

Do We Have a Beef With the Court? Compelled Commercial Speech Upheld, but It Could Have Been Worse

Daniel E. Troy*

Johanns v. Livestock Marketing Association expanded the “government-speech doctrine” at the expense of commercial speech. In upholding the Beef Promotion and Research Act of 1985, the Court weakened the protections afforded businesses compelled to fund commercial messages with which they disagree. Although the Court sidestepped application of the *Central Hudson* test for regulations of commercial speech, the opinion nevertheless continues the jurisprudential mistake of treating commercial messages as “lower value” speech. That proposition is easily established by asking what would have been the reaction to the decision had *Johanns* involved a hot button political issue rather than a beef checkoff program.

The result, however, may not be all negative. First, the Court did not apply the *Central Hudson* test, which affords reduced constitutional protection to commercial speech. Second, the Court adopted a new rule that, at least facially, appears to treat commercial speech as more equal to other forms of expression. Also, by moving away from the *Glickman* and *United Foods* line of precedents, the Court abandoned a test that created an incentive for the government to regulate more rather than less. Meanwhile, *Johanns* leaves open the possibility of selected challenges to invocations of the government-speech doctrine. Such challenges may ultimately impose a limit on what seems now like a boundless doctrine.

*Daniel E. Troy is a partner in the Washington, D.C., and New York offices of Sidley Austin Brown & Wood, where he practices food and drug law, as well as constitutional and appellate litigation. From 2001 to 2004, he was Chief Counsel of the U.S. Food and Drug Administration. He wishes to thank Kurt Kastorf, a summer associate at Sidley, for his invaluable assistance in preparing this article.

I. Introduction

Imagine that the federal government were to impose a special tax exclusively on abortion clinics and used the revenue generated to launch a national advertisement campaign with the slogan “Abortion Providers: Murderers for Hire.” On each advertisement is emblazoned “Paid for by America’s Abortion Providers.” Further imagine that pro-choice groups, understandably upset by such a campaign, push to have the tax repealed. Then, to defeat the repeal effort, government officials respond by funneling the money collected from the abortion providers into a propaganda campaign to build public and legislative support for the tax. Such a campaign would result, at minimum, in a public outcry. Most citizens and politicians to the left of the political spectrum, as well as many on the right, would be outraged and characterize the program as an impermissible compulsion of speech and an inappropriate use of federal funds.

Yet, in *Johanns v. Livestock Marketing Association*,¹ the Supreme Court approved an analogous program and barely made the news. What accounts for the lack of outcry over *Johanns*? The answer is obvious: unlike the hypothetical abortion campaign, which involves compelling controversial political speech, *Johanns* concerned commercial speech.

Specifically, *Johanns* involved a First Amendment challenge to the Beef Promotion and Research Act of 1985.² The Act directed the secretary of agriculture to impose a dollar-per-head assessment (“checkoff”) on all sales or importation of cattle and a proportional assessment on imported beef products.³ It also required the secretary to appoint a Cattlemen’s Beef Promotion and Research Board. That Board, in turn, convened an Operating Committee composed of ten board members and ten representatives named by a federation of state beef councils.⁴ The Operating Committee spent the majority of the assessment on beef-related promotional campaigns. These campaigns typically included the familiar slogan: “Beef. It’s What’s

¹125 S. Ct. 2055 (2005).

²99 Stat. 1597 (codified at 7 U.S.C. § 2901 et seq.).

³125 S. Ct. at 2058.

⁴*Id.*

for Dinner.”⁵ Many of the promotional messages bear the attribution “Funded by America’s Beef Producers.”⁶

The challengers to the program included two associations representing members who collect and pay the checkoff, as well as individual cattle producers and dealers also subject to the assessment.⁷ Before bringing their suit, the plaintiffs invoked a provision of the Act allowing beef producers to petition the secretary of agriculture to hold a referendum on the continuation of the beef checkoff program.⁸ These producers opposed promoting beef as a generic commodity. They contended such a campaign impeded their ability to promote superior subclasses of beef such as American beef, grain-fed beef, and certified Angus or Hereford beef.⁹

The secretary never even held the referendum.¹⁰ Instead, the Beef Promotion and Research Board responded to the petition attempt by using the very money collected through the assessment to promote the Beef Act to cattle producers and legislators and, thus, perpetuating its own existence.¹¹ The U.S. Department of Agriculture, meanwhile, delayed processing the petition. It then declared the petition’s signatures invalid.¹²

The plaintiffs responded by filing suit in federal district court. They alleged, among other things, that the Act violated their First Amendment rights by compelling them to fund a commercial message with which they disagreed.¹³ The district court and the U.S. Court of Appeals for the Eighth Circuit agreed with the plaintiffs, finding a violation of the First Amendment.¹⁴ The Supreme Court, however, vacated and remanded. It determined that the promotional

⁵*Id.* at 2059.

⁶*Id.*

⁷*Id.*

⁸*Livestock Marketing Association v. United States Department of Agriculture*, 132 F. Supp. 2d 817, 820 (D. S.D. 2001).

⁹*Johanns*, 125 S. Ct. at 2060.

¹⁰*Livestock Marketing Association*, 132 F. Supp. 2d at 821–22.

¹¹*Id.* at 821.

¹²*Id.* at 821–22.

¹³*Johanns*, 125 S. Ct. at 2059.

¹⁴*Livestock Marketing Association v. United States Department of Agriculture*, 335 F.3d 711, 725–26 (8th Cir. 2003); *Livestock Marketing Association v. United States Department of Agriculture*, 207 F. Supp. 2d 992, 1002 (D. S.D. 2002).

campaign was government speech, and hence not susceptible to a First Amendment challenge.¹⁵

Interpreting the implications of *Johanns* for commercial speech requires some background about commercial speech generally as well as about commodity checkoff programs specifically. Part II of this article examines the history of the commercial-speech doctrine, as well as the litigation over commodity checkoff programs preceding the *Johanns* decision. Part III questions the logic underlying the decision. Part IV, however, tempers criticism of *Johanns*. Although lovers of freedom should view the decision with disappointment, the message may not be quite as bad as it could have been. The “government-speech” rationale may have been preferable to the other grounds on which the Court could have found for the government, and the majority opinion’s language leaves open the possibility of attaching meaningful limits to the scope of the doctrine in future decisions. Finally, the Court rejected the Eighth Circuit’s invitation to apply the *Central Hudson* test, which treats commercial speech as deserving of less-than-full constitutional protection.

II. Background

A. *The History of Commercial Speech*

1. “Lower Value” Speech

The Supreme Court has long treated commercial speech, such as advertisements placed in a newspaper or magazine, differently than other content.¹⁶ Generally, the government may impose reasonable restrictions on the time, place, or manner of speech, but only if it does so in a content-neutral way.¹⁷ In sharp contrast, the Court allows restrictions on commercial speech, even of truthful information concerning lawful products, if that regulation “directly advances” a “substantial governmental interest” in a manner “not more extensive than is necessary to serve that interest.”¹⁸ Employing this test

¹⁵*Johanns*, 125 S. Ct. at 2066.

¹⁶Daniel E. Troy, Advertising: Not “Low Value” Speech, 16 Yale J. on Reg. 85, 88 (1999).

¹⁷Content-neutral speech restrictions are those that apply to all speech, regardless of subject matter. See, e.g., *Firsby v. Schultz*, 487 U.S. 474, 481 (1988).

¹⁸*Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 573 (1980).

gives the government more control over the content of advertisements than it has over other communications, such as those concerning political, scientific, or artistic issues.¹⁹

Scholars are sharply divided over the Court's approach to commercial speech. Some believe that commercial speech need not be afforded status under the First Amendment equal to other speech.²⁰ Others find little logical or historical justification for concluding that commercial speech is of "lower value" than other modes of expression.²¹

The First Amendment itself provides no basis for affording commercial speech second-class status. It reads: "Congress shall make no law . . . abridging the freedom of Speech, or of the Press."²² That the language of the First Amendment is categorical, however, is not sufficient to demonstrate that commercial speech ought to enjoy full constitutional protection. Few would argue, for example, that the Amendment prohibits imposing limits on speech that creates an imminent and grave danger.²³ Examining the original understanding

¹⁹Troy, *supra* note 16, at 88.

²⁰See, e.g., Cass R. Sunstein, Democracy and the Problem of Free Speech 123–24 (1993); Alexander Meiklejohn, Political Freedom (1960); Akhil Reed Amar, Intratextualism, 112 Harv. L. Rev. 747, 812–18 (1999); C. Edwin Baker, Commercial Speech: A Problem in the Theory of Freedom, 62 Iowa L. Rev. 1 (1976); Lillian R. BeVier, The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle, 30 Stan. L. Rev. 299, 352–55 (1978); Vincent Blasi, The Pathological Perspective and the First Amendment, 85 Colum. L. Rev. 449, 484–89 (1985); Thomas H. Jackson & John Calvin Jeffries, Jr., Commercial Speech: Economic Due Process and the First Amendment, 65 Va. L. Rev. 1 (1979); Frederick Schauer, Commercial Speech and the Architecture of the First Amendment, 56 U. Cin. L. Rev. 1181, 1187 (1988); William Van Alstyne, Remembering Melville Nimmer: Some Cautionary Notes on Commercial Speech, 43 UCLA L. Rev. 1635, 1640 (1996).

²¹44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 522 (1996) (Thomas, J., concurring). See also Troy, *supra* note 16, at 89. See, e.g., Alex Kozinski & Stuart Banner, Who's Afraid of Commercial Speech, 76 Va. L. Rev. 627, 628 (1990); Martin H. Redish, The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression, 39 Geo. Wash. L. Rev. 429, 431 (1971); Rodney A. Smolla, Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech, 71 Tex. L. Rev. 777, 780, 782 (1993). Cf. Kathleen M. Sullivan, Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart, 1996 Sup. Ct. Rev. 123, 147–60.

²²U.S. Const. amend. I.

²³See, e.g., Schenck v. United States, 249 U.S. 47 (1919) (clear and present danger).

of the First Amendment is thus necessary to determine the categories of speech that warrant constitutional protection.

2. *Commercial Speech in Historical Context*

As I have shown at length elsewhere, the colonial history preceding the passage of the First Amendment demonstrates that government efforts to regulate commercial speech should be judged by the same searching inquiry employed in assessing restrictions on other forms of speech.²⁴ Several factors show that the Framers believed that the right to advertise was encompassed within the “freedom of the press.” First, the Founders viewed freedom of speech and property rights as the essential components of individual liberty.²⁵ In *Cato’s Letters*, the authors articulated the inextricable link between free speech and property rights, writing: “This sacred privilege is so essential to free government, that the security of property; and the freedom of speech, always go together; and in those wretched countries where a man cannot call his tongue his own, he can scarce call anything else his own.”²⁶ That view is echoed in the writings of James Madison, who drafted the First Amendment.²⁷

Second, paid advertisements provided both the motive and means for the spread of the press across colonial America.²⁸ American newspapers emerged only as colonial business and industry began to expand.²⁹ These newspapers did not just depend on advertising for their support; they were the primary vehicles for disseminating commercial information.³⁰ Advertisements, like other forms of

²⁴Troy, *supra* note 16, at 93–108.

²⁵*Id.* at 93–96; John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. Chi. L. Rev. 49, 58–63 (1996). See also John Locke, *The Second Treatise on Government* 4 (Thomas P. Peardon ed., Bobbs-Merrill 1st ed. 17th prtng. 1975) (1690) (defining the “state of perfect freedom” as the ability of people “to order their actions and dispose of their possessions and persons as they think fit”).

²⁶John Trenchard & Thomas Gordon, 1 *Cato’s Letters* 110 (Ronald Hamow ed., Liberty Classics ed. 1995) (1720–23).

²⁷See, e.g., James Madison, *Property*, *The Nat’l Gazette*, Mar. 27, 1792, reprinted in 14 *The Papers of James Madison* 266–68 (Robert A. Rutland et al. eds., 1983) (1792).

²⁸Troy, *supra* note 16, at 97–101.

²⁹See Edwin Emery & Michael Emery, *The Press and America* 18 (1978).

³⁰James Playsted Wood, *The Story of Advertising* 85 (1958).

speech, were thought to inform the reading public.³¹ Given the importance of advertising to colonial Americans, modern constitutional scholars are at odds with history when they characterize commercial speech as “lower value.”

Third, the colonial American opposition to government interference with commercial speech proved a catalyst of the American Revolution.³² The British Stamp Act of 1765 assessed a tax on each newspaper printed, as well as a per-advertisement fee.³³ This tax, perceived as an offense to property rights, galvanized the colonial press against the British government.³⁴ The successful repeal of the Stamp Act demonstrates the commitment of early Americans to an independent press and their willingness to fight against monetary restrictions on commercial speech.³⁵

Finally, examining state statutes in place when the First Amendment was ratified reveals that early America did not restrict commercial messages about lawful products or services.³⁶ The only limitations placed on advertising concerned the promotion of unlawful activity.³⁷ These early statutes in fact demonstrate that state legislatures viewed advertising as an important social tool, and sometimes

³¹See, e.g., *History of Printing in America with a Biography of Printers, and an Account of Newspapers* (1810), quoted in D. Boorstin, *The Americans: The Colonial Experience* 328 (1958).

³²Troy, *supra* note 16, at 101–02.

³³See Arthur Schlesinger, Sr., *Prelude to Independence: The Newspaper War on Britain 1764–1776*, at 68 (1966).

³⁴See Kent R. Middleton, *Commercial Speech in the Eighteenth Century*, in *Newsletters to Newspapers: Eighteenth-Century Journalism* 277, 282 (Donovan H. Bond & W. Reynolds McLeod eds., 1977); see also *Objections by A Son of Liberty*, N.Y. J., Nov. 8, 1787, reprinted in 6 *The Complete Anti-Federalist* 34, 36 (Herbert J. Storing ed., 1981).

³⁵See Eric Neisser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 *Geo. L.J.* 257, 264 (1985).

³⁶Troy, *supra* note 16, at 103–06.

³⁷See, e.g., *Act for the Prevention of Lotteries, 1792, The Laws of Maryland 189–90* (1811); *Act to Prevent Horse Racing, 1803, The Public Statute Laws of the State of Connecticut 381–82* (1808); *Act Enabling the Town-Councils of Each Town in This State to Grant Licenses for Retailing Strong Liquors, and to Prevent the Selling of the Same without License, and against the Keeping of Signs at Unlicensed Houses, 1728, The Public Laws of the State of Rhode Island and Providence Plantations 391–95* (1798).

even required advertising as a means of protecting the property and legal rights of others.³⁸

This “robust tradition of American commercial speech” continued through the Civil War and the ratification of the Fourteenth Amendment.³⁹ A review of state legislative practices around the time of the Fourteenth Amendment’s ratification reveals that regulation of advertising remained limited to restrictions on promotion of illegal products and services.⁴⁰ Accordingly, incorporating the behavior of the post-Civil War states into an originalist examination of the First Amendment provides additional evidence that commercial speech ought to be afforded full constitutional protection.⁴¹

B. Modern Commercial-Speech Doctrine

1. The Decline of Equal Treatment for Advertisers

Given advertising’s rich role in our nation’s founding, it may appear surprising that the Supreme Court would afford commercial speech anything less than full First Amendment protection. The emergence of a schism between the commercial-speech doctrine and protections for other modes of expression is, to some extent, a historical accident. During the early twentieth century, courts began to analyze constraints on commercial speech under the rubric of substantive due process. This conflation of categories—restrictions placed on advertisements are infringements on speech, not mere economic regulations—has come back to haunt First Amendment jurisprudence. When the Court began to repudiate the *Lochner*-era

³⁸Troy, *supra* note 16, at 105; see also Act for Amending, and Reducing into System, the Laws and Regulations Concerning Last Wills and Testaments, the Duties of Executors, Administrators and Guardians, and the Rights of Orphans and Other Representatives of Deceased Persons, 1798, Laws of Maryland 457–60 (1811).

³⁹Troy, *supra* note 16, at 109.

⁴⁰*Id.*

⁴¹The restrictions imposed by the First Amendment originally applied only to the federal government. The Supreme Court later considered those restrictions to have been “incorporated” against the states through the Fourteenth Amendment. See *Gitlow v. New York*, 268 U.S. 652 (1925). Thus, originalist jurists consider Reconstruction-era legislative practices to provide relevant evidence of the protections afforded commercial speech. See, e.g., *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 517 (1996) (Scalia, J., concurring) (treating post-Civil War state legislative practices as relevant to the commercial-speech inquiry).

notion that economic regulations violated the Due Process Clause, constitutional protections for advertising crumbled.⁴²

The beginning of the twentieth century saw the Gilded Age give way to the Progressive Era as disenchantment with unfettered capitalism grew.⁴³ The Supreme Court pushed back against the Progressive movement, striking down social welfare programs on the belief that they infringed on natural rights of contract and property. In the early twentieth century's most famous case, *Lochner v. New York*,⁴⁴ the Court struck down a state law that capped the work week at sixty hours for bakery employees.

Although the early twentieth century saw some push for advertising reform, commercial speech remained well-protected. Legislative efforts to clean up false or misleading commercial ads essentially codified the existing common law.⁴⁵ World War I helped to glorify the advertising industry, as ample marketing helped to sell \$24 billion in war bonds and raise \$400 million for the Red Cross.⁴⁶ Both the Supreme Court and state courts protected commercial speech when it was threatened, invoking the due process right to economic liberty.⁴⁷

The national mood changed in the wake of the Great Depression. Advertising took a hard hit, losing out both in terms of income and public esteem.⁴⁸ Public outcry against commercialism resulted in best-selling exposés of advertising practices and a widespread call for increased restrictions on commercial speech.⁴⁹

The Supreme Court, meanwhile, had begun backing away from its *Lochner*-era jurisprudence, allowing states to expand their police

⁴²Troy, *supra* note 16, at 114–22.

⁴³See, e.g., Matthew Josephson, *The Robber Barons* 445–53 (1934); Rudolph J.R. Peritz, *Competition Policy in America 1888–1992: History, Rhetoric, Law* 11 (1996).

⁴⁴198 U.S. 45 (1905).

⁴⁵See Wood, *supra* note 30, at 336 (describing the Advertising Federation of America's model antifraud statute).

⁴⁶Frank Presbrey, *The History and Development of Advertising* 565 (1929).

⁴⁷See, e.g., *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902), discussed in Peritz, *Competition Policy in America*, *supra* note 43, at 102–03 (describing how the *McAnnulty* decision showed “solicitude towards commercial speech”); *Ware v. Ammon*, 278 S.W. 593, 595 (Ky. Ct. App. 1925).

⁴⁸See Wood, *supra* note 30, at 417–24.

⁴⁹*Id.* at 419–26.

powers over commerce.⁵⁰ The advertising industry, having relied on economic due process arguments to protect itself in court, had the rug pulled out from under its feet. In the Supreme Court's first case assessing whether the First Amendment protected advertising, the Court quickly concluded that "purely commercial" speech deserved no constitutional protection.⁵¹

In *Valentine v. Chrestensen*,⁵² the City of New York had warned Mr. Chrestensen that his handbills soliciting people to visit a submarine for a fee violated the city's anti-litter ordinance.⁵³ In response, Chrestensen added a protest to the back of the circular, criticizing the city for refusing to let him use the public pier to display his submarine.⁵⁴ When New York nonetheless threatened to enforce the ordinance, Chrestensen brought suit alleging a violation of the First Amendment.⁵⁵ Justice Owen Roberts, writing for the Court, rejected Chrestensen's claim, declaring that "the Constitution imposes no such restraint on government as respects purely commercial advertising."⁵⁶ The Court rejected Chrestensen's inclusion of the protest on his handbill as a mere ruse.⁵⁷

2. *The Central Hudson Approach*

Fortunately, *Chrestensen* has never been interpreted as strictly as its literal reading would appear to require. Almost immediately, scholars called the Supreme Court's distinction between commercial and noncommercial speech into question.⁵⁸ The Court itself later expressed some reservation about the three-page opinion. Justice

⁵⁰ See *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 535–36 (1949) (noting that the Court no longer followed the *Lochner* line of cases). See, e.g., *People v. Pennock*, 293 N.W. 759, 762 (Mich. 1940) (upholding statute banning advertisement of contraceptives); *Allen v. McGovern*, 169 A. 345, 345–46 (N.J. 1933) (upholding ordinance banning unsolicited advertising); *Semler v. Oregon State Board of Dental Examiners*, 34 P.2d 311, 315 (Or. 1934) (upholding ordinance placing advertisement restrictions on dentists).

⁵¹ *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

⁵² *Id.* at 54.

⁵³ *Id.* at 53.

⁵⁴ *Id.*

⁵⁵ *Id.* at 54.

⁵⁶ *Id.*

⁵⁷ *Id.* at 55.

⁵⁸ Troy, *supra* note 16, at 122.

William O. Douglas, who had joined the opinion, wrote that “[t]he ruling was casual, almost offhand. And it has not survived reflection.”⁵⁹

The most immediate doctrinal problem created by *Chrestensen* was definitional. When is speech commercial? In *New York Times Company v. Sullivan*,⁶⁰ the Court held that an editorial advertisement protesting civil rights abuses by Alabama officials did not lose its First Amendment protection simply because it was a paid advertisement.⁶¹ Twelve years later, the Court narrowed the definition of commercial speech to speech that “propose[s] a commercial transaction.”⁶²

In the 1970s, the Court began to reconsider its approach to advertisements. The resurrection of commercial speech rights began with *Bigelow v. Virginia*.⁶³ In this politically charged case, the Court reversed the conviction of a Virginian editor who accepted an ad describing the availability of low-cost abortions in New York.⁶⁴ Justice Harry Blackmun, writing for the Court, found that speech contained within paid advertisements “is not stripped of First Amendment protection merely because it appears in that form.”⁶⁵ Instead, because commercial speech receives some First Amendment protection, the Court reasoned, the interests of the publisher, reader, and consumer must be balanced against the state interest in prohibiting the dissemination of publications promoting abortion.⁶⁶ The Court deemed Virginia’s interest to be small, because *Roe v. Wade*⁶⁷ had deemed legal the activity that Virginia sought to proscribe.⁶⁸

The Court could have limited *Bigelow* to the narrow proposition that states may not prohibit advertising related to an activity that is a constitutional right. Instead, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,⁶⁹ Justice Blackmun wrote that

⁵⁹ *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring).

⁶⁰ 376 U.S. 254 (1964).

⁶¹ *Id.* at 265–66.

⁶² *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 776 (1976).

⁶³ 421 U.S. 809 (1975).

⁶⁴ *Id.* at 811–13.

⁶⁵ *Id.* at 818.

⁶⁶ *Id.* at 826–27.

⁶⁷ 410 U.S. 113 (1973).

⁶⁸ *Bigelow*, 421 U.S. at 821–22.

⁶⁹ 425 U.S. 748 (1976).

even commercial speech, which does “no more than propose a commercial transaction,” warranted some First Amendment protection.⁷⁰ The test for weighing the First Amendment values served by commercial speech would come four years later, in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.⁷¹

Central Hudson involved the constitutionality of a state regulation completely banning promotional advertising by an electric utility.⁷² The Court adopted a four-part test that gives the government an opportunity to justify restrictions on entirely truthful commercial speech.⁷³ Under this test, a court must determine whether:

- (1) the commercial speech concerns a lawful activity and is not misleading;
- (2) the government interest asserted to justify the regulation is substantial;
- (3) the regulation directly advances that government interest; and
- (4) the regulation is no more extensive than necessary to serve that interest.⁷⁴

The *Central Hudson* test rejected the “highly paternalistic” notion that the government can completely suppress commercial speech, but it “elevated *Virginia Pharmacy*’s hint of second-class status for commercial speech to the level of black-letter law.”⁷⁵ This crabbed reading of the First Amendment has produced a fractured and unpredictable jurisprudence. The highly subjective nature of the test produces inconsistent results.⁷⁶ In the past, the Court has often

⁷⁰*Id.* at 762.

⁷¹447 U.S. 557 (1980).

⁷²*Id.* at 558–59.

⁷³*Id.* at 561–66.

⁷⁴*Id.* at 564–66.

⁷⁵*Id.* at 562; Troy, *supra* note 16, at 127.

⁷⁶See Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 *Geo. Wash. L. Rev.* 298, 301 (1998) (defending the *Central Hudson* approach but conceding that “[n]ot only are the terms of the intermediate scrutiny test themselves indeterminate, but the test itself has also been particularly vulnerable to manipulation by the Supreme Court”). See also Van Alstyne, *supra* note 20, at 1637.

applied a weak version of intermediate scrutiny or deferred to self-serving legislative determinations that the restrictions serve a state interest.⁷⁷

*Posadas de Puerto Rico Association v. Tourism Company of Puerto Rico*⁷⁸ best demonstrates the potential for *Central Hudson* to go awry.⁷⁹ Puerto Rico, after legalizing gambling, prohibited the advertising of gambling to the Puerto Rican public, but allowed casinos to promote gambling in the rest of the United States and to incoming tourists.⁸⁰ The law included a ban on printing the word “casino” on common items such as lighters, pencils, and napkins, which may be accessible to the Puerto Rican public.⁸¹

The Court upheld the restriction.⁸² In doing so, it uncritically accepted the assessment of the Puerto Rican legislature that gambling would result in the “disruption of moral and cultural patterns,” that advertising of gambling would increase these harms, and that the restrictions were “no more extensive than necessary to serve the government’s interests.”⁸³ While this approach of giving the elected government deference in its judgments is generally a sound policy, judicial review must be more rigorous when constitutionally protected rights are at stake. The purpose of the First Amendment, and of the Bill of Rights as a whole, is to empower the judiciary to scrutinize and, if necessary, invalidate legislation. The Court thus rejected a clear constitutional warrant to protect the speech at issue.

The ruling also potentially eviscerated the strength of the *Central Hudson* test. The Court wrote that the “greater power to completely ban casino gambling necessarily includes the lesser power to ban

⁷⁷See, e.g., *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985) (approving of a restriction where it is “reasonably related to the State’s interest”); *Friedman v. Rogers*, 440 U.S. 1, 13 (1979) (upholding a ban on optometrists’ use of trade names where “there is a significant possibility that the trade names will be used to mislead”).

⁷⁸478 U.S. 328 (1986).

⁷⁹See Sullivan, *supra* note 21, at 123; see generally Philip B. Kurland, *Posadas de Puerto Rico v. Tourism Company: ‘Twas Strange, ‘Twas Passing Strange, ‘Twas Pitiful, ‘Twas Wondrous Pitiful*, 1986 Sup. Ct. Rev. 1.

⁸⁰*Posadas*, 478 U.S. at 331–34.

⁸¹*Id.* at 333.

⁸²*Id.* at 348.

⁸³*Id.* at 341–43.

advertising of casino gambling.”⁸⁴ This notion is quite dangerous. Given the broad view that most courts have of the police power, state legislatures, as well as the U.S. Congress, can presumably outlaw a vast array of goods and services. If they correspondingly have the power to regulate all speech concerning those goods and services, the First Amendment would mean very little. The dissent in *Posadas*, in response to the majority’s “greater-include-the-lesser” argument, aptly notes that “the ‘constitutional doctrine’ which bans Puerto Rico from banning advertisements concerning the lawful casino gambling is not so strange a restraint—it is called the First Amendment.”⁸⁵

Wisely, the Court has stepped back somewhat from *Posadas*.⁸⁶ In *44 Liquormart, Inc. v. Rhode Island*,⁸⁷ at least five members of the Court acknowledged the important role that advertising has played in American history.⁸⁸ Nonetheless, although the Court has been far more protective of commercial speech since *44 Liquormart*, the Court has not yet repudiated its doctrine of reduced protection for commercial speech.⁸⁹ However, by applying a standard in *Johanns* closer to that applied in noncommercial speech cases, it may have taken a step towards harmonizing the commercial-speech doctrine with the original meaning of the First Amendment.

C. *The Commodity Checkoff Litigation*

1. *The Rise of Modern Checkoff Programs*

Over the past decade, one of the cutting-edge issues of commercial-speech litigation has involved the constitutionality of agricultural “checkoff” programs. Since 1997, the Supreme Court has (amazingly) decided three such cases, assessing the constitutionality

⁸⁴ *Id.* at 345–46.

⁸⁵ *Id.* at 355 (Brennan, J., dissenting).

⁸⁶ See, e.g., *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995).

⁸⁷ See note 86, *supra*.

⁸⁸ *44 Liquormart*, 517 U.S. at 495–96 (Stevens, J., joined by Kennedy, Souter, and Ginsburg, JJ.); *id.* at 522–23 (Thomas, J., concurring in part and concurring in judgment).

⁸⁹ See Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. Pa. L. Rev. 771, 792 (1999) (noting that “the still-dominant test devised by the Court is simply a quantitatively-reduced protection afforded to commercial speech, as compared to noncommercial speech”).

of regulations on the advertisement of tree fruit,⁹⁰ mushrooms,⁹¹ and beef,⁹² respectively.

Since the New Deal, the federal government has heavily regulated agriculture.⁹³ The Florida Citrus Advertising Tax of 1935 became the prototype for hundreds of farm commodity promotion programs implemented by the states and the federal government.⁹⁴ Many of the early programs involved voluntary assessments. Producers marked a “checkoff” box if they wished to continue in the program.⁹⁵ Legislatures shifted to mandatory programs, as producers complained that nonparticipating members created a “free-rider” problem—i.e., nonparticipants benefited from the programs without paying any of the costs.⁹⁶ Congress created most of the mandatory programs during the 1980s and 1990s.⁹⁷ Currently, sixteen such programs are in place.⁹⁸

Many producers support commodity checkoff programs. Generic advertising of commodities is often a cost-effective means of increasing gross sales of a good.⁹⁹ Making the program mandatory reduces the risk that some business competitors will free-ride off of the generic advertisement of others.¹⁰⁰ However, not all farmers feel that

⁹⁰Glickman v. Wileman Brothers & Elliot, Inc., 521 U.S. 457, 477 (1997).

⁹¹United States v. United Foods, Inc., 533 U.S. 405, 412 (2001).

⁹²Johanns v. Livestock Marketing Association, 125 S. Ct. 2055, 2066 (2005).

⁹³See, e.g., Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 et seq. (2003); Agricultural Adjustment Act of 1938, 7 U.S.C. § 1281 et seq. (2003); Agricultural Act of 1949, 7 U.S.C. § 1421 et seq. (2003).

⁹⁴Geoffrey S. Becker, Federal Farm Promotion (“Check-off”) Programs, North County Small Engines 2 (July 12, 2002), available at <http://www.ncseonline.org/NLE/CRS/abstract.cfm?NLEid=15966>.

⁹⁵*Id.*

⁹⁶Hearings on H.R. 1776 et al. Before the Subcommittee on Domestic Marketing, Consumer Relations, and Nutrition of the House Committee on Agriculture, 101st Cong., 1st Sess. 95–96 (1989) (statement of James Ciarrocchi); see also Richard A. Posner, *Economic Analysis of the Law* 61 (6th ed. 2003).

⁹⁷Becker, *supra* note 94, at 1.

⁹⁸*Id.* See also *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1245–46 (D.C. Cir. 2004) (noting the creation of the Hass Avocado Promotion Program). The Department of Agriculture currently administers programs for avocados, beef, blueberries, cotton, dairy products, eggs, milk, honey, peanuts, lamb, mushrooms, popcorn, pork, potatoes, soybeans, and watermelons. See, e.g., *Johanns*, 125 S. Ct. at 2059 n.2.

⁹⁹Becker, *supra* note 94, at 5.

¹⁰⁰See note 96, *supra*.

the benefits of such programs outweigh the costs. Most gains from increased demand flow to retailers and distributors, rather than to the producers who foot the bill for the advertisements.¹⁰¹

Some producers also reject the premise behind generic marketing of a particular commodity. A primary argument in favor of generic advertisements is that attempts by particular producers to “brand” their goods are inefficient.¹⁰² If most consumers notice no difference between various types of beef, and use all brands of beef interchangeably, then efforts by marketers to teach consumers to eat a particular brand merely add cost to the product without producing a corresponding benefit for consumers.¹⁰³ However, many beef producers vigorously contest the notion that their products are interchangeable.¹⁰⁴ Instead, they wish to promote the superiority of a particular subclass of beef such as American beef, grain-fed beef, or certified Angus or Hereford beef.¹⁰⁵

Thus, mandatory assessment programs force some producers to provide financial support for commercial speech with which they disagree. Because the First Amendment imposes limits on the ability of the government to compel people to speak¹⁰⁶ or to pay for speech with which they disagree,¹⁰⁷ opponents of commodity checkoff programs began to file suit against the Department of Agriculture. The first of these cases to reach the Supreme Court was *Glickman v. Wileman Brothers & Elliott, Inc.*¹⁰⁸

2. *Glickman v. Wileman Brothers & Elliott, Inc.*

In *Glickman*, a group of California fruit producers objected to a mandatory advertising scheme that used more than fifty percent of

¹⁰¹ See Boyd Kidwell, *The Checkoff Wars*, *Progressive Farmer* (October 2004), available at <http://www.progressivefarmer.com/farmer/business/article/0,19846,749517,00.html>. See also Ronald D. Knudson, *Agricultural and Food Policy* 308–11 (4th ed. 1998) (describing monopsony power of buyers in the agricultural sector).

¹⁰² Becker, *supra* note 94, at 5–6.

¹⁰³ *Id.*

¹⁰⁴ *Johanns v. Livestock Marketing Association*, 125 S. Ct. 2055, 2059–60 (2005).

¹⁰⁵ *Id.*

¹⁰⁶ See *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

¹⁰⁷ See *Abood v. Detroit Board of Education*, 431 U.S. 209, 234–35 (1977); *Keller v. State Bar of California*, 496 U.S. 1, 9–11, 16–17 (1990).

¹⁰⁸ 521 U.S. 457 (1997).

the advertising assessments to promote specific varieties of fruit grown only by a few producers.¹⁰⁹ The district court upheld the scheme and entered a judgment against the fruit producers for \$3.1 million in past due assessments.¹¹⁰

On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed.¹¹¹ The court applied the *Central Hudson* test, finding that the government had failed to prove both that generic advertising was more effective than individual advertising and that the program was narrowly tailored.¹¹² The Ninth Circuit opinion conflicted with a decision of the Third Circuit,¹¹³ prompting the Supreme Court to grant certiorari.¹¹⁴

The California scheme presented the commercial-speech doctrine with a new twist. *Central Hudson* and its progeny dealt with affirmative restrictions on speech,¹¹⁵ whereas the fruit growers were not banned from speaking. However, the growers had strong arguments by analogy to two related doctrines: compelled speech and compelled funding of speech.

The First Amendment prohibits the government from compelling political or ideological speech. In *West Virginia State Board of Education v. Barnette*,¹¹⁶ the Court held that Jehovah's Witnesses could not be forced to stand and salute the American flag in violation of their religious beliefs.¹¹⁷ In *Wooley v. Maynard*,¹¹⁸ it set aside the conviction of a New Hampshire man who obscured a portion of his license plate that announced the state motto "Live Free or Die."¹¹⁹ In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*,¹²⁰ it ruled that Boston could not compel a private association of veterans to

¹⁰⁹*Id.* at 464.

¹¹⁰*Id.*

¹¹¹Wileman Brothers & Elliot, Inc. v. Espy, 58 F.3d 1367, 1386 (9th Cir. 1995).

¹¹²*Id.* at 1379–81.

¹¹³See *United States v. Frame*, 885 F.2d 1119, 1137 (3d Cir. 1989).

¹¹⁴Glickman, 521 U.S. at 466–67.

¹¹⁵See *supra* notes 72–74 and accompanying text.

¹¹⁶See note 106, *supra*.

¹¹⁷319 U.S. 624, 642 (1943).

¹¹⁸430 U.S. 705 (1977).

¹¹⁹*Id.* at 716–17.

¹²⁰515 U.S. 557 (1995).

allow members of a gay, lesbian, and bisexual group to march in the veterans' parade.¹²¹

The First Amendment also protects individuals from forced financing of political or ideological speech. For example, in *Abood v. Detroit Board of Education*,¹²² the Court limited unions from spending on ideological messages those funds received from nonunion employees as part of agency shop arrangements.¹²³ And the Court applied the union analogy to the law bar in *Keller v. State Bar of California*,¹²⁴ excusing members from contributing funds to political and ideological causes.¹²⁵

None of these cases convinced the Supreme Court to apply the *Central Hudson* test to the California fruit growers. The Court reversed the decision of the Ninth Circuit, holding that the Department of Agriculture's requirement that the fruit producers finance generic advertising did not violate the First Amendment.¹²⁶ Indeed, the Court said it did not believe the case presented a free speech claim at all. Instead, it characterized the government's action as an extension of a legitimate market order.¹²⁷

The Court cited three distinguishing "characteristics" of the advertising scheme that made application of the *Central Hudson* test inappropriate:

- (1) The scheme did not prevent any producer from communicating any message;
- (2) The scheme did not compel any producer to engage in actual or symbolic speech; and
- (3) The scheme did not require any producer to endorse or finance any political or ideological views.¹²⁸

This list of factors appeared to be a fatal blow to the prospect that the compelled speech and compelled funding of speech doctrines

¹²¹*Id.* at 580–81.

¹²²431 U.S. 209 (1977).

¹²³*Id.* at 234–35.

¹²⁴496 U.S. 1 (1990).

¹²⁵*Id.* at 16–17.

¹²⁶See *Glickman v. Wileman Brothers & Elliot, Inc.*, 521 U.S. 457, 477 (1997).

¹²⁷*Id.* at 476.

¹²⁸*Id.* at 469–70.

would be applied to commercial speech. Each factor appears to reaffirm the Court's perception of commercial speech as "lower value."

The Court cited no authority to substantiate the significance of the first characteristic. In fact, *Wooley v. Maynard*,¹²⁹ which the Court cites to support the third characteristic, indicates that the availability of other modes to express commercial speech has no constitutional significance at all. In *Wooley*, the Court noted that "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"¹³⁰ The Court thus had rejected as irrelevant the dissent's assertion that Mr. Maynard could have affixed a bumper sticker to his car disclaiming his belief in the New Hampshire state motto.¹³¹ It is hard to distinguish *Glickman* from *Wooley*, other than on the ground that the Court believed commercial speech to be less deserving of constitutional protection than Mr. Maynard's speech.

The second characteristic, that the scheme does not compel any producer to engage in actual or symbolic speech, may be true, but seems to ignore the line of cases establishing that compelled funding of speech itself may run afoul of the Constitution. The Court distinguished *Abood* and other compelled funding cases by noting that requiring the fruit producers to pay the assessments "cannot be said to engender any crisis of conscience."¹³² However, it is unclear whether the majority based this assessment on the notion that commercial speech can never produce a crisis of conscience, or on its suspicion that the fruit producers' First Amendment claim was a pretext to overturn the tax scheme.¹³³

The third characteristic, that the scheme did not require the producers to endorse or finance a political or ideological view, leaves little doubt that the Court was affording greater protection to political and ideological speech than to commercial speech. Thus, after

¹²⁹430 U.S. 705 (1977).

¹³⁰*Id.* at 714.

¹³¹*Id.* at 722 (Rehnquist, J., dissenting).

¹³²*Glickman*, 521 U.S. at 472.

¹³³Some of the majority's language suggested that it doubted the sincerity of the respondents' claims. *Id.* at 471 ("With trivial exceptions on which the court did not rely, none of the generic advertising conveys any message with which respondents disagree.").

Glickman, the Court appeared to have rendered the First Amendment impotent to prevent compulsion of commercial speech.¹³⁴

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

Only four years after *Glickman*, though, the Supreme Court granted certiorari on another checkoff case, *United States v. United Foods, Inc.*,¹³⁵ and (surprisingly) appeared to afford meaningful protection to farmers from programs compelling commercial speech.

United Foods objected to the Mushroom Act, passed by Congress in 1990, which authorized a “Mushroom Council” to research and market new uses for mushrooms.¹³⁶ The large agricultural company contended that generic mushroom advertisements disproportionately aided its competitors and refused to pay the assessment.¹³⁷ After United Foods lost an action brought before the secretary of agriculture, it filed a complaint seeking review of the adverse ruling.¹³⁸ The district court held that *Glickman* controlled, and dismissed the action.¹³⁹

The U.S. Court of Appeals for the Sixth Circuit reversed the district court.¹⁴⁰ In the Sixth Circuit’s view, the controlling factor in *Glickman* was the extensiveness of the government regulation of the California fruit industry. By contrast, the mushroom business was “unregulated” and thus “entirely different from the collectivized California tree fruit business.”¹⁴¹ The court concluded that, “in the absence of extensive regulation, the effort by the Department of Agriculture to force payments from plaintiff for advertising is invalid under the First Amendment.”¹⁴²

¹³⁴See Edward J. Schoen, et al., *United Foods and Wileman Bros.: Protection Against Compelled Commercial Speech—Now You See It, Now You Don’t*, 39 Am. Bus. L.J. 467, 496–97 (2002).

¹³⁵533 U.S. 405 (2001).

¹³⁶Mushroom Promotion, Research, and Consumer Information Act, 7 U.S.C. § 6101 (1994).

¹³⁷*United Foods*, 533 U.S. at 408–09.

¹³⁸*Id.*

¹³⁹*United Foods, Inc. v. United States*, 197 F.3d 221, 222 (6th Cir. 1999).

¹⁴⁰*Id.* at 223–24.

¹⁴¹*Id.*

¹⁴²*Id.*

This distinction between the cases ignores the fact that all of the characteristics that the Supreme Court had found to deprive the plaintiffs in *Glickman* of a First Amendment claim were present in *United Foods* as well.¹⁴³ The Mushroom Act did not prevent United Foods from producing its own advertisements. Nor did it require United Foods to engage in symbolic speech or to finance a political or ideological view.

Nonetheless, the Supreme Court affirmed the Sixth Circuit's decision.¹⁴⁴ Unlike in *Glickman*, the Court accepted the producers' analogy to the compelled speech cases, explaining that "[j]ust as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views, or from compelling certain individuals to pay subsidies for speech to which they object."¹⁴⁵ The Court was comparatively protective of commercial speech, noting that "[t]he fact that the speech is in aid of a commercial purpose does not deprive respondent of all First Amendment protection."¹⁴⁶

The Supreme Court, like the Sixth Circuit, distinguished *Glickman* based on the comprehensiveness of the restrictions placed on California fruit growers. The fruit program "differs from the [mushroom program] in a most fundamental respect. In *Glickman* the mandated assessments for speech had been ancillary to a more comprehensive program restricting marketing autonomy."¹⁴⁷ By contrast, with the mushroom program, "for all practical purposes, the advertising itself, far from being ancillary [was] the principal object of the regulatory scheme."¹⁴⁸ The Court thus found it unnecessary to apply the *Central Hudson* test, because, "even viewing commercial speech as entitled to lesser protection," it found "no basis under either *Glickman* or [its] other precedents to sustain the compelled assessments."¹⁴⁹

¹⁴³See *supra* note 128 and accompanying text.

¹⁴⁴*United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001).

¹⁴⁵*Id.* at 410 (citing *Wooley v. Maynard*, 430 U.S. 705 (1977); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); and *Keller v. State Bar of California*, 496 U.S. 1 (1990)).

¹⁴⁶*Id.*

¹⁴⁷*Id.* at 411.

¹⁴⁸*Id.* at 411–12.

¹⁴⁹*Id.* at 410.

As the dissent points out, “it is difficult to understand why the presence or absence of price and output regulations could make a critical First Amendment difference.”¹⁵⁰ That the plaintiffs in *Glickman* were subject to comprehensive regulations does nothing to reduce the impact upon them of being compelled to support a message with which they disagreed.

Nor could the difference have been “fundamental.” The comprehensiveness of the California fruit program was not among the distinguishing characteristics listed by the Court in *Glickman*.¹⁵¹ There is, in fact, some disagreement among members of the Court over whether such regulations were even in place at the time of the litigation.¹⁵²

The *United Foods* decision provided some tangible protection from compelled commercial speech just four years after the Supreme Court appeared to have shut the door on such claims. However, the decision was not a total victory. The opinion yet again reiterated the Court’s position that commercial speech deserves less vigorous protection than other expression.¹⁵³ Moreover, read in tandem with *Glickman*, *United Foods* establishes a rather murky criterion by which First Amendment claims are to be resolved: evidently, lower courts must assess the comprehensiveness of government programs.¹⁵⁴ Even worse, *United Foods* thereby provides an incentive for the government to regulate more, not less.

The Court’s decision concluded by foreshadowing the *Johanns* case. In its brief on the merits before the Supreme Court, the government introduced for the first time the notion that the checkoff programs may comprise “government speech,” and hence be immune from First Amendment scrutiny.¹⁵⁵ The Court rejected that argument as untimely raised, suggesting that it could be presented in a subsequent case.¹⁵⁶ The Department of Agriculture accepted the Court’s invitation in *Johanns v. Livestock Marketing Association*.

¹⁵⁰*Id.* at 421 (Breyer, J., dissenting).

¹⁵¹See *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 469–70 (1997); see also *supra* note 128 and accompanying text.

¹⁵²See *United Foods*, 533 U.S. at 420–21 (Breyer, J., dissenting).

¹⁵³*Id.* at 409.

¹⁵⁴Schoen, *supra* note 134, at 519.

¹⁵⁵*United Foods*, 533 U.S. at 416.

¹⁵⁶*Id.* at 416–17.

III. *Johanns v. Livestock Marketing Association*

In the wake of *United Foods*, the Beef Promotion and Research Act of 1985 looked like a sitting duck. While *United Foods* had left open the question of precisely what constitutes a comprehensive regulatory scheme, there was little question that the Cattlemen's Beef Promotion and Research Board did not meet the test. The Beef Act was virtually identical to the Mushroom Act, which had not survived judicial scrutiny.¹⁵⁷

Nonetheless, in *Johanns* the Court upheld the Beef Act. Just as *United Foods* came down four years after *Glickman*, swinging the pendulum toward greater protection for commercial speech, *Johanns* came down four years after *United Foods* and swung the pendulum back. The decision is hard to rationalize without concluding that it is driven in part by the continued belief of the majority of the Court that commercial speech is "lower value" speech. The view of government speech it espouses is so broad that it appears to displace most protections for compelled funding of speech.

But each time the pendulum swings, its arc may be a bit smaller. *United Foods* did not undo all of the damage to the commercial-speech doctrine wrought by *Glickman*, and *Johanns* does not bring the doctrine back to a pre-*United Foods* state. Ironically, a loss in *Johanns* may do more good for commercial speech in the long run than the win in *United Foods*. The *United Foods* decision appeared to usher in an age where legislatures have an incentive to regulate commodities as comprehensively as possible, to insulate the program from First Amendment scrutiny. That perverse incentive appears to be gone. Moreover, the Court will almost certainly have to impose some kind of a limitation on the government-speech doctrine it espoused in *Johanns*. Because this doctrine treats all forms of speech neutrally, these limits might ultimately help nudge commercial-speech protection toward greater parity with non-commercial-speech protection.

A. *The Decision in Johanns*

1. *Lower Court Rulings*

The plaintiffs in *Johanns* opposed promoting beef as a generic commodity, which they contended impeded their ability to promote

¹⁵⁷ See *Livestock Marketing Association v. United States Department of Agriculture*, 207 F. Supp. 2d 992, 1002 (D. S.D. 2002).

superior subclasses of beef such as American beef, grain-fed beef, and certified Angus or Hereford beef.¹⁵⁸ Before bringing their suit, the plaintiffs had attempted to use a provision of the Act allowing beef producers to petition the secretary of agriculture to hold a referendum on the continuation of the beef checkoff program.¹⁵⁹ When this effort failed, the producers filed suit, alleging, among other things, that the Act violated their First Amendment rights by compelling them to fund a commercial message with which they disagreed.¹⁶⁰

The district court enjoined the program, concluding that the scheme was indistinguishable from the regulations in *United Foods*. The court found that “[t]he beef checkoff is, in all material respects, identical to the mushroom checkoff: producers and importers are required to pay an assessment, which assessments are used by a federally established board or council to fund speech.”¹⁶¹ It thus rejected the Department of Agriculture’s attempts to distinguish the program, including the Department’s claim that the advertisements were government speech.¹⁶²

The U.S. Court of Appeals for the Eighth Circuit unanimously affirmed, on slightly different grounds.¹⁶³ Instead of rejecting the Department of Agriculture’s contention that the beef advertisements were government speech, the court held that the origin of the speech did not matter.¹⁶⁴ In its view, government-speech status was only relevant to First Amendment challenges regarding the content of speech, not challenges to its compelled funding.¹⁶⁵

2. *The Majority Opinion*

The Supreme Court vacated the Eighth Circuit’s decision, accepting the government-speech defense.¹⁶⁶ It distinguished the decisions

¹⁵⁸Johanns v. Livestock Marketing Association, 125 S. Ct. 2055, 2059–60 (2005).

¹⁵⁹Livestock Marketing Association v. United States Department of Agriculture, 132 F. Supp. 2d 817, 820 (D. S.D. 2001).

¹⁶⁰Johanns, 125 S. Ct. at 2060.

¹⁶¹Livestock Marketing Association v. United States Department of Agriculture, 207 F. Supp. 2d 992, 997 (D. S.D. 2002).

¹⁶²*Id.* at 1002–07.

¹⁶³Livestock Marketing Association v. United States Department of Agriculture, 335 F.3d 711, 726 (8th Cir. 2003).

¹⁶⁴*Id.* at 720–21.

¹⁶⁵*Id.*

¹⁶⁶Johanns v. Livestock Marketing Association, 125 S. Ct. 2055, 2066 (2005).

barring compelled payment for speech, stating that “[o]ur compelled-subsidy cases have consistently respected the principle that ‘[c]ompelled support of a private association is fundamentally different from compelled support of the government.’”¹⁶⁷ Because the secretary of agriculture had final say over the content of the advertisements, the program was “effectively controlled by the Federal Government” and thus cannot “be the cause of any possible First Amendment harm.”¹⁶⁸

The Livestock Marketing Association had argued that the advertisements did not constitute permissible government speech for two reasons: First, the advertisements were designed by the Beef Board, which was partially composed of members of private industry and received only pro forma supervision from the secretary of agriculture.¹⁶⁹ Second, the Beef Act employed a targeted assessment, which required individual beef producers to foot the cost of advertising.¹⁷⁰ The Livestock Marketing Association argued that this funding mechanism was suspect both because it gives control of the beef program to narrow interest groups and because it creates the perception among the general public that the advertisements speak for the beef producers.¹⁷¹

The Court rejected each point. It noted that the Beef Board included members appointed by the secretary of agriculture and that the secretary had final say over the content of each advertisement.¹⁷² That the assessment was targeted at beef producers in particular, the Court concluded, made no constitutional difference. It noted that “[c]itizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech. And that is no less true when the funding is achieved through targeted assessments devoted exclusively to the program to which the assessed citizens object.”¹⁷³

¹⁶⁷ *Id.* at 2062.

¹⁶⁸ *Id.* at 2062, 2064.

¹⁶⁹ *Id.* at 2062.

¹⁷⁰ *Id.* at 2063.

¹⁷¹ *Id.*

¹⁷² *Id.* at 2062–63, 2064.

¹⁷³ *Id.* at 2063.

Meanwhile, the Court interpreted the case as a “facial challenge”—i.e., an assertion that the statute would always operate unconstitutionally, on all sets of facts. Thus, the Court rejected the Livestock Marketing Association’s claim that the public would falsely attribute the advertisements to its members.¹⁷⁴ Because nothing in the Beef Act required that the messages be attributed to the respondents, the facial challenge failed. The opinion left open the possibility that a claim of confusion might prevail “[o]n some set of facts.”¹⁷⁵

3. *The Primary Dissent*

Writing the primary dissent, Justice David Souter argued that the beef checkoff program could not qualify as government speech because the design of the program insulated the government from political accountability.¹⁷⁶ He noted that the majority’s “error is not that government speech can never justify compelling a subsidy, but that a compelled subsidy should not be justifiable by speech unless the government must put that speech forward as its own.”¹⁷⁷ In other words, political accountability is lost if the message comes from a self-interested private group currently favored by government.

Justice Souter contended that the government-speech doctrine is justified both by necessity and by the possibility that the political process will serve as a check on what the government chooses to say.¹⁷⁸ But the targeted nature of the assessment and the fact that the government did not take responsibility for its advertisements stymied the ability of the political process to serve as an effective check on the government.

To Justice Souter, that the government targeted the assessment at beef producers heightened the harm imposed by the advertisements. Justice Souter agreed with the majority that the government must be free to use generalized tax revenue to express its views, or else all government action would become subject to a heckler’s veto.¹⁷⁹ Under a targeted assessment, however, “the particular interests of

¹⁷⁴*Id.* at 2065–66.

¹⁷⁵*Id.* at 2065.

¹⁷⁶*Id.* at 2069 (Souter, J., dissenting).

¹⁷⁷*Id.* at 2068.

¹⁷⁸*Id.* at 2070–71.

¹⁷⁹*Id.* at 2070.

those singled out to pay the tax are closely linked with the expression, and taxpayers who disagree with it suffer a more acute limitation on their presumptive autonomy as speakers to decide what to say and what to pay for others to say."¹⁸⁰

Meanwhile, the advertisements in *Johanns* need not indicate that they were funded by the government, removing an important check on political accountability.¹⁸¹ There is no reason that an individual consumer, watching a beef commercial, has any reason to believe that the advertisement is the work of the federal government. If the individual did wonder if the government paid for the ad, the tag line "Funded by America's Beef Producers" would strongly imply otherwise.¹⁸²

B. Johanns as a Setback for Commercial Speech

The *Johanns* decision is a setback for commercial-speech interests. Most immediately, it weakens the protection that advertisers won in *United Foods*. More subtly, it again reaffirms the Supreme Court's view that commercial speech is "lower value."

1. An Expansive View of Government Speech

The government-speech doctrine, as announced by the *Johanns* court, seems unbounded, for two reasons: First, it is hard to constrain a doctrine that is based on a distinction without a difference. The majority distinguishes the compelled-speech line of cases by noting that those cases involved subsidizing private associations rather than government.¹⁸³ However, there is no inherent reason why forcing an organization to pay for speech with which it disagrees is worse when the speech is coordinated by a private association rather than by the government. If a woman who is pro-life were forced to contribute to a campaign to promote abortions, she would probably take little solace in the fact that the program is administered by the state rather than by a private party. If anything, the imprimatur of legitimacy attached to state-sponsored messages may make the coercion even more offensive.

¹⁸⁰ *Id.* at 2071.

¹⁸¹ *Id.* at 2072.

¹⁸² *Id.*

¹⁸³ *Id.* at 2061.

As both the majority and dissent agree, the government must have some ability to fund programs from the general tax revenue without being subject to a heckler's veto.¹⁸⁴ However, this argument merely explains why the government must have *some* ability to compel funding for speech. It does not support a hard rule in which all speech directly controlled by the government is immune from First Amendment inquiry.

By contrast, the dissent's position that targeted assessments should be held to greater First Amendment scrutiny is consistent with the Jeffersonian notion that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."¹⁸⁵ Justice Souter, responding to the majority's contention that there is no principled way to distinguish between general and targeted taxes, refers to "the commonsense notion that individuals feel a closer connection to speech that they are singled out to fund with targeted taxes than they do to expression paid for with general revenues."¹⁸⁶

Second, the government-speech doctrine as expressed in *Johanns* appears unbounded because the majority gave short shrift to the unique facts of the case. Consider: The Beef Board had carefully shielded itself from political accountability. The plaintiffs alleged that the secretary exercised only *pro forma* control over the Beef Board.¹⁸⁷ Moreover, there was no reason for the public to suspect that the government was footing the bill for the beef campaign. Consumers do not normally assume that the government is purchasing commercials demanding that they eat more meat. And even if consumers might otherwise have supposed government sponsorship, the commercials included the true but misleading tag line "Funded by America's Beef Producers."¹⁸⁸

Even the democratic checks built into the Beef Act did not appear to work. As noted, before bringing their suit, the plaintiffs had attempted to invoke a provision of the Act allowing beef producers

¹⁸⁴*Id.* at 2062; *id.* at 2070 (Souter, J., dissenting).

¹⁸⁵A Bill for Establishing Religious Freedom 77, in 5 *The Founders' Constitution* § 37 (P. Kurland & R. Lerner eds., 1987).

¹⁸⁶125 S. Ct. at 2071 n.4 (Souter, J., dissenting) (citing *Massachusetts v. Mellon*, 262 U.S. 447 (1923)).

¹⁸⁷*Id.* at 2072 n.5.

¹⁸⁸*Id.* at 2072.

to petition the secretary of agriculture to hold a referendum on the continuation of the beef checkoff program.¹⁸⁹ The secretary never held the referendum.¹⁹⁰ The Beef Promotion and Research Board meanwhile responded to the petition attempt by using the very funds collected through the assessment to promote the Beef Act to cattle producers and legislators and thereby perpetuate its own existence.¹⁹¹ If the beef checkoff program provides sufficient political accountability to satisfy the requirements of the government-speech doctrine, it is unclear what legislation would not.

The prospect that mere administrative oversight is sufficient to convert compelled subsidies of speech into government speech is troubling. It is easy to imagine how the states might restructure the programs struck down in *Abood* and its progeny to turn them into permissible subsidies. For example, had Michigan given its secretary of labor administrative control over local teachers unions, the ideological messages in *Abood* may have passed the *Johanns* test.¹⁹² This possibility creates a situation antithetical to the First Amendment in which the more invasive state oversight becomes, the less likely it is to face First Amendment scrutiny.

2. A Dismissive View of Commercial Speech

The Court's dismissive attitude toward commercial speech in *Johanns* is just as troubling as the apparently weak limits set on government regulation. The Court rejected the Eighth Circuit's application of the *Central Hudson* test, considering the inquiry to be irrelevant if the advertisements satisfied the requirements for government speech.¹⁹³ Thus, the opinion does not discuss the value of commercial speech directly.

However, it is hard to analyze the ruling without concluding that it relies in part on the notion that compulsion of commercial speech is a less serious threat to the First Amendment than are government infringements on other modes of expression. The abortion analogy

¹⁸⁹ *Livestock Marketing Association v. United States Department of Agriculture*, 132 F. Supp. 2d 817, 820 (D. S.D. 2001).

¹⁹⁰ *Id.* at 821–22.

¹⁹¹ *Id.* at 821.

¹⁹² Compare *Abood v. Detroit Board of Education*, 431 U.S. 209, 235–36 (1977).

¹⁹³ 125 S. Ct. at 2066.

in the introduction to this article demonstrates this point.¹⁹⁴ If the government were to compel abortion clinics to pay for speech condemning abortions, a judicial decision upholding this imposition based on the government-speech doctrine would undoubtedly provoke public outrage. Moreover, it is quite likely that the Court would be hostile to a government scheme that attributed such messages to the abortion providers themselves, and then shielded the implementing officials from accountability.

Thus, even though the Court forswore any explicit references to the “lower value” it has accorded commercial expression, the *Johanns* decision nonetheless demonstrates that commercial speech is not being afforded equal protection with other modes of expression, despite the history and explicit text of the First Amendment.

IV. The Bright Side of *Johanns*

Even if *Johanns* is not a victory for advocates of commercial speech, it need not be seen as a total loss either. Ironically, the most positive aspect of the decision may be the Court’s refusal to grant the speech at issue the review normally entitled to commercial speech under the *Central Hudson* test. By applying the government-speech doctrine instead of *Central Hudson*, the Court adopted a test that is facially neutral as between commercial and other modes of expression. The Court will likely refine and limit this doctrine as litigants attempt to apply it to other forms of speech. Because *Johanns* establishes that the government-speech doctrine applies to commercial speech, any limits that the Court places on the doctrine in non-commercial contexts should, one hopes, benefit commercial expression as well.

A. *The Best of Bad Options*

The good news is that the Court may have chosen a comparatively benign means of upholding the beef checkoff program. Had the Court applied *Central Hudson* but nonetheless found the beef checkoff program constitutional, the decision would likely have eroded the protections afforded by the third and fourth prongs of the test,

¹⁹⁴See Part I, *supra*.

which the Court has used recently to strike down a host of restrictions on advertising.¹⁹⁵ The government had not presented any evidence that generic advertising was more effective than individual advertising or that the program was narrowly tailored.¹⁹⁶

Even a victory for the Livestock Marketing Association via analogy to *United Foods* would not have been entirely satisfying. To distinguish *United Foods* from *Glickman*, the Court had adopted a nebulous test focusing on the comprehensiveness of government regulation.¹⁹⁷ The juxtaposition of the two cases created an odd incentive for the government to protect against First Amendment violations by increasing government regulation. As Justice Stephen Breyer noted in his dissent in *United Foods*, less invasive laws that rely on self-regulation are “more consistent, not less consistent, with producer choice. It is hard to see why a Constitution that seeks to protect individual freedom would consider the absence of ‘heavy regulation’ to amount to a special, determinative reason for refusing to permit this less intrusive program.”¹⁹⁸ Thus, to the extent that *Johanns* represents a shift away from the framework established by *Glickman* and *United Foods*, this shift may be desirable.

B. Limiting the Scope of the Doctrine

As the government-speech doctrine continues to develop, the Court may well place additional limits on its invocation. The majority opinion includes the possibility of one such limit: an “as-applied” challenge to regulations attributing government speech to private parties.¹⁹⁹ Although the Court concludes that *Johanns* presents a facial challenge, it leaves open the possibility that another litigant will prevail on an as-applied claim that the government is falsely crediting speech to the complaining party. The Court states that, “on some set of facts,” the theory might “form the basis for an as-applied

¹⁹⁵ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555–60, 565–66 (2001); *Greater New Orleans Broadcasting Association v. United States*, 527 U.S. 173, 185–96 (1999); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 483–91 (1995).

¹⁹⁶ *Wileman Brothers & Elliot, Inc. v. Espy*, 58 F.3d 1367, 1379–81 (9th Cir. 1995).

¹⁹⁷ See *supra* notes 147–51 and accompanying text.

¹⁹⁸ See *United States v. United Foods, Inc.*, 533 U.S. 405, 422 (2001) (Breyer, J., dissenting).

¹⁹⁹ See *Johanns v. Livestock Marketing Association*, 125 S. Ct. 2055, 2065 (2005). As-applied challenges assert that a statute is unconstitutional on the facts of a particular case.

challenge—if it were established . . . that individual beef advertisements were attributed to [plaintiffs].’’²⁰⁰

C. *Achieving Equal Status for Commercial Speech*

If the premise of this article is correct—that the decision in *Johanns* reflects in part an unwillingness to afford commercial speech equal status with other modes of protected expression—then invoking the government-speech doctrine in cases involving political and ideological speech should force the Court to impose meaningful limits on the doctrine. Because the Court did not delineate between advertisements and other modes of expression in *Johanns*, these limits should arguably apply to commercial speech as well.

Just as politically charged cases drove the Court’s original movement away from its complete renunciation of protection for commercial speech in *Chrestensen* toward the intermediate scrutiny of *Central Hudson*, here, too, political and ideological issues may force the Court to constrain the government-speech doctrine.²⁰¹ In *Bigelow* the Court resurrected commercial speech rights in part because of its desire to solidify the right to abortion.²⁰² Similarly, in *New York Times Company v. Sullivan*, the Court narrowed the definition of commercial speech to afford protection to civil rights advocates.²⁰³ As the states and the federal government begin to invoke the government-speech doctrine to defend subsidies for political or ideological speech, the Court may well begin to impose greater restraints on the doctrine. Given that those limits apply to commercial speech as well, compelled speech in the commercial context might also benefit from such a doctrinal shift.

The ultimate effect of *Johanns v. Livestock Marketing Association* may thus depend on whether the Court views the government-speech doctrine as an occasional defense against compelled subsidies or as a shift away from the convoluted doctrine established by *Glickman* and *United Foods*. If the government-speech doctrine is simply another means for the government to justify restrictions on commercial speech, then constraining the scope of the doctrine will limit the harm caused by *Johanns*.

²⁰⁰ *Id.*

²⁰¹ See *supra* notes 60–68 and accompanying text.

²⁰² See *Bigelow v. Virginia*, 421 U.S. 809, 818, 826–27 (1975).

²⁰³ See *New York Times Co. v. Sullivan*, 376 U.S. 254, 265–66 (1964).

If, however, the Court intends *Johanns* as a shift away from *Glickman* and *United Foods* toward a new mode of analysis for compelled commercial subsidy cases, then *Johanns* could actually work to the benefit of commercial speech. The government-speech doctrine facially affords commercial speech what it has always deserved—equal status with other modes of expression. Thus, if the government-speech doctrine were to become the dominant mode of analysis in compelled subsidy cases, and if later cases involving political and ideological expression were to force the Court to put some meaningful boundaries on the doctrine, the ironic result may be that a case that silently discriminated against commercial expression might nudge it back on the path toward equal status with other forms of speech.

