

RECENT CASES

UNCOVERING COHERENCE IN COMPELLED SUBSIDY OF SPEECH DOCTRINE: *Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. 2055 (2005)

A large number of agriculture products are generically advertised through federal or state-led promotion programs funded by mandatory assessments (“checkoffs”) imposed on producers.¹ Since their inception in the 1980s, these checkoff programs have been subject to First Amendment challenges for compelling producers to pay for speech with which some of them do not agree. In the first agriculture checkoff case to go before the United States Supreme Court, *Glickman v. Wileman Bros. & Elliot, Inc.*,² the Court upheld the use of mandatory assessments to fund promotions for California tree fruit as part of a broader regulatory system aimed at maintaining a stable fruit market. Four years later in *United States v. United Foods, Inc.*,³ the Court struck down a mushroom checkoff as an unconstitutional compelled subsidy, distinguishing the case from *Glickman* on the ground that mushroom advertising was the central, rather than ancillary, purpose to the overall regulatory scheme.⁴ Although the decision in *United Foods* gave reason for optimism to those who opposed checkoffs, the Court implied that similar checkoff programs might be upheld if the promotions could qualify as government speech.⁵ Last Term, in *Johanns v. Livestock Marketing Ass'n*,⁶ that suggestion became reality as the Court rejected a challenge to the federal beef checkoff program (famous for its slogan, “Beef. It’s What’s for

1. See, e.g., 7 U.S.C. §§ 2102–2118 (2000) (cotton); *id.* §§ 2611–2627 (potatoes); *id.* §§ 2701–2718 (eggs); *id.* §§ 4601–4613 (honey); *id.* §§ 4801–4819 (pork); *id.* §§ 7461–7473 (kiwifruit); *id.* §§ 7481–7491 (popcorn); *id.* §§ 7801–7813 (Hass avocados).

2. 521 U.S. 457 (1997).

3. 533 U.S. 405 (2001).

4. See *id.* at 411–14.

5. See *id.* at 416–17.

6. 125 S. Ct. 2055 (2005).

Dinner”) by holding beef promotions to be government speech and thus not subject to a First Amendment challenge as a compelled subsidy. Despite an apparent lack of any unifying guiding principle in this line of cases, some coherence emerges when viewed in the context of government support for collective enterprise; moreover, this view reveals a possibility of ensuring First Amendment protections while leaving aside difficult questions of direct limitations on government speech.

The Beef Promotion and Research Act of 1985⁷ (Beef Act) directs the Secretary of Agriculture (Secretary) to implement a federal program to promote the marketing and consumption of beef.⁸ This program is led by a Beef Promotion and Research Board (Beef Board), whose members are nominated by trade associations and appointed by the Secretary and an Operating Committee, which is composed of ten Beef Board members and ten representatives appointed by state beef councils.⁹ The Operating Committee proposes beef-related projects and promotional campaigns, which are all subject to approval by the Secretary.¹⁰ To fund the program, the Secretary imposes a mandatory one dollar per head assessment on all sales and importation of cattle.¹¹

A group of associations and individuals subject to the check-off brought suit in the U.S. District Court for the District of South Dakota, challenging the assessment on both constitutional and statutory grounds.¹² While the litigation was pending, the Supreme Court decided *United Foods*, striking down a similar mushroom promotion program. The plaintiffs amended

7. 7 U.S.C. §§ 2901–2911 (2000).

8. The Beef Promotion and Research Order issued pursuant to the Beef Act is codified at 7 C.F.R. § 1260 (2005).

9. 7 U.S.C. § 2904(1)–(4) (2000).

10. *Id.* § 2904(4).

11. *Id.* § 2904(8).

12. Initially, the two main complaints were that the Secretary unlawfully refused to conduct a second referendum for the continuation of the beef promotion program among program participants (although one referendum had been held in 1988 as required under the Beef Act, the Act allowed for further referendums if requested by ten percent of program participants, *see id.* § 2906(b)), and that the Beef Board unlawfully increased expenditures from checkoff funds for anti-referendum “producer communications.” *See Livestock Mktg. Ass’n v. USDA*, 132 F. Supp. 2d 817, 823 (D.S.D. 2001). In response to the original complaint, the district court issued a preliminary injunction prohibiting the use of checkoff funds for communications that lauded the promotion program or discouraged a referendum. *See id.* at 832–33.

their complaint to include a constitutional challenge under *United Foods*, alleging that the beef checkoff violated their First Amendment rights to freedom of speech and association by compelling them to pay for advertisements with which they disagreed.¹³

Following a bench trial, the district court found in favor of the plaintiffs and held the Beef Act unconstitutional under the First Amendment.¹⁴ Comparing the beef promotion program to the mushroom checkoff invalidated in *United Foods*, the court found that “[t]he beef checkoff is, in all material respects, identical.”¹⁵ The court, relying partly on a decision by the Court of Appeals for the Third Circuit¹⁶ in a separate challenge to the Beef Act, further rejected the defendants’ argument that the beef promotions constitute government speech and are therefore exempt from First Amendment challenge,¹⁷ instead finding the Beef Board to be more “akin to a labor union or state bar association” than to a governmental agency.¹⁸

The Court of Appeals for the Eighth Circuit affirmed. Although it did not dispute that the beef promotions might be characterized as government speech, the court interpreted the relevant precedent to distinguish between First Amendment challenges to the speech’s content and challenges to its compelled funding as a type of compelled speech, holding that a government speech defense is only applicable in the former.¹⁹ The court agreed with the district court’s finding that the beef promotion program is identical to *United Food’s* mushroom

13. See *Livestock Mktg. Ass’n v. USDA*, 207 F. Supp. 2d 992, 996 (D.S.D. 2002). The plaintiffs disagreed with generic advertising of beef because they believed certain types of beef, such as American or grain-fed, to be superior. See *Johanns v. Livestock Mktg. Ass’n*, 125 S. Ct. 2055, 2059–60 (2005).

14. See *Livestock Mktg. Ass’n*, 207 F. Supp. 2d at 1002.

15. *Id.* In contrast, the court distinguished the case from *Glickman* because of the lack of a larger regulatory scheme. *Id.*

16. *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989). In *Frame*, the federal government brought suit against the operator of a cattle auction for failing to comply with the Beef Act’s requirements that auction businesses collect and pay the one dollar per head assessment. Although the Third Circuit rejected the defendant’s argument, it agreed that “the compelled expressive activities mandated by the Beef Promotion Act are not properly characterized as ‘government speech.’” *Id.* at 1132.

17. See *Livestock Mktg. Ass’n*, 207 F. Supp. 2d at 1003–06.

18. *Id.* at 1004 (citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), and *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990)).

19. See *Livestock Mktg. Ass’n v. USDA*, 335 F.3d 711, 720–21 (8th Cir. 2003).

program and likewise constitutes compelled speech.²⁰ Finally, the Eighth Circuit held that the government's interest in facilitating beef promotion does not outweigh the plaintiffs' infringed First Amendment rights.²¹

The Supreme Court reversed, holding that the beef promotions constitute government speech and are therefore not susceptible to a First Amendment compelled subsidy challenge.²² Writing for the majority, Justice Scalia²³ described two categories of "allegedly compelled expression":²⁴ true compelled speech cases in which the government forces an individual to express a message with which he disagrees,²⁵ and compelled subsidy cases in which the government mandates that an individual subsidize a message with which he disagrees.²⁶ Although true compelled speech cases do implicate the First Amendment, the Court found that, in all of its compelled subsidy cases, it has "consistently respected the principle that '[c]ompelled support of a private association is fundamentally different from compelled support of government,'"²⁷ and it has "generally assumed . . . that compelled funding of government speech does not alone raise First Amendment concerns."²⁸

To show that the beef promotions constitute the kind of government speech assumed to be exempt from First Amendment challenge, the Court found that the message of the beef promo-

20. *See id.* at 725–26.

21. *See id.*

22. *Johanns v. Livestock Mktg. Ass'n*, 125 S. Ct. 2055, 2062–63 (2005).

23. Justice Scalia was joined by Chief Justice Rehnquist and Justices O'Connor, Thomas, and Breyer.

24. *Id.* at 2060.

25. *Id.* The two cases of true compelled speech cited by the Court are *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943) (holding that a school could not require students to recite the Pledge of Allegiance while saluting the flag), and *Wooley v. Maynard*, 430 U.S. 705 (1977) (striking down a New Hampshire state law requiring car drivers to display license plates bearing the state motto "Live Free or Die").

26. *Johanns*, 125 S. Ct. at 2061. The two cases cited by the Court as examples of compelled subsidy are *Keller v. State Bar of California*, 496 U.S. 1 (1990) (holding that compulsory state bar dues could not be used to fund ideological speech not germane to the bar's primary purposes), and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) (finding that required union fees could not be used to express ideological views unrelated to the union's duties as an exclusive bargaining representative).

27. *Johanns*, 125 S. Ct. at 2061 (quoting *Abood*, 431 U.S. at 259 n.13).

28. *Id.* at 2062.

tions is, in fact, effectively controlled by the government. According to the Court, the overarching message of the promotions and many of their details are prescribed directly by Congress (through the Beef Act) and by the Secretary (through the order issued pursuant to the Act).²⁹ Remaining details are left to the Operating Committee, half the members of which are appointed by the Secretary, who also exercises final approval authority over all beef promotions.³⁰ In light of such government control over speech generated from the checkoff, the Court refused to preclude reliance on the government speech doctrine “merely because [the government] solicits assistance from nongovernmental sources in developing specific messages.”³¹

Finally, the Court rejected the plaintiffs’ argument that the beef promotions do not constitute government speech because they are funded by a targeted assessment rather than by general revenues.³² The Court found that use of targeted assessments neither significantly decreases the amount of democratic accountability of the government speech³³ nor increases the likelihood of attribution of the speech to assessment payers, though sufficient evidence of the latter might turn an otherwise permissible compelled subsidy into unconstitutional compelled speech.³⁴ Because the Beef Act and Order do not require any such attribution, any facial challenge fails to raise constitutional concern.³⁵ The Court left open the possibility of an as-applied challenge, but found insufficient evidence in the record from which a reasonable factfinder might conclude that the beef promotions are the respondents’ own speech.³⁶

Justice Thomas concurred, emphasizing the possibility of as-applied challenges to agriculture checkoff schemes if there is sufficient evidence to show that the speech produced is attrib-

29. *See id.* at 2062–63.

30. *See id.* at 2062.

31. *Id.* at 2063.

32. *See id.* at 2063 (“The compelled-*subsidy* analysis is altogether unaffected by whether the funds for the promotions are raised by general taxes or through a targeted assessment.”).

33. *See id.* at 2064.

34. *See id.* at 2064–65.

35. *See id.* at 2065–66.

36. *See id.*

uted to individuals who disagree with its message.³⁷ Justice Breyer also concurred, writing separately to repeat the view expressed in his *United Foods* dissent³⁸ that the challenged assessments would be better characterized as forms of economic regulation.³⁹ Justice Ginsburg agreed with Justice Breyer, but concurred only in the judgment because she disagreed that the beef promotions could be considered government speech where the government issues guidelines and other messages under its own name that advocate restricting consumption of beef.⁴⁰

Justice Souter dissented,⁴¹ arguing that, although it is possible for the government speech doctrine to justify a compelled subsidy, such justification should be conditioned upon the government putting the “speech forward as its own.”⁴² The dissent argued that one of the only clear points in the nascent government speech doctrine is the need for effective democratic checks in situations where the government as a speaker is freed from usual First Amendment limitations.⁴³ Democratic checks and public accountability, Justice Souter argued, can only be brought to bear in compelled subsidy situations when the government makes clear that the subsidy-funded speech is its own.⁴⁴ Justice Kennedy joined Justice Souter’s dissent and also wrote separately to emphasize that he would reserve for another day the question of whether government attribution is sufficient to justify government speech doctrine as a defense to First Amendment challenges to compelled subsidies.⁴⁵

To many observers, the Court’s decisions in three mandatory checkoff cases over eight years seem more schizophrenic than schematic.⁴⁶ Indeed, many view *Glickman* as deviating some-

37. See *id.* at 2066–67 (Thomas, J., concurring).

38. *United States v. United Foods, Inc.*, 533 U.S. 405, 419–31 (2001) (Breyer, J., dissenting).

39. See *Johanns*, 125 S. Ct. at 2067 (Breyer, J., concurring).

40. See *id.* at 2067–68 (Ginsburg, J., concurring in the judgment).

41. Justices Stevens and Kennedy joined Justice Souter’s dissent.

42. *Johanns*, 125 S. Ct. at 2068 (Souter, J., dissenting).

43. See *id.* at 2070–71.

44. See *id.* at 2072–73.

45. See *id.* at 2068 (Kennedy, J., dissenting).

46. See, e.g., First Amendment Center, Quick Look at *Johanns v. Livestock Marketing Association* (May 24, 2005), <http://www.firstamendmentcenter.org/news.aspx?id=15313> (“This was the third time in eight years that the Court has ruled on a federal marketing program, indicative of the confusion in the area.”).

what from the First Amendment principles guiding *Abood* and *Keller*, and interpret *United Foods* as the necessary response to correct the course. *Johanns*, then, is a surprise setback that can only be blamed on a looming government speech doctrine that threatens many areas of First Amendment protection.⁴⁷ Looking beneath the surface, however, it is difficult to say that the *Johanns* majority did not have plentiful precedent with which to justify its decision.

One possible interpretation of these cases is that *Johanns* and its predecessors are guided by deference to a legislative favoring of government action over free speech rights when such rights are necessarily compromised in order to ensure the efficacy of desirable collective enterprises. In other words, when it appears to the Court that Congress has determined that the federal government ought to intervene economically in order to facilitate some type of collective action that would otherwise not occur, but that would also necessarily infringe upon free speech, the Court will defer to the judgment of Congress. In this way, the Court seems to suggest that free speech must sometimes bend, however slightly, to allow the government to fulfill one of its primary purposes: facilitation of economically efficient collective action where the market fails to do so.⁴⁸

The roots of this principle are most clearly seen first in *Abood* and *Keller*. *Abood* posed the question of whether a union, to which all represented employees were statutorily required to pay either dues or an equivalent service charge, could use the money it collected to fund political speech with which some

47. See, e.g., Comment, *Government Speech Doctrine—Compelled Support for Agriculture Advertising*, 119 HARV. L. REV. 277, 283 (2005) (arguing that the *Johanns* Court's use of government speech doctrine treats "as trivial" the "free speech values exalted . . . in *United Foods*").

Indeed, the *Johanns* opinion lends itself well to criticism on a number of grounds. For a critique and analysis treating both commercial speech and government speech doctrines, see Daniel Troy, *Do We Have a Beef with the Court? Compelled Commercial Speech Upheld, but It Could Have Been Worse*, CATO SUP. CT. REV. 2004–2005, at 125.

48. Admittedly, this view is narrow in scope and necessarily excludes consideration of other important doctrinal areas that are certainly implicated in *Johanns*, including, for example, commercial speech doctrine and some areas of government speech doctrine. Far from attempting to provide a comprehensive explanation or critique of the Court's compelled subsidy cases, the view adopted in this Comment seeks simply to illuminate the possibility of coherence, even if narrow, in the Court's jurisprudence that might serve as an additional basis for analysis and litigation.

employees disagreed.⁴⁹ *Keller* presented essentially the same question in the context of a state bar association.⁵⁰ Both statutory situations arose because the government had intervened in order to facilitate collective action thought to be beneficial to society—collective labor bargaining in *Abood* and collective professional self-regulation in *Keller*.⁵¹ In both cases, the Court held that money collected by compulsion could be used to fund only activities that were “germane” to the key purposes of the collective enterprise.⁵²

The Court in *Abood* and *Keller* recognized that the government can and often should use the coercive power of the state to facilitate collective action when it is beneficial to society.⁵³ Without such coercive power, free riding would threaten the ability of many collective enterprises to sustain themselves.⁵⁴ Often the very nature of such coercion necessarily implicates individual rights, including that of freedom of speech.⁵⁵ The decisions in *Abood* and *Keller* imply that impingement of rights might be acceptable if it is a direct result of the legislature’s judgment that the collective enterprise is desirable.⁵⁶ But rather

49. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 211 (1997).

50. *Keller v. State Bar of Cal.*, 496 U.S. 1, 4 (1989).

51. For example, the Court stated in *Abood* that “Congress determined that it would promote 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, and that legislative judgment was surely an allowable one.” *Abood*, 431 U.S. at 219 (citing *Ry. Employees’ Dep’t v. Hanson*, 351 U.S. 225, 235 (1956)); see also *Keller*, 496 U.S. at 4–5 (discussing the State Bar of California’s regulation of the legal profession).

52. See *Abood*, 431 U.S. at 235–36; *Keller*, 496 U.S. at 13–14.

53. The Court recognized this principle in cases preceding *Abood* and *Keller*. See, e.g., *Hanson*, 351 U.S. at 233.

54. See, e.g., *Abood*, 431 U.S. at 221–22 (“A union-shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become ‘free riders.’”); *Keller*, 496 U.S. at 11 (“The reason behind the legislative enactment of ‘agency-shop’ laws is to prevent ‘free riders.’”).

55. See *Abood*, 431 U.S. at 222 (“To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests.”).

56. See *id.* (“[I]nterference [in First Amendment interests] is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.”); *Keller*, 496 U.S. at 13 (“Here the compelled association and integrated bar is justified by the State’s interest in regulating the legal profession and improving the quality of legal services.”). Indeed, this notion can be traced to cases preceding *Abood* in which the Court upheld the government’s power to compel financial support of unions. See,

than conducting an independent balancing of impinged First Amendment speech and association rights against the state's interest in facilitating collective action, the court will defer to a legislative balancing of these interests. It is only where the legislative scheme does not conduct a balancing that the court will step in to determine the answer itself.⁵⁷ This, then, is the true meaning of the "germaneness" test: that the legislature has, by necessity, taken the asserted right off the table in order to implement the desired collective enterprise.

This view of *Abood* and *Keller* sheds light on the Court's progression through *Glickman*, *United Foods*, and finally *Johanns*. In *Glickman*, Congress deemed it necessary to displace competition in the California tree fruit market in favor of pervasive collective action encompassing almost all aspects of that industry.⁵⁸ The regulatory scheme included mandatory assessments imposed on producers to fund generic advertising.⁵⁹ When faced with a First Amendment challenge to the assessments by producers who did not agree with the view expressed in such advertising, the Court noted that the collective enterprise established by Congress was "broad[],"⁶⁰ and the California program certainly appeared more pervasive than the regulatory schemes in *Abood* and *Keller*.⁶¹ Thus, although the regulatory scheme implicated various individual rights, the legislature decided that such impingement was necessary for the sake of the collective enterprise.⁶² As such, even though the right asserted by the *Glickman* plaintiffs was essentially equivalent to the rights at stake in *Abood* and *Keller* (the right not to pay for speech with which

e.g., *Hanson*, 351 U.S. at 238 ("[T]he requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work . . . does not violate . . . the First . . . Amendment[.]").

57. This is not to say that the Court exercises no review at all on such legislation; rather, the Court rarely finds actual legislative actions to be facially unconstitutional in this area.

58. See *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 461–62 (1997).

59. See *id.* at 462.

60. *Id.* at 469.

61. Compare *id.* at 461–63 (description of tree fruit regulations), with *Abood*, 431 U.S. at 211–12 (description of agency-shop clause), and *Keller*, 496 U.S. at 4–5 (description of state authorization of state bar association).

62. See *Glickman*, 521 U.S. at 469 ("The business entities that are compelled to fund the generic advertising at issue in this litigation do so as a part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme.").

one disagrees), the activity compromising that right was now germane to the legislatively chosen purposes of the regulations.⁶³ The Court deferred to the legislature's judgment to favor enforcement of the collective action over individual rights that might be implicated therein.

In *United Foods*, the same right was asserted against a similar agricultural assessment used for generic advertising, but this time the promotion program was independent of any larger regulatory scheme.⁶⁴ As in *Glickman*, Congress deemed it necessary for the sake of collectively promoting an agricultural commodity to compel producers to pay for speech with which some of them disagreed.⁶⁵ But as opposed to *Glickman*, as well as *Abood* and *Keller*, where the rights-infringing elements of the regulatory schemes were germane to the purposes of the regulations, the regulatory scheme in *United Foods* consisted almost entirely of the compelled speech subsidy.⁶⁶ The rights-infringing element, then, went beyond being a germane adjunct to the regulatory scheme to being the entire scheme itself. While that difference would not seem to be dispositively significant in context of deferring to a legislative judgment on collective enterprises that necessarily impinge free speech, the Court seemed to balk at the idea of approving such regulatory schemes, fearing that doing so would render meaningless any limits to the doctrine guiding *Abood*, *Keller*, and *Glickman*.⁶⁷

Under this analysis, the decision in *Johanns* is not completely unexpected. The government presented the Court with an argument that allowed it to apply the principle of deference in legislatively endorsed collective action that guided *Abood*, *Kel-*

63. See *id.* at 473 (“[T]he generic advertising of California peaches and nectarines is unquestionably germane to the purposes of the marketing orders.”).

64. See *United States v. United Foods, Inc.*, 533 U.S. 405, 411–12 (“Here, for all practical purposes, the advertising itself . . . is the principal object of the regulatory scheme.”).

65. See Mushroom Promotion, Research, and Consumer Information Act, 7 U.S.C. § 6101(a)(6) (2000) (“[T]he cooperative development, financing, and implementation of a coordinated program of mushroom promotion, research, and consumer information are necessary to maintain and expand existing markets for mushrooms.”).

66. See *United Foods*, 533 U.S. at 415–16.

67. See *id.*

ler, and *Glickman* to situations like that of *United Foods*.⁶⁸ Because the Court determined that speech produced by the beef promotions program is actually that of the government, the context of the challenged rights-infringing regulation changes dramatically. Government itself is a collective enterprise in which some individual rights are necessarily surrendered.⁶⁹ The beef promotions program, then, is merely one regulation among many that are germane to the various purposes of a very large collective scheme. Viewed in this manner, *Johanns* becomes like *Glickman*: the right not to pay for speech with which one disagrees is a right that was necessarily taken off the table by the legislature in order to effectuate a worthwhile collective enterprise.⁷⁰

On a wider scale, however, aligning *Johanns* with *Glickman* is alarming. If any kind of governmental infringement on speech and association rights can be termed a collective enterprise in which the infringement is justified by the enterprise's social desirability or necessity, then the First Amendment is in great peril. But whereas significant direct limitations on the ability of the government to speak may prove unwise, greater scrutiny of what the legislature deems to be a necessary though rights-infringing collective enterprise could achieve the same effect, at least within the limitations of compelled subsidies of speech. This competitive-enterprise-based interpretation of *Johanns* and its predecessors, then, not only provides a coherent narrative to explain the seemingly confused jurisprudence, but also indicates possible grounds for future litigation opportunities, both in evaluating the constitutionality of other compelled speech subsidies and for arguing in favor of stronger First Amendment protections.

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68. The government put forward a government speech defense in *United Foods*, but because the argument was not raised until late in the litigation, the Court refused to consider it. *See id.* at 416–17.

69. *See, e.g.,* THE FEDERALIST NO. 2, at 15 (John Jay) (Clinton Rossiter ed., 1961) (“Nothing is more certain than the indispensable necessity of government; and it is equally undeniable that whenever and however it is instituted, the people must cede to it some of their natural rights in order to vest it with requisite powers.”).

70. It is interesting to note that Justice Scalia, the author of *Johanns*, along with Chief Justice Rehnquist and Justice Thomas, both of whom joined in the *Johanns* majority, all dissented in *Glickman*.