

FRUITS, NUTS, CIGARETTES, AND THE RIGHT TO REMAIN SILENT

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I. Introduction

Although the First Amendment is most commonly associated with the right to speak, it also affords citizens the right not to speak and protects citizens, in certain situations, from being forced by the government to finance speech with which they disagree.¹ In the tobacco industry, some states have imposed a tax on tobacco companies which compels the companies to unwillingly fund self-vilifying speech.² This breed of government-compelled advertising stems from the community's perception of the alcohol and tobacco companies as harmful, manipulative industries.³ These regulatory schemes erode the industries' protected right to promote a legal product because they force the industry to finance ads that degrade its members for engaging in a legal activity.⁴ Because these advertisements are financed entirely by a tax on the tobacco industry, they constitute a

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¹ See, e.g., *Wooley v. Maynard*, 430 U.S. 705 (1977); *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1 (1986).

² See CAL. REV. & TAX. CODE §§ 30121-30130 (West 2000) (also known as Proposition 99); 2001 Ariz. Sess. Laws 313.

³ Kathryn Murphy, *Can the Budweiser Frogs be Forced to Sing a New-Tune?: Compelled Commercial Counter-speech and the First Amendment*, 84 VA. L. REV. 1195, 1195 (1998).

⁴ *Id.* at 1221-22.

clear case of compelled subsidization of governmental speech that may violate the First Amendment.

In the agricultural context, the federal government has compelled companies to subsidize speech through a scheme of legislation called Agricultural Marketing Orders.⁵ Because these mandatory assessments effectively require agricultural companies to pay for generic advertising that promotes their competitor's product, some producers and retailers have objected to the mandatory assessments.⁶ There is a strong argument that these marketing orders are unconstitutional under the commercial speech doctrine of the First Amendment.⁷ The Supreme Court has confronted this question on two occasions, in *Glickman*,⁸ and more recently in *United Foods*.⁹ These cases seem irreconcilable in that they are based on similar regulatory schemes, yet arrive at contrary conclusions.¹⁰ In addition, the Court in both cases deviated from the *Central Hudson* test, which was the "long-standing method of determining constitutional commercial speech protection."¹¹ In the context of marketing orders, the First Amendment issues present a convergence of the commercial speech doctrine and the compelled speech doctrine. Under current doctrinal principles, regulatory schemes outside the agricultural context may also be constitutionally impermissible, yet the Court's inconsistent treatment of compelled speech has left little guidance to scholars, litigators, and lower courts.

In this Note, I will explore the legal implications of *United Foods* and discuss whether the Court's ruling can be extended to prevent government compelled financing of advertisements in the tobacco industry. First, this note will examine the development of the compelled-commercial speech doctrine and discuss two state regulatory schemes which may be constitutionally suspect under the *United Foods* ruling. Second, this note will argue that the anti-tobacco regulatory schemes are distinguishable from the economic regulation in

⁵ Agricultural Marketing Agreement Act of 1937 ("AAA"), 7 U.S.C. § 602(1) (1997).

⁶ See, e.g., *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997); *United States v. United Foods, Inc.*, 533 U.S. 405 (2001).

⁷ Kristine M.H. Huether, *Preservation of the Commercial Speech Doctrine: Applying the Central Hudson Test to Compelled Monetary Assessments for Generic Agricultural Advertising*, 25 *HAMLIN L. REV.* 79, 107 (2001).

⁸ 521 U.S. 457.

⁹ 533 U.S. 405.

¹⁰ Huether, *supra* note 7, at 81.

¹¹ *Id.*

Glickman. Hence, if *United Foods* is the controlling precedent, the tobacco tax programs should be classified as a speech regulation entitled to First Amendment protection. Third, this note will argue that anti-tobacco advertisements should not be classified as commercial speech and thus, should receive a higher level of First Amendment protection than the marketing orders at issue in *Glickman* and *United Foods*. Rather than apply an intermediate scrutiny test normally used for evaluating commercial speech, the Court should subject these anti-tobacco schemes to strict scrutiny review. In applying strict scrutiny, the schemes may violate the First Amendment because the government has not narrowly tailored its means for advancing its interest in reducing tobacco consumption. Finally, this Note will propose that the disclosure of health-related information is a less constitutionally violative alternative the government should adopt to accomplish its goal of expressing a health message.

II. Background

A. The Supreme Court's Treatment of Commercial Speech

In general, commercial speech falls within the scope of protected speech under the First Amendment but merits less protection than other forms of constitutionally guaranteed expression.¹² The Court has defined commercial speech as "expression related solely to the economic interests of the speaker and its audience" and as "speech proposing a commercial transaction."¹³ In *Virginia State Board of Pharmacy*, the Court argued that consumers and the general public have an interest in commercial information even if the speaker's interests are purely economic.¹⁴ Thus, the Court held that First Amendment protection extends both to "its source and to its recipients."¹⁵ Striking down a Virginia statute that restricted pharmacists from advertising the prices of prescription drugs, Justice Blackmun emphasized that there may be personal objections as to various advertising, but as long as the United States supports a free market economy and resources are primarily allocated through the private

¹² See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

¹³ *Cent. Hudson*, 447 U.S. at 561-62.

¹⁴ *Va. Consumer Council*, 425 U.S. at 756.

¹⁵ *Id.*

sector, the "free flow of commercial information is indispensable."¹⁶ Acknowledging the relationship between speech interests and economic interests, the Court concluded that commercial speech, whose primary purpose is to further economic objectives, is entitled to First Amendment protection.¹⁷

In *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York*, the Court determined that commercial speech requires less protection than non-commercial speech and that the level of protection turns on the nature of the expression and the governmental interests served by the regulation.¹⁸ In this case, the Court held that a New York statute banning promotional advertising by an electric utility was unconstitutional.¹⁹ However, in striking down the regulation, the Court did not apply the heightened scrutiny standard it often applies to restrictions on expression.²⁰ Rather, Justice Powell developed a four-part intermediate scrutiny test.²¹ First, the judiciary should determine whether the speech concerns lawful, non-misleading activity deserving of First Amendment protection.²² Second, the court should inquire "whether the asserted governmental interest is substantial."²³ Third, the regulation must directly advance the asserted governmental interest.²⁴ Finally, the regulation must not be more extensive than necessary to serve that interest.²⁵

The Court applied the *Central Hudson* test in *Zauderer* to a disciplinary ruling against an attorney for advertising infractions.²⁶ Concluding that the advertisements were protected commercial speech, the Court held that Ohio's restrictions banning advertisements containing advice were unconstitutional.²⁷ The Court, however, upheld Ohio's contingency fee disclosure requirements, stating that warnings or disclaimers are acceptable to reduce the possibility of consumer

¹⁶ *Id.* at 765.

¹⁷ *Id.* at 769-70.

¹⁸ 447 U.S. at 563.

¹⁹ *Cent. Hudson*, 447 U.S. at 571.

²⁰ *Id.* at 566.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626 (1985).

²⁶ *Id.*

²⁷ *Id.* at 637-38.

confusion or deception.²⁸

In recent cases, however, the Court has applied the *Central Hudson* intermediate scrutiny test so rigorously that it seems to resemble strict scrutiny review.²⁹ Thus, because the Court has applied the *Central Hudson* commercial speech analysis inconsistently, it remains unclear what kinds of advertising regulations will survive constitutional scrutiny, particularly when the regulations involve advertisements of harmful products.³⁰

B. The Compelled Speech Doctrine

The First Amendment not only protects against limitations on one's speech but against governmentally compelled speech as well.³¹ The Supreme Court has recognized the premises underlying this principle, holding that the First Amendment protects "both the right to speak freely and the right to refrain from speaking at all."³² The Court has rejected the argument that compelled speech is in some way of less constitutional significance than other intrusions on free speech, stating that "there is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say."³³

The Court has also recognized that this protection applies to corporations as well as to individuals and prohibits the government from compelling a corporation to use its own property to disseminate ideas with which it does not agree.³⁴ In *Pacific Gas and Electric*, the Court invalidated a government order requiring a utility company to include in its billing envelopes a newsletter from a group whose views op-

²⁸ *Id.* at 651.

²⁹ *See generally* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

³⁰ *See, e.g., Liquormart*, 517 U.S. at 484 (requiring a more rigorous review of how advertising restrictions advance a governmental interest); *Edenfield v. Fane*, 507 U.S. 761 (1993) (invalidating a prohibition against solicitations by certified public accountants because the government could not justify the restriction on mere speculation or conjecture).

³¹ *See, e.g., Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977); *Wooley v. Maynard*, 430 U.S. 705 (1977); *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943).

³² *Wooley*, 430 U.S. at 714.

³³ *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796-97 (1988).

³⁴ *Pacific Gas & Electric Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986).

posed the utility.³⁵ The government order not only forced the company to disseminate its opponent's speech, but also put pressure on the utility to respond, thus forcing the speaker "to affirm in one breath that which they deny in the next."³⁶ For corporations, as for individuals, the right to speak includes within it the choice of what not to say, and the Court confirmed that "[a]ppellant does not, of course, have the right to be free from vigorous debate. But it *does* have the right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents."³⁷

From these principles, it logically follows that First Amendment protections include an interest in freedom from compulsion to subsidize speech and other expressive activities. In *International Association of Machinists v. Street*, a case involving employees who were legally required against their will to pay union dues, the Supreme Court recognized that this kind of compelled political support could not be squared with the First Amendment.³⁸ The Court held that unions cannot, over an employee's objection, use his or her dues to support political activities which the employee opposes.³⁹

This principle was extended in *Abood*, a case involving a public school teachers' challenge to an agency shop statute that required all government-employed teachers to pay dues to a teacher's union.⁴⁰ The teachers in *Abood* raised a successful constitutional claim that they were being compelled to subsidize ideological activities that they opposed.⁴¹ In considering the use of mandatory contributions for political and ideological purposes, the Court characterized this compelled subsidization as an infringement of the freedom of belief.⁴² The Court emphasized that "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."⁴³ In essence, forcing teachers to fund ideological activities they oppose is like forcing them to affirm a belief they do not share.⁴⁴ Thus, the Court held that un-

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 14.

³⁸ 367 U.S. 740 (1961).

³⁹ *Id.* at 768-69.

⁴⁰ 431 U.S. at 209.

⁴¹ *Id.* at 241-42.

⁴² *Id.* at 235.

⁴³ *Id.* at 234-35.

⁴⁴ *Id.* at 235.

ions cannot constitutionally compel funds from employees for the expression of political or ideological causes that are germane to its duties as a collective-bargaining representative.⁴⁵

In *Keller*, the Court confronted another coerced subsidization challenge.⁴⁶ Like the union dues in *Abood*, lawyers are required to pay state bar dues as a condition of practicing law in California. The Court unanimously held that the use of mandatory bar dues for political and ideological activities violated objecting members' First Amendment rights.⁴⁷ The Respondent tried to distinguish this case from *Abood* on the ground that "compelled association in the context of labor unions serves only a private economic interest in collective bargaining while the State Bar serves more substantial public interests."⁴⁸ The Court, however, held that the guiding principle for determining the constitutionality of bar assessments relating to political or ideological activities is "whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of legal services.'"⁴⁹ Although the Court employed different standards of scrutiny, the Court's view of compelled speech at this point seemed to require freedom from compelled indirect advocacy, or subsidization of opposing viewpoints.

The Court's treatment of compelled speech changed directions in *Glickman*, where the Court rejected a First Amendment challenge to the financing of generic advertising by a marketing board.⁵⁰ In *Glickman*, the Court upheld a regulatory scheme requiring agricultural producers to contribute to generic advertising of California nectarines, peaches, and plums.⁵¹ Although cases preceding *Glickman* afforded increasing protection to commercial speech, the *Glickman* majority held that an analysis of compelled advertising in this context did not raise First Amendment issues.⁵²

The Court reasoned that commercial speech engaged in by a marketing board was not entitled to the same level of protection as political speech engaged in by unions.⁵³ Justice Stevens offered three

⁴⁵ *Id.* at 235-36.

⁴⁶ 496 U.S. at 1.

⁴⁷ *Id.* at 16.

⁴⁸ *Id.* at 13.

⁴⁹ *Id.* at 14 (quoting *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961)).

⁵⁰ 521 U.S. at 457.

⁵¹ *Id.*

⁵² *Id.* at 469-70; *See also Keller*, 496 U.S. 1; *Abood*, 431 U.S. 209.

⁵³ 521 U.S. at 469-70.

reasons for upholding the regulatory scheme.⁵⁴ First, the marketing order did not prevent any producer from communicating his own distinct message.⁵⁵ Second, the orders did not compel any person to engage in actual or symbolic speech.⁵⁶ Finally, the Court sought to distinguish *Glickman* from *Abood* and *Keller* on the grounds that the scheme did not compel producers to finance political or ideological speech.⁵⁷ Thus, the Court avoided any First Amendment analysis by characterizing the marketing order as an economic regulation rather than a commercial speech regulation.⁵⁸ After *Glickman*, it was not entirely clear how the Supreme Court would rule on the constitutionality of another regulatory scheme which compelled subsidization of governmental speech.

Four years later, a case of similar facts reached the opposite result. In *United Foods*, a mushroom producer successfully challenged assessments used to create generic advertisements promoting mushroom sales.⁵⁹ United Foods, a company who grows and markets mushrooms, challenged the constitutionality of a federal statute that imposed a surcharge on all mushroom sales to finance a mushroom industry "council."⁶⁰ The council's sole purpose was to supervise use of the proceeds from the surcharge, which funded research and advertising relating to mushrooms.⁶¹ Although the assessments were to be used for "projects of mushroom promotion, research, consumer information, and industry information," most of the money raised was spent on generic advertising promoting the consumption of mushrooms.⁶²

United Foods rejected this scheme and refused to pay the forced subsidy.⁶³ United Foods argued that generic advertising undermined their own marketing efforts for their branded mushrooms.⁶⁴ The Court ruled in favor of the mushroom grower, holding that "the mandated support is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who

⁵⁴ *Id.*

⁵⁵ *Id.* at 469.

⁵⁶ *Id.*

⁵⁷ *Id.* at 469-70.

⁵⁸ *Id.* at 470.

⁵⁹ 533 U.S. at 405.

⁶⁰ *Id.* at 408.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 408, 411.

⁶⁴ *Id.* at 411.

object to speech, but who, nevertheless, must remain members of the group by law or necessity.”⁶⁵

Rather than expressly overrule *Glickman*, the Court sought to distinguish *Glickman* by framing the issue in *United Foods* as “whether the government may underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, some of whom object to the idea being advanced.”⁶⁶ The Court, however, did not expressly apply any First Amendment test to the statute before rejecting it. Thus, rather than clarifying the appropriate standard for evaluating regulatory schemes which compel subsidization of commercial speech, the Court’s ruling in *United Foods* has left the constitutionality of other regulatory schemes in an uncertain state.

Hence, outside the agricultural context, whether *United Foods* or *Glickman* should be used as precedent for preventing government compelled financing of anti-tobacco ads will ultimately depend on whether the Court adequately distinguished *Glickman* from *United Foods* and if so, whether the ads will be analogized to the economic regulation in *Glickman* as opposed to the speech regulation in *United Foods*.

C. The Court’s Efforts to Distinguish *Glickman* From *United Foods*

Though the regulation in *United Foods* seemed to have the same effect as the marketing order in *Glickman*, the Court focused on a central difference: while the mandatory assessments in *Glickman* were ancillary to a comprehensive program restricting marketplace autonomy, in *United Foods*, “the advertising itself, far from being ancillary, is the principal object of the regulatory scheme.”⁶⁷ The Court distinguished the mushroom statute on the grounds that mushroom growers were not forced to associate as a group which makes cooperative decisions beyond advertising.⁶⁸ One may interpret the two seemingly conflicting decisions to convey that while compelled association is impermissible, it is allowable when incidental to legitimate government action. Thus, the Court’s holding implies that the mandated support in *United Foods* violated the mushroom grower’s First Amendment rights because expression was the primary object of

⁶⁵ *United Foods* 533 U.S. at 413 (referring to *Abood*, 431 U.S. at 209; *Keller*, 496 U.S. at 1).

⁶⁶ *Id.* at 410.

⁶⁷ *United Foods*, 533 U.S. at 411-12.

⁶⁸ *Id.* at 412-13.

compulsory funding.⁶⁹

In *United Foods*, the Court pointed out that funds raised through the Mushroom Act were almost exclusively used for speech, whereas the producers in *Glickman* were “bound together and required by statute to market their products according to cooperative rules.”⁷⁰ The Court found that in *Glickman*, the producers’ “mandated participation in an advertising program with a particular message was a logical concomitant of a valid scheme of economic regulation.”⁷¹ The Court contrasted this with the scheme in *United Foods* where there was no heavy regulation in the mushroom market beyond the collection and disbursement of advertising funds.⁷² “The mushroom growing business is unregulated . . . and the mushroom market has not been collectivized, exempted from antitrust laws, subjected to a uniform price, or otherwise subsidized through price supports or restrictions on supply.”⁷³ Thus, the Court concluded that the marketing scheme in *Glickman* had distinctive features, namely that it was part of a larger comprehensive regulatory scheme, which removed the case from First Amendment review. Although the exact constitutional significance of the existence of a complex regulatory scheme is not clearly articulated in either opinion, the reasoning exists nonetheless.

To reconcile the Court’s seemingly incongruous pattern in these cases, one could argue that the marketing orders also differed based on the government’s policy reasons for creating the schemes. In *Glickman*, the scheme was driven by an economic policy that Congress believed was necessary to maintain a stable market for California tree fruit.⁷⁴ By displacing competition and creating an antitrust exemption for growers, handlers, and processors, the scheme regulated both the supply and demand of California tree fruit.⁷⁵ In *United Foods*, the program’s goal of expanding existing mushroom markets was cultivated for the purpose of overcoming consumer misperceptions and “fears about the safety of eating mushrooms.”⁷⁶

Furthermore, one could argue that government intervention is more legitimate in *Glickman* because the companies were less likely, and possibly incapable, of accomplishing the government’s objective

⁶⁹ *Id.*

⁷⁰ *Id.* at 412.

⁷¹ *Id.*

⁷² *United Foods*, 533 U.S. at 412.

⁷³ *Id.* at 413.

⁷⁴ *United Foods*, 533 U.S. at 414.

⁷⁵ *Id.* at 412.

⁷⁶ *Id.* at 422 (Breyer, J., dissenting).

of regulating the tree fruit market through their individual voluntary efforts. On the other hand, mushroom growers, through individual advertising, are capable of promoting their products and dispelling any myths about mushrooms. This distinction suggests that regulating the economy's supply and demand of certain commodities necessitates a greater degree of compelled association than simply providing consumer information to promote the sale of a product. One could infer that when compelled speech is ancillary to a constitutionally permissible scheme of forced association necessary to accomplish the government's objective, the Court is less likely to disrupt the scheme, even if it implicates some First Amendment interests.

III. State Regulatory Schemes Which May be Constitutionally Suspect Under the *United Foods* Ruling

A. California's Proposition 99

In November 1988, California instituted Proposition 99 ("Prop 99"), the "Cigarette and Tobacco Tax Initiative," which imposed an additional excise tax of one and one-fourth cents (\$.0125) upon distributors of tobacco products.⁷⁷ In addition, the initiative imposed a new excise tax to be determined by the Board of Equalization on other types of tobacco products, such as cigars, chewing tobacco, pipe tobacco, and snuff.⁷⁸

Prop 99 was subsequently implemented through Part 13, Article 2 of the Revenue and Taxation Code, which creates a fund known as the Cigarette and Tobacco Products Surtax Fund (hereinafter "the Fund").⁷⁹ The Fund is entirely financed by the assessments collected from the tax imposed on cigarette distributors.⁸⁰ Prop 99 specifies that money in the Fund is to be used only for a series of particular purposes, including treatment of diseases associated with tobacco use, fire prevention, tobacco-related disease research and "[t]obacco-related school and community health education programs."⁸¹ To accomplish this, revenues from the additional taxes are placed into the

⁷⁷ CAL. REV. & TAX. CODE §§ 30121-30130 (West 2000). Proposition 99 is also known as the "Tobacco Tax and Health Protection Act of 1988."

⁷⁸ CAL. REV. & TAX. CODE § 30123.

⁷⁹ CAL. REV. & TAX. CODE § 30121(a).

⁸⁰ *Id.*

⁸¹ CAL. REV. & TAX. CODE § 30122(a).

Fund, which is divided into six separate accounts.⁸² One account in particular, the "Health Education Account," is available only for the "prevention and reduction of tobacco use among children, through school and community health education programs."⁸³

Health and Safety Code section 104375 directs the Department of Health Education to establish a program to reduce tobacco use "by conducting health education interventions and behavior change programs."⁸⁴ This includes contracting with "one or more qualified agencies" for "production and implementation of an ongoing public awareness of tobacco related disease by the development of informational campaign using a variety of media approaches."⁸⁵ The statute specifically states that "[a]ny media campaign funded with this part shall stress the importance of both preventing the initiation of tobacco use and quitting smoking and shall be based on professional market research and surveys necessary to determine the most effective method of diminishing tobacco use among specified target populations."⁸⁶

Shortly after Prop 99 became effective, and particularly over recent years, print and televised messages funded by Prop 99 have turned from exposing the risks of tobacco use to debasing the tobacco companies. Often, ads charge the tobacco companies as targeting children with their advertising, and manipulating the public. In essence, the tobacco companies are forced to financially sponsor ads which attack not only their product, but them directly. If these anti-industry ads are created pursuant to Health and Safety Code section 104375 and financed by the Health Education Account, then use of Prop 99 revenues may constitute a violation of the distributors' constitutional right to be free from compelled speech.

B. Arizona Statute Section 36-772

Like California, Arizona has implemented Section 36-772, a tobacco tax program whose operation mirrors Prop 99.⁸⁷ Pursuant to the Arizona Tax Code Section 42-3251, the total excise tax levied on the tobacco industry is two cents (\$0.02) for each cigarette, amounting

⁸² CAL. REV. & TAX. CODE § 30122(b) (setting forth the six accounts, entitled: Health Education, Hospital Services, Physician Services, Research, Public Resources, and General Purposes).

⁸³ CAL. REV. & TAX. CODE § 30122(b)(1).

⁸⁴ CAL. HEALTH & SAFETY CODE § 104375(a) (West 2000).

⁸⁵ CAL. HEALTH & SAFETY CODE § 104375(e)(1) (West 2000).

⁸⁶ *Id.*

⁸⁷ ARIZ. REV. STAT. § 36-772(A) (West 2004).

to forty cents (\$0.40) for each pack of cigarettes.⁸⁸

Similar to Prop 99, Section 36-772 created a "Health Education Account," which receives twenty-three percent of the revenues deposited in the Tobacco Tax and Health Care Fund.⁸⁹ This account, like Prop 99, funds programs "for the prevention and reduction of tobacco use, through public health education programs, including community based education, cessation, evaluation and other programs to discourage tobacco use."⁹⁰ The statute then instructs the Department of Health Services to develop and deliver "education programs that are designed to prevent or reduce tobacco use including radio, television, or print media costs."⁹¹ Section 36-772 effectively compels tobacco companies to subsidize an anti-tobacco advertising campaign, thus presenting the same First Amendment concerns as California's Prop 99.

IV. Application of the Compelled Speech Doctrine to Anti-Industry Ads

The First Amendment interests threatened by anti-industry ads are more substantial than many have recognized. Typically, commercial speech claims against the industry have involved government restrictions or bans on advertisements.⁹² However, in the Prop 99 and Section 36-772 context, the First Amendment issues present a convergence of the commercial speech doctrine and the compelled speech doctrine. If there is any constitutional significance to the distinction drawn in *United Foods* between a scheme of marketing regulation and a statute whose primary objective is speech, it is not the degree of compulsion involved. In both cases, funds are extracted by the government for the purpose of subsidizing speech with which the speakers disagree. Whether *United Foods* or *Glickman* can be used as precedent for preventing government compelled financing of anti-tobacco ads will ultimately depend on whether the Court adequately distinguished *Glickman* from *United Foods*, and if so, whether the

⁸⁸ ARIZ. REV. STAT. § 42-3251 (2001) (imposing an excise tax on other types of tobacco products, such as cigars, chewing tobacco, smoking tobacco, and snuff, but excluding tobacco powder or tobacco products used exclusively for agricultural or horticultural purposes and unfit for human consumption).

⁸⁹ ARIZ. REV. STAT. § 36-772(A).

⁹⁰ ARIZ. REV. STAT. § 36-772(A).

⁹¹ ARIZ. REV. STAT. § 36-772(C)(2)(c).

⁹² See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); 44 *Liquormart*, 517 U.S. at 484.

states' advertising schemes are distinguishable from either case.

A. The State Regulatory Schemes Compelling Tobacco Companies to Subsidize Anti-Industry Ads are Distinguishable From the Regulatory Scheme Upheld in *Glickman*.

Compelled funding of speech under the state regulatory schemes is distinguishable from *Glickman* in two respects. First, marketing orders in *Glickman* were part of a large, complex statutory mechanism aimed at an already regulated market.⁹³ The Court held that First Amendment interests were not implicated because the scheme, taken as a whole, should be classified as economic, rather than speech, regulation.⁹⁴ In contrast, Prop 99 and Section 36-772 provide far less governmental regulatory power. Although the funds under both statutes are deposited in various accounts and used for several different purposes, none of the purposes include direct governmental regulation of the tobacco companies' conduct.⁹⁵

The producers in *Glickman* required to finance speech as part of a larger scheme were granted a presumably beneficial economic advantage in return: control over the market that might otherwise be unavailable to them. In conjunction with the compelled funding requirements, the marketing orders also displaced competition and provided an antitrust exemption.⁹⁶ The tobacco industry, on the other hand, is not a regulated market warranting the same economic concerns as the tree fruit market in *Glickman*. The anti-tobacco regulatory schemes do not confer any particular legal advantage on their contributors. Therefore, the mere fact that Prop 99 and Section 36-772 involve the financing of other activities besides speech should be of little constitutional significance.

Second, the state anti-tobacco measures are distinguishable from the marketing orders in *Glickman* because the compelled funding of speech required by Prop 99 and Section 36-772 is not ancillary to a forced association scheme. In *Glickman*, the regulatory scheme forced tree fruit companies to act cooperatively as a non-competing entity.⁹⁷ Upholding the scheme, the Court suggested that coerced subsidies for speech enjoy a greater presumption of validity when part

⁹³ *Glickman*, 521 U.S. at 469.

⁹⁴ *Id.* at 477.

⁹⁵ In the Prop 99 context, the Fund is divided into six accounts entitled: Health Education, Hospital Services, Physician Services, Research, Public Resources, and General Purposes.

⁹⁶ *United Foods*, 533 U.S. at 446.

⁹⁷ 521 U.S. at 475.

of a constitutionally permissible forced association.⁹⁸

While the First Amendment unquestionably protects the individual producer's right to advertise its own brands, the statute [was] designed to further the economic interests of the producers *as a group*. The basic policy decision that underlies the entire statute rests on the assumption that in volatile markets for agricultural commodities the public will best be served by *compelling cooperation* among producers . . .⁹⁹

Far from acting cooperatively, tobacco companies actively compete to gain a share of the market. While state statutes compel all tobacco companies to subsidize the anti-industry ads, the companies are not required to act as a collective entity. Therefore, the Court should recognize these key differences between anti-tobacco regulatory schemes and the marketing orders, and hold that *Glickman* should not be the applicable precedent used to uphold Prop 99 and Section 36-772.

B. Government Compelled Advertising is Compelled Speech Entitled to First Amendment Protection.

Reflecting on the Court's lack of consensus on why commercial speech should be protected, scholars and commentators have revealed wide support for the notion that a federally-compelled advertising campaign would violate the First Amendment.¹⁰⁰ "In refusing to recognize a First Amendment issue [in *Glickman*], the Court blatantly ignored precedent establishing that advertising is speech, that coercing an individual to finance another's speech amounts to coercing speech, and that the First Amendment prohibits compelled speech as it does compelled silence."¹⁰¹ In *United Foods* and *Glickman*, Justice Thomas reiterated this view that "paying money for the purposes of advertising involves speech, and that compelling speech raises a First Amendment issue just as much as restricting speech."¹⁰²

⁹⁸ *Id.*

⁹⁹ *Id.* (emphasis added).

¹⁰⁰ See Aaron A. Goach, *Free Speech and Freer Speech*, 21 HARV. J. L. & PUB. POL'Y 623, 632 (1998); 111 HARV. L. REV. 319 (1997); Scott Joachim, *Seeing Beyond the Smoke and Mirrors: A Proposal for the Abandonment of the Commercial Speech Doctrine and an Analysis of Recent Tobacco Advertising Regulations*, 19 HASTINGS COMM. & ENT. L. J. 517, 520 (1997). Although the regulatory schemes discussed in this Note are state mandated as opposed to federally mandated, they still pose First Amendment concerns.

¹⁰¹ Goach, *supra* note 100, at 632.

¹⁰² *United Foods*, 533 U.S. at 418-19 (Thomas, J., dissenting) (quoting *Glickman*, 521 U.S. at 504 (Thomas, J., dissenting)).

Predicting that a “future, more activist Court” might broaden *Glickman* to justify compelled speech in other industries,¹⁰³ one scholar also warned that *Glickman* might provide constitutional support for other federally mandated advertising programs that oppose the interests of the target industry.

For example, the federal government might adopt an anti-tobacco advertising campaign and finance it through mandatory assessments levied on each tobacco company based on its retail market share These industries would surely object to being forced to sponsor speech in direct opposition to their interests, but it is unclear whether under *Glickman* such an objection would constitute a “crisis of conscience” sufficiently serious to justify First Amendment scrutiny in the eyes of the Court.¹⁰⁴

Another law review article echoes the same warning:

Ultimately, the danger of the Court’s decision in *Glickman* is that it suggests that government may have “free reign” to “force payment for a whole variety of expressive conduct that it could not restrict.” The danger is that instead of taking responsibility for messages that it wishes to foster—and being held accountable by the public for using tax dollars to do so—government can surreptitiously communicate its messages through the pocketbooks of private speakers.¹⁰⁵

Therefore, the Court should recognize that the speech elements present in the anti-tobacco regulatory schemes impose a constitutionally impermissible infringement on the rights of the speakers who are forced to pay for the government’s message.

C. *United Foods* Provides the Governing Standard for Evaluating the Constitutionality of Anti-Tobacco Regulatory Schemes.

Applying the Court’s ruling in *United Foods* to the tobacco context, an anti-industry ad campaign financed by mandatory assessments levied on tobacco companies is constitutionally suspect under the First Amendment. In Arizona and California, the revenues from increased excise taxes are placed in a fund, which is used in part to create counter-advertising that directly attacks the industry.¹⁰⁶ Presumably, these targeted industries object to being forced to sponsor speech in direct opposition to their interests. Like the mushroom

¹⁰³ Goach, *supra* note 100, at 636.

¹⁰⁴ *Id.*

¹⁰⁵ *Leading Cases, Commercial Speech-Compelled Advertising*, 111 HARV. L. REV. 319, 329 (1997) (referring to Souter, J. and Thomas, J. dissenting opinions in *Glickman*, 521 U.S. at 477, 506).

¹⁰⁶ 1990 Cal. Adv. Legis. Serv. 50 (Deering); 2001 Ariz. Legis. Serv. 313 (West).

growers in *United Foods*, tobacco manufacturers and distributors have no choice but to pay the tax if they are to sell their products.

In essence, there are two reasons why the anti-tobacco regulations should be distinguished from *Glickman* and analogized to *United Foods*. First, the speech compelled in *Glickman*, as a result of being part of a complex marketing regulation, conferred an economic advantage on its contributors.¹⁰⁷ In both *United Foods* and the tobacco context, the regulation schemes do not provide an antitrust exemption or any other economic benefit to their contributors.¹⁰⁸ Therefore, the Court should recognize the difference between a regulation that couples a presumably economic benefit with a burden as opposed to a scheme that solely imposes a burden.

Second, the compelled speakers in *United Foods* and in the tobacco context are not subject to any forced association as are the producers in *Glickman*. While the mushroom growers are required to promote all mushrooms generically, they are still active competitors in the mushroom market. This is evidenced by *United Foods*' goal to establish value in their distinct brand of mushrooms. Like the mushroom growers, tobacco companies actively compete to gain market share. Thus, one could argue that government intervention in a non-competitive market as a form of economic regulation should be distinguished from government regulation in a competitive market, where advertising is the primary means of gaining a competitive advantage.

Furthermore, Justice Breyer, in his dissenting opinion in *United Foods*, specifically pointed out his fear that the majority's view would set dangerous precedent because it would call into question the constitutionality of anti-tobacco regulatory schemes.¹⁰⁹

The Court, in applying stricter First Amendment standards and finding them violated, sets an unfortunate precedent. That precedent suggests, perhaps requires, striking down any similar program that, for example, would require tobacco companies to contribute to an industry fund for advertising the harms of smoking . . .¹¹⁰

Prop 99 and Section 36-772 are prime examples of the regulatory schemes Breyer warns will be "infect[ed] . . . with constitutional

¹⁰⁷ *Glickman*, 521 U.S. at 476.

¹⁰⁸ Compare *United Foods*, 533 U.S. at 412, with CAL. REV. & TAX. CODE § 30121(West 2000), and 2001 Ariz. Legis. Serv. 313.

¹⁰⁹ *United Foods*, 533 U.S. at 428.

¹¹⁰ *Id.*

doubt” as a result of the majority’s rule.¹¹¹ From this, it is reasonable to infer that Justice Breyer believes that the majority’s ruling in *United Foods* can be extended to the tobacco context.

There is, however, a notable distinction between the anti-tobacco regulatory schemes and the regulatory scheme in *United Foods*. While speech is obviously an important function of Prop 99 and Section 36-772, it is not the primary object of the scheme, as in the Mushroom Act. By statute, twenty to twenty-three percent of the revenues collected by the tax schemes are used for educational, or speech purposes.¹¹² Although the Court in *United Foods* did not state the exact percentage of the assessments used to fund speech, the Court indicated that “*most* moneys [sic] . . . [were] spent on generic advertising.”¹¹³ There is no indication, however, that the result in *United Foods* would have been different if a larger percentage of the collected funds were devoted to research, the other potential purpose of the statute’s assessment. Thus, the mere fact that speech is not the principal object of the anti-tobacco regulatory schemes should not render the *United Foods*’ ruling inapplicable.

Recognizing the distinctions between *Glickman* and *United Foods*, the Court should find that Prop 99 and Section 36-772 ads, financed entirely by a tax on the tobacco industry, should be analogized to the speech regulation in *United Foods*, which was held to be a constitutionally impermissible subsidization of governmental speech. Debate over whether the Court adequately distinguished *Glickman* in *United Foods* has left the constitutionality of compelled commercial speech in an uncertain state. The tobacco ads, however, are only governed by the *United Foods* holding to the extent that they should be classified as a speech rather than an economic regulation. Once classified as compelled speech, the Court should next evaluate the nature of the speech the tobacco companies are being compelled to subsidize.

D. The Nature of the Speech at Issue

1. The Commercial/ Non-commercial Speech Distinction

With varying degrees of scrutiny used to evaluate the constitutionality of commercial speech, commercial speech jurisprudence re-

¹¹¹ *Id.*

¹¹² CAL. REV. & TAX. CODE § 30124(b)(1); 2001 Ariz. Legis. Serv. 313.

¹¹³ *United Foods*, 533 U.S. at 408 (emphasis added).

mains in an uncertain state.¹¹⁴ In both *Glickman* and *United Foods*, Justice Thomas wrote separately to emphasize his continued disagreement with the use of the *Central Hudson* balancing test and the discounted weight given to commercial speech generally.¹¹⁵ Moreover, scholars advocating abandonment of the commercial/ non-commercial distinction have widely criticized the *Glickman* decision.¹¹⁶ “By embracing both anti-paternalism rhetoric in some commercial speech cases and pro-paternalism results in others, the Court provided itself with precedent to do anything it pleased with respect to advertising.”¹¹⁷

Because of the seeming inconsistency among the compelled speech line of cases, the *Glickman* majority has been criticized for its failure to recognize the First Amendment implications of compelled commercial speech regulations: “While *Abood* undoubtedly dealt with political speech, a close reading of the case illustrates that the *Glickman* Court read its holding too narrowly.”¹¹⁸ However, the Court itself has acknowledged that “nothing in the First Amendment or our cases . . . makes the question whether the adjective ‘political’ can properly be attached to those beliefs the critical constitutional inquiry.”¹¹⁹

Moreover, the significance of the nature of the speech in the advertising regulations seems unclear based on the Court’s reasoning in *Glickman* and *United Foods*. Justice Stevens, writing for the Court in *Glickman* seemed to rely on the commercial/ non-commercial speech distinction in upholding the regulation.¹²⁰ Stevens distinguished *Glickman* from *Machinists*, *Abood*, and *Keller* on the ground that the advertising regulation in *Glickman* did not “compel the producers to endorse or finance any political or ideological views.”¹²¹ In *United*

¹¹⁴ See generally *Lorillard*, 533 U.S. at 525; *Liquormart*, 517 U.S. at 484; *Cent. Hudson*, 447 U.S. at 557.

¹¹⁵ *Glickman*, 521 U.S. at 504; *United Foods*, 533 U.S. at 418-19; See also *Liquormart*, 517 U.S. at 518 (Thomas, J., concurring in part and concurring in judgment) (criticizing *Cent. Hudson*, 477 U.S. at 557).

¹¹⁶ See Goach, *supra* note 100; Huether, *supra* note 7.

¹¹⁷ Nicole B. Cesarez, *Don't Tell Me What to Say: Compelled Commercial Speech and the First Amendment*, 63 MO. L. REV. 929, 939 (1998).

¹¹⁸ Dave Smith, *Forced Advertising: Free Speech or Not Even?*, 33 LAND & WATER L. REV. 779, 790 (1998) (examining the history, merits, and implications of the Supreme Court’s decision in *Glickman*).

¹¹⁹ *Abood*, 431 U.S. at 232.

¹²⁰ 521 U.S. at 469-70.

¹²¹ *Id.*

Foods, the Court struck down the compelled advertising scheme while recognizing that it was commercial speech.¹²²

Therefore, it remains unclear what level of First Amendment protection the Court is willing to afford compelled “commercial” speech. Applying this rationale to the Prop 99 or Section 36-772 context, the anti-industry ads, if classified as “commercial” speech, may be entitled to less First Amendment protection.

2. *The Government’s Message in Anti-Industry Ads is Both Commercial and Political.*

In determining the level of scrutiny to apply, the Court must first assess the nature of the speech under review. While it is unclear what level of protection commercial speech merits, political and ideological speech has always been afforded the highest level of First Amendment protection. Although the Court in *United Foods* did not expressly apply a particular First Amendment test to the Mushroom Act before striking it down, the Court noted that the regulation compelled funding of “commercial” speech.¹²³ The generic advertising under the Mushroom Act fits squarely into the definition of commercial speech because it is expression related to the economic interests of the mushroom grower and its consumers.¹²⁴

The tobacco ads, by contrast, should not be classified as purely commercial speech because their purpose is not solely to propose a commercial transaction. The asserted purpose of California’s and Arizona’s regulatory schemes is to reduce tobacco consumption in order to promote health and safety.¹²⁵ Although the ads created are intended to reduce the economic transactions between tobacco companies and consumers, the statutes’ ultimate goal is to promote a health, rather than economic policy. Hence, the anti-industry ads should be characterized as “political” or “ideological” speech.

Anti-tobacco advertisements exemplify the overlap between politics and commercialism.

The recent wars against tobacco have sparked massive advertising and counter-advertising between governments, both state and federal, and the tobacco companies.¹²⁶ While the first tobacco ads

¹²² 533 U.S. at 412.

¹²³ 533 U.S. at 415.

¹²⁴ *Id.*

¹²⁵ CAL. REV. & TAX. CODE § 30121; 2001 Ariz. Legis. Serv. 313.

¹²⁶ Scott Joachim, Note, *Seeing Beyond the Smoke and Mirrors: A Proposal for the Abandonment of the Commercial Speech Doctrine and an Analysis of Re-*

produced may have been solely to propose a commercial transaction, tobacco has evolved into one of the most controversial political issues today.¹²⁷ The government has “inevitably create[d] for itself a catch-22” by fervently regulating a product that was once purely commercial, it has coerced the tobacco companies into the political arena.¹²⁸ Because the tobacco ads and anti-tobacco ads contain political ideologies, they circumvent the purely commercial speech category. Thus, one could argue that the tobacco companies’ ads and the government’s anti-industry ads that respond to them interlace both commercialism and politics.

The recent anti-industry ads created by Prop 99 and Section 36-772 present an even more compelling case of political or ideological speech. Beyond informing consumers of the detrimental health risks associated with tobacco consumption, these ads have included personal attacks vilifying the tobacco industry.¹²⁹ For example, a radio ad featured a Lorillard employee being called and asked if he wanted to buy dog urine as a source of urea for cigarettes.¹³⁰ In short, anti-industry ads convey a simple government message: tobacco companies are bad, and thus consumers should not buy their products.

Far from promoting an economic transaction, this speech furthers the government’s policy and ideology against the tobacco industry. Although advocates of Prop 99 and Section 36-772 would probably characterize the ads as truthful representations of industry conduct, the charged terms used by the ads and the plain effort to insult the industry would seem to stamp them as “political,” “ideological,” or at a minimum, as opinion rather than fact. Infused with political and ideological messages, anti-industry ads should be subjected to more stringent First Amendment scrutiny than commercial speech.

E. The Court Should Apply Strict Scrutiny

While an intermediate scrutiny analysis may have been the appropriate standard for determining the level of First Amendment protection in the context of compelled monetary assessments for generic advertising of agricultural products, a regulation scheme which compels funding of the anti-tobacco ads should be subject to a more strin-

cent Tobacco Advertising Regulations, 19 HASTINGS COMM. & ENT. L.J. 517, 544 (1997).

¹²⁷ *Id.*

¹²⁸ Joachim, *supra* note 126, at 544.

¹²⁹ Ira Teinowitz, *Cigarette Giant Saves Anti-Tobacco Ad Group*, AD AGE, ¶ 1 (February 19, 2002) at <http://www.adage.com/news.cms?newsId=34065>.

¹³⁰ *Id.* at ¶ 8.

gent standard. While speech in generic advertising is clearly commercial in nature, the Court should recognize the political and ideological nature of the anti-industry ads, and thus subject the regulatory schemes to strict scrutiny review.

1. *The Anti-Industry Ads Serve a Compelling State Interest*

There is no doubt that promoting health and safety is a compelling state interest. Prop 99 and Section 36-772 assert each state's interest in reducing tobacco consumption in order to promote the health and safety of their citizens.¹³¹ In particular, the Health Education Accounts, which directly fund the anti-industry ads, was created to accomplish the states' compelling interest in educating the public about the effects of tobacco consumption, thus encouraging consumers to make informed decisions about whether or not to smoke.¹³²

In the tobacco context, legislative concerns involve a combination of health, safety, and economic factors. The government should have no difficulty establishing its compelling interest in shifting the economic burden of smoking, increasing cigarette prices, generating negative publicity regarding tobacco-related disease, and forcing the tobacco industry to acknowledge the causal connection between smoking and cancer and other diseases. Thus, the state regulatory schemes should pass the first prong of a strict scrutiny review with ease.

2. *Anti-Industry Ads are Not Narrowly Tailored to Serve the State's Compelling Interest*

Although Prop 99 and Section 36-772 should have no difficulty satisfying the first part of strict scrutiny review, the anti-industry ads created pursuant to the regulatory schemes infringe on the speakers' First Amendment rights because they are not narrowly tailored to accomplish the government's compelling interest. These ads provide an ill fit for accomplishing the government's goal because they explicitly disparage the industry, and thus operate beyond their objective of discouraging smoking. Although advertising may be an effective means of educating the public about the health risks associated with tobacco consumption, anti-industry ads are not necessary to convey the government's message. Without debating the effectiveness of the ads, one could argue that compelling advertising as a means of suppressing demand of a legal product constitutes an unnecessary in-

¹³¹ CAL. REV. & TAX. CODE § 30121; 2001 Ariz. Legis. Serv. 313.

¹³² CAL. REV. & TAX. CODE § 30122.

fringement on First Amendment values.

Consequently, if the government cannot compel contributions to fund anti-industry ads, there are other less constitutionally violative options available to accomplish the government's goal of expressing a health message. If the goal is to suppress demand, the states have alternatives to achieve this end that do not involve compelling or suppressing any speech.¹³³ One alternative would be for the government to propagandize against the product or practice using general treasury funds.¹³⁴ If the government seeks to send a message denigrating an industry, it should do so with its own funds, rather than force that industry to fund its message.¹³⁵

Another alternative would be for the government to generate negative publicity through advertising that focuses on the product rather than the industry itself. Regulatory schemes like Prop 99 and Section 36-772 could be modified to permit government to compel funding of health warnings or informational speech, but restrict compelled funding of political opinions, such as anti-industry ads. Some may argue that health warnings and anti-industry ads are equally problematic forms of compelled speech under the First Amendment because the tobacco industry has disagreed with both types of messages. However, there is a significant difference between disclosure of health facts and anti-industry ads, which convey a political opinion.

While one can easily dispute a political opinion, it is much more difficult to dispute factual assertions supported by well-documented research. Over the past two decades, published studies have revealed sobering statistics reflecting the profound dangers inherent in the use of tobacco.¹³⁶ Studies have shown that tobacco remains the largest

¹³³ Kathleen Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996 SUP. CT. REV. 123, 141-42 (1996).

¹³⁴ Sullivan, *supra* note 133, at 141-42 (citing *Liquormart*, 517 U.S. at 518-528 (Thomas, J., concurring)).

¹³⁵ Although this is an option in all compelled speech cases, it is an unlikely alternative in this context.

¹³⁶ Daniel Helberg, *Butt Out: An Analysis of the FDA's Proposed Restrictions on Cigarette Advertising Under the Commercial-Speech Doctrine*, 29 LOY. L.A. L. REV. 1219, 1223 (1996) (citing Substance Abuse and Mental Health Serv. Admin., U.S. Dep't of Health and Human Serv., Nat'l Household Survey on Drug Abuse: Population Estimates 1993, Publ'n No. 94-3017 (1994) at 89, 95; *Cigarette Smoking Among Adults - United States, 1993*, 43 MORBIDITY & MORTALITY WKLY. REP. 925, 925-30 (1994); *Attributable Mortality and Years of Potential Life - United States, 1990*, 42 MORBIDITY & MORTALITY WKLY. REP. 645, 645 (1993); Institute of Medicine, Committee on Preventing Nicotine Addiction in Children

preventable cause of illness and premature death.¹³⁷ Studies have shown that each year, 400,000 Americans die from smoking-related illnesses.¹³⁸ Research conducted and documented by physicians, scientists, and public health experts has publicized the very real and substantial dangers of tobacco consumption in both individual and societal terms.

Although the tobacco industry may quarrel with the validity and reliability of any report or study conveying the health risks of smoking, they can not dispute the fact that studies have been conducted and have drawn these conclusions. On the other hand, there are far less, if any, studies or documented evidence revealing that the tobacco industry is mean, manipulative, and deceitful. Far from being a fact, the anti-industry ads conveying government's message express a political message, or at a minimum, an opinion.

Furthermore, there is a fundamental difference between disclosing a fact and promoting a policy upon which reasonable minds may differ. While factual health statistics provide consumers the opportunity to make an informed choice, a political opinion about an industry's practices deprives the public of the opportunity to form individual opinions. Further, requiring the tobacco industry to disclose facts is consistent with the extension of First Amendment protection to commercial speech, where speech is principally justified by its value to consumers.¹³⁹ There is a strong argument that health information is of greater value to consumers than are opinions of corrupt industry practices. In addition, while the regulatory schemes may infringe on the tobacco industry's First Amendment rights, the industry should not be permitted to conceal facts by hiding behind the First Amendment.

The Supreme Court itself has advocated disclosure requirements as an alternative that is less burdensome on an individual's First Amendment rights.¹⁴⁰ Recognizing that speech compulsion should receive the same protection as speech suppression, the Court articulated that regulating advertising represents a legitimate governmental

and Youths, *Growing Up Tobacco Free: Preventing Nicotine Addiction in Children and Youths 4* (Barbara S. Lynch & Richard J. Bonnie eds., 1994)).

¹³⁷ *Attributable Mortality and Years of Potential Life – United States, 1990*, 42 MORBIDITY & MORTALITY WKLY. REP. 645, 645 (1993).

¹³⁸ *Id.* Compare this statistic with the 250,000 Americans who die each year from AIDS, alcohol, murders, car accidents, suicides, illegal drugs, and fires combined.

¹³⁹ *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985).

¹⁴⁰ *Id.*

goal.¹⁴¹ However, in advancing its goal, the government should employ the least restrictive means necessary to prevent any unnecessary infringement upon a speaker's First Amendment rights. Writing for the court, Justice White stated that "because disclosure requirements trench much more narrowly on an advertiser's interest than do flat prohibitions on speech, [warnings] or [disclaimers] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception."¹⁴² White recognized that while disclosure requirements still implicate an advertiser's First Amendment rights, they are less of an infringement, and he explained, "We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."¹⁴³

The Court recommendation in *Zauderer* seems applicable to the tobacco context where disclosure requirements would advance the government's goal of preventing deception to consumers by providing the public with valuable health information about a harmful, yet legal product. While anti-industry ads are more extensive than necessary to accomplish the goal of reducing tobacco consumption, health warnings directly advance the government's interest without unduly burdening the tobacco industry's First Amendment rights. Although the tobacco industry refuses to acknowledge the causal connection between smoking and numerous health diseases, they cannot contest the fact that studies have concluded that smoking is detrimental to one's health. Thus, compelling the tobacco industry to fund health information as opposed to anti-industry ads would pose less of an infringement on the industry's First Amendment rights.

V. Conclusion

If the Court's holding in *United Foods* is extended beyond the agricultural context, then compelled anti-industry ads funded by the tobacco industry would violate the First Amendment rights of those who seek to promote the sale of products that are legal, yet deemed harmful to society. Regulation schemes, like the ones established in California and Arizona, stem from increased public pressure on the government to take counteracting measures against the perceived

¹⁴¹ *Id.*

¹⁴² *Id.* (citing *In re R.M.J.*, 455 U.S. 191, 201 (1982)).

¹⁴³ *Zauderer*, 471 U.S. at 651.

danger caused by alcohol and tobacco advertising.¹⁴⁴ However, the decision to reduce cigarette consumption by compelling the tobacco industry to fund anti-industry ads sacrifices First Amendment principles and personal autonomy in the name of political expediency.

The government should have no difficulty establishing its compelling interest in shifting the economic burden of smoking, increasing cigarette prices, generating negative publicity regarding tobacco-related disease, and forcing the tobacco industry to acknowledge the causal connection between smoking and cancer and other diseases. Moreover, there is little doubt regarding the dangers of smoking and the power of the media to influence buying behavior.

Although consumer protection, particularly in the tobacco context, provides the underlying rationale for commercial speech regulation, compelled contributions for anti-industry ads are constitutionally impermissible because the government has less intrusive alternatives to accomplish its public health interests. The most viable option for the government to advance its interest in promoting health and reducing tobacco consumption would be to require tobacco companies to finance advertisements that disclose facts about its products, but not compel the companies to promote an anti-industry policy. Although there is still some controversy as to the validity or reliability of studies indicating the health dangers associated with tobacco consumption, health warnings are based on volumes of scientific evidence and published studies conducted over many years. There is much less evidentiary support for the proposition that tobacco companies are deceitful, mean-spirited and manipulative. Thus, providing consumers with beneficial health-related information should be distinguished from compelled funding of anti-industry ads, which unnecessarily violate the First Amendment right to remain silent.

¹⁴⁴ See generally, Murphy, *supra*, note 3.