "ancillary or germane to a cooperative endeavor." *Id.* at 2342.

108 *Roth*, 354 U.S. at 488.

109 *United Foods*, 121 S. Ct. at 2338-39. *See supra* notes 101, 103 and accompanying text (explaining that the Court found the Mushroom Act unconstitutional because the government did not rely on the *Central Hudson* test in its petition to the Court and that the Court followed *Wileman's* economic reasoning).

110 *Wileman*, 521 U.S. at 467-69; *United Foods*, 121 S. Ct. at 2339; *supra* notes 90, 103, 35, 50, 56 and accompanying text (explaining the Court's refusal to apply the *Central Hudson* test in *Wileman* and *United Foods* because both Courts focused on the question of economic policy and not free speech; comparing to the Court's used of the *Central Hudson* test in *Central Hudson*, *Edenfield*, and *Went for It*). The Court has not abandoned the *Central Hudson* test, for an example of the Court's continued application, see *Lorillard Tobacco Co. v. Reilly*, where the Court applied the *Central Hudson* test in determining that a Massachusetts regulation prohibiting outdoor advertising of certain tobacco products was unconstitutional. 121 S. Ct. 2404, 2407 (2001).

111 *See infra* notes 123-132 and accompanying text.

112 *See infra* notes 119-144 and accompanying text.

113 *See infra* notes 145-192 and accompanying text.

Amendment.[114] Considering the second prong, Part B.2 asserts that the government has a substantial interest in preserving the agricultural economy through agricultural marketing orders.[115] Under the third prong of the *Central Hudson* test, Part B.3 observes that generic advertising may advance the government's interests in cases where the government heavily regulates the agricultural commodity.[116] Under the final prong of the *Central Hudson* test, Part B.4 advises that generic advertising is excessive because there is a lack of consistency within marketing orders and an absence of sufficient legislative oversight with respect to the Secretary of Agriculture.[117] The Analysis concludes in Part C by proposing three alternative solutions, which would serve to balance the goals of marketing orders and ensure the viability of agricultural commodities, while securing commercial speech protection to the agricultural producer.[118]

A. The Central Hudson Test is a Viable Standard for Commercial Speech Analysis

In *Wileman* and later in *United Foods*, the Court focused on the regulatory scheme and reasoned that since Congress and the Executive branches create regulatory policy, the Judiciary does not have a role in monitoring policy.[119] However, it is common knowledge that the United States Constitution is supreme to the laws passed by Congress, and it is the Judiciary's role to ensure that those laws comply with the Constitution.[120] The Court miscalculated by focusing on the regulatory scheme when it addressed whether compelled monetary assessments for generic advertising are constitutional, because while "policy judgments [made within the confines of the regulation] are better made by producers and administrators," judges are in the best position to make constitutional judgments.[121] Further, as shown

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114 *See infra* notes 145-170 and accompanying text.

115 *See infra* notes 171-175 and accompanying text.

116 *See infra* notes 176-184 and accompanying text.

117 *See infra* notes 185-192 and accompanying text.

118 *See infra* notes 193-198 and accompanying text.

119 *Wileman*, 521 U.S at 475-77; *United Foods*, 121 S. Ct. at 2339 (following the *Wileman* reasoning and considering the entire regulatory program); *see also supra* notes 92, 103 and accompanying text (discussing the Court's focus on the regulatory policy in *Wileman* and *United Foods*). Moreover, while the *United Foods* Court dismissed the *Central Hudson* test because it was not raised on appeal, it appears from the opinion that the Court likely would have addressed the *Central Hudson* test because after its threshold inquiry considering the statutory scheme, the Court halted its analysis, specifically stating that it did not "consider whether the Government's interest could be considered substantial for purposes of the *Central Hudson* test." *United Foods*, 121 S. Ct. at 2338. Regardless, by following *Wileman's* logic, the Court allowed the level of economic policy to dictate whether the compelled payments were constitutional instead of inquiring into the balance between free speech expression and the government's interests.

120 *Supra* notes 18, 69 and accompanying text.

121 *Wileman*, 521 U.S. at 476. The Court stated that "[w]hether the benefits from the advertising justify its cost is a question that not only might be answered differently in different markets, but also involves the exercise of policy judgments that are better made by producers and administrators than by judges." *Wileman*, 521 U.S. at 476; *see also supra* note 90 and accompanying text (noting the Court's reasoning that advertising content disputes were best handled by the agricultural council and the Secretary of Agriculture).

in Justice Souter's dissent in *Wileman*, the *Central Hudson* test is applicable and reveals a lack of governmental interest in an unnecessarily broad regulation.[122]

1. The Central Hudson Test Fairly Balances Competing Interests

Both before and after *Central Hudson*, the Supreme Court has applied, with few exceptions, a *Central Hudson* type analysis. This method of analysis provides for a critical threshold scrutiny when a free speech interest is questioned in the commercial context.[123] In *Virginia Pharmacy*, the Court considered this threshold question and found a constitutional interest in protecting speech for profit.[124] However, in both *Wileman* and *United Foods*, the Court missed the opportunity to consider whether there was a constitutional interest. Instead, the Court focused on the level of economic regulation, rather than whether compelled assessments for generic advertising is speech.[125] Separating the threshold question of whether there is a free speech interest from the government's competing interest allows the judiciary to fully analyze and identify the speech at issue and ensure protection against encroachment on free speech rights.

The *Central Hudson* test is a fair and effective analytical method of balancing competing interests. The test balances the speaker's interests in speaking and the receiver's interest in receiving, with the government's interests in protecting the public. Like *First National*, where the Court found that the banking organization had an interest in informing the public and attempting to persuade the public, agricultural producers have an interest in informing and selling their branded product.[126] Even though the former concerned speech suppression and the latter, through compelled assessments for generic advertising, involved speech compulsion, the balancing test preserves the policy of recognizing the speaker's interests because it directly and separately considers the speakers interests.[127] In addition, like in *Consolidated Edison*, where the receiver had a right to receive the utility company's nuclear power bill insert in order to receive more information on a controversial subject, consumers have a right to receive more information about food choices.[128] Further, like in *Virginia Pharmacy*, where the Court considered the government's interest in protecting the public from false or misleading speech in a free market

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122 *Wileman*, 521 U.S. at 491-504; *see also supra* notes 96-98 and accompanying text. (explaining Justice Souter's application of the *Central Hudson* test to generic agricultural advertising for California summer fruits).

123 *Supra* note 40 and accompanying text (discussing the first prong of the *Central Hudson* test).

124 *Virginia Pharmacy*, 425 U.S. at 762-63; *see also supra* note 24 and accompanying text (explaining that the *Virginia Pharmacy* Court reasoned speech with profit motives is protected).

125 *Supra* notes 91-92, 103 and accompanying text (discussing how the *Wileman* Court focused on the regulatory policy and how the *United Foods* Court utilized *Wileman's* reasoning and found a constitutional violation only because the Mushroom Act's economic policy was thin).

126 *First National*, 435 U.S. at 777; *see also supra* note 29 and accompanying text (explaining the Court's protection of a corporation's right to speak even when the topic of the speech does not materially affect that corporation).

127 7 U.S.C. § 7401(b)(4) (Supp. V 2000); *see also supra* note 86 and accompanying text (explaining that the AMAA does not prohibit producers from promoting their own brand). *But infra* notes 155-158 and accompanying text (arguing that while the AMAA does not prohibit branded speech, the compelled assessments for generic advertising inhibit speech because an individual corporation is forced to pay for generic advertising, the message with which they disagree).

128 *Consolidated Edison*, 447 U.S. at 541-43; *see also supra* note 34 and accompanying text (explaining the Court's finding that the governmental regulation violated free speech when it prohibited speech on an entire topic of controversy).

economy, the Court should consider the government's interest in maintaining and expanding agricultural commodities under the U.S. free enterprise system.[129] The Court should utilize the *Central Hudson* balancing test for agricultural marketing orders and their compelled assessments for generic advertising because this analytical method separately and distinctly balances the competing interests and preserves the rights of the speaker, the rights of the receiver and the rights of the government.

The Court should apply the *Central Hudson* test to agricultural marketing orders because it adheres to the principle that the United States governs "by the consent of the governed, and [that] the Bill of Rights denies" the government power to coerce consent.[130] The test balances the public's interest in receiving information and making decisions for themselves against the public's consent to the government to regulate businesses to ensure no harm to innocent people. Under agricultural marketing orders, the *Central Hudson* test would weigh the risk to the public and the speaker in promoting generic commodities against the public's interest in allowing the government to regulate the growth and stability of an agricultural commodity through generic advertising.[131] Ensuring an effectively managed government within the margins of the Constitution is central to foundational principles and by attacking these issues from a balancing perspective, the judiciary preserves the Bill of Rights.[132]

2. *The Central Hudson Test is Consistent with Non-Commercial Speech Jurisprudence*

Not only should the judiciary utilize the *Central Hudson* balancing test because it effectively balances competing commercial speech policy interests, but also because this analytical method is consistent with the method used for non-commercial free speech questions. In past non-commercial free speech questions, the Court utilized the analytical method of balancing the rights of the speaker against the necessity of governmental suppression or compulsion. For example, in *Barnette*, *Wooley*, and *Lehnert*, the Court first determined whether the action or expression was protected speech and then balanced the competing governmental interests.[133]

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[129] *Virginia Pharmacy*, 425 U.S. at 770-72; *see also supra* note 26 and accompanying text (discussing the *Virginia Pharmacy* Court's reasoning that the government may suppress speech where there is a significant governmental interest, the restriction is reasonably narrow or where the speech is illegal). While the Courts in *Wileman* and *United Foods* did consider the government's interests within the regulation, they did not consider the government's objectives within the confines of the free market system.

[130] *Barnette*, 319 U.S. at 641; *see also supra* note 62 (discussing the Court's warning that when a government attempts to quiet dissenters, history has shown that the government may lead to extermination of the dissenters).

[131] *See infra* Part III.B (applying the *Central Hudson* test to agricultural marketing orders and their compelled assessments for generic advertising).

[132] *Supra* note 25 (explaining the *Virginia Pharmacy* Court's reasoning that the First Amendment was written so as to balance the risks of speech suppression against the danger of speech misuse).

[133] *Barnette*, 319 U.S. at 632-34; *Wooley*, 430 U.S. at 713-17; *Lehnert*, 500 U.S. at 520-22; *see also supra* notes 60-61 and accompanying text (explaining how the *Barnette* Court first found that the First Amendment protected the flag salute because it was a form of symbolism and conveyed an idea or belief) (finding that although the flag salute was intrinsically beneficial to the government in serving to build national unity, it did not concern a necessary danger, so it was unconstitutional); notes 64-66 and accompanying text (discussing how the *Wooley* Court first determined that the First Amendment protected the right to refrain from speaking and then found that the government did not have a significant

Similarly, by applying the balanced analysis to agricultural marketing orders, the Court would first determine whether the compelled assessments for generic advertising were a speech expression and then balance the competing governmental interest of ensuring the success of an agricultural commodity. Moreover, this promotes consistent methods of analysis between commercial and non-commercial free speech questions, effectively balancing the rights of the speaker and the rights of the government.

A key difference, however, between non-commercial and commercial speech, is the scrutiny level to which the governmental interest is subjected. Traditionally, non-commercial free speech questions involved strict scrutiny, whereas commercial speech questions involved merely intermediate scrutiny.[134] Arguments for application of strict scrutiny to commercial speech have merit because speech may receive less protection when the speaker is acting in a professional capacity versus an individual capacity, even though the message is conveyed by the same speaker.[135] Nevertheless, there are two reasons for adhering to an intermediate level of scrutiny in commercial speech cases.

First, strict scrutiny is not necessary for commercial speech analysis because the final three prongs of the *Central Hudson* test are sufficiently similar to the non-commercial clear-and-present danger test.[136] While both tests protect against the same danger, the risk of harm to the public, non-commercial questions receive an elevated standard under the clear-and-present danger test and economic questions receive an intermediate standard under the *Central Hudson* test. Like the clear-and-present danger test, in which the judiciary questions the "proximity" of the government's regulation, the second and third prongs of the *Central Hudson* test measure the proximity of the regulation to its intended purpose by questioning whether there is a substantial governmental interest and whether the regulation advances that interest.[137] Additionally, like the non-commercial speech test, in which the judiciary questions the "degree" of the governmental regulation, the fourth prong of the *Central Hudson* test measures the degree of the regulation by examining whether the regulation is sufficiently narrow.[138] Because the methods of analysis applied under the two tests are similar, they place consistent significance on governmental interests: The solitary difference between the tests is their treatment of the nature of the speech where non-commercial speech, such as political speech, is "essential to our system of self-government."[139]

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countervailing interest in the compelled speech); notes 73-74 and accompanying text (explaining how the *Lehnert* Court first found that compelled payments for political lobbying by a union violated an employee's free speech and then held that the political lobbying did not serve the purposes of the agency shop agreement).

[134] *Supra* note 43 (explaining the definitions of strict scrutiny and intermediate scrutiny).

[135] *Supra* notes 43, 100 and accompanying text (discussing the theories for applying strict scrutiny to commercial speech questions); *see also supra* notes 47-48 and accompanying text (discussing the regulation requiring an individual working in the professional capacity as an attorney to disclose contingency fees in *Zauderer*); note 56 and accompanying text (discussing the regulation requiring a thirty-day waiting period for an individual working in the professional capacity as an attorney to contact a potential personal injury or wrongful death client in *Went For It*).

[136] *Supra* note 43 (explaining the clear-and-present danger test).

[137] *Supra* note 43 (noting the *Schenck* Court's explanation that understanding the proximity of the regulation, under the circumstances, will help determine whether the regulation is unconstitutional).

[138] *Supra* note 43 (noting the *Schenck* Court's explanation that understanding the degree of the regulation, under the circumstances, will help determine whether the regulation is unconstitutional).

[139] *Supra* note 43 (explaining Justice Rehnquist's dissent in *Central Hudson*).

Second, the economic nature of commercial speech does not require strict scrutiny because it can withstand higher governmental regulation as there is an inherent economic self-interest in the speech – profitability drives the speech.[140] Since the commercial speaker has control over the truthfulness and accuracy of the speech and since there is a profitability incentive that may lead to the tendency to exaggerate, there is an increased risk of incorrect, inaccurate or incomplete information reaching the public. Where consumers rely on the advertising information, intermediate scrutiny allows the governmental regulation to reduce that risk.[141] *Virginia Pharmacy* and *Zauderer* provide examples of how government regulations successfully reduced risk, where, respectively, the Court found that receivers have a right to truthful drug pricing and receivers have a right to full disclosure of attorney contingency fees.[142] In both of these cases, the speaker's motivation is profitable selling and the intermediate scrutiny allows for full consideration of the governmental necessity of protecting the receiver from possible misleading information. Thus, because of the economic nature of commercial speech, the similar, less stringent approach of intermediate scrutiny, supported by the *Central Hudson* approach, is best suited to balance all the interests within a commercial speech question.

Accordingly, the intermediate commercial speech inquiry is a balanced approach between consideration of the government's interests and preservation of the speaker's and receiver's interests. Economic policy should not warrant complete dismissal of the *Central Hudson* test as the Court did with compelled monetary assessments for generic advertising in *Wileman* and *United Foods*.[143] The correct analytical sequence initially considers whether the First Amendment protects the expression of compelled payments for generic advertising and then scrutinizes the depth of the regulation.[144] This method of analysis reduces the risk that the judiciary will overstate the regulation's economic policy because the courts cannot avoid addressing the nature of the expression or whether the First Amendment protects that expression. Having resolved that the Court should apply the *Central Hudson* test to agricultural marketing orders, the next section of this analysis addresses the role of compelled agricultural marketing orders under the *Central Hudson* test.

B. The Central Hudson Test Applied to Agricultural Marketing Orders

1. Compelled Monetary Assessments for Generic Advertising Are Protected by the First Amendment

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140 *Supra* note 36 and accompanying text (discussing the *Central Hudson* Court's reasoning that there is an inherent self-interest in commercial speech).

141 *Supra* note 26 and accompanying text (explaining the *Virginia Pharmacy* Court's teaching that the government may suppress untruthful advertising or advertising that proposes an illegal transaction).

142 *Supra* note 25 and accompanying text (explaining the *Virginia Pharmacy* Court's reasoning that consumers will make the best decision for themselves once they have the pricing information); notes 47-48 and accompanying text (explaining the *Zauderer* Court's reasoning that Ohio's regulation requiring disclosure of contingency-fees was constitutional because it was distinct and served a governmental interest of protecting the consumer).

143 *Supra* notes 92, 103 and accompanying text (discussing the Court's focus on the regulatory policy in *Wileman* and *United Foods*).

144 *See supra* note 125 and accompanying text (noting that the *Wileman* and *United Foods* Courts mistakenly focused on the nature of the regulation's economic policy rather than considering the threshold question of whether there was an expression the First Amendment protects).

a. The Payment of Money Should be Protected Speech

Above all, the Court should protect payments for commercial speech where that speech does not concern unlawful activity and is not misleading.[145] However, these first questions address the issue of speech suppression, not speech compulsion. Hence, to determine whether compelled assessments for generic advertising are an expression protected by commercial speech, it is reasonable to analogize to other First Amendment concerns; namely that monetary payments should be protected speech, that the speaker or payer has a protected right, and that the receiver of the message has a protected right.[146]

Thomas Jefferson once stated: "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."[147] The act of contributing funds indicates support because contributions allow an entity to promote and accomplish its goals, whether these goals are religious, political, or simply entrepreneurial. Yet, some might argue that money cannot be equated to speech.[148] While it may be true that money in and of itself is not speech, the act of paying money or the act of exchanging value is a symbol that supports a belief or idea.[149] Much like the Court's reasoning in *Barnette*, where saluting the flag was symbolic because it communicated a nationalistic idea or belief, the payment of money for generic advertising is symbolic of a belief in the advertised message.[150] In *Wooley*, the Court reasoned that the terms "In God we Trust" and "*E Pluribus Unum*" imprinted on United States currency did not represent an individual's belief since currency is commonly transferred and, unlike an automobile, not closely associated with its owner.[151] It follows that although commercial speech does not protect an agricultural producer's interest in the words on currency, commercial speech does protect the act of financial exchange because it is symbolic of a belief in the generic advertising message.

Here, although compelled payments for generic advertising may be passive, as was the display of "Live Free or Die" motto on a license plate in *Wooley*, because the producer is not directly involved in creating the message, it conveys a belief in the advertised message and is, therefore, unconstitutional.[152] As in *Abood*, where the

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145 *Supra* note 38 and accompanying text (describing the first prong of the *Central Hudson* test).

146 *See infra* notes 147-163 and accompanying text.

147 *Abood*, 431 U.S. at 235 n.31.

148 *See generally Nixon*, 528 U.S. at 398-9 (Stevens, J. concurring); *see also supra* note 105 (explaining Justice Breyer's dissent in *United Foods* where he stated that "money and speech are not identical").

149 *Supra* notes 71-72 and accompanying test (noting the *Abood* Court's holding that compelled payments to support goals to which the employee objects amounts to "compulsory subsidization of ideological activity").

150 *Supra* note 60 and accompanying text (explaining the Court's finding that saluting the flag was a form of utterance and symbolism, which conveyed an idea or belief).

151 *Supra* note 67 (discussing Justice Rehnquist's dissent where he reasoned that the result of the *Wooley* holding may lead to finding unconstitutional federal laws which proscribe the defacement of U.S. currency and the majority's response that currency is different from an automobile because currency, unlike an automobile, is not readily associated with its owner).

152 *Supra* note 67 and accompanying text (discussing how the *Wooley* Court distinguished *Barnette* but still found the compelled payment unconstitutional) and note 83 and accompanying text (recognizing that the agricultural council makes recommendations to the Secretary of Agriculture concerning administration, inspection, research, advertising and promotion).

union could not allocate the service fee that non-union public school teachers paid to activities with which they disagreed, the government should not force agricultural producers to contribute to generic advertising with which they disagree.[153] Accordingly, although the act of compelled payments for agricultural generic advertising is passive, where the producers disagree with that speech, the so-called passive nature of the speech becomes "sinful and tyrannical," and the Court should protect this speech.[154]

b. The Speaker has a Protected Free Speech Right

Further, to determine whether compelled payments for generic advertising from producers who disagree with that advertising message is a protected First Amendment expression, it is helpful to consider the rights of the speaker or, under agricultural marketing orders, the forced contributor. As in *Consolidated Edison*, where the Court found that a heavily regulated electric company still had the right to advertise and promote electricity, private agricultural companies under heavy regulation ought to enjoy the benefits of advertising their commodities in a manner that gives them brand recognition.[155] The *Consolidated Edison* Court found that the government's restrictions were unconstitutional because they restricted the speech based upon the content of the speech.[156] Similarly, regulations placed upon agricultural producers are unconstitutional because the regulation compels payment for promotion of generic food product, the content of which is contrary to promotion of their individual brands. While agricultural marketing orders do not infringe upon the right of an individual producer to speak its own message, the forced monetary assessments compels agricultural producers to pay for the generic advertising message with which they disagree.[157] Under *Wooley*, where it was unconstitutional for the government to compel an individual to display a statement with which he disagreed, it should also be unconstitutional for the government to compel agricultural producers to pay for a similarly disagreeable statements in advertising.[158]

c. The Receiver has a Protected Free Speech Right

The rights of the receiver of the message must be considered when analyzing whether compelled payments for generic advertising are a protected expression. In *Virginia Pharmacy*, the Court allowed consumers, as recipients of advertisements, to pursue the question of the constitutionality of the Virginia

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153 *Supra* notes 70-72 and accompanying text (discussing the *Abood* Court's reasoning that only compelled payments for activities germane to collective bargaining are constitutional).

154 *Abood*, 431 U.S. at 235 n.31.

155 *Supra* note 33 and accompanying text (discussing the *Consolidated Edison* Court's finding that "heavily regulated businesses may enjoy constitutional protection").

156 *Consolidated Edison*, 447 U.S. 536; *see also supra* note 34 (discussing the Court's reasoning that the government's interests were intolerable based on its time, place or manner because it was based upon the content of the speech).

157 *Supra* note 86 and accompanying text (explaining that the AMAA does not prohibit producers from promoting their own brand).

158 *Supra* notes 65-66 and accompanying text (discussing the *Wooley* Court's holding that it was unconstitutional to force citizens to display a message on their license plates with which they disagree).

statute.[159] In *First National*, the Court rejected the government's argument that corporate political advertising might persuade people to favor the corporation's political ideology because this argument was paternalistic, emphasizing that voters consider the source of the information when making decisions.[160] Similarly, because the AMAA serves to promote agricultural commodities to sustain a healthy and safe food source, it is better for consumers to receive many branded messages and not to force agricultural producers to pay for one generic message.[161] The benefit to the receiver is to receive all of the messages and then decide for themselves what is best.[162] Justice Brandeis once noted that where there is a need to expose "falsehood and fallacies...the remedy to be applied is more speech."[163] Here, consumers will make better informed food decisions if there is not just one generic message, but many branded messages.

d. The Difficulties of Content and Context within Agricultural Marketing Orders

One difficulty in determining whether compelled payments for generic advertising is a free speech expression lies in the fact that the topic concerns rather neutral and uninspiring content. As Justice Scalia noted, the Court may react to whether a product advertised might be beneficial, detrimental or where there may simply be indifference to the subject.[164] As in *Barnette*, where the Court held that the validity of the compelled speech must be "considered independently" of the "utility of the ceremony in question," here, the Court should consider the free speech issues separately from the content of the agricultural commodity.[165] Although the economic factors surrounding agricultural marketing might be dull, if the Court does not protect constitutional rights when the issue is neutral, there will be a slow disintegration of a speaker's right to speak and a receiver's right to receive a

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159 *Supra* note 24 (explaining the Court's reasoning both that consumers and the general public have an interest in commercial information and that the protection extends to both the sender and the receiver of the speech).

160 *Supra* notes 30-31 and accompanying text (discussing the Court's finding that the Massachusetts' law was paternalistic).

161 *Supra* note 79 and accompanying text (explaining the purpose of the AMAA). As an example, because of a producer's distribution system, it is possible that one tomato producer is able to allow for full ripening on the vine prior to harvest and shipment as compared to other tomatoes which ripen in a truck or warehouse and where vine ripened tomatoes are healthier).

162 *Supra* note 31 (discussing the Court's opinion in *First National* that the "electorate is entrusted by the First Amendment's Framers to judge and decide upon the credibility and the source of conflicting arguments").

163 Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J. concurring).

164 *See supra* note 102 (discussing a conversation at *United Foods'* oral arguments concerning whether assessing a fee from museums for advertising museums to inner city citizens or assessing a tax on cigarettes to advertise that they are harmful are similar to the case at issue).

165 *Supra* note 63 and accompanying text (discussing the *Barnette* Court's reasoning that the Court's decisions on free speech cases are not dependent upon the content of that speech).

message.[166] Thus, the Court should protect free speech when the subject matter is neither good nor bad, but "merely innocuous."[167]

An additional obstacle to determining whether compelled payments for generic advertising is a free speech expression concerns the context of advertising. Because a statutory purpose of agricultural marketing orders is to encourage consumption, the orders expressly aim to promote and advertise.[168] This statutory justification is at odds with the free speech policy of allowing both the majority and minority opinion to speak, because regardless of advertising success, the statute only allows for promotion of the majority opinion.[169] Similar to *Wooley,* where the government could not compel an individual to disseminate a message on the license plate of his car, which was in public view and directly associated with the owner, the government should not compel an agricultural producer to pay for a generic message whose express purpose is public observation.[170] Further, while the message displayed is not on the agricultural company's private property, it is similarly invasive in that it is exhibited by using the company's private funds; thus; the content of the message is directly attributable to its unwilling sponsor.

2. There is a Substantial Governmental Interest in Generic Advertising

The government has a substantial interest in preserving the agricultural economy because its policy serves to maintain the viability of agricultural commodities for both American producers and consumers.[171] As in *Virginia Pharmacy*, where there was a strong governmental interest in regulating the pharmaceutical industry to ensure the quality and safety of pharmaceutical services, there is a strong governmental interest in regulating agricultural commodities to create a stable agricultural economy to ensure a safe food supply with high quality and diverse choices.[172] In addition, because of the anti-trust exemption within some

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166 *See generally United Foods*, 121 U.S. at 2338. Justice Kennedy opined that:

> The subject matter of the speech may be of interest to but a small segment of the population; yet those whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important for them as it is for other discrete, little noticed groups in a society which values the freedom resulting from speech in all its diverse parts.

Id. See also supra note 102 and accompanying text.

167 *Barnette*, 319 U.S. at 634; *see also supra* note 63 and accompanying text (noting the Court's decision that its analysis does not depend upon whether it believes the speech to be "good, bad or merely innocuous").

168 7 U.S.C. § 7411(a)(5) (Supp. V 2000); *see also supra* notes 80-81 and accompanying text (discussing the goals of the agrieultural marketing orders).

169 7 U.S.C. § 608(c)(9) (1994); *see also supra* note 83 (discussing the AMAA's requirement that two-thirds of producers approve the decisions of the agricultural council); *see also supra* note 105 (noting Justice Breyer reasoning that the Mushroom Act had been successful in stimulating demand and increasing industry revenue).

170 *Wooley*, 430 U.S. at 715; *see also supra* note 66 and accompanying text (discussing the *Wooley* Court's finding that it was unconstitutional for the government to require people to use "their private property as a 'mobile billboard' for the State's ideological message").

171 7 U.S.C. § 602(1) (1994); *see also supra* notes 79-80 and accompanying text (providing the Legislature's stated purpose of the AMAA).

172 *Virginia Pharmacy*, 425 U.S. at 766-67; *see also supra* note 24 (discussing the *Virginia Pharmacy* Court's finding that Virginia did have a legitimate interest in ensuring the quality of the pharmaceutical industry, but that the regulation was overly broad); note 96 (explaining Justice Souter's dissent in *Wileman*, where he found, at a general level, a substantial governmental interest in regulating market instability).

marketing orders, where the government regulates the entire commodity, the government has an interest in the viability of the commodity.[173]

Further evidence of a substantial governmental interest in agricultural marketing orders can be found by analogy to union shop questions where the Court has found a substantial purpose in compelled payments for activities germane to collective bargaining.[174] Similar to *Lehnert*, where a purpose for requiring non-union employees to pay for collective bargaining activities was to ensure that everyone pay for the services provided and thus, avoid the free-rider problem, here, a purpose of agricultural marketing orders is to ensure that those who benefit from the services, the producers and handlers, pay their fair share.[175] Hence, preservation of the agricultural economy serves as a substantial governmental interest to agricultural marketing orders.

3. *Most Often, Generic Advertising Does Not Directly Advance the Government's Interest*

To address whether compelled assessments for generic advertising directly advance the government's interests in maintaining and expanding the agricultural commodity, it is important to consider the contradictory language of the statutes, the purpose of marketing order regulations and the effectiveness of generic advertising.

A contradiction within the language of the agricultural marketing orders themselves demonstrates that the regulation is not directly advancing its stated purpose. Congress found that one of the inherent advantages of generic advertising programs is that they provide a benefit to small producers who lack resources to advertise by leveraging greater economies of scale.[176] However, the marketing orders often exclude the smallest producers, as the Mushroom Act illustrates, where only producers who produce or importers who import over 500,000 pounds of mushrooms annually fall under the definition itself.[177] Thus, as demonstrated by the Mushroom Act, the contradictory language of the statutes suggests that the regulation is not advancing the purported governmental interests.

The underlying goals of agricultural marketing orders are to ensure a commodity's viability and safety, and to influence healthy eating habits among American citizens.[178] Generic advertising has not advanced these goals for two

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[173] 7 U.S.C. 608b (1994); *see also supra* note 79 and accompanying text (providing that some marketing orders contain anti-trust exemptions).

[174] *Abood*, 431 U.S. at 235-36; *Lehnert*, 500 U.S. at 524; *see also supra* note 72 and accompanying text (describing the *Abood* Court's reasoning that the union can use the fees for non-germane activities, but that the union must return proportional monies back to employees who object); note 73 and accompanying text (noting that the *Lehnert* Court explained that the union bears the burden of proving whether the activities are germane to collective bargaining).

[175] *Lehnert*, 500 U.S. at 527; 7 U.S.C. § 7411(a)(5) (Supp. V 2000); *see also supra* note 73 and accompanying text (discussing the Court's finding in *Lehnert* that political lobbying did not reduce the likelihood of the free-rider problem); note 81 (explaining that marketing orders costs are assessed to the producers and processors).

[176] 7 U.S.C. § 7401(b)(10) (Supp. V 2000); *see also supra* note 85 and accompanying text (providing the statutory findings).

[177] 7 U.S.C. §§ 6102(6), (11) (1994); *see also supra* note 88 and accompanying text (providing the exemption limitations within the Mushroom Act).

[178] 7 U.S.C. §§ 602(4), 608c(6)(A) (1994); *see also supra* note 80 and accompanying text (explaining that the statutory purpose of the AMAA was to ensure the viability of certain commodities by controlling supply, pricing, quality and quantity). In pertinent part, the Mushroom Act states the express

primary reasons. First, the generic advertising component does not promote the safety of food product because it does nothing but serve to stimulate demand, whereas other components, including administration, inspection and research, serve the goals of the marketing orders.[179] Second, the government is taking on a paternalistic role in deciding which foods are healthy to the human diet and then building marketing orders around those decisions. Like the Court in *Virginia Pharmacy,* which rejected the argument that restrictions on advertising were for public benefit because the regulations kept the public ignorant and insulated the pharmacist from price competition, here, the government acted paternalistically when it decided which foods are healthy and which of those products it would support through agricultural marketing programs.[180] While the government may play a role in promoting healthy eating, the government has failed to explain why it chooses to favor some healthy foods over others.[181]

Marketing orders assume the risk that a commodity, as a whole, will entice higher demand and be more successful through generic advertising than individual advertising. In *Abood,* the Court explained that "a public employer, unlike his private counterpart," is not motivated by profit and is not constrained by a normal market operation.[182] Like *Abood*, where the Court explained that public entities lack the ability to deny labor cost increases that would require price increases in private industry, the Secretary of Agriculture is also a public figure or entity that need not be concerned with the return on investment as would an individual producer whose funds do not come from a pooled source.[183] However, where the government comprehensively regulates a commodity by controlling such industry essentials as quality, quantity, pricing, product size, and grade, generic advertising may be more effective than individual brand advertising. Similar to Judge Posner's argument that the government creates monopolistic regulations because it is inefficient for the agricultural industry to create its own lobbying cartel and because such regulations reduce the free-rider problem, it is more efficient for generic advertising to promote a comprehensive commodity because the costs are fairly allocated to the producers, and one strong, consistent message may have the ability to reach more consumers and build generic product identity.[184] Thus, in a heavily regulated commodity, it is

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findings of Congress, that "mushrooms are an important food that is a valuable part of the human diet." 7 U.S.C. §6101(a)(1) (1994).

179 7 U.S.C. § 608c(6) (1994); *supra* note 80 and accompanying text (providing the activities under the marketing order).

180 *Virginia Pharmacy,* 425 U.S. at 769; *see also supra* note 25 and accompanying text (describing the *Virginia Pharmacy* Court's reasoning that the Virginia statute was paternalistic).

181 *Supra* note 96 and accompanying text (discussing Justice Souter's dissent in *Wileman*, where he suggested the "erratic pattern" of "piecemeal litigation" is due to the "priorities of particular interest groups").

182 *Abood*, 431 U.S. at 227-28; *see also supra* note 71 and accompanying text (explaining the *Abood* Court's reasoning that there was an equal First Amendment interest for private and public employees through an economic analysis).

183 *Abood*, 431 U.s. at 228; *see also supra* note 71 and accompanying text (explaining the *Abood* Court's resolution that a public sector union can compel payment from non-union members even though the union is less concerned with high prices). *But see Wileman*, 521 U.S. at 469. *See also supra* note 90 and accompanying text (explaining the *Wileman* Court's reasoning that there was not First Amendment concern because the marketing order was a question of economic policy).

184 Posner, *supra* note 81, at 573 (discussing Judge Richard Posner's comments on free-riders in affecting legislation). An example of an agricultural commodity that has had success with generic advertising is the milk industry and its famous milk-mustache celebrity campaign.

arguable that generic advertising may directly advance the marketing order in maintaining and promoting the agricultural commodity.

4. Marketing Orders through Generic Advertising Are More Excessive than Necessary

Under the final stage of the *Central Hudson* test, the generic advertising marketing orders are more excessive than necessary because there is no consistency within the marketing orders and there is a lack of legislative directive to the Secretary of Agriculture.

Since the inception of the AMAA, there have been marketing orders with generic advertising enacted and applied haphazardly, without consistent provisions among the variety of commodities chosen.[185] For example, there is generic advertising for blueberries, but not for raspberries or strawberries. There is also a marketing order for avocados, but not artichokes.[186] Congress passed the canola marketing order in 1996, yet no canola program was put into place.[187] Further, while the U.S. Department of Agriculture is no longer using the Mushroom Act's compelled assessments for generic advertising, it has done nothing to address the constitutional concerns of other similar marketing orders.[188] This haphazard regulatory scheme for generic agricultural advertising is overbroad and lacks consistent, logical support that might explain why some agricultural commodities have marketing orders, while others do not.

In addition, there is no clear directive to the Secretary of Agriculture as to the proper method of program implementation. Similar to the canola program, the only attribute implemented by the Mushroom Act was formulation of the Mushroom Council for generic advertising.[189] This ambiguity demonstrates that the goal of marketing orders, which is to ensure the viability of an agricultural commodity, is not closely tied to generic advertising.[190]

Broad prophylactic rules, which either suppress or compel speech, have long been suspect. The *Edenfield* Court stressed that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms."[191] As compelled assessments for generic advertising are infringing on the commercial

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185 7 U.S.C. § 7401(a) (Supp. V 2000); *see also supra* note 84 (listing the variety of commodities that are presently under agricultural marketing orders).

186 *Supra* note 84 (discussing *United Foods'* oral arguments where Prof. Tribe argued that marketing orders are haphazard); *see also supra* note 96 and accompanying text (discussing Justice Souter's *Wileman* dissent where he pointed out that "[t]he list includes onions but not garlic, tomatoes but not cucumbers, Tokay grapes but not other grapes and so on. The selection is puzzling").

187 *Supra* note 84 (discussing Prof. Tribe's argument in *United Foods'* oral arguments).

188 *Supra* note 104 (discussing the USDA's response in August, 2001 to the *United Foods* holding). As of October 30, 2001, the USDA has not released any information on their approach to the constitutional question of other marketing orders. News Releases, Agricultural Marketing Service, *available at* <www.ams.usda.gov/news/newsrel.html> (last visited Oct. 30, 2001).

189 *Supra* note 88 (discussing Justice Kennedy's opinion in *United Foods* where most of the Mushroom Act's compelled assessments are used for generic advertising).

190 *Wileman*, 521 U.S. at 494; *see also supra* note 96 and accompanying text (discussing Justice Souter's dissent in *Wileman* where he reasoned that the randomness of the marketing orders showed that "the need for promotional control does not go hand-in-hand with a need for market and economic stability").

191 *Edenfield*, 507 U.S. at 777; *see also supra* note 54 and accompanying text (quoting the *Edenfield* Court that found unconstitutional Florida's ban on CPA's contacting potential customers).

speech rights of an agricultural producer, it is time for the Legislature and the USDA to address this constitutional question.[192]

C. *Possible Solutions to Resolve the Commercial Speech Infringement*

From a practical position, the government could both preserve commercial speech rights and regulate a commodity while serving a marketing order's stated purpose. This section highlights the following three possibilities: a credit program, a rebate program and a disclosure requirement. These three alternatives provide workable solutions that would prevent unwilling producers from being compelled to support generic advertising with which they disagree.

Justice Souter suggested a credit program that could achieve the government's stated goals, yet eliminate the need to infringe on commercial speech rights.[193] The AMAA allows marketing orders to issue a credit system, where the agricultural council returns money to a producer when that producer funds either its own branded advertising or a state program's advertising.[194] Since the purpose of compelled payments for generic advertising is to avoid free-rider problems and to expand the entire commodity industry, a credit program would serve the goals of the AMAA.[195]

Another possible solution is a rebate program under which producers who disagree with the advertising can opt-out and receive a reimbursement of their respective monies. In *Keller*, the Court took a practical approach where it found that a rebate program may be inconvenient but that the additional work of breaking out costs was worthy of the "constitutional mandate."[196] Similarly, it might be inconvenient for the agricultural council to break out its costs, but not impossible, and certainly worthy of a constitutional mandate. As in *Lehnert*, where "the union [bore] the burden of proving the proportion of chargeable expenses to total expenses," so too should the government bear the burden of proving proportional expenses and returning those funds to dissenting producers.[197]

A third solution arose in *Zauderer*, where the Court found constitutional a disclosure requirement compelling an attorney to disclose his contingency fees to ensure that his advertising was not deceptive or misleading.[198] In like fashion, Congress could use this approach as a guide to address agricultural marketing orders.

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[192] The U.S. Senate's Agricultural, Nutrition and Forestry Committee's jurisdiction includes "agricultural production, marketing and stabilization of prices." Committee on Rules and Administration, United States Senate, *Authority and Rule of Senate Committees, 1997-98*, Government Printing Office, Washington, D.C., 1997, p. 11, *available at* <http://www.access.gpo.gov/congress/senate/sen_agriculture/gjurisdi.html> (last visited Oct. 30, 2001)

[193] *Supra* note 98 and accompanying text (discussing Justice Souter's reasoning in *Wileman* that a credit system would be less restrictive and more precise).

[194] 7 U.S.C. § 7401(b)(9) (Supp. V 2000); *see also supra* note 86 (providing that Congress has the authority to implement credit programs within marketing orders).

[195] *Supra* notes 79-80 and accompanying text (providing the purpose of agricultural marketing orders is to maintain and expand the viability of agricultural commodities).

[196] *Keller*, 496 U.S. at 16-17; *see also supra* note 78 and accompanying text (discussing the *Keller* Court's decision that the State Bar Association should rebate costs for those activities that are not germane to the regulation of the legal profession).

[197] *Lehnert*, 500 U.S. at 524; *see also supra* note 73 and accompanying text (listing the union activities the Court found constitutional and unconstitutional).

[198] *Zauderer*, 471 U.S. at 650-51; *see also supra* notes 47-48 and accompanying text (discussing the Court's reasoning that disclosure requirements are constitutional).

Under such an approach, the marketing orders would only compel payment for generic advertising from those producers who agree with the speech. The generic advertisements would complement such abstention by containing a disclosure statement which would reveal who paid for the advertisement. This solution would serve the purpose of promoting an agricultural commodity, while ensuring that agricultural producers who disagree with the message are not compelled to pay for speech with which they disagree.

IV. CONCLUSION

The Supreme Court has erred in its approach to the question of whether compelled monetary funding for generic advertising is commercial speech because an economic analysis alone does not adequately balance the speaker's interest and the receiver's interest against the government's interest. The *Central Hudson* test should apply because it effectively balances these interests and is consistent with both commercial and non-commercial jurisprudence. A careful application of the *Central Hudson* test reveals that compelled monetary assessments for generic advertising is a free speech expression, exposes a substantial governmental interest in ensuring the viability of the agricultural economy, demonstrates that most generic advertising does not advance the government's interests, and in the end, reveals that marketing orders are excessive because they are inconsistent and lack direction. Ultimately, Congress must resolve this constitutional infringement by giving agricultural producers the freedom to promote and develop their individual brands without forcing them to finance unwanted messages that masquerade as generic advertising.