RECENT DEVELOPMENTS

THE END OF COMPELLED CONTRIBUTIONS FOR SUBSIDIZED ADVERTISING?: *United States v. United Foods*, 533 U.S. 405 (2001).

I. INTRODUCTION

Until the Supreme Court's opinion in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[1] commercial speech was not treated as a distinct category within First Amendment free speech jurisprudence.[2] That commercial speech should be granted lesser protection is a murky concept, supported by a tenuous balancing act between public and private interests. The marketing of goods produced in regulated industries is a prime breeding ground for this clash of public interests (the government's regulation) and private interests (freedom of speech and action). When the federal or state government thus compels contributions for subsidized industry-wide advertising, the result is complaints of forced commercial speech in contravention of the First Amendment.[3]

Seemingly, this issue was laid to rest in *Glickman v. Wileman Brothers & Elliot, Inc.*,[4] in which a divided Supreme Court held that compelled contributions of this sort do not violate the Constitution.[5] Last year, however, only four years after

---

1. 425 U.S. 748, 762 (1976) (holding that speech that does "no more than propose a commercial transaction" is nonetheless protected by the First Amendment).

2. *See, e.g.*, Valentine v. Christensen, 316 U.S. 52, 54 (1942) (as opposed to other forms of protected speech, there is "no such restraint on government as respects purely commercial advertising"); New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (stressing the difference between protected and "purely commercial" speech). In *Roth v. United States*, 354 U.S. 476 (1957), however, the Court recognized that "[a]ll ideas having even the slightest redeeming social importance . . . have the full protection of the guarantees [of the First Amendment], unless excludable because they encroach upon the limited area of more important interests." *Id.* at 484.

3. The Supreme Court has held repeatedly that the First Amendment "includes both the right to speak freely and the right to refrain from speaking at all." Wooley v. Maynard, 430 U.S. 705, 714 (1977). *See also* Bd. of Educ. v. Barnette, 319 U.S. 624, 633-34 (1943); Riley v. Nat'l Fed'n of Blind of N.C., 487 U.S. 781, 796-97 (1988).

4. 521 U.S. 457 (1997) (cited by the Court alternately as *Glickman* and *Wileman* and hereinafter cited as *Glickman*).

5. *Id.* at 476 ("The mere fact that one or more producers 'do not wish to foster'

Glickman, in *United States v. United Foods*,[6] the Court held that in an otherwise unregulated industry, compelled contributions for subsidized advertising *are* unconstitutional.[7] Despite this apparent departure, rather than overturn their decision in *Glickman*, the Court chose to distinguish *Glickman* and cabin its earlier holding.[8] As a result, instead of clarifying or broadening the scope of protection for commercial speech under the First Amendment, *United Foods* further clouds the waters of constitutional law.

II. A BRIEF REVIEW OF *GLICKMAN*

Four years ago, in a case factually similar to *United Foods*, the Supreme Court decided that no First Amendment issues were raised in *Glickman v. Wileman Bros. & Elliot, Inc.*[9] *Glickman* involved a First Amendment challenge to compelled contributions for generic advertising by California fruit growers.[10] Writing for the Court, Justice Stevens determined that "criticisms of generic advertising provide no basis for concluding that factually accurate advertising constitutes an abridgement of anybody's right to speak freely."[11] Because of the close connection between the legal questions addressed in *Glickman* and *United Foods*, it will be useful to review the *Glickman* Court's arguments.

Justice Stevens posited the legal question in *Glickman* as "whether being compelled to fund this [collectivized]

---

generic advertising of their product is not a sufficient reason for overriding the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial.").

6. 533 U.S. 405 (2001).

7. *Id.* at 416.

8. *Id.* at 415.

9. 521 U.S. at 457. The Court stated:

> [N]one of our First Amendment jurisprudence provides any support for the suggestion that the promotional regulations should be scrutinized under a different standard from that applicable to the other anticompetitive features of the marketing orders. . . . The First Amendment has never been construed to require heightened scrutiny of any financial burden that has the incidental effect of constraining the size of a firm's advertising budget.

Id. at 469. For a more complete discussion of *Glickman*, see Aaron A. Goach, Comment, *Free Speech and Freer Speech:* Glickman v. Wileman Bros. & Elliot, Inc., 21 HARV. J.L. & PUB. POL'Y 623 (1998); *Leading Case: Commercial Speech—Compelled Advertising*, 111 HARV. L. REV. 319 (1997).

10. 521 U.S. at 460.

11. *Id.* at 474.

advertising raises a First Amendment issue for us to resolve, or rather is simply a question of economic policy for Congress and the Executive to resolve."[12] Already, this formulation of the question indicated the Court's conclusion that in certain contexts commercial speech receives no consideration under the First Amendment. With this mentality, it was easy for Justice Stevens to restrict the precedential value of the Court's earlier commercial speech cases to their specific fact patterns. Granting the government's regulatory scheme a presumption of validity, Justice Stevens argued:

> First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not compel the producers to endorse or to finance any political or ideological views.[13]

Justice Stevens used these distinctions to distinguish *Glickman* from the Court's previous First Amendment decisions.[14] In particular, the Court considered the precedent set in *Abood v. Detroit Board of Education*,[15] a political speech case in which the Court invalidated a union requirement that teachers subsidize speech with which they disagreed.[16] Referring again to the generic nature of the collectivized advertising implicated in *Glickman*, however, Justice Stevens concluded that "[n]either the fact that respondents may prefer to foster that message independently in order to promote and distinguish their own products, nor the fact that they think more or less money should be spent fostering it, makes this case comparable to those in which an objection rested on political or ideological disagreement with the content of the message."[17] With all the Court's precedent neatly swept aside,[18]

---

12. *Id.* at 468.

13. *Id.* at 469-70.

14. *Id.* at 469 n. 12, 469 n. 13, 470 n. 14.

15. 431 U.S. 209 (1977).

16. *Id.* at 234 (agreeing with the argument that "they may constitutionally prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative").

17. *Glickman*, 521 U.S. at 472.

18. *See United Foods*, 533 U.S. 405, 423-24 (Breyer, J., dissenting) ("In [*Glickman*] we found . . . *all* of 'our compelled speech case law . . . clearly inapplicable' to compelled financial support of generic advertising.") (quoting *Glickman*, 521 U.S.

Justice Stevens placed the final nail in the coffin: "[a]lthough one may indeed question the wisdom of such a program, its debatable features are insufficient to warrant special First Amendment scrutiny."[19] After *Glickman*, the First Amendment was no longer a protection of all speech, as limited only by a few specific exceptions, but instead a protection of a few specific classes of speech.

The *Glickman* decision was, however, by no means unanimous. Rather, Justice Stevens's opinion is followed by a lengthy dissent by Justice Souter,[20] which was joined by the Chief Justice and Justices Scalia and Thomas, and a brief additional dissent by Justice Thomas,[21] which was joined again by Justice Scalia. These dissents questioned the majority's understanding of First Amendment jurisprudence generally and their application of *Abood* and other precedents specifically. In contrast to the conclusions drawn by and from Justice Stevens's majority opinion, Justice Souter started his analysis with the premise "that speech as such is subject to some level of protection unless it falls within a category, such as obscenity, placing it beyond the Amendment's scope, and that protected speech may not be made the subject of coercion to speak or coercion to subsidize speech."[22] It was to this same divided Court that *United Foods* was presented four years later.

III. FACTS AND PROCEDURAL HISTORY OF *UNITED FOODS*

A. Background to the Case

Congress enacted the Mushroom Promotion, Research, and Consumer Information Act (the "Mushroom Act" or the "Act")[23] in 1990 with a goal of "maintaining and expanding existing markets and uses of mushrooms."[24] This vague purpose was bolstered by even more vague desires to improve Americans' eating habits and benefit the environment. Operating with the power of these noble goals and fearing free-

---

at 470).

19. *Glickman*, 521 U.S. at 474.

20. *Id.* at 478-504 (Souter, J., dissenting).

21. *Id.* at 504-06 (Thomas, J., dissenting).

22. *Id.* at 478 (Souter, J., dissenting)

23. Pub. L. No. 101-624, §§ 1921-1933, 104 Stat. 3359, 3854-65 (codified at 7 U.S.C. § 6101-6112 (1994)).

24. 7 U.S.C. § 6101(b)(2).

rider problems, the Mushroom Act authorizes the Secretary of Agriculture to create the Mushroom Council to pursue these ends.[25] The Act then allows the Council to fund its efforts by imposing assessments on mushroom growers.[26] These monies are spent on generic mushroom advertising.[27]

In 1996, United Foods, a large, Tennessee-based agricultural enterprise, refused to pay its mandatory assessments under the Mushroom Act. Instead, arguing that the forced subsidization of advertising violated the First Amendment, United Foods filed a petition with the Secretary of Agriculture. This matter and the United States's subsequent action in district court were stayed pending the Supreme Court's decision in *Glickman*. After the *Glickman* decision was announced, United Foods's petition was rejected, and the district court upheld the Act and the government's ability to compel payments into the program.[28] United Foods appealed.

B. The Appeal

On appeal, the Sixth Circuit reversed the judgment of the district court and held that (a) *Glickman* was not controlling; and (b) the advertising scheme in question violated United Foods' First Amendment protection against compelled speech.[29] Writing for the Sixth Circuit, Judge Merritt clarified the relevant issue:

> The issue before us is whether the answer to the First Amendment question presented here should be the same as in the recent case of *Glickman v. Wileman Bros. & Elliot, Inc.*... in which the Supreme Court in a controversial 5-4 decision upheld a similar agricultural advertising program in the heavily regulated California tree fruits business (peaches, plums and nectarines).[30]

---

25. 7 U.S.C. § 6104(b).

26. 7 U.S.C. § 6104(g).

27. *See* United States v. United Foods, 533 U.S. 405, 408 (2001) ("It is undisputed ... that most monies raised by the assessments are spent for generic advertising to promote mushroom sales."). The Mushroom Act grants the Mushroom Council authority to spend assessment monies in a variety of manners, upon the approval of the Secretary of Agriculture. 7 U.S.C. § 6104(c).

28. *See United Foods*, 533 U.S. at 409 ("The District Court, holding *Glickman* dispositive of the First Amendment challenge, granted the government's motion for summary judgment.").

29. United Foods, Inc. v. United States, 197 F.3d 221, 224-25 (6th Cir. 1999).

30. *Id.* at 222 (citation omitted).

This formulation identifies the Sixth Circuit Court's hesitancy to grant *Glickman* precedential effect and its acceptance that in *United Foods* there *is* a First Amendment question. Judge Merritt further distilled the question to "whether the degree of government regulation of an industry controls the outcome or whether the government is right that this is irrelevant under [*Glickman*]."[31] After a lengthy discussion, Judge Merrit arrived at the conclusion that "[t]he Court's holding in [*Glickman*] . . . is that nonideological, compelled, commercial speech is justified in the context of the extensive regulation of an industry but not otherwise."[32] This interpretation of *Glickman* was sufficient for Judge Merritt to distinguish the case presented by United Foods with a single sentence—"Mushrooms are unregulated."[33] Unsatisfied with this distinction, the government petitioned the Supreme Court.

C. The Supreme Court

The Supreme Court affirmed in a six to three decision.[34] Writing for the majority, Justice Kennedy determined *Glickman* was not controlling. Applying other First Amendment precedent, Justice Kennedy concluded that mandatory assessments for advertising in an otherwise unregulated environment constitute a First Amendment violation.

Justice Kennedy outlined the law of commercial speech and narrowed the question before the Court to "whether the government may underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, some of whom object to the idea being advanced."[35] This formulation of the legal question curiously omits reference to the overall level of regulation experienced by the affected industry. As a result, the Court's answer was a

31. *Id.* at 222-23.

32. *Id.* at 224.

33. *Id.*

34. United States v. United Foods, 533 U.S. 405, 407 (2001). The *United Foods* majority included Justices Kennedy, Rehnquist, Stevens, Scalia, Souter, and Thomas, with Justices Breyer, Ginsburg, and O'Connor dissenting. By contrast, the *Glickman* majority included Justices Stevens, O'Connor, Kennedy, Ginsburg, and Breyer, with Justices Souter, Rehnquist, Scalia, and Thomas dissenting. Note that Justices Kennedy and Stevens (the majority opinion-writers) constituted the swing votes. This shift will be discussed in Part IV, *infra*.

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

resounding 'sometimes.'

Rather than considering whether the First Amendment was implicated by forced subsidization of commercial speech, as the Court had done in *Glickman*, Justice Kennedy began from the following bold premise:

> First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors; and there is no apparent principle which distinguishes out of hand minor debates about whether a branded mushroom is better than just any mushroom. As a consequence, the compelled funding for the advertising must pass First Amendment scrutiny.[36]

The rule thus enunciated by the Court in *United Foods* is that compelled contributions for advertising *do* raise First Amendment issues, and regulatory schemes involving these subsidies must pass First Amendment scrutiny.

After stating this new rule of First Amendment jurisprudence, the Court proceeded to address the apparent similarities between *United Foods* and *Glickman*. Rather than overturn *Glickman*, however, the Court distinguished *United Foods* on the facts of the cases. Justice Kennedy wrote:

> The program sustained in *Glickman* differs from the one under review in a most fundamental respect. In *Glickman* the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy. Here, for all practical purposes, the advertising itself, far from being ancillary, is the principal object of the regulatory scheme.[37]

This distinction—that the level of regulation experienced in each case is different—was the banner the majority waived as they proceeded to sidestep *Glickman*. Ignoring the statutory similarities between the two industries,[38] Justice Kennedy relies on the levels of regulation actually experienced. Justice Kennedy notes that in *Glickman* "their mandated participation in an advertising program with a particular message was the

36. *Id.* at 411.

37. *Id.* at 411-12.

38. *Id.* at 415 ("Although greater regulation of the mushroom market might have been implemented under the Agricultural Marketing Agreement Act of 1937, the compelled contributions for advertising are not part of some broader regulatory scheme.") (citation omitted).

logical concomitant of a valid scheme of economic regulation,"[39] but in *United Foods*, "[a]s respondent notes, and as the government does not contest, almost all of the funds collected under the mandatory assessments are for one purpose: generic advertising."[40] With this distinction weakly established, the decision was made.

The Court then rested on the precedents set by *Abood v. Detroit Board of Education*[41] and *Keller v. State Bar of California*,[42] both of which required that subsidized speech be germane to the larger purpose used to justify the association.[43] With these cases in mind, Justice Kennedy wrote that "it is only the overriding associational purpose which allows any compelled subsidy for speech in the first place."[44] Finding no such associational purpose, the Court applied First Amendment scrutiny to the marketing order and affirmed the Appellate Court's decision.[45]

D. The Concurrences

Justice Kennedy's majority opinion is followed by two concurrences, by Justices Stevens and Thomas, both of whom also joined the majority. Justice Stevens added his concurrence to reiterate the opinion he wrote in *Glickman*, while Justice Thomas reiterated his *Glickman* dissent.

Justice Stevens's concurrence clarifies the majority's distinction between *United Foods* and *Glickman*. According to Justice Stevens, "[t]he incremental impact on the liberty of a person who has already surrendered far greater liberty to the collective entity (either voluntarily or as a result of permissible compulsion) does not, in my judgment, raise a *significant* constitutional issue if it is ancillary to the main purpose of the

39. *Id.* at 412.

40. *Id.*

41. 431 U.S. 209 (1977).

42. 496 U.S. 1 (1990).

43. *See Abood*, 431 U.S. at 235-36 (holding that a union can only finance speech not germane to collective bargaining with the monies of non-objecting members); *Keller*, 496 U.S. at 13-14 (holding that state bar association can only compel the payment of funds for activities germane to the association's purpose).

44. *United Foods*, 533 U.S. at 413. Justice Kennedy discarded as new on appeal the government's argument that mushroom advertising is government speech, which is exempt from First Amendment scrutiny. *Id.* at 416-17.

45. *Id.* at 417.

collective program."[46] This statement mirrors the sentiment Justice Stevens claims to have embedded in his *Glickman* opinion. Justice Stevens's usage of the adjective "significant" in this context, however, indicates that, although the Court had refused to apply First Amendment strict scrutiny, the *Glickman* scenario had, in fact, raised a constitutional issue; the issue was simply not significant.

The issue in *United Foods* apparently reached the level of significance necessary to require First Amendment protection. According to Justice Stevens, "[t]he naked imposition of such compulsion, like a naked restraint on speech itself, seems quite different to me."[47] By noting this difference, he maintained an appearance of internal consistency between the two decisions. Despite this waffling, Justice Stevens's concluding remark is more broad: "[S]urely the interest in making one entrepreneur finance advertising for the benefit of his competitors, including some who are not required to contribute, is insufficient [to justify a compelled subsidy like this]."[48]

Reiterating his dissent in *Glickman*, Justice Thomas added his brief concurrence to the majority opinion in *United Foods*. In both cases, Justice Thomas argues that "[a]ny regulation that compels the funding of advertising must be subjected to the most stringent First Amendment scrutiny."[49] In *Glickman*, this opinion was the losing proposition, but in *United Foods*, Justice Thomas found himself in the majority.

E. The Dissent

In a lengthy dissent, Justice Breyer rejects the *Glickman-United Foods* distinction offered by Justice Kennedy for the majority and reinforced by Justice Stevens's concurrence. Refusing to acknowledge the Court's perceived differences between the two cases, Justice Breyer states that the Court in *Glickman* relied on three factors:

> First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not

46. *Id.* at 418 (Stevens, J., concurring) (emphasis added).
47. *Id.* (Stevens, J., concurring).
48. *Id.* (Stevens, J., concurring).
49. *Id.* at 419 (Thomas, J., concurring).

> compel the producers to endorse or to finance any political or ideological views.[50]

Justice Breyer then argues that "[t]his case, although it involves mushrooms rather than fruit, is identical in each of these three critical respects. No one, including the Court, claims otherwise. And I believe these similar characteristics demand a similar conclusion."[51] Referring to the level-of-regulation distinction made by the majority,[52] Justice Breyer continues: "But the record indicates that the differences to which the Court points could not have been critical."[53] Once this distinction is abolished, Justice Breyer claims that the case does not resemble *Barnette*[54] or *Wooley*[55] and should have been decided in line with *Glickman*.[56] Finally, Justice Breyer argues that even if First Amendment scrutiny is applied to the regulatory scheme in *United Foods*, the program is not unconstitutional.[57]

IV. ANALYSIS

A. Why Not Overrule Glickman?

Implicit shifts in doctrine can blur the line of constitutional protection,[58] as the Court has now done in *United Foods*. A quick glance at the line-up in *Glickman* and *United Foods* indicates the Court's recent shift in First Amendment commercial speech jurisprudence.

---

50. *Id.* at 419 (Breyer, J., dissenting) (citing *Glickman*, 521 U.S. 457, 469-70 (1996)).

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

52. *See supra* notes 27 and 38.

53. *United Foods*, 533 U.S. at 420. (Breyer, J., dissenting).

54. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding that children could not be compelled to salute the American flag).

55. Wooley v. Maynard, 430 U.S. 705 (1977) (holding that New Hampshire may not require motorists to display the motto "Live Free or Die").

56. *United Foods*, 533 U.S. at 423-24 (Breyer, J., dissenting) ("The use of assessments to pay for advertising does not require respondents to repeat an objectionable message out of their own mouths.").

57. *Id.* at 429 (Breyer, J., dissenting) (reasoning that the government's interest is substantial and directly advances the regulatory goals). Although the Author does not agree with Justice Breyer's argument, a similar argument may have been appropriate in *Glickman*—that the First Amendment *was* implicated but that the regulation still advanced a substantial government interest.

58. *See* United States v. Lopez, 514 U.S. 549, 566 (1995) (acknowledging that the commercial/non-commercial distinction "may in some cases result in legal uncertainty").

Table 1
Judicial Alignments in *Glickman* and *United Foods*[59]

	Assessments Constitutional	Assessments Unconstitutional
Glickman	Stevens, O'Connor, Kennedy, Ginsburg, Breyer	Souter, Rehnquist, Scalia, Thomas
United Foods	Breyer, Ginsburg, O'Connor	Kennedy, Rehnquist, Stevens, Scalia, Souter, Thomas

Justices Stevens and Kennedy, the opinion writers in *Glickman* and *United Foods*, respectively, constitute the swing between the two decisions. The remaining Justices maintained their sides on the issue.[60] The arguments of Justices Stevens and Kennedy are thus the crux of today's First Amendment debate.

As members of the majority in both cases, it was in Justice Stevens's and Justice Kennedy's interests to distinguish *United Foods* rather than overrule the precedent they had set only four terms earlier. Writing for the *United Foods* majority, Justice Kennedy notes this tension: "Though four Justices who join this opinion disagreed, the majority of the Court in *Glickman* found the compelled contributions were nothing more than additional economic regulation, which did not raise First Amendment concerns."[61] Although finding in favor of United Foods and striking down the government's regulatory scheme, Justices Kennedy and Stevens clung to the notion that *Glickman* was decided correctly. As the dissenters in *United Foods* aptly point out and as Justices Kennedy and Stevens tacitly admit, the claimed distinction is based on faulty logic and misinterpretation. Is *United Foods* incorrectly decided or did

59. The *Glickman* majority is listed under "Assessments Constitutional;" the *United Foods* majority is listed under "Assessments Unconstitutional."

60. It is also interesting to note that Chief Justice Rehnquist and Justice O'Connor continue to differ on this issue despite their agreement in most other contexts. Over the course of the 1990s, the two Justices aligned in 78.6 percent of cases, with the percentage increasing to 92.2 percent in the period 1995–1999. *See The Supreme Court in the Nineties: A Statistical Retrospective*, 114 HARV. L. REV. 402, 404, 406 (2000).

61. *United Foods*, 533 U.S. 405, 415 (2001).

United Foods implicitly overrule *Glickman*?

B. Is United Foods *Correct Or Should* Glickman *Stand?*

Justice Breyer's dissenting statement that "similar characteristics demand a similar conclusion"[62] may be proper for the strict observance of precedent, but just as the Court in *Lopez* correctly chose to rein in the expansion of the Commerce Clause, the Court in *United Foods* correctly reaffirmed broad protection for commercial speech. Noting that "First Amendment values are at serious risk,"[63] and that the Court has "not upheld compelled subsidies for speech in the context of a program where the principal object is speech itself,"[64] the Supreme Court decided in *United Foods* that compelled contributions for advertising violated the First Amendment. Although the Court's opinion did not expressly overrule *Glickman* and despite the unclear and incorrect distinction made between *Glickman* and *United Foods*, the majority in *United Foods* properly applied the First Amendment precedents that *Glickman* abandoned.

Perhaps most importantly, the Supreme Court in *United Foods* reinterpreted the precedent set by *Abood v. Detroit Board of Education*.[65] In *Glickman*, the Court claimed that *Abood* had "*merely* recognized a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's 'freedom of belief.'"[66] Under this interpretation, the Court was able to distinguish *Glickman*: "[h]ere, however, requiring respondents to pay the assessments cannot be said to engender any crisis of conscience."[67] Justice Kennedy quotes the *Glickman* interpretation in *United Foods*, but the word "merely" mysteriously has disappeared from the Court's opinion.[68] Reconsidering the precedent, the Court in *United Foods* reads *Abood* more broadly and "take[s] further instruction . . . from *Abood*'s statement that speech need not be

62. *Id.* at 420 (Breyer, J., dissenting).
63. *Id.* at 411.
64. *Id.* at 415.
65. 431 U.S. 209 (1977).
66. *Glickman*, 521 U.S. 457, 471 (1996) (emphasis added).
67. *Id.* at 472.
68. *United Foods*, 533 U.S. at 413 ("We did say in *Glickman* that *Abood* 'recognized . . . .'").

characterized as political before it receives First Amendment protection."[69] This latter statement of the Court's intent refers to Justice Stewart's majority opinion in *Abood,* which repeatedly denies limitation to the First Amendment's coverage. According to Justice Stewart, "[n]othing in the First Amendment or our cases discussing its meaning makes the question whether the adjective 'political' can properly be attached to those beliefs the critical constitutional inquiry."[70] Similarly, Justice Stewart rejected the public/private distinction and other factors that could be seen to limit the scope of the First Amendment.[71] According to *Abood,* the First Amendment recognizes all speech and compelled speech; therefore, a "proper application of the rule in *Abood* requires [the Court in *United Foods*] to invalidate the [Mushroom Act]."[72]

An interpretation of *Keller v. State Bar of California*[73] that emphasizes positive rights of free speech and action also supports the Court's decision in *United Foods.* In *Glickman,* the Court interpreted *Keller* to stand for the proposition that the government *may* act except in certain circumstances. After identifying his interpretation of the *Keller* test,[74] Justice Stevens remarked that "[t]his test is clearly satisfied in this case because . . . in any event, the assessments are not used to fund ideological activities."[75] It was this type of interpretation that was criticized at length by the *Glickman* dissent.[76]

The *United Foods* Court properly reinterpreted *Keller* in a more limited, positive fashion. According to Justice Kennedy, "[t]he central holding in *Keller* . . . was that the objecting members were not required to give speech subsidies for matters not germane to the larger regulatory purpose . . . ."[77]

---

69. *Id.*

70. *Abood,* 431 U.S. at 232.

71. *Id.* ("The differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights.").

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

73. 496 U.S. 1 (1990).

74. Quoting *Keller* at length, Justice Stevens identified the test as (1) whether the regulation is germane to the associational purpose; and (2) whether the regulation "fund[s] activities of an ideological nature which fall outside of those areas of activity." *Glickman,* 521 U.S. 457, 473 (1996).

75. *Id.*

76. *Id.* at 483-86 (Souter, J., dissenting) ("The Court recognizes the centrality of the *Abood* line of authority for resolving today's case, but draws the wrong conclusions from it.").

77. *United Foods,* 533 U.S. 414.

Although this interpretation still leaves room for government regulation, it indicates that such regulation must work against a presumption of First Amendment protection and acknowledges that any such regulation involves "the imposition upon . . . First Amendment rights."[78]

Based on these precedents, *Glickman* should have been decided under the presumption that even "the speech of heavily regulated businesses may enjoy constitutional protection."[79] The bottom line of the *United Foods* Court's correct application of precedent is that all subsidies for commercial speech implicate the First Amendment. The Court in *United Foods* thus correctly applied First Amendment scrutiny to the Mushroom Act.

C. With What Are We Left?

It is disappointing that the Court in *United Foods* chose not to overrule *Glickman*. Critical shifts by the Supreme Court, however, often require that otherwise-controlling precedent be carefully sidestepped rather than overruled, in order to build the necessary coalition to form a majority. The Court's recent Commerce Clause jurisprudence, for example, has involved a number of such maneuvers. In *United States v. Lopez*,[80] Chief Justice Rehnquist wrote an opinion to halt the growth of the Commerce Clause.[81] To maintain the crucial votes of Justices O'Connor, Kennedy, and Thomas,[82] however, Rehnquist apparently was forced to write the *Lopez* opinion narrowly and carefully sidestep six decades of Commerce Clause jurisprudence.[83] Unfortunately, the Supreme Court buried the

78. *Id.* at 415.

79. Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 534 n. 1 (1980). This opinion was not cited in *Glickman* and only appeared in the dissent to *United Foods*. *See United Foods*, 533 U.S. at 428 (Breyer, J., dissenting) (citing *Consolidated Edison* as a counter-point to the statement: "the Court's unreasoned distinction between heavily regulated and less heavily regulated speakers could lead to less First Amendment protection in that it would deprive the former of protection.").

80. 514 U.S. 549 (1995).

81. *Id.* at 567 (holding that the Commerce Clause requires (1) an economic activity (2) with an effect on (3) interstate commerce).

82. Justice Kennedy filed a concurrence, in which Justice O'Connor joined. *Id.* at 568 (Kennedy, J., concurring). Justice Thomas also wrote a concurring opinion. *Id.* at 584 (Thomas, J., concurring).

83. *See id.* at 565 ("Justice Breyer rejects our reading of precedent"). Note that Justice Breyer continues to defend precedent in *United Foods*.

fact that it was changing course, leaving little indication of how to proceed in the future.[84]

Similarly, the precedential value of *Glickman* has been neither eliminated nor fully emasculated. Rather, the language of *United Foods* identifies a First Amendment boundary between compelled contributions for advertising under a regulatory scheme aimed exclusively at such advertising and similar contributions under more expansive regulatory programs. According to the Court, the former deserves protection; the latter does not.[85] Although the existence of such a boundary is identified, lower courts are not offered any guidance as to its exact location. As Justice Breyer readily admitted in his dissent: "[a]t a minimum, the holding here [in *United Foods*], when contrasted with that in *Wileman*, creates an incentive to increase the government's involvement in any information-based regulatory program, thereby unnecessarily increasing the degree of that program's restrictiveness."[86]

United Foods may ultimately have the *effect* of overruling *Glickman*. As indicated above, the general statements of the majority in *United Foods* indicate a broad constitutional baseline of First Amendment protection. These sentiments may pave the way for future First Amendment protection against governmentally-coerced speech. Until this issue reaches the Supreme Court again, however, the jurisprudence of First Amendment commercial speech will remain unsettled.

Paul M. Schoenhard

---

84. *See* E. Spencer Abraham, *Introduction*, 20 HARV. J.L. & PUB. POL'Y 1, 13 (1996). According to then-Senator Abraham:

> Unfortunately, the Lopez opinion has the weaknesses of its strengths. Chief Justice Rehnquist, although pointing to the problems with the government's view, tells us little about what kinds of federal laws are and are not within Congress's commerce power. Beyond the observation that education and crime are traditionally local concerns, he gives little information about the principles on which future decisions will be based. Thus we do not know whether a law premised on a slightly shorter causal chain, or even one that is simply different, would be upheld.

Id.

85. This point is made explicit in Justice Stevens's *United Foods* concurrence. *See* United States v. United Foods, 533 U.S. 405, 417-18 (2001) (Stevens, J., concurring); discussion in Part III, *supra*.

86. *Id.* at 429 (Breyer, J., dissenting).