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Lectures

TRANSPARENT AND EFFICIENT MARKETS: COMPELLED COMMERCIAL SPEECH AND COERCED COMMERCIAL ASSOCIATION IN *UNITED FOODS, ZAUDERER, AND ABOOD*

Robert Post*

In recent years the Court has decided three cases that address the compelled subsidization of commercial speech. Each of these cases involves a federal statute that creates an industry board empowered to tax producers of a specific agricultural product in order to promote and stabilize the market in that product. Taken together, the decisions in this trilogy evidence manifest and disturbing confusion about the constitutional status of commercial speech. At stake in this confusion is the extent to which First Amendment protections for commercial speech will invalidate regulations that now routinely require commercial actors to disclose information to promote transparent and efficient markets.

The first case in the trilogy was *Glickman v. Wileman Brothers & Elliott*,¹ which was decided in 1997. *Glickman* upheld a federal marketing program that required private parties to subsidize an advertising campaign for California summer fruits. Dismissing claims that this mandated subsidization amounted to compelled speech in violation of the First Amendment, the Court in a narrow five-to-four opinion held that “[o]ur compelled speech case law . . . is clearly inapplicable to the regulatory scheme at issue here.”² Four years later, however, the Court reversed course and in *United States v. United Foods, Inc.*³ struck down a similar program designed to promote and stabilize the market in fresh mushrooms. The Court held that “First Amendment concerns apply” whenever the state requires persons to “subsidize speech with which they disagree.”⁴ This holding revolutionized First Amendment jurisprudence in the area of the compelled subsidization of speech,

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¹ 521 U.S. 457 (1997).

² *Id.* at 470.

³ 533 U.S. 405 (2001).

⁴ *Id.* at 410–11.

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sparkling a cascade of challenges to agricultural government marketing programs in the lower courts.⁵

Most recently, the Court in *Johanns v. Livestock Marketing Ass'n*⁶ turned yet another about-face. In the context of a program to promote the market in beef products that was "on all fours with *United Foods*,"⁷ the Court held that because "compelled funding of government speech does not alone raise First Amendment concerns,"⁸ and because the beef advertisements produced by the program were government speech, the program was immune from First Amendment challenge based upon claims of compelled subsidization of speech. *Johanns* went out of its way to offer a generous and encompassing definition of government speech⁹ that seemed deliberately designed to end the many challenges that after *United Foods* had engulfed government agricultural marketing programs.

⁵ See, e.g., *Pelts & Skins, LLC v. Landreneau*, 365 F.3d 423 (5th Cir. 2004) (Louisiana Alligator Resource Fund), *vacated*, 125 S. Ct. 2511 (2005); *Cochran v. Veneman*, 359 F.3d 263 (3d Cir. 2004) (Dairy Promotion Stabilization Act of 1983), *vacated sub nom. Lovell v. Cochran*, 125 S. Ct. 2511 (2005), *and* *Johanns v. Cochran*, 125 S. Ct. 2512 (2005); *Mich. Pork Producers Ass'n v. Veneman*, 348 F.3d 157 (6th Cir. 2003) (Pork Promotion, Research and Consumer Info. Act), *vacated sub nom. Mich. Pork Producers Ass'n v. Campaign for Family Farms*, 125 S. Ct. 2511 (2005), *and* *Johanns v. Campaign for Family Farms*, 125 S. Ct. 2511 (2005); *Delano Farms Co. v. Cal. Table Grape Comm'n*, 318 F.3d 895 (9th Cir. 2003) (California Table Grape Comm'n); *In re Wash. State Apple Adver. Comm'n*, 257 F. Supp. 2d 1290 (E.D. Wash. 2003) (Washington State Apple Commission); *Charter v. U.S. Dep't of Agric.*, 230 F. Supp. 2d 1121 (D. Mont. 2002), *vacated*, 412 F.3d 1017 (9th Cir. 2005); *Gerawan Farming, Inc. v. Kawamura*, 90 P.3d 1179 (Cal. 2004); *Dep't of Citrus v. Graves Bros. Co.*, 889 So. 2d 831 (Fla. Dist. Ct. App. 2004), *vacated*, *Fla. Dep't of Citrus v. Graves Bros. Co.*, 912 So. 2d 1217 (Fla. 2005).

⁶ 125 S. Ct. 2055 (2005).

⁷ *Id.* at 2070 (Souter, J., dissenting).

⁸ *Id.* at 2062.

⁹ "When, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages." *Johanns*, 125 S. Ct. at 2063.

Here, the beef advertisements are subject to political safeguards more than adequate to set them apart from private messages. The program is authorized and the basic message prescribed by federal statute, and specific requirements for the promotions' content are imposed by federal regulations promulgated after notice and comment. The Secretary of Agriculture, a politically accountable official, oversees the program, appoints and dismisses the key personnel, and retains absolute veto power over the advertisements' content, right down to the wording. And Congress, of course, retains oversight authority, not to mention the ability to reform the program at any time. No more is required.

Id. at 2064.

Johanns is very narrowly written. It does not in any way undermine or limit the reasoning of *United Foods* in cases that do not involve government speech. That reasoning has fundamentally altered received First Amendment doctrine in at least three respects:

1. *United Foods* states that First Amendment questions are raised *whenever* government forces "individuals to pay subsidies for speech to which they object."¹⁰
2. *United Foods* holds that courts should carefully review statutes that require the compelled subsidization of *commercial* speech.
3. *United Foods* holds that serious First Amendment questions are raised whenever the state compels persons to *associate* with an organization whose primary purpose is to engage in commercial speech.

Each of these propositions is novel, and each is in my view seriously misguided. One obvious implication of the first proposition is that courts ought rigorously to review the use of tax dollars to support government speech. This implication was so radical that the Court felt impelled in *Johanns* immediately to intervene to disavow it. I discuss the errors implicit in the first proposition elsewhere,¹¹ and I shall not repeat that critique here.

In this Lecture I shall instead focus on the jurisprudential difficulties created by the second and third innovative propositions advanced by *United Foods*. I shall argue that these innovations implicitly re-evaluate the constitutional status of commercial speech by shifting the focus of constitutional analysis from the circulation of information to the independent interests of commercial speakers to speak or to associate. It is evident that *United Foods* did not carefully consider the implications of this shift for the general structure of commercial speech doctrine or for the pervasive regimes of regulation that now envelop commercial speech. Taken to its logical conclusion, the shift is so potentially destabilizing that it is unlikely to be sustained in anything like the pure form in which it is expressed in *United Foods*.

¹⁰ *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001).

¹¹ Robert Post, *Compelled Subsidization of Speech: Johannis v. Livestock Marketing Ass'n*, 2005 SUP. CT. REV. 195 (2006).

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My objective in this Lecture is to make explicit the potential consequences of the second and third innovations of *United Foods*, in the hope that we may in the future avoid the kind of doctrinal uncertainty and embarrassment that has unfortunately already plagued the *Glickman-United Foods-Johanns* trilogy.

I. COMPELLED COMMERCIAL SPEECH BEFORE *UNITED FOODS*

The Court first held that the Constitution protected commercial speech in 1976, when in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*¹² it overruled prior precedent¹³ to decide that the First Amendment constrained state regulation of commercial advertising. From the outset the Court insisted that “[o]ur jurisprudence has emphasized that ‘commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,’ and is subject to ‘modes of regulation that might be impermissible in the realm of noncommercial expression.’”¹⁴ Although content-based regulations of public discourse are subject to strict scrutiny, content-based restrictions of commercial speech are subject to review under the relatively more lenient terms of the so-called *Central Hudson* test:

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.¹⁵

¹² 425 U.S. 748 (1976).

¹³ *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (“[T]he Constitution imposes no . . . restraint on government” regulation of “purely commercial advertising.”).

¹⁴ *Bd. of Trs. v. Fox*, 492 U.S. 469, 477 (1989) (second alteration in original) (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978)); see, e.g., *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995). In recent years, this black-letter proposition has become contestable. Cf. Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996 SUP. CT. REV. 123.

¹⁵ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980). The Court has applied the *Central Hudson* test in radically inconsistent ways. Compare, e.g.,

Commercial speech receives diminished constitutional protection because “[t]he First Amendment’s concern for commercial speech is based on the informational function of advertising.”¹⁶ Whereas communication within “public discourse”¹⁷ is protected *both* because of its participatory value to a speaker *and* because of its informational value to an audience,¹⁸ “[a] commercial advertisement is constitutionally protected not so much because it pertains to the seller’s business as because it furthers the societal interest in the ‘free flow of commercial information.’”¹⁹

In 1985 in *Zauderer v. Office of Disciplinary Counsel*,²⁰ the Court used this explanation of the constitutional status of commercial speech as the premise for its analysis of the problem of mandatory commercial disclosures. At issue in *Zauderer* was a government requirement that speakers include information in their advertisements in order to avoid deceiving consumers. The case involved the constitutionality of a Disciplinary Rule of the Ohio Code of Professional Responsibility providing that lawyers could advertise contingent fee rates only if they disclosed “whether percentages are computed before or after deduction of court costs and expenses.”²¹ Because this Disciplinary Rule required lawyers to speak in ways that they would have preferred to avoid, *Zauderer* was required to address the question of compelled commercial speech.

Zauderer acknowledged that compelled speech within the realm of public discourse raised serious constitutional questions, as the Court had

Posadas de P.R. Assocs. v. Tourism Co., 478 U.S. 328 (1986), *with* *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995). More than a majority of the Justices have at one time or another indicated their dissatisfaction with the test. *See* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). Yet the Court has continued to apply the test with increasing severity. *See, e.g.,* *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367–68 (2002); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554–55 (2001); *Greater New Orleans Bd. Ass’n v. United States*, 527 U.S. 173, 183 (1999).

¹⁶ *Central Hudson*, 447 U.S. at 563; *see* Robert Post, *The Constitutional Status of Commercial Speech*, 48 *UCLA L. REV.* 1 (2000); *see also* Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 *NW. U. L. REV.* 372, 384 (1979).

¹⁷ *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682–83 (1986); *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985).

¹⁸ For a discussion, *see* Post, *supra* note 16.

¹⁹ *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 783 (1978) (quoting *Va. State Bd. of Pharmacy v. Va. Consumer Council, Inc.*, 425 U.S. 748, 764 (1976)).

²⁰ 471 U.S. 626 (1985).

²¹ *Id.* at 633.

ruled in precedents like *West Virginia Board of Education v. Barnette*,²² in which schoolchildren were required to recite the Pledge of Allegiance, and *Wooley v. Maynard*,²³ in which a Jehovah's witness was required to display the state motto of New Hampshire on the license plate of his automobile. *Zauderer* found that compelled *commercial* speech was different, however, because the regulation of commercial speech did not implicate constitutional "interests . . . of the same order as those discussed in *Wooley* . . . and *Barnette*."²⁴ The Court explained that "[b]ecause the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides," a speaker's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal."²⁵

Zauderer accordingly advanced an extraordinarily lenient test for the review of compelled commercial speech. It held that commercial speech could be compelled so "long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."²⁶ This standard for compelling commercial speech was far weaker than the *Central Hudson* test that applied to restrictions on commercial speech:

We reject appellant's contention that we should subject disclosure requirements to a strict "least restrictive means" analysis under which they must be struck down if there are other means by which the State's purposes may be served. Although we have subjected outright prohibitions on speech to such analysis, all our discussions of restraints on commercial speech have recommended disclosure requirements as one of the acceptable less restrictive alternatives to actual

²² 319 U.S. 624 (1943).

²³ 430 U.S. 705 (1977).

²⁴ *Zauderer*, 471 U.S. at 651.

²⁵ *Id.* Although the Court minimized the interests of a commercial speaker, it did not entirely deny them:

Thus, in virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, "warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception."

Id. It is striking that in the context of public discourse compelling speech is frequently regarded as less acceptable than prohibiting speech.

²⁶ *Zauderer*, 471 U.S. at 651.

suppression of speech. See, e.g., *Central Hudson Gas & Electric*, 447 U.S., at 565, 100 S.Ct., at 2351. Because the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed, we do not think it appropriate to strike down such requirements merely because other possible means by which the State might achieve its purposes can be hypothesized.²⁷

Zauderer's holding that *restrictions* on commercial speech should be more stringently reviewed than *compulsions* to engage in commercial speech follows directly from the Court's understanding of the constitutional value of commercial speech. Because restrictions on commercial speech threaten to diminish the "free flow of commercial information,"²⁸ whereas compulsions to speak increase the flow of that information, the latter actually advances the constitutional value attributed to commercial speech. The state's interest in avoiding potential deception follows directly from the need to ensure "that the stream of commercial information flow[s] cleanly. . . ."²⁹ Insofar as the constitutional value of commercial speech derives from the informational benefits of this flow, state compulsions to engage in commercial speech do not compromise constitutionally protected interests possessed by commercial speakers.

Within public discourse, by contrast, the First Amendment ascribes constitutionally valuable interests to speakers,³⁰ which is why the Court in cases like *Barnette* and *Wooley* rigorously scrutinized mandated forms of participation within public discourse. *Zauderer* specifically and explicitly emphasizes the distinction between commercial speech and

²⁷ *Id.* at 651 n.14. The Court continued:

Similarly, we are unpersuaded by appellant's argument that a disclosure requirement is subject to attack if it is "under-inclusive" — that is, if it does not get at all facets of the problem it is designed to ameliorate. As a general matter, governments are entitled to attack problems piecemeal, save where their policies implicate rights so fundamental that strict scrutiny must be applied. . . . The right of a commercial speaker not to divulge accurate information regarding his services is not such a fundamental right.

Id.

²⁸ *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978) (quoting *Va. State Bd. of Pharmacy Citizens v. Va. Consumer Council, Inc.*, 425 U.S. 748, 764 (1976)).

²⁹ *Edenfield v. Fane*, 507 U.S. 761, 768 (1993) (quoting *Va. State Bd. of Pharmacy*, 425 U.S. at 771–72).

³⁰ Robert Post, 1997 *Survey of Books Relating to the Law: I. Constitutional Law: Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517 (1997).

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public discourse by holding that a commercial speaker's constitutional interest in not being compelled to provide "purely factual and uncontroversial information"³¹ is "minimal."³² The Court would surely not characterize as "minimal" the constitutional interests of participants in public discourse, like the *New York Times*, to refuse to publish accurate factual information to supplement what the government might regard as a potentially misleading editorial.³³

"A vast regulatory apparatus in both the federal government and the states . . . to control . . . potentially misleading or deceptive speech"³⁴ has been erected on the foundation of *Zauderer*. This apparatus routinely compels commercial speech by requiring commercial speakers to disclose information to consumers.³⁵ There are many reasons for mandating the disclosure of commercial information. Sometimes, as in *Zauderer*, disclosures are compelled in order to prevent potential deception. But frequently the disclosure of information is required in order to promote transparent and efficient markets.³⁶ To tamper with

³¹ *Zauderer*, 471 U.S. at 651.

³² *Id.*

³³ See *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).

³⁴ Sullivan, *supra* note 14, at 153.

³⁵ For a sample of the many recent cases affirming compelled disclosures under *Zauderer*, see, e.g., *United States v. Schiff*, 379 F.3d 621, 631 (9th Cir. 2004) (upholding order requiring peddlers of suspect tax advice to post a copy of an injunction issued against them on their web site); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001) (upholding a requirement that lightbulb manufacturers disclose the mercury content of their products because "*Zauderer*, not *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n* . . . describes the relationship between means and ends demanded by the First Amendment in compelled commercial disclosure cases"); *United States v. Wenger*, 292 F. Supp. 2d 1296, 1304 (D. Utah 2003) (concluding that the disclosure requirement of 17(b) of the Securities Act of 1933 is constitutional because "[t]hough *Central Hudson* applies to statutes that restrict commercial speech, *Zauderer v. Office of Disciplinary Counsel* discusses the distinction between statutes mandating disclosures versus statutes prohibiting speech"); and *Bellsouth Adver. & Publ'g Corp. v. Tenn. Regulatory Auth.*, 79 S.W.3d 506, 520 (Tenn. 2002) (upholding regulation that compelled a telephone service provider to list its competitors on the cover of the phonebook because "under current law—as announced in *Zauderer*—as long as the disclosure requirement is reasonably related to the state's interest in preventing deception of consumers, and not unduly burdensome, it should be upheld").

³⁶ See, e.g., David S. Rudner, *Balancing Investor Protection with Capital Formation Needs After the SEC Chamber of Commerce Case*, 26 PACE L. REV. 39, 64 (2005) (discussing the benefits to market efficiency of the SEC's required disclosure rules). The SEC, for example, requires broker-dealers to make comprehensive disclosures about the risks of investing in order to provide investors with "market transparency." O. Dennis Hernandez, Jr., *Broker-Dealer Regulation Under the New Penny Stock Disclosure Rules: An Appraisal*, 1993 COLUM. BUS. L. REV. 27, 29. A similar rationale lies behind mandatory disclosure rules for credit card companies. 15 U.S.C. § 1601 (1982) ("It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him . . ."). See also *infra* notes 133–35.

Zauderer's understanding of compelled commercial speech is thus to trouble the foundations of pervasive and well-established regulatory regimes that presently govern American markets and protect American consumers. When the Court sought to address the question of compelled subsidization commercial speech in *United Foods*, it was intervening into a complex regulatory environment that had been established in reliance on the Court's own precedent.

It is true that *Zauderer* concerned compelled commercial speech, whereas *United Foods* addressed the seemingly distinct question of compelled subsidization of commercial speech. But in the contexts we are considering, the First Amendment values at stake in the compelled subsidization of speech derive from the First Amendment values at stake in compulsions to speak. If circumstances are such that it would not be unconstitutional to compel someone to speak, as for example to testify before a legislature, it would also not be unconstitutional to compel them to subsidize that speech.³⁷ For purposes of comparing *Zauderer* with *United Foods*, therefore, we can analyze the constitutional questions raised by compelled subsidization of commercial speech in terms of the constitutional issues raised by compelled commercial speech.

II. COMPELLED ASSOCIATION BEFORE *UNITED FOODS*

United Foods also intervened into what had long been settled doctrine in the area of compelled association. The Court first began to develop doctrine theorizing the connection between compelled association and the compelled subsidization of groups in 1977 in *Abood v. Detroit Board of Education*.³⁸ *Abood* held that serious First Amendment questions were raised by a state law creating an agency shop in which all employees were required to pay to the union that was their collective bargaining agent a fee that was equal in amount to union dues. These First Amendment questions concerned the right of employees not to be compelled to subsidize the ideological speech of an expressive association like a union.

Abood did not argue that the speech of the union would be attributed to the dissident employees who were compelled to contribute fees to the union. Instead *Abood* invoked the Court's decision the previous year in

³⁷ Another way to make this point is that speech is often expensive because it consumes resources like time and energy, and in such circumstances to compel persons to speak is the same as to compel them to subsidize speech.

³⁸ 431 U.S. 209 (1977).

Buckley v. Valeo,³⁹ which had held “that contributing to an organization for the purpose of spreading a political message is protected by the First Amendment.”⁴⁰ *Abood* decided that by parity of reasoning “[t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests. An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative.”⁴¹

The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.

....

These principles prohibit a State from compelling any individual to affirm his belief in God, . . . or to associate with a political party, . . . as a condition of retaining public employment. They are no less applicable to the case at bar, and they thus prohibit the appellees from requiring any of the appellants to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher.⁴²

Abood argued that because *Buckley* had held that First Amendment issues were raised by restrictions of “support of an ideological cause,” so constitutional issues would be raised by compelled support for such a cause. *Buckley* had upheld restrictions on contributions to political candidates if the government was able to advance a sufficiently important state purpose, such as “the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office.”⁴³ *Abood* analogously upheld compelled

³⁹ 424 U.S. 1 (1976).

⁴⁰ *Abood*, 431 U.S. at 234.

⁴¹ *Id.* at 222.

⁴² *Id.* at 234–35.

⁴³ *Buckley*, 424 U.S. at 25.

contributions to unions if the government was able to advance a sufficiently important state purpose, such as promoting “peaceful labor relations to permit a union and an employer to conclude an agreement requiring employees who obtain the benefit of union representation to share its cost.”⁴⁴ Because the state had no interest in compelling persons to contribute to “ideological activities unrelated to collective bargaining,”⁴⁵ *Abood* held that compulsory dues could not be used to support ideological speech that was “not germane to collective bargaining.”⁴⁶ This is the origin of *Abood*’s well-known “germaneness test.”

The Court subsequently reaffirmed *Abood*’s analysis in *Keller v. State Bar of California*,⁴⁷ which interpreted *Abood* to rest on the premise “that just as prohibitions on making contributions to organizations for political purposes implicate fundamental First Amendment concerns, . . . compelled . . . contributions for political purposes work no less an infringement of . . . constitutional rights.”⁴⁸ *Keller* applied the doctrinal structure established by *Abood* to hold that lawyers could be compelled to contribute dues to an integrated state bar so long as these dues were used to fund only “activities . . . germane to” the “purpose for which compelled association was justified: . . . the State’s interest in regulating the legal profession and improving the quality of legal services.”⁴⁹ The dues could not be used to “fund activities of an ideological nature which fall outside of those areas of activity.”⁵⁰

Latent in *Abood*, however, was a subtle ambiguity. Compelling dissident employees to pay dues to a union does not require them merely to support the speech of the union. It also forces them to affiliate with the union, which is itself a distinct expressive association. *Abood* briefly recognized this point when it noted that compelled union dues raised the question of “an employee’s freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit.”⁵¹ The mandated union dues at issue in *Abood* thus threatened two distinct First Amendment rights: freedom of speech and freedom of association.

⁴⁴ *Abood*, 431 U.S. at 219. In essence, *Abood* held that compelled association was required to preclude the possibility that employees who otherwise received the benefits of unionization could “free ride” on the union’s collective bargaining power.

⁴⁵ *Id.* at 236.

⁴⁶ *Id.* at 219.

⁴⁷ 496 U.S. 1 (1990).

⁴⁸ *Id.* at 9–10.

⁴⁹ *Id.* at 13–14.

⁵⁰ *Id.* at 14.

⁵¹ *Abood*, 431 U.S. at 222.

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At one level, these two separate rights are interrelated because First Amendment rights of freedom of association derive from constitutional rights of freedom of speech.⁵² First Amendment rights of association protect the “ability and the opportunity to combine with others to advance one’s views.”⁵³ “The Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.”⁵⁴ State regulation of association raises constitutional concerns when it restricts the capacity of persons to associate “for the purpose of engaging in protected speech or religious activities.”⁵⁵

It follows that there is no First Amendment right to associate in order to engage in forms of speech that are not protected by the First Amendment. Ordinary restrictions on the purchase of corporate stock, for example, do not infringe First Amendment rights of association. The scope of First Amendment rights of association thus depend upon the forms of speech that are protected by the First Amendment.

The First Amendment paradigmatically safeguards speech that embodies values associated with democratic legitimation.⁵⁶ I have used the label “public discourse” to designate speech that embodies these values.⁵⁷ Just as the First Amendment protects the ability of persons to

⁵² First Amendment rights of freedom of association are distinct from due process rights of association, which protect “choices to enter into and maintain certain intimate human relationships . . . against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18 (1984). These forms of intimate association receive “protection as a fundamental element of personal liberty.” *Id.* at 618.

⁵³ *N.Y. State Club Ass’n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988). See *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 126 S. Ct. 1297, 1311–12 (2006):

We have recognized a First Amendment right to associate for the purpose of speaking The reason we have extended First Amendment protection in this way is clear: The right to speak is often exercised most effectively by combining one’s voice with the voices of others. . . . If the government were free to restrict individuals’ ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect.

⁵⁴ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984).

⁵⁵ *Bd. of Dirs. of Rotary Intern. v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987).

⁵⁶ See Post, *supra* note 16, at 9–10; Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1254–55 (1995); see also JAMES WEINSTEIN, *HATE SPEECH, PORNOGRAPHY, AND THE RADICAL ATTACK ON FREE SPEECH DOCTRINE* 12–16, 43–49 (1999); James Weinstein, *Speech Categorization and the Limits of First Amendment Formalism: Lessons from Nike v. Kasky*, 54 CASE W. RES. L. REV. 1091, 1094–10 (2004).

⁵⁷ Robert Post, *Community and the First Amendment*, 29 ARIZ. ST. L.J. 473, 481 (1997).

participate in public discourse so as to render public opinion responsive to their views, so the First Amendment protects the ability of persons to participate in public discourse by joining together to amplify their views in order to make them more effective. Because there is a First Amendment right not to be forced to speak within public discourse,⁵⁸ the Court has also concluded that “[f]reedom of association . . . plainly presupposes a freedom not to associate.”⁵⁹ To require persons to associate against their will with organizations that seek to influence public opinion is to undermine the value of democratic legitimation by frustrating the aspiration of persons to render public opinion responsive to their own views.

Although rights of speech and association are interdependent, they are also analytically distinct, as can be seen in *Abood* itself. Labor unions are organizations with ideological purposes and messages, so that First Amendment rights of association attach to their formation.⁶⁰ First Amendment concerns are therefore triggered by requiring dissident employees to affiliate with labor unions, whether or not the dues of dissident employees are used to support the specifically ideological speech of unions. The right not to associate with a union, and the right not to support its ideological speech, are logically separate issues.

The Court began doctrinally to recognize this distinction in *Ellis v. Brotherhood of Railway, Airline & Steamship Clerk*.⁶¹ The puzzle faced by *Ellis* was how to distinguish union activities that could be supported by compulsory dues from those activities that could not. *Ellis* began its analysis of the problem with the premise that “by allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights” because the “dissenting employee is forced to support financially an organization with whose principles and demands he may disagree.”⁶² *Ellis* concluded that compelled dues could constitutionally be sustained only insofar as unions acted to advance purposes that justified compulsory affiliation. *Ellis* identified “the governmental interest in industrial peace”⁶³ as such a purpose, and it therefore held that “the test must be whether the challenged

⁵⁸ *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 796–97 (1988); *Wooley v. Maynard*, 430 U.S. 705 (1977); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

⁵⁹ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

⁶⁰ *Thomas v. Collins*, 323 U.S. 516 (1945); *Thornhill v. Alabama*, 310 U.S. 88, 102–04 (1940).

⁶¹ 466 U.S. 435 (1984).

⁶² *Id.* at 455.

⁶³ *Id.* at 456.

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expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.”⁶⁴

In this way *Ellis* moved beyond *Abood*’s narrow focus on the ideological speech of unions and instead began to address the separate question of compulsory affiliation. Ruling that mandatory dues, even if spent for non-ideological purposes, nevertheless “involve additional interference with the First Amendment interests of objecting employees,” *Ellis* required courts to determine with respect to all such dues “whether they are nonetheless adequately supported by a governmental interest.”⁶⁵ The Court consolidated this doctrinal structure in *Lehnert v. Ferris Faculty Ass’n*,⁶⁶ holding “that chargeable activities must (1) be ‘germane’ to collective-bargaining activity; (2) be justified by the government’s vital policy interest in labor peace and avoiding ‘free riders’; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.”⁶⁷

Ellis and *Lehnert* articulated a doctrinal structure that protects the right of dissident employees not to be compelled to affiliate with unions. Mandatory dues are conceived as a form of compulsory affiliation, which are permissible only insofar as they are justified by the state’s goal of promoting collective bargaining. The right to be free from coerced affiliation is logically distinct from the right of dissident employees not to be compelled to subsidize the specific ideological speech of unions. The difference is evident in a recent decision like *Romero v. Colegio de Abogados de Puerto Rico*,⁶⁸ in which the First Circuit struck down an integrated bar’s efforts to use compulsory dues to fund mandatory life insurance policies. Although no First Amendment issue of freedom of speech is plausibly raised by the use of bar dues to purchase life insurance policies, *Romero* nevertheless held that a bar’s use of compulsory dues to purchase life insurance violates the right of dissident attorneys not to be compelled to affiliate with the expressive association of the bar:

The very act of the state compelling an employee or an attorney to belong to or pay fees to a union or bar association implicates that person’s First Amendment

⁶⁴ *Id.* at 448.

⁶⁵ *Id.* at 456.

⁶⁶ 500 U.S. 507 (1991).

⁶⁷ *Id.* at 519.

⁶⁸ 204 F.3d 291 (1st Cir. 2000).

right not to associate. . . . In both situations, strong public interests justify the intrusion, and the germaneness test guarantees that these public interests are being served by any challenged activity. Compelling financial support for activities wholly unrelated to those public interests, however, changes the balance and weakens the justification that supported the intrusion on First Amendment associational interests in the first place. Simply stated, that an individual may be compelled to associate and financially contribute for some purposes does not mean she may be compelled to associate and financially contribute for all purposes. . . . Without this germaneness check, once a person is compelled to join and support a bar association for legitimate reasons, she could be forced to pay for any bar activity for any reason or no reason, as long as it did not involve political or ideological expression.⁶⁹

By the time of *United Foods*, therefore, the Court had held that constitutional questions of coerced affiliation would arise whenever persons were forced to subsidize “expressive” organizations like unions or bar associations. Organizations were deemed “expressive” whenever they engaged in “protected speech.”⁷⁰ Persons could be compelled to associate with expressive associations only insofar as the affiliation was “germane” to a state purpose that was sufficiently important to justify coerced affiliation. The Court used the “germaneness test” of *Abood* to protect the distinct right of freedom of association.

⁶⁹ *Id.* at 301. *Romero* should be contrasted with a decision like *Popejoy v. New Mexico Board of Bar Commissioners*, 887 F. Supp. 1422 (D.N.M. 1995), which, by focusing sharply on freedom of speech as distinct from association, rejected a lawyer’s claim that his Bar’s “acquisition of excess office space” was a violation of the First Amendment. “Construction of a building or maintenance of excess space are activities with no communicative value and expressing no ideological or political viewpoint; as such, they do not meaningfully implicate the core First Amendment principle of preventing compelled ideological conformity.” *Id.* at 1429. *Popejoy* did not appreciate the distinction between compelled speech and compelled association, a distinction that came increasingly into focus in the development of the Court’s doctrine between *Abood* and *Lehnert*.

⁷⁰ *Bd. of Dirs. of Rotary Intern. v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987).

III. THE INNOVATIONS OF *UNITED FOODS*A. *Glickman v. Wileman Brothers & Elliott*

In 1997 the Court revisited questions of compelled commercial speech and coerced affiliation in *Glickman v. Wileman Brothers & Elliott*,⁷¹ which was a suit brought by producers of California summer fruits. *Glickman* involved the constitutionality of marketing orders promulgated by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937.⁷² The Act created forms of comprehensive economic regulation “in order to establish and maintain orderly marketing conditions and fair prices. . . .”⁷³ Displacing “competition” and explicitly exempting producers from antitrust laws, the Act authorized mechanisms that created uniform prices, limited the quality and the quantity of commodities, specified the grades and sizes of commodities, sanctioned joint research and development projects, and established standardized packaging requirements.⁷⁴ It imposed mandatory assessments on producers of California summer tree fruits, which were used by the Nectarine Administrative Committee and the Peach Commodity Committee to subsidize generic advertisements for these products. Plaintiffs in the case were producers of California summer fruits who were subject to the assessments. They argued that the First Amendment prohibited compulsory fees for the purpose of subsidizing “generic advertising.”⁷⁵

In a five-to-four opinion authored by Justice Stevens,⁷⁶ the Court rejected plaintiffs’ claim. *Glickman* refused to regard the mandatory assessments as involving compelled commercial speech. It reasoned that because the mandatory assessments did not require plaintiffs “themselves to speak, but . . . merely . . . to make contributions for advertising,”⁷⁷ “our compelled speech case law . . . is clearly inapplicable to the regulatory scheme at issue here.”⁷⁸

⁷¹ 521 U.S. 457 (1997).

⁷² 7 U.S.C. § 608c(6)(I) (2000).

⁷³ *Glickman*, 521 U.S. at 461.

⁷⁴ *Id.*

⁷⁵ *Id.* at 462.

⁷⁶ Chief Justice Rehnquist and Justices Souter, Scalia, and Thomas dissented.

⁷⁷ *Glickman*, 521 U.S. at 471. The Court noted that the mandatory assessments “do not compel any person to engage in any actual or symbolic speech.” *Id.* at 469.

The use of assessments to pay for advertising does not require respondents to repeat an objectionable message out of their own mouths, cf. *Barnette*, . . . require them to use their own property to

Glickman refused to interpret *Abood* as holding that the compelled subsidization of speech was constitutionally equivalent to compelled speech. *Glickman* instead read *Abood* to address the question of compelled affiliation with an expressive association. “*Abood*, and the cases that follow it, did not announce a broad First Amendment right not to be compelled to provide financial support for any organization that conducts expressive activities. Rather, *Abood* merely recognized a First Amendment interest in not being compelled to contribute to an organization whose expressive activities”⁷⁹ would “engender any crisis of conscience.”⁸⁰ Because the advertisements authorized by the Nectarine Administrative Committee and the Peach Commodity Committee did “not compel the producers to endorse or to finance any political or ideological views,”⁸¹ the mandatory assessments did not require plaintiffs to affiliate with an expressive association.⁸²

In effect, *Glickman* held that although there was a First Amendment right to refuse to affiliate with an association that participates in public discourse, there was no First Amendment right to refuse to affiliate with an association that engaged merely in commercial speech. The First Amendment extended only “minimal constitutional protection” to “the freedom of *commercial* association.”⁸³ The mandatory assessments were simply “a species of economic regulation that should enjoy the same

convey an antagonistic ideological message, cf. *Wooley*, . . . force them to respond to a hostile message when they “would prefer to remain silent,” . . . or require them to be publicly identified or associated with another’s message, cf. *PruneYard*. . . . Respondents are not required themselves to speak, but are merely required to make contributions for advertising. With trivial exceptions on which the court did not rely, none of the generic advertising conveys any message with which respondents disagree. Furthermore, the advertising is attributed not to them, but to the California Tree Fruit Agreement or “California Summer Fruits.”

Id. at 470–71.

⁷⁸ *Id.* at 470.

⁷⁹ *Id.* at 471.

⁸⁰ *Id.* at 472.

⁸¹ *Id.* at 469–70.

⁸² “The collective programs authorized by the marketing order do not, as a general matter, impinge on speech or association rights.” *Id.* at 473 n.16. Cf. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634, 635 (1984) (O’Connor, J., concurring in part and concurring in judgment) (finding that there are “only minimal constitutional protection of the freedom of *commercial* association” and that an association whose “activities are not predominantly of the type protected by the First Amendment” is subject to “rationally related state regulation of its membership”).

⁸³ *Glickman*, 521 U.S. at 473 n.16 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634–35 (1984) (Opinion of O’Connor, J.)).

strong presumption of validity that we accord to other policy judgments made by Congress.”⁸⁴

Although *Glickman* explicitly held that the mandatory assessments did not impinge on First Amendment rights of speech or association,⁸⁵ it also, and somewhat mysteriously, applied the “germaneness” test of *Abood*:

[R]ather than suggesting that mandatory funding of expressive activities always constitutes compelled speech in violation of the First Amendment, our cases provide affirmative support for the proposition that assessments to fund a lawful collective program may sometimes be used to pay for speech over the objection of some members of the group.⁸⁶

Mandatory funding of “expressive activities” was constitutional, *Glickman* ruled, if “germane” to a sufficiently important state purpose. Because the purpose of the marketing orders was to maintain stable and orderly markets, and because “the generic advertising of California peaches and nectarines is unquestionably germane to” that purpose,⁸⁷ *Glickman* concluded that the mandatory assessments were constitutional.

Glickman thus offered three logically distinct and independent justifications for its holding. It reasoned that First Amendment rights of freedom of speech were not implicated by the mandatory assessments because compelled subsidization of speech is different from compelled speech. It argued that First Amendment rights of freedom of association were not infringed because the mandatory assessments, at most, established a connection to an organization that was not expressive. And it concluded that even if First Amendment rights of compelled speech or compelled association were implicated, the mandatory assessments were justified because they were germane to a sufficiently important state purpose.

Glickman provoked an aggressive and ambitious dissent by Justice Souter, who argued that “laws requiring an individual to engage in or

⁸⁴ *Glickman*, 521 U.S. at 477.

⁸⁵ “The legal question that we address is whether being compelled to fund this 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.” *Id.* at 468.

⁸⁶ *Id.* at 472–73; see *id.* at 483, 487–88 (Souter, J., dissenting).

⁸⁷ *Id.* at 473 (majority opinion).

pay for expressive activities are reviewed under the same standard that applies to laws prohibiting one from engaging in or paying for such activities.”⁸⁸ The idea that the government “may compel subsidization for any objectionable message that is not political or ideological,” Souter asserted, was “entirely at odds with the principle that speech significant enough to be protected at some level is outside the government’s power to coerce or to support by mandatory subsidy without further justification.”⁸⁹ Ignoring if not flatly contradicting the logic of *Zauderer*, Souter proceeded from the premise that “forced payment for commercial speech should be subject to the same level of judicial scrutiny as any restriction on communications in that category.”⁹⁰ Since restrictions on commercial speech would be subject to the *Central Hudson* test, Souter applied that test to the mandatory assessments and found them wanting.⁹¹

B. United States v. United Foods, Inc.

Four years after *Glickman* the Court executed a sharp and unexpected *volte-face* in *United States v. United Foods, Inc.*,⁹² which involved a challenge to the Mushroom Promotion, Research, and Consumer Information Act.⁹³ The Act authorized the Secretary of Agriculture to create a Mushroom Council empowered to impose mandatory assessments on handlers of fresh mushrooms in order to serve the statute’s goals of advancing projects of mushroom promotion, research, consumer information, and industry information.⁹⁴ It was “undisputed . . . that most moneys raised by the assessments [were] spent for generic advertising to promote mushroom sales.”⁹⁵ The plaintiff, a large agricultural enterprise, alleged that the assessments were unconstitutional under the First Amendment. Surprisingly, the Court agreed in a six-to-three decision.

⁸⁸ *Id.* at 491 (Souter, J., dissenting). Souter’s dissent was joined by Chief Justice Rehnquist and Justice Scalia, and in part by Justice Thomas. Thomas, joined by Scalia, wrote separately to explain that he had refused to join the passages in Souter’s opinion applying the *Central Hudson* test to determine the constitutionality of the Marketing Orders: “I continue to disagree with the use of the *Central Hudson* balancing test and the discounted weight given to commercial speech generally.” *Id.* at 504 (Thomas, J., dissenting).

⁸⁹ *Id.* at 487 (Souter, J., dissenting).

⁹⁰ *Id.* at 478.

⁹¹ *Id.* at 491–504.

⁹² 533 U.S. 405 (2001).

⁹³ 7 U.S.C. §§ 6101–12 (2000).

⁹⁴ 7 U.S.C. § 6104(c)(4) (2000).

⁹⁵ *United Foods*, 533 U.S. at 408.

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Switching his view of the merits from *Glickman*, Justice Kennedy authored the Court's opinion in *United Foods*.⁹⁶ He read *Glickman* as turning entirely on the application of *Abood*'s germaneness test. *United Foods* interpreted "the opinion and the analysis of the Court" in *Glickman* as proceeding from "the premise that the producers were bound together and required by the statute to market their products according to cooperative rules. To that extent, their mandated participation in an advertising program with a particular message was the logical concomitant of a valid scheme of economic regulation."⁹⁷ Because in *Glickman* the "producers were bound together in the common venture, the imposition upon their First Amendment rights caused by using compelled contributions for germane advertising was, as in *Abood* and *Keller*, in furtherance of an otherwise legitimate program."⁹⁸

United Foods held that the assessments imposed by the Mushroom Council, unlike those at issue in *Glickman*, were "not part of some broader regulatory scheme,"⁹⁹ but were used merely to support the advertising itself.¹⁰⁰ The assessments in *United Foods* thus failed *Abood*'s germaneness test. "The expression respondent is required to support is not germane to a purpose related to an association independent from the speech itself; and the rationale of *Abood* extends to the party who objects to the compelled support for this speech."¹⁰¹

United Foods explicitly repudiated the central postulate of *Glickman*, which is that the compelled subsidization of speech does not raise First Amendment concerns unless the compelled speech is ideological in nature. *United Foods* announced "that speech need not be characterized as political before it receives First Amendment protection,"¹⁰² and it

⁹⁶ Justice Stevens also switched his vote. Justice Breyer authored a dissent, joined by Justice Ginsburg and in part by Justice O'Connor.

⁹⁷ *United Foods*, 533 U.S. at 412.

⁹⁸ *Id.* at 414-15.

⁹⁹ *Id.* at 415.

¹⁰⁰ "The only program the Government contends the compelled contributions serve is the very advertising scheme in question." *Id.* at 415.

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.

Id. at 411-12.

¹⁰¹ *Id.* at 415-16.

¹⁰² *Id.* at 413. Stevens wrote separately to explain his own switch:

asserted that constitutional scrutiny is triggered whenever persons are forced to “subsidize speech with which they disagree”¹⁰³ or whenever “certain individuals” are compelled “to pay subsidies for speech to which they object.”¹⁰⁴ I have argued elsewhere that this assertion is a mistake of the first magnitude,¹⁰⁵ and I shall not repeat those arguments here. There are numerous circumstances in which First Amendment concerns are not aroused even though persons are required to pay for speech with which they disagree. Attorneys’ fees statutes are obvious examples.¹⁰⁶

Quite apart from generic issues of compelled subsidization of speech, however, *United Foods* also addresses the more specific questions of compelled subsidization of *commercial* speech or, alternatively, coerced affiliation with an association that engages primarily in *commercial* speech. *United Foods* does not clearly distinguish between issues of compelled subsidization of speech and issues of compelled affiliation. Although this distinction had been clarified in the progression from

As we held in *Glickman*, *Keller*, and a number of other cases, . . . a compelled subsidy is permissible when it is ancillary, or “germane,” to a valid cooperative endeavor. The 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 collective program.

....

This case, however, raises the open question whether such compulsion is constitutional when nothing more than commercial advertising is at stake. The naked imposition of such compulsion, like a naked restraint on speech itself, seems quite different to me. We need not decide whether other interests, such as . . . health or artistic concerns . . . might justify a compelled subsidy like this, but surely the interest in making one entrepreneur finance advertising for the benefit of his competitors, including some who are not required to contribute, is insufficient.

Id. at 418 (Stevens, J., concurring). Stevens added a footnote that seems even more inconsistent with the logic of *Glickman*:

I think it clear that government compulsion to finance objectionable speech imposes a greater restraint on liberty than government regulation of money used to subsidize the speech of others. Even in the commercial speech context, I think it entirely proper for the Court to rely on the First Amendment when evaluating the significance of such compulsion.

Id. at 418 n.*.

¹⁰³ *Id.* at 411.

¹⁰⁴ *Id.* at 410.

¹⁰⁵ See Post, *supra* note 11.

¹⁰⁶ See, e.g., *Banning v. Newdow*, 14 Cal. Rptr. 3d 447 (Cal. Ct. App. 2004).

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Abood to Lehnert, it remains obscure in the *Glickman-United Foods-Johanns* trilogy.¹⁰⁷ In the remainder of this Lecture, therefore, I shall discuss two alternative interpretations of *United Foods*. I shall read the decision as concerned either with compelled subsidization of speech or with coerced affiliation. In each instance, however, I shall focus on the jurisprudential implications of the fact that *United Foods* involves commercial speech, rather than public discourse.

IV. *UNITED FOODS* AND THE COMPELLED SUBSIDIZATION OF COMMERCIAL SPEECH

United Foods rejects *Glickman's* distinction between compelled speech and the compelled subsidization of speech, and it explains that the compelled subsidization of speech raises serious First Amendment questions even if the speech at issue is commercial. This holding puts *United Foods* in serious tension with *Zauderer*, which at the time was the Court's governing precedent concerning the constitutionality of compelled commercial speech. In *Zauderer* the Court had held that mandatory commercial disclosures implicated only "minimal" First Amendment interests. *Zauderer* necessarily implied that compelled subsidization of these disclosures would also implicate only "minimal" First Amendment interests.

United Foods attempts to distinguish *Zauderer* on two grounds. First, *United Foods* argues that the Disciplinary Rule at issue in *Zauderer* applied to "attorneys who advertised by their own choice,"¹⁰⁸ and who, if they wished, could refrain from advertising at all. In *United Foods*, by contrast, commercial firms were forced to pay the assessments whether they wished to or not. Second, *United Foods* argues that in *Zauderer* the state's concern was to prevent advertisements that were potentially misleading. In *United Foods*, by contrast, "there is no suggestion . . . that the mandatory assessments imposed to require one group of private persons to pay for speech by others are somehow necessary to make voluntary advertisements nonmisleading for consumers."¹⁰⁹

United Foods's first proposed ground of distinction is unpersuasive. The attorney in *Zauderer* was forced to disclose commercial information as a condition of advertising his legal services. The commercial speaker

¹⁰⁷ *Glickman* shuffles uneasily between issues of speech and association. *Johanns* addresses only the question of compelled subsidization of speech; it erroneously reads *United Foods* as entirely concerned with that question.

¹⁰⁸ *United Foods*, 533 U.S. at 416.

¹⁰⁹ *Id.*

in *United Foods* was forced to subsidize advertisements as a condition of its selling mushrooms. In *Zauderer* the lawyer could have ceased to advertise; in *United Foods* the commercial firm could have ceased to sell mushrooms. In both cases the requirement of compelled commercial speech was imposed as a condition of engaging in commercial activity. In neither case was it unconditional.

The second ground of distinction advanced by *United Foods* correctly identifies a real difference from *Zauderer*, but the meaning attributed by the Court to this difference is obscure. It is true that the disclosure at issue in *Zauderer* was imposed in order to foreclose the possibility of consumer deception, whereas the regulation in *United Foods* was imposed in order to promote the market in mushrooms. But *Zauderer* did not hold that a commercial speaker's First Amendment interests were "minimal" because the state possessed a powerful interest in averting potential deception. Instead it held that because the constitutional value of commercial speech lies in the circulation of information, commercial speakers do not possess more than residual interests in deciding what kinds of advertisements to promulgate. This conclusion applies as fully to the mushroom producer in *United Foods* as it does to the lawyer in *Zauderer*. Within the logic of *Zauderer*, therefore, the commercial speaker in *United Foods* should possess merely "minimal" First Amendment interests, and these interests should easily have been overridden by the state's need to promote and stabilize the market in mushrooms.

United Foods thus implicitly alters the logic of *Zauderer*. The holding of *United Foods* can be explained only on the assumption that commercial speakers retain significant constitutional interests that are not fully captured by the constitutional values inherent in the circulation of information.¹¹⁰ Like Souter's dissent in *Glickman*, *United Foods* must break with the Court's traditional explanation of its commercial speech doctrine and move from constitutional values that are audience-centered to those that are speaker-centered.¹¹¹ The Court's subsequent decision in

¹¹⁰ In his dissent in *Johanns*, Souter explicitly reads *United Foods* as attributing "autonomy" interests to commercial speakers. *Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. 2055, 2071 (2005) (Souter, J., dissenting). Souter's dissent was joined by Kennedy, the author of *United Foods*, and by Stevens, the author of *Glickman*.

¹¹¹ Such an implicit re-evaluation of the constitutional values in commercial speech might explain the increasing severity with which the Court has in recent years applied the *Central Hudson* test. See, e.g., *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367-68 (2002); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554-55 (2001); *Greater New Orleans Bd. Ass'n v. United States*, 527 U.S. 173, 183 (1999). It is plain that there is disagreement among the Justices joining the Court's opinion in *United Foods* about what test should be used to

Johanns holds merely that taxes used to support government speech can never give rise to First Amendment claims, and it does not in any way modify or alleviate this implicit shift.

V. *UNITED FOODS* AND COERCED AFFILIATION WITH AN ASSOCIATION THAT ENGAGES IN COMMERCIAL SPEECH

United Foods invalidates the mandatory assessments of the Mushroom Council by applying the germaneness test of *Abood*. The use of the germaneness test suggests that the question of coerced affiliation was constitutionally decisive for *United Foods*, which asserts that “[b]efore addressing whether a conflict with freedom of belief exists, a threshold inquiry must be whether there is some state imposed obligation which makes group membership less than voluntary; for it is only the overriding associational purpose which allows any compelled subsidy for speech in the first place.”¹¹² *United Foods* explains that requiring payments to subsidize the speech of an association is constitutional only if “the compelled contribution of moneys to pay for expressive activities [is] a necessary incident of a larger expenditure for an otherwise proper goal requiring the cooperative activity,”¹¹³ and it ultimately distinguishes *Glickman* on the ground that in the latter case there was an adequate constitutional justification for “requiring the cooperative activity.”

United Foods’s reasoning is far from clear. It might concern the structure of plaintiffs’ claim of compelled speech, in which case *United Foods* holds that persons cannot constitutionally be compelled to subsidize speech unless the state is justified in forcing them to affiliate with an expressive association.¹¹⁴ But this interpretation of *United Foods*

measure the constitutionality of restrictions on commercial speech. In *Glickman*, Thomas, joined by Scalia, had dissented specially to note that:

I continue to disagree with the use of the *Central Hudson* balancing test and the discounted weight given to commercial speech generally. . . . Because the regulation at issue here fails even the more lenient *Central Hudson* test, however, it, *a fortiori*, would fail the higher standard that should be applied to all speech, whether commercial or not.

Glickman v. Wileman Bros. & Elliot, Inc., 521 U.S. 457, 504 (1997) (Thomas, J., dissenting). See also *supra* note 88.

¹¹² *United Foods*, 533 U.S. at 413.

¹¹³ *Id.* at 414. The Court continues: “The central holding in *Keller*, moreover, was that the objecting members were not required to give speech subsidies for matters not germane to the larger regulatory purpose which justified the required association.” *Id.*

¹¹⁴ It is noteworthy that Justice Stevens’ short concurrence explicitly avoids this implication. Stevens reserves the question as to which interests would justify compelled contributions for collective advertising. Stevens concludes only that “surely the interest in

is fundamentally implausible.¹¹⁵ In *Zauderer* commercial disclosures were mandated without also requiring “cooperative activity.” If, as Souter argued in his dissent in *Glickman*, the constitutional standard for assessing the mandatory subsidization of commercial speech were to be the same *Central Hudson* test as is used to determine the constitutionality of restrictions on commercial speech,¹¹⁶ the Mushroom Act’s goal of “maintain[ing] and expand[ing] existing markets and uses for mushrooms”¹¹⁷ would plainly meet the *Central Hudson* requirement of substantiality, even though it does not also require “cooperative activity.” Even if five Justices of the Court were prepared to rule, as Thomas believes, that “any regulation that compels the funding of advertising must be subjected to the most stringent First Amendment

making one entrepreneur finance advertising for the benefit of his competitors, including some who are not required to contribute, is insufficient” to justify compelled contributions for speech. *Id.* at 418; see *supra* note 102.

¹¹⁵ There is no reason to believe that compelled speech can be justified only by cooperative activity. We compel persons to report traffic accidents, for example, or to report potential public health risks like those involving child abuse, without also requiring compulsory affiliation of any kind.

¹¹⁶ *United Foods* is deliberately noncommittal on this point. *United Foods*, 533 U.S. at 410. In his dissent in *Glickman*, Souter had explicitly argued that the *Central Hudson* test be employed. *Glickman*, 521 U.S. at 491–92 (Souter, J., dissenting). In his dissent in *Johanns*, by contrast, Souter seemed to suggest “that *Central Hudson* scrutiny is not appropriate in a case involving compelled speech rather than restrictions on speech.” *Johanns v. Livestock Marketing Ass’n*, 125 S. Ct. 2055, 2074 n.10 (2005) (Souter, J., dissenting). Lower courts have reached quite disparate conclusions on this question. Some courts have held that a state regulation that compels speech, rather prohibits it, “tends to [be] less objectionable under the First Amendment.” *Walker v. Bd. of Professional Responsibility of the Supreme Court of Tenn.*, 38 S.W.3d 540, 545 (Tenn. 2001); see *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 n.14 (1985); *Bellsouth Adver. & Publ’g Corp. v. Tenn. Regulatory Auth.*, 79 S.W.3d 506, 519 (Tenn. 2002). Others have held the reverse, that “the relaxed scrutiny of commercial speech . . . provided for by *Central Hudson*” ought to be “inapplicable” “to speech—commercial or otherwise—that is compelled. . . . It is one thing to force someone to close her mouth; it is quite another to force her to become a mouthpiece.” *Mich. Pork Producers Ass’n v. Veneman*, 348 F.3d 157, 163 (6th Cir. 2003), *vacated sub nom.* *Mich. Pork Producers Ass’n v. Campaign for Family Farms*, 125 S. Ct. 2511 (2005); see also *Cochran v. Veneman*, 359 F.3d 263, 280 n.15 (3d Cir. 2004) (Rendell, J., concurring), *vacated sub nom.* *Lovell v. Cochran*, 125 S. Ct. 2511 (2005); *Cal-Almond, Inc. v. U.S. Dep’t of Agric.*, 14 F.3d 429, 436 (9th Cir. 1993).

¹¹⁷ *United Foods*, 533 U.S. at 421 (Breyer, J., dissenting). Breyer continued:

As the Mushroom Act’s economic goals indicate, collective promotion and research is a perfectly traditional form of government intervention in the marketplace. Promotion may help to overcome inaccurate consumer perceptions about a product. . . . Overcoming those perceptions will sometimes bring special public benefits. . . . And compelled payment may be needed to produce those benefits where, otherwise, some producers would take a free ride on the expenditures of others.

Id. at 421–22.

scrutiny,"¹¹⁸ there are nevertheless "compelling purposes" capable of satisfying strict scrutiny that do not also require cooperative activity.

We thus cannot plausibly interpret *United Foods*'s use of *Abood*'s germaneness test as addressing plaintiff's claim of compelled subsidization of speech. It must therefore concern plaintiff's claim of coerced affiliation. Just as *Ellis* and *Lehnert* had conceptualized mandatory union dues as compelling affiliation with the expressive association of a union, so *United Foods* evidently conceived the mandatory assessments of the Mushroom Council as compelling affiliation with the private organization of mushroom producers in whose name the mushroom advertisements were issued.¹¹⁹ This interpretation of *United Foods* has the advantage of explaining its otherwise mysterious use of *Abood*'s germaneness test and of illuminating why *United Foods* sought to identify an "overriding associational purpose which allows any compelled subsidy for speech in the first place."¹²⁰

The disadvantage of this interpretation of *United Foods*, however, is that it raises disquieting questions about the constitutional definition of an expressive association. The First Amendment right to affiliate or not to affiliate with an organization applies only to associations that are "expressive," which is to say only to associations that engage in "protected speech."¹²¹ Heretofore all associations deemed expressive, like unions or bar associations, were organizations that engaged in public discourse. *United Foods* is the first decision to conceive an

¹¹⁸ *United Foods*, 533 U.S. at 419 (Thomas, J., concurring); see *Johanns*, 125 S. Ct. at 2066 (Thomas, J., concurring).

¹¹⁹ The Court in *Johanns* interpreted *United Foods* as resting "on the assumption that the advertising was private speech, not government speech." *Johanns*, 125 S. Ct. at 2061; see, e.g., *Pelts & Skins LLC v. Landreneau*, 365 F.3d 423, 434 (5th Cir. 2004), *vacated*, 125 S. Ct. 2511 (2005). "The common thread uniting *Abood*, *Keller*, *Glickman*, and *United Foods* is that compelled subsidization of speech is permissible when individuals have been bound into a collective association." *Id.* (internal citations omitted).

¹²⁰ *United Foods*, 533 U.S. at 413.

In *Abood*, the infringement upon First Amendment associational rights worked by a union shop arrangement was "constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." To attain the desired benefit of collective bargaining, union members and nonmembers were required to associate with one another, and the legitimate purposes of the group were furthered by the mandated association.

Id. at 413-14 (internal citations omitted).

¹²¹ See *supra* text accompanying notes 53-55.

association as expressive even though it engages *only* in commercial speech.

The problem with this interpretation of *United Foods* is that virtually all commercial organizations—all corporations or business partnerships—engage in commercial speech. If an organization is deemed expressive merely because it engages in commercial speech, all laws regulating affiliation and de-affiliation with business organizations, as well as all laws regulating the internal capacity of persons to control the commercial speech of such organizations,¹²² will be subject to First Amendment scrutiny. This is plainly untenable.

It is noteworthy, therefore, that *United Foods* uses the germaneness test of *Abood* to distinguish commercial associations that exist primarily for the purpose of commercial expression, like the Mushroom Council, from commercial associations that additionally serve other purposes, like the Nectarine Administrative Committee and the Peach Commodity Committee.¹²³ This application of the germaneness test implies that First Amendment rights of association protect against compelled affiliation with commercial associations that primarily engage in commercial speech, but not against coerced affiliation with commercial associations that also serve other ends.¹²⁴

VI. ASSESSING THE INNOVATIONS OF *UNITED FOODS*

United Foods is a highly innovative and consequential decision, whether it is read as turning on the idea that the compulsory subsidization of commercial speech ought to receive careful

¹²² See *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995).

¹²³ Stevens switched his vote between *Glickman* and *United Foods* specifically because he concluded that in *United Foods* “nothing more than commercial advertising is at stake.” *United Foods*, 533 U.S. at 418 (Stevens, J., concurring).

¹²⁴ Because *Johanns* conceptualizes *United Foods* entirely as a compelled speech case, *Johanns* does not address the implicit holding of *United Foods* that First Amendment interests are infringed by compelled affiliation with organizations engaged primarily in commercial speech. It is noteworthy, however, that the “government speech” exception which *Johanns* postulates for the compelled subsidization of speech also makes theoretical sense in the context of compelled association. First Amendment rights cannot be infringed by the use of compulsory tax dollars to affiliate persons with the state itself, even with a state organization that is primarily engaged in commercial speech. This is because all citizens of a state are already affiliated with their government by virtue of their membership in a democratic polity that demands forms of associative solidarity like compulsory jury duty, the military draft, and taxes. It is meaningless to appeal to the First Amendment to complain that the state has coercively required affiliation with itself, as such affiliation is always already implicit in the obligations of citizenship.

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constitutional scrutiny, or instead on the idea that the *Abood* germaneness test protects against coerced affiliation with associations that engage primarily in commercial speech. Neither of these fundamental innovations of *United Foods* is in any way affected by *Johanns*.

The innovations of *United Foods* are not, in my view, well taken. They are largely implicit in the opinion's structure, and as a consequence they are never openly articulated and systematically defended. When rendered explicit, it is plain that they are inconsistent with important precedents and threaten to unsettle significant dimensions of First Amendment jurisprudence. They are also in deep tension with basic principles that inform contemporary regulations of consumer markets.

Consider, first, *United Foods*'s view that commercial speakers retain significant constitutional interests that must be balanced against state interests in compelling the subsidization of commercial speech. *United Foods* never explains the underlying justification for this view. If taken to its logical conclusion, it might signify that the Court is moving toward the position that there is no "philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech."¹²⁵ Justice Thomas has been urging this view for some years now. Any such position would require the Court strictly to review the myriad of commercial rules that now regulate the forms of communication in which commercial transactions are embedded. The potential for commercial speech doctrine to evolve into this kind of Lochnerism was long ago predicted,¹²⁶ but Thomas seems to regard the prospect with undisguised relish:

Although the Constitution may not "enact Mr. Herbert Spencer's Social Statics," and thus the Government has a considerable range of authority in regulating the Nation's economic structure, part of the Constitution—the First Amendment—does enact a distinctly individualistic notion of "the freedom of speech," and

¹²⁵ 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 (1996) (Thomas, J., concurring); see 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, 452-48 (1971); Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777, 780 (1993).

¹²⁶ Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979).

Congress may not simply collectivize that aspect of our society, regardless of what it may do elsewhere.¹²⁷

Of course the likelihood that *United Foods* signifies such a radical shift is quite small. It is more probable that the Court means to signify that commercial speakers retain *some* interests, although not interests that are of equal weight to those of participants in public discourse. But even this more modest innovation can have potentially far-reaching practical consequences. Many of the most fundamental principles of contemporary commercial speech doctrine are built on the premise that commercial speakers lack strong independent constitutional interests. The Court has encouraged states to regulate commercial speech by using prior restraints, for example, and this approach, as I have argued elsewhere, seems to rely on the assumption that the constitutional value of commercial speech lies in the circulation of information rather than in the independent interests of commercial speakers.¹²⁸ The same can be said about the Court's rule that the overbreadth doctrine will not apply to commercial speech.¹²⁹

In the end, the impact of *United Foods* on the structure of commercial speech doctrine will depend on the exact nature of the interests that the Court wishes to attribute to commercial speakers.¹³⁰ The question is how the interests of commercial speakers will be understood to differ from the interests ascribed to participants in public discourse.¹³¹ The Court will not only have to specify the circumstances that enable the interests of commercial speakers to prevail, as in *United Foods*, it will also have to articulate the circumstances in which these interests are diminished, as in *Zauderer*. We cannot begin to predict the effect of *United Foods* on existing doctrine until we have some careful theoretical account of the character of the constitutional interests that the Court wishes to attribute to commercial speakers.

It is clear, however, that even if *United Foods* means that commercial speakers retain interests as against compulsory commercial speech *only* when such speech is mandated for reasons other than protecting

¹²⁷ Glickman v. Wileman Bros. & Elliot, Inc., 521 U.S. 457, 505 n.3 (1997) (Thomas, J., dissenting).

¹²⁸ See Post, *supra* note 16, at 32–33.

¹²⁹ *Id.* at 29–32.

¹³⁰ Even in *Zauderer* the Court had postulated that commercial speakers retained some residual, minimal forms of constitutional interests. See *supra* note 25.

¹³¹ See Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 COLO. L. REV. 1109 (1993).

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consumers against potential deception,¹³² *United Foods* would nevertheless imply a potentially broad and destabilizing change in the texture of the regulations that presently govern commercial speech. This is because commercial speech is routinely and pervasively compelled for reasons that have little to do with the prevention of deception.

The Federal Trade Commission now imposes mandatory disclosure rules on a wide range of industries, requiring sellers to divulge such information as “the durability of light bulbs, octane ratings for gasoline, tar and nicotine content of cigarettes, mileage per gallon for automobiles, or care labeling of textile wearing apparel.”¹³³ Congress has passed innumerable statutes that contain analogous disclosure requirements.¹³⁴ These disclosure requirements force commercial speakers to engage in commercial speech, but they do not do so merely to prevent potential consumer deception. They primarily seek to reduce information costs and thereby to establish a more educated and efficient marketplace.¹³⁵

¹³² The narrowest possible interpretation of *United Foods* is that the case stands for the proposition that commercial speakers can be required to speak for any reason *other than* compelling them to subsidize the speech of potential competitors. Although Stevens’ concurrence in *United Foods* is written so as to gesture toward this narrow conclusion, *supra* note 114, Kennedy’s opinion for the Court in *United Foods* is not. Kennedy’s opinion focuses primarily on the constitutional interests of commercial speakers, rather than on the strength of the state’s interests in imposing a regulation.

¹³³ Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 664 (1977).

¹³⁴ Just to offer some few examples enforced by the FTC, the Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451–61 (2000), directs the FTC to issue regulations requiring that all consumer commodities other than food, drugs, therapeutic devices, and cosmetics be labeled to disclose net contents, identity of commodity, and name and place of business of the product’s manufacturer, packer, or distributor; the Truth in Lending Act, 15 U.S.C. §§ 1601–1667f (2000), requires all creditors who deal with consumers to make certain written disclosures concerning all finance charges and related aspects of credit transactions (including disclosing finance charges expressed as an annual percentage rate); the Wool Products Labeling Act, 15 U.S.C. §§ 68–68j (2000), requires that wool product labels indicate the country in which the product was processed or manufactured and that mail order promotional materials clearly and conspicuously state whether a wool product was processed or manufactured in the United States or was imported; the Fur Products Labeling Act, 15 U.S.C. §§ 69–69j (2000), requires that articles of apparel made of fur be labeled and that invoices and advertising for furs and fur products specify, among other things, the true English name of the animal from which the fur was taken and whether the fur is dyed or used; the Textile Products Identification Act, 15 U.S.C. §§ 70–70k (2000), requires that any textile fiber product processed or manufactured in the United States be so identified and that mail order promotional materials clearly and conspicuously indicate whether a textile fiber product was processed or manufactured in the United States or was imported.

¹³⁵ See, e.g., *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 114–15 (2d Cir. 2001) (upholding mercury disclosure rule even though “the compelled disclosure at issue here

The promotion of transparent markets is a major objective of contemporary regulatory regimes.¹³⁶ Commercial speech is compelled for other reasons as well. Recently, for example, a congressional statute was upheld that prohibited telemarketers from abandoning calls to consumers.¹³⁷ In essence the statute sought to increase the accountability of telemarketers by preventing them from engaging in “no speech.”¹³⁸ In California commercial vendors cannot sell goods to consumers that contain chemicals known to be carcinogenic or to cause reproductive toxicity without first providing “clear and reasonable warning.”¹³⁹ The purpose of this mandated warning is not to prevent deception, but to avoid unwitting harm. Does *United Foods* imply that all these various forms of compelled commercial speech are now constitutionally suspect?

Analogous problems of indeterminacy afflict *United Foods* if it is interpreted as holding that First Amendment rights of association are implicated whenever persons are compelled to affiliate with associations that primarily engage in commercial speech. If the Court means to hold that all organizations that engage in commercial speech are expressive associations, such that First Amendment rights of affiliation and de-affiliation apply to them, the Court has crafted a rule that threatens to constitutionalize much of the law of corporations and business organizations. But if the Court means to cabin these consequences by manipulating the distinction between commercial organizations that are

was not intended to prevent ‘consumer confusion or deception’ per se, . . . but rather to better inform consumers about the products they purchase”).

[M]andated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests. Such disclosure furthers, rather than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the marketplace of ideas.

Id. at 115. See also *CFTC v. Vartuli*, 228 F.3d 94, 108 (2d Cir. 2000) (upholding disclosure rules of the Commodity Exchange Act because “[t]he disclosure requirement at issue here was reasonably related to the government’s interest in preventing . . . hypothetical statistical presentations that, as Congress observed, could lead to inefficiencies in the commodities markets that are contrary to the public interest”).

¹³⁶ See, e.g., Promulgation of Trade Regulation Rule, 43 FED. REG. 59,614, 59,638 (Dec. 21, 1978) (to be codified at 16 C.F.R. pt. 436) (“By establishing a uniform, minimal set of required information, disclosure requirements enhance the efficiency of markets by facilitating comparison of competing franchise offerings.”); Daniel D. Rubino, et al., *Corporate and Securities Law Update*, 67 PLI/NY 11, 51 (1999) (“One of the principal goals underlying SEC regulation . . . is the fostering of market transparency.”); see also *supra* note 36.

¹³⁷ *Nat’l Fed’n of the Blind v. FTC*, 420 F.3d 331 (4th Cir. 2005).

¹³⁸ *Id.* at 341.

¹³⁹ CAL. HEALTH & SAFETY CODE § 25249.6 (West 2006).

primarily engaged in commercial speech and other commercial organizations, then the Court must explain the distinction between organizations which have the primary purpose of engaging in commercial speech, like the Mushroom Council in *United Foods*, and organizations which engage in commercial speech as a consequence of pursuing other objectives, like the Nectarine Administrative Committee and the Peach Commodity Committee in *Glickman*. This distinction is far from obvious, and it is noteworthy that there is no analogous distinction in the contemporary First Amendment jurisprudence of association rights. In *Boy Scouts of America v. Dale*,¹⁴⁰ for example, the Court held that the Boy Scouts were an expressive association without considering whether the primary purpose of the Scouts was to engage in public speech. It was enough that the Scouts had a message that they sought to convey.

The uncertainties that bedevil *United Foods* as a compelled association case are analogous to the uncertainties that envelop *United Foods* as a compelled subsidization of speech case. These two aspects of *United Foods* are theoretically connected because First Amendment rights of association derive from the First Amendment rights of speakers. The Constitution protects association rights because association is an indispensable method for speakers to amplify their voices. To recognize constitutional rights in commercial speakers, therefore, is to recognize the right of commercial speakers to associate to promulgate their speech. Commercial organizations can be expressive associations for purposes of the First Amendment only if commercial speakers have the right to engage in commercial speech, and only if commercial organizations are understood as an effective vehicle for the exercise of that right. This suggests that *United Foods*'s holding that the right to associate or not to associate with commercial organizations is protected by the First Amendment is but a corollary of its modification of *Zauderer* to affirm that commercial speakers retain more than residual rights. To theorize which commercial organizations should receive constitutional protection as expressive associations is to theorize the nature of the rights possessed by commercial speakers.

It is apparent that the Court has not sharply formulated the constitutional conception of commercial speakers that it meant to advance in *United Foods*. With the benefit of time and hindsight, however, we can conduct a thought experiment to test what seems to be the two innovations of *United Foods*. Imagine an advertising firm whose

¹⁴⁰ 530 U.S. 640 (2000).

primary business is to produce and publish advertisements. The firm is thus like the Mushroom Council at issue in *United Foods*, because its chief business is commercial speech. Does *United Foods* imply that such a firm is an expressive association so that all regulations concerning affiliation and de-affiliation with the firm are subject to rigorous First Amendment scrutiny, even if the firm is a publicly held corporation subject to ordinary SEC regulation? Does *United Foods* imply that strict scrutiny should apply to rules regarding entry and departure from the firm, or to rules regarding the internal structures by which the firm's communications are determined?

These questions test both innovations of *United Foods*. If the Court is unwilling to extend First Amendment rights of association to a firm that is entirely dedicated to the publication of commercial speech, we have reason to doubt the seriousness with which the Court is committed to the proposition that commercial speakers retain constitutionally protected rights. These rights would necessarily include the authority to associate together to amplify commercially protected speech. If the Court is unwilling to extend First Amendment rights of association to our hypothesized advertising firm, we may ask why it was willing to apply *Abood's* germaneness test to the Mushroom Council in *United Foods*. It is true that in *United Foods* the Court was faced with state *requirements* that persons affiliate with a commercial association, whereas in our thought experiment we are imagining state *restrictions* on such affiliation, but why would this distinction be constitutionally pertinent? After all, the First Amendment right not to associate is but a corollary of the First Amendment right to associate. If the latter does not obtain, neither does the former.

Our thought experiment, in short, suggests that the Court may well have been wiser to attend to the argument in Justice Breyer's dissenting opinion in *United Foods* that regulation of commercial organizations does not raise First Amendment concerns. The mandatory assessments of the Mushroom Council might most defensibly have been regarded as "a form of economic regulation, not 'commercial speech,' for purposes of applying First Amendment presumptions."¹⁴¹

VII. CONCLUSION

United Foods is an extraordinary decision. It tinkers with the logic of *Zauderer* in ways that threaten to unleash unpredictable transformations

¹⁴¹ *United States v. United Foods, Inc.*, 533 U.S. 405, 428 (2001) (Breyer, J., dissenting).

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of existing First Amendment doctrine. By seeming to relocate the constitutional value of commercial speech from the circulation of information to the independent interests of speakers, *United Foods* takes a step toward destabilizing existing regimes of market regulation and consumer protection in favor of a far-reaching principle that could possibly constitutionalize large stretches of corporate and commercial law. *Johanns* suggests that the Court still has not comprehended the potentially grave consequences of *United Food's* innovations. *Johanns's* embrace of a "government speech" exception to the compelled subsidization of speech doctrine advanced in *United Foods* may resolve the agricultural marketing cases, but it nevertheless permits the innovations of *United Foods* to remain embedded within First Amendment jurisprudence, where they are certain to spark future litigation. When the Court does finally come face to face with the consequences of these innovations, we shall see how willing it is to follow the novel principles advanced in *United Foods*.