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FIRST AMENDMENT FERMENT: COMPELLED COMMERCIAL SPEECH CASES AND THE CONFLICT OVER MANDATORY COMMODITY FEES

A Dissertation

Presented for the

Doctor of Philosophy

Degree

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Retha J. Martin

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DEDICATION

To Bob, staunch supporter
and partner extraordinaire.

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The research and analysis regarding compelled commercial speech utilized the theoretical perspectives of: 1) "hegemony" as theorized by Antonio Gramsci and 2) "countervailing power" as outlined by political economist, John Kenneth Galbraith. Gramsci maintained that hegemony occurs when a dominant class or alliance of classes or social groups assert a unifying world view and successfully gain political and economic control over subordinate society through consent rather than direct force. Galbraith's theory of countervailing power asserts that modern capitalistic society breeds centers of industrial concentration that become monopolies or oligopolies. He views this as a positive formula for growth if the monopolistic power systems induce countervailing institutions that wield sufficient power to prevent potential abuse and exploitation by the dominant groups.

This dual theoretical perspective offered the means to analyze the agricultural climate and players involved in the compelled commercial speech conflict by examining which entities or individuals have the economic power, which parties are vulnerable to abuse or exploitation, which ones are induced to build centers of countervailing power and what will be needed for success as a countervailing institution.

The goal of this study was to obtain evidence and to perform an economic, political and legal analysis that would show the relationship between the law on compelled commercial speech and the underlying interests of key entities seeking to maximize their positions. Further, this analysis sought to identify the consequences, including the role of speech and communications in the industrial, economic and political environment, occasioned by different legal resolutions on compelled commercial speech.

Research methods included analysis of primary documents such as case law, briefs, transcripts, Congressional testimony, published federal and state agency materials, and statements by commodity promotion boards and commissions; review of generic advertising; analysis of secondary evidence on checkoffs in print or electronic format; and telephone interviews with individuals knowledgeable about the checkoff programs or involved in the legal challenges. Two investigative frames were used as tools to collect and analyze evidence, along with traditional legal analysis and a critical approach to all evidentiary materials. Gramsci's ideas on hegemony and Galbraith's theory of countervailing power provided a framework for interpreting the evidence

This study showed a climate ripe for hegemonic change in the agricultural industry driven by economic and political changes that are creating a profound "season of discontent" much broader than the First Amendment free speech issue. Parallel winds of change in First Amendment doctrine have coincided to elevate this particular issue as a platform for the challengers. Resolution of the government speech defense issue and the First Amendment issue regarding the appropriate level of protection for compelled commercial speech will have ripples on economic, political and social institutions that are affected by the way in which commercial speech may be compelled and regulated.

ABSTRACT

A major battle in First Amendment free speech rights is raging over the constitutionality of mandatory commodity assessments for generic product advertising (called "commodity checkoffs"). Such advertising features slogans such as "Got Milk?" "The Other White Meat" and "Beef, It's What's for Dinner." More than $750 million per year is collected in commodity checkoffs on the basis of stand-alone legislation or marketing orders that have their genesis in legislation dating back to 1937. This income directly supports generic advertising, administrative salaries, research and educational activities and indirectly supports other functions. The rationale for commodity checkoffs is to maintain and expand the market for commodities.

The First Amendment challengers claim that forced payment of such fees to fund commercial speech with which they disagree is a violation of their free speech rights. The courts have addressed these arguments in a line of cases, including the 2001 Supreme Court case, *United States v. United Foods.* In *United Foods*, the Court struck down mushroom checkoffs by applying a First Amendment doctrine regarding freedom from compelled speech or compelled association, as first established in the union dues case, *Abood v. Detroit Board of Education.* In doing so, it avoided applying the commercial speech doctrine set forth in the *Central Hudson* test, a standard followed by lower courts in deciding earlier checkoff cases.

United Foods triggered a spate of hotly contested cases involving challenges to commodity checkoffs, with the USDA and dominant leadership in the agricultural industry vigorously defending the checkoff programs on the grounds that the generic advertising constitutes "government speech." The decisions indicate a judicial trend toward recognizing the First Amendment rights of the challengers by holding commodity checkoffs unconstitutional unless they are part of a complex regulatory scheme. The lower courts are divided in regard to the "government speech" defense, and the issue has yet to be addressed by the U.S. Supreme Court.

The legal conflict constitutes only one layer of a broader political, economic and social picture. The research revealed that the agricultural industry is experiencing dramatic shifts from competitive industry models to industry structures characterized by concentration, vertical integration, and powerful control by meat packers, dairy and meat processors and other entities higher in the "food chain." A network of close relationships among the USDA, trade associations and giant agribusiness organizations suggests the possibility of a deeply imbedded hegemony thriving off checkoff fee wealth.

The central thesis of this dissertation is that the line of compelled commercial speech cases represents a fundamental hegemonic conflict within the agricultural industry in which the challengers are using the courts and the First Amendment as a mechanism to break the current hegemony of commodity checkoffs and establish countervailing power. If successful, the resulting changes will impact both the hegemony of the agricultural industry and the development of First Amendment doctrine.

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LIST OF ABBREVIATIONS

ADM	Archer Daniels Midland
AFLO-CIO	American Federation of Labor and Congress of Industrial Organizations
AGP	Ag Processing, Inc.
ALJ	Administrative Law Judge
AMAA	Agricultural Marketing Act of 1937
CARP	Corporate Agribusiness Research Project
CBB	Cattlemen's Beef Board
CCRP	Cornell Commodity Promotion Research Program
CED	Committee for Economic development
CFF	Campaign for Family Farms
CFIF	Center for Individual Freedom
DMI	Dairy Management Inc.
DMCA	Digital Millennium Copyright Act
ERS	Economic Research Service of the United States Department of Agriculture
FLAG	Farmers' Legal Action Group
FCC	Federal Communications Commission
GIPSA	Grain Inspection and Packers and Stockyards Administration
IBP	Iowa Beef Processors, Inc.
IDFA	International Dairy Food Association
LMA	Livestock Marketing Association

NCBA	National Cattlemen's Beef Association
NDB	National Dairy Promotion and Research Board
NICPRE	National Institute for Commodity Promotion Research and Evaluation
NPB	National Pork Board
NPPC	National Pork Producer's Council
OCM	Organization for Competitive Markets
PSA	Packers and Stockyards Act
R-CALF	Ranchers-Cattlemen Action Legal Foundation
USDA	United States Department of Agriculture
WORC	Western Organization of Resource Councils

CHAPTER 1

INTRODUCTION

Constitutional challenges to the laws and regulations promulgated by governmental institutions (or institutions of "the State") never arise in a vacuum in the United States. A targeted law or regulation is always associated with its own lineage of direct and indirect enforcement by legal, economic, cultural and political institutions that interact to produce a dominant approach. Every constitutional challenge is launched within the context of a complex social and political environment populated by players with contradictory private and public agendas. The challengers seek to change the dominant approach and shift the balance of power by asserting an argument grounded in constitutional theory.

A powerful example of a challenge representing a struggle of epic proportion can be found in the civil rights movement of the 1960s. In that conflict, the vested interests and historic actions of government, society and African American citizens and others who believed in equal justice under law (individually and collectively) were involved in the legal battle for equal rights as interpreted under the Constitution of the United States and its Amendments.

While the civil rights conflict today is not evidenced as openly in strident clashes between individuals and State authority, people of color, gays and other minorities still advance constitutional challenges to seek the equality that will allow them to achieve economic, political and cultural goals. Studying the court cases and the legal issues affords only a partial understanding of any conflict since such an approach does not illuminate the nature of the social and political forces that surrounded these legal

developments in the past and continue to provide context for the legal conflicts today. A fuller understanding can be gained only by a careful analysis of the players involved in the battle for power, the interests at stake, the platforms or principles being espoused and the underlying values that may not be openly expressed.

In a parallel fashion, notable struggles have occurred during the second half of the Twentieth Century and early years of the Twenty-first Century in the realm of First Amendment rights. The First Amendment of the Constitution of the United States of America says: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[1] As might be expected in a republic such as the United States, protection of political speech has been a primary and critical focal point of First Amendment jurisprudence. But standards of protection for other types of speech have also generated First Amendment doctrine, including a body of case law and legal rationale regarding Amendment protection for: 1) commercial speech, and 2) speakers seeking protection from compelled speech and compelled association.

In a 1942 case, *Valentine v. Christensen*,[2] the Supreme Court of the United States denied protected status to commercial speech. The court held against the plaintiff who challenged a New York city ordinance preventing citizens from distributing commercial leaflets. In the opinion of the court, the city was entitled to regulate commercial use of the streets. The *Christensen* case and a later case denying protection to door-to-door

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[1] U.S. Const., amend. I.
[2] *Valentine v. Christensen*, 316 U.S. 52 (1942).

salesmen, *Breard v. Alexandria*,[3] established the doctrine that commercial speech warranted no First Amendment protection. However, the Court's failure to provide a well-reasoned rationale and a definition of commercial speech made this doctrine the target of critical commentators.[4]

Legal scholars got a first glimpse of change in the commercial speech doctrine in a 1964 libel case, *New York Times v. Sullivan.*[5] This landmark case was of seminal importance in libel law development, establishing that public officials must show actual malice in order to prevail in a claim for libel. However, the Supreme Court's opinion in *Sullivan* also recognized limited First Amendment protection for "editorial advertisements." The case arose when the *New York Times* ran an advertisement in 1960 on behalf of black clergymen seeking to combat a wave of terror taking place in the South in police actions directed toward nonviolent demonstrators in various cities, including Montgomery, Alabama. Sullivan, a city commissioner in Alabama who was not identified in the ad, successfully convinced an Alabama state court that he was damaged in the amount of $500,000 as a result of minor inaccuracies in the ad that he claimed had harmed his reputation. Under state defamation law, the paper was liable for defamation and could not defend based on truth because of such factual inaccuracies.

Justice William J. Brennan's opinion provided a new federal rule that First Amendment protection will be afforded to criticism leveled against government or public officials unless they show that that the alleged defamatory speech was made with actual malice, i.e., "with knowledge that it was false or with reckless disregard of whether it was

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[3] *Breard v. Alexandria*, 341 U.S. 622 (1951).
[4] Daniel F. Farber, *The First Amendment* (New York: The Foundation Press, 1998), 150.
[5] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

false or not."[6] The ruling made clear that falsity and defamatory nature of the speech aimed at public officials, without more, would not prohibit First Amendment protection. Equally clear was the fact that the publication of speech in an "editorial advertisement" did not prevent such speech from receiving First Amendment protection, since the ad "communicated information, expressed opinion, recited grievances, protested claimed abuses and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern."[7]

The Supreme Court made another significant move toward First Amendment protection for commercial speech in *Bigelow v. Virginia.*[8] A university newspaper in the state of Virginia, a state where abortion was illegal, published an advertisement for abortion services in New York, a state that permitted legal abortion. The Court overturned the newspaper's conviction for violating a Virginia statute prohibiting publications that encouraged abortion. Holding that the statute was unconstitutional, the Court observed that the ad included information of interest to many readers who should not be denied access to such speech simply because the information appeared in commercial advertising.

In 1976, the Supreme Court provided an unequivocal message that its First Amendment doctrine on commercial speech was changing in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[9] The opinion fashioned a new doctrine that governs this area of First Amendment law today despite strong criticism by its detractors over the years. In holding a ban on advertising of drugs by pharmacists

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[6] Ibid. at 280.
[7] Ibid. at 266.
[8] *Bigelow v. Virginia*, 421 U.S. 809 (1975).
[9] *Va. State Board of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976).

unconstitutional, the Court outlined its position that the free flow of commercial information serves the interests of the individual consumer and the public interest in making decisions that are well informed in the aggregate. While the decision clarified that the free speech language in the First Amendment affords a degree of protection to commercial speech or advertising, it did not define the level of protection.

The Court addressed that open question four years later by establishing an intermediate level of protection for commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York.*[10] The standard the Supreme Court outlined in this case provides that truthful, non-misleading commercial speech that is not illegal will receive First Amendment protection if the government proves that it has a substantial interest that warrants the restriction, that the speech restriction directly advances the government's interest, and that the restriction on speech is no more extensive than necessary This standard has served as a legal foundation for challenges by a wide range of professional groups and industries seeking to avoid government regulation of their advertising. Among such groups are private liquor and tobacco companies,[11] members of the legal profession seeking to advertise their services without government restriction,[12] and pharmacists seeking to advertise their services in compounding specified drugs.[13] Each legal conflict represents an effort by challengers to utilize the First Amendment to attack regulations by the State and to trigger shifts in political, economic and social power. Acquiring more market power is typically the

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[10] *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,* 447 U.S. 557 (1980).
[11] See *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996); and *Lorillard Tobacco Company, et al. v. Reilly*, 533 U.S. 525 (2001).
[12] See *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985); *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466 (1988); and *Florida Bar v. Went-For-It*, 515 U.S. 618 (1995).
[13] See *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002).

overriding goal. The commercial speech doctrine has become a mechanism to facilitate this quest.

A threshold question in every case is whether the speech at issue is commercial speech entitled to an intermediate level of First Amendment protection or political speech that is afforded the highest level of protection under a strict scrutiny standard. This issue was squarely before the U.S. Supreme Court in *Nike, Inc. v. Kasky*,[14] a case that invited the high court to consider whether a new definition of commercial speech was warranted.

This case arose when a private individual sued Nike under a California statue that allowed him to seek to enforce California unfair competition and false advertising law on behalf of California citizens as a "private attorney general."[15] He claimed that Nike's communications to the public during the 1990s about working conditions in its overseas factories were false and misleading. The issue at the heart of the case is whether Nike's speech qualifies as political speech that furthers open debate on global labor practices or whether it constitutes commercial messages about Nike's business activities and sales of its shoes. In an environment saturated with commercial messages, the lines between commercial and political speech have blurred, compounding the thorny issue of how to define commercial speech. The California Supreme Court held that the Nike statements constituted commercial speech and were subject to state false advertising laws. Nike sought review of this decision by the United States Supreme Court.

The U.S. Supreme Court heard arguments on April 23, 2003, but then dismissed the case on June 26, 2003, in a per curiam decision (opinion of the court without an identified author) on the grounds that the writ of certiorari was "improvidently

[14] See *Kasky v. Nike, Inc.*, 27 Cal. 4th 939 (2002).
[15] Ibid.

granted."[16] In his concurring opinion, Justice John Paul Stevens (joined by Justice Ruth Bader Ginsburg and Justice David Souter in part) listed three reasons why the case warranted dismissal: 1) the California Supreme Court never entered final judgment, 2) both parties lacked standing to claim federal jurisdiction, and 3) the U.S. Supreme Court should avoid addressing novel constitutional questions prematurely.[17] Justice Stephen Breyer (joined by Justice Sandra Day O'Connor) wrote a dissent opinion finding no reason for the Supreme Court to delay hearing the case. Justice Anthony Kennedy dissented without opinion.

If the Supreme Court would choose to overrule its decision in *Central Hudson* and afford commercial speech the same level of protection as private speech or define commercial speech strictly as "speech that does no more than propose a commercial transaction,"[18] then the issue raised in *Nike, Inc. v. Kasky* would disappear.[19] Many thought that the Supreme Court would use the *Nike* case as an opportunity to take a fresh look at the commercial speech doctrine, but it was clear that procedural issues could provide the Court with grounds to dispense with the case on procedural grounds if it wished to avoid reaching the merits.[20] The Court's dismissal of the case indicated that it

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[16] See *Nike, Inc. v Kasky*, 539 U.S. ___ (2003), 2003 U.S. LEXIS 5015, No. 02-575 (2003).
[17] Ibid., 2003 U.S. LEXIS at 4-5.
[18] *Va. State Board of Pharmacy* at 762.
[19] The Supreme Court has indicated its discomfort with the *Central Hudson* test in several cases during the last few years. See *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001) (citing *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 504 (1997) (Thomas, J., dissenting)); *44 Liquormart v. Rhode Island*, 517 U.S. 484, 518 (1996) (Thomas, J., concurring in part and concurring in judgment); and *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 493 (1995) (Stevens, J., concurring in judgment).
[20] Two procedural issues that were debated during the oral argument were whether the plaintiff, Marc Kasky, had standing to sue for false advertising and whether a case that had not gone to trial was ripe for review by the U.S. Supreme Court. See "Supreme Court considers Nike commercial speech challenge," The Reporters Committee for Freedom of the Press (April 23, 2003); available from http://www.rcfp.org/news/2003/0423nikein.html; Internet; accessed 6 May 2003; and "Justices to review Nike commercial speech decision," The Reporters Committee for Freedom of the Press (January 14, 2003); available from http://www.rcfp.org/news/2003/0114nikein.html; Internet; accessed 6 May 2003.

is not eager to tackle the difficult issue of whether the intermediate level of protection for commercial speech under the *Central Hudson* test should be replaced with the higher level of protection afforded to political and ideological speech.

Freedom of speech is a right expressly enumerated in the Bill of Rights while freedom of association is an implied right. (Although it can be argued that the "right of the people peaceably to assemble" is an express enumeration of the freedom of association, many scholars feel that they can be distinguished.) A compelled association claim is frequently joined with a compelled free speech claim, and courts often find themselves analyzing the two claims together.

The 1977 benchmark case of *Abood v. Detroit Board of Education* [21] was instrumental in developing the First Amendment principle that free speech rights under the Constitution encompass the right to be free from compelled speech and from compelled association. The Supreme Court had to decide whether "agency shop" arrangements were constitutional in school systems where employees were represented by unions. These arrangements required all union and non-union members to pay the same amount to the union as a condition for employment. The payment by union members was identified as union dues while the same amount paid by non-union members was characterized as a "service fee" for the activities taken by the union to represent them as their agent.

In *Abood*, a teachers union (the Detroit Federation of Teachers) and the Detroit Board of Education entered into a collective bargaining agreement that included shop agency terms. Teachers challenging the arrangements contended that they opposed

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[21] See *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

collective bargaining by public employees and objected to the use of their fees for ideological and political causes with which they disagreed. They based their legal challenge on a claim that the compulsory service charges violated their First and Fourteenth Amendment rights.

In reaching its decision in *Abood*, the U.S. Supreme Court relied on two of its earlier union shop agreement cases as precedent, *Railway Employes' Dept. v. Hanson*,[22] decided in 1956, and the 1961 case of *Machinists v. Street*.[23] The Court in *Hanson* upheld the constitutionality of union-shop contracts that required all employees to financially support a union that legally represented them as an agent in collective bargaining. Union members were required to pay dues and non-union members had to pay "service fees."

The constitutionality of the union shop agreement was an issue five years later in the *Street* case, but dissatisfied non-union employees in that case added the claim that the service fees they paid to the union were being used for political speech in violation of their First Amendment rights. The U.S. Supreme Court acknowledged that there were constitutional issues "of the utmost gravity," but sidestepped them with its statutory interpretation that the relevant federal statute (the Railway Labor Act)[24] prohibited a union from spending money that had been exacted for collective bargaining purposes on political activities.[25] The Supreme Court is entitled and, indeed, bound to exercise such judicial discretion to refrain from deciding a case on constitutional grounds if there is another means available through careful interpretation of a statute. Because *Machinist v.*

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[22] *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956).
[23] *Machinists v. Street*, 367 U.S. 740 (1961).
[24] Railway Labor Act, 45 U.S.C. §§ 151 et seq.
[25] See *Street* at 749-750.

Street avoided a decision on constitutional grounds, First Amendment issues remained unresolved. The *Abood* case brought them to the forefront sixteen years later.

In *Abood*, the U.S. Supreme Court upheld the agency shop arrangements as "constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress"[26] but conditioned its decision by holding that the use of the service fees for purposes other than collective bargaining, contract administration and grievance adjustments would be unconstitutional. The Court stated: "Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments."[27] It expanded this principle by stating:

> 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 than 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.[28]

This decision stands for the principle that while a union may compel payment of fees, it must use the fees only for limited purposes which may not include ideological and political activities. The *Abood* case has served as the general starting point for courts to analyze compelled speech and compelled association cases.

At the time *Abood* was decided in 1977, the U.S. Supreme Court had already taken a position in the 1974 case of *Miami Herald Publishing v. Tornillo* against compelling newspapers to print certain speech. In *Tornillo*, the Court struck down a

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[26] *Abood* at 222.
[27] Ibid. at 233.
[28] Ibid. at 234-235.

Florida statute requiring newspapers to provide a "right of reply" to political candidates. The statute required that political candidates be given equal space to reply to newspaper attacks on their official record or personal character. The Supreme Court held that the guarantee of a free press protects a newspaper editor or publisher from being compelled to print a reply. While the *Abood* and *Tornillo* decisions both address issues of compelled speech, *Tornillo* focused on the right of the press to be free from government compelled political or ideological speech and *Abood* addressed the right of non-union employees to be free from political or ideological speech. The *Abood* Court did not cite *Tornillo* or otherwise join these two consistent threads of First Amendment doctrine, choosing instead to expand on its *Hanson* and *Street* decisions that were narrowly focused on agency shop issues.

Abood served as a signal that the courts would scrutinize government's efforts to force individuals to speak or to be publicly associated with a message. A series of significant cases reinforced this position. *Wooley v. Maynard*,[29] also decided in 1977, involved a married couple living in New Hampshire that objected to the words "Live Free or Die" on their license plates and covered that portion of the plates. The Court analogized this case to an earlier case, *West Virginia State Board of Education v. Barnette*,[30] in which it held that a compulsory flag salute implicated freedom of speech. In his majority opinion in *Wooley,* Chief Justice Warren E. Burger held that an individual does not have to use his private property as a "mobile billboard" and does not have to "be an instrument for fostering public adherence to an ideological point of view he finds

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[29] *Wooley v. Maynard*, 430 U.S. 705 (1977).
[30] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

unacceptable."[31] He reinforced the key concept that First Amendment freedoms include "both the right to speak freely and the right to refrain from speaking at all."[32]

In *Pacific Gas & Electric v. Public Utility Commission*,[33] the Supreme Court in 1986 sustained a public utilities claim that its First Amendment rights were violated by the requirement that it include written speech of a private advocacy group in the envelopes in which it mailed its bills.

An example of a case focused primarily on freedom of association is *Roberts v. United States Jaycees*,[34] decided in 1984. This case arose when the Minnesota Department of Human Rights issued an order to the Jaycees compelling them to admit women into their local chapters. The Jaycees took umbrage and refused to comply. Although the Supreme Court upheld the order on the grounds that the constitutional rights of the Jaycees were not sufficiently violated, the opinion by Justice William H. Brennan established several important points of doctrine for future compelled association cases. He recognized that freedom of association was "constitutionally protected" and that "freedom of association...plainly presupposes a freedom not to associate."[35] Most importantly, although the Court declined to perform a First Amendment analysis of the state's order, it clearly indicated that the appropriate standard would be strict scrutiny:

> "Infringements on that right [of association] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." [36]

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[31] *Wooley* at 715, 717.
[32] Ibid. at 714.
[33] See *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1 (1986).
[34] See *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).
[35] Ibid. at 623 (citing *Abood v. Detroit Board of Education* at 234-35).
[36] Ibid. at 623.

Justice Sandra Day O'Connor's concurring opinion provided an example of judicial tension and inconsistency that has occurred when the facts of a compelled speech case include elements of commercial speech. She held that the case should have been analyzed under the commercial speech doctrine since the Jaycees were involved in commercial activity. In her view, the commercial nature of the Jaycees foreclosed them from claiming First Amendment protection in controlling their membership. Under her analysis, freedom of commercial association should only be afforded minimal constitutional protection.[37]

Other cases that have advanced the body of law addressing freedom from compelled speech and freedom from compelled association include: *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*[38] (holding that compelled union dues may be used for nonpolitical social activities); *Chicago Teachers Union v. Hudson*[39] (requiring unions to set up and maintain escrow accounts and systems for reimbursement to ensure that no disputed fees are used for political purposes while a resolution procedure is pending); *Lehnert v. Ferris Faculty Association*[40] (holding based on *Abood* and *Hudson* cases that fees used for lobbying activities are not sufficiently connected to collective bargaining to compel employees to comply); *Keller v. State Bar*[41] (holding based on *Abood* analogy that mandatory bar dues cannot be used by state bar associations for "activities having political or ideological coloration"[42] and that use of mandatory dues

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[37] Ibid. at 633-635.
[38] *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435 (1984).
[39] *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).
[40] *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991).
[41] *Keller v. State Bar*, 496 U.S. 1 (1990).
[42] Ibid. at 15.

must be " 'germane' to the purpose for which compelled speech was justified"[43]); and *Board of Regents of the University of Wisconsin System v. Southworth*[44] (holding that as long as mandatory student fees are distributed in a viewpoint-neutral manner to groups with various political, ideological and expressive positions, the compelled funding does not violate students' First Amendment rights). In *Southworth*, the Supreme Court sought to apply the *Abood* case to the compelled-expression issues in the university setting, but had to modify it by substituting the "viewpoint-neutral" standard in place of the "germaneness" standard.

Beginning in the late 1980s, factions within the agricultural industry have launched constitutional challenges against programs that impose mandatory assessments on commodity producers (referred to as "commodity checkoffs") for purposes of generic advertising of the commodities. Those opposed to the programs disagree with a regulatory scheme that forces commodity producers to contribute payments toward advertising that does not represent their preferred positions. They assert that commodity checkoffs create an unconstitutional restriction on the free speech rights of commodity producers by compelling them to fund generic advertising that they feel does not provide them with benefits or undercuts their own marketing efforts or delivers messages contrary to their ideological and political beliefs. This is the crux of the compelled commercial speech legal challenge. However, those opposing and those defending checkoff programs in legal actions have vacillated between using First Amendment arguments based on the commercial speech doctrine or based on the doctrines governing freedom from compelled speech and compelled association to support their claims.

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[43] Ibid. at 13.

[44] *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000).

The collision of First Amendment doctrines in a compelled commercial speech case can first be seen in *United States v. Frame,*[45] a 1989 case involving a challenge to mandatory beef checkoffs under the Beef Promotion and Research Act of 1985. The beef producer advanced a First Amendment argument based on compelled association. In an opinion written by Circuit Judge Anthony J. Scirica, a panel of three judges on the Third Circuit Court of Appeals accepted this argument under the *Abood* precedent and applied a strict scrutiny standard in accordance with the *Roberts* case. Nevertheless, the opinion found that the government's interests were sufficient to withstand the First Amendment challenge.

The dissenting judge in the *Frame* case, Circuit Judge Dolores K. Sloviter, correctly observed: "Because...there is no precedent for the kind of compelled commercial speech at issue here, it is difficult to find the right framework for analysis."[46] She asserted that a standard of First Amendment review less stringent than the test applied by the majority was warranted because the case involved commercial speech. Judge Sloviter concluded that, under this intermediate standard, the commodity checkoffs were unconstitutional, noting that the government's interests in beef ads were not sufficiently substantial to allow the infringement of producer's First Amendment right to be free from compelled speech.[47]

In the controversial case of *Glickman v. Wileman,*[48] the U.S. Supreme Court chose to ignore the claims of First Amendment speech violations by characterizing the checkoff programs as mere economic regulatory programs that did not implicate the First

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[45] *United States v. Frame*, 885 F. 2d 1119 (3d Cir. 1989),cert. denied, 493 U.S. 1094 (1990).
[46] Ibid. at 1146.
[47] Ibid. at 1147.
[48] *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997).

Amendment. The majority opinion held that if free speech rights had been raised, however, the correct test would have been an *Abood/Keller* analysis. In his dissent, Justice David Souter argued that the compelled funding for generic advertising did, indeed, raise First Amendment free speech issues and that the correct test to apply was the *Central Hudson* test. Justice Souter concluded that the marketing orders imposing mandatory assessments for commercial speech did not pass muster under the *Central Hudson* test and should be held unconstitutional. Many scholars and courts joined Justice Souter in disagreeing with the majority opinion in *Glickman.* An example of critical commentary is found in a 2002 law review article in which the authors state:

> The U.S. Supreme Court decision in Wileman Bros. is troubling: it sidestepped the opportunity to append First Amendment protections against compelled speech and compelled financing of speech to commercial speech, and by lumping advertising into the broader arena of economic regulation, it appeared to have established a precedent curtailing those protections to political and ideological speech, and permitting the government to surreptitiously communicate its message through the pocketbooks of private enterprises.[49]

Disagreement with the *Glickman* case prompted the California State Supreme Court to resort to state activism in concluding that compelled funding of generic advertising implicated the rights of fruit growers under the free speech clause of the California State Constitution. In *Gerawan Farming, Inc. v. Lyons*,[50] a checkoff case involving fruit growers, the California Supreme Court objected strongly to the U.S. Supreme Court's failure to recognize First Amendment rights under the United States Constitution and its conclusion in *Glickman* that the programs were solely economic

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[49] Edward J.Schoen, Margaret M. Hogan and Joseph Falchek, "United Foods and Wileman Bros.: Protection Against Compelled Commercial Speech—Now You See It, Now You Don't," *American Business Law Journal* 39 (2002): 467-520, 519.

[50] See *Gerawan Farming, Inc. v. Lyons,* 24 Ca. 4th 468 (2000).

regulatory schemes. The California high court held that the free speech clause of its state constitution was broader than the First Amendment and protected the commercial speech rights of the commodity producers. Since free speech issues at issue, it overturned the lower court decision granting a motion for judgment on the pleadings and remanded the case to the appellate court with instructions for the lower court to decide: 1) the level of protection afforded commercial speech by the California State Constitution, and 2) what test should be used. The appellate court in 2001 held that an intermediate level "balancing test," should apply and struck down the California State Plum Checkoff and Promotion Program as unconstitutional.[51]

In other cases in which the courts have recognized First Amendment speech rights, there has been tension between whether the commercial nature of the generic advertising should require an intermediate standard of scrutiny under commercial speech doctrine or whether the forced funding and forced association should trigger a strict scrutiny analysis under the doctrines of compelled speech and compelled association. While the Supreme Court has developed separate First Amendment doctrine relevant to both commercial speech and compelled speech, it has not developed a roadmap to follow when the doctrines converge in a single case.

In a 2001 decision addressing commodity checkoffs, *United States, v. United Foods, Inc.*,[52] the U.S. Supreme Court struck down a mushroom checkoff program by using a two-point analysis to determine whether the commercial speech involved was protected against compulsory commodity fees. First, it determined that the regulation involved did not fall within the comprehensive regulatory scheme defined by the court in

[51] *Gerawan Farming, Inc. v. Lyons*, No. F031142 (5th Appellate Dist., State of Cal., 2001).
[52] *United States v. United Foods, Inc.*, 533 U.S. 405 (2001).

the *Glickman* case. Second, relying upon the doctrine regarding freedom from compelled speech and compelled association, the court determined the degree to which the compelled checkoff program was germane to the core purpose of the regulatory program. It dismissed the issue of whether to apply the intermediate commercial speech standard by noting that the government did not rely upon *Central Hudson* in its appeal.[53]

Some commentators felt that the U.S. Supreme Court erred in not performing a *Central Hudson* analysis in *United Foods*. The perceived seriousness of the failure to apply the *Central Hudson* test is pointed out by Schoen, Hogan and Falchek:

> The absence of the heightened *Central Hudson* analysis in *United Foods* may permit courts to review government regulations restricting or compelling commercial speech without any regard to the nature of the governmental interest underlying the regulation, the coherence of the regulatory scheme, the efficacy of the regulation in achieving its stated purpose, or the consideration of whether less intrusive means might accomplish the policy's objective....Commercial speech protections, it seems, might be better served by the heightened Central Hudson analysis than by the obfuscating United Foods analysis.[54]

As noted in the example of the civil rights cases, the legal conflict and its complexities constitute only one layer of the broader political and economic issues. The commodity checkoff programs operate within a dense framework of regulations, power and industry conditions in which major participants include: 1) federal or state legislators who adopt enabling legislation and subsequently enact implementing legislation that creates councils or Commissions, 2) federal and state departments of agriculture that promulgate regulations, 3) secretaries of the departments of agriculture who appoint members of implementing boards, 4) boards, commissions and councils that manage the checkoff programs and determine how monies are used, 5) industry trade

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[53] Ibid. at 415.
[54] Schoen, Hogan and Falcheck, 512.

associations, 6) commodity producers supporting checkoffs, 7) commodity producers against checkoffs, 8) agribusiness corporations, 9) key players in the production chain, i.e., processors and retailers, 10) external activist groups such as environmental protection groups, 11) ad agencies and consulting firms, 12) the media, and 13) the courts.

The interwoven roles of all of these entities support a condition of hegemony or consensual acceptance of power. This occurs when a social group exercises political and moral direction in society and other groups support this leading group with "a relatively wide political consensus" of its policy goals.[55] Antonio Gramsci, the Italian Marxist and social and political theorist, is recognized for his contributions in developing the concept of hegemony.[56] The following description of Gramsci's concept of hegemony is outlined by Benedetto Fontana in his book, *Hegemony and Power*:

> Hegemony is defined by Gramsci as intellectual and moral leadership...whose principal constituting elements are consent and persuasion. A social group or class can be said to assume a hegemonic role to the extent that it articulates and proliferates throughout society cultural and ideological belief systems whose teachings are accepted as universally valid by the general population. Ideology, culture, philosophy, and their 'organizers'—the intellectuals—are thus intrinsic to the notion of hegemony.[57]

An alliance between social groups creates a consensus, which "makes the power of the dominant group appear both natural and legitimate."[58] Hegemony may undergo

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[55] Enrico Augelli and Craig N. Murphy, "Gramsci and International Relations: A General Perspective and Example From Recent US Policy Toward the Third World," in *Gramsci, Historical Materialism and International Relations*, ed., Stephen Gill (Cambridge: University of Cambridge, 1993), 130.

[56] Antonio Gramsci developed his theory of hegemony in *The Prison Notebooks*, which he painstakingly authored during the years 1928 to 1937 while imprisoned by the fascist regime in Italy. See Antonio Gramsci, *Selections from the Prison Notebooks*, eds. and trans., Q. Hoare and G. Nowell Smith (London: Lawrence & Wishart, 1971).

[57] Benedetto Fontana, *Hegemony and Power: On the Relation Between Gramsci and Machiavelli* (Minneapolis: University of Minnesota Press, 1993), 140.

[58] James Watson and Anne Hill, *Dictionary of Media & Communication Studies*, 5th ed., s.v. "hegemony."

change, renegotiation or actual displacement by counter-hegemony if the dominant group is unable to accommodate new ideologies introduced by subordinates.[59]

Gramsci asserted that hegemony occurs when an existing political system is maintained through the consensual support of civil society and its many institutions rather than through means of domination. Intellectual and moral leadership are integral to maintaining a powerful state of hegemony since society at large must identify underlying principles and causes worthy of their support. Minority groups can build alternative counter-hegemony within society, but such efforts must also be supported by a combination of intellectual, ideological and moral leadership that generates the consensus necessary for the power base of a new hegemony.

Gramsci theorized that a strong hegemony with interlocking relations between dominant groups in government and civil society will not require tactics founded on force or coercion to maintain the status quo. On the other hand, a weak or vulnerable hegemony will be more likely to use domination strategies. Hegemony thus raises the specter of an iron fist concealed within a velvet glove of rhetoric and moral authority. In the context of this study, the velvet glove of rhetoric and moral authority is evident in the public justifications for the checkoff programs while the iron fist can be glimpsed in the USDA's "government speech" argument.

The genesis for these ideas is found in Gramsci's fundamental premise that a matrix of social, intellectual, political and ideological forces coalesce at a given time in history to form a "historic bloc." The historic bloc exercises civil, cultural and political leadership. Gramsci incorporated Marx's ideas on base and superstructure to explain that

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[59] Ibid.

the relations of production or the social means for creating value and culture through human labor (the base) form a foundation on which an institutional and civil framework is constituted.[60] Referred to as "superstructure," this is a fluid domain where civil, social, political, legal and intellectual elements interact, state institutions assert authority, conflicting ideologies emerge and coercion is directly or indirectly applied.

The "historic bloc" of the Twenty-First Century has been described as "...one of capitalist democracy, characterized by private ownership of the means of production and wage labor, and ideologically organized by a discourse of parliamentary and electoral politics."[61]

In the hegemonic conflict over mandatory commodity assessments, the challengers have employed the courts and First Amendment arguments against compelled commercial speech as their mechanism of choice in attempting to break the current hegemony in the agricultural industry or at least achieve meaningful change. The agricultural industry (especially the pork and cattle sectors) is experiencing dramatic shifts from more competitive industry models to industry structures characterized by concentration, vertical integration, powerful control by meat packers, processors and other entities higher in the "food chain."[62] The commodity producers are experiencing all-time low profits while at the same time they are paying mandatory fees for generic advertising to promote their products in ways in which many do not approve. Numerous publications, testimony, activist materials and other resources have provided a picture of

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[60] See Douglas Raber, "Librarians as Organic Intellectuals: A Gramscian Approach to Blind Spots and Tunnel Vision," *The Library Quarterly* 73, no. 1 (January 2003): 33-53, 35.
[61] Ibid., 35, citing Antonio Gramsci, *Selections from the Prison Notebooks*, eds. and trans., Q. Hoare and G. Nowell Smith (New York: International Publishers, 1971).
[62] See Daniel I. Padberg and Charles Hall, "The Economic Rationale for Marketing Orders," *San Joaquin Agricultural Law Review* 5 (1995): 73-87.

a network of close relationships among the United States Department of Agriculture, the large trade associations and the giant concentrated agribusiness organizations.[63] This suggests the possibility of a deeply embedded hegemony that is thriving on the checkoff fee wealth.

Efforts by commodity producers to pursue more autonomy and independent practices have been squelched by the dominant groups, including deliberate inactivity on the part of the USDA by declining to follow referendum practices for voting on the continuation of beef checkoffs. The intense resistance to change by the government and industry factions in favor of commodity checkoffs, strongly suggests that the interests of the State and the dominant industry groups supporting checkoffs are closely aligned.

The State can assume the role of neutral referee by taking independent action based on what is best for the public interest and by avoiding alliances with the dominant hegemony or the minority challengers in the agricultural industry. In keeping with this approach, the legislature and regulatory agencies (such as the USDA) could follow rational policies beneficial to the industry, the environment and consumer interests, although possibly in opposition to all particular regulated interests. The "referee approach" is characterized by a balancing of a plurality of interests (e.g., private versus private and public versus private). Consumer advocacy groups often promote this role of the State in order to further their interests in protecting the public and the environment. Such groups have posed serious questions regarding the government's interest in independently protecting the public interest of taxpayers and consumers in the field of

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[63] See, e.g., William Heffernan, "Report to the National Farmers Union: Consolidation in the Food and Agriculture System," National Farmers Union (February 5, 1999), available from http://www.nfu.org/images/heffernan_1999.pdf; Internet; accessed 2 May 2003.

agriculture after the recent passage of the latest farm bill, The Farm Security and Rural Investment Act of 2002.[64]

This legislation was seen by many as a quintessential example of political agendas unleashed during an election year. Many argue that the result represents missed opportunities for the government to change course in its agricultural policies by adopting more environmentally conscious laws that curtail large federal farm subsidies, especially limiting those subsidies that benefit the agribusiness behemoths and exacerbate consolidation.[65] The new support programs also reverse many of the reforms initiated under the 1996 Freedom to Farm Act[66] and increase subsidies by an additional $82 billion over the next ten years.[67] In short, this legislation suggests that, rather than a referee, the State is joined in hegemonic relationships with dominant interests in agriculture, and this has become one more example of a regulatory authority captured by the regulated.

Another conceptual approach that illuminates the economic aspects of the commodities checkoff power struggle is John Kenneth Galbraith's concept of countervailing power outlined in his *American Capitalism: The Concept of*

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[64] Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, §§ 1001-10910 (codified as amended in scattered sections of 7 U.S.C).

[65] See Richard E. Cohen and Corine Hegland, "Farm Bill Winners and Losers," *National Journal* 34, no. 19 (May 11, 2002): 1389-1390; and "How Conservation Measures Up in the Farm Security and Rural Investment Act of 2002," Soil and Water Conservation Society (June 20 2002); available from http://www.swcs.org/t_media_background.htm; Internet; accessed 18 November 2002. For a contrary view, see Thomas M. Franklin and Caitlin A. Burke, "The 2002 Farm Bill: A Conservation Victory," *Wildlife Society Bulletin* 30, no. 2 (Summer 2002): 600-601. Comments on agricultural policy issues related to the farm bill, including the threats agricultural consolidation pose with regard to environment and the existing system of food production, can be found in Chuck Hassebrook, "For American Farms, a Harvest of Change," *New York Times,* 20 April 2002, A16.

[66] Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888 (codified as amended at 7 U.S.C. 7201).

[67] Barbara Rippel, "Farm Bill Undermines Open Trade – and Consumer Welfare, *Consumer's Research Magazine* 85, no. 6 (June 2002), 34-35.

Countervailing Power.[68] Although Galbraith's approach was developed outside the neo-Marxist tradition, it nevertheless remains highly consistent with Gramsci's hegemony framework. Galbraith argued:

> "...[P]rivate economic power is held in check by the countervailing power of those who are subject to it. The first begets the second. The long trend toward concentration of industrial enterprise in the hands of relatively few firms has brought into existence not only strong sellers, as economists have supposed, but also strong buyers as they have failed to see."[69]

Galbraith believed that when a seller gains a monopoly (or several firms develop an oligopoly), an incentive develops for the seller's suppliers and those to whom it sells to "develop the power with which they can defend themselves against exploitation."[70] He provided the following clarification of how this concept differs from the traditional notion of competition within a capitalist economy:

> Competition which, at least since the time of Adam Smith, has been viewed as the autonomous regulator of economic activity and as the only available regulatory mechanism apart from the state, has, in fact, been superseded. Not entirely, to be sure. There are still important markets where the power of the firm as (say) a seller is checked or circumscribed by those who provide a similar or a substitute power or service. This in the broadest sense that can be meaningful, is the meaning of competition....The active constraint is provided by the competitor who offers, or threatens to offer, a better bargain. By contrast, in the typical modern market of few sellers, the active restraint is provided not by competitors but from the other side of the market by strong buyers.[71]

In a nutshell, Galbraith asserted "...power on one side of a market creates both the need for, and the prospect of reward to, the exercise of countervailing power from the other side."[72] However, a certain amount of organization and minimum opportunity must

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[68] John Kenneth Galbraith, *American Capitalism: The Concept of Countervailing Power* (Boston: Houghton Mifflin Company, 1952).
[69] Ibid., 118.
[70] Ibid., 119.
[71] Ibid.
[72] Ibid., 120.

exist for countervailing power to operate. Given the difficulties inherent in developing countervailing power, subordinates seeking change have often turned to the government and the courts for assistance. If countervailing power is valued as a necessary regulatory function, then it is incumbent upon these State institutions to "give it freedom to develop and to determine how it may best do so. The government also faces the question of where and how it will affirmatively support the development of countervailing power."[73] It may choose to support countervailing power with an affirmative role or block it with a negative role.

Statement of Thesis

The Supreme Court and other lower federal and state courts have been active in adjudicating compelled commercial speech cases involving First Amendment challenges to mandatory commodity assessments or checkoffs.[74] A number of these have been filed since the *United Foods* decision in 2001 as anti-checkoff groups determined that the holding in that case offered them renewed hope for success in legal forums. The challenges launched by the subordinate groups have been contested hotly in key cases, with appeals in 2003 before five different federal appellate courts and one state appellate court.[75] (Only days before submission of this dissertation, the Eighth Circuit Court of

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[73] Ibid., 143.

[74] See listing of cases at Appendix B.

[75] See *Livestock Marketing Association v. USDA,* 207 F. Supp. 2d 992 (D. S. Dakota, 2002) and *Livestock Marketing Association v. USDA*, Nos. 02-2769 and 02-2832, 2003 U.S. App. LEXIS 13630 (8th Cir. 2003) (decided July 8, 2003); *Jean Charter and Steve Charter v. USDA,* 230 F. Supp. 2d 1121 (D. Montana 2002) (on appeal before the 9th Circuit Court of Appeals); *Michigan Pork Producers v. Campaign for Family Farms*, 229 F. Supp. 2d 772 (W.D. Mich. 2002), as corrected on October 31, 2002; (on appeal before the 6th Circuit Court of Appeals, the tribunal that held mushroom checkoffs were unconstitutional in the *United Foods* case, affirmed by the U.S. Supreme Court in *United States v. United Foods, Inc.*, 533 U.S. 405 (2001); *Delano Farms v. Ca. Table Grape Commission*, No. 00-16778 (9th Cir. 2003) (the 9th Circuit Court of Appeals reversed a dismissal by finding First Amendment issues were raised so case has returned to trial court); *Joseph and Brenda Cochran v. Ann Veneman*, No. 4:CV-01-0529, 2003 U.S. Dist. LEXIS 4361, (Middle Dist. Penn. 2003) (on appeal before the 3rd Circuit Court of Appeals); *State of Fla.,*

Appeals rendered an opinion in the *Livestock Marketing Association* case holding the federal beef checkoff program unconstitutional.)[76]

The central thesis of this paper is directly related to such litigation, past and present. The thesis is stated as follows:

> **The line of compelled commercial speech cases challenging commodity checkoffs on First Amendment grounds represents a fundamental hegemonic conflict within the agricultural industry in which the challengers are using the courts and the First Amendment in an attempt to break the current hegemony of commodity checkoffs and establish countervailing power.**

The thesis is based on the assumption that decisions of the courts on constitutional issues are signifiers of underlying political, social and economic contests that have moved to the courts as the parties strategically sought to use the judicial system in their struggles. It is also based on a second theoretical assumption that political struggles over constitutional issues arise from a condition of hegemony characterized by a dominant group exercising hegemony to maintain control and minority challengers seeking to build counter-hegemony to change the balance of power. The assumptions noted above would support similar studies of cases dealing with other constitutional issues arising from political contests in which the participants have recognized the courts as a viable terrain for battle.

If the challengers in the checkoff cases are successful, the resulting changes would significantly affect both the hegemony of the agricultural industry (and the related commercial and governmental groups that are within its hegemonic sphere) and the

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Dept. of Citrus v. Graves Brothers Company, Tampa Juice Services, et al., No. 2DO03-2276, 2nd Dist. Ct. of Appeal, Florida (on appeal before Florida state appellate court); and *Pelts & Skins, L.L.C. v. Jenkins, Jr.*, No. 02-384-A (Middle Dist. La. 2003) (on appeal before the 5th Circuit Court of Appeals).

[76] See *Livestock Marketing Association v. USDA*, Nos. 02-2769 and 02-2832, 2003 U.S. App. LEXIS 13630 (8th Cir. 2003).

development of First Amendment doctrine related to compelled commercial speech. Changes in the hegemony of the agricultural industry could change the relative balance of commercial and political power among the commodity producers, processors and dominant trade associations.

The defenders of the existing commodity checkoffs are supported staunchly by the USDA. In fact, the USDA has become an industry apologist. Therefore, both sides in the conflict are utilizing powerful institutions of the State, pitting the Courts and First Amendment doctrine against the USDA.

Overview of Study

This study relies upon an historical approach to gather evidence to perform a combined political and legal analysis. The interests at stake for each of the participating entities are investigated in order to provide a context for understanding why factions within the agricultural industry are using the compelled commercial speech argument as leverage to acquire countervailing power or challenge hegemony. This includes a study of the economic and political interests and the inducements and deterrents experienced by all entities involved in the current checkoff programs. As a foundation for political analysis, this study identifies major changes in the agricultural industry that are influencing the positions of key participants in the programs. Background is provided for legal analysis by reviewing changes and trends that have occurred in the Supreme Court's interpretation of First Amendment doctrines related to protection of commercial speech and freedom from compelled speech and compelled association.

The diagram identified as Figure 1 shows changes that a preliminary analysis has disclosed may be at work in influencing the hegemony in agricultural commodity

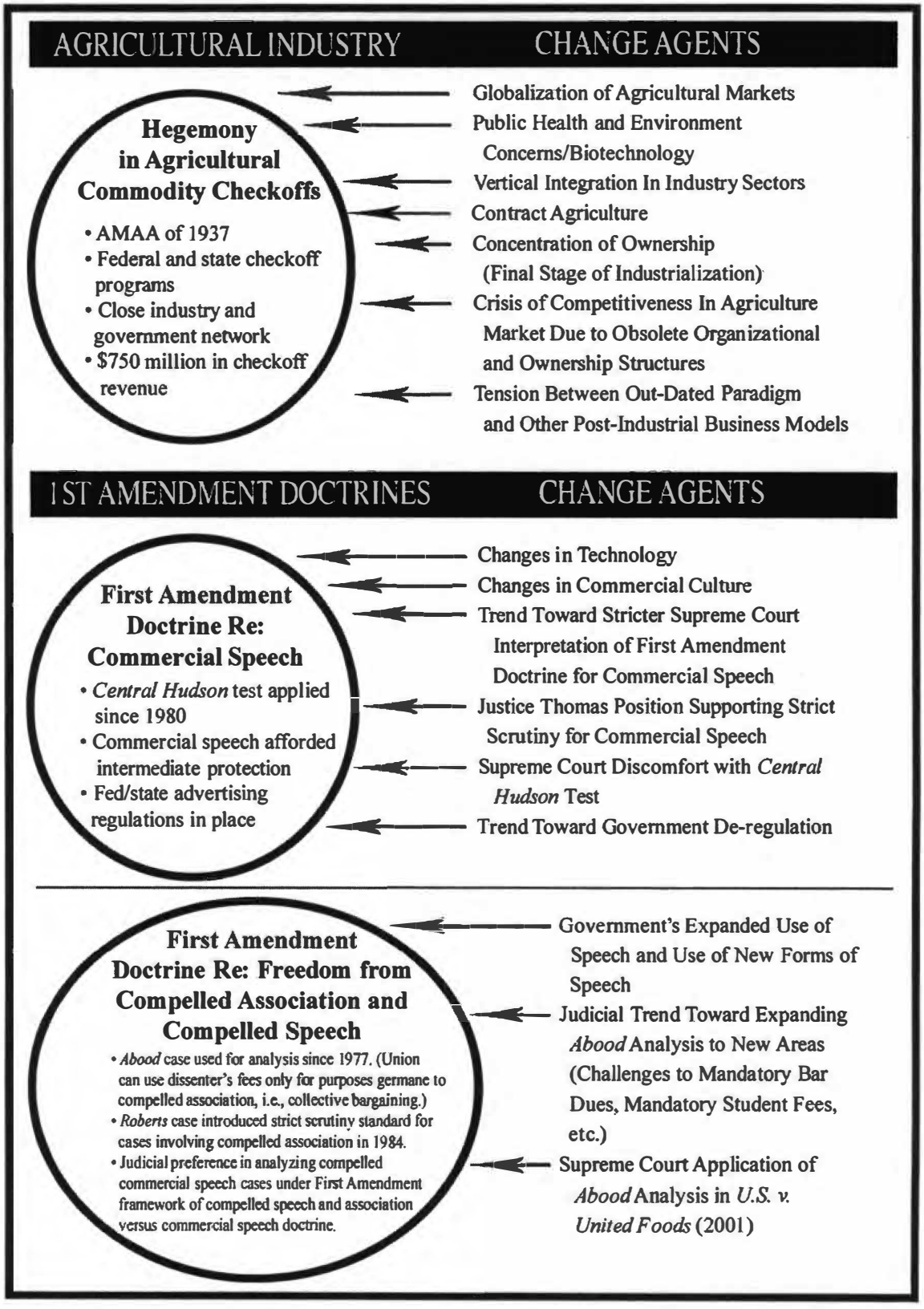


Figure 1 Changes Creating Climate for Hegemonic Challenge

checkoffs and the two areas of First Amendment doctrine relevant to the commodity checkoff litigation. These respective changes have created a climate for the hegemonic challenge that is the focus of this study. (However, it is expected that further research may indicate that not all of the elements of change identified are equally important in creating a climate for hegemonic challenge.)

As shown by the diagram identified as Figure 2, changes have spawned key issues in each sphere. The diagram illustrates how the overlapping of developments in the agricultural industry and First Amendment law has generated a zone of conflict. The following core issue emerging from the zone of conflict will impact both the commercial sphere and the legal sphere: "Should mandatory assessments on commodities used for generic advertising be deemed a violation of First Amendment rights?" Additional critical issues found within the zone of conflict include: which First Amendment doctrine should be applied to compelled commercial speech cases, whether *Glickman v. Wileman* was correct in concluding that no First Amendment rights are implicated if the court finds "collectivization" within a "broader regulatory scheme" and whether the "government speech defense" asserted by defenders of the checkoff program should immunize the checkoff programs from First Amendment scrutiny.

In the realm of private politics, this study analyzes the power dynamics within five segments of the agricultural commodities industry by investigating how the major industry associations representing the producers of each commodity are constituted and who attempts to speak on behalf of each commodity to the press, to government agencies, to Congress, to and through external entities such as ad agencies, and to the public (especially with regard to any claims regarding how the associations are representing the

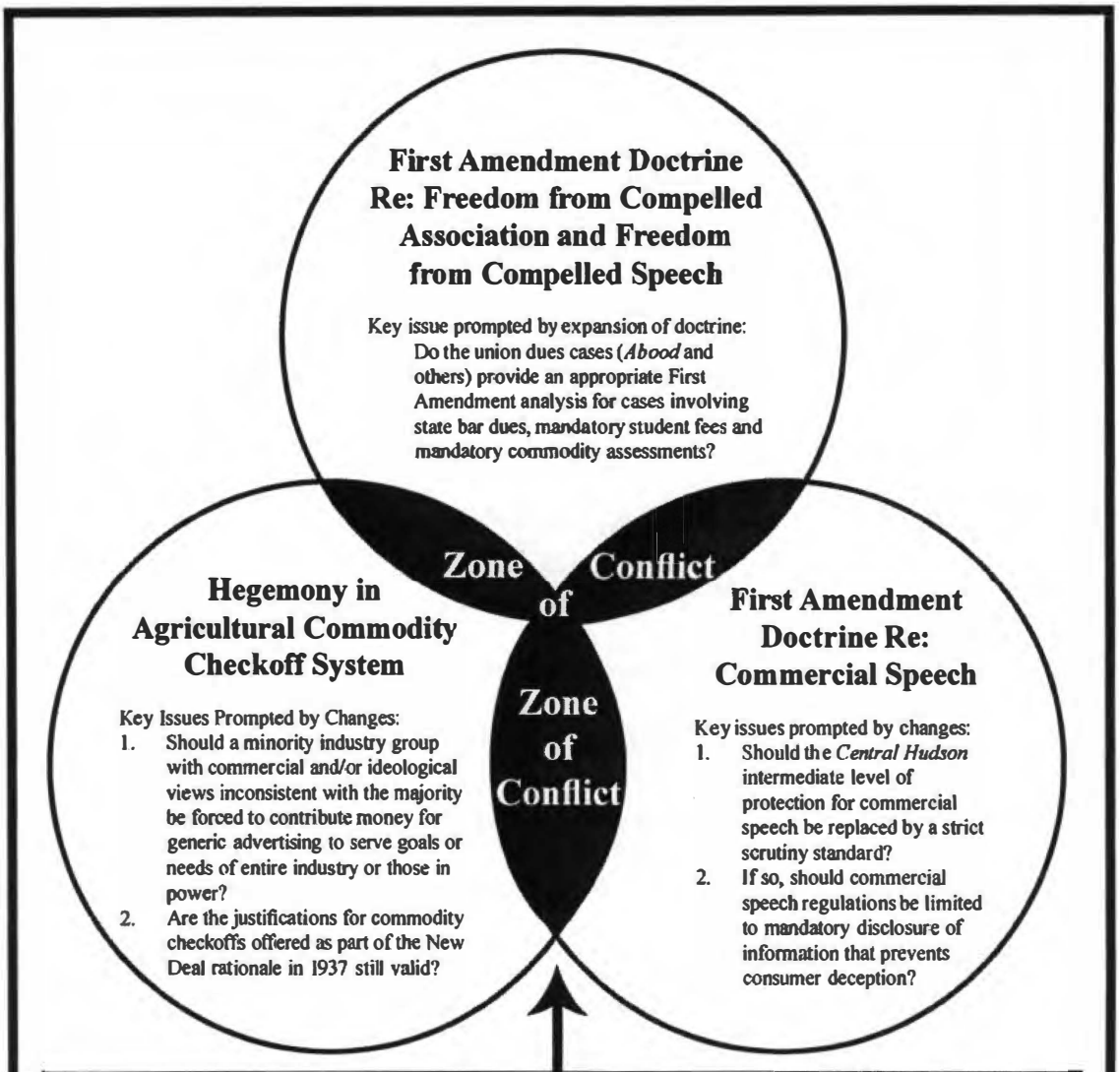


Figure 2 **Intersecting Spheres of Agricultural Hegemony and First Amendment Doctrines**

public good). The research also identities the characteristics of the members comprising the respective factions, and the contradictory positions that are held within each commodity group. Gramsci's concept of hegemony is used in examining the hegemonic matrix of people and institutions supporting the mandatory commodity assessment programs and the nature of the counter-hegemony advanced by the challengers. Additionally, Galbraith's theory of countervailing power is applied to study whether subordinate factions are seeking to generate countervailing power to defend themselves against economic exploitation.

In exploring the public politics of compelled commercial speech, a critical theoretical perspective (utilizing assumptions found in Gramsci's hegemony concept) is used to examine the evolution and rationale for the mandatory commodity checkoff programs, which had their genesis in two pieces of legislation[77] that were central to the New Deal policies of the 1930s.[78] The negative manner in which the government (the USDA in particular) has responded to the various political and legal actions of the

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[77] Agricultural Adjustment Act of May 12,1933, ch. 25, 48 Stat. 31 (codified as amended at 7 U.S.C. §§ 601-605, 607-623 (1994)) and Agricultural Marketing Agreement Act of June 3, 1937, Pub. L. No. 137, 50 Stat. 246 (codified as amended in scattered sections of 7 U.S.C.).

[78] See Olan D. Forker and Ronald W. Ward, *Commodity Advertising: The Economics and Measurement of Generic Programs* (New York.: Lexington Books, 1993) (noting the role of the federal government in the marketing of products since the 1930s); Daniel Bensing, "The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937," *San Joaquin Agricultural Law Review* 5, no. 1 (1995): 3-47, 5 (identifying the Agricultural Marketing Act of 1937 (AMAA) as a "direct statutory descendent of President Roosevelt's Agricultural Adjustment Act (AAA), a centerpiece of the New Deal's first 100 days"); Brian C. Leighton, "The Socialization of Agricultural Advertising: What Perestroika Didn't Do The First Amendment Will," *San Joaquin Agricultural Law Review* 5, no. 1 (1995): 49-65, 49 (referencing the AMAA as a "'short term fix' to pull farmers out of the Depression,"); Laura Jackson, "Commercial Speech: The Constitution—It's What's For Dinner. United States v. United Foods, Inc., 121 S. Ct. 2334 (2001)," *Wyoming Law Review* 2 (2002): 617-640, 620 (noting that the AMAA was enacted as part of the New Deal to advance "orderly marketing conditions and fair prices," quoting *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997)); and Jon Lauck, "After Deregulation: Constructing Agricultural Policy in the Age of 'Freedom to Farm,'" *Drake Journal of Agricultural Law* 5 (Spring 2002): 3-54, 4 and n. 1 (asserting that the sweeping government agricultural programs of the 1930s were prompted by "economic misery in rural America" and continued into the 1990s long after public support for New Deal economic policies had waned).

challengers who have sought to establish countervailing power against the dominant commodity producers, trade organizations and government players is of keen interest in analyzing the underlying framework of political, economic and social forces that are clashing in the public arena of the compelled commercial speech cases. It can be linked to Gramsci's idea of hegemony and suggests that the scope of this study include a critique of the role of the government in the current agricultural hegemony of the commodity checkoff programs.

The legal component of this study includes a review of how the *Central Hudson* test and/or the *Abood* analysis has been applied to compelled commercial speech cases decided by the Supreme Court and lower courts to determine, among other things, whether a doctrinal test has been applied consistently to such cases and to assess whether the Supreme Court has adopted a standard approach with any predictive value for future cases on compelled commercial speech. This review of the checkoff cases involving the commercial speech doctrine and freedom from compelled speech and compelled association will evaluate how the courts have handled the convergence of the First Amendment doctrine with the *Central Hudson* commercial speech analysis. Attached as Appendix B is a comprehensive annotated list of compelled commercial speech cases. Appendix C sets forth a list of criteria for analyzing compelled commercial speech cases.

This study seeks to identify the legal consequences (regarding First Amendment doctrine on compelled commercial speech as well as the broader commercial speech doctrine) and the political consequences (probable shifts in political or economic power) that are likely to occur with respect to alternative actions that may be taken by the Supreme Court with regard to compelled commercial speech. The Supreme Court is

uniquely poised in these cases to become either a "catalyst" or a "brake" in recognizing broader protection for commercial speech or extending the scope of protection against compelled speech or compelled association, thereby providing legitimacy to the counter-hegemony movement that is occurring in the agricultural industry.

Objectives

This study has the following objectives:

1) To examine the historical evolution and legislative rationale of the mandatory commodity checkoff programs for the five industries that are currently involved in First Amendment compelled commercial speech conflicts (fruit growers, mushroom growers, beef industry, pork industry and dairy industry);
2) To identify through collection and analysis of evidence the economic and political interests of the following key participants in five commodity checkoff programs:
    a) federal and state legislators;
    b) federal and state departments of agriculture that promulgate regulations (USDA and comparable state agencies);
    c) secretaries of the departments of agriculture who appoint members of implementing boards;
    d) boards, commissions and councils that manage the checkoff programs and determine how monies are used;
    e) industry trade associations;
    f) commodity producers in favor of checkoffs;
    g) commodity producers against commodity checkoffs ("the challengers");
    h) agribusiness corporations;

i) other key players in the production chain such as processors and retailers;

j) external activist groups such as environmental protection groups;

k) ad agencies and consulting firms;

l) the media, and

k) the Supreme Courts and lower courts.

3) To identify and clarify current agricultural industry trends and/or broader conflicts that are exerting an influence on the positions of the key participants in the hegemonic struggle regarding compelled commercial speech;

4) To analyze, identify, and clarify, within the theoretical perspectives of hegemony and countervailing power, the relationships among the key participants in the commodity checkoff programs (see list of participants set forth in objective two), especially with regard to which entities exert control and dominance;

5) To explore in general terms the history and use by the U.S. Supreme Court of the First Amendment doctrine for protection of commercial speech as set forth in the *Central Hudson* test and the First Amendment standards for freedom from compelled speech and from compelled association based on the *Abood* case;

6) To examine critically the scholarly literature and federal and state cases related to the application of First Amendment doctrines to the area of compelled commercial speech to determine, among other things, whether a standard approach has been developed and consistently applied over time and to judge whether such approach has any predictive value;

7) To critically examine the scholarly literature and federal and state cases relating to the "government speech principle" to determine its viability as a defense against the compelled commercial speech challenge;
8) To explore whether there is a hegemonic relationship between the decisions of the federal judiciary on compelled commercial speech and the economic and political interests of the dominant groups involved in the commodity checkoff programs; and
9) To assess the legal and political consequences of the various legal outcomes on compelled commercial speech issues, with attention to how the public interest will be served by such outcomes.

Analysis of the evidence will be guided by the following research questions:

RQ 1: Do the existing policy goals of the respective external entities (including the USDA and powerful trade organizations) remain in direct conflict with First Amendment speech rights for compelled commercial speech?

RQ 2: Have the Supreme Court and other federal courts failed to recognize the First Amendment constitutional right not to participate in compelled commercial speech by privileging the economic and political interests of the dominant parties in the agricultural hegemony?

RQ 3: Do government's efforts to use "government speech" as a justification for mandatory commodity assessments create a heightened risk that the government may displace or monopolize private speech or interfere with the gatekeeping function of private speakers?

The final objective set forth above notes that this research will seek to obtain evidence to assess the legal and political consequences of the potential legal resolutions on the compelled commercial speech issue. In resolving the legal conflict, the Supreme Court could find that mandatory assessments are:

1) constitutional when they are part of a broader regulatory scheme (such as the regulatory framework governing the fruit growers in *Glickman v. Wileman),*[79] but unconstitutional when they are imposed as stand-alone orders like those assessed against the mushroom growers in *United States v. United Foods,*[80] or
2) unconstitutional and a violation of First Amendment rights regardless of the regulatory scheme in which they reside, because they do not pass scrutiny under First Amendment analysis (either through application of the Central Hudson test or an analysis based on *Abood* principles);
3) constitutional regulations not protected by the First Amendment; or
4) constitutional under a "government speech" exception to the First Amendment.

The consequences will be evaluated in terms of the potential for creating change in the agricultural industry hegemony, the impact of such decisions on the dual legal doctrines involved (the doctrine regarding First Amendment protection for commercial speech and the doctrine of government speech) and, finally, with respect to the way in which the public interest will be served.

A Tempest Brewing: Political, Economic and Legal Significance of the Problem

A web of private and public organizations performing a myriad of roles currently drives the system of collecting, managing, coordinating and spending an immense stream

[79] See *Glickman,* 521 U.S. 457 (1997).
[80] See *United Foods,* 533 U.S. 405 (2001).

of money generated by commodities checkoffs. Estimates put the annual dollar figure at $750 million.[81] The mandatory assessments provide the basis for a dominant hegemonic culture that derives influence, credibility and ongoing employment from the commodity checkoff schemes. Discontinuing or modifying the continuous flow of checkoff money that supports these activities will have political implications regarding who can wield influence and power as well as economic implications for those who financially benefit from the income. The threat to such hegemony can be observed by evaluating the relentless and extensive efforts of the government and the groups supporting the checkoffs to fight the challengers. Success in the courts will lead to shifts in who exercises power in the commodity production chain and the way in which the minority group is able to independently conduct its business and achieve a greater market share.

On a broader scale, this hegemonic conflict can be viewed as a stepping-stone in addressing the "crisis in competitiveness" that arguably exists because of a lack of competitiveness in agricultural markets. The challengers in the compelled commercial speech cases are seeking the ability to promote their products and compete as individual producers rather than as part of an industry bloc lacking any internal level of competition. John Ikerd, professor emeritus at the University of Missouri Department of Agricultural Economics, referred to the current industry model as an obsolete organizational paradigm.[82] The description Ikerd offered is highly reminiscent of Gramsci's concept of

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[81] Jackson, 617.

[82] John Ikerd, "Alternative Organizational Structures: Implications for Competitiveness of Markets," in *A Food and Agriculture Policy for the 21st Century*, 78, Michael C. Stumo, ed.; compilation of papers presented at the Organization for Competitive Markets Food Policy Retreat on April 29 – May 1, 2000; available from http://www.competitivemarkets.com/library/academic/21stcentury; Internet; accessed 1 November 2002.

hegemony. Ikerd observed the following about the lack of competitiveness in the agricultural industry:

> Under current conditions, no one is capable of wresting control of agricultural markets from corporate agribusiness – not even the top managers of agribusiness firms themselves. Stockholders demand profits and growth, not just over the long run, but quarter after quarter...[83]

According to Ikerd, political institutions and institutions of the State have become major contributors to the problem. He declared:

> Government can't stop the corporations, because politicians too have come under their power. Politicians are strongly influenced, if not controlled, by the agribusiness corporations through their large contributions to political campaigns. Agricultural constituencies are influenced, if not controlled, by the general farm organizations and commodity groups. These groups are far more concerned with maintaining production and profits for agriculture as an industry than in maintaining competitive markets or viable family farms and rural communities. The USDA and the rest of the government bureaucracy has an organizational structure much like industry that responds far more to agribusiness interests than to the needs of family farmer. Consequently, government either supports or at least offers no meaningful resistance to corporate consolidation and ultimate corporate control of agricultural markets. Thus, American agricultural [sic] is dominated by an obsolete organizational structure that is essentially out of control.
>
> The crisis of competitiveness in agricultural markets will not pass unless or until the current industrial organizational structure is replaced with an alternative self-regenerating, post-industrial organizational paradigm.[84]

Ikerd's description of a troubled industry is highly revealing, because it identifies a number of *effects* of the hegemony that exist in the agricultural industry. While others may not fully support Ikerd's ultimate conclusion that American agriculture is dominated by an "obsolete organizational structure that is essentially out of control," there is ample evidence that American agriculture is dominated by a hegemonic structure that does not

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[83] Ibid.
[84] Ibid.

encourage or tolerate competition by minority factions. Fred Stokes, president of the Organization for Competitive Markets contended in 2000:

> "While farmers are driven from their lands, food processors and retailers use their market power to depress commodity prices and expand their margins....Family farms are giving way to mega farms under control of giant corporations. Open and competitive markets are being replaced by 'supply chains' and production contracts. More and more we depend on foreign sources for our food needs."[85]

The commodity checkoff challenges represent a small-scale effort to change this model (or break the hegemony) and, as such, may be significant in demonstrating incremental movement toward a different paradigm with broad implications for the agricultural industry.

On the other hand, those supporting the checkoffs have argued that generic advertising is critical for increasing domestic sales as well as ensuring that commodity producers are able to compete in a global market.[86] They contend that commodity checkoffs used for research and development are a key factor in allowing all commodity growers to benefit from new technical advancements.[87] Commodity checkoff defenders have argued that the elimination of commodity checkoffs will seriously jeopardize the ability of industries to speak with one voice in promoting and marketing commodity

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[85] Thomas F. Stokes, forward to *A Food and Agriculture Policy for the 21st Century*, ed. Michael C. Stumo; compilation of papers presented at the Organization for Competitive Markets Food Policy Retreat on April 29 – May 1, 2000; available from http://www.competitivemarkets.com/library/academic/21stcentury; Internet; accessed 1 November 2002.

[86] Padberg and Hall, 82.

[87] "Farm Bureau Continues Support for Checkoff Programs," The Voice of Agriculture Newsroom (March 9, 1999); available from http://www.fb.org/news/nr/nr99/nr0309.html; Internet; accessed 12 November 2002.

products, particularly in foreign markets, and will greatly restrict technological innovation that can be realized through collective funding of progressive research.[88]

The amount of checkoff fees dedicated to research varies by industry. The use of checkoff fees for research raises another area of free speech concerns for the challengers, who frequently object on philosophical and legal grounds to the focus and goals of the research. For example, beef producers may object to use of their mandatory fees for research on irradiated beef procedures and growth hormones. Similarly, fruit growers may object to the use of their fees for research to develop genetically altered fruits or fruits to meet the requirements of a foreign market.

The research addresses how potentially different legal frameworks for compelled commercial speech may influence the exchange of ideas and the economic and political environment in which the entities identified in this research participate. In the commercial free speech arena, the future ability of commercial entities in the United States to exchange ideas freely via advertising of their own design and choosing is at stake. This could have a broad impact on communication strategies of industry and government By looking at potential outcomes of the compelled speech issues, this dissertation identifies characteristics of the role of free speech and unrestricted communication in the industrial, economic and political structure of the United States.

If the courts hold mandatory assessments to be unconstitutional in pending and future cases under the approach provided in *United Foods,* such decisions could mean that, in all but the most highly regulated industries, commercial speakers would enjoy First Amendment rights similar to those afforded to political and cultural speakers. The

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[88] George H. Soares, "Agriculture in Crisis: What California Must Do to Protect its Most Precious Industry," *San Joaquin Agricultural Law Review* 11 (2001): 19-65, 34-36.

line between standards governing commercial speech and standards for political speech may become increasingly blurred, creating a communications environment in which the audience would be unable to distinguish among different types of speech and to evaluate the motives and interests of the speaker. (This highlights the need to consider how the public interest is best served in addressing the compelled commercial speech issue.)

The opposite action by the Supreme Court in holding that mandatory assessments are not protected by the First Amendment could lead to further compulsory assessments to pay for generic industry speech regardless of the level of controversy or support for such commercial messages in the industry. Troubling conflicts may continue to brew within commodity industries that are not unified and are dominated by trade associations that disregard a minority faction of the industry (or eventually even fail to represent the majority faction). If the mandatory assessments continue to be deemed constitutional within a highly regulated framework such as that in the *Glickman* case, then the groundwork is laid for increased governmental regulatory schemes for commodities. Why would this result prevail over the alternative of abolishing the checkoffs? In the words of U.S. Supreme Court Justice John Paul Stevens, this approach would avert "the danger that a federal statute would turn into a toothless scarecrow."[89]

Expected Contributions to Research

Existing research on compelled commercial speech reflects an emphasis on studying developments using a traditional legal analysis. This generates an understanding of the end result of the legal battle, but does not provide knowledge regarding the underlying political, economic and social factors that are prompting

[89] U.S. Supreme Court Justice John Paul Stevens, "The Shakespeare Canon of Statutory Construction," *The University of Pennsylvania Law Review* 140 (1992): 1373-1387, 1387.

challengers to resort to court action. No researcher has yet performed a "holistic" analysis on compelled commercial speech.[90] It is the goal of this research to perform an integrated political, legal and economic analysis of compelled commercial speech in five commodity areas: the beef, pork, dairy, mushroom and tree fruit industries.

This research is also expected to make a contribution to political theory by extending Antonio Gramsci's theoretical conceptualization of an historic bloc that exercises hegemony in capitalist societies to the socio-economic domain of agricultural commodity production.

The broad applicability of the research method utilized in this dissertation is expected to give rise to a third area of scholarly contribution. The study will use a highly structured approach to examine underlying political, economic and social conflicts that are signified by a line of legal cases involving constitutional challenges. This method, referred to as the "Gramscian/Galbraith legal context analysis," can be applied to gain insight into other major constitutional conflicts that represent complex political interests and issues between a dominant hegemony responding to challenges from groups and individuals with unequal power.

Limitations of the Study

The United States Department of Agriculture is involved in the operations and oversight of fourteen generic agricultural commodity programs that require fees for promotion of commodities to increase consumer markets. These include: honey,

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[90] Olan D. Forker and Ronald W. Ward provided a thorough overview of advertising for agricultural commodities in their 1993 book, *Commodity Advertising: The Economics and Measurement of Generic Programs.* However, they devoted only two paragraphs to the constitutionality of commodity promotion programs (an indication that the First Amendment compelled commercial speech issue had not yet emerged as a predominate area of conflict.) See Olan D. Forker and Ronald W. Ward, *Commodity Advertising: the Economics and Measurement of Generic Programs* (N.Y.: Lexington Books, 1993), 256-257.

mushrooms, popcorn, watermelons, potatoes, beef, pork, soybeans, dairy, fluid milk, cotton, eggs, peanuts and blueberries.[91] The compelled commercial speech litigation initially involved challenges to commodity checkoff programs for tree fruit, mushrooms, beef, pork, dairy products and almonds. Since the *United Foods* case in 2001, other commodity checkoff programs have also been challenged, including programs for grapes, alligators and citrus fruit.

The research and analysis in this study will focus on five representative industries—tree fruits, mushrooms, beef, pork and dairy. However, certain aspects of the study may apply to all commodity producers. In addition, the legal analyses required by this study will be based on the full line of compelled commercial speech cases.

[91] See listing of national checkoff programs and website for each commodity board or council at "Straight Answers to the Most Frequently Asked Questions About National Checkoff Programs," Cattlemen's Beef Board (2002); available from http://www.beefboard.com/dsp/dsp_locationContent.cfm?locationID=1062; Internet; accessed 15 June 2003.

CHAPTER 2

LITERATURE REVIEW OF THEORY AND AGRICULTURAL THEMES

This literature review will address the following areas of importance in this dissertation's study of how competing interests in the agricultural industry overlap with the development of First Amendment doctrine and create a zone of conflict related to commodity checkoffs and compelled commercial speech:

1) a dual theoretical framework for viewing the operations of the State and other principal actors in this conflict by applying Gramscian hegemonic theory and Galbraith countervailing power analysis;
2) counter-hegemony in the agricultural industry;
3) the history and rationale for mandatory assessment programs,
4) major players involved in the checkoff programs;
5) areas of change influencing the agricultural industry;
6) two First Amendment standards of review;
7) the compelled commercial speech cases;
8) the government speech doctrine (major legal defense being proffered by those supporting the commodity checkoffs); and
9) the representations inherent in First Amendment compelled commercial speech cases.

The areas outlined above represent component parts of the overall scope and thrust of this dissertation research and are, therefore, considered pertinent to this literature review.

Theoretical Perspective

The research and analysis regarding compelled commercial speech are analyzed within the theoretical perspectives of hegemony and countervailing power. Both of these concepts offer a means to interpret and understand the action being taken by individuals or groups in a subordinate position who have organized their resources to challenge the dominant private and public groups via First Amendment litigation. However, the two concepts of hegemony and countervailing power owe their origins to contrasting social theories of the State.

Antonio Gramsci developed his ideas on hegemony as an extension of his Marxist political orientation while John Kenneth Galbraith's countervailing power argument is aligned with the Neo-Pluralist view of the State. Hegemony, as envisioned by Gramsci, is a condition that includes both political and social dimensions. Countervailing power, on the other hand, has explanatory value in the compelled speech analysis primarily as an economic theory.

The use of the compelled commercial speech argument by the minority group to challenge the dominant scheme of commodity checkoffs can, therefore, be understood on a broader scale by considering it within the framework of Marxism (the underlying framework for Gramsci's theory) as well as within the neo-pluralist State theory (related to Galbraith's concept of countervailing power). The brief overviews of the Marxist and neo-pluralist theories of the State set forth below will provide a basic foundation for understanding the key theoretical concepts of hegemony and countervailing power that are employed in this study.

This portion of the literature review addressing the theoretical framework will be presented in five sections consisting of: 1) a general introduction to the concept of "the State," 2) a background on the Marxist theory of the State, 3) a summary of Gramsci's hegemonic paradigm, 4) a background on Neo-pluralist theory of the State, and 5) an overview of Galbraith's concept of countervailing power.

Concept of "the State." A definition of the state that has been widely respected by scholars is offered by Max Weber, a sociologist who produced a body of work in the late nineteenth century and early twentieth century. He defined the state as: "a human community that successfully claims the monopoly of the legitimate use of physical violence within a given territory."[92] Contemporary author John Hoffman restated the Weber formula as follows: "The state is an institution claiming to exercise a monopoly of legitimate force within a particular territory."[93] The four interrelated elements of monopoly, territory, legitimacy and force formed the foundation for an understanding of the state based on Weber's political sociology. The attribute of force emerged, however, as a primary focus in this definition, balanced by its counterpart, legitimacy.

Weber argued that force is a central criteria for the existence of a state, even though he qualifies this by stating: "...of course, force is not the normal or the only means of the state...."[94] Methods such as persuasion, promised rewards, appeal to duty are alternatives, but they co-exist with the state's potential and actual exercise of force.

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[92] H. H. Gerth and C. Wright Mills, eds. and trans., *From Max Weber: Essays on Sociology* (New York: Oxford University Press, 1946), 78.
[93] John Hoffman, *Beyond the State: An Introductory Critique* (Cambridge, MA: Blackwell Publishers, Inc., 1995), 3.
[94] Gerth and Mills, 78. Also see Hoffmann, 3.

Weber presented legitimacy as the concept underpinning force. A state must achieve a monopoly of legitimate force in order to function as a state. Individuals living within the territory of the state confer a degree of legitimacy on the use of coercion and force by simply complying with the legal norms or obeying the rules, whether through respect, fear or apathy. In contrast, the modern liberal view of legitimacy is normative in its assertion that "free and equal individuals must consent to the laws they obey. Legitimacy excludes the use of force."[95] (The word "liberal" is used here in the context of classical liberal theory that recognizes autonomous citizens have the capacity to rationally decide how to ensure freedom for all members of their society and to choose the acceptable limits that will be imposed on their individual freedom by endorsing political institutions and their rules.) Assuming at least a minimum level of consent, Andrew Haywood described legitimacy as "the quality which transforms naked power into rightful authority; it confers upon an order or command an authoritative or binding character, ensuring that it is obeyed out of duty rather than because of fear."[96]

As a generalization, it appears that all contemporary theories of the state in current Western political systems (e.g., pluralism, neo-pluralism, the New Right, elite theory, Marxism, and neo-Marxism) assume the existence of a "system of rules whereby mutual expectations are established between people."[97] As noted, Max Weber was willing to accept the legitimacy of a state when its citizens acknowledge the command of

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[95] Hoffman, 7.
[96] Andrew Heywood, *Political Ideas and Concepts* (New York: St. Martin's Press, 1994), 95.
[97] Alan Hamlin and Philip Pettit, eds., *The Good Polity: Normative Analysis of the State* (New York: Basil Blackwell, 1989), 2.

those in authority and believe that the laws of the state must be obeyed.[98] On the other hand, Dave Beetham argued that power is legitimate only if three conditions are present:

> "First, power must be exercised according to established rules, whether embodied in formal legal codes or informal conventions. Secondly, these rules must be justified in terms of the shared beliefs of the government and the governed. Thirdly, legitimacy must be demonstrated by the expression of consent on the part of the governed." [99]

All states engage in the "legitimization process" when they undertake activities that are designed to legitimize power. This can occur by following principles of popular consent or, in a more controversial way, by attempting to manufacture legitimacy by manipulating the ideas and symbols delivered to the public. (This may be viewed as ideological hegemony.)[100] A "legitimization crisis" occurs when a political system loses the confidence and voluntary consent of its citizens and becomes vulnerable to a change in regime.[101]

In a modern liberal state, legislative power determines what the rules will be and the sorts of rights allocated, the executive power oversees administration and compliance with the rules, and the judicial power adjudicates cases of dispute and passes judgment.[102] This understanding of a state does not presuppose a certain political system; the powers can be manifested differently (i.e., powers can be separated or combined in function) in states with liberal democratic, sovereign or authoritarian political systems.

The state may be seen as both an apparatus of rules and an agent. It performs as an agent when individuals engage in actions on behalf of the state and their identities

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[98] See Frank Parkin, *Max Weber* (New York: Tavistock Publications, 1982), 76. Parkin observed that this approach does not accommodate the "hegemony" concept. "If subordinate groups accept the commands of their masters as valid norms, the domination of the masters is legitimate, and that is the end of it." Ibid.
[99] Ibid., 96.
[100] See Heywood, 96-97.
[101] Ibid.
[102] Hamlin and Pettit, 2.

become an abstraction, so that the state itself does the acting. The image of the state is passive when it is understood as merely an apparatus of rules, but active and self-directing when it is interpreted as an agent.[103]

During the 1980s, social scientists, political scientists and historians were particularly focused on studying the modern state and its characteristics. They agreed that the following characteristics were inherent in the government of a modern state:

1) The state is a recognizable separate institution or set of institutions, so differentiated from the rest of its society as to create identifiable public and private spheres.
2) The state is sovereign, or the supreme power, within its territory, and by definition the ultimate authority for all law, i.e. binding rules supported by coercive sanctions. Public law is made by state officials and backed by a formal monopoly of force.
3) The state's sovereignty extends to all individuals within a given territory, and applies equally, even to those in formal positions of government or rule-making. Thus sovereignty is distinct from the personnel who at any given time occupy a particular role within the state.
4) The modern state's personnel are mostly recruited and trained for management in a bureaucratic manner.
5) The state has the capacity to extract monetary revenue (taxation) to finance its activities from its subject population.[104]

The Marxist Theory of the State. Karl Marx believed that the capitalistic economy invariably produces systematic inequality and massive restrictions on real freedom. The State reinforces social order in the interest of dominant social groups, the primary one being the capitalist class. John A. Hall and G. John Ikenberry summarized the focus of Marxist theory as follows:

> What mattered more than the universal right to vote was the inequality established between those who owned the means of production and those who, without such means, were forced to labor for them...The state is not at any time a neutral force, representing the general interest. On the contrary, the state embodies the interests

[103] Ibid., 3.
[104] Patrick Dunleavy and Brendan O'Leary, *Theories of the State: The Politics of Liberal Democracy* (London: MacMillan Education, 1987), 2.

> of the dominant class; the rules that it produces correspondingly serve the interests of some rather than all of the people.[105]

Marx argued that the working class (or the class of proletariat wage-laborers) will be in a position to realize its interests only if it successfully mounts a revolution against those who control the means of production (the elite ruling class or the bourgeoisie). Marx saw these two classes as the essential components of capitalism. He stated: "The essential condition for the existence and for the sway of the bourgeois class is the formation and augmentation of capital; the condition for capital is wage labor."[106] A crisis can create the stimulus for class-based political action by yielding a class-consciousness.

Marx's understanding of capitalism is captured by the authors of *The Dictionary of Social Sciences* (who endorse Marxism) in the following definition:

> A system that separates workers from any true property rights....Capitalism transforms the social means of subsistence (i.e., work) into capital on the one hand and the immediate producers into wage laborers on the other hand. Most of the time, capitalism is defined as the private ownership of the means of production, but that definition does not encompass the great harm done to humanity by the system. By claiming all (or most) of the means to produce culture as private property, a small class of owners preempts material culture for their own comfort while denying the vast majority the means to subsistence as well as the means to produce ideological culture when they are not working."[107]

According to Marx, the system of capitalism has inherent flaws that will eventually cause it to disintegrate. Marx referred to them as the "weapons" that the bourgeoisie have created that will create a crisis in capitalism and a climate for a social

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[105] John A. Hall and G. John Ikenberry, *The State* (Minneapolis: University of Minnesota Press, 1989), 7. The authors note: "This view was expressed most forcefully in 1848 in *The Manifesto of the Communist Party.*" Hall and Ikenberry, 102, n. 15.

[106] Karl Marx and Freidrich Engels, *The Manifesto of the Communist Party*, in *Birth of the Communist Manifesto*, ed., Dirk J. Struik (New York: International Publishers, 1971), 101.

[107] T. R. Young and Bruce A. Arrigo, *The Dictionary of Critical Social Sciences,* 1st ed., c.v. "capitalism." It should be noted that this dictionary is not neutral. Rather, it defines concepts and ideas under a critical approach that questions conventional terms, especially those related to all forms of elitism.

revolution.[108] The proletariat will recognize common class interests and be able to make the sacrifices necessary for revolution. The wage-laborer will ultimately be able to demonstrate a capability for "democratic control of a modern economy."[109]

Marx emphasized the concept of exploitation in his assertion that the wage-laborer is exploited by the bourgeoisie due to the inferior bargaining power of the proletariat. This theme is prevalent in his use of words such as "oppression," "subjugation," "force" and "slavery" to characterize the wage-laborer.[110] The relationship of inequality will be remedied when, as a result of the proletarian movement of the "immense majority,"[111] the worker's control of production replaces capitalism and "all the springs of cooperative wealth flow more abundantly."[112]

To Marx, the bourgeoisie, the ruling class under capitalism has "conquered for itself, in the modern representative State, exclusive political sway. The executive of the modern State is but a committee for managing the common affairs of the whole bourgeoisie."[113] In his discussion of Marx's legacy, Richard Miller summarized Marx's central claims as follows:

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[108] Marx and Engels, *Manifesto*, 96. Young and Arrigo summarized the weapons (or general laws) within the system of capitalism that will cause its demise as follows: "(1) the tendency of the rate of profit to fall; (2) the tendency of large firms to buy out or destroy small firms; (3) the tendency to transform all goods and services into commodities; (4) the tendency to transfer (externalize) costs of production to workers, consumers, or the environment; (5) the tendency to disemploy production; (6) the tendency to dominate the political process; (7) the tendency to control the production of ideological culture (art, science, music, literature, and religion); (8) the tendency toward economic imperialism; (9) the tendency to abandon low-profit but essential lines of production…; and (10) the tendency toward revolution." Young and Arrigo, c.v. "capitalism."

[109] Richard W. Miller, "Marx's Legacy," in *The Blackwell Guide to Social and Political Philosophy*, ed., Robert L. Simon (Malden, Mass. Blackwell Publishers, 2002), 133.

[110] See Miller, 134.

[111] Marx and Engels, *Manifesto,* 101.

[112] Miller, 133, quoting K. Marx and F. Engels, *Critique of the Gotha Programme* (1875).

[113] Marx and Engels, *Manifesto,* 91.

1. Government actions serve the long-term interests of the bourgeoisie as a whole, even if those interests conflict with those of the rest of society.[114]

2. This bias in interests served is sustained by mechanisms that are part of the social context of political choice, sufficient mechanisms which will exist, in one form or other, so long as capitalism endures...Marx ascribes the pattern of choice on the part of successful elected officials to underlying relations of economic power rather than bribery or conspiracy.[115]

3. If a social movement threatens to end the bias toward bourgeois interests, the old connection between class and government will be defended through violence which mobilizes residual bourgeois political resources, violence which can only be defeated by organized counter-violence, rooted, in part, in non-electoral activity.[116]

A primary theme of the Marxist view of the capitalist State is that the State will always be biased toward the interests of the bourgeoisie.

Antonio Gramsci's Concept of Hegemony. Antonio Gramsci introduced the idea of hegemony as an alternative to the strict Marxist approach which he felt over-emphasized the economic sphere and class analysis. Gramsci took the position that Marx was mistaken in concluding that a change simply in the ownership of production would result in a truly democratic and free society because power was also exercised in political arenas and civil society.[117] Gramsci offered the concept of hegemony as a more complete explanation of the way in which power is exercised.

Hegemony occurs when a dominant class or alliance of classes or other social groups asserts a unifying world view and successfully gains political and economic control over subordinate society by using active consent (knowingly or not) rather than direct force. Law, religion, art, sciences, politics, the media, private industry and

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[114] Miller, 141.
[115] Ibid.
[116] Ibid., 142.
[117] Robert Bocock, *Hegemony* (New York: Tavistock Publications, 1986), 35.

government all become relevant forces in bolstering the world view of the dominant class and its approach to human and social relationships.[118] However, elements of dissension in this social structure create the need for negotiation and compromise, or, in the alternative, the need to use coercion. Leadership must develop consent at the intellectual, moral and philosophical level in order to create and maintain hegemony. Gramsci asserted that "there can, and indeed must, be hegemonic activity even before the rise to power, and that one should not count only on the material force which power gives in order to exercise an effective leadership."[119]

Challenges to the legitimacy of the dominant hegemony create the potential for change in the dominant ideology, relationships, economics and political institutions. *The Harper Dictionary of Modern Thought* asserted that "the struggle for hegemony is seen as a primary and even decisive factor in radical change, including change in the economic base itself."[120]

Gramsci's interpretation of hegemony recognized that three areas of a social structure form the basis for hegemony: the economic (modes of material production), the state (state-supported bureaucracies, agencies, legal institutions and apparatus for coercion, such as the police and armed forces) and civil society (other private institutions existing within society in the areas of religion, culture, etc.).[121] The line that separates the state and civil society is not boldly defined and may change or be re-negotiated. Gramsci recognized that certain historical periods are characterized by unstable

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[118] See Young and Arrigo, c.v. "Gramsci, Antonio (1891-1937)" and c.v. "hegemony," ideological." Also see *The Harper Dictionary of Modern Thought*, eds., Alan Bullock and Oliver Stallybrass, 1st ed., c.v. "hegemony."
[119] Antonio Gramsci, *Selections from the Prison Notebooks*, 59.
[120] See *The Harper Dictionary of Modern Thought*, 1st ed., c.v. "hegemony."
[121] See Bocock, 33-34.

equilibrium between the classes, leading to close associations and specific alignments of state and civil society.[122] These have been identified as "historic blocs."[123] Bob Jessop interpreted this key concept in Gramsci's paradigm as follows: "the weight of various particular interests is continually re-negotiated in the 'unstable equilibrium of compromise' that underpins hegemony."[124]

Gramsci emphasized the role of "organic intellectuals." As used by Gramsci, this term encompassed intellectual thinkers within the dominant group who may be bureaucrats, politicians, academics, corporate specialists, trade industry researchers, etc. These are the individuals involved in "directing the ideas and aspirations of the class to which they organically belong."[125] In order to create environments favorable to their ideology, the organizers of society or elite leaders within a social group seeking dominance facilitate and maintain a circle of organic intellectuals whose purpose is to provide the social group with "homogeneity and an awareness of its own function not only in the economic but also in the social and political fields."[126] This occurs when "[T]he capitalist entrepreneur creates alongside himself the industrial technician, the

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[122] See Gramsci, 108, 210-211, 245.

[123] See Bocock, 77-78, 104. The terms "base" and "superstructure" as used by Marx are integral to Gramsci's concept of "historic bloc." Marx used the term "base" to refer to forms of production. These modes of production are the determinants of social culture, which influences how people think and behave (their "consciousness" and their ideology). Their attitudes and actions shape the social world of art, religion, science, politics, law, etc. It is this social world that Marx characterized as "superstructure." (See D. A. Drennen, *Karl Marx's Communist Manifesto*, (Woodbury, N.Y.: Barron's Educational Series, Inc., 1972), 60 and Young and Arrigo, c.v. "superstructure." Gramsci would argue that a 'historic bloc" results when there are mutually supportive relationships between the elements of base and superstructure. See Jessop, 151.

[124] Bob Jessop, *The Capitalist State* (New York: New York University Press, 1982), 245-246.

[125] Gramsci, 3. Gramsci drew a distinction between "organic intellectuals" and "traditional intellectuals." Traditional intellectuals are distinguished by their fundamental detachment from the dominant social group. They "put themselves forward as autonomous and independent of the dominant social group" and retain a degree of "uninterrupted historical continuity." Gramsci used the ecclesiastics as an example. Ibid., 7. For further interpretation of Gramsci's distinction between organic and traditional intellectuals, see Richard Bellamy and Darrow Schecter, *Gramsci and the Italian State* (New York: Manchester University Press, 1993), 130-131.

[126] Ibid., 5-6.

specialist in political economy, the organizers of a new culture, of a new legal system, etc."[127]

Bob Jessop has credited Gramsci with introducing a major theoretical break within Marxist theory by focusing on the intellectual and moral aspects of the State machinery. Instead of viewing the state as a strictly coercive apparatus, Gramsci focused on the "relative weight of coercion, fraud-corruption, and active consent." [128] This theoretical shift allowed Gramsci to examine a wider gamut of economic, ideological, political and social factors that influence how political hegemony is supported or undermined by the dominant and subordinate groups. According to Jessop, Gramsci's approach also "implies a concern with the hegemonic apparatuses of state power and the role of intellectuals in organizing the hegemony of the dominant class and forming a 'historic bloc'..."[129] The state can, therefore, serve as a battleground for hegemonic and counter-hegemonic social forces.

Those in disagreement with existing hegemony must find methods by which to respond. Gramsci maintained that the hegemonic paradigm must include a search for transformation (or counter-hegemony) and not be limited simply to anti-hegemony.[130] He developed the idea of a "war of position" to describe the process by which a subordinate group (the proletariat) tries to build hegemony in civil society before engaging in an effort to capture state power from the bourgeoisie.[131] It is a concept that refers to the strategic activities of opposing forces in a capitalist society—the dominant

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[127] Ibid., 5.
[128] Jessop, 151.
[129] Ibid.
[130] See Stefan Kipfer, "Urbanization, everyday life and the survival of capitalism: Lefebvre, Gramsci and the problematic of Hegemony," *Capitalism, Nature, Socialism* 2, no. 2 (June 2002): 117-149.
[131] See Bocock, 76-77.

group is engaged in a war of position to maintain its hegemony in an environment where challenges are always taking place. The subordinate group engages in a war of position to organize its organic intellectuals and other allies aligned with it into a more powerful bloc and also to challenge the hegemony of the dominant group, preferably in more than one terrain at a time (i.e., through State agencies or judicial systems, the media, lobbying efforts, the educational system, and so forth.) If a subordinate group desires change, it must engage in a hegemonic struggle.

Gramsci's work on hegemony was expanded by several theorists in the neo-Gramscian school in the 1970s and 1980s, Ernesto Laclau and Chantal Mouffe."[132] Mouffe argued that Gramsci initiated a break with the strict model of "economism" (the base-superstructure model) and the class reductionist view (the belief that class endows economic, political and ideological pre-determination). Her description of Gramsci's ideas on social relations are found in the following:

1) Gramsci adopted a concept of political forces as "'inter-class'...collective wills in and through ideological struggle,"[133] refusing to recognize them as class subjects.
2) He rejected the assumption that different classes exhibit class ideologies, opting instead for "a pluralistic universe of ideological elements" that can be selectively articulated and synthesized into new ideologies. Hegemony, in Gramsci's view, was not adequately explained by a "paradigmatic class ideology" imposed by a dominant class on other classes. Instead, hegemony involved "the articulation of

[132] See generally Jessop 191-210. Jessop draws liberally on the individual and collaborative writings of Ernesto Laclau and Chantal Mouffe in outlining the "discourse-theoretical" approach. For original source information, see Ernesto Laclau, *Politics and Ideology in Marxist Theory* (London: New Left Books, 1977); Ernesto Laclau, "Togliatti and Politics," *Politics and Power* 2 (London: Routledge and Kegan Paul, 1980); Ernesto Laclau and Chantal Mouffe, "Socialist Strategy—Where Next?" *Marxism Today* (January 1981).
[133] Jessop, 193.

elements from different ideological discourses around a specific hegemonic principle to create a relatively unified but syncratic ideological system."[134]

3) Gramsci recognized a category of 'national-popular' ideological elements having no class connotations that gave rise to the "*par excellence* of ideological class struggle,"[135] a situation that arose when:

> "...two fundamental classes compete to articulate these elements into their own class discourse so that it becomes a 'popular religion' or organic expression of the national interest with the active consent of the people. The agents of this ideological struggle are the intellectuals and it is mediated through an ensemble of hegemonic apparatuses."[136]

Mouffe and Laclau developed these ideas one step further by introducing a "general theory of the discursive constitution of hegemony.[137] In their "discourse-theoretical' approach, they emphasize that discourse is synonymous with social relations which leads them to conclude that the Marxist metaphor of base and superstructure as it is used to define social relations must be modified to reflect that both elements are discursive in nature. (Under the Marxist model, the base was seen as "extra-discursive" and the superstructure was discursive.) The national-popular ideological elements identified in point three above become as important to the formation of social relations and political hegemony as the class struggles.

Jessop referred to "discursive ensembles" and "ideological ensembles" as important aspects of the formation of political hegemony in a framework not dictated by the class paradigm. He offered this description: "The struggle for hegemony is re-interpreted in terms of intervention to articulate different discursive elements into more or

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[134] Ibid.
[135] Ibid.
[136] Ibid., 193.
[137] Ibid., 195.

less discrete ideological ensembles." Jessop argued that this can occur because discursive elements 'have common nuclei of meaning which are not fully determinate in denotation and can be connotatively linked to other elements or produce the specific meanings they reveal in different discursive ensembles."[138]

Gramsi's ideas, along with the interpretations of Jessop and the Neo-Gramicians, Mouffe and Laclau, provided this study with a point of reference for understanding the way in which hegemony operates in the realm of agricultural commodity production. A theoretical assumption underlying this study is that the socio-economic relations existing within agricultural commodity production that give rise to the dominant checkoff hegemony and, on another level, that give rise to an industrial agriculture hegemony, are eminently suitable for interpretation under the same principles that Gramsci formulated for examining and explaining political hegemony.

The Neo-Pluralist Theory of the State. A review of the neo-pluralist theory of the state must begin with a brief consideration of its predecessor, the pluralist theory. A basic tenet of the pluralist theory is that it recognizes the existence of groups as meaningful participants in the political process. Early in the Twentieth Century, political scientists such as Albert Bentley identified pluralism as the most accurate description of an American political system that included many active interest groups and pressure groups.[139] The pluralist view assumes that actions of the State occur through a process of deliberative democracy that incorporates the following assertion:

> While I may take my preferences as a sufficient reason for advancing a proposal, deliberation under conditions of pluralism requires that I find reasons that make

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[138] Ibid., 196.

[139] See Andrew Vincent, *Theories of the State* (New York: Basil Blackwell, 1987), 183.

> the proposal acceptable to others who cannot be expected to regard my preferences as sufficient reasons for agreeing.[140]

Robert Dahl's early works in the 1960s and 1970s presented his view of the pluralist theory. He pictured the state as a "neutral mediator of conflict" that operated as an intermediary between "multiple centers of power." It acted in the best interest of all in the midst of constant negotiations among different centers of power. He asserted that the diverse competing strategies will ensure over time that no interest group or faction will systematically win and coercion will be "reduced to a minimum."[141] This theory is inconsistent with Gramsci's hegemony paradigm, which recognizes that the state at times may not be neutral when it becomes a location of conflict for hegemonic forces. The state may align itself with one of the competing groups or various state institutions may engage in hegemonic conflict between themselves (e.g., the courts versus the executive).

Murray Knuttila, professor of sociology and social studies at the University of Regina in Saskatchewan, Canada, summarized the pluralist view by declaring that "...the state is not an institution capable of eliminating conflict but rather the arena of legitimate political conflict."[142] This idea cuts across the theoretical schools of thought, fitting also within the theories of both Gramsci and Dahl.

In the late 1950s and early 1960s, pluralist political science theorists embraced the image of "stable democracies" functioning by means of interaction and negotiation among power centers. However, political and social unrest during the 1960s and the subsequent expansion of corporate power and commercialism into everyday life

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[140] Hamlin and Pettit, 24.
[141] Robert Dahl, *Pluralist Democracy in the United States: Conflict and Consent* (Chicago: Rand McNally, 1967), 24.
[142] Murray Knuttila, *State Theories: From Liberalism to the Challenge of Feminism* (Toronto: Garamond Press, 1987), 78.

highlighted the interconnections between the economic power centers and the political choices available to U.S. citizens. Conventional pluralists found their assumption about the autonomous nature of politics being questioned by the New Right, the elite theorists and Marxists. In response, the neo-pluralist theorists emerged. These were a group of liberal thinkers, many of whom were formerly instrumental in developing the orthodox pluralist theory. Authors in the group that began questioning the harmony of democracy in a pluralist state included: Charles Lindblom, Robert Dahl, Albert Hirschman, and John Kenneth Galbraith.[143]

In his *Politics and Markets*, Lindblom focused on the weaknesses in the pluralist paradigm, with special attention to the relationship between the market and government. The power of business resources are recognized by government officials who anticipate and prepare policies to expressly address commercial profitability issues.[144] Lindblom concluded that modern liberal democracies afford business a privileged position and, in a perceptive final chapter of his book stated:

> In short, in any private enterprise system, a large category of major decisions is turned over to businessmen, both small and larger. They are taken off the agenda of government. Businessmen thus become a kind of public official and exercise what, on a broad view of their role, are public functions.[145]

Robert Dahl, a former collaborator with Lindblom, also noted the defects in the conventional pluralist theory Representative political mechanisms were insufficient to guide policy-makers in the complex issues facing the modern state so a new model of the "professionalized state" was needed to meet the technological and social changes. While

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[143] Dunleavy and O'Leary, 271.
[144] Ibid., 294.
[145] Charles Lindblom, *Politics and Markets* (New York: Basic Books, 1977), 172. Also see discussion of Lindblom's work in Knuttila, infra, n. 63, 70.

neo-pluralists accept an extended apparatus for collective decision-making as a realistic way to effectuate decision-making, they still retain conventional pluralist values, such as participation by diverse groups and accountability of political representatives to satisfy the wishes of ordinary citizens.

Neo-pluralist theorists are united in their conclusion that modern social, economic and political policies cannot be premised on models that are grossly outdated, such as a model of economics that is premised on the centrality of markets and consumer preferences, but fails to acknowledge the reality that the economic priorities further the objectives of large corporations rather than the individual or collective choices of citizens. In their overview of theories of state, the authors Patrick Dunleavy and Brendan O'Leary, summarized the following common characteristics of neo-pluralism:

> The major problems of liberal democracies concern the possibility that some power centres (especially large corporations) may be able to persuade citizens what they should want. Most neo-pluralists also acknowledge that the development of an advanced industrial state is not directly controlled by citizens, and recognize the existence of a good deal of sub-technocratic government. But however much they assert a need for reform (which varies between different authors), they all see the existing political and social systems of Western democracy as the best attainable form of social organization. Power in society is fragmented between economic and political authority systems, but in such a way as to preserve a very substantial capability for reforming the undeniable social problems, economic strains and political dilemmas which must inevitably remain.[146]

The first sentence of this quotation suggests the importance of the role of commercial communication and the tools of persuasion (including commercial speech) in the allocation of power between corporations, government and citizens. John Kenneth Galbraith took this idea one step farther, arguing that the dominance of large corporations in economic markets requires that the government accommodate their interests first and

[146] Dunleavy and O'Leary, 284-285.

foremost by providing stability in the regulation of the business environment that will allow the corporations to capitalize on long-term investments.[147] Any substantial market sector not dominated by large corporations will have a nominal impact on the market and the shaping of economic policy.

Peter Self argued that a shift has occurred in political thought regarding the role of the State from the benevolent to the malevolent State. He illustrated this by referring to changes in theories of pluralism from a benign view to a distinctly malevolent approach:

> Theories of pluralism, developed initially in and about the American environment, started out with an optimistic view of the consequences of the rise of organized groups for democratic stability and balance, veered towards a stress upon the capture of government by powerful private interests, and contributed finally (in Europe particularly) towards a concept of 'corporate pluralism' in which integrated private and public interests dominate government to the exclusion of other groups.[148]

John Kenneth Galbraith's Concept of Countervailing Power. In his book, *American Capitalism*, the Canadian-born political economist, John Kenneth Galbraith, advanced his theory that modern capitalistic society breeds centers of industrial concentration that become monopolies or oligopolies. He believed that this is a positive formula for growth, if the monopolistic power systems induced countervailing institutions that wield sufficient power to prevent potential abuse and exploitation by the monopolistic group. Galbraith offered examples of how "countervailing power" can arise with large retailing groups balancing the power of large manufacturers, trade unions balancing the power of large employers, supplier and consumer organizations balancing the power of dominant sellers and government regulation balancing the power of private

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[147] Ibid., 295.
[148] Peter Self, *Political Theories of Modern Government, Its Role and Reform* (Boston: George Allen & Unwin, 1985), 17.

monopolies and oligopolies. Although giant firms have replaced small firms to the point where the competitive model is no longer applicable, Galbraith concluded that this is not a problem provided that centers of countervailing power emerge to protect consumers and smaller players. A system of economic checks and balances is more likely to occur when competing centers of monopolistic and oligopolistic power interact with countervailing institutions.[149]

This theoretical perspective offers the means to expand this study's analysis of the agricultural climate and players that are involved in the compelled commercial speech conflict by examining which entities (most likely monopolistic or oligopolistic) or individuals have economic power, which parties are currently vulnerable to abuse or exploitation, which ones are currently induced to build centers of countervailing power and what will be needed to be successful as a countervailing institution.

Summary. This dissertation uses a dual theoretical framework for viewing the operations of the State and other principal actors in this conflict: Gramscian hegemonic theory + Galbraith countervailing power analysis. All evidence will be analyzed within the Gramsci hegemonic framework and the Galbraith countervailing power analysis will be selectively applied when appropriate to evidence dealing more directly with economic aspects of the struggle over commodity checkoffs and compelled commercial speech. The theories will not be combined or modified; all original assumptions and assertions for each theory will be retained in the analysis.

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[149] See generally Galbraith, *American Capitalism*, 119 –131.

Power Blocs and Hegemony in Agriculture

Gramsci recognized that close associations and alignments between state and civil society create "historic blocs" comprised of bourgeoisie and organic intellectuals from various parts of civil society and the state engaged in discourse and activities necessary to build and maintain hegemony. The historic bloc is integral in organizing entire social formations. While the bourgeoisie was the initial class around which a ruling historic bloc organized, later Gramsci theorists understood Gramsci's ideas to mean that such blocs are not as closely bound to class organization. Instead, power blocs can articulate discursive elements containing nuclei of meaning to produce ideological ensembles that form the central foundation for the hegemonic activities of the power bloc.

This dissertation advances the notion that organic intellectuals within the agricultural industry have aligned themselves around agribusiness. In its exercise of hegemony, agribusiness has created certain nuclei of meaning that have formed widely accepted ideological ensembles. The nuclei of meaning are linked to the industrial agriculture model and to the programs for mandatory assessments on commodities.

The power blocs involved are the "industrial agriculture bloc" and separate "commodity industry blocs" for each of the five commodities covered by this study. While interrelated to some measure, they are formulated on different nuclei of meaning and represent different ideological ensembles. The power blocs also are subject to different historical conditions that have been instrumental in developing the social relations necessary to achieve hegemony. A challenge to the hegemony in one of these power blocs and resulting reform or renegotiation of power may influence the other, but they each remain autonomous.

The industrial agriculture bloc exercises hegemony and power over the entire agricultural industry based on its need to reinforce and maintain the industrial agriculture model, a key ideological element in its discursive ensemble. The central organizers for this bloc are the large concentrated and highly integrated agricultural business organizations. Allied with them are other groups and organic intellectuals from within civil society and the state, including the USDA.

The concentration and vertical integration that has occurred in the agricultural industry in the last decade has combined with biotechnology developments to create a climate for a few powerful groups to exercise hegemony by owning, controlling or partnering with companies that provide each necessary function in the food chain. Of particular importance is ownership of intellectual property rights in genetically engineered organisms (seeds, crops, livestock DNA, etc.).

Dr. William Heffernan of the University of Missouri Department of Rural Sociology has identified "food chain clusters" or vertically integrated food systems that cross international boundaries.[150] The industrial agriculture bloc will take on a new character as these food chain clusters become the primary organizers for the agricultural industry in the future. In a report he prepared for the National Farmer's Union, Heffernan touches on how the decision making process will become more complex and more important. There will be a hegemonic dialogue within each food cluster chain and between the clusters of firms. Other participants in the industrial agriculture model will need to negotiate their place in the industry by allying themselves with the food chain

[150] See Heffernan, 3-4.

clusters. The organic intellectuals in academia, the USDA, trade associations, etc. will have to do the same.

Will it be possible to build an effective counter-hegemony to attack the industrial agriculture bloc with these powerful food chain clusters? That remains to be seen. However, from the literature and activities of several of the major coalitions aligned with the agricultural counter-hegemony (Organization for Competitive Markets and National Campaign for Sustainable Agriculture), it appears that there are leaders in the counter-hegemony who are astute about the reorganizing taking place in the industrial agriculture bloc. The strategies and resources will need to be well-coordinated and sophisticated to be effective in dealing with the emerging industrial agriculture power bloc.

A commodity industry bloc exists for each of the five commodities covered by this dissertation: beef, pork, mushrooms, tree fruit and dairy products. In each case, the commodity industry bloc has a history of relations between different segments of the industry and external forces combined with an "ideological ensemble" that have worked together to generate the consensus of the commodity industry itself (albeit sometimes by coercive means), and has achieved public consensus through discourse or by default through public apathy or lack of public awareness. The central organizers for each commodity industry bloc differ as well as the agents they use to exercise hegemony. However, in each commodity industry, the USDA has aligned itself with the dominant power bloc.

While operating in an autonomous manner, the industrial agriculture bloc and the respective commodity industry blocs are linked to Gramsci's historic bloc, the primary bloc that organizes capitalist society and accommodates the masses through

parliamentary democracy. Some of the same agents align themselves with the dominant forces in each bloc (such as various arms of the state apparatus) and some of the discursive and ideological elements are present in each power bloc, but they are still relatively separate in terms of the way they exercise hegemony and influence society. As shown by the model in Figure 3, this phenomenon of power blocs operating within a capitalist state can be conceptualized as a cascading set of power blocs, each formed around a central organizer, each articulating discursive meaning, each assimilating its own ideological ensemble, and each making concessions and negotiating with challengers to maintain and strengthen its hegemony.

One power bloc may experience radical change without imposing change on other power blocs, but often they observe and assimilate new economic, political and social elements that appear successful for other blocs. For example, the complete vertical integration of the poultry industry has set the stage for other commodity industry blocs to consider how vertical integration can be incorporated into their hegemonic strategies.

Certainly, the power bloc that adopted the ideological ensemble for the industrial agriculture model was cognizant of the hugely successful use of similar business models over which that bloc exercises hegemony leads to the conclusion that a discrete "checkoff hegemony" can be recognized for each industry. It contributes significantly to the overall hegemony wielded by each power bloc. The legal termination of the commodity checkoff program in an industry would force the commodity industry bloc to re-formulate its ideological ensemble and re-negotiate relations within the industry to re-establish hegemonic control forfeited through loss of the checkoff programs. Other consequences

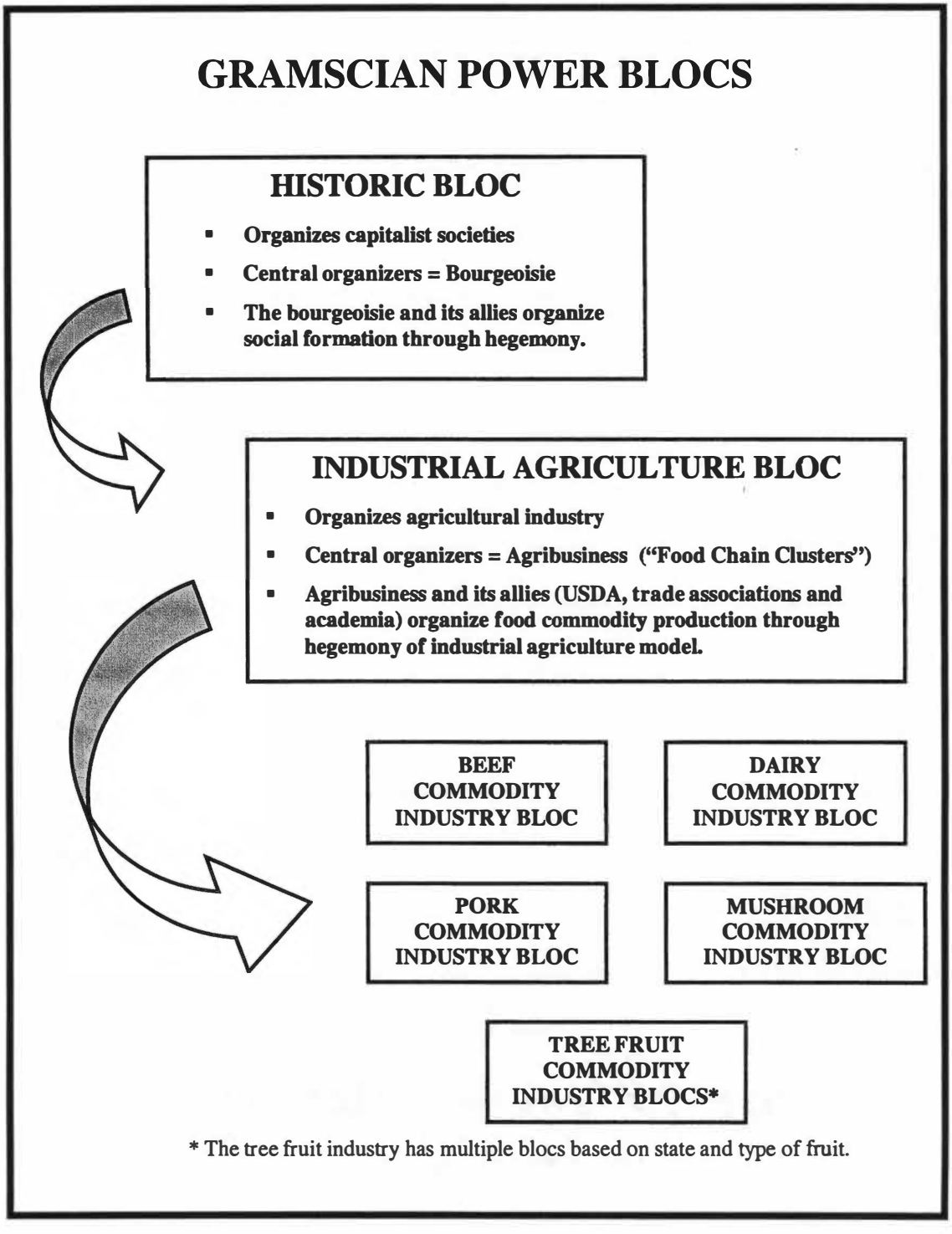


Figure 3 Gramscian Power Blocs

outside of agriculture would result as well. This study will analyze the consequences of different legal outcomes on First Amendment doctrine and public interest as well as on agriculture.

As noted earlier in this dissertation, the struggle for hegemony is intrinsically related to the fact that discursive elements "have common nuclei of meaning which are not fully determinate in denotation and can be connotatively linked to other elements or produce the specific meanings they reveal in different discursive elements."[151] This idea is instructive in examining the counter-hegemony that has arisen to challenge the checkoff hegemony in each commodity industry. Programs for mandatory commodity assessments in each industry were adopted based on certain understandings of the meanings and justifications for such programs, how they would function within the industry structure and how they fit with dominant ideology.

This consensus became strained as both the dominant power bloc and critical segments of the industry developed different meanings for the checkoff programs which were connotatively and literally linked to other elements. An agent of the dominant hegemony, the USDA, even developed its own discursive ensemble around the idea that the generic advertising generated by the checkoff programs is "government speech. " This position was not only sharply opposed by those challenging the checkoff hegemony, but was also at odds with the ideological ensemble of the commodity industry bloc. The commodity industry bloc has grudgingly made a concession to the USDA on this point, a move that has imposed a new thread in the ideological ensemble of the dominant bloc and a source of ongoing tension within that bloc.

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[151] Jessop, 196.

An assumption is made in this dissertation that the industrial agriculture bloc has organized the commodity production system in much the same manner as the bourgeoisie has organized capitalist society under the historic bloc. The evidence indicated that agribusiness has captured the key government agency (the USDA), a major portion of the media, the land grant educational institutions and the major trade associations. There are minority fractions within media, academia and the farming community that are building their own alternative trade association and coalitions for lobbying and legal purposes. The idea ensembles they develop and the strategies they use (such as the First Amendment challenges to the commodity checkoffs) will allow them to engage in a war of position. Each of these groups will be analyzed in detail in chapter seven which presents the investigative frame.

Failed Counter-Hegemony Serves as Legal Catalyst

As noted earlier, the central thesis underlying this research is that the legal developments concerning the constitutionality of compelled commercial speech signify a fundamental hegemonic conflict within the agricultural industry. The challengers, individuals and groups who object to mandatory payment of commodity fees, are now using the Courts as a means to achieve change. However, there is evidence that the challengers initially sought to achieve change by using routine mechanisms within the current hegemony, namely, the referendum procedure.

This occurred in the pork industry when the pork producers followed procedures set forth in 7 U.S.C. § 4812(b)(1)(A) for voting on whether the pork checkoffs should continue. The Campaign for Family Farms took the lead in May 1999 by submitting petitions to the USDA with signatures of at least fifteen per cent of the hog producers as

required. After completing a verification review, the USDA concluded that the petitions did not represent fifteen percent of the hog producers. However, this conclusion was viewed with suspicion, especially when the USDA admitted that the "verification process was vulnerable to criticism."[152]

Recognizing the problems and seeking to preserve the legitimacy of the USDA's role, then Secretary of Agriculture Dan Glickman (a Democrat) decided to conduct a "fairness" referendum in 2000 to allow the pork producers to vote on whether to terminate the checkoff program. The results showed 15,951 votes against the program and 14,396 votes in favor of the program. Accordingly, Secretary Glickman announced that the pork checkoff program would be terminated. In immediate response, the Michigan Pork Producers Association (MPPA) filed suit to challenge the counting of the votes and the "voluntary" referendum and obtained a Temporary Restraining Order to prevent termination of the program while the action for a preliminary injunction was pending.

At this key juncture, a new Secretary of Agriculture, Ann Veneman (a Republican), took office. Despite the votes indicating that more than half of the industry was against the checkoffs, she decided to discount the referendum and continue the pork checkoff program. In an effort to conclude the matter, she entered into an agreement with the MPPA to transfer responsibility for managing the checkoff funds from the National Pork Producers Council to the National Pork Board, a panel of individuals appointed by the Secretary. This prompted the Campaign for Family Farms to cross-claim challenging the settlement and to add a new claim that the pork checkoffs violated the pork

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[152] *Michigan Pork Producers v. Campaign for Family Farms*, 174 F. Supp. 2d 637, 639 (2001), citing Glickman Memorandum of February 25, 2000.

producers' First Amendment rights in commercial speech.[153] In a surprising move, U.S. District Court Judge Richard Enslen ruled on November 1, 2002, that the pork checkoffs were unconstitutional and that collection of all mandatory checkoff fees must cease on November 24, 2002.[154] The USDA and other defendants successfully persuaded the Sixth Circuit Court of Appeals to allow the checkoff payments to continue while the lawsuit was pending. The Sixth Circuit Court of Appeals heard oral arguments in this case on March 14, 2003.

In a parallel development, the Livestock Marketing Association (LMA) submitted petitions to the USDA on November 12, 1999, to drive a referendum for a vote on whether beef checkoffs should continue. The Secretary of Agriculture provided no response. In light of her failure to validate the petitions and schedule a referendum, the LMA and other plaintiffs filed a declaratory judgment action. They sought: 1) a ruling that the Secretary's action (or inaction) was unconstitutional and violative of their due process and equal protection rights; 2) an injunction prohibiting further collections of checkoffs; 3) an injunction regarding the required actions on the referendum, and 4) an order requiring the Cattlemen's Beef Board to cease using checkoff fees to publicize anti-referendum messages in its producer communications. (Such inappropriate use of checkoff fees demonstrated a strong hegemony controlling the cattle industry.) The plaintiffs then amended their complaint, adding a claim that beef checkoffs violated their First Amendment rights to freedom of speech and freedom of association.

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[153] This claim was based on the U.S. Supreme Court opinion in *United States v. United Foods* holding that the mushroom checkoffs were unconstitutional. See *United States v. United Foods*, 533 U.S. 405 (2001).
[154] See *Michigan Pork Producers v. Campaign for Family Farms*, 229 F. Supp. 2d 772, 791-792 (W.D.Mich. 2002), as corrected October 31, 2002.

The LMA was successful in obtaining a court order in 2001 to enjoin the use of checkoff fees by the Cattlemen's Beef Board for communications designed to block or discourage a beef checkoff referendum or to influence government action or policy with regard to keeping the beef checkoff and the beef board or to influence beef producers on these subjects.[155] The USDA's failure to participate in the referendum process also led to another district court victory. On June 21, 2002, District Court Judge Charles B. Kornmann held that beef checkoffs were unconstitutional as a violation of the First Amendment rights of the plaintiffs and ordered that collection of all beef checkoffs cease.[156] The USDA and the other defendants prevailed, however, in their vigorous effort to have the order lifted so that the checkoff program could continue while the litigation was pending. Their appeal with the Eighth Circuit Court of Appeals seeking a reversal of the district court decision met with unfavorable results on July 8, 2003, when the appellate court upheld Judge Kornmann's finding that the beef checkoff programs were unconstitutional.[157]

These two scenarios demonstrate how the challengers' original strategy for counter-hegemony was unsuccessful due to the powerful hegemony in place. The minority group simply did not have the market power or political capital to overcome the tactics of the USDA and the groups aligned with it. However, the favorable Supreme Court decision in *United States v. United Foods* was an unexpected boon that

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[155] *Livestock Marketing Association v. USDA*, 132 F. Supp. 2d 817, 832 (2001). The district court also enjoined the Cattlemen's Beef Board from using descriptive words such as "fair," "accountable," "effective" and "it's working" to refer to the beef checkoff program. It expressly recognized that checkoff funds should be used solely "to promote and fund research to promote the consumption of beef" and to "promote and advertise beef products and the consumption of beef." Ibid.

[156] *Livestock Marketing Association v. USDA*, 207 F. Supp. 2d 992, 1007 (D. S. Dakota 2002).

[157] *Livestock Marketing Association v. USDA*, Nos. 02-2769 and 02-2832, 2003 U.S. App. LEXIS 13630 (8th Cir. 2003).

dramatically shifted power. From a strictly economic standpoint, the challengers' success in their free speech legal claims was seen as being likely to cause a disruption in the flow of millions of dollars in checkoff revenues in the pork and beef industries.

The government is fighting to maintain the legitimacy of the current hegemonic framework. The USDA's handling of this situation and a similar referendum vote in the beef industry suggests that the USDA is situated squarely within the historic bloc of political and social institutions that form the hegemony. However, the outcomes of the recent legal battles in favor of the challenger indicate that the USDA's dominant position may need to be re-negotiated, a process that Gramsci predicted will occur when the relationship between the State and civil society become unstable. Re-negotiation could also be prompted by unstable relationships between classes or between competing interests within civil society.

History and Rationale for Mandatory Assessment Programs and Major Players

Commodity marketing programs are regulated by federal and state governments through a variety of institutional mechanisms.[158] The federal government employs: 1) stand-alone statutory programs or 2) "marketing orders" as authorized under the Agricultural Marketing Agreement Act of 1937 (AMAA).[159] The stand-alone programs arise when Congress passes an Act providing for the advertising, joint promotion, and education of a commodity, and the relevant industry affirms the legislation with a super majority vote.[160]

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[158] See Forker and Ward, 78-99. This book provides an informative overview of the federal and state regulatory mechanisms as well as an in-depth look at how major commodity programs operate.
[159] Agricultural Marketing Agreement Act of June 3, 1937, Pub. L. No. 137, 50 Stat. 246 (codified as amended in scattered sections of 7 U.S.C.).
[160] See Soares, 19-66.

The AMAA vests significant authority in the Secretary of the USDA to adopt regulations for commodities (or marketing orders) in the Code of Federal Regulations.[161] The scope of such marketing orders covers joint promotion, advertising, marketing research, production research, designation of unfair trade practices, and minimum pricing and supply controls.[162] In deference to the expertise and preferences of a particular industry, the statute also requires a vote of approval by two-thirds of the relevant producers or by those producers who market at least two thirds of the output of the relevant commodity.[163] (It is clear that the second condition would privilege the interests of the large producers.) Federal marketing orders may be imposed on both domestic and foreign producers of beef sold in the United States. The free speech controversy arises out of further provisions in the AMAA that permit a commodity program to collect mandatory fees from all producers in an industry to be used for funding of its authorized activities, including generic advertising and promotion of the industry's key commodity.

State agricultural commodities programs are created through the enactment of state legislation that authorizes the secretary of a state department of agriculture to adopt marketing orders to regulate an industry. Other statutory vehicles for commodity regulations are state councils and state commissions. Both are created by stand-alone legislation and can be modified only through further legislation. State councils are generally viewed as providing certainty and reducing the vulnerability of producers to a scenario where one small faction in an industry imposes its agenda on the entire industry. For this reason, state councils have become the preferred vehicle in states where

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[161] 7 U.S.C., § 608c (2001).
[162] Ibid., §602a.
[163] Ibid., § 608c(9)(b).

industries with competing interests seek to address complex issues, often related to technology or environmental issues.[164]

The Agricultural Marketing Agreement Act of 1937 (AMAA) was a reenactment of the Agricultural Adjustment Act of 1933.[165] It was a strategic move by Congress to clarify that all sections of the 1933 Act that had not been amended in 1935 remained in effect.[166] The overwhelming rationale for this legislation was the need to respond to agricultural marketing conditions created by the Depression.

Today the rationale for commodity promotion programs is primarily based on the argument that commodity producers will realize greater benefits through collective action, especially in regard to competing on an international market. Secretary of Agriculture Ann M. Veneman, in 20002 endorsed commodity checkoffs by stating: "The U.S. Department of Agriculture regards such programs, when properly administered, as effective tools for market enhancement."[167] Likewise, the U.S. Congress expressed its resounding support for generic commodity promotion programs in statutory findings it codified in 1996:

> It is in the national public interest and vital to the welfare of the agricultural economy of the United States to maintain and expand existing markets and develop new markets and uses for agricultural commodities through industry-funded, Government-supervised, generic commodity promotion programs established under commodity promotion laws.[168]

The statute specifies that the congressional intent "has always been to maintain and expand markets for the agricultural commodity covered by the law, rather than to

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[164] See Soares, 38.
[165] Agricultural Adjustment Act of 1933, Pub. L. No. 10, 48 Stat. 31, amended in 1935, S. Rep. No 74-1011 (1935).
[166] See Soares, 36-37.
[167] "Pork Checkoff is Dealt a Blow," *The Farmer's Exchange*, 78, no. 1, 1 November 2002, 1.
[168] Commodity Promotion, Research, and Information Act of 1996, 7 U.S.C. § 7401 (b)(1) (Supp. V 2000).

maintain or expand the share of those markets held by any individual producer or processor."[169] Finally, the Congressional findings recognize the value of the generic commodity programs to small producers "who often lack the resources or market power to advertise on their own and who are otherwise often unable to benefit from the economies of scale available in promotion and advertising."[170]

It is noteworthy that Congress issued these laudatory statements about the commodity checkoff programs after the Ninth Circuit had delivered the second of two opinions striking down checkoffs as unconstitutional.[171] This raised a general sense of alarm by the industrial agriculture bloc, resulting in pressure on legislators to clarify the benefits of the programs in a way that would help strengthen the government's case in the next checkoff lawsuit.

California fruit growers supporting mandatory assessments have stated their rationale for the checkoff programs as follows:

> Though created under the auspices of various federal and state statutory schemes, these programs serve the same general purpose—building, maintaining and expanding markets for key agricultural products. The need for collective action in these markets has long been recognized by both state and federal legislatures. In today's global economy and world market, commodity promotional programs help to promote, position, and organize an industry so that it can compete in the international marketplace. It enables producers/handlers to join together and reach markets otherwise out of reach to all but the biggest players in an industry.[172]

An extension of this rationale can be seen in an effort in California to organize support for an "Ag Alliance." In the course of this initiative, industry representatives

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[169] Ibid., § 7401 (b)(3) (Supp V 2000).
[170] Ibid., § 7401 (b)(10) (Supp V 2000).
[171] The two cases were *Cal-Almond v. USDA*, 14 F.3d 429 (9th Cir. 1993) and *Wileman Bros. & Elliott, Inc. v. Espy*, 58 F.3d 1367 (9th Cir. 1995).
[172] Soares, 39.

argued that commodity producers can no longer act on behalf of individual interests since the public now views agriculture collectively and not as industry segments.[173]

Government and Multiple-Industry Players. The USDA is the key governmental agency that oversees the fourteen federal commodity checkoff programs. It derives its authority from the Agriculture Marketing Act of 1937. It has been a named defendant in all challenges to federal commodity checkoffs and receives its legal support from the U.S. Department of Justice.

A number of legal and activist groups have supported the challengers and represented their interests in Court and in the public arena. These include groups such as the Farmers' Legal Action Group (FLAG), a non-profit law center founded in 1986 and based in St. Paul Minnesota.[174] This legal group is dedicated to providing legal services to help sustain and preserve the family farm system of agriculture and provide social and economic justice to American farmers. The Center for Individual Freedom (CFIF) is a non-profit First Amendment rights group based in Alexandria, Virginia, that is active as a plaintiff in several checkoff challenges. The CFIF has provided financial support for various challenges to mandatory advertising, assisted in legal actions, filed amicus curie ("friend of the court") briefs, joined as plaintiffs in two cases challenging beef and dairy checkoffs, and generally supported the position of the checkoff challengers in their First Amendment battles over commodity checkoff programs. The CFIF receives funding from the contributions of individuals, foundations and corporations.

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[173] Ibid., 64-65.

[174] The Farmers' Legal Action Group has received support through grants awarded by various foundations, such as: the Emma B. Howe Foundation, the Nathan Cummings Foundation, the Jessie Smith Noyes Foundation, and Farm Aid.

Another family farm group that has challenged the pork checkoffs and corporate concentration and vertical integration is the Campaign for Family Farms and the Environment (Campaign for Family Farms or CFF). This group was the plaintiff in the major legal action against pork checkoffs, *Michigan Pork Producers v. Campaign for Family Farms*. It has been represented by the Farmers' Legal Action Group in that case. The CFF is a coalition of member organizations, including: the Missouri Rural Crisis Center, Iowa Citizens for Community Improvement, Illinois Stewardship Alliance and Land Stewardship Project (Minnesota).[175]

The Organization for Competitive Markets (OCM) is a recognized national group that describes itself as dedicated to furthering the interests of independent farmers, ranchers and rural communities. Its activities include facilitating discourse among academic and economic experts. It also receives donations from member organizations, foundations and individuals.

Fruit Growers Industry. Federal regulation of the fruit growing industry has occurred through the actions of the secretary of the USDA in promulgating regulations in the Code of Federal Regulations in the form of "marketing orders." The authority for creating and enforcing such regulations, including mandatory commodity assessments, is established in the Agricultural Agreement Act of 1937. The marketing orders subject

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[175] The Campaign for Family Farms is funded in large part through grants from various foundations to its four member groups who carry out their individual missions and serve as fiscal sponsors for CFF. For example, in 2001, the Nathan Cummings Foundation provided the Land Stewardship Project (Minnesota) with a grant to support CFF. The Missouri Rural Crisis Center and the Campaign for Family Farms were awarded two-year grants each from the Educational Foundation of America in 1998 for use on CFF activities. The Jessie Smith Noyes Foundation awarded a grant in 1999 to CFF in care of the Land Stewardship Project and also provided a grant to the Missouri Rural Crisis Center for its organizational activities. In 2000, Farm Aid contributed funding to CFF, the Illinois Stewardship Alliance, the Missouri Rural Crisis Center, and the Land Stewardship Project (Minnesota).

fruit growers to extensive federal regulation that includes measures regulating supplies and prices along with the checkoff requirements.[176]

California, the state with the largest group of fruit growers, has a state act, the California Marketing Act of 1937, that is the counterpart to the federal act. It grants authority to the secretary of the California Department of Food and Agriculture to implement commodity checkoff regulations. Other commodity-specific acts control various individual fruit growers. However, all of these acts are subject to scrutiny after the landmark case of *Gerawan v. Lyons*, decided by the California Supreme Court in 2000. The Court held that the freedom of speech provisions of the California Constitution are broader than the First Amendment rights under the U.S. Constitution. Therefore, the mandatory commodity assessments against plum growers at issue under the California Plum Marketing Program were unconstitutional.[177]

Several industry groups represent the interests of growers of fresh produce on a national or regional basis, however, most of the fruit growing associations are state-based. The Western Growers Association supports growers of fresh produce in California and Arizona with legislative and trade programs that benefit its members collectively. The United Fresh Fruit & Vegetable Association and the Fresh Produce Association of the Americas are recognized national trade groups. Strong trade associations can be found in a number of states, including such groups as the California Growers Association, Florida Citrus Mutual, Texas Fruit Growers Association, Michigan Agricultural Cooperative and many others. The research for this study did not identify

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[176] See Brief for the Respondent on Writ of Certiorari to the U.S. Court of Appeals for the Sixth Circuit,*United States v. United Foods*, (2001) (No. 00-276), filed with the U.S. Supreme Court on March 8, 2001.

[177] *Gerawan*, 24 Cal. 4th 468 (2000).

specific groups that are aligned for or against commodity checkoffs, although individual fruit producers have been active in challenging fruit checkoffs.[178]

Mushroom Growers Industry. Mandatory assessments on mushroom growers were previously imposed by the Mushroom Promotion, Research and Consumer Information Act of 1990.[179] This statute focused narrowly on the goal of maintaining and expanding markets for mushrooms rather than on supply management or stabilizing markets. The Act established the Mushroom Council to administer the mushroom checkoff program. In 2001, the Supreme Court held this Act unconstitutional in *United States v. United Foods, Inc.*[180]

The American Mushroom Institute is the primary mushroom trade association. It has supported commodity checkoff programs and filed an amicus brief in the *United States v. United Foods* case supporting the government's position.

Beef Industry. The checkoff legislation for the beef industry is the Beef Promotion Research Act and Order, enacted in 1986.[181] The beef checkoff program requires cattle producers to pay a one dollar fee for each head of cattle sold, which results in revenues of more than $80 million annually.[182] These mandatory assessments are the

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[178] See *Glickman v. Wileman*, 521 U.S. 457, (1997) and *Gerawan Farming v. Lyons*, 42 Ca. 4th 468 (2000).
[179] The Mushroom Promotion, Research and Consumer Information Act of 1990, 7 U.S.C. §§ 6101—6104 (1990).
[180] *United States v. United Foods, Inc.*, 533 U.S. 405 (2001).
[181] Beef Promotion Research Act and Order, 7 U.S.C. §§ 2901-2918; 7 C.F.R. §§ 1260.101-1260.217 (1986).
[182] Geoffrey S. Becker, Congressional Research Report for Congress on "Federal Farm Promotion ("Check-off") Programs (July 11, 2002); CRS-1; available from http://www.dairytrade.com/roundtable7-02/CRS95-353.pdf; Internet; accessed 22 November 2002. This report stated that the annual assessments for beef checkoffs are $86 million.

source of funding for the "Beef. It's what's for dinner" generic advertising.

Congress created the beef checkoff program as the governing legislation to promote beef as a commodity. The Cattlemen's Beef Board (CBB) is the organization that directs the flow of the beef checkoff money. The U.S. Secretary of Agriculture appoints its members, who represent the three steps in beef production—the beef producers, the cow-calf operators, and the feedlot operators. The National Cattlemen's Beef Association (NCBA) is the largest recipient of checkoff funds and provides services to the CBB that support the objectives of the beef checkoff programs. Many beef producers expressed dissatisfaction upon the forming of the NCBA because the meat packing industry was allowed representation in policy-making. The packers have interests at odds with beef ranchers and feeders who fear and mistrust the economic power of the packers.[183]

Among the challengers to beef checkoffs are two organizations, the Livestock Marketing Association (LMA) and the Western Organization of Resource Councils (WORC). The livestock markets (primary members of the LMA) must collect the checkoff fee of $1.00 per head for every animal that is sold in their rings without any reimbursement for this service. The WORC is an association of six grassroots organizations from six western states. Its membership includes ranchers, farmers, small businessmen, and others who have strong environmental interests.

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[183]See "Concentration in the Meat Packing Industry Minority Report," USDA Advisory Committee on Agricultural Concentration (June 7, 1996); available from http://www.web-span.com/~pga/library/report.html; Internet; accessed 12 November 2002. An example of one way that the packers exert power is through the use of "captive supply" or contract agriculture, which can occur through packer-owned cattle, formula cattle, futures cattle, and custom-fed cattle. These methods, accounting for twenty to thirty percent of the cattle produced, remove control from the producers and affect the prices obtained from independent feeders. Ibid.

Pork Industry. The Pork Promotion, Research and Consumer Information Act[184] has historically governed the commodity checkoff program for hog producers. Enacted in 1985, this act required hog producers to pay 40 cents for each $100 in hog sales and specified that revenues from such checkoffs be spent solely on generic advertising, such as the "Pork, the Other White Meat" promotional campaign. Annual revenue from pork checkoffs has totaled $57 million dollars.[185] However, on October 25, 2002, a federal district court judge in Grand Rapids, Michigan, held that the pork checkoff program violates the free speech rights of hog farmers. In an opinion that expressed his overall disdain for the mandatory commodity assessments, Judge Richard A. Enslen declared: "The government has been made tyrannical by forcing men and women to pay for messages they detest. Such a system is at the bottom unconstitutional and rotten."[186]

The National Pork Board (NPB) administers the pork checkoff program and is instrumental in collecting checkoffs and channeling the revenues. In addition to the promotion of pork, it uses checkoff fees for research related to technology and swine health, consumer information projects and production improvement. The National Pork Producers Council (NPPC), one of the nation's largest livestock commodity organizations, is a recipient of the checkoff fees. It is affiliated with parallel state commodity associations that also receive checkoff fees, such as Michigan Pork Producers, California Pork Producers, Kentucky Pork Producers, Indiana Pork Producers, New York Pork Producers, and Ohio Pork Producers.

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[184] Pork Promotion, Research and Consumer Information Act of 1985, 7 U.S.C. §§ 4801 et seq. (1985).
[185] Becker, CRS-1.
[186] *Michigan Pork Producers* (2002) at 791.

A nonprofit organization discussed earlier, the Campaign for Family Farms, represents family farm hog producers, the challengers in the current litigation against pork checkoff programs.

Dairy Industry. Fluid milk producers began paying checkoffs with the enactment of the Dairy Production Stabilization Act of 1983.[187] In May 2002, this Act was amended to impose checkoffs on imported dairy products as well as milk produced in the United States. Annual revenues from dairy checkoffs today exceed $250 million.

The Dairy Production Stabilization Act of 1983 gave authority to the National Dairy Promotion and Research Board (NDB) to collect mandatory assessments, to evaluate proposals for projects to promote the use of fluid milk and dairy products and carry out research and education projects. The administrative activities of this board were transferred in 1995 to Dairy Management, Inc. (DMI) a private non-profit corporation formed by merging the NDB and the United Dairy Industry Association. Today more than 80,000 dairy producers belong to the DMI. It has become a management organization, overseeing the activities of the American Dairy Association, the National Dairy Council and the U.S. Dairy Export Council.[188]

The DMI has aggressively pursued programs to increase demand for U.S.-produced dairy products, including the widely promoted "Got Milk?" campaign. It has most recently used its checkoff money as a means to induce one of the twenty-four small California towns it has targeted to change its name to "Got Milk?"as a publicity gimmick

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[187] Dairy Production Stabilization Act of 1983, 7 U.S.C. §§ 4501-4507 (1983).
[188] "What is Dairy Management, Inc.?" Dairy Management Inc.(undated); available from http://www.dairycheckoff.com/whatisdmi.asp; Internet; accessed 12 November 2002.

to celebrate the tenth anniversary of the Got Milk campaign and to help the dairy industry combat decreasing milk sales.[189]

Influence of Changing Economic, Political and Cultural Conditions on the Agricultural Industry

The struggle between competing interests in the commercial and legal spheres has created a highly charged "zone of conflict" with regard to compelled commercial speech (see Figure 2) The clash cannot be simply attributed to First Amendment zealots or opportunistic freeloading commodity producers. More complex developments in both the agricultural and legal arenas have primed the social and political environment for the current conflagration. This section will address major influences on the agricultural industry.

Agricultural economist specialist John Crespi maintained that the generic advertising battle is the product of a "long, evolutionary process of economics, legislation, and litigation."[190] Several events in the 1930s laid the foundation for mandatory assessments, including enactment of the Agricultural Marketing Agreement Act of 1937 [191] and a Supreme Court opinion in 1939 in *United States v. Rock Royal CO-OP, Inc.*[192] upholding the constitutionality of the 1937 Act in the face of Fifth Amendment, Tenth Amendment and Fourteenth Amendment challenges. Another landmark piece of legislation was introduced in 1954 when Congress amended the 1937

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[189] Janet Kanters, "'Got Milk' Campaign in California Grows," AgInfoBits (November 6, 2002); available from http://www.aginfonet.sk.ca/news/html/news2797.html; Internet; accessed 5 July 2003.
[190] John Crespi, "Promotion Checkoffs, Why So Controversial? The Evolution of Generic Advertising Battles," (paper prepared for the 2001 Kansas State Agricultural Economics Risk & Profit Conference on August 16-17, 2001); available from http://www.dairytrade.com/roundtable7-02/CRS95-353.pdf; Internet; accessed 22 November 2002 or http://aem.cornell.edu/special_programs/commodity/nicpre/bulltoc.htm; Internet; accessed 28 January 2003.
[191] Agricultural Marketing Agreement Act of June 3, 1937, Pub. L. No. 137, 50 Stat. 246 (codified as amended in scattered sections of 7 U.S.C.).
[192] See *United States v. Rock Royal CO-OP, Inc.*, 307 U.S. 533 (1939).

Act to authorize the Secretary of Agriculture to implement programs for generic advertising and promotion for commodities in furtherance of the goals of the Act.[193] A primary objective of the marketing orders promulgated under this legislation was to stimulate demand for farm products, thereby propping up prices for farm commodities and reducing the need for the government to purchase excess production.[194]

It is noteworthy that almost fifty years passed without challenges to the constitutionality of the 1937 Act. One possible interpretation of this phenomenon is that the agricultural industry had a high level of acceptance of the legitimacy of the Supreme Court decision in *Rock Royal.* The judicial hiatus ended in 1985 when a cattle producer and auctioneer initiated the case of *United States v. Frame,*[195] challenging an amendment to the Beef Promotion and Research Act of 1976[196] that imposed mandatory assessments for generic advertising. Since 1985, there has been a steady stream of litigation challenging the mandatory promotional checkoffs. (See Appendix B listing compelled commercial speech cases.) The agricultural industry has undergone many changes, and the renewed interest in litigation can be seen as one manifestation of the changes.

Several areas of influence are imposing profound changes on the agricultural industry as shown in Figure 1. Reflecting general trends in other areas of business, these key areas include: 1) globalization of agricultural markets (with attendant implications for all links in the chain of producing, promoting and selling goods in a competitive world marketplace); 2) public health and environmental concerns that lead to a tension

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[193] The Agricultural Act of 1954, 7 U.S.C. § 401(c).
[194] Crespi, 6-8.
[195] *Frame*, 888 F.2d 1119 (3rd Cir. 1989).
[196] Beef Promotion and Research Act of 1976, 7 U.S.C. §§ 2901-2918; 7 C.F.R. §§ 1260.101-1260.217.

between advancements in technology and the organic commodities producers, 3) vertical integration in industry sectors; 4) contract agriculture; 5) increased concentration of ownership in larger firms that run agricultural operations; and 6) crisis of competitiveness in agriculture market because of obsolete organizational and ownership structures and tensions with other post-industrial business models.[197] Each of these areas will be briefly addressed below.

Globalization. The term "agribusiness" has become common nomenclature for a commercial or industrial enterprise that manages agricultural operations such as production, processing, storage and distribution of farm commodities in accordance with profit-generating standards and criteria. A major focus of agribusiness is to source raw materials as cheaply as possible and then reformulate them in some manner that can be marketed to the consumer at the highest price the market will bear. This allows the agribusiness concern an edge in productivity, yields, and costs. Opening up new international markets has been a catalyst for "global agribusiness" and have introduced a new era of multinational food conglomerates engaged in import/export trade and transborder business strategies.

Food producers seeking to compete against the multinational behemoths are concerned with their ability to advertise and distinguish their products from the heavily advertised brands of these giant companies. Mandatory commodity checkoffs can be seen as a hindrance when they limit the pool of resources available to create recognition

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[197] See generally "A Food and Agriculture Policy for the 21st Century," Compilation of papers presented at the Organization for Competitive Markets Food Policy Retreat on April 29 – May 1, 2000, ed., Michael C. Stumo, available from http://www.competitivemarkets.com/library/academic/21stcentury; Internet; accessed 1 November 2002.

and a distinct image for a specialty or niche product. An argument also has been made that marketing orders with standards for the handling and quality of commodities are less necessary today, since the large domestic and foreign conglomerates in each major commodity groups have their own established criteria and systems that are often superior to those mandated by the marketing orders. Since they also are involved in their own research and public promotion efforts, the checkoff fees are not needed to bolster their advertising programs.[198]

On the other hand, the opposing side has strongly argued that the competitive nature of the global food commodity market begs for a collective response by organized commodity groups. The players in the global environment are now selling "food products" rather than "food commodities" and this difference is critical.[199] Food commodities can be sold without organized and aggressive marketing and maintain a sense of continuity in time, without major introduction of change. Food products need proactive marketing to create visibility and promote images that attract consumers to more than just the attributes of the commodity itself, i.e., that lifestyle and behavior can be transformed by choosing a particular food product. Professors David Padberg and Charles Hall outlined the need for a "functional commodity brain trust" to perform the serious role of identifying values and attitudes of the consumer and managing the public image of the food product in the same manner that aggressively branded products are managed in a national and global food market.[200]

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[198] Padberg and Hall, 82.
[199] Ibid, 82-83.
[200] Ibid., 83.

Health and Environmental Concerns/Organic Agriculture. The U.S. Food and Drug Administration's approval of a genetically altered organism for commercial sale on May 18, 1994, ushered in a new era of genetically engineered crops that are resistant to pests and disease.[201] They are touted as capable of repelling pests, resisting herbicides, and competing with weeds for water and nutrients.[202] The agricultural industry welcomed the opportunity to increase production and grow crops with less need for pesticides. However, there is a dark side to these genetically engineered crops, also called "transgenic crops" (or "Frankenfood" by the purists). There is a tradeoff between resistance and resilience. As the plants are modified, they become more resistant to weeds and herbs. They will have less sturdy stems, less vigorous deep roots and less ability to compete with weeds. Another disadvantage for farmers growing transgenic crops is that they must plant some fields with traditional plants to serve as "refuges" for nonresistant pests (to maintain a nonresistant pest population). The refuges have extremely low yields because the pests "swarm" in from genetically protected fields.[203] The transgenic crops can increase productivity, but there are disadvantages as noted above. Not all farmers are enthusiastic about the new transgenic crops, resulting in further division in the agricultural community.

Another developing area of agriculture is organic agriculture. This is the process of growing grains, fruits and vegetables without using synthetic pesticides. Organic farmers view farming as a way of sustaining an ecosystem rather than a factory for

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[201] The approval was for the Flavr Savr tomato, genetically engineered with fish DNA. It was the first biotech food to reach the market.
[202] See Carl Jordan, "Genetic Engineering the Farm Crisis and World Hunger," *Bioscience* 52 (June 2002) 523-529.
[203] Ibid.

producing food. [204] The goal is "ecologically sustainable agriculture" that will restore the soil and improve the efficiency of nutrient cycling in the soil.[205] Grounds for difference exist within the agriculture industry since many organic farmers run small operations so their interests may not be aligned with the large farming operations. There are also ideological differences since the organic farmers' goals are often heavily focused on environmental concerns with profit a secondary objective.

It is clear, however, that organic farming has moved from a fringe agricultural initiative to a new food sector. In 1997, organic food was cited as a "$3.5 billion business growing at an average rate of 20 percent annually." [206]

Vertical Integration and Contract Agriculture. Vertical integration occurs when "integrating firms have acquired or build operations in position of their former buyers or sellers. The result is a network of subsidiaries conducting business rather than independent firms buying and selling to each other." [207] Often the network includes a mix of wholly owned operations and other independent entities working for the conglomerate under contracts.

By the end of the Twenty-first Century, the entire poultry industry had been vertically integrated, and vertical integration had made large inroads in the pork industry.[208] The vertical structure raises issues similar to the ones outlined in the section below on concentration of ownership. A major outcome of vertical integration is the loss of autonomy. The owner will control all farming decisions, and the farmer essentially

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[204] See "Wholesome Harvest," Union of Concerned Scientists (Fall 1997); available from http://www.ucsusa.org/publication.cfm?publicationID=293; Internet; accessed 5 July 2003.
[205] See Jordan, 523-529.
[206] "Wholesome Harvest," ¶ 8.
[207] Padberg and Hall, 83, n. 27.
[208] Ibid., 83.

becomes a paid laborer. Another serious concern is the unfair bargaining position of the contract farmer or the farmer/employee. With the exception of Iowa and Nebraska, vertical integration practices were virtually unregulated in the 1990s.[209] But the most serious concerns are the environmental risks that accompany the large production facilities owned and controlled by the packers. Four states have experienced large-scale pollution incidents related to large hog confinement units and the number is expected to grow. Although some technology is available to address the odor problems, the conglomerate owners allege that the cost is too great. It can be argued that the social costs for the large integrated hog operations are being unfairly borne by others so that the integrated firms can profitably compete.[210]

Concentration of Ownership. Early in the Twenty-first Century, the agricultural industry experienced a period of increased concentration and mergers. In fact, in the summer of 1999, Senator Paul Wellstone, a Democrat from Minnesota, became so alarmed at the frenetic pace of the mergers in the agricultural community that he proposed a freeze on all agribusiness mergers for eighteen months.[211] Twenty-seven of his fellow senators voted for this proposal, demonstrating that the concern was recognized by members of Congress.[212]

Several years earlier, Secretary of Agriculture Dan Glickman had formed a USDA Advisory Committee on Agricultural Concentration to investigate the concentration in the agricultural industry and make recommendations in February 1996. After hearing

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[209] See "Concentration in the Meat Packing Industry Majority Committee Report" and "Concentration in the Meat Packing Industry Minority Report," ¶¶ 33-39, USDA Advisory Committee on Agricultural Concentration (June 7, 1996); available from http://www.web-span.com/~pga/library/report.html; Internet; accessed 12 November 2002.

[210] Ibid., Minority Report, ¶¶ 33-39.

[211] Lauck, 51. Senator Wellstone died in an airplane crash late in 2002.

[212] Ibid.

testimony from more than seventy individuals representing all sectors of the agricultural process, representative trade associations, environmental groups, and others, the committee provided its report four months later in two sections, the main committee report and a minority report (referenced herein as the "Majority Report" and the "Minority Report).[213] Both acknowledged that the growing level of concentration within the agricultural industry was accompanied by a strong level of mistrust by the producers toward the agribusiness conglomerates. The Minority Report forcefully pointed out that the larger concentrated firms are able to maintain profit margins within the profit cycle, while the smaller producers "become primary shock absorbers for fluctuations in the commodity cycle."[214]

The Majority Report identified the following negative characteristics of the current agricultural environment in its findings: 1) producers felt an intense sense of powerlessness as they felt coerced into doing business with concentrated firms, especially in the cattle industry, where the producers compared record losses with the sizable profits posted by those in higher levels of the industry chain, 2) the devastating effect of depressed producer prices on everyone in the cattle industry; 3) evidence of severe mistrust in the procurement system with the most flagrant example being the cattle producers' mistrust of the meatpackers and their ability to use concentration to depress prices (some witnesses were afraid to testify for fear of reprisal by the packers), 4) the potential for price manipulation and other detrimental effects on ranchers and farmers due to formula pricing, captive supplies, and vertical integration.[215]

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[213] See Majority Report and Minority Report.
[214] Ibid., Minority Report, ¶ 4.
[215] Ibid., Majority Report, ¶¶ 9-14.

Several critical paragraphs in the Minority Report directly support the thesis of this paper that the compelled commercial speech cases represent a hegemonic conflict within the agricultural industry:

> Checkoff-Financed Producer Organizations
> Extensive dissatisfaction was voiced by beef producers over the formation of the National Cattlemen's Beef Association because of packer representation in the organization's policy formation. Allowing representation of an industry segment with interests that may be contrary to the interest of the producer, was viewed as an unfair use of mandatory nonrefundable beef checkoff funds. In effect, the splintered cow-calf and feedlot operations were helping support the concentrated interests of the packing segment.
>
> The activities of the various checkoff programs tend to be focused on large-scale production, reflecting, no doubt, the wishes of the largest contributors. This further contributes to concentration at the production level. Those who object to commodity group activities or the resulting concentration have little chance to show their dissatisfaction since the checkoffs are not refundable.
>
> Findings
> The use of commodity checkoff funds to finance research and promotion of the interests of the largest market participants accelerates the rate of concentration in the industries from which the funds are withheld. The use of nonrefundable checkoff funds to support an organization that is viewed by contributors as not accountable to its members is improper. Those who disagree with a promotion organization's membership and policies should not be compelled to support it. Recommendation: All checkoff fees should be made refundable.[216]

The observations and findings of the six members of Congress who signed the Minority Report emphasized the alliances generated by the close relationship of the activities of the National Cattlemen's Beef Association and the business interests of the concentrated packers.[217] These relationships demonstrate how private enterprise is able to utilize a trade association to further its agenda. The two become hegemonic partners, both benefiting from the beef checkoff hegemony to the extreme disadvantage of the

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[216] Minority Report, ¶¶ 41-43.
[217] The following committee members signed the Minority Report: Paul Strandberg (Minnesota), Herman Schumacher (Vice Chair, South Dakota), Marty Strange (Vice Chair, Nebraska), Becky Edington (Georgia), Tyrone Moos, (South Dakota) and Lois Wales (Texas).

cattle producers. In fact, in its conclusion, the Minority Report forcefully stated its belief that the current concentration in the livestock industry needs to be addressed by the Secretary of Agriculture and Congress. However, the actions of the Secretary of Agriculture and the USDA in the last several years with respect to the beef checkoff issue suggest that this agency has joined in the hegemonic alliance with the packers and the National Cattlemen's Beef Association.

In the Minority Report's sobering summary, the participating committee members expressed their grave concerns in two concluding paragraphs:

> The importance of the issues addressed by the committee cannot be overstated. All consumers and all producers will feel ill effects if market power grows without accompanying accountability. Some concentration of agriculture is, indeed, inevitable as farmers retire or otherwise voluntarily leave the farm, and as technology provides increasing economies of scale. However, as briefly described above, there are several anticompetitive forces at work in the livestock industry that are artificially accelerating the rate of concentration.
>
> Once concentration occurs, it is almost impossible to reverse. We have thus concentrated our recommendations on preventative measures in hopes of allowing "progress" but preserving competition. Such a strategy is not only in the interest of independent market participants, but is vital for the long-term protection of the American consumer. Without immediate and strong action by the Secretary, and where necessary, by the Congress, the interests of artificial concentration will prevail. We stand ready, individually and as a group, to lend our help in this vital task.[218]

A telling note at the end of the Minority Report stated that the biggest question left unanswered was whether the "big three beef packers" should be broken up since they control almost 80 percent of the fed cattle slaughter along with shares of other markets such as the cow/bull and pork.

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[218] Minority Report, ¶¶ 44-45.

Author Jon Lauck used the phrase "corporate feudalism" to describe an agricultural environment dominated by concentration.[219] The antithesis is a model of economic independence, a position sought by the challengers in the checkoff cases. Lauck pointed out the support that exists for the corporate feudalism model, particularly by economists who feel that the large processors offer producers an opportunity to reduce risk and save their farms.[220]

Crisis of Competition in Agriculture Markets. The agricultural community has faced various levels of economic crisis during the last century arising from agricultural market failure. It has not responded to market gluts like other industries are forced to respond, i.e., by reducing production in order to achieve a more sustainable level of supply. Rather, farmers have maintained the same level of production or increased production in order to compensate for lower prices, which pushes prices even lower. This has been the perennial "farm problem" that American industry and government have not been able to solve. A related problem arises because the failure of a farm does not lead to a reduction in the number of producing facilities. Instead, a new owner acquires the farming interests and the aggregate size of all American farming resources remains static.

A third factor in this dysfunctional economic model is a high level of government regulation of agricultural markets as the government has sought to ameliorate the severe losses and overproduction through price controls, farm subsidy programs, and the purchase of farm commodity surplus.

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[219] Lauck, 46.
[220] Ibid.

CHAPTER 3

LITERATURE REVIEW OF LEGAL THEMES

First Amendment Standards of Review

Turning to the legal sphere, two different First Amendment standards for protection of speech governed communications in the United States in 2003. A demanding "strict scrutiny" standard for "pure speech" or political speech coexisted with a less stringent intermediate scrutiny standard for commercial speech (referred to as the *Central Hudson* test) outlined in *Central Hudson Gas & Electric v. Public Service Commission.*[221]

In 1994, the Supreme Court determined in *Roberts v. United States Jaycees* that the strict scrutiny standard is the appropriate standard for cases narrowly focused on freedom from compelled association.[222] Under this standard, the government can justify its regulation by showing that it has "...compelling state interests unrelated to the suppression of ideas" in the matter underlying the regulation and that these interests "cannot be achieved through means significantly less restrictive."[223]

The *Abood* case, decided in 1977, and the line of cases following its analysis for determining cases with mixed issues of freedom from compelled speech and compelled association apply a standard of protection for speech that can be characterized as intermediate. In these cases, government-compelled speech will pass First Amendment scrutiny based on a showing that the government has an "important" interest in a collective or associational activity and that the compelled speech is germane to achieving

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[221] See *Central Hudson*, 447 U.S. 557 (1980).
[222] See *Roberts* , 485 U.S. 609 (1984).
[223] Ibid. at 623.

that legitimate regulatory purpose. The U.S. Supreme Court established this standard in the following language of *Abood*:

> To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made in Hanson and Street [prior union shop cases] is that such interference as exists is constitutionally justified by the legislative assessment of the ***important contribution*** of the union shop to the system of labor relations established by Congress. [emphasis added] [224]

This standard was followed in the *United States v. United Foods* case in 2001. The Supreme Court stated : "The features of the marketing scheme found ***important*** in Glickman are not present in the case now before us." [emphasis added][225]

A description of the level of scrutiny required for an *Abood /Keller* analysis is provided by the dissenting judge in the *Gerawan* v. *Lyons* case, decided by the state appellate court for the Fifth Appellate District upon remand.[226] The majority opinion in this case held that the appropriate level of scrutiny for the checkoff programs under the free speech clause of the California State Constitution was an intermediate level balancing test based on "whether the asserted governmental interests are sufficiently substantial to outweigh the free speech rights of dissenting plum growers."[227] Dissenting Judge Herbert I. Levy argued that the *Abood/Keller* germaneness test should be the appropriate standard. In clarifying the *Abood/Keller* standard, Judge Levy stated:

> Although generally referred to as the 'germaneness test,' it [the *Abood/Keller* test] encompasses more than a determination of whether the speech is relevant to the goals of the association. Rather, when a member of a compelled association objects to being burdened with particular expenditures, 'the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred' for

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[224] *Abood* at 222.
[225] *United Foods* at 2339.
[226] *Gerawan v. Lyons*, No. F031142 (5th App. Dist., State of Cal. 2001).
[227] Ibid. at 6.

the purpose of furthering those goals. (citing *Keller v. State Bar of California*, 496 U.S. at 14) ***Requiring more than a rational relationship and less than a narrowly tailored service of a compelling state interest, this test essentially constitutes an intermediate level of scrutiny.*** Moreover, this analysis is not specific to a particular type of speech. Compelled contributions to commercial speech, as well as political or ideological speech are subject to this test. (citing *United States v. United Foods*, 121 S.Ct. at 2339). (Levy, H.dissenting) [emphasis added] [228]

In its July 8, 2003 opinion holding the beef checkoff unconstitutional, the Eighth Circuit Court of Appeals discussed the *Keller* and *Abood* analysis before applying the *Central Hudson* test. It stated: "In compelled speech cases, the Supreme Court has traditionally applied a balancing-of-interests test to determine whether or not the challenged governmental action is justified."[229] The court cited language by Justice Stevens in his concurring opinion in *United Foods* that recognized compelled funding of speech as a subset of compelled speech cases called a "compelled subsidy."[230]

The intermediate standard for protection of commercial speech set forth in *Central Hudson* requires that the government demonstrate a substantial interest in the subject matter of the regulation. The Supreme Court held that regulation of speech impacting economic transactions does not violate the First Amendment if:

1) it concerns lawful activity and is not misleading;
2) the government interest is substantial;
3) the regulation advances the governmental interest asserted (i.e. whether there is a reasonable fit between a commercial speech regulation and achievement of a legitimate policy goal); and
4) the regulation is no more extensive than necessary.[231]

In a subsequent case, *44 Liquormart v. Rhode Island*,[232] the Supreme Court

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[228] Ibid. at 13-14.
[229] *Livestock Marketing Association v. USDA*, Nos. 02-2769 and 02-2832 at 16, 2003 U.S. App. LEXIS 13630 (8th Cir. 2003).
[230] Ibid.
[231] *Central Hudson* at 566.

justices were sharply divided over the level of protection to afford truthful commercial speech. The court invalidated a Rhode Island law that forbid the advertising of alcohol at any location other than within liquor store premises. Writing for a plurality of the justices, Justice Stevens expressed the view that special care was warranted in reviewing regulations that impose restrictions on truthful, nonmisleading commercial messages:

> ...when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.[233]

Legal scholars have concluded that this language suggests that a heightened degree of intermediate scrutiny be applied to commercial speech cases involving regulatory schemes designed to restrict the public from receiving truthful information. Seven of the justices agreed that the regulation on advertising failed the *Central Hudson* test, but four of the justices seemed uneasy about applying the test. In this case and later cases, Justice Clarence Thomas argued that the Court should apply a strict scrutiny standard to evaluate the constitutionality of commercial speech.

The question raised by the *44 Liquormart* case is "whether the government should be able to suppress truthful advertising in the interest of consumer protection, or whether, as some Justices have insisted, truthful advertising should receive exactly the same constitutional protection as other speech."[234]

The Compelled Commercial Speech Cases

The Supreme Court decided a case in 1939, *United States v. Rock Royal CO-OP,*

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[232] See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).
[233] Ibid. at 501.
[234] Farber, 159. Professor Farber argued that the "core values" underlying the First Amendment that are relevant for other categories of traditionally protected speech are not present to the same extent for commercial speech.

Inc.,[235] that was a precursor to the checkoff challenge cases that emerged in the late 1980s. The government initiated the case to collect mandatory fees from several milk processors as authorized under the 1937 Agricultural Marketing Act and a subsequent milk order. The processors used a three-pronged defense, claiming: 1) their due process rights under the Fifth Amendment were violated, 2) the federal government was prohibited by the Tenth Amendment from fixing the price of milk prior to its entry in interstate commerce, and 3) that the authority given to the Secretary of Agriculture violated their property rights under the Fourteenth Amendment. The Secretary's authority encompassed activities such as determining market areas, implementing market orders based only on the consent of the producers and authorizing bloc voting by farming cooperatives. These arguments testing the constitutionality of the milk order garnered the support of the district court, but were ultimately rejected by the U.S. Supreme Court.

Fifty years passed before the next constitutional test of mandatory commodity fees occured in 1989 in the case of *United States v. Frame*.[236] This time the focus was on the compelled payment by cattle producers and importers of one dollar per head for use in a national beef promotional campaign. The challengers sought a ruling by the Third Circuit Court of Appeals that the Beef Promotion and Research Act was unconstitutional because it exceeded the limits of Congressional authority granted by the Constitution, or violated the free speech and association clauses of the First Amendment or violated the takings clause or equal protection guarantee of the due process clause of the Fifth Amendment. The appellate court held the act was constitutional under the *Central Hudson* test. However, it expressly rejected the government speech argument in its

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[235] *United States v. Rock Royal CO-OP, Inc.*, 307 U.S. 533 (1939).
[236] *Frame* at 1132.

decision, stating: "...the underlying rationale of the right to be free from compelled speech or association leads us to conclude that the compelled expressive activities mandated by the Beef Promotion Act are not properly characterized as 'government speech.'"[237]

In its first ruling on compelled commercial speech, the U.S. Supreme Court in *Glickman v. Wileman Brothers & Elliott, Inc.*[238] delivered a 5-4 decision in 1997, rejecting a First Amendment challenge to the constitutionality of a series of agricultural marketing orders imposed by the federal government requiring fruit growers in central California to pay assessments for product advertising. The Court held that the agricultural orders in *Glickman* (issued by the Secretary of Agriculture of the United States) did not prohibit or compel speech in a manner that raised any First Amendment concerns. Such federal regulations were, therefore, constitutional because they were part of a collective regulatory program and ancillary to a comprehensive scheme restricting marketing autonomy. The Court stated that such federal regulations stabilize commodity markets by collectivizing agricultural supplies. It observed that the mandatory assessments on fruit growers in the *Glickman* case had the character of economic assessments rather than speech restrictions because they were employed as an integral component of other controls on commodity supplies. In performing this analysis, the Court expressly rejected the *Central Hudson* analysis (which had been carefully applied by the appellate court) and dismissed the First Amendment free speech claims of the fruit growers. In an offhand statement, the Court noted:

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[237] Ibid. at 1132.
[238] *Wileman Bros,* 521 U.S. 457 (1997).

> "Although respondents have continued in this Court to argue about their disagreement with particular messages, those arguments, while perhaps calling into question the administration of portions of the program, have no bearing on the validity of the entire program."[239]

As mentioned in chapter one of this dissertation, the California compelled speech case of *Gerawan Farming Inc. v. Lyons,* [240] decided in 2000, expressed the discontent of the California judiciary with the Supreme Court's decision in *Glickman*. The case arose when a fruit grower, Gerawan Farming, Inc., was required to pay more than $80,000 per year to comply with the California Plum Marketing Program. More than 55% of these funds were used for generic advertising on behalf of all plum growers. This advertising reflected viewpoints Gerawan strongly opposed. Gerawan claimed these mandatory assessments used for generic advertising constituted a violation of its commercial free speech rights under: 1) the First Amendment, which states "Congress shall make no law...abridging the freedom of speech, or of the press," and 2) the California Constitution, Article I, Section 2, Subdivision (a) which provides "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." The fruit grower filed an action against the California Secretary of Food and Agriculture and others seeking declaratory and injunctive relief.

Relying upon the U.S. Supreme Court's 1997 determination in *Glickman v. Wileman* that compelled commercial speech does not raise a First Amendment issue, the California Supreme Court (in a 4-3 decision) reluctantly concluded that there was no violation of Gerawan's commercial free speech rights under the First Amendment.

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[239] Ibid. at 467-468.
[240] See *Gerawan,* 24 Ca. 4th 468 (2000).

However, the majority defiantly asserted that the *Glickman* decision was faulty and delivered a scathing criticism of the U.S. Supreme Court's opinion in that case. The California Supreme Court found that the conclusion of the *Glickman* court that the First Amendment's right to freedom of speech does not protect commercial speech against compelled funding to be "simply untenable" with respect to Article I of the California Constitution.[241] It held that the California Plum Marketing Program implicated Gerawan's right to freedom of speech under the free speech clause of the California Constitution by compelling funding of generic advertising. (This was not a finding that Gerawan's rights were violated. Rather, the decision recognized that Gerawan had sufficient facts to argue that its rights under the California Constitution *may* have been violated.) The California Supreme Court then sent the case back to the appellate court to determine the appropriate standard for evaluating whether the plum checkoff program was unconstitutional and to decide whether Gerawan's commercial speech rights were violated.[242]

The California Supreme Court was fully entitled under its state constitution to accord greater free speech protection to commercial speech than the U.S. Supreme Court. The critical language in this case was nevertheless an open challenge to the U.S. Supreme

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[241] Ibid. at 514.

[242] See *Gerawan Farming, Inc. v. Lyons*, No. F031142 (5th App. Dist., State of Cal. 2001); available from http://www.cfac.org/Attachments/Gerawan_Farming_v_Lyons.html; Internet; accessed 5 July 2003. The Fifth Appellate District Court of Appeal of the State of California issued an opinion on December 17, 2001, that Gerawan's commercial free speech rights under Article I of the California Constitution were violated. It applied an intermediate scrutiny balancing test. Ibid. at 6. Since the fruit growers were empowered by vote to reject a marketing order program, the court held that, even if the government has a substantial interest, in this case it does not matter. It stated:

> The governmental interest in the present form of the program is tenuous and is based on findings of necessity that are wholly illusory, for a simple reason: under the current statute, the government is forbidden to enact a remedial program no matter how severe an economic crisis arises in the plum industry *unless a majority of growers wants the program.* [emphasis in original] Ibid. at 7.

Court to reconsider its ruling in *Glickman v. Wileman* should an appropriate case or controversy reach the court.

The next compelled commercial speech case came before the U.S. Supreme Court in the summer of 2001, seven months after *Gerawan.* The decision in *United States v. United Foods, Inc.* revealed a Supreme Court making a decided effort to retrench from its position in *Glickman.* The issue was whether mandatory assessments imposed by the Mushroom Promotion, Research, and Consumer Information Act of 1990 on members of the mushroom industry for industry advertisements violated the First Amendment. The Court struck down the government regulation compelling mushroom growers to submit mandatory assessments because the primary intent of the regulation was to solicit funds for advertising rather than to implement a full regulatory scheme as evidenced by the regulations at issue in *Glickman.*

The *United Foods* case showed incremental movement toward broader protection against compelled commercial speech. However, it also showed a Supreme Court unable to provide clear guidance on how to incorporate the two First Amendment doctrines impacting compelled commercial speech – the commercial speech doctrine and the doctrine governing freedom from compelled speech and association.

Many industry groups and their promotion boards who benefit from mandatory fees for generic advertising embedded in federal and state regulatory programs expressed concern that the *United Foods* decision would spawn multiple lawsuits that would rock the status quo. The groups most concerned filed *amicus curie* briefs with the Supreme Court on behalf of the USDA and the government in *United Foods*, namely: American Mushroom Institute, the American Soybean Association, the National Milk Producers

Federation, the Milk Industry Foundation, the United Egg Producers, the United Egg Association and National Cattlemen's Beef Association.

Independent cattle producers in the cattle industry watched the outcome of the *United Foods* case with a vested interest since a favorable Supreme Court ruling on mandatory fees (also referred to as "commodity checkoffs") would offer new hope for two pending lawsuits challenging the constitutionality of beef checkoff fees imposed on cattle producers under the Beef Promotion Research Act and Order. The beef checkoff program requires cattle producers to pay a one-dollar fee for each head of cattle sold. Enacted in 1986, the legislation channels a huge stream of money (over two million dollars a week by some estimates)[243] to the National Cattlemen's Beef Association (NCBA), a private organization that represents only three percent of the U.S. cattle industry. A Congressional Research Service Report updated on July 11, 2002, reported that annual beef assessments are 86 million dollars (a figure less than the two million dollars per week). It was reported in 2002 that the NCBA used the checkoffs to fund almost 90 percent of its activities, including the promotion of many platforms opposed by cattle producers.[244] Some members of the beef industry (primarily the independent cattle producers) strongly object to paying the mandatory fees.

In a show of protest, cattle producers in the year 2000 submitted petitions with more than 146,000 signatures (well over the minimum 108,000 signatures required) to the USDA demanding a referendum vote on continuing the mandatory fees. The USDA

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[243] Bill Mackay, Jr., a lead intervener in the case, has used this figure in various media interviews. *See, e.g.,* "Judge Allows Ranchers to Intervene in "Beef Checkoff Lawsuit," Northern Plains Resource Council ¶ 4 (December 21, 2001); available from http://www.nprcmt.org/media/2001/PR-AG-Checkoff-Intervenor-Accepted-12-20-01.asp; Internet; accessed 14 May 2002.

[244] Kari Lydersen, "Farmers Fight Checkoff Rip-Off," AlterNet.org (September 16, 2002); available from http://www.alternet.org/story.html?StoryID=13950; Internet; accessed 6 July 2003.

soundly rebuffed their demand on January 17, 2001, by disqualifying more than half of the signatures and announcing that no referendum would take place. In response, the Western Organization of Resource Councils (WORC) and the Livestock Marketing Association (LMA) filed a lawsuit in Federal District Court in South Dakota seeking to force the USDA to hold a referendum. Defendants included the USDA, the Cattlemen's Beef Promotion and Research Board (the group that administers the program) and the Nebraska Cattleman, Inc., a group supporting beef checkoffs. This case, described earlier in Chapter 2 of this dissertation, has been a success story for the anti-checkoff groups.

Following the *United Foods* decision, the District Judge Charles B. Kornmann requested that the USDA clarify its position regarding the beef checkoffs. In response, the USDA asserted that such checkoffs are constitutional and indicated that it would defend such mandatory fees.[245] In a bold move on June 21, 2002, the Judge Kornmann ruled that the checkoffs and the Beef Promotion Research Act are unconstitutional and unenforceable and rejected the defendants' government speech arguments.[246] This decision was upheld by the 8th Circuit Court of Appeals on July 8, 2003.

In 2002, independent dairy farmers also made a bid also to challenge mandatory fee-based promotion programs as violations of First Amendment free speech rights in reliance on the Supreme Court's decision in *United Foods*. A Pennsylvania dairy farming family, the Cochrans, together with the Center for Individual Freedom, filed a suit in U.S. District Court in Scranton, Pennsylvania on April 2, 2002, to protest dairy

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[245] ACA Journal, "Checkoff Challenges Get Complicated" (November 2001); available from http://www.chicattle.org/journ/November/chi_checkoff.htm; Internet, accessed 28 April 28, 2002.
[246] See *Livestock Marketing Association v. United States*, 207 F. Supp. 2d 992 (D. S. Dakota 2002). Also see "History of LMA's Campaign to Obtain a Producer Referendum on the Beef Checkoff," Livestock Marketing Association (July 16, 2002) available from http://www.lmaweb.com/lmapress.html; Internet, accessed 1 August 2002).

checkoffs that pay for speech they do not support, including the popular "Got Milk" campaign.[247] The dairy checkoff program brought in over $250,000 million in 2001 based on an assessment of approximately two cents per gallon.[248] On March 24, 2003, District Judge John E. Jones, III granted summary judgment to the government defendants.[249] He performed an analysis under the *United Foods* and *Glickman* cases and concluded that the level of regulatory intervention in the dairy industry required a finding that the dairy checkoffs were constitutional. The checkoff challengers contend that their position as independent milk producers who do not belong to a milk cooperative distinguishes them from much of the industry and the courts should evaluate their case accordingly. They have filed an appeal with the Third Circuit Court of Appeals.

The *United Foods* decision holding mandatory assessments for generic advertising in the mushroom industry unconstitutional under a finely drawn set of conditions created uncertainty for other agricultural programs that also impose mandatory assessments. The compelled speech cases on the court dockets in 2003 forced courts to immediately begin interpreting *United Foods* to determine how the distinctions made in that case impact commodities checkoffs in the other eleven industries that require them pursuant to federally controlled programs. The *United Foods* ruling has also had an impact in 2003 on state programs that assess mandatory generic advertising fees as seen

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[247] Complaint, *Joseph S. Cochran and Brenda S. Cochran v. USDA* (Middle Dist. Penn. 2002) (No. 4:CV-01-0529), filed April 2, 2002.

[248] A Congressional Research Service Report, updated July 11, 2002, listed an annual assessment of $254 million for dairy products. Cited in Geoffrey S. Becker, Congressional Research Report for Congress on "Federal Farm Promotion ("Check-off") Programs (July 11, 2002) CRS-2; available from http://www.dairytrade.com/roundtable7-02/CRS95-353.pdf.; Internet; accessed 22 November 2002. Also see Center for Individual Freedom, "Dairy Farmers and Center for Individual Freedom File Suit Against Dairy Checkoff" (April 2, 2002) available from http://www.cfif.org/5_8_2001/Legal/activities/legal_challenge_file.htm; Internet; accessed 28 April 2002.

[249] See *Joseph S. Cochran and Brenda S. Cochran v. USDA*, No. 4:CV-01-0529, 2003 U.S. Dist. LEXIS 4361 (Middle Dist. Penn. 2003).

by the decision of a Circuit Court in Florida striking down a mandatory state citrus checkoffs.[250]

The compelled commercial speech cases arising from beef checkoffs appear to be good candidates for a possible hearing by the Supreme Court in 2004 to determine the validity of the government's claim that commodity checkoffs constitute an extension of government speech and are, therefore, constitutional. This argument assumed that government speech is immune from First Amendment scrutiny, a position that has been vigorously refuted by the First Amendment challengers in two pending cases in federal courts in Montana and South Dakota. Compelled payments for generic advertising, the challengers argued, are part of programs that are industry-funded, self-directed and producer-driven, contrary to the claim by the Department of Justice that such programs are a function of the government. Moreover, they asserted that the government's position fails even if the mandatory assessments are deemed to be government speech, since the courts must apply the same First Amendment scrutiny to a forced subsidy of speech whether the speech is by an industry promotion board or the government. The district court in Montana accepted the government speech argument while the district court in South Dakota rejected it (a decision upheld by the Eighth Circuit Court of Appeals).[251] This raises the potential for conflicting decisions by the respective appellate courts of the Eighth and Ninth Circuits.

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[250] See *State of Fla., Dept. of Citrus v. Graves Brothers Company, Tampa Juice Services, et al.*, No. 2DO03-2276, 2nd Dist. Ct. of App., Florida.

[251] See *Livestock Marketing Association v. United States*, 207 F.Supp. 2d 992 (D.S. Dakota, 2002), *Livestock Marketing Association v. USDA*, Nos. 02-2769 and 02-2832, 2003 U.S. App. LEXIS 13630 (8th Cir. 2003) and *Jeanne Charter and Steve Charter v. United States*, 230 F. Supp. 2d 1121 (D. Montana 2002).

In 2003, the Sixth Circuit considered the constitutionality of the pork checkoffs in *Michigan Pork Producers v. Campaign for Family Farms,* a case argued on March 14, 2003. Other Federal and state courts have rendered decisions at a furious pace in the early months of 2003 on the constitutionality of four other agricultural commodities: grapes, apples, citrus and alligators.

In *Delano Farms Company, et al. v. California Table Grape Commission,*[252] the challengers, who produce and sell branded table grapes, objected to compelled payments for generic advertising of grapes that undermined their branded advertising. The Ninth Circuit Court of Appeals found that the fact situation hued closely to the *United Foods* case and that First Amendment rights of the grape growers were, therefore, at issue. Accordingly, the appellate court reversed the district court's decision granting dismissal of the grape growers'constitutionality claim. The case is now before the district court again awaiting trial.

In the case of *In Re Washington Apple Advertising Commission,*[253] decided on March 14, 2003, the U.S. District Court for the Western District of Washington granted a preliminary injunction to apple producers who challenged the Washington state apple checkoff program. The court expressly rejected the government speech argument. The Commission, responsible for prompting this legal action as a means of confirming the constitutionality of its mandatory assessment program, closed down its offices after the ruling.

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[252] *Delano Farms Company et al. v. California Table Grape Commission*, No. 00-16778 (9th Cir. 2003).
[253] *In Re Washington Apple Advertising Commission*, No. CS-01-0278-EFS (E.D. Wa. 2003).

On March 31, 2003, a citrus checkoff (called a "box tax") was held unconstitutional in a consolidated case before the Florida Tenth Judicial Circuit Court.[254] The Circuit Court held that the generic advertising did not constitute government speech despite the fact that the State of Florida ran the promotional program. It struck down the box tax based on an analysis based on the *United Foods* and *Glickman* cases. The Department of Citrus for the State of Florida has filed an appeal.

Lastly, the District Court for the Middle District of Louisiana struck down alligator checkoffs compelling alligator farmers to fund generic promotional programs that did not recognize type, quality or brand of alligator products. In its analysis, the court distinguished the alligator checkoff program from the marketing orders in the *Glickman* case. It rejected the government speech argument because of the "close nexus between the alligator producers and the message funded."[255] Judge John V. Parker closed his opinion granting summary judgment to the alligator growers with the following statements:

> The undersigned admits to a certain degree of difficulty in maintaining an appropriately straight judicial face while attempting to apply the Supreme Court precepts that explain the simple language of the First Amendment to the alligator advertising program at issue here.
>
> When important constitutional issues must be resolved by a determination of whether an alligator is more like a mushroom than a peach, then in the words of Justice Thomas: 'Surely we have lost our way.' (citing *Glickman,* 521 U.S. at 506 (Thomas J., dissenting)).[256]

The Louisiana Department of Wildlife and Fisheries has filed an appeal with the Fifth Circuit Court of Appeals.

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[254] *State of Fla., Dept. of Citrus v. Graves Brothers Company, Tampa Juice Services, et al.*, No. 2DO03-2276, 2nd Dist. Ct. of App., Florida.

[255] *Pelts & Skins, L.L.C. v. James Jenkins, Jr., Secretary of the Louisiana Department of Wildlife and Fisheries,*No. 02-384-A, 2003 U.S. Dist. LEXIS 7014, 21-22 (Middle Dist. Louisiana 2003).

[256] Ibid. at 34.

The "Government Speech" Counter-Argument

In the pending compelled commercial speech cases, the United States government has advanced the argument that its mandatory assessments constitute "government speech" that is not subject to First Amendment challenge or scrutiny.[257] The challengers have countered by arguing that the industry trade associations and commodity boards administer the commodity assessment programs; therefore, the speech involved in the generic advertising cannot fall within the realm of government speech. Even if the speech is deemed "government speech," the challengers argue that it would fail to pass First Amendment scrutiny under either the current Supreme Court standard for First Amendment protection of commercial speech (i.e., the *Central Hudson* standard)[258] or under the standard for protection from compelled speech or compelled association (established in *Abood* and later cases).[259]

What is government speech? In laying the groundwork for his analysis of government participation in communication networks, Professor Mark Yudof provided this comprehensive description of government expression that falls within the parameter of government speech:

> Government speech here will include organized (local, state, and federal) governments' efforts to communicate symbols, ideas, information, perceptions, and values to the citizenry. Overlapping this public rhetoric, and difficult to disentangle from it, are the private utterances of government officials. Also troubling is the problem of distinguishing propaganda or indoctrination from information or education. The modes and types of government discourse include time-honored methods as well as those provided by modern technology: direct

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[257] The United States Department of Agriculture raised the defense of government speech in its arguments before the Supreme Court in *United States v. United Foods*, 533 U.S. 405 (2001). The court declined to rule on the defense since the government had failed to assert and argue it in a timely manner in the lower court proceedings. In all compelled commercial speech cases since *United Foods*, the USDA has asserted the government speech defense.

[258] See *Central Hudson*, 447 U.S. 557 (1980).

[259] See *Abood*, 431 U.S. 209 (1977).

> access to the broadcast media, mass distribution of documents, speeches and other activities of political leaders reported in the private media, the gathering and dissemination of statistics and research results, advertising, preparation and dissemination of official reports, activities of government public-relations offices, dissemination of official records of government proceedings, press conferences, public schooling, military training, and so on."[260]

The courts in an increasing number of cases involving the government speech doctrine are fleshing out a working legal definition of "government speech." The concept of government speech is based on an assumption that there is a need for a democratic government to inform its citizens about its business in order to accomplish its Constitutional purposes, including actions taken under its power to regulate. The Supreme Court has established the broad principle that the government generally may expend funds through "speech and other expression to advocate and defend its own policies."[261] It has further held that when the government speaks through its officials or through the expenditure of public funds, it has the broad power to determine what message and viewpoint it will convey.[262] A government can occupy many roles when it "speaks" as it relays government speech that explains, persuades and justifies policies and preferences. If the government is purposefully acting as a speaker with an identified message which is reasonably understood by those receiving it to be a government message, then such action should fit within the concept of government speech.

On the other hand, if the agents purportedly representing the government have not been hired or formally recognized as acting on behalf of the government, there is no government speech. Moreover, if the government's expression of an idea is obscured

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[260] Mark G. Yudof, *When Government Speaks: Politics, Law and Government Expression in America* (Berkley, CA: University of California Press, 1983), 13.
[261] *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995).
[262] See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).

behind the veil of other actors or the decision to distribute an idea is accompanied by an effort to override the market's distribution system for the expression of ideas (e.g., traditional advertising channels or press releases by private industry), then government speech is suspect. Citizens can resort to collective political action to reject an unacceptable government idea only if they know the government is speaking.[263]

The "government speech" argument has been asserted as a defensive strategy by government in pending legal actions involving compelled commercial speech. In addition, industry trade associations and others who have aligned themselves with the government in these actions have directly and indirectly supported the concept. As an example, in March of 2002, fifteen agricultural trade associations were thwarted in their efforts to gain statutory recognition for "government speech" for commodity checkoffs when Congress failed to respond to their request to expand the 2002 Farm Bill to include language declaring that all checkoff-related advertising qualifies as government speech.[264]

The USDA's position that government speech is protected is based on the principle that the government has a right to be a contributor to the marketplace of ideas. Therefore, the traditional interpretation of the First Amendment as a restraint on government is loosened to allow the government to exercise a voice. This is a practical as well as a doctrinal principle, since the government must often have the capacity to act as a speaker to express its policy preferences and to conduct business. However, as

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[263] See Randall P. Bezanson and William G. Buss, "The Many Faces of Government Speech," *Iowa Law Review* 86 (2001): 1377-1511.

[264] Center for Individual Freedom, "Commodity Groups Attempt End Run Around Courts in Checkoff Battle," (May 8, 2002) available from http://www.cfif.org/5_8_2001/Free_line/current/backdoor_ploy.html; Internet; accessed 1 August 2002.

Professor Yudof noted, "The advancement of policy objectives through communications activities and the provision of information almost invariably advances the interests of those in power."[265] The inherent risk is that the government has the resources to become a powerful voice that can be used to muffle or silence other voices as well as legitimately express its views on policy.[266]

In the compelled commercial speech cases, the government has asserted that it has assumed the role of speaker in the mandatory commodity assessment cases due to the level of oversight that it exercises. It has relied upon the case of *Lebron v. National R.R. Passenger Corp.*,[267] decided by the U.S. Supreme Court in 1995, to support its position. The case arose when Amtrak denied Michael Lebron the right to display an advertisement on a billboard at the main entrance to Amtrak's Pennsylvania Station in New York City. He sued claiming that his First Amendment and Fifth Amendment rights had been violated. Lebron argued that Amtrak, as a government-created corporation, should be deemed a government entity for purposes of First Amendment rights. The U.S. Supreme Court agreed with Lebron, stating that when "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment."[268] The

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[265] Yudof, 171.
[266] See Randall P. Bezanson, "The Government Speech Forum: Forbes and Finley and Government Speech Selection Judgments," *Iowa Law Review* 83 (August 1998): 953-994, 992.
[267] *Lebron v. National R.R. Passenger Corp.,* 513 U.S. 374 (1995).
[268] Ibid. at 400.

Court reached this conclusion by determining that the government had created Amtrak to further its objectives and retained control over its operations.[269]

The government has relied on *Lebron* to argue that the checkoff commissions and boards are government actors and the generic advertising they produce is government speech. It has advanced a three-point argument that such governing groups are created by Congressional acts to achieve government objects, the Secretary of Agriculture exercises control in appointing and removing board members, and the USDA exercises control over the messages in the checkoff-funded generic advertising.[270] In response, the anti-checkoff challengers have pointed out: 1) Amtrak was subsidized with public funds in 1995 and still receives public funds today, and 2) the *Lebron* case was concerned with whether Amtrak was a government entity for purposes of addressing a restraint of speech claim, whereas the checkoff cases deal with claims that First Amendment rights have been violated by compelled support for objectionable speech. They argued that *Lebron* cannot serve as precedent since that case did not address "whether Amtrak would be considered government if Amtrak had tried to claim Mr. Lebron's speech as its own, or had compelled Mr. Lebron to pay for a message he despise."[271]

The government's claim of extensive oversight has been disputed by the challengers in light of the many years that the program has been characterized and operated as a "self-directed" industry program. The trade groups and the USDA are aligned within the dominant hegemony, but their interests appear to be at odds in the

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[269] Ibid. at 398.
[270] Final Brief for the Federal Appellants at 39-40, *Michigan Pork Producers, et al v. Campaign for Family Farms, et al. v. Ann Veneman* (6th Cir. 2003) (Appeal Nos. 02-2337 and 02-2338), filed February 4, 2003.
[271] Final Brief for the Appellees at 5, *Michigan Pork Producers, et al v. Campaign for Family Farms, et al. v. Ann Veneman* (6th Cir. 2003) (Appeal Nos. 02-2337 and 02-2338), filed February 6, 2003.

event that the government speech defense is fully accepted by the courts. If the argument is recognized, centralized government control over the commodity programs would appear to reduce the autonomous decision-making regarding commercial messages that is currently enjoyed by the industry boards and associations.

Government speech has come under increasing scrutiny as an abridgment of the rights of others under the First Amendment. Scholars have concluded that the government crosses the line in abridging such rights in several ways. A 1998 law review article succinctly summarized this as follows:

> When government expression seriously inhibits competing speech, monopolizes the opportunity for exchange of ideas, or deceives the audience as to its truth or its origins, government's expression functions effectively as a regulation of other, usually private, speech, and is thus subject to the fullest panoply of First Amendment limitations.[272]

The evidence obtained in connection with this paper is expected to show that the current challenges to government speech are related to the government's expanded use of speech and its adoption of new forms of speech. In addition, the courts are recognizing new types of First Amendment claims, which creates a climate for testing doctrine. With respect to the hegemonic struggle over compelled commercial speech, the doctrine of government speech may represent a blatant effort to exercise industry control.

What Do the Compelled Commercial Speech Cases Represent?

The first section of this literature review presented a theoretical perspective of Gramsci's hegemony and Galbraith's concept of countervailing power. Subsequent sections provided details that build a cultural, political, economic and social context for

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[272] Ibid.

examining the thesis of this dissertation. The diagram identified as Figure 4 illustrates the various ways in which the compelled commercial speech cases represent opportunities, conflicts, threats, judicial actions or failure to act, trends and other meanings in the three spheres of importance that intersect to form the zone of conflict.

With regard to First Amendment doctrine regarding commercial speech, the line of cases can be viewed as representing a consistent effort by certain individuals or groups to reduce or eliminate advertising regulations, Supreme Court inconsistency and struggle to interpret First Amendment doctrine regarding commercial speech (characterized by uncertainty and missed opportunities to clarify existing standards or develop new standards for protection of commercial speech), a slow trend toward expanding the protection for commercial speech, and a judicial balancing of free speech values with commercial nature of speech and the need for regulation.

Viewed from the perspective of First Amendment doctrine regarding freedom from compelled speech and compelled association, the cases represent an effort to stop mandatory payment of fees that are used for speech considered objectionable or for activities that force unwanted affiliation. They also represent an expansion of the principles found in the union dues cases and other cases to a new subject of conflict (compelled commercial speech) and a balancing of free speech values against the need for collective dues and fees.

In the agricultural sphere, the cases represent first and foremost the extreme dissatisfaction of individuals and groups with commodity system programs. Such parties are using the courts to vent their frustration and seek judicial results consistent with their positions. These cases represent a conflict of interest between dominant and minority

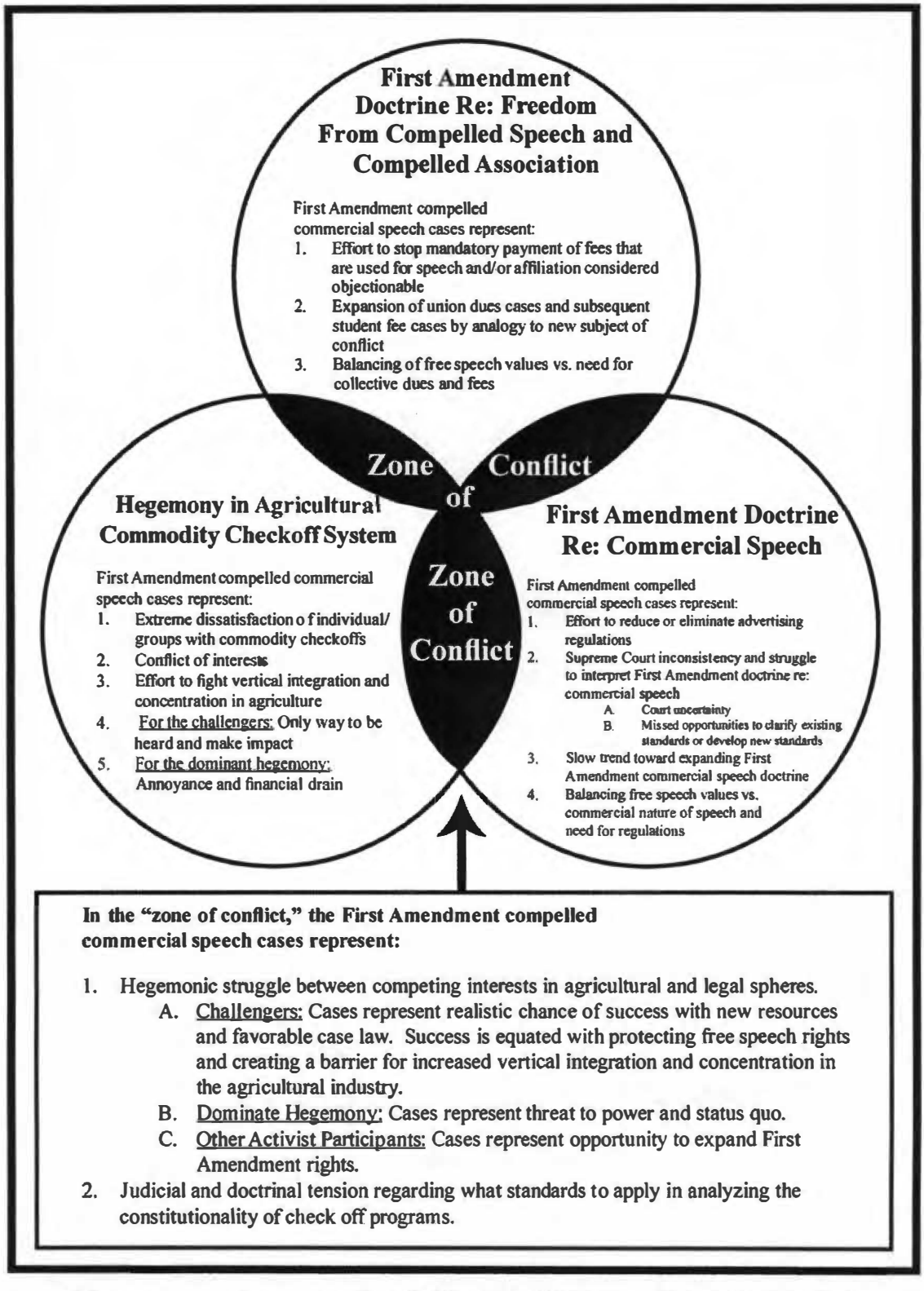


Figure 4 **Representations Inherent in First Amendment Compelled Commercial Speech Cases**

groups. More specifically, they represent an effort by the challengers to fight vertical integration and concentration in agriculture. The challengers perceive legal mechanisms the only way to be heard or to have an impact. Historically, the dominant hegemony was annoyed by the inconvenience and cost incurred by responding to the persistent challengers. Their response has changed as the courts have incorporated changes in First Amendment doctrine more favorable to the challengers and the zone of conflict has created a serious legal challenge for the dominant parties in the agricultural hegemony.

In the zone of conflict, the stakes have become high and the battle fierce, primarily because the challengers are now brandishing new decisions in their favor and are receiving some help from activist and trade groups. The First Amendment compelled speech cases in this zone represent a genuine counter-hegemony for the challengers with a strong potential for success. In addition to more favorable case law, the challengers appear to have intellectual and moral leadership, components identified by Gramsci as necessary for realizing success as a counter-hegemony. On the other hand, these cases signify a threat to the dominant hegemony, now facing the possibility of curtailment of funds and, as a result, less power to act. Other legal and activist organizations and entities may view the cases as opportunities to expand First Amendment rights in commercial speech or possibly to serve as one link in a larger strategical effort to protect free speech rights of U.S. citizens.

CHAPTER 4

METHODOLOGY

Theoretical Perspectives as Organizing Generalizations for Research

The theoretical perspectives of hegemony and countervailing power (as supplemented by an overall understanding of the state theories of Marxism and Neo-Pluralism) informed the process of gathering evidence and analysis required in this study. These theories facilitated an overall organization of evidence into four major subsets:

1) information that explains the dominant hegemony of commodity checkoffs in the agricultural industry (including history, justifications, legislation and its proponents, interests of State institutions and industry monopolies or oligopolies, public and private policy agendas, etc.);

2) information that clarifies the position of the minority challengers in seeking counter-hegemony or countervailing power to prevent exploitation (history of their efforts, characteristics of the challengers, nature of their platform, economic and political goals they are seeking to achieve, exploitation they are seeking to prevent, etc.);

3) key externalities that affect the first two subsets, such as changes in the agricultural industry (vertical integration in industry sectors, increasing concentration in ownership, globalization of agricultural markets, etc.) and changes in First Amendment doctrine; and

4) evidence that explores the existing case law on commercial speech and compelled speech and compelled association (consistency in applying standards and predictive value of the cases); and

5) evidence that pertains to legal and political consequences of various judicial outcomes (including implications for the public interest, the agricultural industry and the freedom of commercial expression).

The analysis phase focused on identifying the relationships and the cooperation and/or conflicts within each individual subset and between the subsets. The investigative frame shown in the chart at Figure 4 was used as a tool in facilitating such analysis. The approach outlined in this chart guides the researcher in analyzing the relationships between key evidence within each of the four subsets outlined above, specifically seeking to discover links between the hegemonic conflicts related to political and economic differences and the legal manifestation of the interests at stake in the courts.

Research Methods

One method used in this study is a traditional legal analysis of federal cases relating to compelled commercial speech and government speech. However, the researcher breaks away from the conventional approach of studying the subject strictly through legal analysis of judicial opinions by seeking to collect data that will afford a richer analysis of the political and economic interests driving the participants in the legal process and defining their communication strategies in the short-term and in the future.

The initial phase of this study is exploratory. It requires the researcher to follow an historiographical approach for gathering data and assimilating evidence from primary sources. The beginning period for collection of evidence is the date on which the interests of the key entities can first be publicly identified (rather than the date on which the first legal action arose). Obtaining evidence related to the social, political and economic contexts surrounding each entity's early and ongoing involvement in the

compelled commercial speech debate is a research goal. This includes evidence on policies and events that have formed the basis for specific legal claims. Telephone interviews serve as a viable primary source of evidence for understanding the conditions of the current hegemonic agricultural environment and the respective interests driving the current compelled speech litigation.

The following research methods were employed in carrying out this study:

1) Analysis of primary legislative documents

a) Legislation and annotations (used to identify political parties and elected officials in opposition or support of beef checkoffs)

b) Transcripts of hearings, committee activities

c) Public comments

d) Proposed bills (identify political party and elected officials in support)

2) Analysis of primary legal and judicial documents

a) U.S. Supreme Court cases and lower Federal Court cases

b) State Supreme Court cases and lower state court cases

c) Briefs submitted by parties to the cases

d) Amicus curie briefs by other interested parties

3) Analysis of primary federal and state agency documents:

a) Regulatory rulings of United States Department of Agriculture

b) Regulatory rulings of State Agencies

c) Published public comments

d) Reports by agency task forces or committees

4) Analysis of Reports of Agricultural Commodity Promotion Boards and Commissions

5) Review of generic advertising

6) Review of Secondary Print and Electronic Information and Evidence on Checkoffs

a) Law review articles

b) Periodical and newspaper articles (Successful Farming)

c) Books on mandatory assessments

d) Newsletters/electronic articles published by trade associations

e) Newsletters/electronic articles published by activist groups (Free speech rights groups and environmental groups)

f) Websites/publications of federal and state agencies

g) Websites/publications of associations supporting checkoffs or the dominant hegemony

h) Websites/publications of associations challenging checkoffs or the minority against the dominant hegemony

7) Interviews

The study sought to gather evidence from a representative group of individuals belonging to the categories listed below:

a) Commodity producers who are named parties in compelled speech lawsuits

b) Non-litigant commodity producers supporting checkoffs

c) Non-litigant commodity producers opposed to checkoffs

d) Attorneys representing parties in compelled speech lawsuits

e) Attorneys and representatives of legal organizations and activist groups

f) Agricultural agency officials and representatives

g) Recognized agribusiness experts (academic and industry specialists)

Sample interview questions are attached as Appendix D.

8) Review of Literature on Theoretical Ideas Included in D issertation

a) Books

b) Print and electronic articles

Mode of Analysis

Court decisions on commercial speech and communications are a visible representation of the political and economic interests of other entities. The thrust of this study was to obtain evidence and perform a descriptive analysis that would: 1) show the relationship between the law on compelled commercial speech and the underlying critical interests of other key entities seeking to maximize their positions (Phase I analysis); and 2) identify the consequences, including the role of speech and communications in the industrial, economic and political environments, occasioned by different legal resolutions on compelled commercial speech (Phase II analysis). Gramsci's ideas on hegemony and Galbraith's theory of countervailing power were used to create a fundamental framework for interpreting the evidence.

Phase I Analysis. Table 1 shows an "investigative frame" that was used as a guide in conducting the Phase I analysis. The information inserted in the chart was based on preliminary research and included for illustrative purposes. The final content of the investigative frame was determined during the analysis process.

Table 1 Investigative Frame for Analysis of Connections Between Key Economic and Political Interests and Decisions of the Federal Courts Regarding Compelled Commercial Speech

Entities	*History*	*Interests at Stake*	*Principle Level*	*Legal Level*
Federal and State Agencies ***Political Parties and Elected Officials***	Legislative granting authority Pattern of actions taken in past Individuals and groups playing major roles	Dollars Industry alliances and support Bureaucratic structure and jobs Government control Interest in Stable commodities market Interest in expanding market for commodities	Mandatory fees for compelled commercial speech is not a free speech issue (involves only economic regulation). Generic advertising funded by checkoff money is "government speech" not subject to First Amendment scrutiny. Economic regulation is needed to protect public from defective products/unstable commodities market. Checkoffs are needed to create consumer demand for commodities and to support education and research.	Checkoffs are constitutional. Satisfied with *Glickman v. Wileman* (1997) which upheld the checkoffs as economic regulation within a comprehensive regulatory scheme. Supreme Court in *Glickman* said there was no First Amendment issue. Dissatisfied with *U.S. v. United Foods* (2001) in which the Supreme Court struck down the mushroom checkoffs.
Industry Trade Organizations ***Agricultural Commodity Boards***	Manner in which trade organizations and boards have functioned in the past Actions demonstrating effectiveness or weakness	Dollars Government alliances and support Organizational structure and jobs Organizational control Interest in stable commodities market Interest in expanding market for commodities	Not a First Amendment issue Support claim that generic advertising is "government speech" Aggressive lobbying is viable option to get Congressional recognition of checkoffs as "government speech" Checkoffs are needed to create consumer demand for commodities and to support education and research	Checkoffs are constitutional Government speech is immune from First Amendment scrutiny Satisfied with *Glickman* decision Aligned with the government in these cases Dissatisfied with the *United Foods* case striking down mushroom checkoffs

Table 1 (Continued)

Entities	*History*	*Interests at Stake*	*Principle Level*	*Legal Level*
Commodity Producers for Mandatory Assessments (Defending Hegemony)	Record of cooperation and conflicts with other producers within the industry	Dollars to communicate collective messages Alliances with major purchasers of commodities Interest in stable commodities market Interest in expanding sales of commodities	Not a First Amendment issue Support "government speech" argument Aggressive lobbying is viable option to get Congressional recognition of checkoffs as "government speech" Checkoffs are needed for promotion, education, research	Satisfied with *Glickman* decision in favor of checkoffs Aligned with the government in these cases Dissatisfied with the *United Foods* case striking down the mushroom checkoffs
Commodity Producers Against Mandatory Assessments (Opposing Hegemony) ***Activist Groups (Seeking free speech and other goals)***	History of how the minority groups developed awareness of the issues Past efforts by minority groups to achieve counter-hegemony Nature of support by activist groups	Dollars to communicate independent messages Interest in product differentiation Interest in participating in a commodities market free from compelled speech regulation Interest in making unique contributions and sales in the commodities market Interest in fighting the industrial agriculture model of agriculture	Commodity producers should not be compelled to fund commercial speech with which they disagree. Checkoff programs are self-directed with government oversight, so generic advertising is not government speech. Industry trade organizations and agricultural commodity promotion boards are using checkoff moneys in ways detrimental to the interest of those commodity producers paying the fees.	Commodity checkoffs are unconstitutional violations of the First Amendment. Even if generic ads are government speech, the checkoff programs do not pass First Amendment scrutiny. *United Foods* case provides legal grounds for challenges by members of the fruit, mushroom, beef, pork and milk industries. *United Foods* case recognizes First Am. right not to be compelled to fund objectionable speech, unless government shows a detailed regulatory scheme.

Table 1 (Continued)

Entities	*History*	*Interests at Stake*	*Principle Level*	*Legal Level*
State and Federal Judiciaries	Development of doctrines and principles in cases dealing with: 1) commercial speech, 2) freedom from compelled speech and association, 3) government speech, and 4) compelled commercial speech.	Implementation of the First Amendment of the Constitution of the United States Constitutional norms Institutional obligations Cost to governmental interests Judicial manageability and enforceability Substantive justice Democratic acceptability given reasonable disagreement	In prior cases, the Supreme Court indicated it was uncomfortable with the current standard for protection of commercial speech so it had an incentive to avoid applying the commercial speech doctrine if another approach was available. The Supreme Court defers to legislative branch if the Court can apply a narrow construction to a statutory issue to avoid constitutional conflict. Strong criticism of the *Glickman* decision prompted careful reassessment of First Amendment doctrine in *United Foods*. California State Supreme Court disagreed with the *Glickman* case and recognized commodity checkoffs as violation of free speech rights under the California Constitution.	*Glickman v. Wileman* held there was no need to apply First Amendment scrutiny to the checkoff programs since they were economic regulations. Programs were constitutional because they were part of a broader regulatory scheme. Court specifically sidestepped a commercial speech analysis. U.S. Supreme Court moved away from the *Glickman* position in *U.S. v. United Foods* by applying a First Amendment analysis and holding mushroom checkoffs unconstitutional. The Court distinguished *United Foods* from *Glickman* because the mushroom checkoff program was created in stand-alone legislation.

Phase II Analysis. What are the consequences of legal decisions regarding compelled commercial speech? This phase of the analysis focused on the future role of speech and communications in the industrial, economic and political environments under four different legal resolutions:

1) Mandatory commodity assessments are held constitutional when they are part of a broader regulatory scheme;
2) Mandatory commodity assessments are held unconstitutional and a violation of the First Amendment regardless of the regulatory scheme in which they reside;
3) Mandatory commodity assessments are constitutional regulations not protected by the First Amendment; and
4) Mandatory commodity assessments are constitutional as they are within the "government speech" exception to the First Amendment.

Traditional legal analysis was used (see list of criteria for analyzing compelled commercial speech cases attached as Appendix C) along with a critical review of relevant evidentiary materials listed earlier in this methodology section. In addition, a legal investigative frame was used as a structured means to identify and analyze key elements of the cases and legal proceedings that form the body of law related to First Amendment challenges of the checkoff programs. The five areas covered by the legal investigative frame included: 1) the cases, the parties and the courts that have rendered decisions on checkoffs; 2) the history of factual and legal developments underlying each case; 3) the interests at stake for the presiding federal or state judges and the legal institutions in which they serve; 4) the opinions and legal doctrines or principles on which such opinions are based; and 5) the status of each case and its relevance with regard to the line of cases on compelled commercial speech. A summary of the legal investigative frame is provided in chapter eight of this dissertation. In addition, an annotated list of the cases included in the investigative frame is provided in Appendix B.

Conclusion

This study was expected to show a climate ripe for hegemonic change in the agricultural industry driven by economic and political changes that are creating a profound "season of discontent" much broader than the compelled commercial speech issue. Parallel winds of change in the development of First Amendment doctrine have coincided with changes in the agricultural industry to elevate this particular issue as a platform for the challengers. First Amendment rights is their cause, but agricultural autonomy may be their quest. The resolution of the First Amendment issue regarding the appropriate level of protection for compelled commercial speech is expected to cause ripples affecting economic, political and social institutions that are impacted by the way in which commercial speech may be regulated. Strategies for communication by private business will undergo change, and relationships and foundations for authority between government agencies and private institutions will be impacted. The public will need to assess its assumptions about the commercial messages that it receives and their legitimacy.

Change in agricultural hegemony and the First Amendment doctrine are expected to be a key theme of this study. In writing his thoughts about Justice Holmes in 1931, Harold Laski characterized the esteemed jurist's approach to change as follows:

> The conservative believes that change is erroneous and undesirable; the radical insists that it is necessary and urgent. Mr. Justice Holmes simply urges that since change is inevitable, we must provide for its coming and see to it that the game is played in terms of the rules.[273]

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[273] Harold J. Laski, "Mr. Justice Holmes," ed., Felix Frankfurter, in *Mr. Justice Holmes* (New York: Coward-McCann, 1931), quoted in Roberta Kevelson, *The Law as a System of Signs* (New York: Plenum Press, 1988), 203.

A critical question in the compelled commercial speech conflict is "Whose rules?" Has the hegemony created by the commodity checkoffs and other agricultural developments created an environment where rules of dominance prevail over traditional rules for processing minority dissents and respecting the autonomy of market participants? Is the issue of compelled commercial speech simply a representation of the hegemonic battle to establish new rules? This dissertation used critical research to examine these questions in investigating the central thesis of this paper, i.e., that the challengers are using the Courts and the First Amendment as a mechanism to break the current hegemony of commodity checkoffs and establish countervailing power.

In view of the checkoff cases before the courts in 2003 in the Third, Fifth, Sixth, Eighth and Ninth Circuits, it is certain that the U.S. Supreme Court will have the opportunity to address the constitutional dilemma of how to apply First Amendment doctrine to compelled commercial speech sometime in 2003 or 2004. The evidence, analysis and conclusions of this dissertation has added to the current literature by providing a holistic analysis of the political, social and economic elements underlying the compelled commercial speech cases and advancing some implications for Supreme Court decision-making on the compelled commercial speech issue.

CHAPTER 5

THE EVIDENCE

The research method for this dissertation required the identification and study of primary legislative, legal and judicial documents, published cases, official reports of administrative boards and commissions, generic advertising, and secondary evidence in print and electronic format. In addition, in-depth interviews with participants knowledgeable and involved in commodity checkoff programs were conducted. The goal was to solicit the understandings and opinions of participants regarding: the impact of these programs; the agricultural industry environment; the political, economic, and legal interests of the individuals and entities involved in the legal conflicts; the relationships of power and control that determine the way in which commodity checkoffs are allocated and used; and key arguments and positions involved in the legal conflicts.

Individuals representing divergent views and opposing philosophies generously gave their time and shared their observations and insights in telephone interviews that helped piece together the puzzle of the legal conflicts over commodity checkoff programs. Those who provided interviews on an attribution basis include:

1) John Bunting – Dairy farmer in Delaware County, New York, writer for *The Milkweed,* a dairy newspaper produced in print and on-line from Wisconsin;[274]
2) Mike Callicrate – Beef producer in St. Francis, Kansas, plaintiff in three legal actions (one involving checkoffs and two involving antitrust actions against meat packing companies);[275]

[274] John Bunting, telephone interview by Retha J. Martin, 2 May 2003, transcript on file with author [hereinafter "Bunting interview"].

3) Jeanne Charter - Cattle producer in Shepherd, Montana (plaintiff in legal action currently pending before the Ninth Circuit Court of Appeals, *Steven and Jeanne Charter v. USDA*);[276]

4) Joseph and Brenda Cochran – Dairy farmers in Scranton, Pennsylvania (plaintiffs in legal action currently pending before the Third Circuit Court of Appeals, *Joseph and Brenda Cochran v. USDA)*;[277]

5) Enrique E. Figueroa, Ph.D. – Director, Roberto Hernandez Center at University of Wisconsin, Milwaukee, Wisconsin; former Administrator of the United States Agricultural Marketing Service;[278]

6) Renee Giachino, J.D – General Counsel for Center for Individual Freedom, Alexandria, VA (an activist organization promoting individual rights, also a plaintiff in a beef checkoff case and a dairy checkoff case);[279]

7) Daniel Glickman – Former Secretary of U.S. Department of Agriculture, Director, Harvard University Institute of Politics, Cambridge, Massachusetts;[280]

8) Erik Jaffe, J.D. – Constitutional lawyer in Washington, D.C., law clerk for Supreme Court Justice Clarence Thomas at the time *Glickman v. Wileman* was decided, legal counsel for plaintiffs in beef checkoff case, *Steven and Jeanne*

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[275] Mike Callicrate, telephone interview by Retha J. Martin, 20 March 2003, transcript on file with author [hereinafter "Callicrate interview"].
[276] Jeanne Charter, telephone interview by Retha J. Martin, 20 February 2003, transcript on file with author [hereinafter "Charter interview"].
[277] Joseph and Brenda Cochran, telephone interview by Retha J. Martin, 3 May 2003, transcript on file with author [hereinafter "Cochran interview"].
[278] Enrique Figueroa, telephone interview by Retha J. Martin, 2 March 2003, transcript on file with author [hereinafter "Figueroa interview"].
[279] Renee Giachino, telephone interview by Retha J. Martin, 12 February 2003, transcript on file with author [hereinafter "Giachino interview"].
[280] Daniel Glickman, telephone interview by Retha J. Martin, 25 March 2003, transcript on file with author [hereinafter "Glickman interview"].

Charter v. USDA (currently pending before the Ninth Circuit Court of Appeals);[281]

9) Harry Kaiser, Ph.D. – Director, Cornell Commodity Promotion Research Program, Professor, Department of Applied Economics and Management, Cornell University, Ithaca, New York; [282]

10) Kathleen Merrigan, Ph.D.- Director, Agriculture, Food and Environment Program, Gerald J. and Dorothy R. Friedman School of Nutrition Science and Policy at Tufts University, Medford, Massachusetts; former Administrator of the United States Agricultural Marketing Service (replacing Enrique Figueroa);[283]

11) David Moeller, J.D. – Counsel for Farmers' Legal Action Group Incorporated, St. Paul, Minnesota (a coalition of groups representing the interests of family farmers and independent livestock producers);[284]

12) Doug O'Brien, J.D. – Agriculture Legislative Assistant for Senator Tom Harkin, Washington, D.C.; former legal specialist with USDA Packer and Stockyards Administration, former associate legal counsel for Organization for Competitive Markets, clerked for Iowa Supreme Court Justice (Note: Senator Harkin is the ranking Democratic member of Committee on Agriculture, Nutrition and Forestry, U.S. Senate, Democrat, Iowa);[285]

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[281] Erik Jaffe, telephone interview by Retha J. Martin, 4 April 2003, transcript on file with author [hereinafter "Jaffe interview"].
[282] Harry M. Kaiser, telephone interview by Retha J. Martin, 28 May 2003, transcript on file with author [hereinafter "Kaiser interview"].
[283] Kathleen Merrigan, telephone interview by Retha J. Martin, 27 March 2003, transcript on file with author [hereinafter "Merrigan interview"].
[284] David Moeller, telephone interview by Retha J. Martin, 21 March 2003, transcript on file with author [hereinafter "Moeller interview"].
[285] Doug O'Brien, telephone interview by Retha J. Martin, 31 March 2003, transcript on file with author [hereinafter "O'Brien interview"].

13) Barry Richard, J.D. – Constitutional lawyer, Tallahassee, Forida, counsel for defendants, Florida Department of Citrus in citrus checkoff cases (represented President George W. Bush in the 2000 presidential election litigation);[286]

14) Terry Stokes – Chief Operating Officer, National Cattlemen's Beef Association, Denver, Colorado (the group that provides checkoff services under contract with the Cattlemen's Beef Board);[287]

15) Steven Vetter – Editor, *Western Livestock Journal*, a national livestock weekly newspaper; Denver, Colorado; [288] and

16) Ronald Ward, Ph.D. – Professor of econometrics and agricultural market structures at University of Florida, Gainesville, Florida (advisor to Cattlemen's Beef Research and Promotion Board, National Dairy Board, Mushroom Promotion Board, California Almond Board and others).[289]

Several informative interviews were also provided anonymously by individuals who asked to be identified as:

- a representative of the National Cattlemen's Beef Board;
- an executive of the Livestock Marketing Association (plaintiff in a beef checkoff lawsuit currently pending before the Eighth Circuit Court of Appeals, *Livestock Marketing Association v. USDA*);
- a pork producer and member of the Pork Board;

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[286] Barry Richard, telephone interview by Retha J. Martin, 26 March 2003, transcript on file with author [hereinafter "Richard interview"].
[287] Terry Stokes, telephone interviews by Retha J. Martin, 17 March 2003 and 19 March 2003, transcripts on file with author [hereinafter "Stokes interview one" and "Stokes interview two"].
[288] Steven Vetter, telephone interview by Retha J. Martin, 28 March 2003, transcript on file with author [hereinafter "Vetter interview"].
[289] Ronald Ward, telephone interview by Retha J. Martin, 18 February 2003, transcript on file with author [hereinafter "Ward interview"].

- a legislative assistant for a Senator serving as a member of the Committee on Agriculture, Nutrition and Forestry, U.S. Senate;
- a legislative assistant for a Congressman serving as a member of the House Agricultural Committee, U.S. House of Representatives.

In addition, several others provided information strictly for background purposes on an anonymous basis.

The theoretical perspectives of hegemony and countervailing power provided the necessary framework to gather evidence for this study. These theories guided the collection of evidence in four categories: 1) information that explains the dominant hegemony of commodity checkoffs in the agricultural industry, 2) information that clarifies the position of the minority challengers in seeking counter-hegemony or countervailing power to prevent exploitation; 3) key externalities that affect the first two subsets, such as changes in the agricultural industry and changes in First Amendment doctrine; 4) evidence that explores the existing case law on commercial speech and compelled speech and compelled association; and 5) evidence that relates to the legal and political consequences of various outcomes and the impact on the public interest, the agricultural industry and freedom of commercial expression.

Evidence That Brings Understanding to Both Sides

The respective views of the opposing forces in the checkoff litigation are illuminated in number of source documents that give attention in varying degrees to both sides. Chief among these are transcripts of oral arguments and legal opinions of the courts. A sampling of such materials utilized in this study include:

- Transcript of oral arguments on cross summary judgment motions in *Jeanne and Steve Charter v. United States Department of Agriculture* (oral arguments occurred on April 16, 2002, in the United States District Court for the District of Montana, Billings Division);[290]
- Transcript of oral arguments before the Eighth Circuit Court of Appeals in *Livestock Marketing Association v. United States Department of Agriculture* on March 10, 2003, in St. Paul, Minnesota;[291]
- Transcript of oral arguments before the Sixth Circuit Court of Appeals in *Michigan Pork Producers v. Campaign for Family Farms v. United States Department of Agriculture* (oral arguments on March 14, 2003, in Cincinnati, Ohio);[292]
- Decision and Order of Dismissal on December 9, 1997, in *In Re: United Foods, Inc.*, Administrative Law Court, United States Department of Agriculture;[293]
- Fruit Checkoffs – Order Granting Plaintiffs' Motion for Partial Summary Judgment, Consolidated Cases of *Tampa Juice Services, Inc., et al. v. State of Florida, Department of Citrus, Graves Brothers Company, et al. v. State of Florida, Department of Citrus,* and *Oak Hammock Groves, Ltd., et al., v. State of Florida, Department of Citrus*, issued March 31, 2003. [294]

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[290] Oral Arguments on Cross Summary Judgment Motions, *Jeanne and Steve Charter v. United States Department of Agriculture* (Dist. Montana 2002) (Cause No. CV 00-198-BLG-RFC), argued 16 April 2002.
[291] Oral Arguments on Appeal, *Livestock Marketing Association v. United States Department of Agriculture* (8th Cir. 2003) (Appeal Nos. 02-2796 and 02-2843), argued 10 March 2003.
[292] Oral Arguments on Appeal, *Michigan Pork Producers, et al. v. Campaign for Family Farms, et al. v. Ann Veneman* (6th Cir. 2003) (Appeal Nos. 02-2337 and 02-2338), argued 14 March 2003.
[293] Decision and Order of Dismissal, *In Re: United Foods, Inc.* (USDA Administrative Law Court, 1997) (MPRCIA No. 96-0001), issued 9 Dec. 1997.
[294] Order Granting Plaintiffs' Motion for Partial Summary Judgment, *Tampa Juice Services, Inc. et al. v. State of Florida, Department of Citrus* (10th Cir., Polk County, Fla., 2003) (Case Nos. GC-G-00-3488, GC-G-00-3718, GC-G-01-0286, GC-G-01-0375, and GC-G-01-0694); *Graves Brothers Company v. State of*

- Judicial decisions in compelled commercial speech cases listed in Appendix B;

Various reports from the United States General Accounting Office provided information that was useful in analyzing both the dominant hegemony and the challenging position. The following reports were useful in the analysis:

- "Pork Promotion Program: Petition Validation Process Needs to be Strengthened," United States General Accounting Office Report to Congressional Requesters, September 2000 (GAO/RCED-00-274);[295]
- "Economic Models of Cattle Prices: How USDA Can Act to Improve Models to Explain Cattle Prices," United States General Accounting Office Report to the Honorable Tom Daschle, U.S. Senate, March 2002;[296]
- "Packers and Stockyards Programs: Investigations of Competitive Practices Need Improvements," United States General Accounting Office Publication of Testimony Before the Subcommittee on Administrative Oversight and the Courts, Committee on the Judiciary, United States Senate, September 25, 2000;[297]

Florida, Department of Citrus (Case No. GC-G-02-46-4686) and *Oak Hammock Groves, Ltd., et al. v. State of Florida, Department of Citrus* (Case No. GC-G-03-0281), order issued 31 March 2003.

[295] United States General Accounting Office, "Pork Promotion Program: Petition Validation Process Needs to be Strengthened," Report to Congressional Requesters, GAO/RCED-00-274 (Washington, D.C.: GPO, September 2000).

[296] United States General Accounting Office, "Economic Models of Cattle Prices: How USDA Can Act to Improve Models to Explain Cattle Prices," Report to the Honorable Tom Daschle, U.S. Senate, GAO-02-246 (Washington, D.C.: GPO, March 2002).

[297] United States General Accounting Office, "Packers and Stockyards Programs: Investigations of Competitive Practices Need Improvements," Publication of Testimony Before the Subcommittee on Administrative Oversight and the Courts, Committee on the Judiciary, U.S. Senate, GAO/T-RCED-00299 (Washington, D.C.: GPO, September 25, 2000).

- "Cattle Prices: Questions and Answers," by Geoffrey S. Becker, Congressional Research Service, Environment and Natural Resources Policy Division, Report for Congress, November 14, 1996;[298]
- "Federal Farm Promotion ('Check-off') Programs," by Geoffrey S. Becker, Congressional Research Service, Resources, Science and Industry Division Report for Congress, July 11, 2002;[299]
- "Merger and Antitrust Issues in Agriculture: Statutes and Agencies," by Jerry Heykoop, Agricultural Policy Analyst, Congressional Research Service, Resources, Science and Industry Division, Report for Congress, May 21, 2002;[300]
- "Consolidation in U.S. Meatpacking," by James M. MacDonald, Michael E. Onlinger, Kenneth E. Nelson, and Charles R. Handy, Economic Research Service (ERS), USDA, Food and Rural Economics Division, February 2000;[301]
- "A Time to Act," report by USDA National Commission on Small Farms, January 1998;[302] and
- "Concentration in the Meat Packing Industry," Majority and Minority Reports by the USDA Advisory Committee on Agricultural Concentration, June 7, 1996.[303]

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[298] Geoffrey S. Becker, "Cattle Prices: Questions and Answers," Congressional Research Service, Environment and Natural Resources Policy Division, Report for Congress, 96-115 ENR (Wa. D.C.: GPO, November 19, 1996).

[299] Geoffrey S. Becker, "Federal Farm Promotion ('Check-off') Programs," Congressional Research Service, Resources Science and Industry Division, Report for Congress, 93-353 ENR (Wa. D.C.: GPO, July 11, 2002).

[300] Jerry Heykoop, "Merger and Antitrust Issues in Agriculture: Statutes and Agencies," Congressional Research Service, Resources, Science and Industry Division, Report for Congress, RS20562 (Wa. D.C.: GPO, May 21, 2002).

[301] James M. MacDonald, Michael E. Onlinger, Kenneth E. Nelson, and Charles R. Handy, "Consolidation in U.S. Meatpacking," Economic Research Service, USDA, Food and Rural Economics Division, Agricultural Economics Report, ERSAER 785 (Wa. D.C.: GPO, February 2000).

[302] United States Department of Agriculture National Commission on Small Farms, "A Time to Act," Special Report, MP-1545 (Wa. D.C.: GPO, January 1998).

[303] United States Department of Agriculture Advisory Committee on Agricultural Concentration, "Concentration in the Meat Packing Industry, Majority and Minority Reports" (Wa. D.C.: GPO, June 7, 1996); available in part from http://www.web-span.com/~pga/library/report.html; Internet; accessed 12 November 2002.

Evidence That Identifies and Explains the Dominant Hegemony

Several key sources of evidence provided understanding of the dominant hegemony in terms of the interests at stake, the principles, and the legal arguments. The following individuals provided interviews that were instructive in this regard: Terry Stokes, Dr. Ronald Ward, Barry Richard, Dr. Enrique Figueroa, Dr. Kathleen Merrigan, Dr. Harry Kaiser, Secretary Daniel Glickman, Doug O'Brien, a staffer for a Congressman on the House Agricultural Committee, a pork producer and member of the Pork Board, and a representative of the Cattlemen's Beef Board. Advertising samples and other materials provided by National Cattlemen's Beef Association were also helpful.

Legal documents filed in various checkoff lawsuits by the United States Department of Agriculture, the state and federal commodity associations and individual producers documented the publicly stated positions of these groups and outlined their legal arguments. Such documents consisted of briefs, memorandums in support of motions for preliminary injunction or summary judgment and transcripts of testimony, depositions, and oral arguments. Examples of items used for analysis included:

- Beef Checkoffs - Declaration of Barry Carpenter in Support of Defendant's Motion for Summary Judgment, executed February 14, 2002; filed by the United States Department of Agriculture in *Jeanne and Steve Charter v. United States Department of Agriculture* in the United States District Court for the District of Montana, Billings Division;[304]

[304] Declaration of Barry Carpenter in Support of Defendant's Motion for Summary Judgment, *Jeanne and Steve Charter v. United States Department of Agriculture* (Dist. Montana) (No. CV 00-198-BLG-RFC), executed 14 February 2002.

- Beef Checkoffs – Briefs for cross summary judgment motions, filed February 15, 2002, in *Jeanne and Steve Charter v. United States Department of Agriculture* in the United States District Court for the District of Montana, Billings Division, [305]
- Beef Checkoffs – Briefs for appellate review, filed in September and October 2002, in *Livestock Marketing Association v. United States Department of Agriculture* in the United States Eighth Circuit Court of Appeals;[306]
- Beef and Pork Checkoffs – Reports and literature published by the Cattlemen's Beef Board and the Pork Board;
- Pork Checkoffs – Briefs for appellate review, filed in February 2003, in *Michigan Pork Producers v. Campaign for Family Farms* in the United States Sixth Circuit Court of Appeals,[307]
- Pork Checkoffs - Deposition of Barry Carpenter, Deputy Administrator of the Livestock and Seed Program in the Agriculture Marketing Service, on May 13-14, 2002, in *Michigan Pork Producers Association Inc, et al. v. Campaign for Family Farms, et al. v. Ann Veneman, USDA, et al.* in the U.S. District Court, Western District of Michigan, Southern Division;[308]
- Pork Checkoffs – Deposition of Hugh Dorminy, President of the National Pork Board, May 10, 2002, in *Michigan Pork Producers Association Inc, et al. v.*

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[305] Briefs for Cross Summary Judgment Motions, *Jeanne and Steve Charter v. United States Department of Agriculture* (Dist. Montana 2002) (No. CV 00-198-BLG-RFC), filed 15 February 2002.
[306] Briefs for Appellate Review, *Livestock Marketing Association v. United States Department of Agriculture* (8th Cir. 2002) (Appeal Nos. 02-2769 and 02-2832, filed September and October 2002.
[307] Briefs for Appellate Review, *Michigan Pork Producers, et al. v. Campaign for Family Farms, et al. v. Ann Veneman* (6th Cir. 2003) (Appeal Nos. 02-2337 and 02-2338) filed February 2003.
[308] Deposition of Barry Carpenter, *Michigan Pork Producers, et al. v. Campaign for Family Farms, et al. v. Ann Veneman* (W. Dist. Mich. 2002) (No. 1:01-CV-34), taken 13-14 May 2002.

Campaign for Family Farms, et al. v. Ann Veneman, USDA, et al. in the U.S. District Court, Western District of Michigan, Southern Division; [309]

- Dairy Checkoffs – Published statements and online articles by Richard T. Rossier, attorney representing American Dairy Council;
- Dairy Checkoffs – Memorandum in Support of Plaintiff's Motion for Summary Judgment, filed June 5, 2002, in *Joseph and Brenda Cochran v. Veneman,* United States District Court, Middle District of Pennsylvania;[310]
- Mushroom Checkoffs – Testimony of Wade Whitfield, President and CEO of the Mushroom Institute, on August 15-16, 1995, in *In Re: Donald B. Mills, Inc.;* Administrative Law Hearing, United States Department of Agriculture,[311]
- Mushroom Checkoffs – Reply Brief for the Petitioner, United States Department of Agriculture, filed in April 2001, in the appeal before the U.S. Supreme Court in *United States v. United Foods;* [312]
- Fruit Checkoffs – Hearing testimony of Dan Gerawan, President of Gerawan Farming, Inc. on July 29, 1999 before the Subcommittee on Commercial and Administrative Law, Committee of the Judiciary, U.S. House of Representatives;[313]

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[309] Deposition of Hugh Dorminy, *Michigan Pork Producers, et al. v. Campaign for Family Farms, et al. v. Ann Veneman,* (W. Dist. Mich. 2002) (No. 1:01-CV-34), filed 10 May 2002.
[310] Memorandum in Support of Plaintiffs' Motion for Summary Judgment, *Joseph and Brenda Cochran v. Veneman,* (Middle Dist. Penn. 2002) (Case No. 4:CV-01-0529), filed 5 June 2002.
[311] U.S. Department of Agriculture, Administrative Law Hearing, before Judge S. Bernstein, San Francisco, CA, *In Re: Donald B. Mills, Inc.,* MPRCIA No. 95-1, Testimony of John Haltrom, 15-16 August 1995.
[312] Reply Brief for Petitioner, *United States v. United Foods, Inc.* (U.S. Supreme Court 2000) (No. 00 276), filed April 2001.
[313] U.S. Congress, House, Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, Testimony of Dan Gersawan, 106th Congress, 1st sess., 29 July 1999.

- Fruit Checkoffs – Briefs urging support for the checkoff program submitted by the USDA, the Tree Fruit Agreement and other parties filing amicus curie for the Supreme Court review in *Glickman v. Wileman*; and
- Fruit Checkoffs – Complaints filed by plaintiffs, Graves Brothers Company, et al. and Barron Collier Company, Ltd. in the Florida citrus checkoff challenges.[314]

Web sites maintained by the trade associations and primary groups involved in administration of the checkoff programs provided information and opinions of outlined the public positions of these groups. The following were included among the websites that provided evidence: Cattlemen's Beef Board,[315] the National Pork Board,[316] the National Milk Producers Federation,[317] the Mushroom Institute[318] and others. (See list included in bibliography.)

Evidence That Clarifies the Position of the Anti-Checkoff Challengers

During evidence gathering, it became apparent that analyzing what the legal conflict over commodity checkoffs *collectively* represents would not be productive, since the structure of each commodity industry was different and the characteristics of the challengers in various legal actions appeared disparate. It was, therefore, especially important to gather evidence that would clarify the positions of the anti-checkoff challengers in each of the respective industries.

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[314] Complaint, *Graves Brothers, et al. v. State of Florida, Department of Citrus* (2nd Judicial Circuit, Leon County, Fla., 2002) (No. 02 CA 2207), filed September 2002; and Complaint *Barron Collier Company, Ltd. v. State of Florida, Department of Citrus* (10th Judicial Circuit, Polk County, Fla., 2003) (Case No. 53-2003 CA-000281), filed January 2003.
[315] See website for Cattlemen's Beef Board at http://www.beefboard.org.
[316] See website for the National Pork Board at http://www.porkboard.org.
[317] See website for the National Milk Producers Federation at http://www.nmpf.org.
[318] See website for the Mushroom Institute at http://www.americanmushroom.org.

The challengers' point of view in the beef industry was articulated by Jeanne Charter in her interview and numerous published materials. Mike Callicrate also provided an additional perspective of a cattle producer and feedlot operator fighting a dominant hegemony on several fronts, including the checkoff challenges and other antitrust legal actions. An executive of the Livestock Marketing Association ("LMA") provided additional observations and information on the beef checkoff cases, especially regarding LMA's involvement in the referendum process.

In her interview, attorney Renee Giachino provided background and articulated the positions of the anti-checkoff challengers in the beef, pork and dairy industries. David Moeller's interview focused more on the pork industry and the views of pork checkoff challengers that are affiliated with his client, Campaign for Family Farms, a coalition of farm and rural groups opposed to the corporate takeover of the hog industry and supportive of family farming.

John Bunting, (dairy farmer and writer for an agricultural newsletter, *The Milkweed,*) and Joseph and Brenda Cochran (plaintiffs in a dairy checkoff lawsuit) provided information and background on what the constitutional challenge to mandatory dairy assessments represented for dairy farmers. A particularly poignant glimpse of the position of the anti-checkoff challenger, Brenda Cochran, can be found in her on-line letters published under "Dispatches From Dairyland: A new voice from the raw edge of dairy disaster"[319] on the website for The New Farm. The letters describe the economic

[319] See Brenda Cochran, "Dispatches from Dairyland," The New Farm (November 18, 2002); available from http://www.newfarm.org/depts/dairyland_dispatches/print/111802.shtml; Internet; accessed 4 April 2003; and Brenda Cochran , "Dispatches from Dairyland," The New Farm (November 26, 2002); available from http://www.newfarm.org/depts/dairyland_dispatches/112602.shtml; Internet; accessed 16 March 2003.

experiences of the dairy farmer today that have prompted she and her husband to engage in legal action.

The challengers point of view in the mushroom challenge was obtained primarily through documents filed in connection with the *United Foods* case and a related predecessor administrative law case (*In Re: Donald B. Mills, Inc.*), for which the record was submitted with other lower court records for the U.S. Supreme Court review in the *United Foods* case. Documents that provided useful evidence included:

- Testimony of John Haltom, President of Pictsweet Mushroom Farms, on August 17, 1995, in *In Re: Donald B. Mills, Inc.*; Administrative Law Hearing , USDA;[320] and
- Affidavit of Donald Dressler, Executive Vice President of United Foods, filed on July 9, 1998, in *United Foods v. United States Department of Agriculture,* Case Nos. 96-1252 and 98-1082 in the United States District Court for the Western District of Tennessee.[321]

Web sites of groups opposing checkoffs furnished information that was highly useful in gleaning an understanding of their underlying interests. Among these were the following: R-CALF,[322] Livestock Marketing Association,[323] Center for Individual Freedom[324] and Erik Jaffe's legal services website.[325]

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[320] U.S. Department of Agriculture, Administrative Law Hearing, before Judge S. Bernstein, San Francisco, Cal., *In Re: Donald B. Mills, Inc.*, MPRCIA No. 95-1, Testimony of John Haltrom, 17 August 1995.
[321] Affidavit of Donald Dressler, *United Foods v. USDA* (W. Dist. Tenn.) (Nos. 96-1252 and 98-1082), filed 9 July 1998.
[322] See website for R-CALF, available from http://www.rcalf.com.
[323] See website for Livestock Marketing Association; available from http://www.lmaweb.com.
[324] See website for Center for Individual Freedom; available from http://cfif.org.
[325] See website for Law Offices of Erik Jaffe; available from http://www.esjpc.com.

Evidence Relative to Key Externalities

A wide scope of legal materials, testimony in Congressional hearings, scholarly articles and popular press materials were used to gain an understanding of the major political, economic and social influences acting upon the agricultural industry and contributing in some way to the checkoff conflict. Materials relating to U.S. agricultural policy, concentration, vertical integration, and commodity promotion and marketing were useful. Several key books traced with clarity, thoughtfulness and some urgency, the historical changes occurring in agriculture during the past few decades, including: *Hard Tomatoes, Hard Times* by Jim Hightower (1973), *The Corporate Reapers: The Book of Agribusiness* by A.V. Krebs (1992), and *Fatal Harvest: The Tragedy of Industrial Agriculture,* edited by Andrew Kimbrell. The individuals interviewed for this research were highly knowledgeable and, in addition to their individual contributions, provided a wealth of information on authors, academic scholars, industry and media representatives, government contacts and books and articles to use as resources.

Evidence That Provides Background for Case Law and Judicial Activity

Three areas of doctrine were pertinent to the research required to meet the objectives outlined in this dissertation. The first two related to doctrinal approaches for evaluating compelled commercial speech rights under the First Amendment, i.e., the commercial speech doctrine and the doctrine on freedom from compelled speech and association. The third area of importance was government speech, a concept that has been recognized in dicta as a principle having merit, but not yet molded by the Supreme Court into a clear doctrine.

The research required that each of these threads of law be explored in the context of the cases addressing compelled commercial speech. In addition, the researcher was required to scrutinize the judicial interests at stake and possible hegemonic relationships between the compelled speech decisions and the interests of the dominant groups in the checkoff hegemony (and the larger agricultural hegemony.) Based on these requirements, the evidence could be roughly grouped into:

1) case law and scholarly literature (law review articles, treatises, etc.) providing historical understanding of the three doctrinal areas;
2) case law, briefs and memoranda in past and pending cases, scholarly literature, interviews and publications focusing on judicial applications of these First Amendment doctrines and the government speech principle to the cases involving constitutional challenges of mandatory commodity fees; and
3) a collection of evidence providing social, political and economic context for the court decisions, including such things as:
   - public statements revealing background on the stated and unstated goals of the groups exercising hegemony;
   - evidence of underlying facts that were at odds with the reported opinions;
   - important developments related to key externalities (for example, the class action suit brought by cattle producers under the Packer & Stockyards Act to challenge the USDA failure to protect producers against the anticompetive business practices);
   - previous voting patterns of the U.S. Supreme Court justices on the issues in question;

- political and social environment for the time period of each case, including the year 2003 as the compelled commercial speech cases wind their way through the courts,
- agency activities in enforcing or failing to enforce rules,
- trends in economic policy, and
- other influences that might impact the decision-making of the federal and district courts and the U.S. Supreme Court.

The cases shown at Appendix B serve as a basic foundation for this analysis.

Evidence Pertaining to Consequences of Legal Outcomes

Objective nine required that the researcher gather evidence to analyze the legal and political consequences of different alternatives that the U.S. Supreme Court could choose in its next ruling on the constitutionality of the mandatory commodity assessments. The Supreme Court may hold that the checkoffs are: 1) constitutional when part of a broader regulatory scheme, but unconstitutional when they arise in stand-alone legislation; 2) unconstitutional as a violation of First Amendment rights because they do not pass any First Amendment analysis; 3) constitutional regulations not protected by the First Amendment; or 4) constitutional under a First Amendment exception to the First Amendment.

The interviews conducted in this study provided insight into the way each of the participants expected different outcomes to affect their own vested interests and the current environment. The researcher reviewed the consequences of each of the cases decided thus far to gather information on what similar or different consequences might

occur in future cases. A number of law review articles were helpful in identifying potential legal consequences.

The framework for this dissertation required the researcher to examine the consequences of the legal outcomes for agriculture, First Amendment doctrine and the public interest. A basic assumption was made that any of the possible outcomes would reflect elements of the Gramscian theory of hegemony, as the judicial decision making yielded advantages and disadvantages to those engaged in the war of position in the judicial arena.

CHAPTER 6

INDUSTRY CONDITIONS

A constitutional lawyer interviewed as part of this research, Erik S. Jaffe, was asked what is at stake for the parties in the cases dealing with challenges to mandatory commodity assessments. He replied, "Money. Well, both money and principle. Some people, like my clients, are doing this out of principle, and, in fact, likely contrary to their economic interests."[326] When asked whether there were other things going on in agriculture related to this conflict, he replied, "Of course there are. On the substance, it's about many things."[327]

Like a magnet, the cases have drawn in participants with a range of interests to advance and protect. One way to gauge the scope of interested parties is to examine the seven amici curiae briefs filed in *Glickman v. Wileman*, the 1997 Supreme Court case addressing the First Amendment challenge to tree fruit checkoffs. These "friends of the court" briefs were filed by groups as disparate as the AFL-CIO and the American Association of Advertising Agencies.[328]

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[326] Jaffee interview, 2.

[327] Ibid.

[328] The following four amicus briefs in support of Secretary Daniel Glickman were filed: 1) joint brief on behalf of individual states, including Arizona, California, Florida, Michigan, Nebraska, New Jersey, New York, Oregon, Vermont and Virginia; 2) AFL-CIO; 3) joint brief on behalf of National Association of State Departments of Agriculture, National Milk Producers Federation, and the National Cattlemen's Beef Association, Inc.; 4) joint brief on behalf of Washington State Apple Commission, Idaho Potato Commission, California Kiwifruit Commission, the Almond Alliance, California Stone Fruit Coalition and the American Mushroom Institute. Three briefs were filed in support of Wileman Brothers & Elliott, Inc., et al., including: 1) joint brief on behalf of American Advertising Federation, American Association of Advertising Agencies, Magazine Publishers of America, Direct Marketing Association, National Right to Work Legal Defense Foundation, Inc., Pacific Legal Foundation, Sun-Maid Growers of California, and Treehouse Farms, Inc.; 2) joint brief on behalf of United Sheep Producers and the U.S. Association of Importers of Textiles and Apparel; and 3) joint brief on behalf of Washington Legal Foundation and the Allied Educational Foundation. For summary listing of briefs with names of counsel of record, see First Amendment Center, Supreme Court Files for the 96-97 Term, *Glickman v. Wileman Bros. & Elliott, Inc.* 95-1184; available from http://www.freedomforum.org/fac/96-97/Glic_news.htm; Internet; accessed 5 April 2003.

By mining the evidence beyond the "money and principle" level, other substantive areas began to emerge as factors for prompting such a large number of plaintiffs to launch legal challenges at this time and so many interested parties to file briefs of amici curiae. Among these were shifting industry structures, branding and product differentiation strategies, threats to status quo that could arise through a change in First Amendment doctrine, and threats to the current balance of power and influence.

According to David Moeller, an attorney for the Farmer's Legal Action Group, Inc., in St. Paul, Minnesota, the source of the conflict is related to the interests being represented:

> I think, from the farmer's perspective, the conflict basically comes from whose interest at heart they [industry commodity groups] are representing. Are they representing family farmers who are trying to make a living on the land or are they representing the industrial model of agriculture, which includes not only factory farms, the short hand term, but also processors and other parts of the chain that don't have the family farmer's interest at heart?[329]

Secretary Daniel Glickman, Secretary of Agriculture from March 1995 to January 2001, characterized the checkoff challenges as follows:

> I think that it's true that most of these checkoff programs and the monies that are spent are viewed as kind of tools or pawns of the established interests within that community. So there's a lot of internal politics within the commodity communities between big and small. To some extent, these debates on the checkoff and promotional programs are part of a larger debate about the future of agriculture.[330]

Steven Vetter, editor of *Western Livestock Journal*, also viewed the checkoffs as pawns. He stated: "...I really think the checkoff has been used as a pawn in efforts to get under the skin of rival factions, if you will."[331]

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[329] Moeller interview, 1.
[330] Glickman interview, 1 .
[331] Vetter interview, 8.

Terry Stokes, Chief Executive Office of the National Cattlemen's Beef Association, identified the theme of change as an important factor for the checkoff dissatisfaction: " ...I do know that when you look at the changing industry structure that is occurring today as a result of many factors, I think the changes that are going on within the beef industry are drivers of some of the discontent as it relates to the response to change."[332]

A similar view was expressed by a producer and member of the Pork Board who also attributed the source of the checkoff conflict to change: "[I]t's about the changing landscape of rural America. And so farmers are lashing out wherever they can just to try to take some control."[333]

Another theme in the checkoff challenges is getting one's voice heard. A representative of the Cattlemen's Beef Board noted that the Charter case arose because the Charters "...refused to pay [checkoffs] so they could be given a forum to voice their opposition to NCBA on some public policy issues with which they disagree."[334] Jeanne Charter would agree with this assessment. She summarized why she and her husband got involved in the checkoff challenges: "It was basically that we felt that our money was going to our own destruction."[335] The checkoff lawsuit afforded a way for them to communicate their dissatisfaction with the checkoffs and the forced speech they entail.

A Powerful Hegemony Exercised by the Industrial Agriculture Bloc

Applying Gramsci's theory of hegemony, the various entities joined in social relation in the dominant group in agriculture may be seen as forming the "fractions" of an

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[332] Stokes interview, 3.
[333] Interview with anonymous pork producer and member of the Pork Board, 3-4.
[334] Interview with anonymous representative of the Cattlemen's Beef Board, 5.
[335] Charter interview, 3.

agricultural bloc comprised of government and civil society, similar to the historic bloc outlined by Gramsci. (Gramsci uses the word "fraction" to refer to an hegemonic class.) This bloc can be viewed as essential to exercising and maintaining a dominant hegemony in agriculture centered around the corporate or industrial agriculture model, a business model that has been widely adopted in the business community as a means to compete globally and serve the culture and ideology of American consumerism. This bloc will be referenced hereafter in this paper as the "industrial agriculture bloc" or "AgriBiz."

The "historic bloc" described by Gramsci refers to a unified group in which the bourgeoisie class and its allies organize and dominate an entire social structure. In the case of the "industrial agriculture bloc," large agricultural commodity producers that have become increasingly concentrated and vertically integrated are analogous to the bourgeoisie class. These commodity producers serve as central organizers of the industrial agriculture bloc with allies from within the state (e.g., the United States Department of Agriculture and the Justice Department), the media, academia, etc. The dominant commodity producers exercise hegemony through their agents, including the USDA, trade associations they have organized to further their commercial and political interests, and the checkoff commodity boards. AgriBiz (or the "industrial agriculture bloc") will continue to maintain or expand its dominant control in the current agricultural environment in the absence of a viable counter-hegemony or, as Galbraith would argue, in the absence of a legitimate countervailing economic power to prevent abuse and exploitation.

The checkoff programs have become an integral part of AgriBiz. They have impressively served the needs of the industrial agriculture bloc in strengthening the

connections between the political, business, agricultural and academic communities. Such programs have become an ideal tool for "organic intellectuals" to legitimize the activities and ideology of the agricultural hegemony. As noted in the literature review, according to Gramsci, organic intellectuals are those in various professional occupations who direct the "ideas and aspirations" of the dominant social group to which they belong.[336] In the agricultural hegemony of AgriBiz, the organic intellectuals provide homogeneity through their web of ideas supporting the dominant industrial agricultural model.

The checkoff programs require a wide range of organic intellectuals to be involved in: 1) developing economic, political and social justifications for the checkoff programs; 2) participating in interlocking networks of private and government intellectuals to administer the programs (including USDA employees, appointed boards and commissions, state agencies, trade associations providing services under contract, advertising agencies, etc.); 3) demonstrating the efficacy of the programs on an ongoing basis, including their relevance to other goals of the dominant hegemony (e.g., importance of checkoff dollars to developing international trade); and 4) using money gathered from outside the government coffers to advertise and promote the programs and recruit new support for the programs.

Opinions differ regarding whether commodity checkoffs in various industries have accomplished their stated purpose, namely increasing the demand for a commodity through promotion. Professor Ronald Ward expressed the strict position of an economist in stating during his interview : "[I]f the program [checkoff program] wasn't effective,

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[336] Gramsci, *Selections from the Prison Notebooks*, 3.

then it shouldn't exist."[337] Complex models of measuring the effectiveness of the programs have been developed to justify the programs in the eyes of the producers who carry the financial burden and to meet institutional requirements for periodic evaluation.

The conflict over checkoffs represents one prong of an effort by several fractions seeking to establish a new historic bloc and a counter-hegemony centered around an alternative agricultural model. But this group must effectively counter the value system of the industrial agriculture bloc that has been extensively promoted through political, economic and public relations efforts on a global scale. The diagram shown at Figure 5 visually represents the major global agricultural hegemony exercised by the industrial agriculture bloc in the outer ring and the efforts of the counter-hegemony to break through. The zone of conflict is the terrain where the crisis in agriculture is occurring in a variety of ways.

AgriBiz is generating themes and representations that reinforce the industrial agriculture model and the hegemony of the industrial agriculture bloc. Its agricultural ethics and goals are incorporated into trade policies, economic decisions regarding intervention in markets and enforcement of antitrust laws, decisions on genetically altered commodities, farm policy and, last but not least, USDA activities related to the checkoff programs. A thought-provoking 2002 book titled *Fatal Harvest: The Tragedy of Industrial Agriculture* identifies seven popular themes of AgriBiz, referring to them as "myths" and "corporate lies." Since the industrial agriculture bloc has been enormously successful in winning the consensus of the American people, these themes have acquired a legitimacy that makes them difficult to challenge. The primary themes (or myths)

[337] Ward interview, 3.



Figure 5 **Counter-Hegemony by Activist Groups and Public Seeking Sustainable Agriculture, Competitive Markets and Other Goals**

identified in *Fatal Harvest* include:

- Industrial agriculture will feed the world.
- Industrial food is safe, healthy, and nutritious.
- Industrial food is cheap.
- Industrial agriculture is efficient.
- Industrial food offers more choices.
- Industrial agriculture benefits the environment and wildlife.
- Biotechnology will solve the problems of industrial agriculture.[338]

The following additional ideas and themes advanced by the AgriBiz movement have also earned legitimacy:

- Concentrated operations increase efficiency and production.
- Globalization makes it imperative for companies to buy the best product at the lowest price on the global market at any given time.
- Sustainable prosperity for farmers.
- Investment in foreign markets is needed to export excess production and feed hungry populations.

As a key element of its hegemony, AgriBiz has won the general population over to the acceptance of the industrial business model (as adopted on a global scale) and vertical integration as the preferred ideology for the success of agriculture as an industry today. In fact, there are signs that the cost-benefit approach is persuading fractions within the industrial agriculture bloc and some segments of the public to accept the possibility that agriculture practiced in the U.S. under the old production paradigm is a

[338] See Andrew Kimbrell, ed., *Fatal Harvest: The Tragedy of Industrial Agriculture* (Washington: Island Press, 2002), 49-62.

"dead weight" on the economy. In other words, the only way in which the agricultural industry can economically justify its presence in the American economy is to demonstrate a major contribution to the gross domestic product (GDP) through competitive agribusiness operating with global inputs and selling to foreign markets. Economist, Steven C. Blank, an economist at the University of California, Davis, explored this concept in his article outlining the economic threats to American farming.[339]

Blank described the profit squeeze on American farmers by noting agricultural producers experienced a decrease of seven percent in the USDA's index of prices received for their output from 1990 to 2000 while experiencing an increase of nineteen percent in the USDA's index of prices paid for inputs.[340] His research supported a theory that American agriculture has moved up the farming food chain because "a falling world price ceiling and a steadily rising cost floor" have caused many farmers to shift from producing low-value annual crops to increasingly higher-value crops, such as annuals or perennials, in the quest for more profit.[341] Finally, the farmer must resort to an alternative income source as a better investment of his resources.

Blank concluded that all countries exhibit a pattern of climbing up the food chain as they develop so that the importance of agriculture in the gross domestic product declines. Agriculture is responsible for helping economies to grow in less-developed countries, but in developing nations, the economic return is greater when agricultural workers move to more profitable industries. However, other countries in the world must be able and willing to sell America a sufficient food supply in order for the country to

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[339] See Steven C. Blank, "A Portfolio of Threats to American Agriculture," *Contemporary Economic Policy* (October 2002): 381-393.
[340] Ibid., 383.
[341] Ibid., 384 -385.

totally cease supporting agriculture as a viable industry. He outlined the following possible scenario for countries at the top of the food chain:

> Eventually, some developed countries will choose to leave agriculture due to efficiency concerns—it, too, is an investment decision. At some point, it will be inefficient for a country to invest resources in agricultural production when more profitable investments will contribute to the nation's wealth (i.e., deadweight losses will occur if resources remain in agricultural production.) No country has reached that point yet, but several small Western European countries, Japan and the United States are getting close enough that the idea must be faced...Much of our labor, capital, and management resources that remain in American agriculture are there by choice but could be better invested elsewhere.[342]

In Blank's view, American agribusiness deserves recognitions for "taking a global perspective" with regard to price and cost strategies. He stated:

> Numerous examples exist of how American agribusiness is maintaining its boom by increasingly seeking out the least-cost sources of agricultural commodities. That means they are using strategic alliances, foreign direct investment, and other methods of securing foreign sources of the commodities they use as inputs into their processing and distribution industries...(citations omitted) By doing so, American firms guarantee American consumers a steady supply of food and speed the economic development of the countries supplying us. It is part of an expanding system of mutual dependence that will ensure an uninterrupted food supply.[343]

The United States now has only 1.3 percent of its population in the agricultural industry. According to Blank, government programs have kept certain segments of agriculture in business longer than the market would allow because the added premiums allow farmers to receive more than the global market price. He deemed such programs to be risk management tools for farms. He concluded: "An increasingly urban America

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[342] Ibid., 387.
[343] Ibid., 388.

has tired of subsidizing farmers and ranchers. Agriculture is losing its appeal as an investment for our nation."[344]

The Changing Face of the Checkoff Challenger

A comparison of the plaintiffs who have sought legal redress in the First Amendment cases already decided and currently winding their way through the courts shows that they are not a homogenous group. Erik Jaffe's interview reinforced the need to compare the commodity checkoff challengers in each of the five industries (beef, pork, fruit, mushrooms and dairy) and dispelled the notion that there is a single way to frame the checkoff conflicts for all five industries selected for this study. Jaffe's comments include the following:

> If you look at the different industries that have had fights over this, different industries have had different players fighting it.[345]
>
> You should try to figure out the structure of the industry and who benefits from the checkoff and why....You tend to have a different breakout of who's fighting on which side of the issue.[346]
>
> [W]hen you're looking at these checkoff programs, you should be precise about who pays the checkoff.[347]

In each of the commodities, there exists an "industry commodity bloc" that exercises hegemony over the industry. The groups serving the role as central organizers (analogous to Gramsci's concept of the bourgeoisie as central organizers of large social superstructures) differ for each commodity and may, in fact, be undergoing change. (For example, the grocery retailers are showing signs of supplanting the packers and processors as central organizers in the livestock industry.) Because the "industry

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[344] Ibid., 392.
[345] Jaffe interview, 2.
[346] Ibid., 2-3.
[347] Ibid., 3.

commodity blocs" are aligned with the USDA, the challengers have found that the courts offer them a new terrain to wage their "war of position" against the dominant hegemony.

The Livestock Checkoff Challengers. The search for key externalities influencing the conflict over checkoffs pointed overwhelmingly in one direction for two of the five commodities studied, beef and pork. Without a doubt, the most dominant theme throughout the interviews and resource materials used to study these commodities was the theme of crisis occurring through the rapid rate of concentration and vertical integration in the agricultural industry. It defined the parameters of a major ideological and political conflict in which First Amendment law regarding the constitutionality of the checkoffs has provided an additional forum of the courts for the challengers to advance their struggle against the political and economic power wielded by the groups who control the businesses and organizations benefiting from concentration and vertical integration. As a contributing factor, the globalization of agricultural markets is driving the accelerated pace of concentration and vertical integration.

In this hegemonic battle in the livestock industry, the face of the challenger has been the independent producer and small rancher who objects to his or her checkoff dollar being used to promote messages and interests that generate profits for the large processors, meat packers and retailers who control the industry farther up the food chain. The short-term goal of these challengers is to win the "battle for the beef bucks"[348] and recover more of their profits being siphoned off into the checkoff programs. Their larger goal is to create a countervailing power that will disrupt the hegemony of the "commodity industry bloc," and to ideally force change in the "industrial agriculture

[348] Lee Pitts, "Gone in a Mushroom Cloud," Triple A Livestock Report (undated); available from http://www.aaalivestock.com/pages/issues/iss_mush.html; Internet; accessed 6 May 2003.

bloc" by altering the relations of power that govern the organization of the commodity industries and markets.

Figure 6 illustrates the position of the small independent livestock producers (in the middle of the circle diagram) who are using the First Amendment legal actions in their counter-hegemony. They are pushing outward to break the checkoff hegemony, and, also, create an impact on the outer ring, the agricultural hegemony that includes the elements of concentration and vertical integration that are of paramount concern to this group.

The critical interests at stake for this group are to recapture a greater share of the profit stream by eliminating mandatory checkoff payments and to close off some of the ways in which the check-off generated benefits are being funneled to the checkoff hegemony and the agricultural hegemony. The ultimate interest at stake for the challengers is to find a way to improve their economic future in an industry that is now rewarding them with paltry profits, as evidenced by a drop in the food price index for major commodities of almost half in the forty years between 1960 and 2000.[349] Challengers are using an argument based in principle, claiming that it is unfair that they cannot exercise any control over speech that they are forced to fund. At the legal level, the challengers claim that the mandatory checkoff fees are a violation of their First Amendment rights to free speech under the First Amendment that guarantees: "Congress shall make no law...abridging the freedom of speech..." [350]

An executive of Livestock Marketing Association identifies the structure of the

[349] Carl F. Jordan, "Genetic Engineering the Farm Crisis and World Hunger," *Bioscience* (June 2002): 523-529, 523.
[350] U.S. Const., amend I.

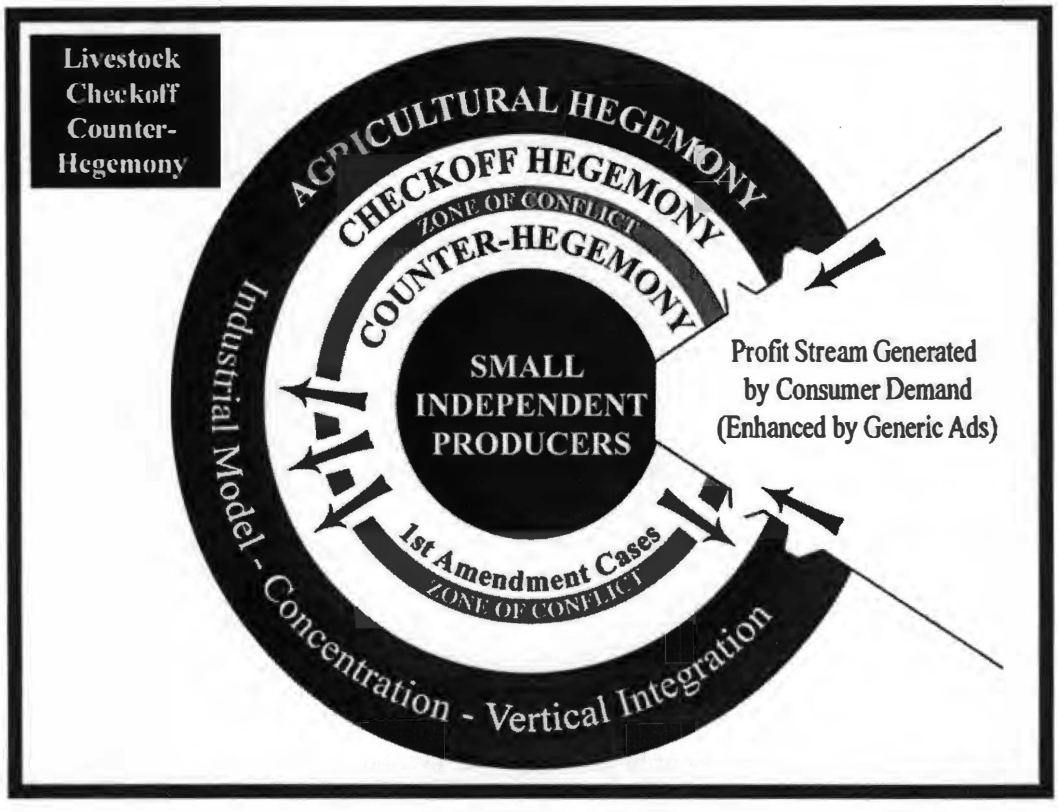


Figure 6 **Counter-Hegemony by Small Independent Producers in Livestock Industries Seeking to *Widen* Profit Stream Reaching Them**

beef industry as an underlying major factor in creating the environment for the checkoff legal actions. The LMA became active with its referendum challenge because of the following complaints received from its members:

1) Producers should have the right under a compelled, mandatory program to have some say about whether the program is doing right by them. "Those who pay should get a say."
2) The beef checkoff is not headed in the right direction.
3) The beef checkoff is not doing the producers any good. Producers are paying money for no return because the benefits are realized by segments of the industry farther upstream.
4) The trade association, National Cattlemen's Beef Association (NCBA), is getting most of the dollars, and the packers are too much in control of USDA.
5) Producers object to the absolute control exercised by the NCBA and the Cattlemen's Beef Board (CBB) over the programs.
6) The NCBA is advocating policies with which the LMA members do not agree.

The Mushroom and Tree Fruit Checkoff Challengers. In contrast to the livestock industry, the First Amendment checkoff challenges arising in the mushroom and fruit industries resonate with branding and product differentiation themes. The challengers in these cases are some of the largest producers in their industries who seek to differentiate their products through high quality, customized service and branding. An example is Gerawan Farming, one of the largest tree fruit growers in the world[351] that

[351] U.S. Congress, House, Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, Hearing on Taxpayers Defense Act, Testimony of Dan Gerawan, 106th Congress, 1st sess., 19 July 1999.

has been involved in challenging checkoff legislation for the past 15 years.[352] Gerawan has implemented sophisticated marketing and advertising programs to inform and persuade consumers to buy their unique commodity products. Strategies it has adopted to distinguish its fruit include quality-enhancing methods in the areas of cooling, transportation, and air handling (use of optimal temperatures and controlled atmospheric gases in storage facilities to extend the shelf life of fruits after harvest).[353]

These large fruit and mushroom growers have argued that the substantial fees they pay for commodity checkoffs and the generic advertising generated by these mandatory fees are highly detrimental in undermining their individual advertising because: 1) they must still invest in their own advertising to promote their branded or unique products and counteract the message that all of the respective products are homogenous, so they pay twice for advertising, which reduces resources available for further promotions or business investments, and 2) the generic advertising promulgates an inaccurate message that all the products in their industries are homogenous, a message that strictly benefits competitors.

The mushroom challengers in the *United Foods* case also further argued that an increase in demand for a homogenous mushroom product would reduce their market share due to the structure of the industry. Growers sell through three different channels: 1) whole fresh mushrooms to wholesalers or retailers, 2) lower quality mushrooms to processors, such as Campbell's and Giorgio, and 3) discounted mushrooms to

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[352] Dennis Pollack, "Growers Get Chance to Influence Feds," The Fresno Bee (March 28, 2003); available from http://www.fresnobee.com/local/agriculture/v-print/story/6459850p-7404311c.html; Internet; accessed 5 April 2003.

[353] See U.S. Department of Agriculture, Administrative Law Hearing, before Judge S. Bernstein, San Francisco, Cal., *In Re: Donald B. Mills, Inc.*, MPRCIA No. 95-1, Testimony of John Haltrom, 17 August 1995; available from http://www.usdoj.gov/osg/briefs/2000/3mer/2mer/2000-0276.mer.ja.html; Internet; accessed 5 April 2003.

processors of last resort, which could include a company such as Monterey or Campbell's. With greater demand, growers who sell to processors and processors of last resort would switch to selling fresh mushrooms.[354] In addition, the challengers objected to advertising that promoted mushrooms as aphrodisiac and associated them with wine drinking. Their final objection was to exemptions in the Mushroom Marketing Act that allowed all smaller mushroom producers who grow less than 500,000 pounds of mushrooms a year to avoid paying the checkoff fees.[355]

As major industrial agriculture players using advanced technology and sophisticated strategies for branding and advertising, the challengers in the tree fruit and mushroom cases are aligned with the "industrial agriculture bloc." They also appear to be central organizers of commodity production and the structure of their respective industries, playing a key role in the exercise of hegemony in their "commodity industry blocs." However, the commodity industry blocs for these industries do not appear as strong as in the case of the livestock industries. The large commodity producers have not joined in exercising hegemony over the checkoff programs, which may explain why the USDA does not seem to have joined them as an ally.

The challengers in the tree fruit and mushroom cases are not seeking to establish countervailing power that will change the relations of commodity production in their industry or create an alternative commodity industry bloc. On a broader scale, they are not challenging the "industrial agriculture bloc." They would simply like to break the checkoff hegemony for the sole reason of increasing their profits and strengthening their power as a fraction within the "commodity industry bloc." This is an example of the

[354] Ibid.
[355] Ibid.

conflicts that can occur within a hegemonic group as fissures develop due to conflicting interests, and a fraction within a dominant bloc negotiates for power. The interests of the large producers selling branded products in these industries are deeply at odds with the interests of others in the hegemony who are supporting generic advertising and its economic benefits to all the players, i.e., trade associations, the commodity boards, the government and the academic specialists who are all pursuing goals related to generic product advertising.

The diagram in Figure 7 shows that the position of challengers in the tree fruit and mushroom industries as part of the agricultural hegemony and their counter-hegemony launched through the First Amendment checkoff cases to attack the checkoff programs. The critical economic interest at stake for them is to try to capture more of the profit stream that is flowing to the small generic commodity producers. They can do this by successfully eliminating their checkoff payments and using the money to expand their advertising programs to differentiate their branded, higher-value products and services from the generic producers. More of the profit stream will be funneled off in the first ring and the amount reaching the generic producers will be significantly narrowed. A legal ruling that commodity checkoffs are unconstitutional would ensure that no dollars are diverted to support the checkoff hegemony.

At the level of principle, the challengers in the tree fruit and mushroom industries would like the freedom to use their advertising dollars to engage in speech that supports only their branded products, the special features of those products and the quality services offered in connection with those products. The testimony of John Haltom, president of

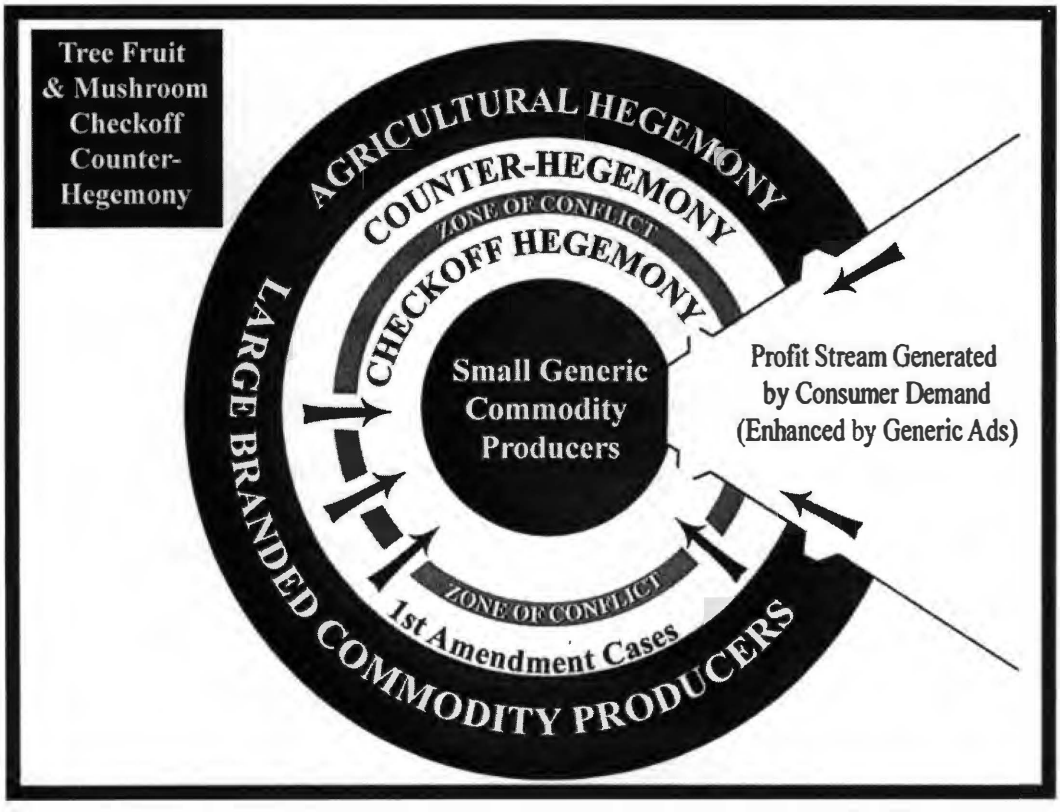


Figure 7 **Counter-Hegemony by Large Branded Commodity Producers in Tree Fruit and Mushroom Industries Seeking to *Narrow* Profit Stream Reaching Small Generic Commodity Producers**

Pictsweet Mushroom Farms (a subsidiary of United Foods) showed that he did not believe the checkoff programs would work in an industry such as fresh mushrooms where the products are not homogenous and are sold to a regional market. Pictsweet has sought to increase sales through its own local advertising of its premium mushrooms, in-store promotions and direct distribution of products to retailers.

The checkoff dollars in this industry are also used for regional advertising in direct competition with Pictsweet's branded advertising. Other than Campbell's (a national operation) and Monterey Mushrooms (a semi-national operation with farms in Tennessee and Texas), all other mushroom growers do not benefit from targeted generic advertising in other regions. Pictsweet stands to gain nothing when the generic advertising occurs in its region (thereby creating a false message that all mushrooms are homogenous) or when it occurs in another region (in which case it would be superfluous.)[356]

Haltrom's position included two other points. He asserted that processors and smaller mushroom growers should not be exempt from the checkoff payments since they also stood to benefit if the checkoff program was a success. He also disagreed with the message of a Valentine's promotion for mushrooms purporting mushrooms to be aphrodisiacs on the grounds that this was in poor taste.[357]

At the legal level, the tree fruit growers have claimed in various cases that the forced payment of checkoff violated their First Amendment right under the commercial speech doctrine (i.e., that the statutory regulations do not pass the *Central Hudson* test)

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[356] Ibid.
[357] Ibid.

and/or that such regulations are a violation of the First Amendment right to be free from compelled speech or compelled association under the *Abood* and *Keller* line of cases.

The U.S. Supreme Court decision in the tree fruit checkoff case of *Glickman v. Wileman* in 1997 led to a much different result than the Supreme Court ruling four years later in the mushroom challenge case of *United States v. United Foods*. As discussed earlier in this dissertation, the Court upheld the fruit checkoff program in the *Glickman* case on the grounds that it was part of a larger regulatory scheme and struck down the mushroom checkoffs in the *United Foods* case because the government failed to show that the checkoffs were germane to the purpose of the Mushroom Act.

One strong similarity in both cases is that the faces of the challengers were large scale growers who felt a negative impact on their branding and marketing strategies from the checkoffs. One difference is that the checkoffs in the *Glickman* case were implemented through marketing orders as part of a marketing scheme and the checkoffs in *United Foods* arose through stand-alone legislation. This is a critical difference, leading the mushroom growers to prevail in breaking the hegemony of checkoffs in their industry by securing a favorable ruling in *United Foods,* while the tree fruit growers in *Glickman* failed.[358]

Ironically, the *United Foods* case, which was brought by a dominant mushroom

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[358] The outcome of the *Glickman v. Wileman* case led one plaintiff, Gerawan Farming, Inc., to file a malpractice suit against Mr.Thomas A. Campagne, the lawyer who argued the case before the U.S. Supreme Court. Gerawan had originally retained Campagne, a generalist with a small practice in Fresno, California, but asked him to defer to Michael W. McConnell, a Constitutional law specialist with experience before the Supreme Court. After Campagne refused to step aside, both he and McConnell filed counsel-of-record forms to present oral argument before the Supreme Court. The Clerk of the Court resolved the dispute by flipping a coin to determine who would deliver the argument, and Campagne won. It was the opinion of the president of Gerawan Farming, Inc. that Campagne woefully failed in his representation. Gerawan's lawsuit against Campagne under the California legal malpractice statute raised interesting issues. See Krista M. Enns, "Can a California Litigant Prevail in an Action for Legal Malpractice Based on an Attorney's Oral Argument Before the United States Supreme Court?" *Duke Law Journal* 48 (October 1998): 111-146.

grower (the third largest in the United States)[359] to seek relief from being forced to subsidize advertising messages benefiting smaller growers, became the lightning rod for cases brought by smaller independent hog and cattle farmers and ranchers in the beef and cattle industry. The small producers in these cases rallied against use of the checkoffs they claimed provided benefits only to the large producers, the meat packers and processors, the retailers and agribusiness.

The Dairy Checkoff Challengers. A close look at the checkoff challenges in the dairy industry reveals challengers with different faces and sharply different interests. For purposes of this dissertation, the focus will be on the political, economic and legal aspects of three key dairy cases: *Gallo Cattle Company v. California Milk Advisory Board and Ann Veneman,*[360] *Nature's Dairy v. Glickman,*[361] and *Cochran v. USDA.*[362]

Joseph and Brenda Cochran, plaintiffs in a pending case in Pennsylvania, are independent milk producers who do not belong to a farm cooperative. Instead, they choose to sell their milk to a dairy owned by an individual proprietor.[363] They differentiate their product from the homogenous (or standard) milk promoted and sold nationwide because of their farming methods and they object to paying for generic advertising that merely competes with their individualized efforts. It is also apparent that certain parts of the dairy industry are experiencing a crisis of concentration and vertical integration. So the underlying economic and political factors inherent in the dairy conflict have elements found in all four of the other commodity conflicts covered by this

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[359] See Testimony of John Haltrom, 17 August 1995.
[360] *Gallo Cattle Company v. California Milk Advisory Board and Veneman,* 185 F.3d 969 (9th Cir. 1999).
[361] *Nature's Dairy v. Glickman,* No. 99-439, 1999 U.S. App. LEXIS 3547 (6th Cir. 1999).
[362] *Joseph S. Cochran and Brenda S. Cochran v. Ann Veneman,* No. 4:CV-01-0529, 2003 U.S. Dist. LEXIS 4361 (Middle Dist. Penn. 2003).
[363] Chochran interview, 6.

study (beef, pork, mushroom and fruit). Evidence showed that industry structure for dairy differs according to the region of the country, the cooperative arrangements and the different dairy commodities (cheese, fluid milk and others).

This was confirmed by Brenda Cochran (dairy farmer and challenger in the dairy checkoff cases), who stated: "You are quite correct in picking up the fragmentation of our producers in the industry on style of production, style of management, style of marketing options, different regionalistic issues that seem to be continuing to divide us."[364]

Dairy importers now must pay a promotion fee on all imported dairy products under the 2002 Farm Act. As a consequence, they were seen as likely in 2003 to become the next dairy checkoff challengers, claiming that they should be exempt from the checkoffs because they already pay a tariff. They will be seeking to break the checkoff hegemony so they can strengthen their position in the dominant "commodity industry bloc"controlling the U.S. dairy industry.

Precipitating Conditions for Beef and Pork Checkoff Challenges: Industry Concentration and Vertical Integration

Asked what he would do with the millions he'd just won in the state lottery, Farmer Jones scratched his chin and answered, "Oh, I suppose I'll just keep on farming till it's all gone."[365]

Secretary of Agriculture Daniel Glickman, delivered testimony on September 28, 2000, at a hearing of the Antitrust, Business Rights and Competition Subcommittee of the Senate Judiciary Committee. He stated:

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[364] Cochran interview, 4.
[365] Ashton Applewhite, William R. Evans, III, Andrew Frothingham, *And I Quote* (N.Y.: St. Martin's Press, 1992), 227.

> Consolidation and concentration in agriculture is an extraordinary critical issue facing agriculture because it threatens the foundation of rural America. The effects of concentration on family farmers and independent producers have been a dominant issue in agricultural policy for some time. Recently, however, rapid transformation in agricultural markets has generated increasing concern, and complaints that family farmers and independent producers, particularly in the livestock industry, do not have open and fair access to those markets. As a result, many small farmers believe they are being forced to compete at a disadvantage. This consolidation is taking place across broad agricultural sectors – transportation, the grain industry, livestock, and even biotechnology.[366]

The shift to increased consolidation, coupled with declining farm profits in the last two decades, set the scene for a contentious relationship between the ever-expanding mass of those supporting the industrial model for agriculture and those feeling exploited and disenfranchised by their inequitable position in the production chain. The first group, referenced herein as the "industrial agriculture bloc" or AgriBiz, is comprised of fractions primarily from agribusiness, large producers, government, academia and trade associations. The second group, referenced herein as "AgriChoice," seeks to challenge the status quo by building a counter-hegemony and consensus in its own oppositional movements. Its goal is to construct an alternative political force (or agricultural bloc) founded on political and ideological positions, such as sustainable agriculture, respect for the environment and community and social returns. Changes in the agricultural industry arising from increased industry concentration and vertical integration have implications for smaller independent farmers and ranchers, in particular, so they are an important fraction in this historic bloc.

The evidence indicated that the agricultural industry is experiencing what Gramsci called a crisis of hegemony:

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[366] U.S. Congress, Senate, Committee on the Judiciary, Antitrust, Business Rights and Competition Subcommittee, Testimony of Daniel Glickman, 28 September 2000.

> A crisis occurs, sometimes lasting for decades. This exceptional duration means that uncurable structural contradictions have revealed themselves...and that, despite this, the political forces which are struggling to conserve and defend the existing structure itself are making efforts to cure them without certain limits, and to overcome them. These incessant and persistent efforts...form the terrain of the conjunctural and it is upon this terrain that the forces of opposition organize.[367]

As might be expected, the people who have taken a strong stance against the commodity checkoff programs belong to the AgriChoice group. The pressures created by industry concentration and vertical integration are explicitly recognized by many as an overwhelming catalyst for the First Amendment checkoff challenges in the courts.

The language used to describe the increasing level of concentration ranged from strident and alarmist on the part of the coalitions objecting to checkoffs to a bare whisper of acknowledgement in some government publications.

At one end of the spectrum was Mike Callicrate, a beef producer in Kansas who viewed vertical integration as follows:

> ...the problem is the alliances that the NCBA [National Cattlemen's Beef Association] promotes take away market power from the producer and essentially forces them into these supply chain arrangements much like chicken farmers have experienced for years....Complete vertical integration where the producer becomes usurped and a slave in the supply chain only to consume his asset and go bankrupt whenever he can't find a job on a farm providing enough income to offset his losses. It is so wrong. The NCBA has been hijacked by the big packers and retailers...The problem is "however the packer votes, so goes the big cattle feeders."[368]

Callicrate denounced the role of the USDA:

> The USDA is not our friend. USDA does what the big meat packers and retailers ask them to do. It is the government agencies that have just castrated the United States government and their ability to enforce these antitrust laws...I don't know what the government is trying to get done. My answer to this is we just need a whole lot more buyers...We need enough buyers so that they can't sit around the

[367] Gramsci, *Prison Notebooks*, 179 (quoted in *The Politics of Thatcherism*, 23).
[368] Callicrate interview, p. 2.

> darn table together and fix the price. We have packers right now that are just fixing prices and cooperating rather than competing. IBP [Iowa Beef Processor] opens up the market every week by shooting everybody in the foot. The other packers follow. It is the most anti-competitive situation you can imagine.[369]

The Corporate Agribusiness Research Project (CARP) has monitored corporate agribusiness from a public interest perspective to "serve family farmers, farm workers and consumers in their struggles for economic and social justice."[370] It focused a critical eye on corporate agribusiness operations, claiming:

> In another erea, they would have been called 'the robber barons.' Today, the ADMs [Archer Daniel Midlands], the Cargills, the ConAgras, the IBPs [Iowa Beef Processors], the Smithfield Foods, the Tysons, the Chiquitas and other corporate agribusiness behemoths which produce and manufacture our food have become the merchants of greed.[371]

CARP argued that corporate agribusiness has "deified the cost benefit analysis" at the expense of the common good.[372] It raised the specter of a family farm system at the brink of being swallowed by agribusiness in a wave of concentration orchestrated by the "merchants of greed":

> Thus, we have arrived at a point where our family farm system of agriculture is facing its dark night of the soul, standing now on the threshold of eradication. Throughout the 1980s we saw an ever-mounting numbers of farm bankruptcies, foreclosures, and forced evictions reap a grim "human harvest" of suicides, alcoholism, divorce, family violence, personal stress, and loss of community.
>
> Continuing into the 1990s we witnessed the very economic and social fabric of rural America being ripped asunder as the control of our food supply was seized by those merchants of greed whose purpose is not to feed people, or provide jobs, or husband the land, but simply to increase their cash flow and reduce their transactional costs in order to placate their excess-profit-obsessed institutional investors.[373]

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[369] Ibid, p. 3.
[370] Corporate Agribusiness Research Project, home page; available from http://www.electricarrow.com//CARP; Internet; accessed 1 April 2003.
[371] "The Merchants of Greed," Corporate Agribusiness Research Project; available from http://www.electricarrow.com/CARP/tiller/index.html; Internet; accessed 1 April 2003.
[372] Ibid.
[373] Ibid.

The AgriChoice viewpoint has been repeatedly voiced in Congressional hearings. Michael Stumo, a former Iowa hog and cattle buyer who is now a lawyer employed by the Organization for Competitive Markets, gave particularly ominous testimony before a hearing held by Senator Richard Lugar on agriculture concentration and enforcement of the Packers and Stockyards Act:

> I come before you today with a sense of urgency. This is not just another farm crisis. This is the 'end game' of independent, family farm agriculture. The crux of the issue is industry structure. There are tremendous amounts of money being made in the food industry. The farm sector is not receiving that money because of the oligopsonistic [buyer shared monopoly] meat packers and the oligopsonistic retailers have positioned themselves to capture the bulk of that profit. Thus, high retail margins, high packer margins, and the end of the family farm....How did we get here? First the meat packers consolidated horizontally. Now they are appropriating the food chain vertically. If packers own or control livestock, there is no independent livestock agriculture. Period.[374]

On May 17, 2001, Peter Carstensen, George H. Young-Bascom Professor of Law at University of Wisconsin Law School, provided testimony on concentration and competition in agriculture before the Senate Appropriations Subcommittee on Agriculture, Rural Development and Related Agencies. He described the longstanding history of "frequent abuses of temporary market dominance and unacceptable efforts to exploit information or strategic advantage."[375] He emphasized that the Packers and Stockyards Act (PSA) was enacted to eliminate purely anticompetitive conduct in the market as well as control the unfair conduct of the packers. Suspect market structure and conduct is not being addressed by the USDA or Grain Inspection and Packers and

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[374] U.S. Congress, Senate, Agriculture, Nutrition and Forestry Committee, Hearing on Agriculture Business Concentration, Testimony of Michael Stumo, 1 February 2000.

[375] U.S. Congress, Senate, Senate Appropriations Subcommittee on Agriculture, Rural Development and Related Agencies, Hearing on Competition and Concentration in Agriculture, Testimony of Peter C. Carstensen, 17 May 2001 1 February 2000; available from http://www.antitrustinstitute.org/recent/120.pdf; Internet; accessed 7 July 2003.

Stockyards Administration (GIPSA), however, a major failing that has been repeatedly brought to the public conscience. He pointed out the abuses that can occur through contracts of adhesion and an inoperative price reporting system:

> Left to their own devices, the large buyers will, as the Attorney General of Oklahoma has opined, force contracts of adhesion onto farmers and ranchers. For example, such contracts often deny the producer access to the courts and at the same time impose unfair and inequitable arbitration terms that effectively deny the producer all recourse. Confidentiality clauses keep farmers and ranchers from sharing information that would make them more concentrated. The fact would seem to require special regulations to ensure equitable treatment of sellers in such markets. Yet GIPSA has done and is apparently doing nothing to provide basic regulation for any market. Market facilitating legislation is long overdue and this committee should insist that GIPSA get on with the task.[376]

Professor Carstensen concluded:

> There is a manifest need for effective regulation of the livestock markets to ensure efficiency, fairness and equity in light of the high concentration and resulting incentives to engage in strategic conduct. The public record fully documents the existence of serious problems concerning both fairness and equity in these markets...Given the dramatic changes in the ways in which livestock are sold, it is striking that the Department [of Agriculture] and GIPSA have totally failed to exercise the rule making authority that they possess to craft appropriate, market facilitating regulations to govern the new methods of buying and selling livestock.[377]

Jeanne Charter is a plaintiff in a major checkoff lawsuit and a voice for the independent rancher. She identifies vertical integration as an underlying issue dividing the agricultural industry for fifteen or twenty years. The following exchange took place in an interview with Jeanne Charter in February 2003:

> Interviewer: Well, the differences between your thinking and some of the more dominant groups' interests, are they longstanding? They go back since you've been involved?

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[376] Ibid, 17.
[377] Ibid.

> Jeanne Charter: "Yeah, they're longstanding with us, 15, 20 years. The basic difference has been over whether the industry should stay organized in their own competitive markets or go into a vertically integrated structure." [378]

In a government report released in September 2001 titled *Food and Agriculture Policy: Taking Stock for the New Century,* the government ignored these topics. The report set forth the Bush administration's farm policy principles with vague references to improving the infrastructure, such as: "The infrastructure that supports market growth and efficiency, which includes everything from border inspection services to research endeavors, must be renewed and reoriented to fit today's realities, with input and cooperation from every link in the food chain."[379] The report acknowledged only briefly the negative implications of concentration in the industry in a single paragraph:

> While this structural change clearly is advantageous for some, it also prompts concerns about competition, market access, and the use of market power by some participants to the disadvantage of others. Moreover, reduced competition could limit society's gain from structural change by stifling innovation or tilting the market's results in favor of those with the greatest market power.[380]

There were no negative implications noted in connection with vertical integration. The report merely stated: "Globalization of markets pressure firms to be more competitive and to 'shorten the supply chain,' streamlining the system (eliminating transactions and their associated costs) to efficiently meet rapidly changing consumer demand."[381]

Other reports by the government shed light on how it is approaching the concentration and vertical integration issues. Incredulously, one Congressional Research

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[378] Charter interview, 1.
[379] United States Department of Agriculture, *Food and Agricultural Policy: Taking Stock for the New Century* (Washington, D.C.: GPO, September 2001), 27-28.
[380] Ibid., 21.
[381] Ibid., 27.

Service Report referred to the severe impacts of anticompetitive practices as "quality-of-life issues." The report began:

> Many issues associated with concentration and consolidation, such as job loss, change in ownership structure, and other quality-of-life issues, are not addressed by antitrust laws, but it is these quality-of-life issues that often are the driving force behind calls for stronger regulations and law enforcement in agriculture.[382]

There are clear policy implications for the government's continued acquiescence in the current tolerance for concentration in the agricultural sector. It implies a government facilitating the status quo.

Moving to the pro-checkoff end of the spectrum, Terry Stokes, President of the National Cattlemen's Beef Association, provided his acknowledgement of the issues raised by consolidation and described the situation:

> It is a philosophical divide that is occurring in the industry today as it relates to the free market system versus government intervention, free trade versus a protectionist approach....[383]
>
> I think there is concern within the entire industry about consolidation that is occurring at various levels. An example of that would be you have four meat packers that harvest about 80 percent of total production. You also have growing consolidation in the retail segment. There is concern by some that there is less return or when you look at the farm-to-retail spread, there is less of that dollar that is going back to the cow/calf producer. Based on that particular data, that seems to be a concern.
>
> The question becomes do you correct the situation, for example, in the packing segment by putting restrictions upon meat packers or do you facilitate more competition within that segment? Last year, we had a debate, and we will have to debate it again this year, over legislation that would ban meat packers from owning cattle and feed yards. There is a group within the industry that wants to have that legislation, and there are those who don't because those who don't feel

[382] Jerry Heykoop, "Merger and Antitrust Issues in Agriculture: Statutes and Agencies," CRS Report for Congress (May 21, 2002), CRS-1.
[383] Stokes interview one, 4.

> like it's a restriction on the free market system and it would be detrimental to the industry. The other group thinks it would facilitate competition." [384]

Stokes' frank acknowledgement of the divisions existing within the various sectors of beef production were in contrast to a general refusal by much of the dominant industrial agriculture bloc to recognize the existence of serious issues related to industry concentration and vertical integration.

It was the opinion of a representative from the Cattlemen's Beef Board that the threat of integration should be distinguished from the checkoff issue. The representative clarified this position as follows:

> That's [the threat of integration] a policy issue. That's not a checkoff issue. But it's one of the changes in the industry that does lead to anxiety. And I think it underlies a lot of the legal challenges. But, oddly enough, the checkoff is not responsible for the formation of those alliances, nor has it done anything to encourage them.[385]

This same individual also recognized the divisions within the cattle industry in the following comment: "In our industry, there are a number of conflicts, the conflicts between producers and packers, between segments of the industry, and between organizations. It gets pretty complex."[386]

A secondary theme, intertwined with the impact of concentration and vertical integration,was the shift to global food markets. Various fractions within AgriBiz have driven the move toward a borderless food production and distribution system with inputs and outputs based solely on economics and profitability. National corporations, adept at operating within this paradigm, have furthered this shift. This theme has implications for the beef industry because the small independent producers believe that imported foreign

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[384] Stokes interview two, 11-12.
[385] Interview with anonymous representative from the Cattlemen's Beef Board, 14.
[386] Ibid., 17.

beef is "supplanting domestic production and acting to suppress market prices obtained by United States cattle producers."[387]

If the move toward concentration and globalization in agriculture follows the trend of other industries, there is every reason to believe that, without a change in the balance of political and economic forces, transnational agricultural corporations will dominate. In describing the transnational capitalist class, Leslie Sklair, defined "transnational" as referring to "forces, processes and institutions that cross borders but do not derive authority and power from the state."[388] He noted that transnational corporations are "owned by shareholders and controlled by Boards of Directors who can be citizens of any country. The prime responsibility of these Boards is to make the company as profitable as possible with no specific privileges extended to their states of origin."[389]

Sklair's description of transnational corporations and their global role suggested that agricultural transnational corporations may become or already have become the central organizers for the "industrial agriculture bloc," a socio-political-economic bloc whose allies now include numerous agents of the state. Evidence suggests that fractions of the "industrial agriculture bloc" within the United States government are quietly negotiating away some of the national economic base for the various "commodity industry blocs" that currently exercise hegemony within their respective industries. This has occurred because allies of the transnational corporations who are negotiating trade agreements appear willing to sacrifice the economic interests of various "commodity

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[387] Brief of Appellees at 16, *Livestock Marketing Association, et al. v. USDA. et al. v. Nebraska Cattleman, Inc., et al.*, (8th Cir. 2002) (Appeal Nos. 02-3769 and 02-2832), filed October 7, 2002.
[388] Leslie Sklair, *The Transnational Capitalist Class* (Malden, MA: Blackwell Publishers, 2001), 2.
[389] Ibid.

industry blocs" (and perhaps the economic interests of the nation) to strengthen the power of the transnational corporations in the "industrial agriculture bloc."[390]

Sklair summarized the argument of his book, *Globalization: Capitalism and its Alternatives*, as follows:

> The argument of this book is that the most important global force at the beginning of the twenty-first century is the capitalist global system. Transnational corporations provide the material base for a transnational capitalist class that unquestionably dictates economic transnational practices, and is the most important single force in the struggle to dominate political and culture-ideology transnational practices.[391]

He emphasized the importance of the "culture-ideology" of consumerism:

> "[H]ow those who own and control the transnational corporations harness the transnational capitalist class to solidify their hegemonic control of consumerist culture and ideology, is the site of the many struggles for the global system. Who will win and who will lose these struggles is not a forgone conclusion."[392]

As noted earlier, the central organizing group in the "industrial agriculture bloc" is comprised of large commodity producers (agribusiness). As food markets increasingly become global and mergers and acquisition occur across borders, these commodity producers will likely become transnational with businesses that cover chemicals, biotechnology, food production and distribution and other related areas. (The alliances are referred to by William Heffernan as "food chain clusters.")[393] These clusters have already begun to assume control as the organizing force in the industrial agriculture bloc. Clearly, the hegemony exercised within the agricultural industry has been and will continue to be influenced by the role of large transnational agribusiness organizations

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[390] See generally, Leslie Sklair, *Globalization: Capitalism and its Alternatives* (Oxford: Oxford University Press, 2002).
[391] Ibid., 9.
[392] Ibid.
[393] Heffernan, 3-4.

pursing strategies of increased concentration and vertical integration.

The First Amendment challenges to the checkoffs represent a strategy for the beef and pork producers to regain the dollars that are currently being paid to fund industry programs that they claim fail to provide them with benefits and, in fact, are counter to their interests. It also represents the use of the legal system as a means for building counter-hegemony and gaining power in the broader agricultural conflict between AgriBiz and AgriChoice. The diagram shown as Figure 8 illustrates how the livestock industry structure does not allow benefits to flow back to producers. An indication of the diminished bargaining position of the producers and feeders can be seen in the lack of profits in the sales from the U.S. livestock sector to the U.S. beef and pork sectors, but growing profits at the next stage in which the processors, packers and grinders sell to wholesalers and retailers. The diagram also reflects the impact of imported beef and pork.

Without market power, the sales made by the livestock sector to the beef and pork sectors allow little or no profit. The second sale made to the consumers is where the benefits of any generic advertising will be realized. As long as the livestock producers have no bargaining power, more sales at zero profit or a loss will not benefit them. The adage used by the dominant industrial agriculture bloc "a rising tide floats all ships" becomes "a rising tide floats all yachts."

Precipitating Conditions for Fruit and Mushroom Checkoff Challenges: Branding and Product Differentiation

The anti-checkoff forces in the legal battles over mandatory assessments in the fruit and mushroom industries are the large growers who are seeking to maximize the

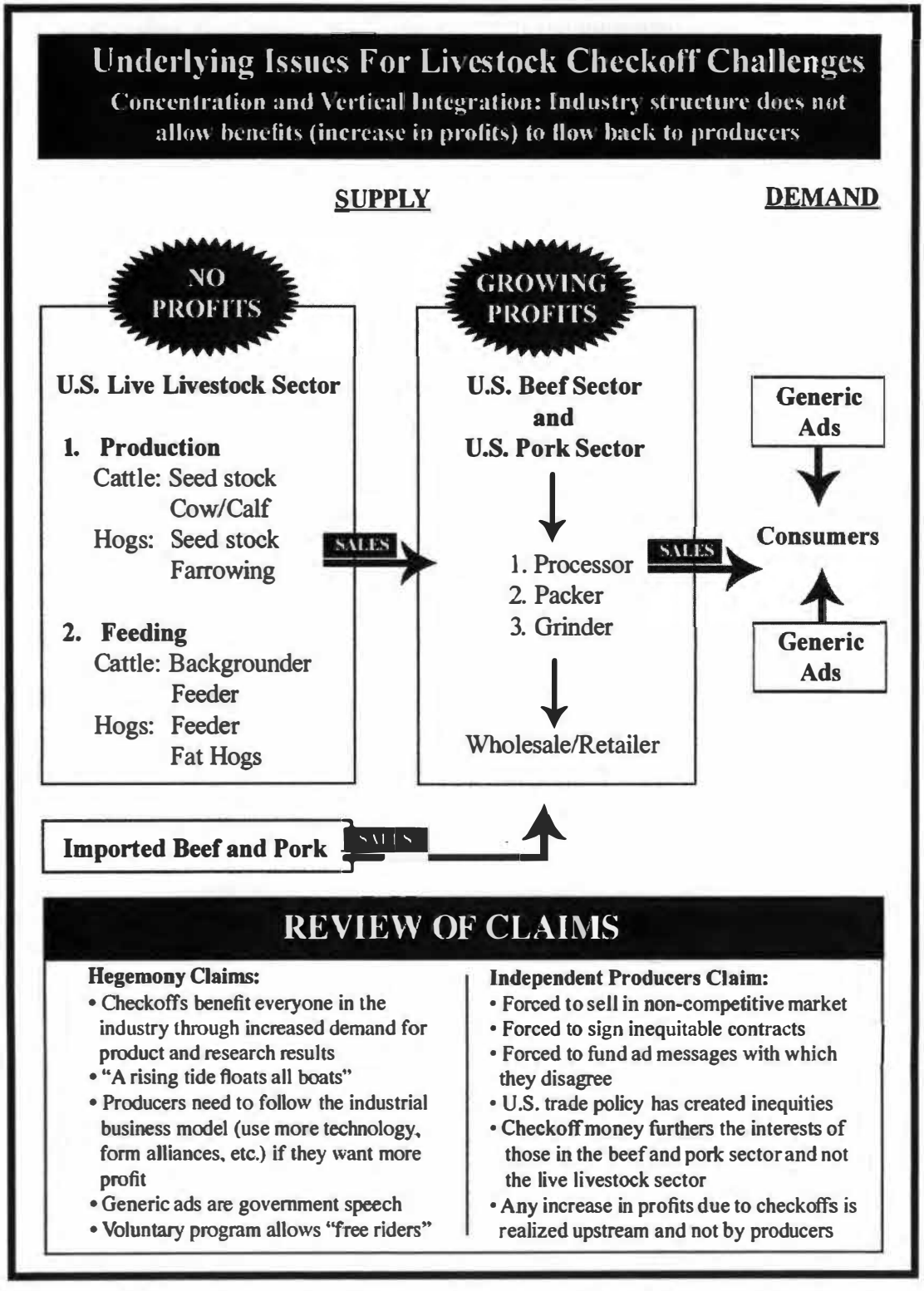


Figure 8 **Key Economic and Policy Issues Underlying Livestock Checkoff Challenges**

benefits of advertising their uniquely different and branded products. The diagram shown as Figure 9 illustrates an industry structure in which the anti-checkoff challengers find that mandatory fees undercut their marketing efforts. The challengers in these industries are sophisticated, large commercial production organizations who seek to increase their market shares by coaxing consumers to buy their branded products or recognizably high-quality products in place of generic products. Any increase in their market shares will likely come at the expense of the generic commodity growers or producers of other branded products. In either case, the net results of generic advertising are negative for growers of products that are notably distinguishable by superior features and/or a strong level of brand recognition acquired through extensive brand advertising.

The mushroom and tree fruit industries illustrate the tension that exits between the goals of generic commodity producers and those promoting and selling products through branding and the advertising of unique product features. However, given the trend toward increased use of brands for all commodities, this tension may become more apparent in the livestock and dairy industries. Once full-scale branding occurs in those industries, the generic promotion of homogenous products may become an idea that has outlived its usefulness, even for the larger agribusiness enterprises. However, if the checkoff dollars can be captured by larger corporate interests for promotional efforts or research efforts that enhance their own brands and products, the programs may still offer strategic value to those entities.

Mix of Conditions in Dairy Checkoff Challenges

Three dairy checkoff cases will be considered in this dissertation. All are lower court cases since no dairy checkoff case has come before the Supreme Court. The first is

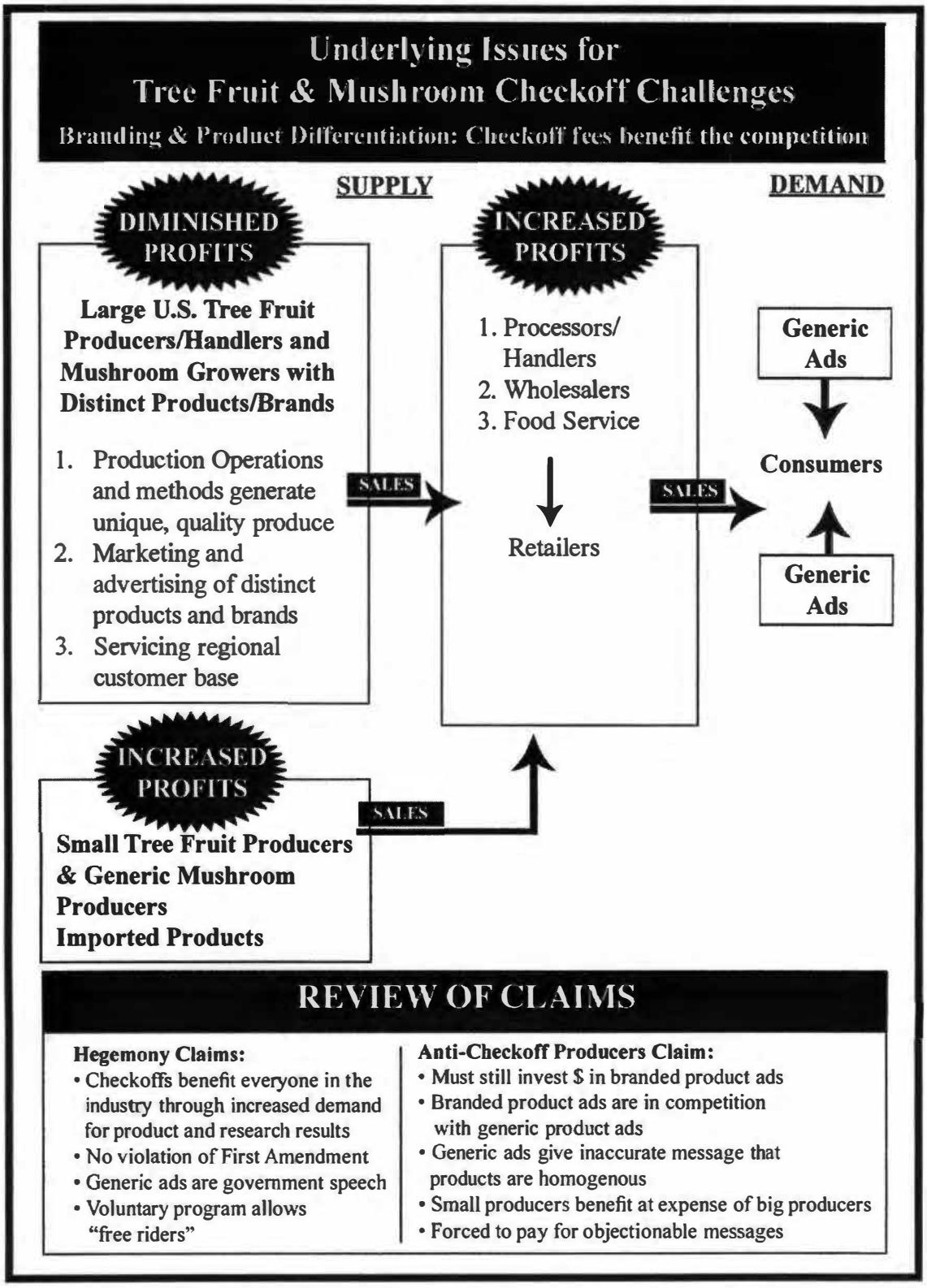


Figure 9 **Key Economic and Policy Issues Underlying Tree Fruit and Mushroom Checkoff Challenges**

a 1999 case decided by the Ninth Circuit Court of Appeals, *Gallo Cattle Company v. California Milk Advisory Board and Veneman.*[394] A Sixth Circuit Court of Appeals case, *Nature's Dairy v. Glickman,*[395] was also decided in 1999 and a Pennsylvania District Court provided an opinion in *Joseph P. Cochran, et al. v. Ann Veneman, et al.*[396]

The chart shown as Figure 10 outlines the three cases and highlights the underlying issues for each. The challengers in the first two cases were unsuccessful in persuading the courts to strike down the dairy checkoffs. The plaintiffs in the first case, *Gallo Cattle Co. v. Ca. Milk Advisory Board and Veneman*, were large companies within the agricultural hegemony that have characteristics similar to the tree fruit checkoff challengers. They are motivated to fight the checkoff hegemony in order to achieve greater returns for their branding and product differentiation programs. In the case of *Nature's Dairy v. Glickman*, the challengers are among the largest dairy producers in the United States and are, therefore, a major force within the agricultural hegemony. Their goal in challenging the checkoff programs is purely profit.

The Cochrans, plaintiffs in the third case, *Cochran v. Veneman*, fit the profile of the small independent ranchers and farmers fighting the checkoff hegemony in the livestock industry. They describe themselves as committed to the goals of sustainable agriculture, fair pricing, the right to be free from compelled speech under the Constitution and the right to engage in independent farming practices not dictated by a milk cooperative. Hence, the checkoff lawsuit in which they are involved symbolizes a bundle of issues with one aim—to fight the large agricultural hegemony that they see as a

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[394] *Gallo,* 185 F.3d 969 (9th Cir. 1999).
[395] *Nature's Dairy,* No. 99-439, U.S. App. LEXIS 12720 (6th Cir. 1999).
[396] *Chochran, et al.*, 2003 U.S. Dist. LEXIS 4361 (Middle Dist. Penn. 2003).

Case Name/Description of Plaintiffs	Underlying Issues
Case #1: ***Gallo Cattle Co. v. Ca. Milk Advisory Board and Veneman*, 185 F.3d 969 (9th Cir. 1999)** Court upheld the checkoff program in an addendum revising its earlier ruling that the program violated Gallo's First Amendment rights. Plaintiff is a large California dairy operation (once the nation's largest dairy farm) that uses 100 % of its milk to produce cheese. Gallo promotes and sells premium, award-winning cheese under the label "Joseph Farms." Its cheeses are distinguishable from other cheeses.	***The underlying issue is branding and product differentiation.*** Checkoff fees pay for a generic advertising program that uses "Real California Cheese" on a seal applied to products and the slogan "It's the Cheese." Gallo objects to the generic message because Gallo's cheeses are superior and distinguishable. Placing the compelled message on Gallo's product falsely portrays its product as the same as others. Checkoff program hamstrings progressive agriculture.
Case #2 ***Nature's Dairy v. Glickman*, No. 99-439, 1999 U.S. App. LEXIS 3547 (6th Cir. 1999)** Court upheld the dairy checkoff program, finding it similar to the regulatory scheme in *Glickman*. Plaintiffs include seventeen huge commercial dairy operations (the largest in the nation). All plaintiffs represented by lawyer, Ben Yale, who represents Cochrans in case #3.	***The underlying issue is strictly desire to increase profit.*** These large dairies want to increase their profits by avoiding any checkoff payments. Large producers do not feel the checkoff promotion program is needed. Other than the legal argument that free speech rights have been violated, plaintiffs voice no other opinions regarding issues that might be related to their checkoff challenges.
Case #3: ***Cochran v. Veneman*, No. 4: CV-01-0529, 2003 U.S. Dist. LEXIS 4361 (Middle Dist. Penn. 2003)** Court upheld the checkoff program based on an analysis under *Glickman*. Plaintiffs are a N.Y. couple who run a family dairy operation of 150 head of cattle with three sons. Plaintiffs are part of a dairy counter-hegemony movement. Plaintiffs are represented by Ben Yale, also counsel for the commercial dairy farms in Case #2.	***There are multiple underlying issues:*** Generic advertising does not represent the interests of the challengers. Milk pricing system is manipulated and inequitable. Concentrated commercial dairy farm operations have gained industry power and favor with the government. Competition from imported dairy products (e.g., "milk protein concentrates" or MPCs) has eroded market for U.S. dairy products. USDA misrepresents data and restricts access to data.

Figure 10 Diverse Plaintiffs in Dairy Checkoff Challenges and Underlying Issues

crippling influence on agriculture today. The district court upheld the checkoffs, so Cochrans have filed an appeal with the Third Circuit Court of Appeals.

Brenda Cochran described the farmer's perspective on the dairy checkoff:

> I just have to say on behalf of most dairy farmers I associate with, the constant erosion of our economic strength through years and years and years of insane milk prices makes any "deduct" [for mandatory checkoffs] on a milk check a further stifling of our ability to reorganize and react to what we feel are unfair powers exerted against us in the marketplace...That's why we're looking to the Constitution to level the playing field, so to speak. The Constitution, under proper scrutiny, will be upheld.[397]

As can be seen by the checkoff cases, the dairy industry has several different types of producers functioning under different regulations depending on geographic location and product category. The industry also has highly sophisticated and concentrated cooperatives that have been perceived as a major negative force in the dairy farmers' struggle for an equitable marketing environment.

According to Brenda Cochran, the diverse characteristics of the milk producers create disadvantages, but the checkoff issue has prompted some unity.

> You are quite right in picking up the fragmentation of our producers in the industry on style of production, style of management, style of marketing options, different regionalistic issues that seem to be continuing to divide us. So, we are definitely an industry of division. And that has been one of our weaknesses at least in the political forum. It's often used against us in personal meetings with congressmen and senators. They will point to what appears to be tremendous disagreement between regions and dairy farmers on how to best solve these problems. This is something I think that we have moved into a positive zone on. But I do think this case [the Cochran dairy checkoff case], this challenge, does speak more generally to many different type producers than say some of the other pricing issues.[398]

Brenda and Joseph Cochran were unable to see any benefits from the dairy checkoff programs. Brenda Cochran summed it up by saying: "[T]he only benefit I see to

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[397] Cochran interview, 3.
[398] Ibid., 4.

generic dairy commodity checkoffs is to processors and ultimately retailers((if they can be seen as part of the picture) because they're moving more finished product..[399] The Cochrans and other commodity producers interviewed in this study are keenly aware of the subordinate position of the producer at the bottom of the food chain in the industrial agriculture model. Brenda Cochran referred to a "class struggle" that she first recognized in the form of hostility toward farmers in the 1980s under the Reagan administration. The privileged class or group in commodity production is the industrial agriculture bloc organized by the processors and the retailers. The hegemony this bloc exercises allows it to dominate milk producers of all sizes, creating tension and impetus for the challengers to seek out new issues (the diary checkoff program) and new terrain (the courts) for counter-hegemony. It is noteworthy that the checkoff challengers in the *Gallo Cattle* and *Nature's Dairy* cases were large milk producers dissatisfied with the checkoff system.

[399] Ibid, 8. This assessment from one of the farmers in the trenches reinforces the idea presented in this paper that the dominant hegemony is being organized by agribusiness to support and further its dominance.

CHAPTER 7

CHASING THE CHECKOFF FEE: EXPLORING THE INTERESTS AND POLITICAL AND ECONOMIC ACTIONS OF THE PLAYERS

The Investigative Frame

This analysis used the investigative frame presented earlier in this dissertation at Figure 4 as a tool for gathering and organizing key evidence and findings for further analysis. This frame required the researcher first to identify the entities involved in the commodity checkoff conflicts. Once the entities were identified, the investigative frame guided the researcher in locating evidence that provided an understanding of the general history of each entity and its actions, the interests at stake for such entity, the principles espoused by that entity and, finally, the legal positions that the entity has asserted in furtherance of its objectives.

This section explores the evidence as it relates to all areas within the investigative frame with the exception of the Federal and State judiciaries. A separate legal investigation frame will be used to study the Federal and State judiciaries in chapter seven.

The preliminary list of entities shown in the investigative frame proved to be correct, namely: 1) Federal and state agencies, 2) political parties and elected officials, 3) industry trade associations and agricultural commodity promotion boards, 4) commodity producers defending hegemony, 5) commodity producers challenging hegemony, and 6) activist groups seeking free speech and other goals. However, the evidence showed that clearly the industry trade associations referenced in item three should be acknowledged as falling within two groups – those supporting checkoffs and alternative organizations

started by those against checkoffs. In addition, the evidence established that six additional entities play roles in influencing (or attempting to influence) the ongoing conflict between pro-checkoff and anti-checkoff forces: the media, agribusiness (corporations whose business revolve around agriculture), advertising agency associations, the AFL-CIO, and academic specialists whose work and source of funding aligns them with either the dominant hegemony or the anti-checkoff challengers.

The final list of entities that were relevant in this study are shown in Table 2.

Federal and State Agencies. The primary agency with responsibility for administering the checkoff programs is the Unites States Department of Agriculture. Founded by Abraham Lincoln in 1862 as "The People's Department,"[400] it is an agency of immense size today, ranking third in the civilian departments of the U.S. Government[401] with a host of employees throughout the United States and 60 countries numbering more than 100,000. Its operations are broken into the following seven mission areas: 1) Rural Development; 2) Farm and Foreign Agricultural Services; 3) Food, Nutrition, and Consumer Services; 4) Food Safety; 5) Natural Resources and Environment; 6) Research, Education, and Economics; and 7) Marketing and Regulatory Programs.[402] Several functional units, under the direct authority of the Secretary of Agriculture, provide umbrella services to all of the USDA in matters related to administration, communications, economics, finances and legal issues[403]

USDA's responsibilities in overseeing mandatory commodity assessments fall

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[400] U.S. Department of Agriculture, *Agriculture Fact Book 2000*, (Wa. D.C.: U.S. Government Printing Office, 2000), v (foreward by Daniel Glickman).
[401] Ibid., 49.
[402] Ibid.
[403] Ibid.

Table 2 Key Entities or "Fractions" Involved in Commodity Checkoff Conflicts

Entities (Gramsci referenced as "Fractions")	Pro-Checkoff (Defending Hegemony)	Anti-Checkoff (Opposing Hegemony)	Neutral
Federal and State Agencies	X		
Political Parties and Elected Officials	X (Majority)	X (Minority)	
Industry Trade Associations Aligned with Hegemony	X		
Industry Trade Associations Aligned with Counter-Hegemony		X (A prominent example is R-Calf for cattle producers)	
Agricultural Commodity Boards	X		
Commodity Producers Defending Hegemony	X		
Commodity Producers Opposing Hegemony		X	
Activist Groups 1) First Amendment Free Speech Groups, 2) Legal Coalitions, 3) Grass Roots Farm Activist Groups, and 4) National Coalitions for Agricultural Change		X	
The Media	X	X	X
Agribusiness	X		
Advertising Agency Associations	X		
AFL-CIO	X		
Academic Specialists Aligned with Hegemony	X		
Academic Specialists Aligned with Counter-Hegemony		X	

within the auspices of the Marketing and Regulatory Programs. The Agricultural Marketing Service (AMS) is charged with administering the research and promotion programs for thirteen industries, including: beef, pork, cotton, fluid milk, dairy products, eggs, honey, mushrooms (only mushroom research programs are carried out using checkoff dollars in the wake of the *United Foods* decision), potatoes, soybeans, watermelons, popcorn and peanuts.[404]

Individual authority is given to the Secretary of Agriculture to appoint members of the commodity boards, and the AMS interacts with the boards. Its staff facilitates the oversight of the commodity checkoff programs. The staff member at the Agricultural Marketing Service responsible for the livestock industry is Barry Carpenter. He reports to Kenneth Clayton, who reports to A.J. Yates, acting administrator of the Agricultural Marketing Service.

The enforcement of the commodity checkoff programs and their legal defense in First Amendment actions challenging such programs on constitutional grounds is carried out by the Office of the General Counsel at USDA and the United States Justice Department. The activities of both agencies are funded by budget appropriations in the Federal budget derived from U.S. taxpayer dollars.

Daniel Glickman offered the following opinion on the USDA's position on checkoff programs: "...I think USDA has always been a strong supporter of the promotion programs. Look, most of these were created by statute, not all of them, but most of them. And that means Congress has gone on record in favor of them."[405]

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[404] Ibid., 230-231.
[405] Glickman interview, 5.

There is evidence that the USDA is cross-pollinated with individuals who have been active professionally in commodity boards or associations, agribusiness, academic projects or consulting projects paid for and aligned with the dominant pro-checkoff hegemony. A closer look at the current leadership roster for USDA shows the following professional crossovers:

- **Ann M. Veneman, Agriculture Secretary** – Secretary Veneman was sworn in to this top position on August 9, 2002. Her background at the USDA included service from 1986 to 1993 in positions at USDA's Agricultural Service (1986-1989), Deputy Under Secretary for International Affairs and Commodity Programs (1989-1991), and USDA Deputy Secretary (1991-1993). She served as Secretary of the California Department of Food and Agriculture from 1995 to 1999. Between her years of state and federal government service, Veneman worked as an attorney with a legal services and lobbying firm in Washington, D.C. (1993-1995) and with a firm in Sacramento, California (1999-2001.[406]

  International trade is a top priority for Veneman, Her interest in this area was enhanced by her experience as a U.S. negotiator in major trade policy discussions during the past decade. Veneman is widely viewed as an advocate of agribusiness and a "biotech absolutist," a perception that was reinforced when she made the following declaration at an agricultural conference at University of California in 1999: "We simply will not be able to feed the world without

[406] See "Agriculture Secretary Ann M. Veneman," United States Department of Agriculture (March 2002); available from http://www.usda.gov/agencies/gallery/veneman.htm; Internet; accessed 14 June 2003.

biotechnology."[407] She served on the board of directors of Calgene Inc., the biotechnology company that introduced the first genetically engineered food on the market, the Flavr Savr tomato produced with fish genes. Later, she became a director at Monsanto when it aquired Calgene. She also served on the International Policy Council, a trade group formed and funded by agribusiness enterprises such as Cargill, Nestle, Kraft and Archer Daniels Midland.[408]

- **Dr. Charles Lambert , Deputy Under Secretary for Marketing and Regulatory Programs** – Prior to joining USDA on December 2, 2002, Dr. Lambert was employed by the National Cattlemen's Beef Association for more than fifteen years in various capacities. His final position at the trade association was as chief economist.[409]
- **A.J. Yates, Administrator of the Agricultural Marketing Service** - A.J. Yates began his service at the USDA in September 2001. His background includef a career in state government at the California Department of Food and Agriculture (CDFA). Beginning in 1991, Yates served five years as Deputy Secretary of the CDFA and three years as Undersecretary. He left in January 1999 for a two-year

[407] "Bush's Corporate Cabinet, Ann Veneman, Secretary of Agriculture," MultiNational Monitor (May 1 2001); available from http://multinationalmonitor.org/mm2001/01may/may01bushcc.html; Internet; accessed 15 June 2003. Also see John Nichols, "Meet Ann Veneman—Perhaps Bush's Most Dangersous Cabinet Pick," Madison Capital Times, published online at Common Dreams NewCenter , ¶ 4 (January 15, 2001); available from http://www.commondreams.org/views01/0115-04.htm; Internet; accessed 15 June 2003.

[408] Ibid.

[409] See "Biographical Sketch: Dr. Charles 'Chuck' Lambert," United States Department of Agriculture (November 7, 2002); available from http://www.usda.gove/agencies/gallery/lambert.htm; Internet; accessed 21 March 2003.

stint in private business as a senior marketing consultant for Panagraph Marketing Solutions in Fresno, California, before joining the USDA.[410]

- **Dale Moore, Chief of Staff** – In February 2001, Dale Moore joined USDA as chief of staff to Secretary Ann Veneman. He worked for the National Cattlemen's Beef Association as executive director for legislative affairs for three years prior to beginning his job at USDA. He is the member of Secretary Veneman's staff cited most often in the press (and in the interviews for this research) as being closely aligned with the industrial agriculture bloc working in favor of agribusiness and against the interests of independent farmers. As legislative director of the Committee on Agriculture at the U.S. House of Representatives from 1995 to 1996, he was involved in Congressional work on the 1996 Farm Bill. Prior to that, he held staff positions on the House Agricultural Committee and performed three years as minority counsel for the House Agriculture Committee's Subcommittee on Department Operations, Research and Foreign Agriculture (1991-1993). He began his career working six years from 1985 to 1991 as the agricultural legislative assistant for U.S. Representative Pat Roberts from Kansas, now a U.S. Senator from Kansas.[411]
- **Alison Harrison, Deputy Director of Communications and Press Secretary** – Alison Harrison was appointed to this position on October 12, 2001, after fifteen years of employment with the National Cattlemen's Beef Association (NCBA).

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[410] See "Biography: A.J. Yates, Administrator, Agricultural Marketing Service," United States Department of Agriculture (September 2001); available from http://www.ams.usda.gov/admin/YatesBio.htm; Internet; accessed 21 March 2003.

[411] See "Biography, Dale Moore, Chief of Staff," United States Department of Agriculture (February 2001); available from http://www.usda.gov/agencies/gallery/moore.htm; Internet; accessed 21 March 2003.

Harrison's responsibilities as Executive Director of Public Relations for the NCBA included managing the organization's media and public relations initiatives as part of its consumer marketing and public policy strategies.[412]

- **Donna Reifschneider, Adminstrator of USDA's Grain Inspection, Packers and Stockyards Administration (GIPSA)** – Reifschneider joined the USDA on April 2, 2002. She has held various positions in the livestock industry, including: executive committee member of the Meat Export Federation (1999-2002), president of the National Pork Producers Council, chair of the Pork Quality Assurance committee (1992-1998) and chair of the Pork Food Safety committee (1995-1998) and member of the Pork Trade committee (1999 to present).[413]

Reifschneider's past employment with the Meat Export Federation and her position as president of the National Pork Producer's Council have caused critics to question her commitment to protect the rights of the independent pork producers under the Packers and Stockyards Act (PSA). Anticompetitive practices by the meatpackers have been ignored by GIPSA during Reifschneider's term (as well as during past administrations). A class action lawsuit, *Pickett v. IBP*,[414] brought under the PSA was scheduled for trial in January 2004. The plaintiffs have challenged the captive supply arrangements of the meatpackers and have alleged that they have unlawfully suppressed prices. The challengers have publicly stated:

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[412] See "Veneman Names Alisa Harrison As Deputy Director of Communications and Press Secretary," News Release, United States Department of Agriculture (October 12, 2001); available from http://www.usda.gov/news/releases/2001/10/0197.htm; Internet; accessed 21 March 2003.
[413] "Veneman Selects Donna Reifschneider as Administrator of GIPSA," News Release No. 0130.02, United States Department of Agriculture (April 2, 2002); available from http://www.usda.gov/news/releases/2002/04/0130.htm; Internet; accessed 21 March 2003.
[414] *Pickett et al. v. IBP, Inc.*, Civil No. 96-A-1103-N (Dist. Ct. MD Ala.).

> The packers have succeeded in convincing USDA and the Congress that captive supplies are merely a natural change in the industry...They will not be able to use campaign contributions and K Street lobbyists to influence the decision of the jury that will hear this case. If the jury rules for cattlemen, it will be the most significant event in the cattle industry since the federal government broke up the packer-cartel in the early 1920's.[415]

Several of those interviewed for this study seriously questioned whether Donna Reifschneider could be an effective administrator in enforcing the PSA, given her alignment with the dominant hegemony in past employment. In the end, GIPSA's complete failure to represent the interests of farmers in enforcing the PSA against abusive captive supply practices has resulted in the counter-hegemony's choice to bypass Reifschneider's agency and use the court's for their war of position. Regardless of the outcome, Reifschneider's name will be linked with the first class action lawsuit ever under the PSA to challenge anticompetitive practices of the meatpackers—primarily the result of GIPSA's failure to act in its enforcement capacity.

- **Dr. J.B. Penn, Under Secretary, Farm & Foreign Agricultural Services** – Dr. J.B. Penn assumed his position at USDA in April 2002, after pursuing a career in the private sector for many years as an agricultural economist. He worked for Sparks Companies, Inc., from 1988 to 2002, serving as vice president and manager of their Washington office for more than twelve years before joining the USDA. (Sparks is an agricultural and commodity market research, analysis and consulting firm based in Memphis, Tennessee.) Penn had earlier experience in

[415] "OCM's Cattlemen's Competitive Market Project Applauds Favorable Decision in Cattle Price Manipulation Case," Organization for Competitive Markets (April 11, 2003); available from http://www.competitivemarkets.com/news_and_events/PR.Pickett.041103.htm; Internet; accessed 22 May 2003.

the private sector as president of Economic Perspectives, Inc. from 1981 to 1988 and held several government positions early in his career as deputy administrator for economics with the USDA Economics and Statistics Service and senior staff economist for the President's Council of Economic Advisors. Penn is the author of *Agricultural and Food Policy* (fourth edition) and numerous articles and other publications.

Jeanne Charter, an outspoken critic of the USDA and a plaintiff in a beef checkoff case, described the connection between the National Cattlemen's Beef Association and the USDA as being:

> ...kind of like snakes mating, you can't tell where NCBA ends and the USDA begins in the beef industry. It's almost a truism with people passing back and forth, either being a government bureaucrat or an industry bureaucrat. That part of the question of the future character of the industry is how intertwined it is with public agencies.[416]

The evidence suggests the existence of a loose community of agricultural elites who move between government, industry and academia performing leadership roles. The anti-checkoff challengers argue that these are crossover artists who sing the same song wherever they are professionally located. They remain mouthpieces for the pro-commodity groups rather than neutral parties seeking to serve the public interest.

David Moeller stated: "I think there are industry ties in a lot of what USDA does, and I think that drives their policy."[417] Mike Callcrate succinctly stated: "The USDA is industry. There is a revolving door from industry to the USDA and back again."[418]

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[416] Charter interview, 4.
[417] Moeller interview, 2.
[418] Callicrate interview, 9.

In short, the evidence suggest that the United States Department of Agriculture, the administrative organizations that carry out services under the checkoff programs and the industry trade groups speak with one voice (or at least sing in harmony).

Political Parties and Elected Officials. The legislators who are in positions to most likely influence the commodity checkoff programs are the senators who are active on the Committee on Agriculture, Nutrition and Forestry for the Senate and the and members of the House of Representatives who serve on the Committee on Agriculture for the U.S. House of Representatives. At present, the following individuals provide leadership on these committees:

- Senator Tom Harkin (Democrat, Iowa) – Former Chairman and ongoing ranking Democratic member of Committee on Agriculture, Nutrition and Forestry, U.S. Senate;
- Senator Thad Cochran (Republican, Mississippi) – Chairman, Committee on Agriculture, Nutrition and Forestry, U.S. Senate;
- Senator Richard G. Lugar (Republican, Indiana) – Foreign Relations Chairman, Committee on Agriculture, Nutrition and Forestry, U.S. Senate (forfeited position of highest-ranking Republican on the committee when he became Chairman of Foreign Relations);
- Congressman Larry Combest (Republican, Texas) – Departing Chairman, Committee on Agriculture, U.S. House of Representatives (retiring, effective May 2003);

- Congressman Bob Goodlatte (Republican, Virginia) – Incoming Chairman, Committee on Agriculture, U.S. House of Representative (effective May 2003); and
- Congressman Charles W. Stenholm (Democrat, Texas) – Ranking Democratic Minority member, Committee on Agriculture, U.S. House of Representatives.

John Kingdon offered insight into the process of decision making by congressional representatives in his book titled *Congressmen's Voting Decisions.*[419] Especially useful is a decisional flow chart that Kingdon used to model how representatives make decisions regarding proposed bills or amendments based on a series of considerations.[420] Kingdon's model, shown herein as Figure 11, sheds light on how legislators and government decision makers have approached proposals for change related to industry concentration and the checkoff fees. Specifically, Kingdon's model identifies a number of key points in the decision-making process where the industrial agriculture bloc can exercise hegemony to influence on the behavior of the legislator or a government official These are points of pressure for AgrBiz to win consent.

The first pivotal question is whether the proposal is controversial. Issues that are noncontroversial are easy for the legislators to handle. They simply vote along with the predominant view on the issue (Kingdon calls it "voting with the environment.")[421] However, if the proposal is controversial, the congressional representative then will then determine whether there is conflict among actors within his or her "field of forces" consisting of his constituents, fellow congressmen, lobbyists, academics, industry

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[419] See John W. Kingdon, *Congressmen's Voting Decision* (Ann Arbor, Mich: The University of Michigan Press, 1989).
[420] Ibid., 244.
[421] Ibid., 243.

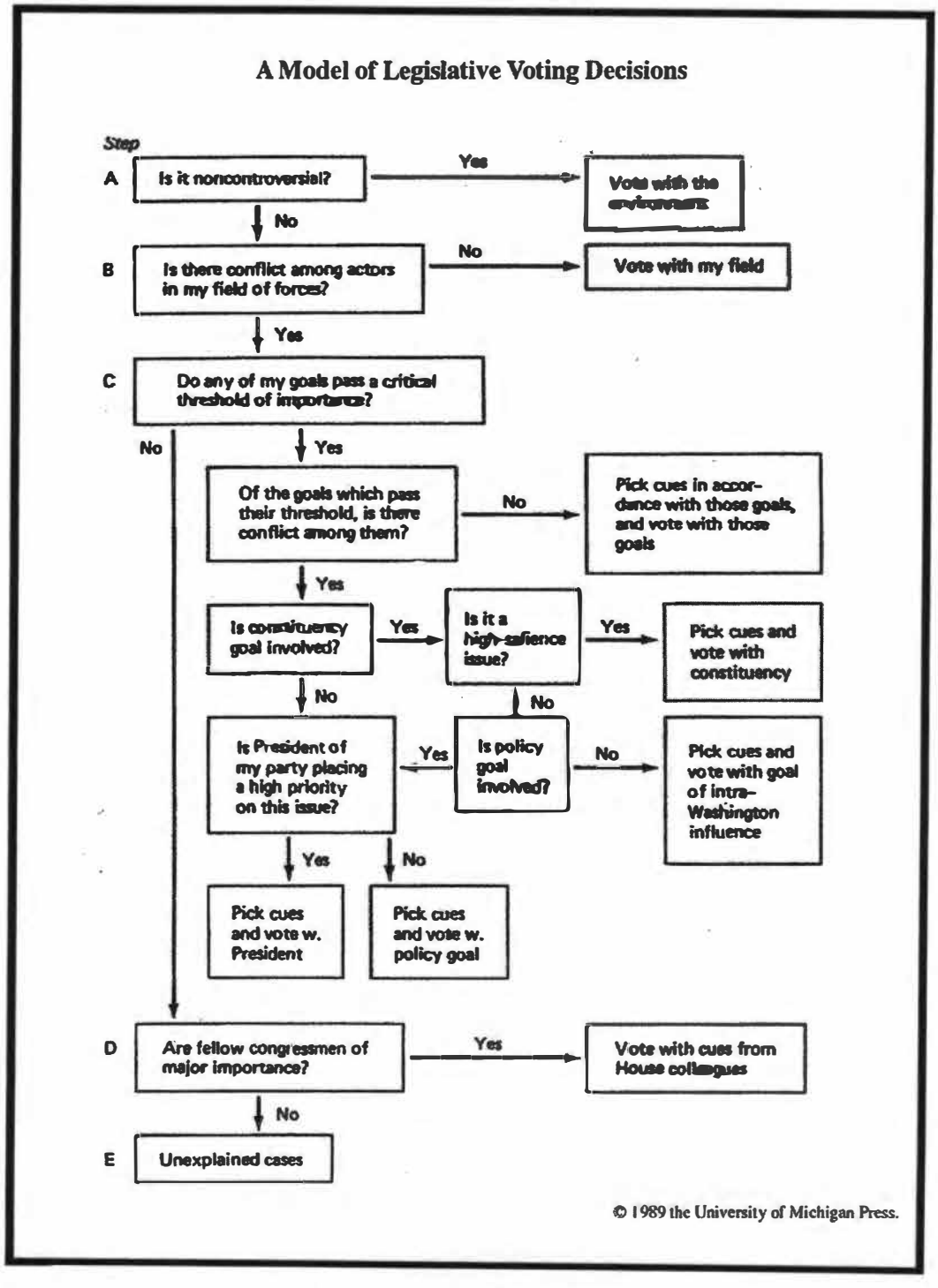


Figure 11 **Model of Legislative Voting Decisions (Reproduced by permission of publisher from *Congressmen's Voting Decisions* by John W. Kingdon, The University of Michigan Press, 1989.)**

representatives and other reference groups. If this group shares the legislator's viewpoint or is neutral, he or she will vote consistently with this circle of people.[422] It is in the best interest of the various commodity industry blocs and the industrial agriculture bloc to ensure that key legislators on agricultural committees and subcommittees are surrounded by a cadre of individuals who can legitimize and support their interests. In the case of checkoffs, this includes providing available information on the benefits of the checkoffs, their historical value, evidence of the groups supporting the checkoffs, recent academic evaluations of their effectiveness and so on.

At the next decision-making juncture, the legislator evaluates his or her goals (constituency goals, policy goals, economic goals, etc.) and determines whether there is conflict within those goals. If conflict does not exist, the legislator easily votes in accordance with his goals.[423] Through lobbying and aggressive promotion of their positions, various individuals representing the hegemony can attempt to influence the goal-setting agenda of legislators. The goals of the industrial model of agriculture are easily aligned with the goals of the checkoff programs since increasing consumer demand will create more sales to take advantage of higher levels of production and efficiency.

At the next step, if a congressional representative determines that a constituency goal is involved and that it is highly salient, he or she will vote with the constituency. Here, AgriBiz can again be extremely influential in identifying its various "fractions" (a word used by Gramsci to identify the component groups in a dominant bloc) as key constituents with demands and needs to be met.

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[422] Ibid., 245.
[423] Ibid., 246-247.

If the matter does not involve a constituency goal that is highly salient, the next consideration is whether one of the legislator's own policy goals is involved. If he or she has no policy goals regarding this issue, he will vote consistent with the goal of intra-Washington influence.[424] This is another juncture for the dominant industrial agriculture bloc to exert its hegemony over individual legislators since its agenda is part of an underlying mindset among the majority of Washington actors supportive of the hegemony.

The decision making then turns on whether the President of the legislator's party is placing a high priority on the issue and whether a policy goal is involved. The representative votes with the President if the top executive deems the issue to be a high priority, but votes with his or her own policy goal if the President has not placed a priority on the matter.[425]

If none of the legislator's goals passed the critical level of importance, the legislator immediately considers whether there are fellow congressional representatives of major importance voicing a position. If so, the legislator votes with these colleagues. While Kingdon recognized that that the model cannot explain some cases, the model does suggest numerous decision points at which the agricultural hegemony can attempt to influence and gain consensus from legislators.[426]

An example of how commodity industry blocs attempted to exert hegemony on the legislative process in the checkoff cases can be seen in a letter that was forwarded by fifteen major trade groups to Tom Harkin, Chairman of the Senate Agriculture, Nutrition

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[424] Ibid.
[425] Ibid., 248.
[426] Ibid., 248-250.

and Forestry Committee during the process of finalizing the 2002 Farm Bill. As a strategy in their "war of position" against the checkoff challengers, the letter proposed to the Senate Committee that Congress could help ensure that government was able to do its job in collecting funds to run the checkoff programs by inserting language in the 2002 Farm Bill recognizing that the advertising and promotion involved in the checkoff program was government speech. Detailed draft language was attached to the letter.[427] This prompted letters to the same Senate Committee from the anti-checkoff groups pointing out that this was a "back-door" effort to circumvent the Supreme Court's interpretation of the principle of government speech. With numerous other issues to resolve in finalizing the 2002 Farm Bill, the legislators chose to ignore this attempt to solicit their support for the controversial government speech principle, a hot potato that was already within the jurisdiction of the courts.

An article written by Senator Bryon Dorgan (Democrat, North Dakota) in 2000, characterized the way in which legislators have not sincerely represented the interests of the family farmers. He writes: "We've shed crocodile tears over farmers while promoting their demise."[428]

Industry Trade Associations and Agricultural Commodity Promotion Boards Aligned with Hegemony. Each of the five industries studied has a structure for

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[427] See Commodity Groups, letter from fourteen commodity groups to the Honorable Senator Tom Harkin (March 5, 2002); available from http://www.electricarrow.com/CARP/agbiz/149.htm; Internet; accessed 16 May 2003. The trade groups signing the letter included: Alabama Farmers' Federation, Alabama Peanut Producers Association, American Beekeeping Federation, American Farm Bureau Federation, American Mushroom Institute, Georgia Agricultural Commodity Commission for Peanuts, National Cattlemen's Beef Association, National Cotton Council of America, National Milk Producers Federation, National Pork Producers Council, National Potato Council, The Popcorn Institute, United Egg Association, United Egg Producers, and Western Peanut Growers Assocation.

[428] Senator Bryon Dorgan, "Don't be Down on the Farm: How to Preserve a National Treasure," The Washington Monthly Online, ¶ 38 (January/February 2000); available from http://www.washingtonmonthly.com/features/2000/0001.dorgan.html; Internet; accessed 13 April 2003.

implementing checkoff programs that includes several key players. The first stopping place for the checkoff fees in several programs (pork and livestock) is a state council or board. (The beef program has certified beef councils in forty-five states.)[429] The state entity then passes on at least fifty percent of the fees (more if it chooses) to a national board responsible for deciding how the money will be allocated. In the beef industry, this is the Cattlemen's Beef Promotion and Research Board (CBB), a board comprised of 110 domestic producers and one importer. In the pork industry, this management board is the National Pork Board (NPB), a management group of fifteen pork producers that are elected. These two boards then each contract with third parties to carry out the activities necessary to implement the plans and goals established by the primary board.

The CBB has a contract with the National Cattlemen's Beef Association (NCBA), a national trade association with open membership, and the NPB has a contract with the National Pork Producers Council (NPPC). The NPPC is comprised of 175 members (a minimum of two from each state and five importers) that are elected by producer and importer representatives. It collects and allocates checkoff fees and administers the checkoff programs.

The NCBA and the NPPC are service providers to the primary boards. However, they are also major trade associations with their own agendas and a demanding membership that supports the industrial agriculture model. This creates an obvious conflict of interest. Jeanne Charter described the relationship between the NCBA and the CBB as follows:

> They [the NCBA] are essentially more of a checkoff contractor now than they are a private industry group. They're living off of it. The policy part is kind of a side

[429] Interview with anonymous representative of the Cattlemen's Beef Board, 3.

> line....their jobs are at stake. Most of their staff is part-time checkoff related and part-time policy related. So they're able to kind of keep more people on staff and a lot of their overhead is covered this way. People always do this with grant monies and so on. It props things up that otherwise would be much more modest. The other thing we heard in '96 when they got handed the program was that the senior staff salaries tripled.

Livestock board managers have sought to counter the conflict of interest claims through rhetoric describing "firewalls"and strategies designed to demonstrate that the checkoff programs are not sustaining the trade associations. But the anti-checkoff group has not been persuaded. An executive of the Livestock Marketing Association described the firewall between the CBB and the NCBA as a "glass wall you can see through."[430] The executive also offered the following comments about the personnel employed by these groups:

> It's all an incestuous relationship in which the NCBA board members serve on the Beef Board and they serve on boards of the state beef councils. They interchange, they intertwine. Former chairmen of the Beef Board ...become presidents of the National Cattlemen's Beef Association or former presidents of the Cattlemen's Association eventually sometimes become chairmen of the Beef Board. They just recirculate. [431]

Although this research did not include a study of the movement of people in management positions between the NCBA and the CBB, it is worth noting that those fighting the checkoffs have the perception that this as a problem. The concern arises because the membership of the NCBA represents an overwhelming number from the beef commodity industry bloc. Although the CBB is charged with the responsibility of fairly deciding how funds will be spent to best represent the interests of all producers paying checkoffs, the hegemony in the beef industry can be exercised through the presence of those on the board with strong NCBA connections. However, a representative of the

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[430] Interview with anonymous executive of Livestock Marketing Association, 7.
[431] Ibid.

Cattlemen's Beef Board interviewed for this research gave assurances that this has not occurred. The representative clarified the relationship between NCBA and CBB as follows:

> NCBA is a contractor of checkoff funded programs, and we only reimburse the costs they incur in those programs. We do not allow them to receive any profit margin, if you will. We simply reimburse the actual costs incurred. So, through a set of accounting practices and procedures, we've created a firewall that, we are confident, prevents any of the checkoff money from flowing through to any of the membership or public policy interests of NCBA....We have conducted a series of compliance audits using outside audit firms to examine the contracts and the way charges were billed to the beef board and the way they were analyzed and paid to make sure that we've achieved this cost recovery. [432]

In the following interview excerpt, the representative emphasized that NCBA is not allowed to use checkoff fees to further its policy agenda:

> Representative: [T]he position NCBA takes on a public policy issue is not relevant to their performance on managing an advertising program, for example, or managing a research project when, in fact, they are subcontracting with an advertising agency or with a university to conduct research.
>
> Interveiwer: Do you think there's any flow over in the choices that are made and the messages and so forth in those programs?
>
> Representative: You mean a flow over from the policy position?
>
> Interviewer: Right.
>
> Representatative: I've sure seen no evidence of that. And I really think if there had been evidence of that, as highly visible as both activities are and with the regulatory control that USDA exerts over checkoff dollars, that would have been exposed and stopped.[433]

While the NCBA may be prevented from using checkoff funds for public policy purposes, it does engage in extensive public relations efforts and politically motivated strategies to promote the checkoff programs themselves. NCBA runs advertisements in a

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[432] Interview with anonymous representative of the Cattlemen's Beef Board, 6.
[433] Ibid., 6-7.

broad range of trade publications to garner support for the checkoffs by extolling the benefits of the various initiatives funded by the checkoff programs apart from the generic advertising. These are advertisements promoting the checkoff program, not promoting beef as a commodity. The advertisements are full-page and provide messages such as following:

> "Checkoff dollars educate consumers about beef."
> "Your beef checkoff is focused on food safety."
> "The checkoff educates consumers about beef safety."
> "The checkoff is spreading the news of beef's nutritional value."

A similar approach is followed by the National Pork Board. Its industry-targeted advertisements feature advertising messages such as the following:

> The Pork Checkoff.
> Uncovering new ways for producers to market their pork.
>
> The Pork Checkoff is helping U.S. pork producers of all sizes explore niche-marketing opportunities for pork by finding new ways to work outside the traditional commodity chain. Opening the door to unique market opportunities is one way the Pork Checkoff is helping to build a better future for American pork producers. Find out more about what your Pork Checkoff is doing for you. Call 10800-456-PORK.

These internal industry ads are part of the hegemonic strategy followed by the dominant industry bloc to maintain control of the checkoff program by building consensus around the supplemental benefits of the programs.

Kathleen Merrigan, former administrator of the USDA Agricultural Marketing Service (the administrative arm responsible for the mandatory commodity assessment programs), pointed out the problems that existed with the close relationship between the Pork Board and the NPPC:

> The anti-checkoff crowd felt very angry about the allowed association between the Pork Board and the National Pork Producers Council. (I think that

> could be said for beef, too.) The lobbying arms for the industry and the Board haven't been—there's not been enough of a firewall between them. There were actually staff people who had part of their time taken by the Pork Board and part of their time by NPPC. That's just setting you on the road for trouble.[434]

It is significant that, in attempting to resolve the pork referendum issue by means of a settlement agreement, U.S. Secretary of Agriculture Ann Veneman brokered an agreement between the USDA and the NPPC to move all of the checkoff-funded projects and support staff for checkoff activities from NPPC to the National Pork Board. NPPC then became primarily a member-funded lobbying group struggling to maintain funding. As a result, efforts have been made to explore a "merger" between the National Pork Board and the National Pork Producers Council. (However, if the pork checkoff programs are ultimately held to be unconstitutional, the Pork Board and its deep pool of checkoff funding would disappear.) Regardless of the restrictions on the use of checkoff funds for political and public policy interests, the trade association and lobbying groups in the beef and pork industries (National Cattlemen's Beef Association and National Pork Producer's Council) are loathe to be separated from these funds.

In the dairy industry, the National Dairy Promotion and Research Board (thirty-six representative milk producers) and the National Fluid Milk Processor Promotion Program (twenty fluid milk producers) bear responsibility for implementing the dairy checkoff programs. They contract with Dairy Management, Inc. (DMI), a domestic and international non-profit organization. Several groups are funded and managed by the dairy checkoffs, including the American Dairy Association, the National Dairy Council and the U.S. Dairy Export Council.

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[434] Merrigan interview, 5.

The International Dairy Foods Association (IDFA) is an industry trade association that represent the interests of dairy processors and manufacturers. It claims that 85 percent of the dairy products consumed in the U.S. originate from its members.[435] IDFA is the leading processor lobbying group with a strong presence in Washington. It does not receive funding from the checkoff programs. On the other hand, a separate group called the National Milk Producers Federation (NMPF), with membership of approximately 55,000 dairy producers and cooperatives, receives checkoff money for services it provides under contract with DMI, including evaluations of the effectiveness of dairy checkoffs by economists it retains on staff.

The *United Foods* decision in June 25, 2001, held that the mandatory assessments for generic advertising and promotional programs for mushrooms under the Mushroom Order[436] were unconstitutional. This industry's checkoff programs had been managed by the Mushroom Council, comprised of nine members appointed by the Secretary of Agriculture, who are non-exempt producers (i.e., producers required to pay the mandatory assessment fees because they do not meet any exemptions). After the landmark ruling, the Mushroom Council voted to keep itself in business by continuing mandatory assessments for non-promotional program initiatives and voluntary checkoff fees for generic advertising and promotional efforts.

The Justice Department did not give up in the *United Foods* case, which moved back before the U.S. District Court in Jackson, Tennessee, in the form of two district

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[435] U.S. Congress, Senate, Hearing on U.S. Preparations for Negotiations in the World Trade Organization, Testimony of Janet A. Nuzum on behalf of International Dairy Foods Association,; 30 September 1999; available from http://agriculture.senate.gov/Hearings/Hearings_1999/nuz99930.htm; Internet; accessed 18 June 2003.

[436] The Mushroom Promotion, Research, and Consumer Information Order is authorized by the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. §§ 6101-6112.

court actions that have been consolidated.[437] The government argued that the *United Foods* decision was only an interlocutory ruling and not a final decision disposing of the case. According to local counsel representing United Foods, this case is dormant while the Sixth Circuit Court of Appeals considers the case of *Michigan Pork Producers v. Campaign for Family Farms.*[438] (Even if the Sixth Circuit rules that the pork checkoff program is unconstitutional, the government will likely try to keep the *United Foods* case open while the *Michigan Pork Producers* case or a checkoff case works its way up on appeal to the U.S. Supreme Court.) In the meantime, the Mushroom Council has continued all activities, including its generic advertising, with volunteer contributions.

The major trade association in the mushroom industry is the Mushroom Institute. It has a history of 48 years of activity on behalf of mushroom growers, processors, and marketers of cultivated mushrooms. Its stated goals sound very similar to the goals of the Mushroom Order, but it is a voluntary organization funded by membership fees.

In contrast to the Mushroom Council, the Washington Apple Commission decided to close its operations when the District Court for the Eastern District of Washington held that the mandatory assessments for promotion of apples in the state of Washington were unconstitutional.[439] The Washington Apple Commission had initiated the legal proceedings itself with the assumption that it would receive confirmation that its program was unconstitutional. The ruling brought an end to a commodity commission that had functioned in many ways as an industry trade group in providing support to its apple

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[437] *United States of America v. United Foods,* No. 96-1252 and *United Foods v. United States of America,* No. 98-1082, United States District Court for the Western District of Tennessee, Jackson, Tennessee.
[438] *Michigan Pork Producers v. Campaign for Family Farms*, 174 F. Supp. 2d 772 (W.D. Mich. 2002), as corrected October 31, 2002.
[439] See *In Re Washington Apple Advertising Commission*, No. CS-01-0278-EFS (E.D. Wa. 2003).

growers and handlers. The Washington state apple industry is now scrambling to develop an alternative program that will allow it to continue funding certain activities that it considers relevant to its infrastructure.[440]

A state circuit court in Florida held in March 2003 that a mandatory "box tax" assessed on citrus for generic advertising was unconstitutional. The primary entity responsible for administering this program was the Florida Citrus Commission. The Commission has twelve members from within the industry who are appointed by the governor to oversee and guide activities of the Florida Department of Citrus, including the promotional initiatives funded by the box tax. The makeup of the Citrus Commission (industry members and not government employees) and its method of self-governance and decision-making were key in the court's decision that this commission did not meet the requirements necessary to recognize the government's argument that the generic advertising funded by the "box tax" was government speech.[441]

A number of state and national trade associations represent the interests of fruit growers in the United States. Many of their objectives are aligned with producing fruit for export and foreign trade. This industry is feeling the impact of the industrial agriculture model along with other agricultural sectors.

One strong theme that was noticeable throughout these interviews was that the

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[440] See Tim Linden, "Washington apple industry examines its options," The Produce News (April 18, 2003); available from http://www.theproducenews.com/storydetail.cfm?ID=3058; Internet; accessed 10 June 2003.

[441] See Order Granting Plaintiffs' Motion for Partial Summary Judgment, *Tampa Juice Services, Inc. et al. v. State of Florida, Department of Citrus,* (Case Nos. GC-G-00-3488, GC-G-00-3718, GC-G-01-0286, GC-G-01-0375, and GC-G-01-0694); *Graves Brothers Company v. State of Florida, Florida Department of Citrus* (Case No. GC-G-02-46-4686) and *Oak Hammock Groves, Ltd., et al. v. State of Florida, Florida Department of Citrus* (Case No. GC-G-03-0281) (10th Cir., Polk County, Fla., March 31, 2003).

challengers had opportunities to engage in the organizational processes and chose not to avail themselves of these opportunities. They were perceived as not being willing to pursue organizational avenues for voicing their views and implementing change. A representative of the Cattlemen's Beef Board stated:

> I frankly don't think the groups like the Charters or the LMA have attempted to influence decisions with documented logical support. For example, we have met with LMA officers, we have asked them what it is you don't like about the checkoff, what would you like to see changed. Some of their advertising to solicit signatures in the referendum talked about wanting to make some changes in the checkoff and the only way they could do it was with a referendum. So we asked them, what changes do you want to make? And they either could not or would not identify any, kept coming back, to the concept, we just want to vote. Well, ok, then get ten percent of signatures. But, if there are some changes you want to make, let's sit down and talk about them and maybe they'd be good ideas. Maybe we can make them. So, it's a little difficult to assess...the effectiveness of an organization if they won't even try. It's like the fellow who goes to the local coffee shop every morning and complains about the local government, but never bothers going to the city council meeting where something could be changed.[442]

The same representative emphasized this point later by stating:

> I'd love to find a way that we could get LMA and the other oganiztions to open up and tell us what it is they want changed. But, when you send at least six letters a year to an organization asking them to attend meetings, providing them a copy of priorities and plans almost a year ahead of time as they're in the developmental stage, and ask for any input, concerns, questions, or even proposals that they might want to bring forth, and those initiatives are greeted with deafening silence, what can you do.[443]

A pork producer and member of the National Pork Board expressed a similar view:

> During my time on the board, we've invited them to come eat with us, gone out to meet with them and nobody shows up to try to get their impact. Instead of killing it [the checkoff program], how would you spend the money differently? But it's easier to criticize than to offer new ideas. They've stuck to the strategy of just being critical. We try to get them involved. And we've yet to have somebody that got involved or really understood the programs that didn't come away being a pretty good supporter.[444]

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[442] Interview with anonymous representative of the Cattlemen's Beef Board, 19.
[443] Ibid., 20.
[444] Interview with anonymous pork producer and member of the National Pork Board, 4.

However, Mike Callicrate, beef producer and outspoken voice for the beef anti-checkoff group, identified two factors that he considered to be barriers for effective participation—intimidation and block voting. Here is an excerpt from his interview:

> Interviewer: Is there a process within the whole NCBA organization for your voice to be heard and for folks who share your point of view to get some leverage?
>
> Mike Callicrate: No, there is not. I have been a member of NCBA for twenty-something years. Now with the meat packers on the board of NCBA, what happens is when you go to an NCBA meeting, they ridicule you, they shout you down, and they laugh at you in front of everyone. That has a terrible intimidation effect, so people have simply refused to stand up and speak out. Then they just get their butt whipped because we have the packers now and the big cattle feeders that have put forth the proxy vote and won that decision into their policy to where...I mean, these guys are holding up six cards each. They get to vote all their votes in every single committee meeting, and it is just overwhelming against the interest of the individual cattleman and for the big cattle feeders and big feed yards who are in bed together.[445]

Steve Vetter, editor of *Western Livestock Journal*, raised the possibility that those against the checkoffs might not be sufficiently aggressive:

> Steve Vetter: I do think there are ways that people that do have programs that aren't currently being funded by checkoff programs can go about getting their ideas heard. It just is a matter of contacting the Beef Board and harassing them, if you will, to hear their ideas. I do think that what some of the people against the checkoffs don't do—I don't think they push hard enough to try to get their ideas heard. If they've had one bad experience, they don't want to go back in and try again. And I think that is a mistake on their part.
>
> Interviewer: Do you think that they—the producers—have a certain reservation about any repercussions if they voice a lot of negative concern, that there are other parts of the industry that could fence them out, or refuse to work with them or have reason not to buy their beef?
>
> Steve Vetter: I don't think there'd be a reason as much in terms of the checkoff programs. Now, there are other issues within the industry that if you voice your opinion, I'm sure there could be some ramifications. But, just in terms of what the checkoff does, I would be hard pressed to think that about the checkoff, which

[445] Callicrate interview, 4.

> is primarily working toward promoting the consumption and sale of beef. I really don't see that there would be a whole lot of repercussions.[446]

These interview excerpts suggest individuals on the livestock boards, producers opposed to checkoffs and outside observers have decidedly different perspectives on the structural processes that exist for discourse and decision making about allocation of checkoff funds.

Industry Trade Associations Aligned with Counter-Hegemony and Activist Groups Seeking Free Speech and Other Goals. These two categories are presented together since they have formed a network of alliances to collaborate on projects, share resources and strengthen their political clout.

Two trade associations in the cattle industry are recognized as being aligned with counter-hegemony against the beef checkoffs and against the industrial agriculture model. The first is Ranchers-Cattlemen Action Legal Foundation (R-CALF), a non-profit national organization that offers membership to cow/calf producers and independent stockyards and feedlots. It represents more than 6,700 cattle producers in aggressively advocating trade and marketing positions that are favorable to their interests. The cow/calf producers claim that the NCBA no longer represents their interests, since its decision making is now dominated by meatpackers and importers, therefore, R-CALF has offered these cow/calf producers an alternative. It has developed political strength in a very short time, having only become a national membership organization in 1999.[447]

The second group aligned with counter-hegemony in the cattle industry is Livestock Marketing Association (LMA), a non-profit trade association that serves a membership of more than 800 livestock dealers, markets, order buyers and related

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[446] Vetter interview, 4.
[447] See website of R-CALF at http://www.rcalf.com.

businesses in North America. It became the catalyst group facilitating a controversial pork referendum, and became a party to a lawsuit challenging the USDA's handling of the referendum. When the *United Foods* case was decided, LMA amended its complaint to add an additional First Amendment claim.

The Kansas Cattlemen's Association is another politically active and outspoken trade association aligned with counter-hegemony.

Two major national agricultural coalitions have been become respected for the leadership in advocating change in agriculture. The first, Organization for Competitive Markets (OCM), is committed to restoring equitable, competitive markets for agricultural commodities and their end products. It was formed in March of 1998 and has a diverse membership of commodity producers, attorneys, professors, grass roots and public interest groups. Its activities include lobbying, providing a growing resource for legal actions and educating producers that they can become part of a movement to reclaim fair pricing. The Organization for Competitive Markets is concerned about looking at competition issues within the livestock industry from the legal and economic standpoints.

The second coalition is the National Campaign for Sustainable Agriculture. Begun in 1994, it has an impressive list of partner organizations as members that collaborate with it to achieve change that will promote stewardship of the land. One of its key roles is as a lobbying group to "shape and promote U.S. farm and food policies in support of a food system that is environmentally sound, economically viable, socially just and humane."[448]

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[448] See "Sustainable Agriculture Wins in the 2002 U.S. Farm Bill," National Campaign for Sustainable Agriculture (January 2003); available from http://www.sustainableagriculture.net/NCSAandFBJan2003.php; Internet; accessed 30 March 2003.

The Western Organization of Resource Councils (WORC) is a regional coalition with an active presence in Washington, D.C. It has engaged in lobbying efforts with other groups, filed amicus curie briefs, and joined Livestock Marketing Association as a party to a checkoff lawsuit.

The Dakota Resource Council is a public interest group that has taken a stand against the checkoff systems. Another non-profit group, The Land Stewardship Project focuses on sustainable agriculture goals and has a broad range of policy, research and education programs.

Three other groups previously mentioned in Chapter 2 have been major contributors to the activities of the counter-hegemony. They include The Campaign for Family Farms (CFF), a coalition that has served as an advocate for independent hog farmers, the Farmers' Legal Action Group (FLAG), a nonprofit law center that represents advocacy organizations, and the Center for Individual Freedom (CFIF), a First Amendment rights advocacy group.

Doug O'Brien, attorney and agricultural legislative assistant for Senator Tom Harkin, commented during his interview that groups such as OCM, National Farmers Union, R-CALF, Campaign for Family Farms and even mainstream groups such as American Farm Bureau "fear that farmers are in a very disadvantageous position with spiraling consolidation and vertical integration."[449] They are interested in restoring competitive markets. O'Brien identified incremental changes in the 2002 Farm Bill that expressly occurred because of the activities and involvements of these trade associations, including additional protections for producers growing hogs under production contracts, a

[449] O'Brien interview, 5.

recognized right of a farmer to talk with his attorney, accountant or banker about a contract, and country of origin labeling requirement. The ban on packer ownership was eliminated from the Farm Bill, but new legislative proposals have kept the issue on the table. O'Brien concluded:

> [T]hey [the trade association groups] are affecting the debate. Is this a freight train, does it have too much momentum to be able to be stopped? It's not going to be stopped. It can be steered a little bit. Before the Farm Bill, three years ago, those things I just listed were really almost all things observers and the industry would have thought were going to be impossible.[450]

Commodity Producers Defending Hegemony. In each court action, there have been individual commodity producers aligned with the government. They generally join the action as intervenors and ally themselves with the dominant commodity industry bloc.

In the livestock industries, the commodity producers defending the checkoff hegemony are the large concentrated operations that engage in factory farming methods. They typically are owned by one of the mega agribusiness companies or contract with them. The checkoffs are useful in allowing these producers to have indirect bargaining power, even in issues that appear unrelated to the checkoffs, such as country of origin labeling or irradiation of meat. The ability to use checkoff funds for foreign promotions and for deals with large processors and reatailers is a benefit. And finally, some of the large commodity producers have more negotiating power to realize financial benefits from increased demand that do not trickle down to the small independent producers.

Commodity producers aligned with hegemony in the dairy industry include cooperatives as well as private companies. In the United States milk processing industry, dairy cooperatives are an important link in the food chain. In 1999, it was estimated that

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[450] Ibid.

cooperatives handled 86 percent of the milk produced by farmers. Over half serve only as bargaining cooperatives, marketing their members' milk, but performing no processing. The remaining group of approximately 43 percent process products such as butter, cheese, skimmed milk powder and whey powder. Dairy Farmers of America and Land O'Lakes are the two largest dairy cooperatives in the United States. The private dairy industry is dominated by the multinational companies, including Kraft (a Philip Morris subsidiary), Dean Foods and Suiza. (Dean Foods and Suiza merged their operations in 2002, creating a commercial dairy powerhouse.)

There may be commodity producers aligned with hegemony in the mushroom industry and the tree fruit industry, but these are not noisy groups. They are the independent small producers who are getting the advantages of the checkoff payments paid by the large producers who sell branded products with distinctive features and premium quality. The large producers are fighting the checkoff programs in order to reduce the negative financial and marketing impact of the checkffs. They would like to increase their advantage in competing with the smaller producers, but nothing in the evidence suggested a war of position between the large producers and the small producers. The war of position appears to be between the large producers and the USDA.

Commodity Producers Opposing Hegemony. The most visible commodity producers against checkoffs are the plaintiffs in the pending lawsuits. In the beef and pork industries, the evidence suggest that they represent the interests of a large group of anti-checkoff farmers and ranchers who are seeking ways to have a voice and develop counter-hegemony.

The Media. The media offer a public site for hegemonic discourse. Within their ranks are "organic intellectuals" who participate in hegemonic conflicts in agriculture at the macro-level by constructing consent for the industrial agriculture model and at the commodity level by engaging in discourse related to the hegemonic principles underlying the power of the respective commodity industry blocs. Mainstream media have tended to support the dominant industrial agriculture bloc. The large, well-funded public relations apparatus of the dominant group has had an influence on news, editorial content and advertising.

The themes and idea ensembles presented by mainstream media are open to challenge by the minority voices of organic intellectuals who disagree with (or are willing to report the opinions of those who disagree with) the assumptions, the methods and the outcomes of the dominant power blocs in agriculture. Those engaged in counter-hegemony have tended to use alternative print and electronic media or radio.

Since the constitutionality of generic advertising is at issue in the commodity checkoff challenges, media advertising as well as media content has become a part of the hegemonic discourse. Thousands of advertising dollars are available for media to publish two types of advertisements: ads in industry trade publications aimed primarily at commodity producers and others in the food chain extolling the benefits of the commodity checkoff programs, and generic ads in national mainstream media or regional media outlets promoting the commodities to consumers. According to individuals interviewed in this study, the majority of industry trade publications are known to report on the checkoff challenges in a way favorable to the hegemony. A small number have taken open positions against checkoffs.

Terry Stokes, CEO of the National Cattlemen's Beef Association, confirmed that the media has tended to focus on the positive aspects of the checkoff programs. However, in his view, the media has reported fairly on the legal conflicts related to checkoffs.

> Interviewer: Do you feel that the media has aligned itself with one side or the other, or are both sides in the conflict getting fair treatment by the media?
>
> Terry Stokes: I think as far as the cases go, I think they have had fair treatment. I think what we have seen in the media is that you see a focus of the media on the results that have been achieved through the beef checkoff programs, but as far as the case itself, I think there has been fair coverage.[451]

He clarified the two different types of advertising used by the NCBA (consumer ads directed toward the consumer and producer communications ads in trade magazines) and emphasized that the law prohibits the NCBA from using checkoff dollars for advocacy purposes in any of these ads.

Jeanne Charter, plaintiff in a beef checkoff lawsuit, asserted that the checkoff money available in the beef industry does not compare to the budget for a big commercial product, but it is sufficient to "really propaganidize within the industry." According to her, that is how a lot of the checkoff money is spent. She stated:

> They [those in control of the checkoff money] do big spreads in the monthly ag publications. They're a big client for them. Hardly any of the monthly ag publications have a discouraging word to say about the checkoffs. I think they're compromised by the money.[452]

Charter also referred to self-promotion ads that are published during the market news, primarily on radio. According to Charter, the primary objectives of these industry-focused advertising programs promoting checkoff programs are twofold:

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[451] Stokes interview, 8.
[452] Charter interview, 5.

> I think the real purpose of the programs, at least in beef, is to, number one, try to influence producer thinking. But I think that's even secondary to trying to influence agricultural news reporting. With ag channels in Montana, I think probably the checkoffs are their biggest single client. That's enough to where they just don't report anything negative about them. Or, consequently, they're very loath to report anything negative about the National Cattlemen's Beef Association.[453]

Charter said that the NCBA's has an "institutional core" that benefits politically by its control over checkoff money, including the economic relationship between the NCBA and the media arising out of the purchase of broadcasting time or print space for checkoff ads. Charter states: "It's like 'crony capitalism.' Their friends are always the ones that get the contracts. If any, say radio station, gets out of line and really is critical, they won't get any more ads. That is invaluable to somebody that's got an agenda. They do."[454]

In his interview, Steven Vetter, editor of *Western Livestock Journal*, indicated his commitment to presenting both sides of the checkoff issue equally in his publication:

> I can honestly say that the key thing to a newspaper is news. With the exception of your publisher's or your editor's comments that might come up every once in awhile, news stories are there to present facts and let people come up with their own conclusions. And I've really worked hard to stay that way. There are other publications that aren't afraid to show that they are on one side of the issue or the other. And there have been recent showings of that.[455]

He discussed the alignment of specific media with the pro-checkoff and anti-checkoff groups:

> ...I think there are definitely a couple of instances where you could say there is some media alignment with the various sides. I will say that I think that most of the alignment I have seen has been going on the side that's against the checkoff for the most part. That's not to say that there aren't instances where maybe there is a publication out there that decides with the checkoff. But I have seen more

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[453] Charter interview, 5-6.
[454] Ibid., 7.
[455] Vetter interview, 7.

> cases where the groups that are adamantly against the checkoff have been able to infiltrate some media, particularly trade media, organizations more heavily.[456]

Mike Callicrate, cattle producer and feedlot operator, was willing to be more specific about the media players and their alignment in his interview. He identified the following publications as being on the side of the packers, retailers and the NCBA: *Beef Magazine, Drover's Journal, Calf Magazine, Beef Today, Cattlebuyer's Weekly.*[457] According to Callicrate, radio broadcasting media is also dominated by the industrial agriculture bloc. He stated:

> The major radio ag stations are really controlled with the industrial message. They depend heavily upon Cargill and Monsanto. A lot of the chemical companies advertise that are connected in this new industrial model that they are trying to force onto us, and the radio stations in trying to keep adequate advertising dollars generated have really turned their back on the family farmer and rancher. There are some really good radio stations out there but darn few...Ron Thorson with a radio station in Illinois, he is the strongest voice for the producer in that whole section of the country.[458]

With this information as a background, Gramsci's framework of hegemony can provide a means of understanding the role of the media as a source of intellectual discourse between: 1) anti-checkoff challengers versus defenders of the checkoff programs, and 2) advocates for sustainable agriculture, family farming and competitive markets versus industrial agriculture and agribusiness. Since gaining the consent of the majority is a vital goal of the ruling alliance, the media can play a key role in interpreting the ideology and culture of the dominant group and promoting a unified view. While it can promote legitimacy for the dominant view, certain segments of the media can also choose to help explain and build the foundation for counter-hegemony. The dominant

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[456] Ibid., 6.
[457] Callicrate interview, 10.
[458] Ibid., 11.

bloc in power must win the consent of organic intellectuals within the media and negotiate such consent on an ongoing basis. (This Gramsci-based view of the media recognizes a certain level of media free will that is not found in the strict Marxist view that the media is an apparatus of the State that exists solely to serves the needs of the historic bloc centrally organized by the bourgeois.) If the dominant bloc is successful in getting the media to rely on "official" sources, this leads to greater consensus and maintaining the status quo.

Stuart Hall, British cultural theorist and neo-Marxist researcher, collaborated with other researchers in 1978 to analyze the way in which the British media portrayed violence and the coercive government response to dissidents in *Policing the Crisis: Mugging, the State and Law and Order.*[459] Hall described the media as "a key terrain where 'consent' is won or lost' and "a field of ideological struggle."[460] Consistent with Gramsci's ideas, the media is not bound to a deterministic role (as a communication tool of the Marxist bourgeoisie) but instead reproduces "the interpretations of the crisis subscribed to by the ruling-class alliance" in a manner that reflects the media's own "constructions and inflections."[461]

Janet Woollacott examined the arguments of *Policing the Crisis* in the chapter she contributed to the 1982 overview of the Marx and liberal pluralist views of mass media, *Culture, Society and the Media.* Woollacott emphasized that Hall, et al. had assigned to the media "a crucial transformative but secondary role in defining social

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[459] Stuart Hall, Charles Critcher, Tony Jefferson, John Clarke and Brian Roberts, *Policing the Crisis: Mugging the State and Law and Order* (London: Macmillan, 1978).
[460] Ibid., 220.
[461] Ibid. Also see Janet Woollacott, "Messages and meanings," in *Culture, society and the media*, eds., Michael Gurevitch, Tony Bennett, James Curran and Janet Woollacott (New York: Methuen, 1982): 91-111, 109.

events."[462] This relegated the media to a subordinate position lacking autonomy since "[T]he primary definers are those to whom the media turn, their accredited sources in government and other institutions."[463] She questioned how the media can serve as a field of ideological struggle when their work (the news) only serves "to reproduce and reinforce 'primary definitions'. They are assumed thereby to signify a crisis which already exists for the primary definers, a crisis already in operation in the realm of politics and economics."[464] (The primary definers are politicians, the courts, the police and other institutional entities.)

Woollacott concluded that the struggle to construct consent described in *Policing the Crisis* would, therefore, be *outside* the terrain of the media and "in the areas of class experience and the cultural forms through which men and women live that experience."[465] In chapter one of *Culture, Society and the Media*, Woollacott, James Curran and Michael Gurevitch state that researchers in the Marxist tradition in Britain portray the media's role as that of "renewing, amplifying and extending the existing predispositions that constitute the dominant culture, not in creating them."[466]

Woollacott's conclusions rested on the assumption that the media can be viewed in a collective manner. However, the evidence in this study suggested that the mainstream media that amplifies and extends the idealogy ensemble of the dominant bloc has its counterpoint in the alternative print and electronic media of those engaged in counter-hegemony. Such media may be merely sympathetic to the challengers or may

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[462] Woollacott, 109.
[463] Ibid.
[464] Ibid.
[465] Ibid., 110.
[466] James Curran, Michael Gurevitch and Janet Woollacott, "The study of the media: theoretical approaches," in *Culture, Society and theMmedia*, eds., Michael Gurevitch, Tony Bennett, James Curran and Janet Woollacott (New York: Methuen, 1982): 11-29, 14.

be fully aligned with the ideology ensemble of those seeking to build counter-hegemony. The checkoff challengers and the industrial agriculture critics are able to interject their counter-hegemony movement into the media and use the media as a terrain for struggle. They do so in a systematic way by funding alternative news outlets, issuing press releases, engaging in publicized debates covered by the media, providing media workshops and other support for groups involved in counter-hegemony who wish to have their voices heard.[467] The Internet and new technologies allow publishing by activist groups and create more opportunities for the counter-hegemony to move the hegemonic struggle to the terrain of the media.

In their interview, Brenda and Joseph Cochran, dairy checkoff challengers, pointed out the value of the local press in supporting counter-hegemony:
"I always noticed that if you have a farmer, a motivated farmer in this community and he develops a good relationship with the local press, the local media, they will pull very related issues off the AP. They will put it in the local paper. And you eventually have your power base in that town or that county more educated about the broader issues."[468]

Media reporting on the checkoff challenges has been primarily in industry trade publications. It is the conclusion of some individuals (including several interviewed in this study) that money for advertising has been the glue that keeps many of these media outlets closely aligned with the dominant industry blocs defending the checkoffs. They have suggested that publications accepting advertising promoting the benefits of the checkoff programs have less incentive to probe stories identifying the broader economic

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[467] See, e.g., "Media Skills & Strategy Workshop for Sustainable Agriculture," The Land Stewardship Newsletter 15, no. 5 (October/November 1997); available from http://www.landstewardshipproject.org/lsl/lspv15n5.html; Internet; accessed 3 June 2003.
[468] Cochran interview, 10.

and political issues behind the checkoff challenges. The scope of this study does not include a content analysis to explore this issue, but the evidence does show that all participants in the checkoff conflicts have delivered messages to the media in various forms in an effort to win consent to their legal, economic and political positions. In the lawsuits challenging the commodity checkoffs, it is likely that the steady influx of advertising dollars for checkoff advertisements targeting producers in trade publications and consumers in mainstream media has created a media climate receptive to the ideological principles of the commodity industry blocs.

The evidence shows that various media have become strategic tools to be used in a field of ideological struggle between the dominant group and those launching counter-hegemony. But the involvement of the media has not been entirely formulaic. Stuart Hall claimed that media operated within the Gramscian framework by reproducing the "primary definitions" of the dominant bloc subject to the media's own "constructions and inflections."[469] However, there are pressures on modern media that require a greater degree of "constructions and inflections" than Hall may have been prepared to recognize within a strict Gramscian framework. First, there are institutional demands on the press, such as the need to show profits to corporate media owners and the need to select stories with titillating news or "infotainment" value. Second, there are societal and cultural expectations that the press will perform a "watchdog" role on government to critically report on activities that are contrary to the public interest.[470] Third, media are also

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[469] Hall, et al., 220.

[470] There is a consensus that the "watchdog" role of the press in monitoring government agencies has waned because of limited media resources and the demand for more provocative stories. See Lucinda Fleeson, "Where are the watchdogs?" *American Journalism Review* 23, no. 6 (July/August 2001): 36-46. This article stated:

influenced by how a topic, an issue, a group or an industry have been characterized or framed by the press in earlier stories.[471]

The "primary definitions" of the dominant bloc are powerful, but they exist alongside institutional constraints and societal realities that create an operating environment in which the media may on occasion find itself giving priority to some factor apart from the hegemonic struggles taking place in its terrain. However, the industrial agriculture bloc has been highly successful in winning the media's consent to its economic, moral, political and cultural values.

While the voice of counter-hegemony seeking to publicize its views has traditionally had an uphill battle, it has still been able to engage alternative media aligned with the counter-hegemony (and occasionally mainstream media) in discourse about alternatives such as sustainable agriculture, competitive commodity markets and family farming. The research in this study indicated that, while the dominant power bloc has an advantage in its ability to access and control the media, is still subject to the media's decision-making process regarding the newsworthiness of material and the internal structures and demands that influence the media. These are the factors that each side of the hegemonic conflict must consider as they pursue their objectives in the media terrain.

An instructive example of a hegemonic struggle in the media is a legal conflict arising out of the decision of the Tennessee Valley Authority (TVA) to build the Tellico

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In its last piece on Washington beat reporting, in April 1999, AJR found that many newspapers and wire services had walked away from covering federal agencies and departments long regarded as the meat of good reporting in Washington. Much of the media simply abandoned departments like transportation or housing or agriculture. In the last two years, there has been further decline. Ibid., 35.

[471] Framing in journalism refers to the process of assimilating the news in a manner that contextualizes it and gives it an interpretation or frame of reference, so it is not received as random facts. It involves media choices with regard to selection and salience. See Denis McQuail, *McQuail's Mass Communication Theory*, 4th ed. (Thousand Oaks, CA: Sage Publications, 2000), 343 and 495.

Dam. This case also bears closer examination because the plaintiffs strategically used the courts in an effort to break the hegemony that was exercised by a dominant bloc centrally organized around the TVA. It is analogous to the efforts of the checkoff challengers to use the First Amendment to create change in the agricultural industry.

In 1959, the TVA lacked a significant mission. With an increase in coal and nuclear power sources, there were no new justifiable dam projects on the horizon. The TVA settled on a land-development project to build a new dam, the Tellico Dam, that would create a reservoir, flooding over thirty-three miles of the Tennessee River and over three hundred forty farms containing some of the most fertile land in the state of Tennessee. The facts showed that the project was not economically sound or environmentally necessary.[472]

In the 1970s, farmers and local citizens launched a lengthy battle to fight the government's push forward on this project by challenging it on the basis of the Endangered Species Act. Plaintiffs argued that the Tellico Dam project would endanger a small, three-inch perch called the snail darter.[473] The lawsuit was not brought by extreme environmentalists, but rather citizens who were seeking economic review of governmental action in spending millions of dollars to support an agency cause that could not be justified on economic, environmental or public policy grounds. The legal action represents an attempt to break the TVA hegemony.

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[472] See Zygmunt J.B. Plater, "Law and the Fourth Estate: Endangered Nature, the Press, and the Dicey Game of Democratic Governance," *Environmental Law* 32 (Winter 2002): 1-36, 7-8.
[473] Ibid., 13-14.

In a law review article, Zygmunt J.B. Plater, lead counsel in *Tennessee Valley Authority v. Hill*[474] discussed the manner in which the case was used by the citizens as a public action tool:

> Where in this country's modern industrial democracy is there an operative forum to which stupendous mistakes can be brought for effective public interest review? Apparently the answer is "nowhere," unless citizens have money, power, or press enough to get traction and crack into the political process. There is nothing within the process itself that goes out looking for ongoing major agency or economic initiatives that need review, and courts for their part do not willingly take on the function of project and program scrutiny.
>
> But it may be different where citizens can find and prove a substantive statutory violation in court, forcing the other branches of government to take account of the larger questions.[475]

The courts became the terrain for the battle. The small coalition of farms and concerned citizens ultimately convinced the courts to enjoin the dam project, but by then the project was 95 percent completed. It was a $150 billion project that was unnecessary and could not be economically justified. Plater's journal article identified ways in which the press failed to report the complete story (and still fails to do so today as evidenced by Rush Limbaugh's use of the snail darter lawsuit as an example of environmentalism run amok).[476] In the press, the story was presented as a cliché about "economic progress versus environmental protectionism" and "little fish versus big dam."[477]

The hegemonic struggle was between the powerful, government-backed TVA and the challengers, a group of farmers and others acting on behalf of the public interest. Each sought to use the media, but the dominant power bloc was more successful in getting the press to present its position. Plater identifies several reasons, including the

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[474] *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).
[475] Plater, 11.
[476] Ibid., 4, also see n. 6.
[477] Ibid., 25.

ingrained perceptions of the press and the public that the TVA was a progressive agency offering opportunities to bring social progress to backward rural areas rather than a bureaucratic giant misusing its agency powers to initiate a pork barrel project. The hegemonic political efforts of the TVA, seeing its project at risk, were also a huge factor. For example, *National Geographic* had agreed to print an article about the Tellico Dam project written by Supreme Court Justice William O Douglas, but reconsidered after the TVA persuaded its editor not to run the story.[478] The TVA engaged in other political activities to influence the media's reporting on the project. (The TVA's actions undertaken to protect its authority and continue to exercise hegemony can be analogized to the efforts of the USDA in the commodity checkoff cases.)

Another factor Plater identified that might explain why the dominant power bloc was more successful in getting the media to frame the story in its favor was the manner in which the press functions in choosing and presenting its stories to the public. Editors demand stories with a hook or a simple, easily understood metaphor or catchy summary. Factors that the media considers when deciding whether a story is newsworthy include: conflict, impact, audience interest, novelty, prominence of people and institutions, proximity and timeliness.[479] Plater stated:

> It was hard to understand how persistent the little-fish-big-dam perceptual frame would be. Reporters' and legislators' eyes glazed over when the citizens rolled out maps, reports, and documents showing the weaknesses of the dam and the beneficial role of the endangered species in facilitating alternative development of the valley. The fish/dam rubric is quick, easy, funny, and comforting. It is discomfiting and hard, on the other hand, for reporters and their audiences to devote energetic attention to a complex and disruptively contrary image that is not so familiar and crisp.[480]

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[478] Ibid., 28, n. 69.
[479] Ibid., 29.
[480] Ibid., 25.

Plater ruefully observed that being correct on the merits of an argument is not enough if the political process does not integrate the key principle at stake. A court victory does not guarantee a political change. He concluded:

> It is not enough that the citizens were correct on the merits of their argument that Tellico Dam was a mistake. The merits of challenged projects and programs are irrelevant unless they can be authoritatively established and (even more important) forced into the mechanics of the political structures that support those initiatives. And, as so often happens in public interest cases, the citizens' arguments on the merits missed the point of the players in the political process.[481]

The snail darter lawsuit sharply illustrates that those engaged in a war of position simultaneously in the terrain of the media and the courts must be mindful of the media environment and its requirements as they seek to create a "court of public interest" that will enhance their battle in the courts.

On National Ag Day, March 25, 2002, Dupont and the Agriculture Council of America sponsored a one-day seminar with the theme "The Growing Gap Between Farmers and the Media." Farmers expressed concerns with the way the media had portrayed them in stories dealing with the environment, international trade and farm subsidies. The media responded by providing tips to the farmers on how to avoid becoming "media road kill." Their suggestions included "stop being defensive, tell their stories in consumer friendly sound bites and be more accessible to the media."[482] However, when the hegemony of the dominant power bloc has captured the major media

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[481] Ibid., 10.

[482] "Ag industry seeks to improve public image," *Resource* 9, no. 5 (May 2002): 17. Also see "DuPont Sponsors National Ag Day Event for U.S. Farmers, Media," DuPont Daily News (March 25, 2002); available from http://www.dupont.com/corp/news/daily/2002/dn03_25_02c.html; Internet; accessed 7 June 2003.

outlets, it may be impossible for the farmers to shift the way in which the media portrays a topic, regardless of tactics.

The press may simply grow weary of an issue. In *The Corporate Reapers*, A.V. Krebs reported that this was the case in the early 1990s when the press got tired of reporting on agricultural woes. He quoted Brian Ahlberg, former communications director for the National Family Farm Coalition:

> The real reason papers and broadcasters no longer run the kind of stories they did in the 1980s is that they consider family farmers history, not news. The media, once a proponent of the family farm idea, has largely abandoned it, perhaps in fatalistic surrender to the forces which are eradicating independence, personality and community responsibility from its own industry. Such is the predicament of today's family farmers and their supporters.[483]

Another factor that may have a bearing on how media report agricultural conflicts and issues is that fewer media outlets in the early Twenty-first Century are family owned. Corporate media owners and publishers may be less able or less willing to identify with non-corporate interests. They identify with the idea that "big is better" and that consolidated, larger agricultural enterprises will make more efficient use of resources.

Discourse about issues and ideologies important to hegemonic conflicts can occur in the terrain of mediated communications in many ways, all contributing to the war of position. Such discourse may arise in exchanges between different media outlets expressing conflicting views or between the media and outside organizations. It may feature the opinions of individuals, activist groups, officials speaking on behalf of the USDA, legal representatives, agribusiness and other "organic intellectuals" aligned with

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[483] A.V. Krebs, *The Corporate Reapers: The Book of Agribusiness* (Wa., D.C.: Essential Books, 1992), 440, quoting Brian Ahlberg, former communications director for National Family Farm Coalition.

the hegemony or the counter-hegemony. It may simply be a single article or series of articles published by a media outlet pursuant to the editorial choices of the editor.

Agribusiness. A network of giant corporate agribusiness enterprises serve as the central organizers within the agricultural hegemony. The annual revenue for the farming business in the United States is estimated at $80 billion.[484] One land-grant university proclaims on its website: "The agribusiness industry accounts for nearly one-fifth of the U.S. gross national product and employs close to one-fourth of the U.S. labor force."[485] Many of these companies are multinational and have business goals focused on strengthening their presence in the world market. The Agribusiness Council[486] describes the challenge for U.S. agribusiness as follows:

> As the world's largest and most efficient supplier of agro-food products, the United States faces fierce competition from and ever-increasing number of world "breadbaskets." Maintaining U.S. agribusiness global leadership requires a forum capable of embracing our nation's agricultural constituents; and a mechanism for action on broad, complex issues requiring multi-sectoral coordination and representation at the highest national and international levels.[487]

A wide range of companies can be identified with agribusiness. A 1979 dictionary definition of "agribusiness" limits the term to "a combination of the producing

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[484] See Mary Hillebrand, "Agriculture Giants Join B2B E-Commerce Arena," E-Commerce Times, ¶ 12 (March 2, 2000); available from http://www.ecommercetimes.com/perl/story/2641.html; Internet; accessed 24 May 2003.

[485] "Agribusiness Fact Sheet," College of Agriculture, Food Systems, and Natural Resources, North Dakota State University (undated); available from http://www.ndsu.edu/ndsu/academic/factsheets/ag/agbus.shtml; Internet; accessed 24 May 2003.

[486] The Agribusiness Council describes its organization as follows: "The Agribusiness Council (ABC) is a private, nonprofit/tax-exempt, membership organization dedicated to strengthening U.S. agro-industrial competitiveness through programs which highlight international trade and development potentials as well as broad issues which encompass several individual agribusiness sectors and require a 'food systems' approach. Examples of such issues are commercialization of new technology/crops, environmental impacts, human resource development, trade and investment policy, natural resource management, and rural development." The Agribusiness Counsel Home Page (undated); available from http://www.agribusinesscouncil.org; Internet; accessed 24 May 2003.

[487] "Challenge for U.S. Agribusiness," The Agribusiness Council Home Page; available from http://www.agribusinesscouncil.org/#def; Internet; accessed 1 April 2003.

operations of a farm, the manufacture and distribution of farm equipment and supplies, and the processing, storage, and distribution of farm commodities."[488] While the term "agribusiness" still encompasses traditional activities related to agricultural production, processing and distribution, the research for this project show that it also includes other businesses involved in supporting agriculture and the food chain in areas such as: biotechnology, precision farming (global positioning tools), farm and financial management, agricultural trade, pharmaceuticals, chemicals, land development, agricultural e-commerce, environmental impact management, risk management, utilization of agricultural byproducts and agricultural systems management. (The process of trying to precisely define the term is like trying to put socks on an octopus.)

The important concept of "food chain clusters" introduced by Dr. William Heffernan in his report to the National Farmers Union in 1999[489] has been mentioned several times in this dissertation. It was included in Figure 3 to show that the central organizers of the industrial agriculture bloc will soon be the powerful "food chain clusters." Heffernan used the concept of "food chain clusters" to refer to the manner in which agribusiness entities are aligning and grouping themselves to exercise control over the food system in a seamless, vertically integrated manner.[490] Clusters of firms are formed through joint ventures, subsidiaries, partnerships, mergers, part ownership, or contractual commitments. These clusters enjoy the economic, political and social benefits of dominating a food process from seed to packaged product. The chain of control includes owning intellectual property rights in genetically modified seeds, animal

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[488] *Websters New Collegiate Dictionary* (1979), s.v. "agribusiness"
[489] See Heffernan, "Report to the National Farmer's Union: Consolidation in the Food and Agriculture System" (February 5, 2000).
[490] Ibid., 3.

semen, etc.; interim stages of applying fertilizers or chemicals, feeding livestock or poultry; and final stages of processing or meatpacking commodities into forms ready to sell to retailers. The seamless system is the ultimate goal of the industrial agriculture model.[491]

Heffernan argued that the "emerging clusters of firms" will define the future of the global food system. He stated: "Within this emerging system, there will be no markets and thus no 'price discovery' from the gene, fertilizer processing and chemical production to the supermarket shelf." [492] His work strongly supports the framework of this dissertation study regarding the Gramscian theory of power blocs.

It is estimated that the processing/food manufacturing stage of the food chain handles more than eighty percent of the raw domestic food products. According to Professor Richard T. Rogers of University of Massachusetts-Amhurst, Department of Resource Economics, "The processing stage has the fewest number of establishments in the vertical food system, but the processor/food manufacturer is often considered the most powerful, influential firm in the system—the marketing channel leader."[493] Rogers' paper on structural changes in U.S. food manufacturing provides the following listing of the top twenty-five food processing companies for the year 1998:

1) Philip Morris Companies, Inc.
2) Conagra, Inc.;
3) Cargill, Inc.;
4) Pepsico, Inc.;
5) The Coca-Cola Company;

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[491] Ibid., 3-4. .
[492] Ibid., 3.
[493] Richard T. Rogers, "Structural Change in U.S. Food Manufacturing, 1958 to 1997,"Agribusiness: An International Journal 17, no. 1 (2000): 3-32, 3; posted on website of Economic Research Service, USDA, 3 (May 4, 2000); available from http://www.ers.usda.gov/briefing/foodmarketstructures/conferencepapers/rogers.pdf; Internet; accessed 16 June 2003.

6) Archer Daniels Midland Company;
7) Mars, Inc.;
8) IBP, Inc.;
9) Anheiser-Busch Companies, Inc.;
10) Sara Lee Corporation;
11) H.J. Heinz Company;
12) Nabisco, Inc.;
13) Bestfoods;
14) Nestle USA, Inc.;
15) Dairy Farmers of America;
16) Kellogg Company;
17) Campbell Soup Company;
18) The Pillsbury Company;
19) Tyson Foods, Inc.;
20) General Mills, Inc.;
21) Quaker Oats Company;
22) The Procter & Gamble Company;
23) Dole Food Co., Inc.;
24) Hershey Foods Coproation; and
25) Land O' Lakes, Inc. [494]

These processors form a fraction within the industrial agriculture bloc. Their ability to exercise hegemony is enhanced by well financed lobbying efforts, connections with the USDA, relationships with academic institutions and mammoth advertising budgets. Farmers sell their raw products to the processors and manufactures either on the basis of a market price or a contract price.

In some industries such as livestock, the concentration at the processor/meat packer level has arguably created inequitable market pricing for farmers who are unable to receive price signals because of the large number of captive supply contracts imposed by the meatpackers. Meatpackers are able to refrain from trading for several days due to the large number of supply contracts and thus drive down the prices of the livestock commodities. Rogers states that "as more product volume moves through non-market methods, the less is known about true product values as key economic information

[494] Ibid., 4, data sourced from "The 1998 Top 100 Food Companies," *Food Processing* (December 1998).

summarized by price becomes more difficult to discover."[495] As another strategy, processors are entering into long-term strategic alliances with commodity producers which require the producers to enter into contracts to grow their products pursuant to defined specifications.[496]

The nation's four largest meatpackers have been key players in the agribusiness environment. They include IBP (now owned by Tyson Foods Inc.), Swift & Co. (ConAgra is 46 percent owner), Excel Corp., (the slaughterhouse subsidiary of Cargill, Inc.), and Farmland. Referred to as "The Big Four," these meatpacking enterprises control an estimated 75 to 80 percent of the beef cattle slaughtered in the United States each year.[497]

The Tyson/IBP conglomerate is a powerful "fraction" (as the term is used by Gramsci) in the industrial agriculture bloc exercising hegemony in agribusiness. Formed in late 2000 when Tyson Foods, the world's largest poultry producer and processor, acquired controlling stock in IBP, the conglomerate became the nation's largest meatpacking company. Two corporations, each powerhouses in their industries, merged to create a $20 billion behemoth poised to "concentrate market power, reduce raw material and labor expenditures and eliminate competition" across a broad swath of the agricultural industry.[498] IBP is the largest beef meatpacker in the United States and the second largest pork meatpacker.[499] To the extent that IBP and its parent company, Tyson, use this concentration of ownership to exercise control over prices and goods, the

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[495] Ibid., 2.
[496] Ibid.
[497] See Steven D. Vetter, "Audit of 'Big 4' requested," *Western Livestock Journal* 32, no. 21, 10 March 2003, 1 and 7.
[498] A.V. Krebs, "Merchants of Greed," Corporate Agribusiness Research Project (undated); available from http://www.organicconsumers.org/corp/greed.cfm; Internet; accessed 10 July 2003.
[499] Heffernan, 10.

losers in this union could be consumers and independent cattle and poultry producers. A lawsuit filed by cattle producers in 1996, alleging that IPB engaged in illegal price control practices, has been certified a class action for cash sellers of fed cattle to IBP and is scheduled for trial on January 12, 2004.[500]

Another major agribusiness player, Cargill Corp., has the distinction of being the nation's largest private corporation with operations in seventy countries.[501] In addition to its Excel meat processing business, Cargill is a major grain processor and one of the largest seed companies in the world. Its agribusiness portfolio demonstrates vertical integration with business enterprises in the areas of seed operation, animal feed, feeding cattle operations, and processing plants. By entering into a joint venture with Monsanto[502] (one of the world's leading biotechnology companies), Cargill gained access to the biotechnology that would allow it to create new genetic products. The Cargill/Monsanto alliance is aggressively involved in application of the "terminator gene" to create sterile seeds that can only be used one season.[503]

Archer Daniels Midland (ADM) calls itself the "Supermarket to the World." Its operations include a global network of processing facilities for the processing of grains for the food and animal feed markets. ADM has entered into joint ventures with numerous agricultural companies and cooperatives that will give it access to farmers and the flood of raw materials that it needs, including: joint ventures with Countrymark,

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[500] See Official Court Website, *Pickett v. IBP, Inc.*; available from http://www.endcaptivesupply.com/schedule.html; Internet; accessed 23 May 2003.
[501] Heffernan, 3.
[502] Monsanto's product line also includes pest and weed killing chemicals and fertilizers.
[503] Heffernan, 4.

Riceland and United Grain Growers.[504] It is also involved in a joint venture with Growmark, a company producing grains for energy products, and two feed cooperatives, Goldkist and Ag Processing, Inc. (AGP). It has aggressively expanded into foreign markets with commodity processing and feed operations in South America and oilseed refining, feed and broiler processing in China. Its presence in the production and processing of livestock has been felt through its joint venture with AGP and its continued purchase of shares in IBP.[505]

Smithfield Foods is an unmistakable major agribusiness player as the largest pork producer in the United States and the world, with annual sales in 2000 of $5.2 billion. It slaughters more than 12 million hogs annually, raised on hog farms it owns or sourced through contracts with farmers. Known for its growing number of factory farms and processing facilities, it is has come to the attention of public interest groups for controversial corporate behavior related to the despoiling of land and water.[506] The confinement facilities used by Smithfield produce large amounts of swine waste that are kept in lagoons. They are difficult to disperse into the surrounding environment, and have created environmental damage, especially in North Carolina, which is the number two hog producing state in the United States. Robert F. Kennedy, Jr. and other lawyers have brought legal actions against Smithfield, claiming that it illegally dumped untreated hog waste and contaminants into the waterways of North Carolina.[507]

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[504] Ibid., 9.
[505] Ibid.
[506] See A.V. Krebs, "Merchants of Greed," Corporate Agribusiness Research Project (undated); available from http://www.organicconsumers.org/corp/greed.cfm; Internet; accessed 10 July 2003.
[507] See "Lawsuits Charge Smithfield Foods—Biggest U.S. Factory Farmed Hog Producer—Illegally Dumping Millions of Pounds of Untreated Pig Waste, Other Toxins in North Carolina, Polluting Rivers, Causing Fish Kills, Shellfish Disease," Earth Crash Earth Spirit (February 17, 2001); available from http://eces.org/articles/static/98238960099021.shtml; Internet; accessed 17 June 2003.

In the U.S. dairy industry, a recent merger between Suiza Foods Corp, the largest fluid milk producer in the U.S., and Dean Foods Co., the second largest, has created a mega operation poised to exert a dominant influence. As part of the merger, the Justice Department required the two companies to sell dairy processing plants in eight different states to avoid reduced competition. The plants were acquired by a new entity, National Dairy Holdings, L.P., that is fifty percent owned by a dairy cooperative, Dairy Farmers of America Inc.[508]

Companies that supply farmers with seeds, fertilizers, pesticides and machinery comprise another major group within agribusiness. Those involved in biotechnology have acquired increasing commercial power as they have amassed patents and propriety intellectual property assets in agricultural products such as genetically engineered seeds and plants. Many of these assets are quietly being funneled out of land-grant institutions as the universities agree to transfer rights in research to biotechnology companies.[509] The roster of prominent biotechnology companies operating in the United States includes: Monsanto, American Cyanamid, Dow, Pioneer-Hybred, Rhone-Poulenc, DuPont, Inc. and United Agri5 Products, (a subsidiary of Con Agra).

Novartis, a Swiss producer of genetically engineered crops, pharmaceuticals and chemicals, was formed in 1996 when CIBA-Geigy and Sandoz merged. The company became the number one agrochemical company in the world after it aquired Merck in

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[508] See "The Family Tree of Texas Dairies," Dairy Foods (August 2002); available from http://www.diaryfoods.com/articles/2002/0802/0802_dairy100.htm; Internet; accessed 10 July 2003.
[509] See Joshua A. Newberg and Richard L. Dunn, "Keeping Secrets in the Campus Lab: Law, Values and Rules of Engagement for Industry-University R&D Partnerships," *American Business Law Journal* 39 (Winter 2002):187-240.

1997.[510] Novartis has a business connection with ADM through its part ownership of Land-O-Lakes, an ADM business. This alliance could prove useful to Novartis over time since its holdings do not include grain or food processing companies.

Another leader the chemical and industrial products is DuPont, Inc. It is also involved in biotechnology. DuPont has entered into joint ventures with ConAgra's United Agri Products business, thus joining the agrochemical and biotechnology interests of DuPont with the array of businesses under the ConAgra umbrella.

Food retailers form another powerful fraction within the industrial agriculture. In 2001, the U.S. food industry ranked fifth in the ranking of most profitable industries measured by percentage of return on assets."[511] One reason for the impressive success of this industry has been its strategy of forcing down the prices of raw materials from producers and farmers while increasing the costs of food to consumers to ensure high margins of profitability.

The fast pace of concentration in the retail grocery sector during the past decade is changing the face of the supermarket business. The catalyst that has shaken up the grocery business is Wal-Mart. The Arkansas-based company first began selling food in 1988. In 2002, it edged out Kroger (a national chain located in Cincinnati, Ohio) to become the nation's number one grocer based on annual sales of more than $53 billion.

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[510] As noted earlier in this dissertation, Novartis is known in the United States for its controversial arrangement with the University of California-Berkley to conduct research on genomics under a $25 million contract.

[511] See "Fortune 500: Drug Industry Most Profitable Again," Families USA (April 2002); available from http://www.tilrc.org/docs/0402drug$.htm; Internet; accessed 25 May 2003.

The third largest grocer is Albertson's (based in Boise, Idaho) and the fourth major supermarket chain is Safeway (headquartered in Pleasanton, California).[512]

Wal-Mart targeted the grocery business as being ripe for entry in the late 1980s when it noticed that concentration in the grocery business had resulted in higher food prices by grocers seeking to expand their profit margins. The industry was vulnerable to Wal-Mart's price cutting strategies, and Wal-Mart could still make a profit while undercutting competitors by ten to fifteen percent. Competition is fierce between the four top grocers and industry watchers predict that at least one of the supermarket chains will not survive.[513]

Wal-Mart's food business success is the result of many strategies, but clearly its ability to exercise enormous pressure on entities farther down the food chain gives it an edge. Suppliers are pressured to source raw materials at lowest costs and provide them in uniform packaging with uniform weights. No Wal-Mart stores offer meat cutting or butcher services. The industrial agriculture business model meshes perfectly with the Wal-Mart business model. Wal-Mart's move toward vertical integration can be seen in its ownership of food distributors, AmeriService and McLane's.[514]

The competitors, Kroger, Albertson's and Safeway, have adopted new strategies to compete, including cost cutting, expansion of their house brands and providing consumers with meat butchering services. These supermarket chains also must shoulder

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[512] See Patricia Callahan, "Wal-Mart supercenters top grocery list," *The Wall Street Journal* (June 9, 2003); republished online at Sunspot.net Business website; available from http://www.sunspot.net/business/bal-wlmart060903,0,5949846.story?coll=bal-business-headlines; Internet; accessed 16 June 2003.
[513] Ibid., ¶¶ 11-15.
[514] Brendan Coffey, "Revenge Of The Big-Box Stores," Forbes Online, ¶ 4 (March 12, 2003); available from http://www.forbes.com/2003/03/12/cz_bc_0312sf.html; Internet; accessed 16 June 2003.

additional costs incurred because their labor force is mostly unionized. In contrast, Wal-Mart has aggressively fought off all attempts to introduce unions.[515]

Consultants with the Boston Consulting Group offer the following summary of Wal-Mart 's powerful presence in the grocery industry:

> Wal-Mart's U.S. grocery sales have skyrocketed from $10 billion to more than $45 billion in little over a decade—a 14.6 percent real annual growth rate. We project these sales to reach nearly $70 billion by 2005....If Wal-Mart can find the right entry vehicles, it aspires to expand in Japan, Western Europe, and many developing countries. To be sure, its march across the United States—and the rest of the world—shows no signs of slowing down. In its wake, Wal-Mart has left a trail of shuttered grocery stores. Surviving retailers in the United States face squeezed margins, diminished traffic, and a reduced share of grocery purchases.[516]

So the newest fraction to ally itself with the industrial agriculture bloc is Wal-Mart. As the largest retailer in the world, the potential for this company to exercise hegemony in the production of agricultural commodities is enormous. This research has identified large concentrated agribusiness enterprises as organizers within the industrial agricultural bloc. Wal-Mart's dominance in the food chain will allow it to wield power within this group and ally itself with a multinational industrial agriculture bloc as it expands internationally. A superstructure of economic, political and social relationships may be defined by the modes of agricultural production generated by Wal-Mart as it exercises hegemony over the agricultural industry.

Since 1962, agribusiness has operated under the prevailing influence of The Committee for Economic Development (CED). The web site for CED describes itself as

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[515] See Wendy Zellner, "How Wal-Mart Keeps Unions at Bay," *Business Week* (Oct. 28, 2002); republished on Labor Research Association website; available from http://www.businessweek.com/magazine/content/02_43/b3805095.htm; Internet; accessed 16 June 2003.

[516] Marin Gjaja, Alexander Lintner and Henry M. Vogel, "Dancing with the 800-Pound Gorilla," Boston Consulting Group, ¶ 2 (2003); available from http://www.bettermanagement.com/Library/Library.aspx?a=8&libraryid=4892; Internet, accessed 16 June 2003.

"an independent, nonpartisan organization of business and education leaders dedicated to policy research on the major economic and social issues of our time and the implementation of its recommendations by the public and private sectors."[517] Launched by business leaders in the World War II years, this organization turned its full attention to agriculture in 1962 when it released a report titled "An Adaptive Program for Agriculture." The panel responsible for this report, two hundred businessmen, academics and educators (many of them agricultural economists), began with the pronouncement: "The movement of people from agriculture has not been fast enough to take full advantage of the opportunities that improving farm technologies, thus increasing capital, [will] create."[518] In order to remove the excess resources (people) from farming, the CED report outlined a program that was based in large part on changing the price system to generate financial hardship.

The growing power of agribusiness in the food supply chain from farmer to the consumer has been accompanied by the dwindling market power of the commodity producer. The preferred use of contractual arrangements, alliances, joint ventures and direct ownership by Agribusiness has all but eliminated open competitive markets and hastened this result. These preferred means of controlling production are designed to serve the industrial agriculture bloc and minimize the power of the subordinate producer and the consumer at opposite ends of the food chain.

In early 2003, Hal Hamilton, founding co-chair of the National Campaign for Sustainable Agriculture, attended a Harvard Business School Agribusiness Executive

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[517] Committee for Economic Development Mission, available from http://www.ced.org/about/mission.shtml; Internet; accessed 27 April 2003.
[518] A.V. Krebs, *The Corporate Reapers: The Book of Agribusiness* (Wa. D.C.: Essential Books, 1992), 289, quoting "An Adaptive Program for Agriculture," report by the Committee for Economic Development, 1962.

Seminar. Given his alignment with the counter-hegemony against the industrial agriculture model, he reported that he "felt a bit like a fish out of water" at the seminar with 160 top managers of large agribusiness companies.[519] His observations on the agribusiness "mindset" are as follows:

> Not only do incentives and rules of the competitive market stand in the way of a 'greener' business climate, but there's also an internal culture in the business world that lulls its leaders into a cozy complacency...There's a 'school spirit' among these executives that makes it difficult for any of them to question the wisdom of transgenetic crops, even in the face of consumer resistance. Technology equals progress which ensures the common good. They like to believe that they have science on their side.[520]

Hamilton succinctly summarizes the business objectives of the agribusiness companies represented by those attending the conference:

> These companies have two powerful motivators: the drive for efficiency and the search for unique values that increase market return. The whole system is constructed on squeezing inefficiencies out, procuring and moving commodities very cheaply, adding unique value at the lowest possible cost to the next customer up the chain, or getting a premium by adding some desired attribute that the customer wants.[521]

This describes the industrial agriculture model. It is the guiding force for agribusiness.

Advertising Agency Associations. One group caught in an awkward position by the changing face of the challenger in these cases was the advertising associations. While advertising agencies are clearly the recipients of the checkoff funds, the associations represent their interests. Needless to say, advertisers have a keen interest in keeping the millions of dollars flowing their direction for national campaigns such as "Got Milk,"

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[519] Hal Hamilton, "Agribusiness Executives Tune-Up at Harvard," Sustainability Institute, ¶ ¶ 1-2 (January 27, 2003); available from http://sustainer.org/pubs/columns/01.27.03Hamilton.html; Internet; Internet; accessed 25 May 2003.
[520] Ibid., ¶¶ 6-8.
[521] Ibid., ¶ 9.

California Raisins, "Beef, it's what's for Dinner." In the *Glickman* case, the American Advertising Federation and several other advertising groups filed an amicus curie brief in favor of the challenger, Gerawan Farming. Their brief argued that:

> [T]ruthful commercial messages regarding lawful products and services are entitled to full Constitutional protection...Assessed under the level of scrutiny accorded fully protected speech, this becomes an extremely easy case. The government obviously cannot compel a speaker to endorse or propound a particular view. Moreover, whether assessed under Central Hudson or Abood, the Secretary's program is clearly unconstitutional.[522]

While their primary objective in this brief may have been to argue for an expanded level of protection for commercial speech, the advertising associations clearly staked a position on the side of the challengers and argued that the checkoffs are unconstitutional. In the *Glickman* case, this aligned them with the large producers investing major marketing dollars in campaigns for their branded products. In an odd twist, control of the checkoff advertising dollars in the cattle, beef and dairy cases, is exercised by the USDA, state governments, commodity boards and those appointed and hired by them to administer the checkoff programs. The challengers are the little guys seeking a ruling that the checkoff programs are unconstitutional while the government and other fractions in the dominant hegemony claim that the government can compel a speaker to endorse a particular view when the message constitutes government speech. The dominant hegemony argues that the government speech doctrine applies, so First Amendment protection is not afforded to the individual producers.

It would appear that this puts the advertising associations at odds with their clients in the beef, pork and dairy cases who are arguing for reduced First Amendment

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[522] Richard T. Rossier and Wayne R. Watkinson, "Glickman v. Wileman: On the Doorstep of The Supreme Court," NICPRE Quarterly 2, no. 3 (Third Quarter 1996); available from http://commodity.aem.cornell.edu/nicpre/newslet/vol2no3/index.htm; Internet, accessed 5 April 2003.

protection of generic advertising under the government speech doctrine. However, the Supreme Court has largely ignored the commercial speech doctrine in *Glickman* and *United Foods*, preferring to decide the cases under a freedom from compelled speech analysis based on the *Abood* and *Keller* cases. Given this direction of the court, advertising agencies and their associations who are interested in expanding the commercial speech doctrine may have little to gain (and everything to lose in terms of client goodwill) by filing an amicus curie brief case before the Supreme Court on this point when the next checkoff case is heard.

American Federation of Labor and Congress of Industrial Organizations (AFL-CIO). The AFL-CIO filed an amicus curiae brief in *Glickman v. Wileman* in order to state its views on the agency shop cases (the line of cases based on *Abood v. Detroit Board of Education* governing freedom from compelled speech) and to clarify for the court how these cases should properly be applied. The AFL-CIO foresaw that the challenges to compelled speech in the form of checkoffs created the potential for new application and possibly a new interpretation of the *Abood* principles. *Abood* held that employees who chose not to belong to a union could be forced to pay service fees to a union, provided that such fees were used strictly for purposes germane to the reason why the unions were established, i.e., to serve the purpose of collective bargaining.

Clearly, it was in the manifest interest of the AFL-CIO to ensure that the Supreme Court did not alter the *Abood* analysis to disturb the status quo vis-à-vis the manner in which service fees have been collected from non-union members for more than twenty years. The AFL-CIO's brief characterized the free speech claim of the fruit growers and handlers challenging the checkoffs in *Wileman* as a "negative First Amendment right" to

abstain from making financial contributions to generic advertising or speech. (The nomenclature of "negative First Amendment right," which refers to the constitutional right to *refrain* from speaking, has been used at times to identify the corollary to the affirmative First Amendment right to speak or express oneself.) An interpretation of the *Abood* line of cases most favorable to maintaining the status quo was offered by the AFL-CIO in its amicus brief:

> ...the fruit handler's claims are like other claims this Court has considered by members of regulated groups urging that their compelled association with expressive activity contemplated by a legislative regulatory scheme violates their constitutional right of non-association. Most closely analogous are claims of this nature that have been brought by employees challenging union expenditures in agency shop cases, and attorneys challenging bar expenditures in unified bar cases.
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> In these cases, the Court has repeatedly rejected these claims so long as the positive group speech activity serves the overall goals of the regulatory scheme. And, unless the challenged speech activity is political or ideological speech at the core of protected First Amendment values, the Court has taken a *generous view* in considering whether the expenditures are rationally related to the overall legislative purpose. [emphasis added][523]

The goal of the AFL-CIO was to persuade the Supreme Court to take a "generous view" in concluding that the checkoff fees are rationally related to the overall legislative purpose of the marketing orders governing the tree fruit industry. The AFL-CIO brief makes a broad assertion that a regulated party's ability to exercise "a broad constitutional right to opt out of the affirmative portion of an overall system for regulating a facet of the economy" will threaten "important economic and social programs." In other words, it will threaten the First Amendment principle that allows unions to collect service fees from non-union members.

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[523] Motion for Leave to File Brief *Amicus Curiae* and Brief of the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae in Support of Petitioner, *Glickman v. Wileman* (1997) (No 95-1184), in the Supreme Court of the United States, October Term, 1996, 4-5.

Academic Specialists Aligned With Hegemony or Aligned With Counter-Hegemony. The history of the academic community's involvement in agriculture sheds light on the role played in the early Twenty-first Century by academic specialists in the industrial agriculture bloc and their counterparts engaged in research and activities supporting counter-hegemony.

The agricultural research establishment traces its roots to the passage of the Morrill Act in 1862,[524] legislation that provided public land for universities in each state charged with responsibility for establishing and supporting agriculture and mechanical arts. This was followed by the Hatch Act in 1887,[525] authorizing federal funds for experiment stations that would function in conjunction with the land grant universities. Congress passed a second Morrill Act in 1890[526] that granted funds to any state that wished to secure them for "separate but equal" land grant colleges for black students. (Seventeen states elected to establish black colleges, now referred to as "1890 colleges or universities.") A final prong of this agricultural research system was the Extension Service. Created by the 1914 Smith-Lever Act,[527] this was a system for using county agricultural extension agents to provide rural America with information and farming practices developed by the land grant universities and research stations.[528]

In his critical overview of agribusiness, *The Corporate Reapers: The Book of Agribusiness,* agricultural analyst, A.V. Krebs, traced the relationship between land grant

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[524] Morrill Act of 1862, 7 U.S.C. §§ 301 et seq.
[525] Hatch Act of 1887, 7 U.S.C. §§ 361a-361i.
[526] Morrill Act of 1890, 7 U.S.C. §§ 321 et seq.
[527] Smith Lever Act of 1914, 7 U.S.C. §§ 341 et seq.
[528] See David L. Howell, William I. Lindley, Raymond H. Morton, Glenn Z. Stevens, Edgar Paul Yoder, *Elements of the structure of agricultural education in the United States of America* (Paris, France: United Nations Educational, Scientific and Cultural Organization, 1983), 53-55. Also see A.V. Krebs, *The Corporate Reapers: The Book of Agribusiness* (Washington, D.C.: Essential Books, 1992), 263-264.

universities and industry. He asserted that the connection between business and agriculture arose during the early years of the land grant colleges. Krebs stated:

> After gaining a certain measure of self-respect, these colleges began to ally themselves with the movement for scientific agriculture, which had begun in the 18th century, and went on to build an educational foundation on which a new organization of agriculture could take place.[529]

In Krebs' opinion, the new organization of agriculture created inequitable conditions for farmers. Rural farmers and the public have not been served well by an educational system that has favored industrial interests.

Krebs is not alone in his assessment. This same view has been advanced by various strong voices during the last five decades. In 1972, a particularly critical and powerful report was issued by the Agribusiness Accountability Project, a public interest project that was founded by Jim Hightower and a former Nader's Raider, Susan DeMarco.[530] The Agribusiness Accountability Project formed a Task Force on the Land Grant College Complex that documented how government and agribusiness dominated the research agendas of the land grant institutions to the disadvantage of family farmers. The resulting report, titled *Hard Tomatoes, Hard Times*, created a major stir in government and agribusiness circles. It identified pervasive ties between business and

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[529] Krebs, 264.

[530] Prior to his leadership on the Agribusiness Accountability Project, Jim Hightower served as a congressional aide. While working on the project, he became an advocate for consumers and farm workers. He later served two controversial terms as Commissioner of the Texas Department of Agriculture from 1982 to 1990. He carried his activism into this position, promoting organic farming, regulation of pesticides, small-farm cooperatives and consumer causes. In the early Twenty-first Century, he worked as an author and host of a radio show with a progressive, populist outlook. See "Politician Turned Political Sparkplug Jim Hightower is Keeping the Grassroots Connected and Radio Active," Horizon Magazine (1999); available from http://www.horizonmag.com/7/Jim-Hightower.asp; Internet; accessed 11 July 2003.

the land grant colleges.[531] The report claimed that the participants were a "close-knit bunch" that were "inbred and rather tightly drawn."[532] The group is described as follows:

> The land grant college community includes more than those who are on campus: administrators, faculty, researchers and extension agents. In addition, the community also includes officials of the national Association of State Universities and Land Grant Colleges (NASULGC), the Cooperative State Research Service and other USDA officials, various local and national advisory structures, private agricultural and research foundations and agribusiness clients of the system.[533]

The one external element that became integrated into the land grant community was agribusiness. The report asserted that "agribusiness ingratiates itself."[534] By offering money for grants and research, agribusiness secured a place for itself in the land grant community. However, in addition to the wellspring of financial support offered by corporate agriculture, *Hard Times, Hard Tomatoes* alleges that agribusiness was welcomed as a partner because its "attitudes and objectives were shared by the land grant communities."[535] This suggests that organic intellectuals in academia and agribusiness were building an "ideology ensemble" that would provide agribusiness and land grant institutions with a foundation for sharing power within the industrial agriculture bloc.

The report also argued that "the community serves itself" by the movement of people among three spheres of society—the land grant college community, government and agribusiness. It questioned the integrity of the land grant officials and staffs:

> Corporations make a sizeable investment in teaching, research and extension work, and they are repaid amply in (1) research products, (2) graduates prepared to work in agribusiness, and (3) legitimacy for their commercial products. Land grant officials and staffs, on the other hand, work hard to meet the requests of

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[531] See Jim Hightower, *Hard Tomatoes, Hard Times: A Report of the Agribusiness Accountability Project on the Failure of America's Land Grant College Complex* (Cambridge, MA: Schenkman Publishing Company, 1973).
[532] Ibid., 87.
[533] Ibid., 86.
[534] Ibid., 90.
[535] Ibid., 90-91.

> agribusiness, while many are on corporate retainers and a few actually hold seats on corporate boards of directors. It is a sharing process that raises serious questions of conflict of interest and of intellectual and scientific integrity.[536]

The concluding chapter of the *Hard Times, Hard Tomatoes* report presents a picture of an industrial agriculture bloc with two important fractions (agribusiness and land grant institutions) that exercise hegemony. The report states:

> America's land grant college complex has wedded itself to an agribusiness vision of automated, vertically-integrated and corporatized agriculture. It has accepted corporate agribusiness as an integral part of its community, applying some three-quarters of a billion tax dollars a year to help big business work its will in rural America....It has been a deliberate choice—corporations over people.[537]

Hightower's report described the effect of this hegemony by concluding that "the colleges have mistaken corporate need as 'the changing needs of a changing nation.' That is proving to be a fatal mistake—not fatal for the corporations or for the colleges, but for the people of America."[538] The Task Force emphasized the need for others to get involved in challenging the dominant position of the land grant college-agribusiness power bloc by stating:

> Today, the complex [land grant complex] serves only one constituency: corporate agribusiness. Others must get into this public complex, and they must get in on an equal footing with corporate executives. But the land grant community will not break off it monogamous relationship with agribusiness simply because it ought to do so. Significant change will come only under pressure.
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> The recommendations of the Task Force, therefore, are directed toward opening this closed world to public view and to participation by constituencies that today are locked out.[539]

This was a call for counter-hegemony, made in 1972 by a public interest organization that promoted a movement to break the hegemony exercised by two primary

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[536] Ibid., 91.
[537] Ibid., 138.
[538] Ibid., 139.
[539] Ibid., 139-140.

players in the dominant industrial agricultural bloc, the land grant colleges and agribusiness. Their ally was the U.S. government. The three entities are intertwined because: "The bow on the agribusiness-agrigovernment relationship is tied on the land grant campuses."[540] The Task Force issued a challenge for changes that would increase the power of "consumers, environmentalists, independent family farmers, farm workers, minorities, small town businessmen, rural public officials and other interests directly affected by the work of the land grand complex."[541]

The same challenge could have been issued thirty years later, since the same relationships between land grant institutions and agribusiness are prevalent in 2003. (In fact, the author of *Hard Times, Hard Tomatoes*, Jim Hightower, has continued to speak out against the corporatization of agriculture and other public interest issues in books, a monthly newsletter, the *Hightower Lowdown*, radio commentaries and a column in the *Nation* magazine.)

Legislation passed in 1980, the Bayh-Dole Act,[542] proved to be revolutionary in spurring academic-corporate partnering. It permitted universities to patent research discoveries resulting from federal funding. The legislation was the result of intense lobbying by a coalition of business and educational leaders seeking to create new opportunities for collaboration between business and academia. It was controversial, raising the question of whether the university's role as a center of learning engaged in research for the public good should be expanded to allow the university to become a source of viable commercial ideas. Academia saw the chance to earn royalties for its

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[540] Ibid., 96.
[541] Ibid., 141.
[542] Bayh-Dole Act of 1980, 35 U.S.C. §§ 200 et seq.

scientific endeavors, and industry saw a way to vacuum valuable ideas out of the ivory tower. The timing was right with pressure for innovation resulting from declines in United States productivity and foreign competition and the need for universities to mine new sources of revenue from grants and royalties as costs rose and tax support fell.[543]

Congress enacted other statues since 1980 to create incentives for academic-industry alliances, but the Bayh-Dole Act remains a turning point. Through this Act, Congress provided legitimacy for the notion that a university should develop and own intellectual property for its own financial gain. The Act provided an incentive for universities to accept a stronger corporate presence and set the scene for the invasion of the biotechnology firms in the 1980s and 1990s.

At issue in the new millennium are the rights of universities to retain ownership over seed lines developed during decades of research. Private corporations seek access to the seed lines to develop genetically modified plant varieties over which they then wish to exercise proprietary ownership. If this happens, a university loses control over its scientific resources—it is unable to share them with other universities or make them available to the public. There is a huge loss to those who share in the benefits of these resources.

Land grant universities are increasingly choosing to sacrifice their resources for the research dollars that will serve the narrow purpose of building corporate profits. In a significant move, North Dakota State University decided in 2001 to reject a biotechnology contract proposed by Monsanto that would have required a portion of the

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[543] See Eval Press and Jennifer Washburn, "The Kept University," The Atlantic Online, ¶¶ 12-13 (March 2000); available from http://www.theatlantic.com/issues/2000/03/press.htm; Internet; accessed 15 June 2003.

university's genetic plant resources to fall under the control of Monsanto. This was heralded as a special act of public service.[544]

One of the most stunning examples of the opposite approach by a university is a $25 million deal signed in November of 1998 between University of California-Berkeley and the Swiss agribusiness powerhouse, Novartis, a global biotechnology and pharmaceutical company interested in research to develop genetically engineered crops. As noted earlier in this dissertation, the arrangement gives Novartis unprecedented control. It allows Novartis to fill two seats (out of five) on the research committee for the Department of Plant and Microbial Biology and grants Novartis the first right to negotiate licenses for approximately a third of any research discoveries resulting in proprietary intellectual property arising from any projects within the department, however funded.[545]

These are astounding concessions to private business. The deal struck by this department (one of four within the College of Natural Sciences), was met with opposition from other faculty, public interest groups and students. There were sharp divisions over whether the agreement diminished Berkeley's commitment to conduct research for the public good and whether it would be possible for members of the department to freely exchange ideas with Novartis waiting in the wings to capture intellectual property rights. (The ability to patent genetically engineered organisms has provided a powerful hegemonic tool to the agribusiness organizers in the industrial agriculture bloc.)[546]

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[544] Brian DeVoire, "When Opportunity Knocks," The Land Stewardship Letter 19, no. 1, ¶¶1-2 (Jan/Feb/Mar 2001); available from http://www.landstewardshipproject.org/lsl/lspv19n1.html; Internet; accessed 19 May 2003.
[545] See Press and Washburn, "The Kept University," ¶¶ 3-4.
[546] Ibid., ¶¶ 5-6.

Dean Gordon Rausser, dean of the College of Natural Resources and proponent of alliances between universities and private business, claimed "Without modern laboratory facilities and access to commercially developed proprietary databases...we can neither provide first-rate graduate education nor perform the fundamental research that is part of the University's mission."[547]

An article in *The Land Stewardship* online newsletter (an electronic publication aligned with counter-hegemony against the industrial agriculture bloc) emphasized that the goals of the biotechnology sector have played an important role. The article stated:

> [I]n recent years various agreements between universities and private industry have locked up the fruits of land grant science at a dizzying pace. Ties between private industry and public institutions have always been a part of U.S. agricultural research. However, biotechnology has accelerated and deepened those ties considerably in recent years. Its incredible expense and insatiable appetite for resources has sent 'life sciences' corporations and universities rushing into each other's arms (citation omitted).
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> This trend is raising concerns among advocates of public research that land grant institutions are becoming little more than field stations for private corporations.[548]

The troubling manner in which universities today are serving the profit needs of corporate America rather than undertaking research and programs to advance the public good has come to the attention of the American Association of University Professors. This organization issued a "Statement on Corporate Funding of Academic Research"[549] in 2001 that outlined certain standards and actions that should be followed by faculty to help reduce conflicts of interest that arise due to the university-industry relationship. In its online and print publications, this association has expressed the need to preserve

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[547] Ibid., ¶ 8, quote from Rausser article in Berkeley alumni magazine.
[548] DeVoire, ¶¶ 4-5.
[549] "Statement on Corporate Funding of Academic Research," American Association of University Professors (2001), available from http://www.aaup.org/statemst/Redbook/repcorf.htm; Internet; accessed 29 May 2003.

academic freedom and independence in a world of corporate influence and power. However, the evidence in this study suggests that, in the agricultural communities of the land grant institutions, the effort to "preserve independence" is largely a hollow goal, since academic independence may already have been sacrificed at the alter of the industrial agricultural model several decades ago. In an effort to achieve some degree of transparency, American biological journals in the latter part of the 1990s began requiring authors submitting papers to identify any personal or family interests in biotechnology firms and specify the source of their funding.[550]

The quest for academic autonomy by agricultural specialists in modern times may be pursued by the few assertive voices willing to: 1) publish scientific results that may not be favored by corporate America, and 2) speak out on behalf of the need to direct research and resources toward furthering the public good. These activities are viewed as a threat to the entrenched and dominant industrial agricultural bloc. Instances of retaliation by university administrations and by corporations targeting researchers in legal battles are examples of the war of position the dominant bloc and those attempting to engage in counter-hegemony. Evidence that the industrial agricultural bloc has "captured" the university administration of universities can be seen in instances where professors have been stripped of duties and prohibited from speaking as well as in academic environments where researchers are discouraged from criticizing large corporate donors. The legal actions are coercive attempts to not only silence an individual researcher, but to exercise an intimidating effect on the publication of any

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[550] Jean-Pierre Berlan and Richard C. Lewontin, The Genetic-Industrial Complex: CASHING IN ON LIFE," Norfolk Genetic Information Network, ¶ 6 (December 1998); available from http://ngin.tripod.com/pblinks2.htm; Internet; accessed 15 June 2003.

future scientific research that would disclose negative information about corporations or their products.[551]

This historical overview provides a framework for understanding the role of various agricultural specialists involved in the commodity checkoff programs and the legal conflicts related to these programs. The specialists supporting the agricultural business model are aligned with the commodity industry blocs exercising control in the checkoff hegemony.

The most visible professors in the group aligned with the checkoff hegemony are those that publicly extol the benefits of the checkoffs or those that appear as witnesses on behalf of the government and testify that the checkoff programs are overwhelmingly beneficial to particular industries and producers. They typically provide econometric testimony attesting to the success of a specific commodity program in generating an increased demand for the commodity. Examples include Dr. Ron Ward of the University of Florida and Dr. Wayne Purcell of the Virginia Polytechnical Institute, who has written a paper titled *A Primer on Beef Demand*[552] for the American National Cattleman's Beef Industry Planning Group. Dr. Purcell has published numerous articles and other publications that address issues of profitability and growth in the cattle industry. His research and writings revealed a fundamental alignment with the industrial agricultural bloc. In his view, the middleman and the beef packing plants are exonerated from responsibility in contributing to the low prices experienced by cattle producers. This

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[551] See Donna R. Euben, "Academic Freedom of Individual Professors and Higher Education Institutions: The Current Legal Landscape," American Association of University Professors (May 2002); available from http://www.aaup.org/Com-a/aeuben.HTM; Internet; accessed 79 May 2003.

[552] See Wayne Purcell, *A Primer on Beef Demand*, RILP Publications (April 1998); available from http://www.aaec.vt.edu/rilp/publications.html; Internet; accessed 19 June 2003.

perspective can be seen in the following excerpt from his publication "The Source of Better Prices for Cattle Producers":

> Like it or not, producers have to recognize that regulating the marketplace or controlling how packers can do business is not going to push calf prices up in any significant way...The facts simply do not support the claims that producers are being robbed by middlemen. What the facts do show are price spreads being extracted by retailers that are growing dollar for dollar with their possible increases in costs. At the packer level, the facts show spreads that are growing slower than general price inflation, perhaps testimony to the low-cost operations of the huge beef packing plants of the 1990s.[553]

It was Purcell's opinion that an expansion of consumer demand is the secret to increasing producers' profitability. He stated:

> The facts show another hard truth: Any increase in middlemen's spreads, even increases economically justified by rising costs, will push producers' prices down if retail prices are stagnant because of weak demand for beef. In expanding on this now-obvious point, we come to a better understanding of where the needed dollars are: *They are in the pockets of the modern affluent consumer.* If we will support and push the emerging programs that are finally starting to move to a high-quality, consistent, and consumer-friendly (read "convenient") beef product offering, we will save some of the cattle-producing families that will otherwise be pushed out of business by a marketplace that has no conscience. To get that done, we will need investments in new technology and in new product offerings by the big packers.[554]

The National Institute for Commodity Promotion Research and Evaluation (NICPRE) at Cornell University is a formalized way in which the hegemony has given legitimacy to checkoff programs through its research to determine whether the commodity promotion programs are effective. The institute, funded by a special grant from Congress, engages in research on commodity promotion economics. Dr. Harry Kaiser is director of the NICPRE and, also, serves as director of an affiliated

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[553] Wayne Purcell, "The Source of Better Prices for Cattle Producers," RILP Publications (June 1999); available from http://www.aaec.vt.edu/rilp/publications.html; Internet; accessed 19 June 2003.
[554] Ibid.

organization, the Cornell Commodity Promotion Research Program (CCPRP). The stated purpose of CCPRP is:

> (1) to provide the public with information to judge the appropriateness of continuing authorization for commodity checkoff programs and continuing support of export promotion programs, and (2) to collaborate with and provide information to boards of directors and managers of commodity promotion checkoff programs to help them better utilize promotion funds. The CCPRP serves as a central source of knowledge on the economics of commodity promotion checkoff programs.[555]

In their interviews for this study, Dr. Ward and Dr. Kaiser both indicated that their work as economists was necessary to provide the commodity research boards and the government with the independent research necessary for policy decisions related to whether to continue the programs and how to spend checkoff money. They asserted that their research unequivocally demonstrated the economic benefits of the checkoff programs.[556] The following is an excerpt from Dr. Ward's interview:

> Interviewer: And does your research show that the goals for enhancing the market demand for these products...that the goals are achieved by the checkoff programs?
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> Ron Ward: Well, the ones I've looked at have. I think you could find a lot of exceptions and you could find problems with any of them. But the big ones we've looked at, you can measure the impact on demand. You absolutely can. It's just not my work—it's a lot of people's work. And you can determine whether or not it had an impact in terms of shifting the demand for the product. Then, you have to figure out was it worth the cost. Some of the commodities have done a better job than others in terms of doing that evaluation.[557]

Dr. Kaiser had the following comments about the benefits of the programs:

> And all of the economic research—well, that may be a little bit of an overstatement—but most of the economic research, probably at least 90 percent

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[555] Harry M. Kaiser and Jennifer L. Ferrero, "Cornell Commodity Promotion Research Program: Objectives and Progress to Date," Institute for Commodity Promotion Research and Evaluation (undated); available from http://www.commodity.aem.cornell.edu/object.htm; Internet; accessed 16 March 2003.
[556] Ward interview, 4 and Kaiser interview, 6.
[557] Ward interview, 3.

plus, has indicated that these programs have benefits and the benefits exceed the costs.[558]

He described the extent of the benefits as follows:

> For most commodities, what we find is that there are benefits to the people that pay for these programs in the aggregate. So, let's say you have a commodity and it's got 100,000 producers in the United States, and they're in the mandatory program. What we tend to find is that the aggregate net income, net revenue of that industry at the farm level goes up by more than the cost of the program. And typically we see that in the magnitude of like four-fold so that if the program costs $1 million, we see that the industry benefits by infusing another $4 million in terms of farm net revenue into the industry...
>
> We don't know how that money is distributed. Do large producers get more of the benefits than small producers? I have done a little bit of research on that, some theoretical research, that actually indicates that, in fact, the smaller farmers may be benefiting more than the large farmers on a per unit basis.

Kaiser emphasized that the large benefit ratios are often hard to detect, because the level of investment overall is so small:

> Harry Kaiser: Most of these programs are yielding very good benefit cost ratios for the benefits that they're getting from the advertising, the promotion, or whatever they're doing. And the typical rate of return is usually 4, 5 or 6, something like that. So that if you invest $1, you get $4 or $5 back in the aggregate to the industry....
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> Interview: And at what point would the producers start seeing a return? The profits for producers have been increasing going down, so there must be some point where if it gets high enough, those people on the end would see a return.
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> Harry Kaiser: Yeah. They're getting a return. They just don't see it, because it's so small...My point is that the returns on a percentage basis are humongous, 400 percent or 500 percent. But they're putting such a small amount in, you can barely distinguish it from other factors.[559]

He also pointed out that, while the processors and retailers are free riders, the farmer still realizes benefits:

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[558] Kaiser interview, 2.
[559] Ibid., 7.

> So there are benefits, there are positive benefits to the farmers. They outweigh the costs in general. But, having said that, there are huge free rider benefits to the processors and to retailers of these programs because they don't pay for them, but they get benefits from the programs. Processors see higher prices because of these programs and higher demand. And with the exception of food milk processors, most processors don't pay a penny for these programs...so when farmers say, "this is unfair because we're paying for these programs and other people are getting benefits" it's true....But what is not true is when they imply "when the processors and retailers are better off, we are worse off." That is not true.[560]

The benefits of generic advertising have been strongly asserted by a host of other researchers who have performed various economic analyses, including a team from Texas A&M University, led by Dr. John Nichols, director of the Texas A&M Center for Consumer and Food Marketing Issues. Nichols and his team of agricultural economists (Dr. George Carroll Davis, Dr. Oral Capps, Jr. and Dr. David A. Bessler) were commissioned by the National Pork Board (NPB) to conduct a study to investigate the returns to pork producers as a result of the pork checkoffs. They delivered a report titled "An Economic Evaluation of the Pork Checkoff Program, Texas A&M Department of Agriculture Economics, 2001 Departmental Technical Report No. 01-1," dated January 2001.[561]

In deposition testimony Dr. Capps provided in the case of *Michigan Pork Producers v. Campaign for Family Farms,* he outlined details of the pork study. Capps identified two different economic models that were used by the researchers to conclude that pork producers were realizing returns based on the pork checkoffs.[562] In fact, their

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[560] Ibid., 9.

[561] See Deposition of Oral Capps, Jr. at 18, *Michigan Pork Producers Association, Inc. v. Campaign for Family Farms* (W. Dist. Mich. 2002) (No. 1:01 CV-34), taken on 15 May 2002.

[562] Capps referred to the two models used in the study as the "structural model" and the "time series model." Both models showed that the pork checkoff delivered a positive benefit. (The time series model was more conservative, but still showed benefits.) Ibid. at 50, 55, 64-65.

report stated: "Unequivocally all producers benefit from the demand enhancing expenditures of the checkoff program."[563] Capps testified that Technical Report No. 01-1 was "peer reviewed" by another faculty member in the same department as the research team at Texas A&M. It was also reviewed at a preliminary stage by two outside academics, Dr. Marvin Hayenga of Iowa State and Dr. Harry Kaiser of Cornell who received financial reimbursement for their services. It did not receive a traditional "blind peer review" as required for published journal articles.[564]

The groups challenging the checkoffs are quick to point out that the majority of the research showing positive benefits of checkoffs was performed by academic specialists with funding from the government and various commodity promotion boards, who openly admit to "collaborative" goals. While academic specialists give assurances of their autonomy in performing independent, scientific research, a reasonable assumption can be made that an academic specialist who is paid by the government or a commodity promotion board may be predisposed to support the viewpoint (or "ideological ensemble" in the language of Laclau and Mouffe) of the industrial commodity bloc exercising hegemony.

Agriculture specialists aligned with the counter-hegemony against the industrial agriculture bloc are in the minority. John Bunting, a New York dairy farmer, activist and writer for the online farm newsletter, *The Milkweed,* attributes this to the fact that the land grant university system is a major player in supporting the industrialized system of agriculture.[565] He expressed concern in his interview about the close relationship

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[563] Ibid., 55.
[564] Ibid., 26-29.
[565] Bunting interview, 7.

between agribusiness and the land grant universities, and stated that he was not aware of a single "dairy economist" that was critical of the industrialized agriculture model[566] However, he commended one food marketing economist, Dr. Ron Cotterill, for his work.

Cotterill, director of the Food Marketing Policy Center at the University of Connecticut, has a record of clashing with corporate giants when his studies have disclosed monopoly pricing practices in the food industry. He recently published a study that showed supermarkets and milk processors in New England had gouged consumers by significantly overcharging for milk under the guise of meeting federal requirements of the Northeast Dairy Compact (a federal program that ran from 1997 to 2001 and guaranteed New England farmers a minimum price for milk). The research agenda followed by Cotterill aligns him with the counter-hegemony against the industrial agriculture model as evident by his own admission:

> Most of the economists in my subject area of industrial organization and anti-trust economics work for the big guys. Only a very small fraction work for the little guy and the public interest. As the trend continues toward economic concentration and fewer big firms, our research becomes all the more important.[567]

John Bunting reported on a face-off between Cotterill and another economist, Dr. Ken Baily, associate professor of dairy markets and policy economist at Penn State University, who has attempted to discredit Cotterill's study on the milk pricing in the Northeast Dairy Compact. Bailey's work is clearly aligned with dominant corporate interests. (Bunting referred to Bailey's work as "defending the status of corporate

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[566] Ibid.

[567] Elizabeth Omara-Otunnu, "Cotterill Analyzes Competition, Monopoly in Food Industry," Advance on the Web (March 3, 2003); available from http://www.advance.uconn.edu/03030307.htm; Internet; accessed 30 May 2003.

truth.")[568]

Dr. Neil Harl, agricultural economist, lawyer, and director of the Center for International Agricultural Finance at Iowa State University, has been another academic voice for the agricultural counter-hegemony. His writing, speaking and leadership suggests that he may be a central organizer for organic intellectuals within academia and in other sectors seeking to build a power bloc against the dominant hegemony. His assertion that the "the greatest economic threat to farmers as independent entrepreneurs is the *deadly combination of concentration and vertical integration*" [569] has appeared in his various public talks and papers, providing the counter-hegemony with a phrase from an academic specialist to identify the practices it strongly opposes.

The Organization for Competitive Markets (formed in 1998 to increase accuracy and fairness in the food chain market)[570] hosted a debate at its annual meeting between Dr. Harl and an advocate for the industrial agricultural model from Texas A&M, Dr. Ron Knudtson. Harl argued for a diverse industry structure that would replace the "deadly combination of horizontal concentration and vertical integration" and Knudson responded by arguing "bigger is more efficient" so consolidation is the answer for the future.

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[568] John Bunting, "Dueling Economists: PSU's Bailey vs. Uconn's Cotterill," *The Milkweed*, 1 (August 2001); available from http://www.sp.uconn.edu/~cotteril/bunting.html; Internet; accessed 30 May 2003.

[569] Neil E. Harl, "Economic Impact and Impacts of Continuing to Proceed as We Are Now," presented at conference, "Concentrations in Agriculture: How Much, How Serious, and Why Worry?" (February 4, 2003); available from http://www.ag.iastate.edu/centers/leopold/teams/policy/harl.pdf; Internet; accessed 6 July 2003.

[570] The Organization for Competitive Markets has stated that it was created because: "Dominant voices in agricultural policy ignored issues of industry structure, power and monopoly concerns." The organization hopes "to play a part in creating a newly profitable, diverse, and decentralized food production structure for the benefit of independent farmers, ranchers and rural communities." "OCM's Place in the World," Organization for Competitive Markets (August 2000); available from http://www.competitivemarkets.com/news_and_events/newsletter/OCM-N-15.htm; Internet; accessed 30 May 2003.

In another head-to-head in the academic "war of position" between hegemony and counter-hegemony, Harl took on the economist, Steven C. Blank. As noted earlier in this dissertation, Blank predicted that food production in the United States will disappear and agribusiness will flourish as raw products are provided from foreign sources. Harl wrote a review of Blank's book, *The End of Agriculture in the American Portfolio* that disputes many of Blank's conclusions and questions the factual basis for many statements. Harl acknowledged the accuracy of Blank's observation that economic forces will determine the direction of the agricultural sector, but objected to Blank's "extrapolation of trends at the margin" to predict the future for American agriculture.[571]

Harl has joined other academic colleagues in research and publications relating to monopoly by the meatpackers in the livestock industry, including: John Connor, agricultural economist and professor of Agricultural Economics, Purdue University; Peter C. Carstensen, agricultural law expert and Young-Bascom Professor of Law, University of Wisconsin School of Law; and Roger A. McEowen, agricultural law expert and associate professor of Agricultural Economics and Extension Specialist, Agricultural Law and Policy, Kansas State University.

The four scholars released a report in 2002 titled "The Ban on Packer Ownership and Feeding of Livestock: Legal and Economic Implications."[572] The report discussed legislative efforts to balance the economic power between producers and processors in a highly concentrated and vertically integrated meatpacking industry. The authors

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[571] Neil Harl, "Review of *The End of Agriculture in the American Portfolio* (Steven C. Blank)," Iowa State University faculty website (1998); available from http://www.econ.iastate.edu/faculty/har/Book_Review.html; Internet; accessed 30 May 2003.

[572] See John Connor, Peter C. Carstensen, Roger A. McEowen and Neil E. Harl, "The Ban on Packer Ownership and Feeding of Livestock: Legal and Economic Implications," Iowa State University faculty website (2002); available from http://www.econ.iastate.edu/faculty/har/PackerOwnership.pdf; Internet; accessed 6 June 2003.

criticized captive supply arrangements and disputed claims by the meatpacking industry and its supporters that it alleged were misleading, e.g., the legislation curbing ownership of livestock would have a severe detrimental impact, that shared risk arrangements would become illegal, etc.

This economic report became a banner document for the counter-hegemony in the war of position, especially when a contrary report was released by the Sparks Company, Inc., a commodity market research firm hired by the National Cattlemen's Beef Association and the National Pork Producer's Council to study the impact of the proposed law banning packer ownership and feeding of livestock fourteen days prior to slaughter. The Sparks report concluded that the proposed would have a severe negative impact on the beef and pork industries that a Sparks executive outlined as follows:

> The end result likely would be lower producer prices, higher costs, smaller markets and diminished returns for the foreseeable future. Losses for cattle and hogs could be as high as $10.9 billion and $3.5 billion of that cost would be on the beef industry.[573]

A similar war of position between the experts occurred on May 8, 2003, when a report was published by an academic team challenging the USDA's published conclusions regarding costs for country of origin labeling. Such labeling has been strongly opposed by agribusiness (the industrial agricultural bloc) that seeks to avoid informing consumers about the source of food products. The May 2003 report carefully evaluated the numbers and methods used by USDA economists and found that such numbers were "excessively high" and based on numerous inaccurate assumptions. This team included: Dr. Harl, Dr. McEowen, Dr. Connor and two other agricultural

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[573] "New Report Concludes Packer Ownership Proposal Could Cost Cattle Industry $3.5 Billion," site affiliated with beef.org, website of the National Cattlemen's Beef Association, ¶ 2 (March 18, 2002); available from http://policy.dnsalias.net/sparks; Internet; accessed 9 July 2003.

economists, Dr. John VanSickle of the University of Florida and C. Robert Taylor of Auburn University.[574]

The 1996 Farm Act required all commodity programs to demonstrate the effectiveness of their generic advertising on a periodic basis as a condition for maintaining such programs. The agriculture economists performing this research have played an important role in maintaining the checkoff hegemony. This was evident from the interviews conducted with Dr. Ron Ward and Dr. Harry Kaiser for this study. A significant number of agricultural economists have built their careers around performing research relating to the mandatory commodity promotion programs.

Although agricultural economists and law experts aligned with the agricultural counter-hegemony may agree with using First Amendment strategies as another means to wage a war of position against the industrial agriculture bloc, they have not been outspoken in challenging the commodity checkoffs. They have not launched a counter-challenge to the research demonstrating that the commodity checkoff programs have achieved the goal established by the legislature, namely, "to increase the primary demand (i.e., size of the pie) of a product."[575] In the conflict over commodity checkoffs, the agricultural specialists on the side of counter-hegemony seem willing to concede the issue of the effectiveness of the generic advertising and let the free speech argument be the primary focus of the hegemonic battle. (However, Erik Jaffe, a constitutional lawyer representing checkoff challengers emphasized in his interview that the formulas and

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[574] Alan Guebert, "Cooking the Books on COOL [County of Origin Labeling]," *Farmers Advance*, 21 May 2003, 16-A.

[575] Amitav Chakravarti and Chris Janiszewski, "The Influence of Generic Advertising on Brand Preferences (October 2002); available from http://www.cba.ufl.edu/mkt/facstaff/chrisworking/paper11.pdf; Internet; accessed 3 March 2003.

procedures used to support the findings that the commodity programs were effective had never been subjected to a rigorous examination in a legal challenge.)[576]

In a study on "The Influence of Generic Advertising on Brand Preferences," two marketing professors (Amitav Chakravarti, assistant professor of marketing, Leonard N. Stern School of Business, New York University, New York, and Chris Janiszewski, Jack Faricy professor of marketing, Warrington College of Business, University of Florida, Gainesville, Florida) asserted that "the concern of these commodity producers [filing lawsuits in the checkoff cases] is not that generic advertising is ineffective at increasing primary demand but that it is also redistributing 'shares of the pie,' especially in markets that have become differentiated."[577] Markets can become differentiated by branding or by advertising unique product attributes. The agricultural economists have touted the effectiveness of the programs, but Chakravarti and Janiszewski argued that the issue driving the checkoff lawsuits is the potential for generic advertising to: 1) influence the distribution of market shares among brands in differentiated markets, and 2) cause consumers to become more responsive to price. They stated:

> Generic advertising is designed to increase primary demand, or the 'size of the pie,' without affecting selective demand, or the 'share of the pie'. We find evidence to the contrary—generic advertising increases the consumer's sensitivity to changes in price and systematically alters brand preferences. These effects of generic advertising can be attributed to the tendency of generic ads to change the relative importance of the attributes used to evaluate the brands. The results have implications for the public policy issue of how to effectively implement generic advertising without differentially benefiting certain brands and the managerial issue of how to integrate generic and brand advertising in order to achieve product category and brand differentiation goals.[578]

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[576] Jaffe intervew, 1.
[577] Chakravarti and Janiszewski, 8.
[578] Ibid., 3.

Chakravarti and Janiszewski's study was the only research identified during this dissertation project that explored the interrelationship between generic and branded advertising. This is clearly a key issue in the tree fruit and mushroom checkoff lawsuits and may also be an issue for livestock and dairy commodities as the trend toward branding becomes more prevalent in those industries.

. The researchers questioned the positive or negative effect that generic advertising has on the whether "generic advertising may mitigate or amplify the advertising efforts of individual brands."[579] They noted the concerns exemplified in recent challenges to generic advertising and stated:

> In each case, the plaintiff argued that generic advertising was not achieving its legislatively mandated goal of increasing primary demand for all of the sellers in the commodity market. In this article, we will demonstrate that the concerns of United Foods and small cattle producers are legitimate.
>
> In study 1, we show some generic ad campaigns increase, and others decrease, brand differentiation in a product category. These changes in brand differentiation result in changes in brand choice. In studies 2 and 3, we show that generic advertising influences the competitive structure of a market because it increases the importance of an advertised product attribute by decreasing access to information about non-advertised product attributes. We also show that decreasing access to information about non-advertised product attributes results in an increased sensitivity to price, a consequence unique to generic advertising...[580]

The researchers reached the following two conclusions based on a series of four experiments conducted with generic and branded advertisements. "First generic advertising has the potential to redistribute market shares among brands. Second, generic advertising has the potential to make people more responsive to price."[581]

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[579] Ibid., 4.
[580] Ibid., 4-5.
[581] Ibid., 33.

The two academic specialists involved in this study are marketing professors who appear to be in a neutral position with regard to the checkoff hegemony.

Several former government agricultural officials that have moved into academia were interviewed in this study, including: Daniel Glickman, Enrique Figueroa and Kathleen Merrigan. While they may retain loyalties toward political parties and powerful private business contacts that are aligned with the dominant industrial agricultural model, they were willing to acknowledge both the negative and positive aspects of the checkoff programs and to assess ways in which the USDA could have done a better job handling checkoff matters arising during their tenures. One explanation for why they may feel more freedom to admit weaknesses of the checkoff system than other agriculture economists and academic specialists is because they hold academic posts that are not politically or financially beholden to the checkoff system.[582]

The Government's Position (or Lack of a Position)

"There is a near universal frustration at the inactivity of the USDA."
~ Doug O'Brien (commenting on the government's failure to address concentration in agriculture)

The Government and Change in Agriculture. A children's fairy tale spins the yarn of a royal leader who hired tailors to weave cloth and sew a new set of clothes for him. In furtherance of a self-serving scheme, they kept the gold the emperor gave them for their services and spread the message that "stupid people and those not good at their

[582] Daniel Glickman, former Secretary, U.S. Department of Agriculture, currently holds the position of Director, Harvard University Institute of Politics. Dr. Kathleen Merrigan, former Administrator, Agriculture Marketing Service, U.S. Department of Agriculture is currently the Director of the Agriculture, Food and Environment Program at Tufts University and Dr. Enrique Figueroa, former Administrator, Agriculture Marketing Service, USDA, is serving as Director of the Roberto Hernandez Center and Special Assistant to the Provost for Latino Affairs at the University of Wisconsin in Madison, Wisconsin.

jobs are unable to see the fabric and the new clothes."[583] Time passed and no one in the emperor's entourage acknowledged the obvious—that the tailors produced no clothes. Finally, the tailors pocketed the last of the gold and the king modeled his nonexistent new clothes in a parade. A young child finally spoke the truth, "He hasn't got anything on!"[584]

Like the emperor and his entourage, the United States Department of Agriculture, legislators and politicians have watched the disappearing rural farm population, the major shift in agriculture represented by growing concentration and the glaring structural inequality in the agricultural economy with a singular failure to acknowledge and address these developments. A member of Senator Harkin's staff, Doug O'Brien, succinctly summarized this by noting that there is a "near universal frustration at the inactivity of the USDA" in responding to the higher degree of concentration in the agricultural industry.[585] In the face of inescapable evidence of change (reports by advisory panels and commissions, testimony before Senate and House committees and subcommittees) and numerous efforts by to raise the consciousness of the State, the legislators and political actors have been sluggish in acting.

The Farm Bill of 2002 provided for a shift back to a farm dependency paradigm with significant farm subsidies, but did nothing to address the inequitable economic structures that have arisen through concentration and continue to become more extreme. Many scholars believe that this legislation, in fact, reinforces the interests of corporate agriculture since almost half of the farms receiving assistance are commercial farms with

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[583] Hans Christian Anderson, *The Emperor's New Clothes* (New York: Scholastic, Ind., 1977), 8.
[584] Ibid., 29.
[585] O'Brien interview, 3.

annual income of $250,000 and higher.[586] Activist agricultural organizations and individuals continue to push legislation that will seek to limit ownership of cattle by meat packing operations and to seek better enforcement of the Packers and Stockyards Act by GIPSA. The issues surrounding the increased importation of foreign beef and its impact on the demand and price of domestic beef do not appear to be on the radar.

A number of special advisory councils and hearings have put the issue of concentration before legislators and the USDA. Likewise, objections to the checkoff challenges have been communicated through referendums (clearly an indication that a certain percentage of the industry population disagrees with paying the checkoff fees). But the government and politicians have chosen to let the tailors continue to collect the gold and ignore the reality that the emperor has no clothes.

Gramsci's theory suggests that this is an example of AgriBiz hegemony – a dominant group seeking to avoid a "crisis of hegemony" by quietly reinforcing its power bloc and refusing to recognize or address the agricultural crisis. The ideology of AgriBiz can be seen in their vision of an industry that "shuns a commodity system and embraces value-added production"[587] and in the Federal government's approach to farm policy.

In the 1960s and 1970s, the government's policies fell heavily under the influence of commercial business leaders and economists at the Committee for Economic Development (CED). In his 1992 book, *The Corporate Reapers*, A.V. Krebs argued that the government became more than an observer in the structural changes required. In a 1974 report by the CED, it concluded:

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[586] See United States Department of Agriculture, *Food and Agricultural Policy: Taking Stock for the New Century* (September 2001), 49, 112.
[587] Troy Marshall, "Saving Rural America," Florida Farmers Inc., ¶ 5 (2003); available from http://www.floridafarmers.org/news/articles/saving.htm; Internet; accessed 12 July 2003.

> "The diagnosis [previously made by the CED in 1962] was that agriculture was using too many resources; fewer farms and farmers could produce all the output then required or even more than could be marketed. As a result of these findings, we prescribed programs 'for the better use of our resources in agriculture [that], vigorously prosecuted, would enable the people involved in farming to receive higher incomes without government controls or subsidy.'
>
> In general, policies of this nature have been pursued by the U.S. government, with the result described in the present statement; namely, that U.S. agriculture today is far more efficient, a far more productive industry."[588]

While it has not expressly endorsed the industrial agricultural model and its attendant commercial values and ideology, the USDA almost thirty years later has provided full tacit support for this approach as the preferred means for the future of agriculture within the American economy. This is implicit throughout the language found in the USDA publication titled *Food and Agricultural Policy: Taking Stock for the New Century* published by the USDA in 2001 as a comprehensive report on American agriculture. A close reading of the USDA's leading publication shows language such as:

> "Globalization makes it imperative for companies to diversify their sources of raw materials and buy from the farmer, wholesaler, or food processing company that provides the best product for the lowest price at any given time.
>
> All of our experience and evidence points to increasingly fierce competition in the agricultural system, suggesting that the innovative, cost-effective producers will prosper. Mergers, acquisitions, and further globalization of the food system can be expected to continue. Helping consumers eventually get what they want can be good business, and businesses that can do this quickly and efficiently tend to succeed while those who are slow to understand key trends face rapid erosion of competitive position."[589]

This report embraced "mergers, acquisitions and further globalization of the food system," and the benefits of increased contractual arrangements, size economies and reduced transaction costs occurring as the result of structural changes (i.e., vertical

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[588] A.V. Krebs, *The Corporate Reapers* (Washington, D.C.: Essential Books, 1992), 292, quoting "1974 Report by the Committee for Economic Development."

[589] United States Department of Agriculture, *Food and Agricultural Policy: Taking Stock for the New Century* (September 2001), 27-28.

integration).[590] It made only passing reference to the potential antitrust concerns with regard to monopolies created by structural change in the following paragraph:

> While this structural change is advantageous for some, it also prompts concerns about competition, market access, and the use of market power by some participants to the disadvantage of others. Moreover, reduced competition could limit society's gain from structural change by stifling innovation or tilting the market's result in favor of those with the greatest market power.[591]

In this publication, the USDA discussed the diverse farm sector in terms of commercial farms, intermediate farms, and rural farms. Woven throughout is a message of encouragement to intermediate farmers and rural farmers to move toward "off-farm" income. The executive summary glibly noted: "Today, fewer farmers are full time, choosing to merge farm and nonfarm employment opportunities."[592] The publication at no point acknowledged the reality of the forced exodus of thousands of farmers or their painful efforts to work second and third jobs to maintain a subsistence level of income. The USDA does point out the disparity in farm program benefits intended to bolster the farm industry. In regard to the most financially disadvantaged segment of farmers, the USDA report noted:

> This limited-resource group comprised about 6 percent of farms, had average household income of $9,500, but received less than 1 percent of direct government payments in 1999. In contrast, 47 percent of payments went to large commercial farms, which contributed nearly half of program commodity production and had average household income of $135,000....Even though many intermediate farms and rural-residence farms receive some program benefits, only one in four generated enough revenue to cover economic costs. Even more problematic is the inability of these farms to improve their cost efficiency at the same pace as larger commercial operations, whose investment in new technologies and ability to expand are aided by program benefits.[593]

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[590] Ibid., 21.
[591] Ibid., 21.
[592] Ibid., 4.
[593] Ibid., 49.

Intermediate farmers are encouraged to consider direct marketing and value-enhanced products, but the commitment of the USDA to this group is questionable when this suggestion is followed by: "Moreover, the importance of off-farm earnings clearly suggests that large benefits accrue to these farmers from efforts to expand off-farm employment opportunities and strengthen rural communities."[594] At the same time it has minimized the importance of the intermediate farmers, the USDA is forced to solicit their participation in addressing environmental issues. It stated: "...this group of farms controls a significant portion of the farmland (45 percent), and supporting their compliance with environmental regulations is important to the quality of the Nation's resources."[595]

The USDA dismissed economics as unimportant to rural-residence farms with the observation that "[O]bjectives other than farm profitability, such as enjoyment of a rural lifestyle and farm work, keep them in agriculture."[596] It further minimized their role as a non-participant in the economics agricultural game by noting:

> Not surprisingly, traditional agricultural policy has very little influence on the financial well-being of these households. They are very little connected to commodity prices but much more so to wage rates, interest rates, employment levels and tax policies. Their needs obviously are more effectively addressed by rural development and other policies that most affect them.[597]

Again, an annoying reality for the USDA is that, while the rural farmers fail to contribute economic value, they own a great deal of farmland. The USDA report sought to find a redeeming role for the rural farmers in conservation and environmental programs:

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[594] Ibid., 54.
[595] Ibid., 55.
[596] Ibid.
[597] Ibid.

> These farms are small individually, and they account for only a small proportion of total output, but collectively they control a large proportion (29 percent) of the farmland, suggesting that their participation in appropriately designed conservation and environmental programs potentially could make important contributions to national objectives in those areas.

It is telling that only one of the USDA's target initiatives for rural farming are related to any future role in agriculture. The three new policy initiatives include: "...expanding value-added agricultural production, finding alternative methods to increase rural income from the natural resource asset base, and providing leadership in education, specifically entrepreneurial skills."[598] In the absence of an economic contribution that can increase Gross National Production (GNP), there is no other role for rural farmers so they need to retrained and moved to other industries, consistent with Steven Blank's assertion that agriculture is a "dead loss" to the nation if it cannot contribute to the global agribusiness movement. While mentioning environmental and health concerns, the promise of biotechnology and other scientific advances, the report makes no reference to the larger issue of "sustainable agriculture" that has begun to capture the attention and concern of activist groups and the public who are interested in a longer-range vision of how the current industrial model with allow the earth to sustain its resources in the face of practices of commercial farming and depletion of agricultural assets. Sustainable agriculture and an expanded range of values relative to environment and quality of life are absent from the discussion.

In addition, the USDA has quietly refused to address in this report and elsewhere the growing economic inequities inherent in the agricultural industry dominated by commercial agriculture (i.e., the industrial model and vertical integration). For example,

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[598] Ibid., 92.

although concerns have been growing among the public and legislators regarding the dominance of a small number of meatpackers and the level of their profits accrued through a variety of practices such as captive supply arrangements, this issue and the role of the Grain Inspection and Packers and Stockyards Administration in protecting the interests of farmers and the public is noticeably ignored in *Food and Agricultural Policy: Taking Stock for the New Century.*

The USDA's vision of American agriculture is through the eyes of the industrial agriculture bloc. Alternative agricultural models based on any conceptual foundation other than the economic cost-benefit of the industrial model are literally off the USDA's radar. Even organic farming and smaller operations with value-added crop features appear to be tolerated as enterprises operating at the fringes of the dominant model, but not as opportunities for developing legitimate alternative models. As organic food products have gained consumer popularity, some organic farming operations have begun to operate more fully within the industrial agriculture model, and the USDA has slowly begun to give greater recognition to organic farming.

The favored treatment that the USDA has given to the ideology of commercial agriculture and the global industrial agriculture model and its implicit acceptance of the ideology for the future of agriculture can be seen in this USDA report. The USDA summarized its position as: "Foremost, our strongly held view is that agricultural policy must recognize that the marketplace is the best guide for allocating resources and provides the most objective reward for efficiency and good management."[599] However,

[599] Ibid., 61.

this is a hollow statement if competition in the marketplace no longer exists due to concentration and vertical integration.

In addition, the report asserted that the globalization of markets and culture and other fundamental changes in society and agriculture are trends that are "positive and unstoppable."[600] This is a huge challenge for those seeking to build an historic bloc capable of counter-hegemony that is sufficiently powerful to break the current hegemony in agriculture. They must first generate a public consciousness and then win consent to a set of beliefs and values based on the platform that the trends are *negative* and *can be stopped or changed.*

The Government and the Checkoff Programs. Dr. Ron Ward emphasized during his interview that the USDA and the AMS must support the current checkoff program because the law requires this role. According to Ward, they must carry out their responsibilities in four areas: 1) administration of the program, 2) message and delivery, 3) monitoring and evaluation, and 4) equity and legal challenges.[601] The commodity checkoff statutes require evidence that the programs are effective so this becomes a threshold requirement for an ongoing program. Ward stated: "I don't think they would defend one [checkoff program] if they felt like it was totally not effective."[602] He suggests that the government should be expected to stand behind the checkoffs as part of its agency function:

> The USDA has a responsibility in every one of those [areas of oversight] by law. So, they're supporting them legally. Part of it is because they think it's a

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[600] Ibid., 2.
[601] Ward interview, 5.
[602] It should be noted that the government vigorously defended the mushroom checkoff program in the *United Foods* case, despite the absence of evidence by the mushroom commodity board, the Mushroom Council, that the generic advertising for mushrooms was effective.

> good program maybe, but part of it is just the fact that it is a piece of legislation that's in place. So, they just couldn't say, well, we're walking away from it.[603]

It can be argued that the USDA has reluctantly stepped up to its role in handling the commodity referendums for livestock. The government's role in responsibly carrying out the mandates of the checkoff legislation requiring referendums have been seriously scrutinized by many, including the courts. However, during the interviews for this study, the views on the referendums and how they were handled varied widely, depending upon whether the interviewee was aligned with the commodity industry bloc or the group challenging checkoffs.

A representative of the Cattlemen's Beef Board thought the USDA should have moved more quickly in handling the beef referendum, but was satisfied with the USDA's actions in conducting a signature verification process, providing the following comments:

> [I]t was clear in the manner in which LMA gathered signatures, there had to be some kind of verfication process in order to comply with the law, which says that if 10 percent of America's beef producers want to petition for a referendum, then the secretary can call one. So the question becomes, "Are these beef producers?" And as you probably know...USDA, yeah, I would have liked them to move a little faster. But USDA hired Price Waterhouse to conduct a verification process, and LMA fell way short of the number of bona fide cattle producers necessary to hold a referendum... So it's unfortunate that LMA didn't conduct a factually sound—or just didn't go about gathering the signatures in a manner that would have assured that they were cattle producers, that they really knew what they were signing.[604]

Daniel Glickman had the following response when asked whether he was satisfied with the way the USDA handled the pork matter:

> No, because I think that first of all, we were not election officers, and we were in the midst of conducting a hotly contested election and, frankly, not very capable of doing that. And we did not do it very well. It's one of the things we talked about at the end, I mean, we did the best we could, and I think that my

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[603] Ward interview, 5.
[604] Interview with anonymous representative of the Cattlemen's Beef Board, 15.

> certification was in good faith as close as it probably was. But the whole process of ballot counting and verifying signatures, it was just a monumental mess. And it was not one the government was really set up to do. [605]

A pork producer and member of the Pork Board strongly agreed with Secretary Glickman's assessment:

> [T]he referendum, in my view, was a flawed process from the beginning. When USDA set it up under Secretary Glickman, they did a number of things that we challenged that were wrong. Primarily, that you didn't have to verify eligibility to vote...You could challenge someone's elibigility if you wanted to. It was on the different sides to challenge each other. But then they made it really burdensome to challenge because when you challenge somebody, you had to do it in writing, and that letter could only challenge one vote. If you wanted to challenge 1,000 people, you'd have to send 1,000 letters. So, it wasn't done to really have a fair election, in my view. We challenged in the beginning, and I think the next time it's done, USDA learned from that.[606]

Several of those interviewed in this study expressed the viewpoint that the position of the government in the checkoff challenge has not been one of neutrality because of the government's stake in using the checkoff programs to create and enhance its authority. Enrique Figueroa, former administrator of the Agricultural Marketing Service (AMS), the group within the USDA responsible for overseeing the checkoff programs, pointed out how close the ties are between the AMS and the commodity industries. In order to generate a more arms-length relationship, he wanted to remove administrative oversight of the commodity promotion programs to a group that was not involved in the certification products in exchange for use fees. He noted:

> One idea that I had that I was not successful in implementing that I wanted – AMS is organized by commodity, the avocado program, the poultry program—I wanted to reorganize where I would have a division of research and promotion oversight so that the people there strictly did that, whether it was pork or beef or cotton. The reason I wanted to do that is because historically, the divisions—tobacco or whatever it is—their livelihoods are a direct function of how well

[605] Glickman interview, 3.
[606] Interview with anonymous pork producer and member of the Pork Board, 5.

> those industries are willing to pay AMS in user fees. The Agricultural Marketing Service is probably the one agency within the entire federal government that has the largest proportion of its operational budget coming from user fees."[607]

User fees are the payments made by the commodity producers for the government's testing, certification and grading of the commodities. A satisfactory relationship between the dominant industry blocs and the USDA with respect to checkoff programs will strengthen the relationships needed for a steady flow of user fees. Expecting the government to take any take steps that would jeopardize the checkoff programs without a statutory directive from Congress or a legal mandate from the courts is tantamount to asking the foxes to lock the door on the henhouse.

The Challenger's Story

The hegemony is quick to emphasize that the origin of many of the stand-alone checkoffs occurred through the initiatives of producers themselves as they hopefully voted for self-directed programs that would be administered by the government to assist them in addressing the severe conditions they were experiencing in the deteriorating farm markets in the 1970s and 1980s.[608] This is a painful irony to the producers who feel betrayed by the promise of enhanced returns through checkoff programs. In a poignant commentary, George Naylor (an Iowa farmer elected president of the National Family Farm Coalition, a coalition of 34 grassroots farm and rural groups) reflected on how naïve he and others were initially about the goals of checkoffs, voting for the corn checkoffs in the 1970s with faith that promotions would be good for farmers. Now he believes differently. He concluded that a primary goal of checkoffs is to generate

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[607] Figueroa interview, pp. 3-4.

[608] The foundation for the checkoff programs seems deeply at odds with the argument of "government speech" used by the USDA and the trade associations to defend against the First Amendment claim violations alleged by the challengers.

higher production to get more cheap commodities for export. Naylor implicates the media along with the corporations:

> "..[t]he only beneficiaries of checkoffs are the big corporations who can increase their volume and margins. If the American people really knew how they and farmers have been lied to, they would wonder what has really happened to our country. Unfortunately today's campaign tactics and shallow, misleading news reporting leaves the average citizen bewildered or numb."[609]

There was a consensus among the individuals interviewed that the lawsuits challenging the constitutionality of mandatory commodity fees were prompted partially by the lack of a guaranteed vote on a periodic basis. Several individuals expressed their opinion that the conflicts could have been avoided if regular elections or referendums were in place. A Livestock Marketing Association executive stated:

> Personally, I think the largest mistake that was made by the proponents of the checkoffs when they drafted the legislation—and I know why they didn't do it, but I think it was a very large mistake on their part—was that they didn't establish a period vote in the law. I think they did it because they didn't want to take the chance that this thing would come back to a vote and would end the program...And when they took away their right to get a vote other than through the ridiculously difficult, almost impossible petition drive, that said to producers as they became unhappy, well, how dare they force me to pay when I can't have any right then to say at any point whether I think the program ought to continue to exist or not. They can't tell me on one end it's directed by me, I have a free right to make a decision whether it should continue or not when they don't have any means within the law to make that happen.[610]

This same individual emphasized the importance of a periodic vote several more times during the interview:

> I do think that, again, if NCBA or NBBC and others of these commodity checkoffs had permitted periodic votes after some of the issues came up, they would be in existence today and there probably would be no lawsuits...I still think that most of these checkoffs have shot themselves in the foot by not

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[609] "Iowa Farmer Details Experiences with Checkoff Programs Hails Recent Court Pork Decision," The Agribusiness Examiner (November 4, 2002); Internet; available from http://www.electricarrow.com/CARP/agbiz/200.htm; Internet; accessed 1 April 2003.
[610] Interview with anonymous executive of Livestock Marketing Association, 4.

> allowing producers to have a periodic referendum in which they could tell these guys, I agree with how you've done it or I don't.[611]

The editor of the *Western Livestock Journal*, Steven Vetter, voiced his opinion in favor of periodic referendums:

> I do think that there probably are better alternatives in terms of language to allow for referendums automatically every seven, eight, ten years, five years, whatever would be deemed appropriate. And I sure think it would help take things to a better level in terms of having all interested parties involved in the system.[612]

Daniel Glickman expressed a similar view several times during his interview:

> I would say the larger more established interests have kind of viewed this as very proprietary. These are their deals. The larger guys are contributing most of the money into it, and they haven't viewed it as a very democratic process for small producers.
>
> If you'll notice, in many of these programs, there's no automatic requirement for a revote after a certain number of years. It's only if a certain number of people ask for a vote is there a vote. So, to the small guy, that's always looked like a ruse to keep elections from happening. In my judgment, I think the small guys are right on that. I think all these checkoff programs would be a lot better and there would be a lot less political activity associated with their demise or attempted demise if the processes appeared to be more open and transparent and there were automatic referendums every three years or five years, the same way we have elections on everything else. But the promoters of these programs have tended to resist that.[613]

He emphasized the need for a democratic process to maintain industry confidence:

> I believe there ought to be a structured process, whether it's part of the existing government operation or maybe as a self-regulatory body that would do this [handle elections for continuing checkoffs]. But there needs to be a body, a formal body that could be conducting these elections. I don't see how these promotion and marketing programs can stay in effect for the longer term without people having confidence in them that they're being run in a democratic way and that the election process is democratic. I think if you did that, then you would have a little less of a tendency to run to the courts and use interesting and novel theories to probably kill them.[614]

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[611] Ibid., 20.
[612] Vetter interview, 3-4.
[613] Glickman interview, 2.
[614] Ibid., 3.

The litigation challenging checkoffs in the beef and pork industries attests to the lack of confidence in a democratic process. Doug O'Brien, staff member for Senator Tom Harkin, observed that the pork checkoff conflict was fueled by the perceptions of the hog farmers that the USDA had not followed a democratic process because the referendum process "resulted in the fact that 53 percent of the people did not have their wishes abided by. And the USDA was the one that made that happen."[615] He stated:

> I think it [the checkoff conflict] started out...as a release valve for the frustrations created by the development of a more industrialized model of livestock production. But how it grew into something bigger than it was because of the process, because of the sort of painful process that the referendum went through and how the settlement seemed to take away the democratic voice for a lot of folks who voted in that thing.[616]

Counter-Hegemony

"We only admit to the truth when we recognize
that our economic problems are moral problems."[617]
~ M. L. Wilson

AgriChoice, the group engaged in counter-hegemony against the industrial agriculture bloc, is attempting to construct elements into a moral-political force that will shift the terms of the agricultural debate. The checkoff challenge is in the "zone of conflict" and contributes to this counter-hegemony movement in four ways.

The first is by establishing a moral ground in the First Amendment right to be free from compelled speech. This is a much more powerful platform than an argument that the mandatory assessments amount to commercial speech and, therefore, should be afforded First Amendment protection. It is true that legal counsel may be persuaded that the

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[615] O'Brien interview, 9.
[616] O'Brien interview, 6.
[617] M. L. Wilson, "Beyond Economics," in *Farmers in a Changing World: Yearbook of Agriculture 1940* (Washington. D.C.: U.S. Government Printing Office, 1940): 922-927, 928.

Abood standard is a stricter test and a better fit in legally analyzing the First Amendment checkoff challenges than the commercial speech doctrine, but the *Abood* approach is also valuable in offering a more recognizable moral ground for the checkoff challengers in their efforts to build counter-hegemony. They can argue "my First Amendment rights are violated by being forced to pay for speech I do not approve" or "those who pay should have a say" with greater moral indignation than "forced payment of checkoff fees violates the commercial speech doctrine." In order to solicit support from a wider public for the second argument, they must explain why the mandatory payment of fees amounts to commercial speech (i.e., advertising) and what the standard is for protecting commercial speech and so on. Using this argument to build an "ideological ensemble" for a counter-hegemony movement would not be an easy task.

The second and third contributions of the checkoff challenge arise only through the efforts of the anti-checkoff challengers in the livestock and dairy industries. However, these are important ways in which the checkoff challenges benefit the efforts to build counter-hegemony.

The second contribution is to generate political outrage at the inequitable distribution of checkoff benefits (and profits) in the agricultural chain. The dollars are extracted from the producers at the bottom of the chain, but the beneficiaries of the generic advertising are entities higher in the chain. The statistics bear this out: the producer's share of the total beef dollar has sunk to the lowest point in American history and, between the years 1995 to 2000, the spread between wholesale meat prices and the

price producers are paid has increased by 54 percent for beef and 24 percent for pork.[618] The challengers in the tree fruit and mushroom industries are not involved in making this contribution, because they are not motivated by a goal of more equitable distribution of profits in their industries. Instead, these checkoff challengers are the major players in their commodity industry blocs seeking to increase their market shares.

The third way in which the checkoff challenge helps build a moral-political foundation is by characterizing the checkoff program as an integral part of an irresponsible system that interferes with efficient and accessible competitive markets and inflicts damage on the environment. Again, this argumentative platform resonates in the challengers' rhetoric in the livestock and dairy industries, but does not apply to the mushroom and tree fruit industries where the producers and handlers have challenged the checkoffs for profit reasons. They have not engaged in any public rhetoric or actions that indicate that the checkoff lawsuits are part of a larger strategy to attack current market practices or the industrial agriculture model and its impact on the environment. Indeed, this is logical since the current economic and agricultural paradigm has generated success for them.

The fourth way in which the checkoff challenges may contribute to a moral-political force in the broader counter-hegemony movement against the industrial agriculture bloc is by delivering a message through a judicial victory. A win for the checkoff challengers would communicate to the agricultural industry and the public that the courts offer a means for correcting injustice when other parts of the State apparatus

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[618] For a discussion on the significance of trends in "farm-to-wholesale" and "wholesale-to-retail" price spreads for beef, see C. Robert Taylor, "Where's the Beef? Monopoly and Monopsony Power in the Beef Industry," Agricultural & Resource Policy Forum (March 2002); available from http://www.agpolicy.org/weekpdf/087a.pdf; Internet; accessed 11 July 2003.

have joined the dominant group in creating and maintaining unjust agricultural conditions. It would demonstrate that the courts are a favorable terrain for fighting a "war of position."

Mike Callicrate, beef producer and plaintiff in a beef checkoff case, stated: "The courts are our last resort, and we just hope we can find fair judges that will let us prevail."[619] Similar statements were expressed by other anti-checkoff challengers, such as Joseph and Brenda Cochran, plaintiffs in a dairy checkoff case. Brenda Cochran explained their decision to become involved in legal action as follows:

> [F]or awhile, it appeared that Congressmen and Senators weren't always cooperating with what appeared to be an agenda that was coming out of USDA. Then after awhile, we noticed a peculiar change, and they were deaf, certainly they were dumb. They weren't listening, they weren't doing. We slowly had to give up on the executive branch, the legislative branch. And our last hope was the judicial system...We still have hope, more hope in the judicial system than executive or legislative branches right now. They've been co-opted.[620]

Ultimately, the challengers are seeking a shift in power. Jeanne Charter, a producer of a ranch with 250 cattle, described this objective as follows:

> Jeanne Charter: By far, the huge investment in our industry is in people our size because of the conditions under which you've got to raise cows and calves...Then, you get all the power going to the centralized, organized end. It's bad enough anyway, and then this checkoff arrangement's made it worse. Our industry goal is to cut them down to size because they really are the less important part of the industry. But the tail's wagging the dog. This is one place where strategically they could be cut down to size. And USDA, too. Like I say, I'm increasingly appalled at how they think they should run things.
>
> Interviewer: When you say "them," to cut "them" down to size that are less important, who is that?
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> Jeanne Charter: The processing sector. The feeding and processing sectors have power out of proportion to their investment, basically. It doesn't come near the investment people like us collectively have....The processing and feeding sector always wins the policy debates.

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[619] Callicrate interview, 14.
[620] Cochran interview, 15-16.

Interviewer: And those that don't win the policy debates are who?

Jeanne Charter: The smaller producers that need competitive marketing.

Interviewer: So when you say the processing sectors and the National Cattlemen's Beef Association, are you talking about the same group?

Jeanne Charter: Yeah. They're members, but they're more than that. They're kind of an inner circle that runs things. They're dominant players.[621]

Ms. Charter and other challengers were frank in identifying the way in which they are using checkoffs to further their battle against the hegemony of centralization:

> That's what the fight is over, kind of that the checkoff is aiding and abetting further centralization, both in terms of the programs and in terms of empowering National Cattlemen's. Both those ways. What they've relied on for the most part was...most people in agriculture are pretty private. They kind of hope things will turn out. That's about as far as it goes. But, it [the checkoff legal battle] is a major result against the idea that the powers that be will look out for us. An awful lot of people decided, well, that's not going to happen.[622]

She clarified that the challengers were motivated by a realization that the beef commodity industry bloc (referenced as the "powers that be") is not looking out for the best interest of a lot of people in agriculture. This view is echoed by another rancher and feedlot operator, Mike Callicrate, who viewed the NCBA as a major player in the dominant industry group that is using checkoff funds contrary to the best interests of the beef producers. He focused on ways in which he felt the National Cattlemen's Beef Association (NCBA) had followed a wrong path: "The NCBA has hijacked the checkoff. The NCBA has failed to represent the cattle producer who pays the checkoff on any of the most critical issues affecting them, those being competitive markets, open markets,

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[621] Charter interview, 14.
[622] Ibid.

free markets as well as unfair imports."[623] He explained the importance of the increased representation in NCBA by the importers of foreign beef:

> [T]he importers hold the second largest voting block of anyone on the checkoff right behind Texas, which has the largest inventory of cattle of any state. That is scary. In fact, when we saw the reorganization the last time, U.S. producers lost three seats because of the cattle herd liquidation going on in the United States...So we are forcing cattle herd liquidation in a market that is the highest and best market in the world for beef, and we do not have access to it as U.S. producers. In fact, importers of foreign beef have preferential access, and, of course, it is not the Australian producer we import from. It is Con-Agra. It is IBP. It is the big processors, and those guys are buying it in Australia below its cost of production.
>
> That is what angers the U.S. cattlemen so much, that they have now decided to just simply "defund" NCBA by calling for an end to the checkoff. That is what it's about. It's about taking the money away from an organization that has lost its way and essentially turned against U.S. cattlemen.[624]

Dan Alberts, a Nebraska lawyer, concluded that the checkoff assessment programs are a "cozy method to tie the agribusiness system together and to minimize counter speech." [625]

To maximize its influence and become the representative voice of a significant mass of people, the AgriChoice group must find a philosophical position that will allow a new historic bloc to form and infuse the debate with new elements of ideological discourse that will be meaningful for a broader scope of consumers, producers, legislators, government officials and academic representatives. One of the tasks for the challengers is to find a way to express their alternative ideology in a populist idiom.[626]

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[623] Callicrate interview, 1.
[624] Callicrate interview, 1-2.
[625] Robert Schuber, "Federal Judge Grounds Beef Checkoff," Cropchoice.com (June 26, 2002), available from http://www.cropchoice.com/leadstry.asp?RecID=756; Internet; accessed 20 March 2003.
[626] See Stuart Hall, "The Great Moving Right Show," in *The Politics of Thatcherism*, eds. Stuart Hall and Martin Jacques, 20-39.(London: Lawrence and Wishart, 1983), 28.

Comments provided by Doug O'Brien, attorney and staff member for Senator Tom Harkin, suggested that the success of the counter-hegemony would only be realized if the public gets involved. He observed: "Some would argue that this tide will not turn until the consumers start to feel this. You're just not going to reach those legislators from more urban districts until consumers begin to understand the implications of this food system."[627]

Stuart Hall, in his analysis of "Thatcherism" and the emergence of the hegemony of the radical right in Britain, pointed out the importance of capturing the commitment of the people in determining the success of a political movement. His paragraph describing how the underlying theoretical ideologies (Keynesianism and monetarism) must be translated into populist language that can be understood and assimilated by the citizens is particularly instructive:

> Neither Keynesiansim nor monetarism, however, win votes as such in the electoral marketplace. But, in the discourse of 'social market values,' Thatcherism discovered a powerful means of translating economic doctrine into the language of experience, moral imperative and common sense, thus providing a 'philosophy' in the broader sense—an alternative ethic to that of the 'caring society'. [referring to the ideology of the left] This translation of a theoretical ideology into a populist idiom was a major political achievement: and the conversion of hard-faced economics into the language of compulsive moralism was, in many ways, the centerpiece of this transformation. 'Being British' became once again identified with the restoration of competition and profitability: with tight money and sound finance...[628]

While the AgriChoice counter-hegemony has begun to consolidate its fractions and define its ideological base, it has not advanced an idiom yet that fully engages the public. Several themes or phrases that are being used with some degree of success

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[627] O'Brien interview, 6.
[628] Stuart Hall, "The Great Moving Right Show," in *The Poltics of Thatcherism*, eds., Stuart Hall and Martin Jacques (London: Lawrrence and Wishart, 1983), 28-29.

include: sustainable agriculture, competitive markets, environmentalism, market transparency. The checkoff challengers have introduced freedom from compelled speech as one theme for counter-hegemony and have used the phrase "Those who pay should have a say." However, this theme has not translated into a popular symbol or phrase or idiom that would allow the counter-hegemony to leverage this legal conflict fully to its benefit outside the beef industry.

Several groups involved in delivering the messages of the counter-hegemony serve as "umbrella or facilitation groups" for organizing and focusing the philosophies and resources of the counter-hegemony. The most prominent among these (and the most successful thus far in influencing agricultural legislation and the dominant hegemony) are the Organization for Competitive Markets, the National Campaign for Sustainable Agriculture and the Western Organization of Resource Councils. It is worth noting, however, that these organizations have clearly defined missions and are sensitive to "mission creep."

For example, the Organization for Competitive Markets (OCM) is highly focused on creating change that will influence the industrial model by creating more competitive market conditions to benefit farmers who are victims of industry concentration and vertical integration. The organization debated the issue of whether to get involved in the legal challenges to checkoffs. However, as this research has pointed out, concentration and vertical integration do not appear to be issues in the fruit and mushroom checkoff cases (which are driven by branding and product differentiation concerns). Furthermore, the organization would have to make the assumption that the commodity checkoff programs are improperly used by agribusiness and the large corporate players to the

disadvantage of the producers paying the checkoffs. The nexus to the mission of OCM was tenuous and the group decided not to use its resources to weigh in on the issue. Doug O'Brien, who was associate legal counsel for OCM for fifteen months, described the OCM consideration of the checkoff issue as follows:

> OCM is one of those groups that's very cognizant about mission and tries to stay on consolidation. It was a debate within the organization all the time, whether this [the checkoff challenge] was really a competition/consolidation issue or not. ...I think most people probably agreed with the proposition that the checkoff is a consolidation issue. But they had so much on their plate, they never got directly involved.[629]

In the beef industry, the counter-hegemony related to the beef checkoffs is occurring simultaneously with another separate, but parallel, counter-hegemony against the beef commodity industry bloc launched by beef producers who are alleging violations of the Packers & Stockyards Act (PSA)[630] by the meat packers in three different legal actions. The three lawsuits include: *Pickett v. IBP*,[631] *Republican Valley Feeders, Inc., et al. v. ConAGra*,[632] and *Murdoch v. Excel*.[633]

The lawsuit that has captured the attention of the beef industry most dramatically is *Pickett v. IBP* because it is the first class action lawsuit to be brought under the PSA, a

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[629] O'Brien interview, 4.

[630] Packers and Stockyards Act, 7 U.S.C. §§ 181 et seq. The PSA was enacted in 1921 to address meat packer concentration problems when the "Big Five" meat packers controlled 55 percent of the beef slaughtered. It has provisions that ban price discrimination and manipulation of price, livestock and carcasses. The act also prohibits commercial bribery and misrepresentation of livestock source, condition or quality. The goal of the legislation was to ensure competition in the livestock industry. It remains an important (but largely ineffective) enforcement tool at a time when the packer concentration in livestock has exceeded 80 percent. Its enforcement agency, the federal Grain Inspection, Packers and Stockyards Administration (GIPSA) has failed to respond to complaints and petitions and is understaffed. It was criticized by a 2000 report of the U.S. General Accounting Office for failing to carry out its responsibilities, despite the fact that it has anti-trust authority that exceeds that granted to the Justice Department in the Sherman Act. See United States General Accounting Office, *Packers and Stockyards Programs: Investigations of Competitive Practices Need Improvements,* Testimony before the Subcommittee on Administrative Oversight and the Courts, Committee on the Judiciary, United States Senate, GAO/RCED-00-299 (Washington, D.C.: GPO, September 2000).

[631] *Picket et al. v. IBP, Inc.*, No. 96-A-1103-N (Middle Dist. Ala).

[632] *Republican Valley Feeders, Inc. et al v. ConAgra*, No. 8:CV02-3124 (Dist. Neb.).

[633] *Murdoch Enterprises, Inc. v. Excel Corporation*, No. 8:CV02-3123 (Dist. Neb.).

statute that has been on the books for more than eighty years. It was filed in a federal district court in Alabama in 1996 by a small group of cattle producers: Henry Pickett from Alabama, Mike Callicrate from Kansas, Pat Googins from Montana, Chris Abbot from Nebraska, Johnny Smith from South Dakota and Robert Rothwell's family corporation from Nebraska. The District Court Judge for the Middle District of Alabama, Judge Lyle Strom, certified the case as an anti-trust class action suit against IBP on April 30, 1999, despite extensive maneuvering by IBP to avoid this result. It is one of the largest antitrust cases in the United States in the early years of the Twenty-first Century and represents the first success by cattlemen in reaching trial in an antitrust class action lawsuit against meatpackers.

The beef producers in the *Pickett* case claim that IBP, Inc. has engaged in abusive market practices by using "captive supplies" of cattle. Captive supply arrangements can occur through IBP's ownership of cattle or through its use of forward contracts, marketing agreements or joint-venture arrangements. The case is scheduled for trial in January 2004. It is an example of counter-hegemony occurring in the same terrain with different parties and different causes of action (First Amendment issues and anti-trust issues) but with the same industrial agriculture bloc being the target.

Countervailing Power

In advancing his theory of countervailing power, John Kenneth Galbraith recognized that one outcome of modern capitalistic society was monopolistic power wielded by centers of concentration. However, this was not necessarily a negative phenomenon if the concentrated power triggered strong economic and business strategies by countervailing institutions that would serve as a check on the monopolistic systems

and prevent economic exploitation of consumers, smaller players and subordinate enterprises. In the agricultural context, the question is whether such countervailing power has emerged or can emerge in the future.

Terry Stokes, CEO of the National Cattlemen's Beef Association, described examples of livestock producers forming alliances and creating economically successful production units. This suggests the possibility of developing countervailing economic power as conceptualized by Galbraith. Stokes stated:

> [T]oday within the industry you have producers who are wanting to get into the meat packing business to capture more of that value. For example, we have a quality beef project, which an Iowan cattleman put together a co-op and bought the Tama Packing Company. There was establishment a few years ago of the U.S. Premium Beef Co-op. Raleigh Beef in Southern California is a group of cattlemen who went together and built a packing company...The same thing was done with certified Angus Beef. I could name you a dozen different types of arrangements where people have come together and looked at ways in which they want to market their cattle.[634]

He described the concept of beef producers and industry partners working together to produce high quality beef products that satisfy consumer needs as follows:

> Well, you will have participants from different segments of the industry coming together to produce a branded product. For example, if you go to King Super's here in Denver, they have Cattlemen's Collection. That is the brand of beef that they sell there. In Cattlemen's Collection, there is cow-calf producers, feeders, a packer and a retailer that are participating in that to produce a value added product for consumers.[635]

Stokes identified branding as another way in which the cattle industry is getting more value from products. He cited the Cattlemen's Collection alliance and the Certified Angus cooperative as examples of this.[636]

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[634] Stokes interview, 12.
[635] Ibid., 14-15.
[636] Ibid., 15.

However, several hurdles emerge when considering whether independent livestock producers (or dairy producers) can launch a successful countervailing power structure as suggested by Stokes.

First, the group launching the countervailing power must have capital and resources. At this time, the smaller independent producers are universally strapped for cash. This also translates into a shortage of time as fewer farmers struggle to farm operations with reduced farmhands and have less time for developing relationships and exploring new collaborative efforts.

Second, the producers in this group are generally highly opposed to the industrial business model so it is illogical to assume that this group will generate a legitimate countervailing power within the framework of the agribusiness corporate model. Apart from the philosophical differences over commercial commodity production, the independent producers, by nature, also prefer a business model that offers privacy and autonomy. This was mentioned by several farmers interviewed in this study as a drawback in generating collective action to develop countervailing power.

Third, the bargaining power of the producers is woefully diminished. Without aggressive strategies to change their bargaining position, the producers will continue to operate from a severely disabled position in seeking to form a viable countervailing power. Producers are cautiously optimistic that the class action antitrust lawsuit by the beef producers against IBP, ConAgra and Excel Corporation may improve the bargaining position of livestock producers sufficiently for them to consider new possibilities for countervailing power. Producers hope that the First Amendment cases holding

commodity checkoffs unconstitutional will provide a shift in the bargaining position of the producer as well.

A fourth hurdle relates to the hegemony's control over information and its access. Dairy farmer John Bunting has experienced lack of cooperation by the USDA in providing him with information that should be readily available to the public without this filing a Freedom of Information request.[637] It is his opinion that the small, independent American farmer is highly disadvantaged in business decision-making by his or her inability to access information controlled by government agencies. To the extent that an effort to build countervailing power requires up-to-date information that the government can delay in providing or even refuse to provide, the counter-hegemony will be disadvantage.

Possibilities do exist, however, for countervailing power. In every instance, though, the producers need to address the need for a new business model outside the industrial business model that has garnered acceptance. Given the long-term critical importance of adopting new agricultural practices more attuned to maintaining the resources needed for a healthy agricultural industry, a successful countervailing power may likely be founded on sustainable agriculture principles. The values and ideology behind these principles are aligned with the predominant viewpoints of the smaller,

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[637] Bunting interview, 13. Bunting gave an example of his efforts to confirm how the milk produced on his farm was priced. He sought this information to better understand "dairy numbers and diary policy and everything about the politics of it." He knew that some groups were selling milk to the government, which then depressed the support price milk of the producers. Several months later after numerous phone calls to the USDA, he was able to determine that the milk was being sold to the government by four milk cooperatives and Kraft. During the process of seeking the information, he contacted an individual at Cornell University (the academic institution that performs academic research for the USDA related to commodity checkoffs and milk programs) and was deliberately misled. Ibid., 19-20.

independent farmers, so it makes sense that this commitment to natural resources could be leveraged to build countervailing power.

Retired University of Missouri professor of agricultural economics Dr. John Ikerd has written extensively about sustainable agriculture. He is a visionary who sees a post-industrial paradigm for agriculture already starting to emerge consistent with the shift from the industrial society to the knowledge society. In a 1997 article, Ikerd wrote:

> The conventional wisdom among those in the agricultural establishment is that trends toward industrial production for mass markets are trends of future for American agriculture. Agriculture is becoming just another industrial sector of our industrial economy. But the world is continually changing. A growing number of people who make their living forecasting the future, the futurist, see a new post-industrial era where there is room for more than one model or paradigm for economic and human progress. (citations omitted)[638]

Industrial work requires large scale operations and bigger outputs. On the other hand, "...the smallest effective size is best for enterprises based on information and knowledge work."[639] Alvin Toffler, recognized for his futurist writings, offered the view that efficiency and productivity are losing credibility as the guiding standard for business success.[640] The progressive business model is no longer identified with mass production, but instead with the ability to "produce customized goods and services aimed at niche markets, to constantly innovate, to focus on value-added products and tailored production."[641]

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[638] John E. Ikerd, "The Role of Marketing in Sustainable Agriculture," presented at the 87th Annual Meeting of American Society of Agronomy in Oct./Nov. 1995, online article on University of Missouri faculty website; ¶ 35 (1996); available from http://www.ssu.missouri.edu/faculty/jikerd/papers/stl-mkt.htm; Internet; accessed 13 April 2003. The author cites the following sources at the end of this paragraph: Alvin Toffler, *Power Shifts* (N.Y.: Bantam Books, 1990); Peter Drucker, *The New Realities* (New York:: Harper and Row, 1989); Peter Drucker, *The Post Capitalist Society* (New York: Harper Business, Harper Collins, 1989); John Naisbitt and Patricia Aburdene, *Megatrends* (New York: Hearst Corporation, 1990); and Robert B. Reich, *The Work of Nations* (New York: Random House, 1992).
[639] Ibid., ¶ 41.
[640] Ibid., ¶ 36, referencing Toffler, *Power Shifts* (1990).
[641] Ibid.

It is Ikerd's prediction that "[D]ifferences in organizing principles may be critically important in determining the future size and ownership structure of economic enterprises, including farms.[642] The flexible, dynamic possibilities inherent in the philosophy and practice of sustainable agriculture make it highly compatible with the emerging paradigm of knowledge work.

Ikerd proposed that building a new agricultural model around the economics and marketing strategies of niche marketing will be an effective way of competing with the industrial model. However, he draws a clear distinction between farmers competing in markets for value-added products and farmers producing and selling agricultural products in niche markets:

> Farmers who attempt to add value through processing, transportation, or storage must be willing and able to perform those functions better or at a lower costs than can existing marketing firms, if they expect to make a profit. Even if such farmers are successful, they are not engaging in niche marketing. Instead, they have become successful players in the mass marketing game.[643]

As pointed out above, there are real and substantial financial and organization hurdles that smaller, independent farmers must overcome to effectively launch countervailing power by playing the mass marketing game. Ikerd suggested that their success lies in using the niche marketing model as a viable alternative, and concluded:

> "If the road to agricultural sustainability leads toward larger numbers of smaller, more diversified farms, then niche marketing represents an opportunity for smaller, diversified farms to expand vertically and to compete commercially with larger, specialized agricultural enterprises...In the post industrial era of human progress, niche markets may well become the norm rather than exception."[644]

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[642] Ibid., ¶ 41.
[643] Ibid. ¶ 34.
[644] Ibid., ¶ 48.

The countervailing power in niche marketing may be enhanced and perhaps depend upon acquiring the ability to adopt sophisticated branding techniques that will serve to support the goals of the producers. This nod toward consumerism recognizes the strong role and power that resides in branding programs and commercial communications. In addition to serving as a critical selling tool, a branding program for a niche market can expand the assets of an agricultural producer and build goodwill in its intellectual property.

Another aspect of building a new model that can emerge as a countervailing power is the need to market directly to the consumer or to build an alternative system of processing and/or distribution to the consumer that bypasses the concentrated areas of control that exist within commodities. In the tree fruit and mushroom industries, this has taken place as small producers have generated direct marketing relationships with retailers and developed their own distribution systems.

An alliance between producers and consumers could become the pivotal point in building countervailing power. It could afford the relationships to bypass corporate agribusiness or could promote new attitudes and demands by consumers that will force change in the industrial agriculture model. Jeanne Charter emphasized the importance of the relationship with the consumer in creating change:

> There's a growing network of active family farm groups basically that has been holidng on and, in the beef industry, has been actually growing in the last five years just because people are seeing they better do something or get out...They're starting to be rival groups...I think the thing that's happening with the family farm groups, the challenge farm groups, is we're beginning to talk to consumers more. That kind of alliance could be potent.[645]

[645] Charter interview, 17.

Farm cooperatives organized under the Capper-Volstead Act seem to offer some possibility for countervailing power. Cooperative are exempted from anti-trust laws under the Capper-Volstead Act.[646] Enacted in 1922, this statute provides that agricultural producers may: "...act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged."[647] Such enterprises may enter into agreements, but must be "operated for the mutual benefit of the members thereof" and meet certain other requirements.[648] Farmer cooperatives are not permitted to enhance their product prices and members are not permitted to be vertically integrated in their operations.[649]

In a 2003 conference paper on the structure of the agricultural sector, Neil Harl discussed the possibility of farmers building alliances among producers to establish countervailing power. He suggested collective action under the Capper-Volstead Act as a strategy for farmers seeking countervailing power, but pointed out one of the drawbacks already mentioned in this section: "Historically, however, farmers have been unwilling to accept such a disciplined approach to achieving bargaining power."[650] Professor Harl stated:

> The key question is whether producers will be willing to sacrifice independence of action in order to bargain collectively for access to inputs and for greater market power in marketing their products. The most likely avenue for such collective action is through organizations specifically created for that

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[646] Capper-Volstead Act, 7 U.S.C. § 291 et seq.
[647] 7 U.S.C. § 291.
[648] Ibid.
[649] Vertical integration occurs when one entity controls one or more steps in production from the raw materials to the consumer, reducing business transactions and their associated costs and creating a shortened supply chain.
[650] Neil E. Harl, "Economic Impact and Impacts of Continuing to Proceed as We Are Now, 11-12.

> purpose. The time may be near when that will be the only practical alternative to vulnerability and serfdom.[651]

Countervailing power by producers seems unavoidably linked to collective activity. In *American Capitalism: The Theory of Countervailing Power,* John Kenneth Galbraith said: "The development of countervailing power requires a certain minimum opportunity and capacity for organization, corporate or otherwise."[652] The challenge for independent farmers is to find the minimum opportunity and capacity for organization, whether through use of the Capper-Volstead Act or other means.

A number of legal commentators have expressed the opinion that the Capper-Volstead Act falls short of the potential it could offer to commodity producers as an effective tool for economic competition because the judiciary has failed to clarify issues related to member qualification, specifically what should be the boundaries of permissible integration by cooperative members.[653] In an increasingly integrated and industrialized agricultural environment, this has become an issue for producers since one integrated member in a cooperative could taint its immunity status. Rather than focusing on the goals of cooperative ventures, producers participating in cooperatives are distracted by concerns related to losing their anti-trust statutory immunity. The USDA is also unduly burdened with assisting farmers in setting up cooperatives rather than

> Because the protections Congress envisioned [for farmers through Capper-Volstead] have been hampered, and the text of the Capper-Volstead Act has been ignored at times, farmers and cooperatives have a renewed fear that they will be subject to prosecution under antitrust laws...In order to alleviate these concerns and fulfill the wishes of Congress, the courts must engage in a renewed and refreshed reading of the Capper-Volstead Act and apply its language in a manner consistent with the Congress's desires. Such an application must involve a definitive interpretation of the terms "producer" and "farmer." The proper interpretation would focus on risk assumption by the individual, as well as personal involvement in the farming operation. Going one step further, Congress should consider a certification program administered by the USDA for cooperatives that would provide prima facie evident of their Capper-Volstead status. Addressing this issue is critical to agriculture in the United States. Farmers must be permitted to integrate their operations and engage in cooperative action. The future of agriculture depends on it.[654]

While cooperatives have continued to offer an alternative means of establishing countervailing power and success stories are recognized, cooperatives have not mustered the economic strength to become a countervailing power against the powerful concentrated agribusiness enterprises. It should be noted that cooperatives in dairy are the exception, having gained more power and control than cooperatives in other industries. Several individuals interviewed for this study have suggested that they have become a key player in the dairy commodity industry bloc aligned with business conglomerates such as Kraft, Inc.

Professor Neil Harl emphasized that there is critical need for legislatures to enact legislation to improve the diminished market power of producers. He declared:

> It is unlikely that countervailing power can be achieved in one grand move to get large numbers of producers to bargain collectively for inputs and for the sale of commodities. Rather, greater market power is likely to be achieved, if at all, by bargaining groups of relatively modest size and comprised of producers committed to collective marketing and committed to producing commodities at a quality level desired by processors and on a schedule consistent with the purchaser's capacity.

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[654] Claiborne, 319.

> To facilitate the formation and operation of such collective marketing (and input supply) groups, enabling legislation at the state (or federal) level is needed to assure that—(1) agribusiness firms would be required to bargain in good faith; (2) would assure that recriminatory behavior would not be allowed by agribusiness firms; (3) members of the unit would be required to be producers (to bring the group within the exemption from antitrust strictures found in the Capper-Volstead Act.

Professor Harl's position is consistent with John Kenneth Galbraith's concept of how the government can play a role in facilitating countervailing power. Galbraith stated: "In light of the difficulty in organizing countervailing power, it is not surprising that the assistance of government has repeatedly been sought in this task."[655] He described the difficulties faced by government in responding:

> The role of countervailing power in the economy marks out two broad problems in policy for the government. In all but conditions of inflationary demand, countervailing power performs a valuable—indeed an indispensable—regulatory function in the modern economy. Accordingly, it is incumbent upon government to give it freedom to develop and to determine how it may best do so. The government also faces the question of where and how it will affirmatively support the development of countervailing power.[656]

Again, the importance of connecting with the consumer can be seen in the process of laying the groundwork for countervailing power through legislative action. It is a prerequisite for generating support among legislators for new laws along the lines proposed by Neil Harl—support that must be substantial to overcome strong resistance by those in the dominant power blocs. Doug O'Brien's statement (quoted earlier in this dissertation) succinctly summarized this: "Some would argue that this tide will not turn until consumers start to feel this."[657]

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[655] Galbraith, 133.
[656] Galbraith, 143.
[657] O'Brien interview, 11.

Commodity checkoff programs for generic advertising would not appear to play any role in a post-industrial economic model based on a paradigm of diversity and smaller scale farming. The idea of creating a demand for homogenous products is inconsistent with a model for countervailing power based on tailoring agricultural resources with specific tastes and preferences of consumers. This alternative model would suggest a strong focus on branding, the antithesis of commodity checkoff programs based on promoting like commodities. It is possible that checkoff programs might be imposed for collecting voluntary or mandatory fees for other uses, such as education and research, which might contribute toward the goals of countervailing power, if the objectives and goals of the producers could be unified in these areas.

CHAPTER 8

IN THE LEGAL ARENA

"There is hardly a political question in the United States which does not sooner or later turn into a judicial one."[658]
~ Alex de Tocqueville

The Legal Investigative Frame

The federal and state judiciaries have created a growing body of controversial law addressing the constitutionality of mandatory commodity assessments. The use of a legal investigative frame guided the researcher in a structured analysis of this legal activity by focusing on five areas: 1) the cases, parties and courts that have rendered decisions on checkoffs; 2) the history of factual and legal developments underlying each case; 3) the interests at stake for the presiding federal or state judges and the legal institutions in which they serve; 4) the opinions and legal doctrines or principles on which such opinions are based; and 5) the status of each case and its relevance with regard to the line of cases on compelled commercial speech. The legal investigative frame used for this analysis is shown at Table 3. The cases included in the legal investigative frame also appear along with others in the annotated list of cases in Appendix B.

The legal investigative frame begins with the case of *U.S. v. Rock Royal CO-OP, Inc.*,[659] a case brought by milk processors in 1939 challenging the constitutionality of a milk order under the 1937 Agricultural Marketing Agreement Act.[660] In the face of a distinctly unreceptive U.S. Supreme Court, no constitutional challenges were raised for almost fifty years.

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[658] Alex de Tocqueville, *Democracy in America* (New York: Mentor Books, 1965), 75.
[659] *U.S. v. Rock Royal CO-OP, Inc.*, 307 U.S. 533 (1939).
[660] Agricultural Marketing Agreement Act of June 3, 1937, Pub.L.No. 137, 50 Stat. 246 (codified as amended as scattered sections of 7 U.S.C.).

Table 3 Legal Investigative Frame

Case	Characteristics of Checkoff Challengers	History	Interests at Stake for Judiciary	Legal Opinion and Doctrinal Basis	Status of Lawsuit and Relevance
U.S. v. Rock Royal CO-OP, Inc., 307 U.S. 533 (1939)	Milk processors who refused to pay assessments under Milk Order No. 27 were defendants in a lawsuit filed by the U.S. government to collect the mandatory fees. Milk processors alleged they were aggrieved parties on the grounds that Milk Order No. 27 violated their 5th Amendment, 10th Amendment and 14th Amendment rights.	Milk Order No. 27 governed milk produced for sale in a defined metropolitan area of New York. All cooperatives paid money into a milk pool called the "Producers Settlement Fund." Withdrawals were made primarily by a large, favored cooperative, the Dairymen's League. District court struck down the milk order, finding the order discriminatory and based on property taken without compensation and transferred to another.	Respect for Constitutional separation of powers Scope of Congressional authority to authorize regulatory powers Scope of the Commerce Clause Consistency with earlier cases finding Agricultural Adjustment Act of 1935 was unconstitutional because powers given to the Secretary were overbroad Legitimacy of the institution of the Supreme Court in upholding one portion of the New Deal legislation while striking down others Recognizing the scope of state rights. Balancing equities when facts showed a abuse of a regulatory scheme (Sec. of Agriculture colluded in misinforming public to get referendum vote.)	Supreme Court upheld constitutional validity of the programs developed under the marketing orders. (5-4) Congress is entitled to regulate economic sectors Statutory language narrowly defines the delegation of authority to the Secretary Majority: "The associations of producers of milk have a vital interest in the establishment of an efficient marketing system...If the Act and Order are otherwise valid, the fact that their effect would be to give cooperatives a monopoly of the market would not violate the Sherman Act." At 559-560. Dissent: "As the order is drawn and administered, it inevitably tends to destroy the business of smaller handlers by placing them at the mercy of their larger competitors... it operates to deny the appellees due process of law." At 587.	Final ruling. Case established constitutionality of the 1937 Agricultural Marketing and Agreement Act. It privileged government regulation that openly favored control shared by the Secretary of Agriculture and dominant groups. It clarified that marketing orders will not be rendered unlawful simply because "ulterior motives of corporate aggrandizement stimulated their activities." At 560. The constitutionality of the 1937 Act was not challenged again until two cases arose in the 1980s, *U.S. v. Frame*, 888 F.2d 1119 (3rd Cir. 1989) and *Cal-Almond v. USDA*, 14 F.3d 429 (9th Cir. 1993).

Table 3 (Continued)

Case	Characteristics of Checkoff Challengers	History	Interests at Stake for Judiciary	Legal Opinion and Doctrinal Basis	Status of Lawsuit and Relevance
U.S. v. Frame, 888 F. 2d 1119 (3rd Cir. 1989)	Beef producer and cattle auction operator in Pennsylvania. Frame objected to paying $1.00 per head of cattle as producer and collecting the fee as auction operator under the Beef Promotion and Research Act. He made a 1st Amendment claim arguing that the Act violated his rights of free association and free speech under the *Abood* case. (He made additional constitutional and statutory claims as well.)	The Act of 1937 was amended in 1954 to allow mandatory fees to be used for advertising purposes. The Beef Promotion and Research Act was passed in 1976 and amended in 1985 Government brought suit against Frame to collect fees. District court held no violation of 1st Amendment because speech was deemed "government speech".	Respect for Constitutional separation of powers Respect for precedent in choosing which 1st Amendment doctrine to apply (*Central Hudson* test or *Abood* analysis). Dissent acknowledged "...there is no precedent for the kind of compelled commercial speech at issue here." At 1146. Maintaining legitimacy of the institution in choosing how to apply the "government speech" principle.	Court rejected the constitutional challenges to the Beef Act. (2-1) Held no infringement of challenger's 1st Amendment rights. Government interests were "compelling" and "ideologically neutral." Any infringement of freedoms is slight. Majority: Court held *Central Hudson* test applied to the free speech claim and *Abood* analysis applied to the free association claims. So it applied the stricter scrutiny of *Abood*. Dissent: Argued that the checkoff program did not even pass the lesser *Central Hudson* standard.	Final decision. Significant because the court chose the *Abood* analysis as its preferred 1st Amendment analysis. Also significant because the court rejected the government speech argument. Text from the opinion has been quoted in later documents: "[A]lthough the Secretary's extensive supervision passes muster under the non-delegation doctrine, it does not transform this self-help program for the beef industry into 'government speech.'" At 1133.
Cal-Almond v. USDA, 14 F.3d 429 (9th Cir. 1993) (Cal-Almond I) *Cal-Almond, Inc., v. USDA*, 67 F. 3d 874 (9th Cir. 1995) *USDA v. Cal-Almond, Inc.*, 102 F.3d 999 (1996).	In Cal-Almond I, three almond handlers challenged federal marketing orders administered by the Almond Board of California. In the 1995 case, the 9th Circuit reviewed a district court ruling ordering the USDA to pay money owed to the almond handlers. Almond handlers objected to a checkoff system designed to favor the almond producers who sell to the end market and not to processors.	Blue Diamond Almonds, the largest almond handler, held over 90 % of the retail market and controlled the Board through "bloc voting." Plaintiffs were unable to recoup ad costs incurred in helping fund ads for cereals, ice creams and a chain of mini-markets. Board denied credit based on its regulations requiring that products contain over 50% almonds to qualify for reimbursement.	Legitimacy of the institution in reaching position contrary to the 3rd Circuit in the *Frame* case. Ability of the judiciary to enforce its decisions against the Secretary of Agriculture. (Judicial authority vs. executive and administrative authority.) Should the court privilege the Commerce Clause or the First Amendment?	In Cal-Almond I, the 9th Circuit held that the Almond Marketing Order forced the almond handlers to engage in compelled speech in violation of their 1st Amendment rights in free speech and free association. The 9th Circuit remanded the case to the district court. It ordered the USDA to refund several million dollars owed to the almond handlers (from escrow accounts, credits for advertising, etc.) The USDA appealed. In the 1995 case, the 9th Cir. upheld part of the order for reimbursement.	The conflict continued in Cal-Almond II, III and IV. (see below). In the 1996 legal squabble, the USDA appealed the district court's order to put assessments into escrow and the district court's stay of an enforcement action against the almond handlers. The 9th Cir. ruled in favor of the handlers and chastised the Secretary for seeking to pursue the enforcement action while delaying the administrative decision.

Table 3 (Continued)

Case	Characteristics of Checkoff Challengers	History	Interests at Stake for Judiciary	Legal Opinion and Doctrinal Basis	Status of Lawsuit and Relevance
Wileman Bros. & Elliott, Inc. v. Espy, 58 F.3d 1367 (9th Cir. 1995)	Tree fruit growers, handlers and processors in California.	Challenged regulations in the nectarine and peach marketing orders, including assessments for generic advertising	Respect for 9th Circuit precedent. Legitimacy as a judicial institution when taking a position contrary to the 3rd Circuit.	Struck down generic advertising program for Calif. nectarines and peaches. Cited its earlier decision in Cal-Almond I as precedent.	The government sought Supreme Court review. Congress tried to nullify the *Espy* case and Cal-Almond II in the FAIR Act of 1996.
Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997)	Tree fruit and citrus packing companies and handlers Large producers Plaintiffs challenged the tree fruit checkoffs implemented under Marketing Order 916 for nectarines and Marketing Order 917 for peaches, pears and plums. At issue were $3.1 million in contributions held in a trust fund account.	The 3rd Cir. considered both compelled speech and commercial speech 1st Amendment analyses in the *Frame* case and upheld the beef checkoffs. The 9th Circuit in Cal-Almond I and *Espy* used the *Abood* compelled speech and compelled association analyses to hold the mandatory fees for almond and tree fruit unconstitutional. The Congress responded to the 9th Circuit cases with language in the Fair Act indicating its displeasure with this judicial direction and clarifying and justifying the mandatory commodity fee programs.	Respect for Constitutional separation of powers. (Is there a sufficiently strong basis for overriding Congress? Is this a constitutional question or an economic policy issue for Congress and the Executive to resolve?) Macro issues are at stake relating to which principles should be privileged. Should the Court privilege free market or government regulation? 1st Amendment or the Commerce Clause? Beliefs regarding economic and social realities and values in this doctrinal area. (Balancing free speech vs. governmental and societal interests) Respect for Constitutional principles and precedents regarding commercial speech and freedom from compelled speech. (Court's credibility in choosing proper 1st Amendment doctrine for future cases.) Cost to governmental interests if mandatory checkoffs for generic advertising come under 1st Amendment scrutiny.	Supreme Court upheld checkoffs and reversed *Espy*. (5-4) "Doubts concerning the policy judgments that underlie many features of this legislation do not...justify reliance on the First Amendment as a basis for reviewing economic regulations." At 2141. Court created a three-part test for whether a 1st Amendment analysis is required: 1) Does the advertising program impose a restraint on the producer's freedom to communicate a message to the audience? 2) Does the ad program compel producer to engage in any actual or symbolic speech, and 3) Does the ad program compel producer to endorse or finance any political or ideological views that are not germane to the purposes for which the compelled association is justified? The court held that the generic ads did not warrant scrutiny under *Central Hudson* and applied the *Abood* "germaneness test."	This decision served as precedent for checkoff cases during four subsequent years impacting six decisions noted below before the Supreme Court decided *U.S. v. United Foods*, which represented a change in approach. The case of *Glickman v. Wileman Bros. & Elliott, Inc.* was highly criticized by commentators for its failure to apply 1st Amendment principles. The dissent by Justice Souter was considered by many to be the correct analysis. Dan Gerawan filed a new "15A Petition" challenging the legality of the tree fruit marketing order on the grounds that the industry no longer regulates fruit out of marketing channels, so such regulatory scheme is moot. A loss in the administrative proceeding will allow him to argue this in a new court challenge.

Table 3 (Continued)

Case	Characteristics of Checkoff Challengers	History	Interests at Stake for Judiciary	Legal Opinion and Doctrinal Basis	Status of Lawsuit and Relevance
USDA v. Cal-Almond, Inc., 521 U.S. 1113 (1997) (Cal-Almond II) *Cal-Almond, Inc. v. Dept. of Agriculture*, No. 94-17160 (9th Cir. Sept. 4, 1997) (Cal-Almond III)	Almond handlers were subject to an almond marketing order. After early success before the 9th Circuit, the challengers experienced a reversal after the *Glickman v. Wileman* decision.	The 9th Circuit took a firm stance against the compelled payment of checkoff fees in the 1993 case and in its other decisions in 1995 and 1996 related to remedies and enforcement of its 1993 decision. The 9th Circuit was engaged in a struggle with the USDA over the repayment of money in escrow and resolution of administrative proceedings.	Conformance in all jurisdictions. Need to impose new approach on the 9th Circuit immediately to change the direction of the *Cal-Almond* case and the decision-making of the 9th Circuit. Need to extend the analysis in the tree fruit case to other commodities to reinforce the choice made to privilege government regulation over free markets and Commerce clause over 1st Amendment.	After granting certiorari, the Supreme Court in Cal-Almond II vacated the Cal-Almond I decision and remanded to the 9th Circuit for reconsideration one day after its decision in *Glickman v. Wileman.* In Cal-Almond III, the 9th Circuit remanded case to the district court to dismiss the 1st Amendment claims, citing the *Wileman* case.	The case was sent back to the district court for a decision under the *Glickman v. Wileman* precedent.
Goetz v. Glickman, 149 F.3d 1131 (10th Cir. 1998)	Kansas cattle producer, buyer and trader. Joined by others in contesting mandatory beef assessments under Beef Promotion and Research Act of 1985. Intervenors were Kansas Livestock Ass'n, National Cattlemen's Ass'n and National Livestock and Meat Board.	The district court decision in 1996 relied solely on the *Frame* case in holding for the government and did not even reference the 9th Circuit cases. The government asserted the "government speech" argument.	Judicial deference to U.S. Supreme Court. Judicial restraint in restricting decision to scope of this case. (Avoiding a ruling on the government speech argument.) Maintaining legitimacy of the institution Beliefs regarding economic and social realities and values in this doctrinal area.	The 10th Circuit affirmed the district court decision holding that the Beef Act does not infringe the 1st Amendment rights of the challengers. The court held that the 1st Amendment challenge was foreclosed by *Glikcman v. Wileman.*	Supreme Court denied certiorari, so the 10th Circuit decision was final. Relying on *Glickman*, the 10th Circuit found that the district court erred in applying the *Central Hudson* test.
Gallo Cattle, Inc. v. Ca. Milk Advisory Board, 185 F.3d 969 (9th Cir. 1999)	Cheese producer and one of the nation's largest dairy farms objected to mandatory assessments under the California Milk Promotion Marketing Order. Gallo Cheese is sold under the 'Joseph Farms' label and is distinguished as a premium cheese.	The *Glickman* decision involved tree fruit, a generic commodity. This case introduced issues of branding and product distinctiveness. (Generic commodity v. premium branded product.)	Judicial deference to U.S. Supreme Court. Maintaining legitimacy of the institution when required by the U.S. Supreme Court. to change positions. Proper interpretation of *Glickman* to indicate compliance with the position of the U.S. Supreme Court regarding 1st Amendment challenges to checkoffs.	The 9th Circuit affirmed the district court's grant of summary judgment in favor of Ann Veneman in her official capacity as the Secretary of the California Department of Food and Agriculture. The court found that the Milk Marketing Order was a "species of economic regulation" that did not violate 1st Amendment rights	In its Jan. 2003 *Delano Farms* opinion, the 9th Circuit addressed the soundness of this decision (and its 1999 *Cal-Almond* decision) in light of *United Foods.* It held both opinions were not undermined by *United Foods,* because both involved marketing orders like *Glickman.*

Table 3 (Continued)

Case	Characteristics of Checkoff Challengers	History	Interests at Stake for Judiciary	Legal Opinion and Doctrinal Basis	Status of Lawsuit and Relevance
Nature's Dairy v. Glickman, No. 99-439, 1999 U.S. App. LEXIS 3547 (6th Cir. 1999)	Large milk producers. Claimed that the Dariy Production Stabilization Act of 1983 violated their 1st Amendment rights. Action was against Secretary of Agriculture and National Dairy Promotion Board.	District court granted summary judgment to the government and the board. This case was decided chronologically in time after the 9th Circuit upheld the California Milk Promotion Marketing Order in *Gallo*.	Deference to U.S. Supreme Court and deference to 9th Circuit. Respect for Constitutional separation of powers. (Constitutional question versus economic policy issue for Congress and the Executive)	Upheld checkoffs Court rejected the argument of Nature's Dairy that the contested provisions of the Dairy Act create a stand-alone program unlike the comprehensive marketing order in *Glickman*. The court recognized that "federal regulation has permeated the milk industry for more than fifty years." At 11.	Final decision. Petition for writ of certiorari was denied by the U.S. Supreme Court. Example of another appellate jurisdiction following *Glickman*. The court made clear that it was deferring to the judgment of Congress.
Cal-Almond v. USDA, 192 F.3d 1272 (9th Cir. 1999) (Cal-Almond IV)	Almond handlers who objected to an Almond Marketing Order on 1st Amendment grounds. The Almond Order afforded ways to receive credit for the mandatory assessments when almond handlers met certain requirements with their own advertising programs (called "creditable" and "credit-back" programs). Cal-Almond and other almond handlers alleged that these credit schemes related to the checkoff programs violated their free speech rights.	Cal-Almond filed a petition with the USDA challenging the credit programs. The administrative law judge (ALJ) relied on the 9th Cir. decision in Cal-Almond I to uphold Cal-Almond's constitutional rights. Both sides appealed. The USDA judicial officer stayed the case while *Glickman* was pending. After the 9th Circuit remanded the case for dismissal in Cal-Almond III, the USDA judicial officer reversed the decision of the ALJ, holding that *Glickman* foreclosed the 1st Amendment claims. The district court agreed.	Judicial deference to U.S. Supreme Court. Consistency in applying *Glickman*. Interest in providing finality to the Cal-Almond litigation.	The court affirmed the decision of the district court that Cal-Almond's claims were foreclosed by the decision in the *Glickman* case. The court held that Cal-Almond's objections called into question the administration of the almond checkoff program, but were not relevant in determining the constitutionality of the program.	The 9th Circuit confirmed that Cal-mond I was implicitly overruled.

Table 3 (Continued)

Case	Characteristics of Checkoff Challengers	History	Interests at Stake for Judiciary	Legal Opinion and Doctrinal Basis	Status of Lawsuit and Relevance
Gerawan Farming, Inc. v. Lyons, 24 Ca. 4th 468 (2000). *Gerawan Farming, Inc. v. Lyons*, No. F031142 (Court of Appeal, Fifth Appellate District, Dec. 17, 2001).	Tree fruit growers and handlers Gerawan is a large enterprise using advanced technology and sophisticated marketing practices.	Gerawan claimed that the Cal. Plum Marketing Program, violated his 1st Amendment rights and his free speech rights under the Cal. Constituition. The district court granted the secretary's motion for judgment on the pleadings and the appellate court affirmed. Gerawan appealed to the Cal. State Supreme Court.	Respect for free speech rights in California State Constitution Judicial deference for U.S. Supreme Court decision in *Glickman* Respect for federal Constitutional principles and precedents regarding commercial speech and freedom from compelled speech. Respect for Cal. State Constitution. Judicial consistency between state and federal judiciary	The Cal. Supreme Court held that the Cal. Plum Marketing Program "implicated" Gerawan's free speech rights under the Cal. Constitution, article I, sec. 2, subdivision (a), but not under the 1st Amendment. It remanded to the appellate court to decide the level of protection article I offered commercial speech and what test should be used. Appellate court held for Gerawan based on an intermedialte level balancing test.	The Cal. Supreme Court characterized the mandatory fees for generic advertising as "commercial speech" that was protected by the State Constitution. After *United Foods*, the 9th Cir. applied an *Abood* compelled speech analysis, an intermediate level of scrutiny. So both state and federal courts in Cal. have applied an intermediate test to compelled commercial speech.
U.S. v. United Foods, 533 U.S. 405 (2001) Consolidated administrative proceeding and enforcement proceeding pending before the district court in Jackson, Tennessee: *U.S. v. United Foods*, No. 96-1252 and U.S. v. *United Foods*, No. 98-1082 (Western Dist. Tenn.) These consolidated court actions are on hold pending the outcome of the 6th Circuit *Michigan Pork Producers* case.	Fresh mushroom handler required to pay a mandatory assessment under the Mushroom Promotion, Research, and Consumer Information Act. The assessments were used primarily for generic advertising promoting mushrooms.	The district court held that *Glickman* was controlling and granted the government summary judgment. The 6th Circuit reversed, holding that the mushroom checkoff program was a violation of the free speech rights of the mushroom handlers.	Maintain legitimacy of the Court Respect for precedent while acknowledging changed beliefs about social and economic realities. (Criticism of *Glickman*.) Concessions to the swing voters (Kennedy and Stevens) by not overruling Glickman Respect for Constitutional separation of powers. Macro issues are at stake relating to which principles to privilege. Free market or govern-ment regulation? 1st Amendment or the Commerce Clause? Choice of 1st Amendment doctrine Principal of judicial restraint in deciding case narrowly.	U.S. Supreme Court affirmed the 6th Circuit and struck down the mushroom checkoff program. It distinguished the stand-alone program for mushrooms from the comprehensive regulatory scheme in *Glickman*. Justices Kennedy and Stevens switched to the free speech side. The court applied the *Abood* compelled speech analysis and declined to apply the *Central Hudson* test. (The decision states that there would be no basis to sustain the checkoffs even if commercial speech was afforded lesser protection.) Court did not address the government speech argument since it was not raised in lower court proceedings.	Government has argued that the Supreme Court only disposed of the summary judgment motion, so it can raise the government speech argument in district court proceedings. This case represented a change in the Supreme Court approach within a span of four years. It signaled that the Court would recognize 1st Amendment rights in compelled commercial speech cases. It showed movement toward privileging free market over government regulation and the 1st Amendment over the Commerce Clause.

Table 3 (Continued)

Case	Characteristics of Checkoff Challengers	History	Interests at Stake for Judiciary	Legal Opinion and Doctrinal Basis	Status of Lawsuit and Relevance
Livestock Marketing Association v. USDA,, 207 F.Supp.2d 992 (D.S. Dakota, 2002) *Livestock Marketing Association v. USDA*, Nos. 02-2769 and 02-2832 (9th Cir. 2003)	An association of livestock producers (LMA), an association of organizations for family farms and natural resources (WORC) and individual beef producers. Plaintiffs sought: 1) declaration that Beef Act and the Secretary's failure to act on a referendum violated equal protection and due process rights, and 2) an injunction to stop collection of checkoff fees.	The district court struck down the beef checkoff and enjoined collection of fees on the basis of *United Foods*. The court also rejected the government speech defense, calling it an "evolving concept" rather than a doctrine. At 2003. 1st Amendment claim was added after *United Foods* decision.	Respect for constitutional principles. Deference to precedent, i.e., Supreme Court rulings of *Glickman* and *United Foods*. Beliefs about social and economic realities. Judicial consistency (or independence) with decisions in other jurisdictions. (Dist. court in Montana upheld beef checkoffs using same evidentiary record.)	8th Circuit Court of Appeals found the beef checkoff was unconstitutional based on a *Central Hudson* commercial speech analysis. Court "inferred" that the Supreme Court would have used the *Central Hudson* test in *United Foods* if the government had argued it. The 8th Cir. rejected government speech defense and found government speech does not create total immunity from 1st Amendment scrutiny.	This decision makes a statement that the *Central Hudson* test is a viable approach for compelled commercial speech cases. It shows doctrinal tension that exists as the judiciary must address the intersection of the compelled speech and commercial speech doctrines. (Both may be seen as intermediate tests, but require different proof.) Appeal expected.
Jean and Steve Charter v. USDA, 230 F.Supp.2d 1121 (D. Montana 2002)	Small independent beef producers seeking a declaration that the Beef Act is unconstitutional, an order barring assessments and refund of past assessments. The Charters produce grass-fed beef and object to paying for ads that treat all beef the same.	Producers refused to pay beef checkoffs. Administra tive law judge ordered payment; they appealed. USDA argued that the govern-ment speech defense applied or, in the alternative, the checkoff program was constitutional.	Respect for constitutional principles. Deference to precedent, i.e., rulings of *Glickman* and *United Foods*. Beliefs about social and economic realities. Judicial consistency (or independence) with decisions in other jurisdictions.	The district court declared the Beef Act constitutional since the speech compelled by the Act is government speech. The court declared the judicial reasoning rejecting the government speech defense in the *Goetz* and *Livestock Marketing* cases was faulty because it incorrectly applied *Frame* as precedent.	Appeal pending before the 9th Circuit Court of Appeals. The district court held the Beef Act constitutionally sound as "non-ideological, content-oriented government speech which does not violate free speech or free association." At 63.
Michigan Pork Producers v. Campaign for Family Farms, 229 F.Supp.2d 772 (W.D. Mich. 2002), as corrected October 31, 2002.	Challengers are individual pork producers and four advocacy groups within The Campaign for Family Farms (CFF). Challengers objected to the mandatory assessments in the Pork Production, Research and Consumer Education Act of 1985 on 1st Amendment grounds.	Case began as a controversy over the outcome of a referendum to determine whether the pork checkoff program should continue. The parties filed various dispositive motions to dispose of the case and strike certain evidence.	Respect for constitutional principles. Deference to precedent, i.e., Supreme Court rulings of *Glickman* and *United Foods*. Beliefs about social and economic realities. Judicial consistency with decisions in other jurisdictions.	The court decided in favor of CFF, et al. It granted their Motion for Summary Judgment, Motion to Dismiss Affirmative Defenses and an injunction prohibiting the collection of fees. Judge Richard Alan Enslen held the pork checkoff program resembled *United Foods* more than *Glickman*. The court rejected the government speech defense.	Appeal pending before the 6th Circuit Court of Appeals. Oral argument occurred Mar. 14, 2003. Opinion has been widely quoted: "The government has been made tyrannical by forcing men and women to pay for messages they detest. Such a system is at the bottom unconstitutional and rotten." At 791.

Table 3 (Continued)

Case	Characteristics of Checkoff Challengers	History	Interests at Stake for Judiciary	Legal Opinion and Doctrinal Basis	Status of Lawsuit and Relevance
Delano Farms v. Ca. Table Grape Commission, No. 00-16778 (9th Cir. 2003)	Three table grape growers objected to mandatory fees required by the Cal. Table Grape Commission. The growers sell grapes under the brand names of Delano Farms, Silver King and Grape Royale. Challengers paid fees into escrow since 1996.	Dist. court upheld grape checkoffs based on *Glickman*. Parties stipulated to dismissal of all claims except the constitutional claim after *United Foods*. Dist. court held for Commission on that claim. Grape growers appealed.	Judicial deference to U.S. Supreme Court Maintaining the legitimacy of the institution in view of its changed position that checkoffs can violate free speech rights. (Court must either distinguish its *Gallo* and *Cal-Almond* decisions from *United Foods* or concede that they are no longer good law.)	The 9th Circuit ruled that the grape growers were entitled to First Amendment protection and reversed the dismissal. Case could then return to the dist. Court for trial. The court found the grape checkoff program was aligned with *United Foods*.	The Grape Commssion declined to appeal and the case is now before the district court. The 9th Cir. held that its rulings in *Gallo* and *Cal-Almond* were "plainly distinguishable" since the checkoff schemes in those cases were similar to *Glickman*.
Joseph and Brenda . Cochran v. Ann Veneman, No. 4:CV-01-0529, 2003 U.S. Dist. LEXIS 4361, (Middle Dist. Penn. 2003)	Milk producers who run a family dairy operation of 150 head of cattle with three sons, using traditional farming methods. Producers claimed that payment of dairy checkoffs violated their free speech rights.	Producers sought a declaration that the Dairy Promotion and Research Program was unconstitutional and sought to enjoin further fee collection.	Respect for constitutional principles. Deference to precedent, i.e., Supreme Court rulings of *Glickman* and *United Foods*. Beliefs about social and economic realities.	District court upheld the dairy checkoffs because the facts were consistent with *Glickman*. It held that the dairy checkoff program was part of a larger regulatory scheme and that the statute passed the *Glickman* 3-part test.	Producers have filed an appeal with the 3rd Circuit Court of Appeals.
In Re Washington Apple Advertising Commission, No. CS-01-0278-EFS (E.D. Wa. 2003)	The Washington Apple Commission initiated this lawsuit as a class action suit against itself to clarify whether its mandatory commodity assessments were constitutional.	The Commission selected two growers as proxies for the class action. 7 organic growers and 3 warehouses that sell branded apples joined as interveners.	Respect for constitutional principles. Deference to Supreme Court precedent. Choice of 1st Amendment doctrine (compelled speech or commercial speech).	The district court struck down the apple checkoff program by applying *United Foods*. The court found no government speech and rejected *Central Hudson* as an inappropriate test.	The Commission shut down its offices. It is in settlement discussions with growers to allow the Commission to collect small assessments for export promotions and to support industry groups.
State of Fla., Dept. of Citrus v. Graves Bros. Co., Tampa Juice Services, et al., Case No. 2DO03-2276, (2nd Dist. Ct. of Appeal, Fla.)	Large citrus growers claimed that a tax on fruit that was used to fund generic ads ("box tax") violated their 1st Amendment rights and filed a declaratory judgment action.	Cases of five original plaintiffs joined by other growers were consolidated with a case by foreign citrus processors who objected to a tax on imported juices equivalent to the box tax.	Deference to Supreme Court precedent. Consistency between federal and state judiciary. Beliefs about social and economic realities.	Court granted the growers partial summary judgment and held the box tax was unconstitutional It applied *Glickman* and *United Foods* and rejected the government speech defense.	Declaratory judgment for growers granted May 14, 2003. State of Fla. has appealed rulings. Court recognized 1st Amendment immunity for government speech.
Pelts & Skins, L.L.C. v. Jenkins, Jr., No. 02-384-A (Middle Dist. La. 2003)	Alligator farmer who sells premium alligator hides under its own brand as a high-end item.	The Dept. of Wildlife and Fisheries used mandatory fees for alligator hide promotions.	Respect for constitutional principles. Deference to Sup. Court precedent.	Court held fees were unconstitutional violations of free speech. It rejected the government speech defense.	The Dept. of Wildlife and Fisheries has filed an appeal with the 5th Cir. Court of Appeals.

The next case included is *U.S. v. Frame,*[661] decided by the Third Circuit Court of Appeals in 1989. It ushered in a busy era of commodity checkoff litigation. The investigative frame traces this line of cases, including two somewhat contradictory U.S. Supreme Court cases, *Glickman v. Wileman*[662] and *United States v. United Foods.*[663] In these cases, the Court interpreted the First Amendment rights of tree fruit growers and handlers compelled to pay mandatory assessments for generic advertising differently than such mandatory fees imposed on mushroom growers. Three district court decisions in 2002 resulted in appeals before appellate courts in the Sixth Circuit, Eighth Circuit and Ninth Circuit. Oral argument occurred in March 2003 for the cases in the Sixth Circuit and the Eight Circuit. In a decision issued on July 8, 2003, the Eighth Circuit held that the beef checkoff program was unconstitutional. The Sixth Circuit decision should be forthcoming soon. The legal investigative frame concludes with four district court decisions and one state court decision issued in the year 2003 on the constitutionality of compelled checkoff programs for generic advertising of table grapes, milk, apples, citrus fruit and alligator hides. Legal battles are continuing all but one of these cases. The legal investigative frame presented in Table 3 is a snapshot in time that will be expanded and modified as the courts move forward in addressing the key issues in these cases, creating new legal, social, economic and political realities for the parties involved.

Favored Doctrine: First Amendment Doctrine Based on Freedom from Compelled Speech

The evidence clearly indicated that the Supreme Court has chosen to analyze the cases challenging mandatory commodity fees by applying the First Amendment doctrine

[661] *U.S. v. Frame*, 888 F.2d 1119 (3rd Cir. 1989).
[662] *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997).
[663] *United States v. United Foods*, 533 U.S. 405 (2001).

relating to freedom from compelled speech and compelled association rather than the commercial speech doctrine.

In *Roberts v. United States Jaycees,*[664] the U.S. Supreme Court held that a strict scrutiny standard was appropriate in cases involving freedom from compelled association.[665] Such explicit language has not been stated in cases involving freedom from compelled speech. Accordingly, the Third Circuit Court of Appeals was at a crossroads when it considered the most appropriate First Amendment doctrine to apply in interpreting the constitutionality of the mandatory assessments under the Beef Act in *United States v. Frame.* It concluded that the appropriate standard for evaluating challengers' right to free speech was the *Central Hudson* test and the proper test for determining infringement of their right of association was a strict scrutiny test (as required by the *Roberts* case). However, since one of the claims in the case was a freedom from compelled association claim, the *Frame* court decided that it was bound to apply the strict scrutiny standard as established in *Roberts* rather than the lesser standard established in *Central Hudson*, even though the speech involved was commercial speech.[666]

In contrast, the Ninth Circuit applied the *Central Hudson* test in reaching its 1993 decision in *Cal-Almond v. USDA.*[667] Even though the *Central Hudson* test is an intermediate test, the government did not fare well under the Ninth Circuit application. In order to establish that a regulation on commercial speech is constitutional, the government had to show: 1) the commercial speech in question was not false or

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[664] *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).
[665] See *Roberts* at 623.
[666] See *Frame* at 1134.
[667] See *Cal-Almond v. USDA*, 14 R.3d 429, 437 (9th Cir. 1993) (Cal-Almond I).

misleading, 2) the asserted government interest necessitating the commodity program was "substantial," 3) the program directly advanced that interest, and 4) the program was no more extensive than necessary to serve that interest.[668] The appellate court found that the first and second prongs of the test were met, but the government failed to meet the third and fourth prongs of the test. It fell short in convincing the court that the generic advertising was more effective than advertising by individual producers and that the tree fruit program was narrowly tailored.[669]

Under the third prong, it faced the impossible task of showing that the checkoff program directly advanced the government's interests, because it had no data to demonstrate the effectiveness of the program. Furthermore, the dominant almond grower, Blue Diamond, commanded a whopping share of the almonds sold in retail grocery stores (over ninety percent in the year 1987).[670] This meant that, in order for the checkoff program to be deemed effective, the government would need to show that the program had given Blue Diamond an incentive to advertise more. This it could not do. In addition, the evidence showed that the almond checkoff program served to "*hinder* the efforts of the challengers to increase sales and returns to growers [emphasis in original]"[671] because the program denied credits to growers that advertised products that contained less than fifty percent almonds. Advertisements by the plaintiff almond growers were for products not meeting the fifty percent standard because they sold their almonds as ingredients for use in cereal and ice cream.

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[668] *Central Hudson* at 566.
[669] See *Cal-Almond, Inc.* (Cal-Almond I) at 437-440.
[670] Ibid. at 438, n. 9.
[671] Ibid. at 438.

Under the fourth prong, the government was again at a disadvantage in showing the fit between the goal of the legislation and the means chosen to implement such legislation, because it submitted no evidence to show that the Almond Board was making better use of the checkoff money than other forms of advertising. The government did argue that "the regulations reflect the reasonable judgment that the Board will make better use of these monies in its market promotion programs."[672] The court was not impressed with the many restrictions in the program that prevented credits to the almond growers who sold their crops as ingredients while providing advantages to Blue Diamond. The opinion of the Ninth Circuit Court of Appeals stated:

> "...USDA offers no justifications for the restrictions that deny credit for certain advertisements: ads promoting more than two complementary branded products (§ 981.441 (c)(5)(i)), ads promoting a product that also has "competing nuts" (§ 981.441 (c)(5)(ii)), or ads promoting retail stores not owned by handlers (§ 981.441 (c)(5)(iii)). It is true that the fit between means and ends need not be perfect, but there seems to be no logical justification for these types of restrictions other than the restrictions are designed to benefit Blue Diamond, who overwhelmingly dominates the retail almond market, at the expense of smaller handlers such as appellants, who sell primarily to ingredient manufacturers.[673]

By applying the *Central Hudson* test, the Ninth Circuit had fleshed out the hegemonic structure of the almond industry and revealed an inequitable program administered by the dominant industry bloc with the collaboration of the USDA. Any pretense that the program was enhancing market share was stripped away by this analysis. During the following two years, the USDA failed to cooperate in paying money owed to the almond handlers and the Ninth Circuit ruled on the *Cal-Almond* case again in

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[672] Ibid. at 440.
[673] Ibid.

1995 to enforce an order requiring the USDA to make such payments.[674] The Ninth Circuit denied a motion filed by the USDA to reconsider the opinion in Cal-Almond I.

Demonstrating its continued willingness to apply First Amendment scrutiny to checkoff programs, the Ninth Circuit in 1995 struck down marketing orders for collection of mandatory assessment for nectarines, peaches and plums in the case of *Wileman Bros. & Elliott, Inc. v. Espy* [675] (the case was renamed *Glickman v. Wileman Bros. & Elliott, Inc.* when it was argued before the U.S. Supreme Court). The Ninth Circuit based its finding of unconstitutionality on a *Central Hudson* analysis. It concluded that the checkoff programs did not "directly advance" the government's interest because the generic advertising did not increase consumption more effectively than what might be accomplished by individual growers conducting their own targeted marketing campaigns. In addition, the Ninth Circuit determined that the mandatory checkoff programs for the tree fruits were not narrowly tailored by comparing them with the less restrictive almond marketing program in Cal-Almond I that the Court previously held was not narrowly tailored.[676]

Alarm bells went off all over the United States when the Ninth Circuit struck down these two checkoff programs within the space of two years and began to establish a line of cases based on its interpretation of the commodity checkoff cases under the *Central Hudson* test. Dominant industry blocs in numerous industries got involved in a legislative initiative to add language to the Federal Agriculture Improvement and Reform Act of 1996 (FAIR Act of 1996) to attempt to clarify the intentions behind the

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[674] *Cal-Almond v. USDA*, 67 F.3d 874 (9th Cir. 1995).
[675] See *Wileman Bros. & Elliott, Inc. v. Espy*, 58 F.3d 1376 (9th Cir. 1995).
[676] Ibid. at 1379-1380.

commodity promotion laws, hoping to avoid certain death of a commodity program at the hands of a court diligently applying the *Central Hudson* test. A report on this can be found in the January/April 1996 online *Agricultural Law Letter* published by McLeod, Watkinson & Miller, a pro-checkoff law firm aligned with the checkoff hegemony that has been involved at times in drafting legislation for mandatory assessment programs for promotion of commodities. Under the subheading "Congress Steps In," the newsletter stated the following about new language contained in the FAIR Act of 1996[677] that supported checkoff programs: "Because the position taken by the Ninth Circuit raised serious concerns about the future of commodity checkoff programs that provide for generic advertising of agricultural products, Congress felt compelled to address this issue in the Farm Bill..."[678]

The FAIR Act sought to counter the Ninth Circuit's requirements that the government must show that generic advertising programs sell products more effectively than the advertising conducted by independent producers and that the programs are not narrowly tailored. For example, it carefully distinguished between the purpose of the advertising of individual producers or processors (to increase individual market share) and the purpose of the generic advertising for commodities (to increase overall demand for an agricultural commodity). Other legislative language attempted to clarify what the Congress intended in setting up the legislative framework for the mandatory assessment

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[677] Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888 (codified as amended at 7 U.S.C. 7201).

[678] Richard Rossier, "Congress Addresses Confusion Over Commodity Promotion Programs," The Agriculture Law Letter, McLeod, Watkinson & Miller (January/April 1996); available from http://www.mwmlaw.com/janapr96.htm; Internet; accessed 6 June 2003.

programs.[679] Some of these were self-serving proclamations, but one significant change required that all commodity checkoff programs conduct periodic studies to evaluate their effectiveness. This would generate the necessary data to perhaps withstand scrutiny under the *Central Hudson* test. The Congress (or certain dominant fractions within Congress allied with the USDA and major commodity checkoff supporters) had delivered a message that it supported commodity promotion programs that imposed mandatory assessments and disapproved of the First Amendment scrutiny of such programs

An amicus brief filed by the AFL-CIO with the Supreme Court in the *Glickman* case contended that the lower court (the Ninth Circuit Court of Appeals) erred "in mechanically reaching the conclusion that the *Central Hudson* analysis applies to every form of regulation touching upon commercial speech."[680] Indeed, the U.S. Supreme Court in *44 Liquormart, Inc. v. Rhode Island* held that such an error could result in "concluding that *all* commercial speech regulations are subject to a similar form of constitutional review simply because they target a similar category of expression." [emphasis in original][681]

In February of 1996, a district court in the District of Kansas decided *Goetz v. Glickman*,[682] a case brought by a cattle producer, buyer and trader challenging the

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[679] Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888 (codified as amended at 7 U.S.C. 7201).

[680] Motion for Leave to File Brief *Amicus Curiae* and Brief of the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae in Support of Petitioner, *Glickman v. Wileman* (1997) (No 95-1184), in the Supreme Court of the United States, October Term, 1996, 7.

[681] Ibid., quoting *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). The *44 Liquormart* opinion authored by Justice John Paul Stevens suggests that some State regulation of commercial speech warrants a stricter First Amendment review than the intermediate *Central Hudson* standard. He described the basis for stricter review in *44 Liquormart* as follows: "[W]hen a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands." *44 Liquormart* at 501.

[682] *Goetz v. Glickman*, 149 F.3d 1131 (10th Cir. 1998).

mandatory beef assessments under the Beef Promotion Research Act of 1985.[683] The court upheld the checkoff program based squarely on the precedent of the *Frame* case. It expressed its disapproval of the two Ninth Circuit cases that had relied on the *Central Hudson* test to strike down the almond and tree fruit checkoffs by omitting any reference to these cases in its opinion. The *Goetz* case was significant in demonstrating the alliances between various industry associations and the USDA. Intervenors on behalf of the government included: Kansas Livestock Association, the National Cattlemen's Association, the National Live Stock and Meat Board and four Kansas cattle ranchers.

The U.S. Supreme Court issued the *Glickman v. Wileman* decision in 1997, one year after Congress demonstrated its support for the producer funded generic commodity promotion programs. The Court chose to ignore the protected status of commercial speech under *Central Hudson* and applied an analysis tenuously based on the *Abood* line of cases in determining that no First Amendment issues were raised. The *Glickman* decision diminished First Amendment values relating to the protection of commercial speech by declaring that no free speech issues were involved because producers were not prohibited from communicating any message, compelled to engage in actual or symbolic speech, or compelled to endorse or finance political or ideological views.[684]

Commentators expressed the view that the Court's analysis was flawed because it relied on the assumption that First Amendment issues were raised only if the compelled fees for commercial speech were germane to the purpose of the overall regulatory scheme

[683] Beef Promotion and Research Act of 1985, 7 U.S.C. §§ 2901-2918; 7 C.F.R. §§ 1260.101-1260.217.
[684] *Glickman* at 469.

and the objectionable speech was ideological in nature.[685] The *Abood* court expressly stated that "nothing in the First Amendment or our cases discussing its meaning makes the question of whether the adjective political can properly be attached to these beliefs the critical inquiry."[686] (This flaw in interpretation was acknowledged in the *United Foods* case four years later when the Court declared the mushroom checkoffs unconstitutional.) In addition to the misinterpretation of the case law in *Abood,* the court appears to have mischaracterized the facts set forth in the record. Commentators have criticized the court's failure to recognize that the fruit growers and handlers had, in fact, voiced speech-related objections and were not all interested in marketing the fruit advertised as claimed by the *Glickman* court.[687]

It has been said that the Supreme Court in *Glickman v. Wileman* allowed "a governmental regulatory scheme to bootstrap a commercial speech restriction."[688] One reason this occurred was because the *Central Hudson* test was ignored. This legal analysis suggests that the Court was able to achieve the following by avoiding application of the *Central Hudson* test and introducing the *Abood* test as an alternative in *Glickman*:

1) The Court avoided a First Amendment analysis of the checkoff programs by characterizing marketing orders as purely economic in nature. This gave the Court the freedom to ignore the manner in which the third and fourth prongs of the *Central Hudson* test presented problems for the government. It also privileged the position of government over free speech rights in commercial

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[685] Edward J. Schoen, Margaret M. Hogan and Joseph S. Falchek, "United Foods and Wileman Bros.: Protection Against Compelled Commercial Speech-Now You See It, Now You Don't," *American Business Law Journal* 39 (Spring 2002): 467-520, 502.
[686] *Abood* at 326.
[687] Schoen, Hogan and Falchek, 499.
[688] Ibid., 514.

speech by not requiring that the government show that the marketing orders were more effective than other independent advertising and were narrowly tailored.

2) By avoiding the *Central Hudson* analysis, the Court avoided addressing two thorny issues, namely:
   - Does commercial speech warrant the same level of protection as political and ideological speech?
   - How should the *Central Hudson* test be applied to a marketing order such as the one at issue in *Glickman v. Wileman*? Did the Ninth Circuit apply it properly?
3) The Court avoided overriding the actions of Congress in the FAIR Act of 1996.
4) The Court avoided a conflict with the United States Department of Agriculture.

The majority in the *Glickman v. Wileman* decision consisted of Justices John Paul Stevens (author of the majority opinion), Anthony Kennedy, Ruth Bader Ginsburg, Sandra Day O'Connor, John Paul Stevens and Stephen Breyer. Those in the minority were Chief Justice William Rehnquist, Justices David Souter (author of the minority opinon), Antonin Scalia and Clarence Thomas. In his dissent, Justice Souter declared that the majority erred in not applying the *Central Hudson* test.

United States v. United Foods[689] presented the U.S. Supreme Court with an opportunity to remedy its failure in *Glickman* to recognize the First Amendment principles for protection of commercial speech. In particular, it offered the Supreme Court a chance to clarify the level of protection that should be afforded to commercial speech and a chance to demonstrate the proper application of the *Central Hudson* test

[689] *United Foods*, 533 U.S. 405 (2001).

which imposes a heightened level of scrutiny that does not exist under the *Abood* germaneness test. (*Abood* held that a union could compel the payment of dues to further the State's interest in collective bargaining, but could not use the funds for ideological communications or activities not germane to the purpose of the compelled association, i.e., collective bargaining.)[690]

The Supreme Court in *United Foods* did not frame the case broadly as a commercial speech issue. That would have likely forced the Court to overrule *Glickman.* Instead, it chose to frame the issue narrowly as follows: "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."[691] This approach allowed it room to distinguish the *United Foods* case from *Glickman* and still incorporate certain portions of the *Glickman* ruling that appeared consistent (or salvageable) in view of the modified direction of the Court in *United Foods.* The Court did this by initially establishing that the government was prohibited from compelling individuals to express speech with a certain viewpoint, citing *Wooley v. Maynard*[692] (establishing that the government does not have the right to compel a citizen to purchase and display a license plate with the motto "Live or Let Die") and *W. Va. State Board of Educ. v. Barnette*[693] (establishing that a public school cannot compel a student to salute the flag). The Court then acknowledged the case law defining the principle that the government likewise cannot compel citizens to fund speech that is objectionable to them.

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[690] See *Abood* at 235-236.
[691] *United Foods* at 2338. Also see Schoen, Hogan and Falcheck, 506.
[692] See *Wooley v. Maynard*, 430 U.S. 705 (1977).
[693] See *Va. State Board of Educ. v. Barnette,* 319 U.S. 624 (1943).

It cited *Abood v. Detroit Board of Education* and *Keller v. State Bar of California* for this proposition.[694]

The next step the Supreme Court took was to apply these First Amendment principles to the commercial speech at issue, i.e., the funding of generic mushroom advertising from mandatory checkoff fees. This was the first time that the Supreme Court had connected these principles to commercial speech. In spite of the Court's lack of emphasis on this expansion of *Abood* to commercial speech, the step was significant.[695] It was not an anomaly, however, since the *Abood* analysis had been extended to other diverse fact situations involving compelled speech.[696] The Court found that First Amendment issues were involved in the compelled funding of generic mushroom advertising.

It then relied upon its *Glickman* decision to hold that programs with mandatory commodity assessments may avoid First Amendment scrutiny if they are part of a broader regulatory scheme and if the compelled funding of commercial speech is germane to the purpose for which the regulatory scheme was organized. The Court in *Glickman* held that the tree fruit marketing order fell within the parameters of these limitations on First Amendment protection since "the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy." [697] The commodity promotion program for mushrooms fell outside these exceptions, hence the Court found it was unconstitutional.

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[694] *United Foods* at 212, citing *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) and *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990).
[695] See Schoen, Hogan and Falchk, 508.
[696] See, e.g., *Keller v. State Bar of California*, 496 U.S. 1 (1990) and *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000).
[697] *United Foods* at 2338.

By recognizing that issues of First Amendment rights were raised by the mushroom mandatory commodity assessments in the mushroom checkoffs, the Supreme Court repaired some of the damage that it inflicted by denigrating First Amendment rights in the *Glickman* case. However, by clinging to its characterization of certain checkoff programs as economic regulations, it created a source of ongoing confusion.

The Supreme Court in *United Foods* tried to distance itself from the three-part test it established in *Glickman* for determining whether a First Amendment analysis is required.[698] The Court referenced the government's attempt to avoid First Amendment scrutiny by claiming that the mushroom checkoffs met the requirement of this test. It then stated: "These points were noted in Glickman in the context of a different regulatory scheme and are not controlling of the outcome."[699] It is noteworthy, however, that one lower court (Middle District of Pennsylvania) performed a detailed analysis under this test in its effort to apply the precedents of both *Glickman* and *United Foods* in its decision making.[700] The dissent in *United Foods* also defended the use of this three-point test.[701]

The *Glickman* decision admonished the Ninth Circuit Court of Appeals for using the *Central Hudson* test to evaluate the constitutionality of mandatory assessments by stating:

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[698] The three-part test set forth in *Glickman* for determining whether a First Amendment issue is raised is as follows: 1) Does the compelled funding of speech impose a restraint on the freedom of the objecting commodity producer to communicate its own advertising messages? 2) Is the objecting commodity producer compelled to express any actual or symbolic speech to which the producer objects? 3) Does the mandatory promotion program compel the producer to endorse or fund political or ideological views that it disfavors?

[699] *United Foods* at 2338.

[700] See *Joseph and Brenda Cochran v. Ann Veneman*, No. 4:CV-01-0529, 2003 U.S. Dist. LEXIS 4361, (Middle Dist. Penn. 2003).

[701] *Untied Foods* at 2343-2344, J. Breyer dissenting.

> The Court of Appeals fails to explain why the Central Hudson test, which involved a restriction on commercial speech, should govern a case involving the compelled funding of speech. Given the fact that the Court of Appeals relied on Abood for the proposition that the program implicates the First Amendment, it is difficult to understand why the Court of Appeals did not apply Abood's 'germaneness' test. [702]

Some commentators have assumed that, in the wake of *Glickman*, the *United Foods* decision also specifically rejected the *Central Hudson* test as being inappropriate for compelled commercial speech cases. This has been argued in briefs filed in several of the pending checkoff cases. However, a close reading of the opinion does not bear this out.

The majority opinion written by Justice Anthony Kennedy simply indicated that the Court was refraining from a *Central Hudson* analysis since it found that the compelled funding of commercial speech was unconstitutional under lesser standards. It also noted that the government had not relied upon *Central Hudson* in its appeal.[703] (This is not surprising, since it would not be in its best interest to invite a heightened *Central Hudson* review similar to the Ninth Circuit reviews in Cal-Almond I and *Espy*.)

The fact that the government did not rely on *Central Hudson* in its appeal would not have prohibited the Court from analyzing the case under *Central Hudson.* It appeared that the Court may have cited this fact to bolster its position in choosing to narrowly frame the issue for review in such a way that it did not have to scrutinize the government's action under *Central Hudson.* (As noted earlier, its chosen framing of the issue was "whether the government may underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, some of

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[702] *Glickman* at 474, no. 18.
[703] *United Foods* at 2337-2338.

whom object to the idea being advanced.")[704] In short, the majority opinion of the Court sidestepped applying the *Central Hudson* test rather than expressly holding that it did not apply.

In his dissent, Justice Breyer held fast to the concept that the disputed speech is a species of economic regulations. He reached a conclusion opposite to that of Justice Kennedy regarding the outcome of a *Central Hudson* analysis:

> Even if I were to classify the speech at issue here as 'commercial speech' and apply the somewhat more stringent standard set forth in the Court's commercial speech cases, I would reach the same result [that the First Amendment does not seek to limit the Government's regulatory choices in the manner supported by the majority].[705]

Justice Breyer than performed a brief *Central Hudson* anlaysis, arguing that: 1) the government interest was substantial, 2) the compelled funding for speech directly advanced a substantial government interest in maintaining a collective advertising program and avoiding free riders, and 3) the government's program is effective as shown by the data introduced in the record.[706]

The manner in which *Central Hudson* was referenced in both the majority and minority opinions indicated that the Court was aware of its relevance to compelled commercial speech. While the majority in *United Foods* clearly preferred using the *Abood* standard, it did not summarily dismiss the *Central Hudson* test or foreclose future application of the test to cases involving compelled funding for generic advertising.

Why have the anti-checkoff plaintiffs so easily accepted the *Abood* test over the *Central Hudson* test when the cases decided by the Ninth Circuit under *Central Hudson*

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[704] Ibid. at 2339.
[705] *United Foods* at 2348.
[706] Ibid.

favored the challengers? Even though commentators have questioned the Supreme Court's decision not to incorporate a *Central Hudson* commercial speech analysis in its *United Foods* opinion, all five lawyers interviewed for this study (four with attribution and one anonymously) unanimously concurred that the *Abood* analysis is a better fit for the checkoff lawsuits. They pointed out that the *Central Hudson* test involves a government restriction on commercial speech as opposed to the checkoff cases which involve compelled funding of speech through mandatory commodity assessments. In addition, several of the attorneys are unwilling to characterize the speech in question as strictly commercial, taking the position that the advertising to which their clients object is political and ideological. In their opinions, the checkoff cases are thus more akin to the *Abood* line of cases. Moreover, the germaneness test under *Abood* may offer the courts a simpler analysis than the four-step test in *Central Hudson.* Clearly, courts in several cases, including *United Foods*, have indicated that they prefer not applying the *Central Hudson* standard if another doctrinal basis for First Amendment analysis can be employed.

An exception is the July 8, 2003 decision by the *Eighth Circuit in Livestock Marketing Association v. USDA.* The appellate court "inferred" that the U.S. Supreme Court would have used the *Central Hudson* test if the government had relied upon it in presenting its case. Accordingly, it applied the *Central Hudson* test to analyze the constitutionality of the beef checkoff program:

> [W]e conclude that *Glickman* does not provide a complete answer to this commercial speech issue. We infer that, had the government relied upon *Central Hudson* in *United Foods*, the Supreme Court would have adapted the *Central*

> *Hudson* test to the circumstances of that case, but would nevertheless have held that the Mushroom Act unconstitutionally regulated commercial speech.[707]

The court expressly weighed use of the commercial speech doctrine and use of the compelled speech doctrine and concluded that the commercial speech context should control. The Court stated:

> We reach this conclusion [to use *Central Hudson*] recognizing that *Central Hudson* involved a restriction on speech while the present case involves compelled speech. In our view it is more significant that *Central Hudson* and the case at bar both involve government interference with private speech in a commercial context.[708]

The appellate court then applied the four-prong *Central Hudson* test and found :

> [T]he government's interest in protecting the welfare of the beef industry by compelling all beef producers and importers to pay for generic beef advertising is not sufficiently substantial to justify the infringement on appellees' First Amendment free speech right.[709]

The "inference" made by the 8th Circuit Court of Appeals regarding the Supreme Court's willingness to use the *Central Hudson* test if the government had relied upon it provided the means for the appellate court to apply a commercial speech analysis and still reconcile its decision with *United Foods*. The inference also invites the Supreme Court to take another look at applying the Central Hudson test to the compelled commercial speech cases and creates an expectation that the Supreme Court will either confirm or deny the Eighth Circuit's inference in another checkoff case.

Renee Giachino, attorney for Center for Individual Freedom, questioned whether the *Central Hudson* case will continue to set the proper standard for protection of commercial speech since the U.S. Supreme Court has indicated its discomfort with the

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[707] *Livestock Marketing Association v. USDA*, Nos. 02-2769 and 02-2832 at 18, 2003 U.S. App. LEXIS 13630 (8th Cir. 2003).
[708] Ibid.
[709] Ibid. at 23.

test in several of its recent cases.[710] The case of *Nike, Inc. v. Kasky,* [711] which was argued before the Supreme Court during the 2002-2003 term was expected to shed light on whether the Court was ready to reassess the *Central Hudson* standard. The Court's dismissal of the case for procedural reasons provided an indication that it was not prepared to reevaluate *Central Hudson* or that the *Nike* case did not offer the fact situation the Court may be seeking for a reassessment of the commercial speech doctrine.

Barry Richard, constitutional attorney and counsel for the State of Florida Citrus Commission in the challenge to the citrus "box tax" in Florida expressed his view that the *Central Hudson* and *Abood* analyses are, in fact, linked:

> Central Hudson is kind of the granddaddy of these commercial speech cases, and it sort of sits at the base of the body of case law. I think people [in the checkoff cases] don't talk about Central Hudson so much because Central Hudson stood for the kind of seminal principles that don't really give us much guidance when you get to the more specific issues in these cases. Central Hudson laid out the methodology and so forth. But that really doesn't do much to help us here. That's why I think they turned to Abood and Keller. The other thing, by the way is that Central Hudson wasn't a case that involved financing. The current cases are a step away. Central Hudson was a direct regulation of speech.....here you're dealing with a cases in which the government isn't saying "you can't do something" or "you must say something." They're saying "you must provide money that we will use to give a message." So, it's kind of a step away from Central Hudson.[712]

Richard explained that the *Abood* decision held that the government could force the contribution of money and the only question at issue was what to do with such money. He stated:

> The answer was, you can only do the stuff that was related to the governmental interest. So if you look back at Central Hudson, that really was the same question. But they [the court in Abood] were saying "once you get it, how can you use it? If you use it for something beyond collective bargaining, then you're

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[710] Giachino interview, 1-2.
[711] *Nike, Inc.v. Kasky*, 539 U.S. ___ (2003), U.S. LEXIS 5015, No. 02-575 (2003).
[712] Richard interview, 4-5.

> no longer serving the substantial governmental interest Central Hudson said you had to have in order to regulate speech. So that's how the two are tied together. ...I don't think it's an either/or between the Central Hudson and the Abood/Keller analyis. I think Abood and Keller was another step—maybe it's better to say a more specific step—after Central Hudson.[713]

David Moeller, attorney with Farmers Action Group, Inc. and counsel for independent pork producers and the Campaign for Family Farms in the *Michigan Pork Producers* case, draws a distinction between "commercial speech" and "compelled speech." He deemed this to be an important difference since his clients claim that the generic advertising for pork is political and ideological in nature. Here is an excerpt from Moeller's interview:

> Interviewer: Do you think it's correct for Central Hudson not to be a part of the analysis?
>
> David Moeller: That's what we argue in our brief. We argue that, basically the Supreme Court foreclosed that in the United Foods decision. Plus, we argue that Central Hudson does not apply because Central Hudson talks about regulation of advertising or commercial speech. This is compelled, forced speech. And the standard in Central Hudson is not applicable to compelled speech. And, as we said in our brief, USDA even said that this doesn't apply in both the Glickman and the United Foods decisions in their United Foods arguments.
>
> Interviewer: If the court recognizes the First Amendment doctrine for freedom from compelled speech in a case where the speech involved is commercial speech, it sort of comes in the back door, or at least it appears that way. ..do you think that's a possible result?
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> David Moeller: In a way that's what United Foods did where they didn't have ideological objections like what we have in our case. In our case, it's more than just commercial objections. It's also ideological and political objections, which is another reason, going back to your last question, why Central Hudson doe not apply.[714]

Another attorney involved in representing checkoff challengers, Renee Giachino, shared the view that the *Central Hudson* analysis is inappropriate for the commodity

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[713] Ibid., 6.
[714] Moeller, 4-5.

checkoff cases involving compelled funding for generic advertising. Giachino is in-house counsel for Center for Individual Freedom, a non-profit group that is serving as co-counsel representing checkoff challengers in two cases, *Steven and Jeanne Charter v. USDA* (a beef checkoff case) and *Joseph and Brenda Cochran* (a dairy checkoff case). Here is an excerpt from her interview:

> Interviewer: These cases that you're involved in revolve around First Amendment commercial speech issues, is that right?
>
> Renee Giachino: Arguably, yes, they do involve speech. I think that there is certainly some debate as to the level of scrutiny that is applied to that speech. I know that the government asserts that the speech at issue is commercial in nature. However, we maintain that their reasoning is wrong on several counts.
>
> Interviewer: Do you want to mention these, the reasons why you think their reasoning is wrong on that?
>
> Renee Giachino: Well, they are relying upon the Central Hudson test, with restrictions on commercial speech. As we lay out in some of our briefs...most particularly, in one of our briefs, we walk through the numerous reasons that we believe that Central Hudson does not apply in this instance. First of all, the Supreme Court in the United Foods case recognized that the Central Hudson test—it was made clear in the Wileman case—does not govern a case involving compelled funding of speech. It think there's a clear distinction there from the Central Hudson case, which some even question nowadays whether or not it's still good law....But, the Central Hudson case involved a restriction on commercial speech....I also think what's very important to note, particularly in the checkoff programs, is that much of the speech involved is, in fact, not even commercial speech. There is speech that talks about issues of nutrition, of legislation. These are to me political or opinion issues about an economic subject. [715]

Erik Jaffe, constitutional lawyer representing anti-checkoff challengers in the *Charter* case and the *Cochran* case was unequivocal about *Central Hudson* being an inappropriate test. He stated:

> The commercial speech anlaysis made no sense here. Commercial speech analysis was developed for attempts to squelch commercial speech, to forbid advertising, to stop people from doing things, which raises a whole host of

[715] Giachino interview, 1-2.

different questions and has potentially different balances than the notion that you can make people say something or make people support speech. So, at the end of the day, you can track back and find a macro theory that encompasses them both, it's not that hard. But in terms of the "on the ground" doctrine...it was a lot cleaner to do it the other way [under Abood] because at some point, there's a couple of nice clean kickouts like the germaneness inquiry that avoid having to jump through a hundred million hoops every time.[716]

As noted earlier in this dissertation, the *Abood* line of reasoning provides the counter-hegemony challenging the checkoffs with a strong, simple basis for presenting its moral argument and ideological themes to the industry and the public. Its task becomes far more difficult when it must explain how the commercial speech doctrine applies to the compelled funding of generic advertising programs. As Jaffee observed, the lawyers representing the anti-checkoff challengers also can present their clients' cases more easily and by relying on *Abood* principles. It is likely that this partially explains the willingness by various factions within the counter-hegemony (legal representatives, trade associations, public interest groups, etc.) to accept the Supreme Court's obvious preference for analyzing these case under the *Abood* standard and ignoring the *Central Hudson* test.

Stretching the Limits of Government Speech

"The so-called 'government speech' doctrine is not so much a doctrine as it is an evolving concept that the government may compel the use of coerced financial contributions for public purposes."[717]
~ U.S. District Judge Charles Kornmann
District of South Dakota, Northern Division

The dominant hegemony has advanced the theory of government speech as a defense to the claim of the challengers that their First Amendment free speech rights have been violated. Objective seven requires the researcher to critically examine the scholarly

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[716] Jaffe interview, 7.
[717] *Livestock Marketing Association v. USDA*, 107 F. Supp. 2d 992 (2002).

literature and federal and state cases on the "government speech doctrine" to determine its viability as a defense against the compelled commercial speech challenge.

In the mandatory commodity assessment programs, the acknowledged governmental policy is to create and maintain a demand for agricultural commodities. Commodity producers endorsed the mandatory programs as industry self-help programs that would allow them to promote their products as a group and avoid free-riders who reaped benefits but were not willing to contribute. The government speech argument requires an assumption that the government not only has a vital interest in regulating the commercial speech of the producers for this purpose (either under the *Abood* germaneness test or the *Central Hudson* test), but that it has become the voice of the industry, controlling its generic advertising messages. The government has claimed that it is speaking whenever a generic ad appears promoting the commodities produced by the cattle industry, the fruit industry, the dairy industry, the grape industry and the alligator hide industry.

Can the underlying government policy of promoting demand for all comities with checkoff programs be implemented aggressively and effectively for each industry when all generic advertising generated is the government speaking? The government's claim of government speech is an extreme position that seems to impede competition and the free exchange of ideas *within* industries and interfere with competitive messages *between* industries. If all generic commodity advertising is government speech, how can the desire to increase the demand in every industry be met? Generic advertising for pork competes with generic advertising for beef. Generic advertising for tree fruit competes with generic advertising for citrus fruit. Generic advertising for homogenous products

competes with advertising for branded products. By successfully advertising and increasing the demand for one commodity, the government reduces the size of the pie for another commodity. The government has thus expanded its role overseeing the checkoff programs to become a participant in the commercial marketplace by using mandatory fees collected from various discrete groups to deliver messages that it claims represent government speech. U.S. District Court Judge Charles B. Kornmann refers to the peculiar result that occurs when the government becomes the speaker for agricultural commodities: "Common sense tells us that the government is not 'speaking' in encouraging consumers to eat beef. After all, is the 'government message' therefore that consumers should eat no other product or at least reduce the consumption of other products such as pork, chicken, fish, or soy meal? The answer is obvious."[718]

The government's justification for speaking on behalf of all citizens is abundantly clear when it is seeking to recruit military personnel, advising of health concerns, promoting political issues relevant to government business and so forth. It does not create a risk that its voice will displace or monopolize private speech or interfere with the gatekeeping function of the media and other private speakers, since U.S. citizens can tell that the government is speaking and its message is related to recognizable government functions. Public understanding and public choice is not hindered

By attempting to stretch the government speech principle to cover the producer-funded generic advertising in the commodity programs, the government seems woefully out of step with the deregulation trend that has characterized legislative activities during the last decade. Renee Giachino, attorney for the Center for Individual Freedom,

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[718] *Livestock Marketing Association* (2002) at 1006.

identified additional government involvement that, in her opinion, would be needed to justify the claim of government speech:

> Interveiwer: Do you think that if the government speech argument was accepted, there would be any changes in the decision-making and the power exercised by the USDA and dominant groups?
>
> Renee Giachino: There would have to be. In order to justify it as government speech, they are really going to have to elevate these programs to what we see with our military. True government involvement, not a rubber stamping instance. I also think that they are going to have to go back to the individual commodities producers and re-vote. They sold these programs to them as self-help industry programs. Now, they're trying to convert it to government speech. It's extremely misleading, it's disingenuous.[719]

The viability of the government speech defense will depend on three factors:

1) How will the U.S. Supreme Court define "government speech"?
2) How will the Court interpret the facts in a case involving compelled funding for generic advertising vis-à-vis this definition?
3) In the event that the Court finds that the generic advertising under the checkoff programs constitutes government speech, will the Court recognize that such speech is immune from First Amendment scrutiny or will it apply some standard of First Amendment review?

A definition of government speech could take into account considerations such as the following: whether there is government attribution, the level of government control and involvement, whether funding occurs through general tax revenues or mandatory contributions from a targeted group, whether the targeted group is a discrete or narrow segment of society with common interests or widely representative of the general population, who retains copyrights in any creative work, etc.

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[719] Giachino interview, 10.

Possible Hegemonic Relationship Between Judicial Decisions and Economic/Political Interests of the Dominant Group

Objective number eight requires the researcher to examine the court decisions and other evidence to explore whether there is a hegemonic relationship between the decisions of the judiciary on compelled commercial speech and the economic and political interests of the dominant groups involved in the commodity checkoff programs. The following research questions are relevant to this inquiry:

> RQ 1: Do the existing policy goals of the respective external entities (including the USDA and powerful trade organizations) remain in direct conflict with First Amendment free speech rights for compelled commercial speech?
>
> RQ 2: Have the Supreme Court and other federal courts failed to recognize the First Amendment constitutional right not to participate in compelled commercial speech by privileging the economic and political interests of the dominant parties in the agricultural hegemony?

Policy Goals Versus First Amendment. In analyzing Research Question 1, it is helpful to reference Table 2, the chart that includes a listing of the entities that have been identified in this study. The chart also indicates each entity's affinity for or against the checkoffs. While it would be unfair to assume that all entities favoring checkoffs can be characterized as being against First Amendment free speech rights for compelled commercial speech, this research suggests that this may be true in many cases.

As evidenced by their legal claims in commodity checkoff cases since 2001, the USDA, the industry trade associations aligned with hegemony and large commodity producers have taken the position that generic advertising of commodities funded by private parties is equivalent to government speech and, therefore, enjoys full immunity from First Amendment scrutiny. This is in direct conflict with the First Amendment rights of all individuals seeking protection against compelled speech or compelled

association. The government speech argument indicates a desire for increased control over privately funded speech and the flow of checkoff money without accountability under the First Amendment. Rene Giachino, legal counsel for Center for Individual Freedom, provided the following assessment of the USDA's interests:

> I think it's a cash cow for them. I think they have put into play this incredible monster. At a time when our economy is already suffering, of course no one wants to see any program that helps support America's families be dismantled. But it should not happen at the expense of trampling the constitutional rights of other individuals."[720]

The policy goals of the USDA have been to increase efficiency and production in the United States under the industrial agricultural model so that the United States can be competitive in the global marketplace. Even if generic advertising can be shown to help accomplish this, the goal needs to be balanced against the First Amendment rights of its citizens. This was the opinion of Renee Giachino, as well as others interviewed who were aligned with the counter-hegemony. Giachino stated:

> Even if you assume that the beef checkoff communications are characterized as government speech, they would still run afoul of the First Amendment. I think that whenever individuals are compelled to subsidize the expression of viewpoints with which they disagree, the First Amendment test is going to be the same, regardless of whether the speaker is being subsidized by a third party favored by the government or by the government itself.[721]

A representative of the Cattlemen's Beef Board described the goals of his board:

> "I think our sole purpose for existence is to administer this program in such a way that will increase demand for beef and enhance profit opportunities for cattle producers. And, as an organization, that's what we're all about. [722]

A critical question remains unanswered. Which cattle producers is the representative taking about?

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[720] Giachino interview, 3.
[721] Giachino interview, 11.
[722] Interview with anonymous representative of Cattlemen's Beef Board, 11.

Judicial Decision Making. Research Question 2 requires an analysis of the behavior of the U.S. Supreme Court and other courts in order to assess whether such behavior indicates a failure to "recognize the First Amendment constitutional right not to participate in compelled commercial speech by privileging the economic and political interests of the dominant parties in the agricultural hegemony."

Richard H. Fallon, Jr.'s book titled *Implementing the Constitution* [723] served as a primary resource in providing a conceptual framework for exploring the nature of the judicial decisions in the checkoff cases. Fallon's book examined the Supreme Court's responsibilities in specifying the meanings of constitutional norms and creating doctrinal tests to protect or implement these norms. His perspective on how the Supreme Court implements the Constitution is practical, incorporating elements of two major models of Supreme Court decision making: the legal model and the attitudinal model The aim of the Supreme Court justices is to produce "coherent, workable constitutional doctrine."[724]

Both of these distinct models attempt to explain the behavior of the U.S. Supreme court. The legal model emphasizes four factors that are used by the Justices in their decision making: plain meaning, intent of the framers (or legislators), precedent and balancing.[725] This is the model that Supreme Court justices profess that they follow in applying the law.[726] In cases dealing with First Amendment issues, the considerations are: 1) How do the facts of the case compare with precedent? 2) What is the plain meaning of the First Amendment and the statutes that are being challenged as being

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[723] Richard H. Fallon, Jr., *Implementing the Constitution* (Cambridge, Mass: Harvard University Press, 2001).
[724] Ibid., 37.
[725] Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (New York: Cambridge University Press, 1993), 33.
[726] Ibid.

contrary to that meaning? 3) What was the intent of the Constitutional framers and the legislators? and 4) How should societal and constitutional issues be balanced?[727]

The attitudinal model asserts that the Supreme Court justices decide cases the way they do "in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices."[728] Professors Jeffrey A. Segal of the State University of New York, Stony Brook and Harold J. Spaeth of Michigan State University are major proponents of this model and have been instrumental in testing and developing it. It is their opinion that the unique position of the U.S. Supreme Court justices as employees of the government, but without political or electoral accountability, allows them to make decisions based on their personal ideologies, attitudes and values.[729]

According to Fallon, Congress and other institutions bear the primary responsibility for implementing the Constitution.[730] The Supreme Court becomes involved through the process of judicial review. The process requires the Court to engage in two functions: "identifying constitutional norms and specifying their meaning" and "crafting doctrine or developing standards of review."[731] First Amendment norms are often vague and must be converted into rules of law in the form of doctrines and tests. Fallon states:

> [E]ffective implementation requires the crafting of doctrine by courts. The Supreme Court has responded accordingly. By no means illegitimately, it has developed a complex, increasingly code-like sprawl of two-,three-, and four-part tests. Critics have protested that the Court's multipart tests are inappropriate because they do not plausibly reflect the Constitution's true meaning. The critics may be correct about the gap between meaning and doctrine, but their protest is

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[727] Ibid., 64.
[728] Ibid., 65.
[729] Ibid., 73.
[730] See Fallon, 38-39.
[731] Ibid., 38.

> largely beside the point. The measure of the soundness of constitutional doctrine—including 'prophylactic' rules as well as three- and four-part tests—is whether it implements the Constitution effectively.
>
> Once established, the Court's doctrinal formulations matter enormously, at least if they are successful....a test established in one case will generally be viewed as thereafter binding the Justices themselves. In most cases in the Supreme Court, the argument among lawyers and Justices alike turns predominantly on the meanings of previous cases.[732]

Fallon noted a rough distinction between "ordinary" and "extraordinary" adjudication of constitutional law cases. Ordinary adjudication occurs when a majority of the Court is satisfied that existing doctrine adequately frames the key issue for judicial consideration in a pending case. Extraordinary adjudication results when the Court finds that established doctrine falls short of providing the basis for resolving a conflict, prompting the Justices to reexamine the doctrine's applicability or to launch a new doctrinal approach.[733] The new doctrine often bears the name of the case in which it was first introduced by the U.S. Supreme Court, such as the *Central Hudson* test.

Several additional points by Fallon are useful in providing a foundation for the analysis of the line of cases dealing with compelled commercial speech. First, he maintained that "every ultimate conclusion must at least be reconcilable with the written constitutional text."[734] Secondly, he identified "value arguments" as important in allowing the Supreme Court justices to decide which approach is better when they find that more than one reasonable meaning can arise from the language of the Constitution. Such value arguments can influence the manner in which all participants in the legal process read the text of the Constitution, interpret precedents and apply their view of

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[732] Ibid., 42.
[733] Ibid., 43.
[734] Ibid., 47.

original understanding to current facts."[735] The six categories of value arguments that Fallon identified are:

1) Ultimate ideals of constitutional justice (moral values or principles, what is right);
2) Institutional concerns (need to reach a majority decision);
3) Costs to governmental interests (costs incurred in enforcing constitutional values, whether interests are compelling, etc.);
4) Judicial manageability and enforceability;
5) Risks of error in acting versus risks of legal uncertainty; and
6) Democratic acceptability in light of reasonable disagreement.[736]

In recognizing that value arguments play an important role in constitutional adjudication along with considerations of established doctrine and precedent, Fallon infused his approach with elements of the attitudinal model of judicial decision making.

Another key aspect of Supreme Court decision making was explored by Robert Kahn in the essay he authored as chapter four in *Supreme Court in American Politics.* He examined the relationship between beliefs about social, political and economic reality and changes in Supreme Court doctrine. Kahn suggested that Supreme Court decision making be analyzed in two stages:

> The first stage is the identification of the presence and nature of constitutional principles at issue in a particular case. The second stage then asks how the recognition and definition of political, economic, and social facts change over time and how changes in the definition of social facts inform changes in constitutional law or doctrine.[737]

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[735] Ibid.
[736] Ibid., 47-52.
[737] Ronald Kahn, "Institutional Norms and the Historical Development of Supreme Court Politics: Changing "Social Facts" and Doctrinal Development," in *The Supreme Court in American Politics: New*

Kahn applied his concept concerning the relationship between beliefs about reality and doctrinal change to three sets of landmark cases in which the Supreme Court rendered strikingly different opinions at different periods in time.[738] He also explored how changing conceptions of social, economic and political realities have been relevant in the doctrinal changes that have evolved in cases dealing with capital punishment.

Kahn theorized that "beliefs about social reality are built into the development of an area of case law or doctrine as precedents."[739] However, as new facts create fresh constructions of reality, this puts pressure on existing beliefs, casting doubt on established case law or doctrine.[740] Doctrinal change may be the result, but not necessarily. Kahn uses the following quote from a 1995 article by Michael McCann to illustrate the failure of some courts to respond to new circumstances:

> New facts sometimes can pose an awkward dilemma for particular policy arguments of normative positions....Yet more often, 'inconvenient' facts are simply ignored, discounted, countered by other facts, or interpreted differently by our adversaries. Again the key point is that facts have no meaning apart from the interpretive frames themselves—the beliefs, values, knowledges—in which they are understood; facts cannot resolve interpretive disagreements.[741]

Kahn's ideas on changing social facts and doctrinal development and Fallon's framework for understanding Supreme Court decision making were used in this research

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Institutionalist Interpretations, eds., Howard Gillman and Cornell Clayton (Lawrence, KS: University Press of Kansas, 1999), 43-59, 45.

[738] The three sets of cases Ronald Kahn analyzed were: 1) *Lochner v. New York*, 198 U.S. 45 (1905) and *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) and other post-*Lochner* cases; 2) *Plessy v. Ferguson*, 163 U.S. 537 (1896) and *Brown v. Board of Education of Topeka*, 349 U.S. 483 (1954); and 3) *Bradwell v. Illinois*, 83 U.S. 130 (1872), *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833 (1992). Ibid., 45-50.

[739] Ibid., 59.

[740] Ibid., 44.

[741] Ibid., 44, quoting Michael W. McCann, "As a Matter of ('Social') Fact," *Law and Courts* 5 (1995): 7-9, 9.

project to study the behavior of the U.S. Supreme Court and lower courts (by analogy) in cases dealing with compelled commercial speech.

The Hunt for a Hegemonic Relationship. The legal investigative frame shown at Table 3 offered a starting point for examining the possibility of a hegemonic connection between the decisions of the courts relating to compelled commercial speech and the economic and political interests of the power blocs in each industry. Fallon's approach suggested that the manner in which each case served as precedent for later cases is important to note as well as any "value arguments" that might be identified. The shift in the Supreme Court's doctrinal position in the four years between the decision in *Glickman* in 1997 and *United Foods* in 2001 strongly suggested that it would be useful to look at changing social, political and economic realities during this time period. The investigative frame adds another element to the hegemonic analysis by identifying "interests at stake" for the judiciary at the time each case was decided.

While the research did not disclose the positions held by the U.S. Supreme Court justices regarding concentration and vertical integration in agriculture, other beliefs and values about commerce and free speech rights were evident in the way they chose to interpret precedent and apply doctrine. Starting with *U.S. v. Rock Royal*, the Supreme Court in 1939 was highly responsive to the justifications given for regulation and ignored the inequities and abuses inherent in the structure for implementing the program. The opinion of the court and other materials indicate that there was an industrial agriculture bloc in place in New York city at this time that was exercising a strong hegemony. The large milk processors, specifically the Dairymen's League, were the central organizers and the form of commodity production that evolved was highly supportive of their

interests and discriminatory of the smaller milk processors. The Secretary of Agriculture, Henry A. Wallace, was allied with the hegemony as evidenced by his involvement in allowing pamphlets to be printed misinforming the public about the facts of the program in order to secure a favorable vote. The small milk processors attempted to use the courts as a new terrain to challenge the milk hegemony, but found an unreceptive judiciary.

Two possible conclusions can be reached. It may be that the court was wary of striking this part of the New Deal when it was aggressively striking down other parts of the New Deal in other cases. Strategically, they could defer to Congress on this legislation by simply recognizing its right to regulate economic sectors. On the other hand, the Court may have been sympathetic toward a highly regulated milk environment as the United States and farmers were trying to work their way out of a deep depression. The Court's very pointed statement that it would tolerate a monopoly in the market if the rest of the program passed muster indicated that the Court prioritized the need for an efficient marketing system and disfavored the rights of the small cooperatives, knowing that they would go out of business. It is not clear whether the intent was to deliberately favor the dominant industry bloc, but the justices had to be aware that this would, in fact, be the result.

The decision in the *Frame* case in 1989 in the Third Circuit was based on a *Central Hudson* analysis. There are institutional reasons to see why this court may have been inclined to rule against the challenger. It was the first case of this type to be heard for almost forty years and the appellate court had little recent case precedent. Farmers were suffering a depression at the time and there would be good reason to assume that the

mandatory beef checkoff program (which was fairly new at that time) could provide relief.

The two Ninth Circuit cases in *Cal-Almond* and *Espy* were decidedly in favor of the challengers and expressed a commitment to protect commercial speech, a commitment that was also evident in the *Gerawan* case. The court in both cases applied the *Central Hudson* test to strike down the almond and the tree fruit checkoffs. The Ninth Circuit did not have any more precedent to look at than the Third Circuit did in the *Frame* case, but its appellate judges saw a different social, economic and political reality than the Third Circuit. For example, the dominant almond grower, Blue Diamond, was receiving highly favorable treatment under the checkoff program compared to the other growers. The facts suggested a highly inequitable checkoff program which the Ninth Circuit noted in its opinion. The Ninth Circuit ruled on the remedies aspect of this case in 1995 when it become obvious that the USDA would not cooperate in reimbursing moneys dues.

Congress reacted by passing legislation that attempted to bolster the position of the government in future checkoff challenges, especially when the Court applied the *Central Hudson* test. This strong reaction by Congress was not missed by the Supreme Court in 1997 when they decided the *Glickman v. Wileman* case. The dissatisfaction of Congress with the direction the case law had been heading with *Central Hudson* being the preferred doctrine used to determine constitutionality was no longer a problem. The Court deferred totally to the Commerce Clause and the regulatory justifications for the legislation, ignoring issues of commercial speech and the First Amendment. The Court in *Glickman* even chastised the Ninth Circuit for applying the *Central Hudson* test. This

was an odd thing for it to do since there was no Supreme Court precedent (other than the early *Rock Royal* case, which was quite dated and not fully on point). The Court also interpreted the facts in a questionable way, indicating that the fruit growers were all of one accord with the chosen advertising messages when the record clearly indicated otherwise. It has been suggested by several people interviewed in this study and at least one law review article that the program, as implemented, did not fit the definition of a collective. The Court's dismissal of the First Amendment issue without any discussion of the merits of the claim indicated a heavy-handed approach in deferring to Congress' regulatory powers and a lack of sensitivity to First Amendment issues. The possibility exists that the industrial agriculture hegemony with its allies at the USDA and Congress had given a strong message that it disapproved of any tampering with the checkoff programs.

Four years later in *United States v. United Foods,* the Supreme Court struck down the mushroom checkoff program. What happened during those four years to create the switch? The research showed a legal community highly critical of the Supreme Court's decision making in *Glickman.* The California Supreme Court had published a scathing opinion in *Gerawan Farming, Inc. v. Lyons,*[742] criticizing the U. S. Supreme Court's failure to recognize commercial speech rights. Lower courts were trying to apply the *Glickman* case with some confusion. In addition, the Supreme Court had decided another case under a modified *Abood* analysis during that time period, *Board of Regents of the University of Wisconsin System v. Southworth.* [743] The evidence showed that the justices (or at least the two justices who switched sides, Justice Kennedy and Justice Stevens) had

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[742] *Gerawan Farming, Inc. v. Lyons*, 24 Ca. 4th 468; 12 P.3d 720, 101 Cal. Rptr. 2d 470 (2000).
[743] See *Board of Regents of the University of Wisconsin System v. Southworth*, 520 U.S. 217 (2000).

developed different beliefs regarding the economic, social and political realities surrounding the mandatory commodity assessment programs.

CHAPTER 9

CONSEQUENCES OF LEGAL OUTCOMES

This chapter will address objective number nine which instructs the researcher to assess the legal and political consequences of the various legal outcomes on compelled commercial speech issues, with attention to how the public interest will be served by such outcomes. The spheres of agriculture, First Amendment doctrine and public interest will be impacted by such consequences. The potential legal outcomes could include one of the following Supreme Court findings:

1) the checkoffs are constitutional when they are part of a broader regulatory scheme (such as the regulatory framework governing the fruit growers in *Glickman v. Wileman*[744]), but unconstitutional when they are imposed as stand-alone orders like those assessed against the mushroom growers in *United States v. United Foods;* [745] or
2) the checkoffs are unconstitutional and a violation of First Amendment rights regardless of the regulatory scheme in which they reside, because they do not pass scrutiny under First Amendment analysis (either through application of the *Central Hudson* test or an analysis based on *Abood* principles); or
3) the checkoffs are constitutional regulations not protected by the First Amendment; or
4) the checkoffs are constitutional under a "government speech" exception to the First Amendment.

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[744] See *Glickman, v. Wileman,* 521 U.S. 457 (1997).
[745] See *United States v United Foods,* 533 U.S. 405 (2001).

The direction chosen by the U.S. Supreme Court to resolve the First Amendment commodity checkoff cases will have consequences for agriculture, the development of First Amendment doctrine and the public interest. However, the degree of impact on each area will be directly related to which resolution the Supreme Court adopts.

Since the government defendant in every checkoff case in the federal and state court systems has asserted government speech as a defense, the Supreme Court will be able to choose one of the first three options outlined above *only if* it rejects option number four, i.e., the checkoff programs are constitutional under a government speech exception to the First Amendment. The government speech defense presents certain tollgates for the Court. If it determines that the generic advertising funded by compelled checkoff dollars does not qualify as government speech, then it can immediately consider which of the first three options it will choose. If it decides that the generic advertising created pursuant to the checkoff programs does constitute government speech, then the Court must decide whether to automatically exempt the compelled speech from First Amendment protection or whether to subject it to a First Amendment analysis resulting in one of the first three alternatives.

Once the analysis moves past the government speech hurdle (by a finding of no government speech or a rejection of the government speech exemption to the First Amendment), the Court will be guided by its most recent precedents, the *United Foods* case and the *Glickman* case. It is important to note that alternative number three, which states that the checkoffs are constitutional regulations not protected by the First Amendment, was a much-criticized holding of the Court in the *Glickman* decision. It was considered an aberration by most First Amendment scholars, an opinion also shared by

the California Supreme Court in its *Gerawan v. Lyons* decision. The U.S. Supreme Court moved away from this position in *United Foods* by recognizing that mandatory commodity assessments for generic advertising raise First Amendment issues. Given the direction the Court has taken, any future decision that the checkoff programs are constitutional because they are not protected by the First Amendment is an extremely remote possibility.

At this juncture, it is also less likely that the Court will choose option two (the checkoffs are unconstitutional and a violation of First Amendment rights regardless of the regulatory scheme in which they reside) because it adopted option one as its preferred approach in the *United Foods* case. Under option one, the Court found that the checkoffs were constitutional when they were part of a broader regulatory scheme, but unconstitutional when they were imposed as stand-alone orders. The *United Foods* decision clarified that the fundamental justification for treating the tree fruit program differently than the mushroom program for First Amendment purposes is that the compelled commercial speech in *Glickman,* which was part of a regulatory scheme set up by a marketing order, met the germaneness test of the *Abood* line of cases. In other words, the compelled funding for speech was sufficiently germane to the purpose of the marketing order to pass First Amendment scrutiny. *United Foods* also indicated the Court's preference to avoid First Amendment analysis under the commercial speech doctrine in cases dealing with mandatory commodity assessments.

The manner in which the United States Supreme Court will address the government speech defense (option four) in the checkoff challenges is an open question. If it recognizes generic advertising as government speech that is exempt from any First

Amendment analysis, further First Amendment analysis is moot. However, if the Court moves on to a First Amendment analysis (by holding the generic advertising is not government speech or that such advertising is government speech that must meet First Amendment scrutiny), all three of the options outlined above are available. The Court embarked on a path in *United Foods* that recognized option one as its road map for future cases involving First Amendment challenges to checkoff programs. In applying the approach outlined in option one, the Court would have an opportunity to further clarify the "germaneness test" and extend the First Amendment doctrine it developed in *Abood* and its progeny of cases.

One factor that could be a consideration for the Supreme Court is the recent Eighth Circuit Court of Appeals decision in which the appellate court "inferred" that the Supreme Court would have used the *Central Hudson* test had the government relied on it.[746] If the Supreme Court wishes to change directions, this suggests a way for it to shift to the commercial speech doctrine in a future checkoff case without the change appearing inconsistent with *United Foods*. This would be an unexpected move, however, given the Supreme Court's past reluctance to apply the commercial speech doctrine to the First Amendment challenges to the forced funding of generic advertising.

Consequences for Agriculture

The future of agriculture in the United States in different contexts (environmental, social, cultural and political) and the potential role of commodity checkoff programs can only be envisioned within the reality of the history and current state of the relevant

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[746] See *Livestock Marketing Association v. USDA*, Nos. 02-2769 and 02-2832 at 18, 2003 U.S. App. LEXIS 13630 (8th Cir. 2003).

economic production for agricultural commodities. According to the base and superstructure analysis of Marx and Engels, also incorporated by Gramsci in his writings, the key to understanding how the agricultural apparatus functions today and how it may function in the future is to look at the relations involved in production. Marx and Engels clarified this in the Preface to a *Contribution to the critique of political economy*:

> In the social production of their life, men enter into definite relations which are indispensable and independent of their will, relations of production which correspond to a definite state of development of their material productive forces. The sum total of these relations of production constitutes the economic structure of society, the real foundation on which rises a legal and political superstructure and to which correspond definite forms of social consciousness. The mode of production of material life conditions the social, political and intellectual life process in general.[747]

Analyzed within Gramsci's theory of hegemony, the relations of production have generated a dominant hegemony in agriculture that is aligned with the industrial production model. Consistent with other areas of economic development, agribusiness has transformed the agrarian industry and culture in accordance with industrial agriculture and has forever altered the relationships of farmers with other entities in the food chain. Agricultural journalist and analyst, A.V. Krebs, observed:

> Throughout the history of the United States corporate agribusiness has steadfastly sought to economically concentrate the nation's food delivery system's means of production by seeking to totally control its source of raw materials through the substitution of capital for efficiency and technology for labor.
>
> At the same time corporate agribusiness has also sought to standardize the food supply by shifting its main source from the farm to the factory, from being *produced* by thousands of family farmers to being *manufactured,* marketed and sold by a diminishing number of large, publicly unaccountable and increasingly private corporations. [emphasis in original][748]

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[747] Karl Marx and Frederick Engels, *Selected Works* (London: Lawrence & Wishart, 1973), 262-263.
[748] Krebs, acknowledgements page.

Krebs noted that an "evolving economic and government farm and food policy has furthered such efforts."[749] The outcome is a two-tier system of agriculture with large, profit-oriented corporate farms in one sector and a divided group in the second sector, including organic and niche farmers, some intermediate farms still able to make a profit and break even and all the remaining farmers that are increasingly dependent on off-farm income or whatever farm supports are available for survival These are the relations of production that define the agricultural industry and from which arise the current legal and political superstructure.

Commodity checkoff programs have emerged as one branch in the socio-economic superstructure of agriculture, given life through the consensual agreement of producers, but sustained through increasingly stronger claims of control by government and industry forces. These include the virtually impossible hurdles that must be overcome to secure a referendum vote in several commodities, the discretionary behavior by the Secretary of Agriculture, Ann Veneman, with respect to commodity checkoffs, and ultimately, the coercive argument that all generic commodity advertising is government speech. How can the success or failure of the checkoff challenges impact this situation?

Consequences for Counter-Hegemony. A ruling by the U.S. Supreme Court that checkoff programs are unconstitutional can occur if the Court applies a First Amendment analysis upon finding that generic advertising is not government speech or upon rejecting the government speech immunity argument. In holding that generic advertising for a commodity in addition to mushrooms is unconstitutional, the Supreme

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[749] Ibid.

Court would provide the anti-checkoff forces engaged in counter-hegemony with a model for strategically using the courts to effectuate change. It would be a practical model for utilizing one fraction of the State apparatus against another (judiciary branch against the executive branch) as well as a symbolic and inspirational model for those seeking to build a historic bloc capable of counter-hegemony.

Brenda Cochran and her husband, Steven Cochran, are dairy farmers and plaintiffs in the diary checkoff case, *Joseph S. Chochran and Brenda s. Cochran v. Ann Veneman.*[750] In her interview, Brenda Cochran said: "Breaking down the dairy checkoff would chip away at the power base of those in control."[751] Joseph Cochran described the effect as follows: " I kind of look at it as striking a blow for the little man."[752] He noted that the checkoff is a "very, very miniscule part" of the overall effort to bring about change, but it could be important as an example. The experience of Brenda and Joseph Cochran is that, as farmers, they are "voiceless and powerless."[753] Success in the courts would give the minority groups in the commodity industries a voice.

If the Supreme Court continues its current path of distinguishing between two types of commodity checkoff programs—those that are constitutional because they fit the parameters of the regulatory scheme in the *Glickman* case and those that are unconstitutional under the *United Foods* case—the agricultural community could feel consequences if various commodity programs are restructured to withstand a germaneness test.

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[750] *Joseph S. Chochran and Brenda S. Cochran v. Ann Veneman*, No. 4:CV-01-0529, 2003 U.S. Dist. LEXIS 4361, (Middle Dist. Penn. 2003).
[751] Chochran interview, 3.
[752] Cochran interview, 3.
[753] Ibid., 2.

Consequences for Hegemony. Regardless of which commodity is involved, a ruling by the Supreme Court in favor of the USDA based on recognition of the government speech argument would create tension among different fractions of the checkoff hegemony that could prompt a renegotiation among those with power and influence in the checkoff programs. This is because the USDA will have sacrificed some credibility by claiming it was the puppet-master all along controlling the commodity programs, when other fractions within the dominant group understood that the programs were designed as self-help mechanisms.

An executive of the Livestock Marketing Association referred to the reluctant acquiescence to the government speech argument by the trade associations and large producers as "swallowing the pill."[754] The same individual noted that the trade association representatives who were required to testify must be "choking on their words"[755] when they assured the courts that the USDA controlled the programs and all messages.

Various fractions within the checkoff hegemony may harbor nagging perceptions that the government speech argument is a legal fiction, and they may not truly recognize the government's authority. In addition, they may resent efforts by the USDA to increase its control of the programs to position itself more favorably with regard to its government speech claim. Historically, the leadership of the trade commodity groups has not responded well to the increased control by the USDA. Dr. Kathleen Merrigan, former administrator of the Agricultural Marketing Service, described the reaction of the pork

[754] Interview with anonymous executive of the Livestock Marketing Association, 19.
[755] Ibid.

industry when the AMS increased its oversight of communications when the pork referendum was pending:

> But the supporters of the checkoff argued that they should be allowed more autonomy than they were given. When it was starting to get toward the time of a referendum, we required them to submit all their materials to USDA for clearance....And they accused us of micromanaging and bureaucratic inertia would slow them down so they'd be ineffectual.[756]

Gaining legal legitimization of the government speech argument as applied to commodity checkoffs is no guarantee of legitimization in the eyes of all those with political and economic power in the checkoff hegemony.

Further rulings striking down checkoffs as unconstitutional would be welcomed by certain fractions within the broader agricultural hegemony, since plaintiffs in several commodity industries are large producers who sell highly differentiated, branded products. Even where this is not the case, there is some indication that some larger producers are quietly watching in the wings with the desire to see the checkoff programs curtailed. For example, some the largest dairy producers in the United States (Bos Dairy, DenDulk Dairy Farm, Rio Grande Dairy, County Line Dairy, etc.) were involved in an unsuccessful challenge of the dairy checkoffs in 1999 in *Nature's Dairy, et al. v. Glickman.*[757]

The constitutional lawyer that represented this group of large dairy challengers, Benjamin Yale, is now representing Brenda and Joseph Cochran, independent dairy farmers who do not sell to a milk cooperative and identify themselves as part of an alternative agricultural movement. Given their position, they may be more successful than the large producers that are part of the dominant hegemony. However, a success by

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[756] Merrigan interview, 3-4.
[757] See *Nature's Dairy,* 1999 U.S. App. LEXIS 3547 (6th Cir. 1999).

the Cochrans would clearly inure to the benefit of the larger dairy farmers who would also like to avoid the burden of paying checkoffs.

If the Supreme Court holds more commodity checkoff programs to be unconstitutional, the impact will be felt by the hegemony in several identifiable ways:

1) Assuming that the generic advertising was successfully creating demand, some entity in the food chain hegemony will lose those benefits.
2) In certain industries, the checkoff dollars have been used to promote the branded products of a few major producers so these producers would lose these windfalls. (An example is the checkoff funded advertising for HORMEL meats.)
3) There will be a loss of money for funding research and education. This could mean that private industry would have to increase its investment for these endeavors. Corporate agribusiness might lose a lot of free product development and promotion for hormones and genetically engineered crops.[758]
4) The United States government will lose funds that it has been using to penetrate foreign markets with generic advertising.
5) The USDA will lose both a source of income from outside general revenue and a convenient platform for engaging in activities and rhetoric that enhances its image as an agency helping all farmers (i.e., a means for building hegemony).
6) The administrative organizations supporting each commodity group will no longer have a purpose unless voluntary checkoffs are instituted or checkoff funds are used strictly for research and education. This includes boards and

[758]See David Dechant, "Checkoffs, mushrooms and dominoes," Cropchoice.com (July 16, 2001); available from http://www.cropchoice.com/leadstry.asp?recid=373; Internet; accessed 20 March 2003.

commissions at the federal and state levels that handle the checkoff funds and direct the promotional and advertising activities.

7) The industry trade associations will lose a structured means of support for ongoing activities that organize themselves around the checkoff program.

To further expand on the last point, this means there will be an impact on the indirect ways in which these organizations have been able to share and wield influence with agribusiness, media, legislators, government and ad agencies because of the flow of checkoff money and the political nature of the way in which the funds are allocated for selected generic messages. The dominant hegemony will lose an important tool for furthering its various goals and this may prompt some economic and political reposturing to build another means of accomplishing some of the same goals.

Consequences for First Amendment Doctrine

Government Speech Principle. The Supreme Court could hold that the USDA's activities do not constitute government speech, thus refusing to recognize the government's primary defense in these cases. This would shift the court's focus to a First Amendment analysis of the particular checkoff commodity program being challenged and leave the thornier problem of clarifying the constitutionality of government speech for another day.

Such an outcome is indeed, likely, since many lower courts have already concluded that the USDA's government speech argument with regard to a self-directed commodity program is disingenuous. Moreover, given the U.S. Supreme Court's preference for taking incremental steps in establishing new doctrine or expanding existing doctrine, it may deal with the government speech defense in its next checkoff

case by taking the opportunity to outline a test for determining whether the speech in question is government speech. Possible prongs for such a test might be whether the speech has been expressly attributed to the government, whether it has been paid for by general federal and state revenues, the makeup of the implementing board or commission, and the level of autonomy and authority afforded this governing group.[759] The court could conclude that the generic advertising does not constitute government speech because it fails the newly-established test.

On the other hand, if the Supreme Court upholds commodity checkoff programs by accepting the government speech argument, it will provide legitimacy for a scenario where commercial speech (or art or another area of expression) implemented under the guise of a self-directed program with government oversight can then be commandeered by the government as an instrument for government expression without regard to First Amendment rights. Figure 12 shows a continuum of how generic advertising programs can be structured so that they constitute commercial speech, compelled commercial speech and government speech.

The question in the compelled speech cases that have arisen since the *United Foods* decision is whether the government has created a role for itself in these programs sufficient to support an assertion of government speech. If the Supreme Court concludes

[759] Both of these conditions were cited as grounds for disqualifying generic advertising from the category of government speech in the oral arguments made before the appellate courts in *Michigan Pork Producers, Inc. et al. v. Campaign for Family Farms, et al. v. Veneman,* 174 F.Supp.2d 637 (W.D. Mich. 2001), argued before the Sixth Circuit Court of Appeals on March 14, 2003, and *Livestock Marketing Association v. USDA* , 207 F.Supp.2d 992 (D.S. Dakota, 2002), argued before the Eighth Circuit Court of Appeals on March 10, 2003.

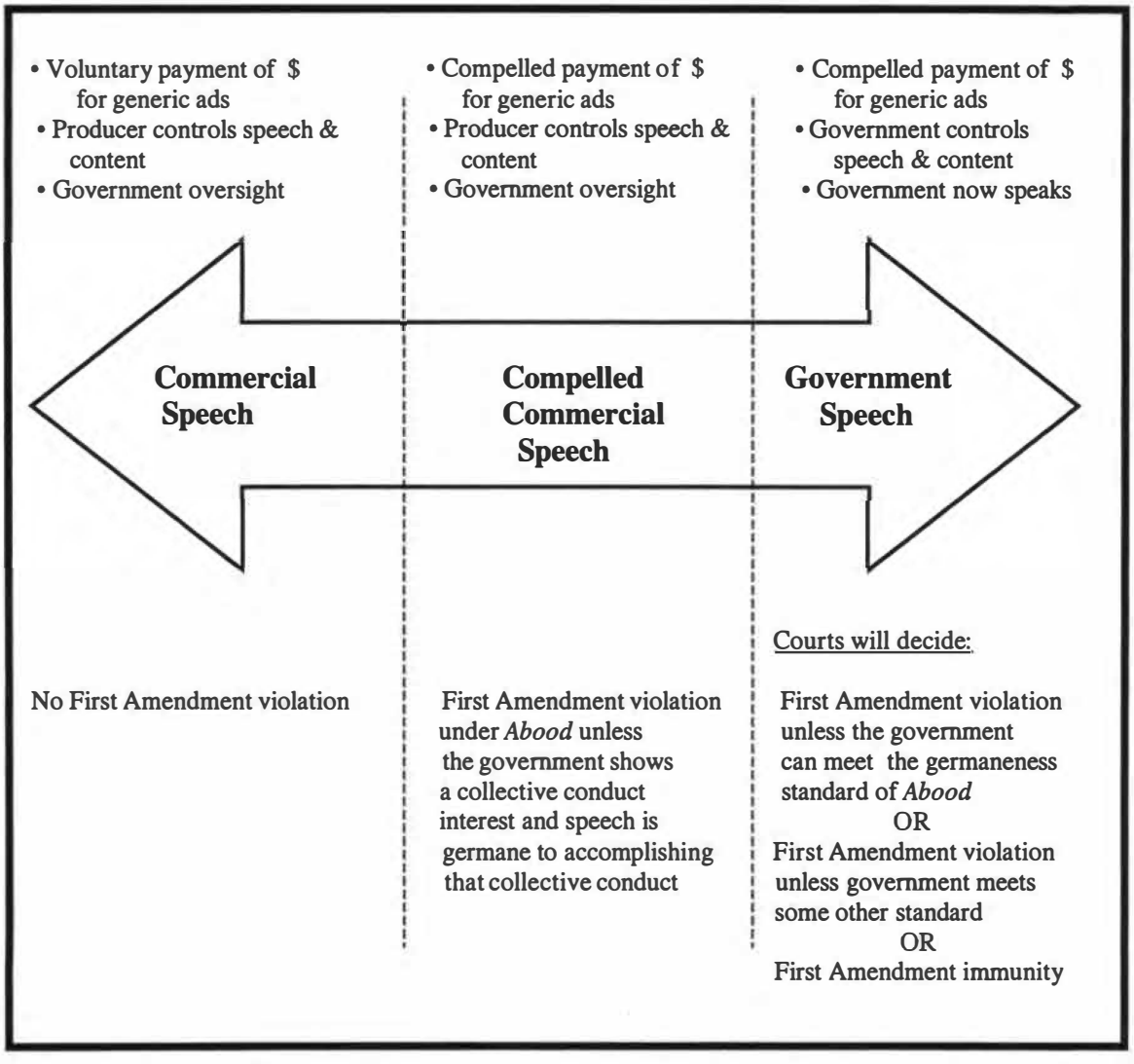


Figure 12 Continuum for Analyzing Constitutionality of Generic Advertising Programs

that this has happened, the USDA would then urge the Court to conclude that First Amendment scrutiny is no longer necessary by virtue of the "government speech" designation. However, the fact that the government is speaking does not obviate the need for a First Amendment analysis.

It should be noted that the Supreme Court has never adopted a government speech doctrine. All of the cases that mention the government speech doctrine do so in dicta. *Keller v. Bar of California*[760] expressly said the speech being litigated was not government speech. *In Board of Regents of the University of Wisconsin System v. Southworth,*[761] the parties conceded it was not government speech. The closest the Supreme Court has come to outlining a government speech doctrine was in the *Rust v. Sullivan*[762] case in which the Supreme Court held that the government was not obliged to subsidize the speech of doctors who were engaged in communications relating to abortion.

As Supreme Court Justice Antonin Scalia observed, this was not a case of government speech, but rather a case about the government not subsidizing speech. The doctors claimed that they were entitled to speak their own messages about abortion and the government responded that it paid them to provide medical services and not to subsidize their speech on abortions. This case is, therefore, more accurately stands for the proposition that "government is not obliged to subsidize the speech of the doctors" rather than "government can speak about anything it wants." Dicta in the *Southworth* case raises the question of whether traditional political checks are enough with regard to

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[760] *Keller*, 496 U.S. 1 (1990).
[761] *Southworth*, 529 U.S. 217 (2000).
[762] *Rust v. Sullivan*, 500 U.S. 173 (1991).

government speech, but does not answer this question.[763] (Interpretations of this case concluding that the court affirmatively indicated that political checks on government speech are enough are overstating the court's opinion.)

Erik Jaffe, constitutional lawyer and counsel for beef checkoff plaintiffs, Jeanne and Steven Charter, asserted: "If you accept the government version of this [government speech], it will create gaping loopholes in the First Amendment, not just here but everywhere."[764] This is because a finding that the government's involvement in generic advertising promoting individual commodities amounts to government speech raises serious questions about the First Amendment distinctions between speech and conduct. Jaffe noted: "While the government may have a free hand to engage in all kinds of controversial conduct, there are limits on its ability to engage in or to compel others to engage in speech."[765] If there is a macro principle under the U.S. Constitution that people cannot be compelled to support speech, then that principle would seem to also apply to the U.S. government, unless the government is able to establish that compelled support for particular types of speech meets an appropriate standard of proof.

This is the 800-pound gorilla that the courts have shied away from addressing in cases that involve government speech. If they render a decision containing a strong argument *against* government speech, will it invite an avalanche of claims by people who

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[763] See *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000). The U.S. Supreme Court made the following reference to political checks on government speech in the *Southworth* opinion:

> The University having disclaimed that the speech is its own, we do not reach the question whether traditional political controls to ensure responsible government action would be sufficient to overcome First Amendment objections and to allow the challenged program under the principle that the government can speak for itself. If the challenged speech here were financed by tuition dollars and the University and its officials were responsible for its content, the case might be evaluated on the premise that the government itself is the speaker. That is not the case before us. Ibid. at 229.

[764] Jaffe interview, 11.

[765] Ibid., 24.

disagree with what the government is doing and demand a refund on their taxes? How can the government's free expression be restrained by First Amendment principles without causing dozens of lawsuits against government entities who are engaging in daily activities that require expression? The answer is that government (and the courts) will not become vulnerable to such an onslaught if the Supreme Court adopts a standard that delineates with clarity the nature of government speech that violates the First Amendment. The germaneness test of the *Abood* and *Keller* line of cases would afford such a clear-cut standard to identify unconstitutional government speech and prevent these types of lawsuits.

If the Supreme Court accepts the government's argument that the speech in question is government speech, it appears that it would have no choice but to address the constitutionality of that speech. A strong holding by the court that the government speech involved is unconstitutional because it does not meet the germaneness standard would be a doctrinally significant step, because it would recognize that speech is different than the non-speech activities of the government. On a theoretical level, the significance of this doctrinal holding would lie in the fact that government speech would now be recognized as having First Amendment restrictions on its speech activities.

On a practical level, it would not have dramatic consequences, since the government and its representatives in all avenues would still be entitled to engage in speech that is germane to legislation, policies and the business of running the government. In his interview comments, Erik Jaffe notes that a court holding that government speech must be evaluated under a First Amendment standard such as Abood "would be taking the principle that speech is different and applying it uniformly across

governments and across private actors, across all forms of government conduct, whether it involves direct or indirect efforts to manipulate speech."[766]

Government speech would need to be closely tied to substantive conduct that is germane to a government interest. For example, compelled support for government speech that furthers health and safety concerns would meet this standard (e.g., a safety seal that must be displayed on every product). However, a stand-alone statute that requires a producer to pay for generic advertising conducted by a state to promote a commodity would not meet this standard, unless the state had actually entered into the commercial business of selling the commodity or was able to show that the generic advertising was germane to some regulatory scheme. The gist of the *United Foods* case is that, if the government is not regulating the industry, it does not have the right to compel support for speech. The Supreme Court could extend this doctrine by concluding that government speech is also subject to this restriction.

A decision by the Circuit Court in Florida in the consolidated *Tampa Juice Services, Inc., et al. v. State of Florida, Department of Citrus,* [767] provides an example of an effort by a state judiciary to tackle the government speech issue with an unpredictable result. The case arose when Florida citrus growers and handlers challenged a checkoff on citrus (called a "box tax") that required the citrus handlers to pay mandatory fees for use by the Florida Citrus Commission to fund generic advertising for citrus.

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[766] Jaffe interview, 24.

[767] Order Granting Plaintiffs' Motion for Partial Summary Judgment, *Tampa Juice Services, Inc. et al. v. State of Florida, Department of Citrus,* (Case Nos. GC-G-00-3488, GC-G-00-3718, GC-G-01-0286, GC-G-01-0375, and GC-G-01-0694); *Graves Brothers Company v. State of Florida, Florida Department of Citrus* (Case No. GC-G-02-46-4686) and *Oak Hammock Groves, Ltd., et al. v. State of Florida, Florida Department of Citrus* (Case No. GC-G-03-0281) (10th Cir., Polk County, Fla., March 31, 2003).

As noted by Barry Richard, counsel for the Florida Department of Citrus, the rationale for this tax is to "maintain a high level of quality and wholesomeness in Florida citrus" and to also "bring to the attention of the general public the end result of that." He claimed that the two must go hand in hand since "[T]here's no sense regulating quality and wholesomeness if nobody knows about it."[768]

On the surface, there did not appear to be ambiguities regarding the fact that the speech was government speech, because the program was carried out by the State of Florida through the Florida Citrus Commission. The state title of the Commission implied that it was an arm of the state government. As shown by Figure 12, the court would be expected to move to the analysis on the far right on that continuum. Once the speech was characterized as government speech, the circuit court would then have two choices: 1) accept the argument of the state of Florida that the government speech status exempts the checkoff program from First Amendment scrutiny, or 2) determine whether the government speech in question is constitutional by analyzing whether it meets the requirements of germaneness as outlined in *United States v. United Foods* and *Glickman v. Wileman*, i.e., whether it is part of a regulatory scheme and such speech is germane to the purpose of such scheme.

Circuit Judge Dennis P. Maloney was willing to grant government speech an exemption from First Amendment analysis. In his opinion, he stated: "If the Box Tax is 'Government Speech' it is immune from First Amendment analysis."[769] But he concluded that the generic advertising was *not* government speech despite the appearance

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[768] Richard interview, 2.

[769] Order Granting Plaintiffs' Motion for Partial Summary Judgment at 3, *Tampa Juice Services, Inc., et al. v. State of Florida, Department of Citrus* (10th Cir., Polk County, Fla., March 31, 2003).

that the program and its messages were those of the state of Florida. He found that the Citrus Commission was similar to self-help boards and commissions in other cases he cited as precedent and, therefore, the Citrus Commission could not be seen as a government agency entitled to claim the government speech exception to the First Amendment.[770]

While the members of the Commission are appointed by the Governor for three-year terms, they must meet eligibility requirements as growers, growers and shippers or growers and processors of citrus fruit. Judge Maloney reviewed heavily on his determination that the Commission operated with a high level of autonomy in its rule-making and enforcement, administration of the advertising campaigns and the box tax, enforcement of the rules, ability to reduce the "tax rates" by vote of nine members, etc. As a second consideration, Judge Maloney noted that the funding for the citrus box tax came from compelled payments from a specified group of citizens (rather than from general revenue funds). Citing the *Michigan Pork Producers* case, he determined that this was a case of "an unconstitutionally coercive action by the government which is, therefore, not subject to the governmental speech exemption."[771]

Judge Maloney's finding that the generic citrus advertising was not government speech led him to apply an analysis similar to that performed by the Court in *United Foods.* The analysis thus stayed within the boundaries of the middle section of the continuum shown in Figure 12..

The citrus decision suggests that, in the absence of guidance by the U.S. Supreme Court, lower courts are stepping into the vacuum to create rules for determining what is

[770] Ibid. at 4-5.
[771] Ibid. at 5.

government speech, whether the speech in question meets the definition, and whether is exempt from First Amendment scrutiny.

In the flurry of decisions in checkoff cases in 2003, only one court has endorsed the government speech argument. A ruling by District Judge Richard F. Cebull in a beef checkoff challenge in the Western District of Montana upheld the beef checkoffs on the grounds that generic advertising for beef was government speech. Judge Cebull applied a cursory First Amendment analysis to find that the Beef Act was "constitutionally sound" because it was "non-ideological, content-oriented government speech which does not violate free speech or free association."[772] The Center for Individual Freedom, a non-profit group that has supported checkoff challengers, notes the following on its website:

> The Montana district court's decision is the first ever to hold that an agricultural promotion program is the government speaking and that compelled support for that speech was immune from First Amendment scrutiny. The legal brief filed with the 9th Circuit argues that both the reasoning and the result of that decision are in error and, if allowed to stand, it will create a vast loophole in the First Amendment and render meaningless several well-established lines of First Amendment case law.[773]

Clearly, a move by the Supreme Court to provide a test for whether speech may be defined as government speech would be a step forward in clarifying the questions surrounding the concept of government speech and possible developing a doctrine for government speech. In the event that the USDA loses because the generic advertising in a particular case fails to meet the requirements for government speech, it is highly predictable that the government will then modify the generic advertising to meet the requirements. The challengers will not overlook the importance of the unresolved First

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[772] See *Jeanne Charter and Steve Charter v. USDA*, 230 F. Supp. 2d 1121, 1141 (Dist. Montana 2002).
[773] "Ranchers File Brief in 9th Circuit Beef Checkoff Appeal," Center for Individual Freedom (April 4, 2003); available from http://www.cfif.org/htdocs/legal_issues/legal_activities/litigation/generic_advertising_appeal.htm; Internet; accessed 4 April 2003.

Amendment issue for government speech and a new spate of lawsuits will be filed to prod the Supreme Court into more thoroughly addressing how the First Amendment impacts government speech.

In his overview of government speech, Professor Mark G. Yudof observed: "The recognition of the constitutional ramifications of government expression calls attention to broader norms of majority rule, democracy, and consent..."[774] The USDA's claim that it is exempt from First Amendment restrictions because the generic advertising funded by compelled fees is government speech, indeed, raises issues of majority rule, democracy and consent. As part of the dominant checkoff hegemony and the broader agricultural hegemony, the USDA has assumed the role of speaking for the majority. The USDA has asserted that it has the consent of the majority, but confusing and controversial referendums in the pork and beef industries have rendered this claim open to speculation.

Even if it can be said that the USDA has a significant level of consent, a zone of conflict (or as Gramsci calls it, a "war of position") arises with respect to Yudof's final element of "democracy." The minority voices are looking to the courts to recognize their First Amendment rights under the U.S. Constitution to be free from compelled speech or association. The manner in which the Supreme Court eventually interprets the USDA's claim that it is exempt from First Amendment restrictions because the mandatory checkoffs are used for generic advertising that qualifies as government speech will have direct consequences on the individual First Amendment rights of the checkoff challengers.

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[774] Mark G. Yudof, *When Government Speaks: Politics, Law and Government Expression in America* (Berkeley, CA: University of California Press, 1983), 161.

By concluding that First Amendment scrutiny does not apply to government speech, the government will be given new authority for viewpoint discrimination. One area that would clearly be at risk is the public forum doctrine. If the government builds a facility or creates another forum over which it exercises control (such as an electronic, on-line forum), it can claim that its purpose is to deliver its own message. Accordingly, it has the right to allow only private citizens who agree with its viewpoint to speak and is entitled to prohibit others with contrary viewpoints from speaking. The government can argue that it is entirely acceptable to impose a viewpoint restriction, since the message is government speech. The government can analogize its situation to the government speech in the checkoff cases to claim that it is using private citizens to deliver its preferred government message in the same manner that the USDA used mandatory checkoff fees from private citizens to deliver its generic advertising message. In both cases, the viewpoint discrimination is immune from First Amendment scrutiny because it is the government speaking.

First Amendment Doctrine on Compelled Speech and Association. While the Supreme Court's approach to the government speech argument remains open to speculation, the path it has taken in the *United Foods* by choosing to analyze the First Amendment rights of the challengers under *Abood* and *Keller* has predictive value for how it will handle future checkoff challenges. This is an established line of cases that has utilized the "germaneness test" as a straightforward way of determining whether the compelled speech or association can withstand First Amendment scrutiny. The Supreme Court might offer some refinement of this test or modify it in some manner, but the

Abood analysis has proved durable in its application by the Supreme Court in a broad range of contexts.

The Eighth Circuit Court of Appeals decision in the *Livestock Marketing* case[775] suggests that the *Central Hudson* commercial speech analysis may not be completely disregarded by the Supreme Court in a future case challenging commodity checkoffs. It would be a major switch, however, given the Court's reluctance to apply the *Central Hudson* test to compelled commercial speech and its history in *Glickman* of chastising the Ninth Circuit Court of Appeals for using the *Central Hudson* test to analyze the constitutionality of the tree fruit marketing orders.

It is likely that the *Glickman v. Wileman* case will continue to relied upon as precedent in guiding the court to determine, as a threshold issue, whether the checkoff regulations are part of a broader regulatory scheme in which the government has an important interest and whether the compelled support of speech is germane to furthering the purpose for which the regulation has been enacted. However, the Court has distanced itself already from several of its questionable holdings in the *Glickman* case. It is noteworthy that two of the Justices that joined the majority in the *Glickman* opinion quickly switched sides four years later to constitute a majority in the *United Foods* decision.[776]

The Supreme Court's continued application of the *Abood* and *Keller* analysis should not introduce anything novel into the First Amendment doctrinal arena, provided

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[775] See *Livestock Marketing Association v. USDA*, Nos. 02-2769 and 02-2832, 2003 U.S. App. LEXIS 13630 (8th Cir. 2003).

[776] Justice Anthony Kennedy and Justice John Paul Stevens joined Chief Justice William Rehnquist, Justice Antonin Scalia, Justice David Souter and Justice Clarence Thomas in the majority opinion in *United States v. United Foods*, 533 U.S. 405 (2001).

that the interpretation of "germane" remains consistent with the current line of cases. In *Abood*, a union could not use the union dues of a dissenting employee for activities outside collective bargaining, i.e., for activities not "germane" to the purpose for which the compelled association was justified. Likewise, in *Keller v. State Bar of California*, et al., the U.S. Supreme Court held that compulsory state bar dues by the California State Bar could not be used for ideological speech that was not germane to the purpose of the States interest "in regulating the legal profession and improving the quality of legal services."[777]

While the Supreme Court's approach to the government speech argument in the next case dealing with a checkoff challenge is less certain, the path it has taken in relying on *Abood* and *Keller* in the *United Foods* case has predictive value for future checkoff challenges.[778]

First Amendment Commercial Speech Doctrine. Prior to *Glickman*, the lower courts analyzed the First Amendment aspects of compelled commercial speech cases by applying the four-prong *Central Hudson* test. In *United States v. Frame,* the Third Circuit Court of Appeals evaluated the case under both an *Abood* analysis and a *Central Hudson* analysis.[779] The Supreme Court in *Glickman* rejected the approach used by the Ninth Circuit Court of Appeals in analyzing the case under *Central Hudson*. In *United Foods*, the Court merely declined to apply the *Central Hudson* test on the grounds that it would not find the compelled assessments on mushrooms sustainable under even the

[777] *Keller*, 496 U.S. 1 (1990).
[778] *Abood*, 431 U.S. 209 (1977).
[779] *Frame*, 885 F.2d 1119 (3rd Cir. 1989).

lesser standard of protection of the commercial speech standard set forth in *Central Hudson.* The Court also noted that the government does not rely on *Central Hudson.*[780]

The USDA declined to use the *Central Hudson* test as an alternative argument in *United Foods* or any other cases in which it is now involved. This may be because the Supreme Court in *Glickman* expressly indicated that the *Central Hudson* test was an incorrect standard to apply or perhaps the USDA recognized that it had a weak case under the *Central Hudson* test and, therefore, concentrated on an *Abood* analysis combined with a government speech defense in its briefs. However, as already mentioned, the Eighth Circuit Court of Appeals re-introduced the *Central Hudson* test in it opinion in the *Livestock Marketing Association* case[781] on July 8, 2003, and may be prompting the U.S. Supreme Court to begin applying the *Central Hudson* test or explain more fully why the test is inappropriate for cases on compelled funding of generic advertising.

Although the Supreme Court has frequently acknowledged that members of the Court are not comfortable with the *Central Hudson* commercial speech test, the Court does not seem eager to clarify or modify its position. Court watchers who thought the *Nike, Inc. v. Kasky* case[782] argued on April 23, 2003, was the vehicle that would prompt the Supreme Court to clarify its position on commercial speech were disappointed when the court dismissed the case on June 26, 2003 on the ground that the writ of certiorari was "improvidently granted." The Court found that the case was not final, that the parties didn't have standing to sue in a federal jurisdiction and that the court should avoid

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[780] See *United Foods* at 2337-2338.
[781] *Livestock Marketing Association v. USDA*, No. 02-2769and 02-2832, 2003 U.S. App. LEXIS 13630 (8th Cir. 2003).
[782] *Nike, Inc. v. Kasky*, 539 U.S. ___, 2003 U.S. LEXIS 5015, No. 02-575 (2003).

deciding novel questions of constitutionality prematurely. The case is moving forward in the lower courts in California and is expected to come back before the U.S. Supreme Court again in several years. While these proceedings occur, the United States Supreme Court may have an opportunity to address commercial speech in the checkoff cases if it chooses. However, the Court may conclude that the compelled commercial speech cases are not the best vehicle for breaking new ground in the commercial speech area, especially when such cases are amenable to an *Abood* analysis.

Consequences for the Public Interest

Congress authorized the generic advertising program for mushrooms in 1990 based on its express finding that the mushroom program was "in the public interest" [783] "to maintain and expand existing markets for mushrooms."[784] Congress made an even stronger statement in the FAIR Act of 1996 (an agricultural reform act) that the generic advertising programs for a number of commodities are "in the national public interest and vital to the welfare of the agricultural economy of the United States."[785]

Almost all of those interviewed in this study expressly acknowledged that the commodity checkoff programs have provided benefits in the areas of research, education and food safety. These benefits, enjoyed by the public as well as the industry, will be diminished if additional mandatory commodity checkoff programs are deemed unconstitutional. Arguably, efforts can continue through voluntary checkoff programs strictly for these purposes, but a number of pro-checkoff interviewees in this study emphasized the problem with "free riders" or those in the industry who realize the

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[783] 7 U.S.C. 6101(b). See Brief for the Petitioners, *United States v. United Foods*, Supreme Court No. 00-276,
[784] 7 U.S.C. 6101(a)(6)
[785] 7 U.S.C. 7401(b)(1). See U.S.C. 7401(a)(10) specifying the commodity programs that are covered by the FAIR Act.

benefits without contributing their fair share. Past voluntary programs have shown a level of participation by producers lower than what might be anticipated if the only abstainers are those who object to the messages and ideology of the dominant group. Clearly, there are producers in agreement with the dominant group who simply do not wish to participate for strictly financial reasons, especially if a sufficient number of other producers are willing to sustain the programs.

One example of the impact of striking down a commodity checkoff system can be seen in the aftermath of the decision by the district court in Washington that the mandatory promotional program for apples was unconstitutional. The Apple Commission shut its offices, and a number of groups and associations that received funding through the Commission are now looking for alternative funding.[786] The Apple Commission also performed certain regulatory and administrative services for Washington apple growers, such as administering the export program and dealing with the government Market Access Program (MAP) funds. Apple growers have expressed concern that a vacuum now exists in the absence of the organizational and service functions provided by the Washington Apple Commission and the termination of the funding to support the industry's infrastructure.[787]

A consumer activism website has characterized the checkoff conflicts as against the best interests of consumers, since the checkoffs are being challenged by alternative farmers who "raise and market fringe products that cost more to produce and appeal to a

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[786] These include the Northwest Horticultural Council, the Northwest Fruit Exporters, and the Washington State Horticultural Association.

[787] See Kathleen Thomas, "Washington Apple Commission Ceases Operations After 66 Years," The Produce News" (April 15, 2003); available from http://www.theproducenews.com/storydetail.cfm?ID=3046; Internet; accessed 10 June 2003; and Greg Brown, "Washington Apple Commission Falls," The Fruit Growers News (May 2003); available from http://www.fruitgrowersnews.com/pages/issue03_05_wac.html; Internet; accessed 10 June 2003.

tiny fraction of the public."[788] While there is a public interest in low-cost food, a definition of the consuming public would have to include a growing segment of those who prefer products produced by alternative farming methods. To the extent that these farmers are penalized in their ability to use their money for advertising purposes of their choosing or for sustaining farming operations that produce organic and naturally grown products to a public seeking such items, the public interest is not served.

There remains a question whether the public interest is being served by answering public demand for cheap food by following the industrial agriculture model. Senator Bryon Dorgan argued:

> [I]f you think the farmer's travail has been the consumer's gain, you might check your local supermarket. Somehow, those Depression-level prices on the farm haven't shown up on the bar codes. Prices of hamburger and bread have inched up, even as farm prices have plummeted.
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> Someone is getting the spread, and that someone is the food processing and packing industry, which has scored big off the misery of U.S. farmers. The big four cereal manufacturers have returns on equity of upwards of 29 percent even as farmers go bankrupt. From a loaf of bread that costs $1.59 at the store, the wheat farmer gets about five to six cents. In 1981 the wheat farmer got about double that. The processors can reap where the farmer sows, in large part because the industry has become so concentrated in recent years.[789]

A.V. Krebs, editor and publisher of *The Agribusiness Examiner*, has noted the following about the pivotal role of agriculture and food:

> Food, next to life itself, has become our greatest common denominator. Its availability, quality, price, its reflection of the culture it feeds and its moral and religious significance make it quite literally history's 'staff of life.' Today, in the never-ending worldwide struggle to determine who will control its production, quality and accessibility, food is no longer viewed first and foremost as a

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[788] "Dakota Resource Council," ActivistCash.com, available from http://www.consumerfreedom.com/activistcash/nanny_selector.cfm; Internet; accessed 20 May 2003.
[789] Bryon Dorgan, "Don't be Down on the Farm: How to Preserve a National Treasure," *The Washington Monthly Online*, ¶ ¶ 13-14 (January/February 2000); available from http://www.washingtonmonthly.com/features/2000/0001.dorgan.html; Internet; accessed 13 April 2003.

> sustainer of life. Rather, to those who seek to command our food supply it has become instead a major source of corporate cash flow, economic leverage, a form of currency, a tool of international politics, an instrument of power – a weapon![790]

In modern days in the United States, many political and ideological controversies are fought through advertising. However, the Supreme Court's standard for protection of commercial speech under the *Central Hudson* test makes it clear that speech does not have to be political or ideological to be protected by the First Amendment. Likewise, the Supreme Court's decision in the *United Foods* case makes it clear that the First Amendment will protect commodity producers who are not governed by comprehensive regulatory schemes against being forced to pay for objectionable commercial advertising, regardless of whether such advertising is political or ideological in nature. Commercial communications can constitute a means of persuasion and influence with regard to products as well as social and cultural controversies.[791]

Since money has become a key factor in determining access to modern communication channels, the future ability of commodity producers to participate in the expression of commercial messages without being compelled to fund objectionable speech is a notable thread in the broad fabric of a participatory democracy. A system of mandatory fees paid by a limited group for commercial messages that the government claims are its own under the government speech principle does not support democratic self-government. If the government speech argument is rejected, it is still equally troublesome to democratic principles to require a minority group in an industry to support

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[790] A.V. Krebs, *The Corporate Reapers: The Book of Agribusiness* (Washington. D.C.: Essential Books, 1992), 15.

[791] The level of First Amendment protection afforded to commercial speech or a combination of commercial speech and political/ideological speech has been a critical issue for the courts. Further Supreme Court guidance was expected in the Supreme Court's decision on *Nike v. Kasky* in the summer of 2003, but the Court's dismissal of the case after hearing oral arguments forestalled that judicial opportunity.

the commercial speech of the dominant group and to be associated with the views of the dominant group unless there is a vital government interest at stake.

The legal arguments focus on how strong the government interest must be to support the intrusion of the government on First Amendment rights. Does the government's interest in promoting the demand for commodities under any regulatory scheme justify the infringement of First Amendment rights? The Supreme Court in *United Foods* held that this economic goal of the government supported the violation of First Amendment rights when the regulations were germane to the objective of a comprehensive regulatory scheme (such as the marketing order in the *Glickman* case), but not when they were found in a stand-alone statute. Although the Supreme Court has relied on the *Abood* line of cases to clarify why the mandatory fees are permissible in one instance and not in another, from a public interest standpoint, what difference does it make? A legal distinction can be made, but the impact of overriding First Amendment rights is the same regardless of the legislative vehicle in which the regulation resides.

Mandatory checkoff programs have afforded the dominant industrial blocs in each industry with opportunities to manipulate producer-funded programs to further their specific business goals. Examples can be seen by glancing through the legal investigative frame used with this research (see Table 3). In many cases, there are inequities in the industry that are enhanced or sustained by the checkoff programs. While the pro-checkoff forces have discounted the theme of inequity as legitimate concern, this research nevertheless showed that checkoff programs were vulnerable to manipulation by the dominant group in each industry, enabled and supported by the USDA. It is worthwhile asking the question whether the public interest is served when even some of the checkoff

programs are held to be constitutional (i.e., those within the context of complex regulatory schemes) if the programs lead to abuse of regulatory schemes. Do the political, social and economic realities of the new Millennium prompt the same Supreme Court response as the 1937 decision in *United States v. Royal Rock CO-OP, Inc.*? The Supreme Court in *Rock Royal* held that the government interest in an efficient marketing system justified giving cooperatives a monopoly in the market.

Another area of concern for the public interest will arise if the Supreme Court continues in the direction of recognizing the constitutionality of programs for producer-funded compelled commercial speech only when they are part of comprehensive regulatory schemes. It can be assumed that the dominant hegemony supporting checkoffs in those industries where the checkoff programs are created by stand-alone legislation will refashion their programs to accommodate this Supreme Court requirement. So an incentive exists for a number of industries to create more complex regulatory schemes affecting other areas of economic and market control merely to achieve a constitutional mandatory commodity assessment program.

The current trend toward branding agricultural commodities has been embraced by a public that has become highly responsive to consumer goods differentiated by commercial brands. There is a question whether the public interest will be served in the years ahead by requiring producers to fund generic advertising when the public is accustomed to purchasing based on brand differentiation and expects to learn about specific characteristics of products through branded advertising.

A Supreme Court willing to recognize the constitutionality of the mandatory commodity checkoff programs will enhance the authority of the government. Such

authority will be enhanced even more if the Supreme Court recognizes that the speech compelled through mandatory advertising is government speech. It is notable that as generic advertising has become more pervasive, the government has sought a more invasive role as an aggressive player. This suggests that critical consequences for the public interest as a result of the legal outcomes may be related to the following research question posed in this study:

> RQ 3: Does the government's efforts to use "government speech" as a justification for mandatory commodity assessments create a heightened risk that the government may displace or monopolize private speech or interfere with the gatekeeping function of private speakers?

At the producer level, there is evidence that the government's speech will displace private speech, since the producers paying checkoff fees to fund the government speech must forfeit money that would otherwise be available for its own advertising If an increase in branding for commodities follows the current trend, the government speech in the form of generic advertising will interfere with the private commodity producer's branded advertising programs at an even greater level, since the producer will then have to spend money on commercial advertising to counteract the government's message, while still paying the mandatory fees and investing in advertising programs to build its brand.

While these outcomes have already occurred within the context of the checkoff programs, the Supreme Court in *United Foods* has at least recognized First Amendment protection for producers compelled to fund checkoff programs created by stand-alone legislation. These First Amendment protections could be stripped away if the Supreme Court holds that generic advertising is government speech and, therefore, immune from

First Amendment scrutiny. The government would have complete control over the funding and the messages of private producers without even the less burdensome First Amendment requirement under *Abood* that the speech involved be germane to the purpose of the government interest underlying the regulatory program.

The media serve as primary gatekeepers. Therefore, several Supreme Court cases dealing with the compelled right of reply on television or in newspapers and compelled access to media advertising are instructive in providing background for the considerations raised in this first research question. In the 1969 case of *Red Lion Broadcasting Co. v. FCC*,[792] the U.S. Supreme Court exhibited a strong bent for allowing compelled speech in the area of broadcasting by upholding the right of the Federal Communication Commissions (FCC) to impose "fairness requirements" on broadcasters, including the "personal attack rule." This rule required broadcasters to afford equal air time to individuals or groups whose character or honesty had been attacked on the air during a discussion related to topic of public importance. Broadcasters were finally successful in getting the FCC to cease enforcing the "personal attack rule" in the year 2000 (an effort that required a writ of mandamus form a D.C. Circuit Court). It is noteworthy that the rule was upheld by the courts and enforced by the FCC for almost five decades.

In a contrary decision five years later, the U.S. Supreme Court in *Miami Herald Publishing Co. v. Tornillo* [793] held that a newspaper could not be compelled to give political candidates the right to equal space to respond to criticism levied by the newspaper. A third case, *Resident Participation of Denver, Inc. v. Love*, [794]decided by a

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[792] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).
[793] *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).
[794] *Resident Participation of Denver, Inc. v. Love,* 322 F.Supp. 1100 (D.Colo. 1971).

panel of three federal judges in Colorado, involved three Denver newspapers that refused to run the advertisement of an activist citizens group that opposed building a rendering plant within Denver city limits. The citizens group brought suit to compel the newspapers to print their ads, but the district court panel held that newspapers, as private entities, were entitled to refuse the advertising.

The courts have supported their decisions providing less First Amendment protections to print broadcasting by different rationales, such as: spectrum scarcity (scarcity of frequencies on the electromagnetic spectrum requires more government regulation), need for the government to act as a trustee for the public, the pervasive nature of the broadcasting medium and the need for the government to protect children against the impact of the medium.

Would newspapers that are aligned with the counter-hegemony against mandatory commodity checkoffs (or simply in disapproval of a message in a particular advertisement) be free to refuse the generic advertising cloaked in the guise of government speech? While the *Tornillo* case and the *Resident Participation* case could provide the media with some ability to refuse the advertising, the power of the USDA, together with the power of other dominant industrial blocs allied with the USDA, could create opportunities for coercion against the media, especially with regard to smaller agricultural media outlets. In addition, the courts might align themselves with the government agency as evidenced by the history of the "personal attack rule."

An insightful law review article by Schoen, Hogan and Falchek discussed the topic of "government-imposed counter-advertising."[795] The authors emphasized that "[T]he U.S. Supreme Court has insisted on several occasions that compulsory speech in the context of commercial speech should be limited to mandatory disclosure of information that prevents consumer deception."[796] Accurate and fair information will assist the consumer in participating in a fair bargaining process. This constitutional principle, the authors contended, was overlooked by the Supreme Court in the *United Foods* case because of its focus (fixation may be a better word) on regulatory schemes. Funding for compelled speech in commodity programs such as those reviewed in *Glickman* and *United Foods* furthers an objective "to enhance consumer awareness about, and promote the sale of, the regulated commodities" rather than "to enhance the dissemination of accurate and useful information to consumers."[797] It is the opinion of the authors that the *Central Hudson* test must be used to analyze these commodity checkoff cases because the compelled funding of commercial speech falls outside the permissible category of "mandatory disclosure of information that prevents consumer deception."[798]

The rulings in *Glickman* and *United Foods* provide ammunition for advocates of government-imposed counter-advertising. Because *United Foods* was decided on such a narrow basis, it affords First Amendment protection to only a discrete group in a discrete situation. The article states:

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[795] Edward J. Schoen, Margaret M. Hogan and Joseph S. Falchek, "United Foods and Wileman Bros.: Protection Against Compelled Commercial Speech—Now You See It, Now You Don't," *American Business Law Journal* 30 (Spring 2002): 467-520, 515-516.
[796] Ibid., 514, citing *Virginia State Board of Pharmacy v. Virginia Consumer Council, Inc.*, 425 U.S. 748 (1976) and *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).
[797] Ibid., 515.
[798] Ibid., 514.

> The Court appears to limit First Amendment protection against compelled commercial speech to situations in which membership in the association is required, the government regulatory scheme is less pervasive, and the government regulation is centrally aligned with the purpose of the message.[799]

The authors identify the alcohol and tobacco industries as completely outside the scope of this ruling. They suggest that no First Amendment protection will be afforded in cases where government programs impose counter-advertising in favor of temperance for alcohol or abstinence for smoking. The authors clarify this point and its implications for the media as follows:

> [T]here has been some pressure for advertisements warning consumers about the health dangers of drinking and cigarettes. In assessing the viability of mandatory counter-advertisements, two levels of inquiry are required: whether a business organization can be forced to counter-advertise and whether media can be forced to accept such ads.[800]

The authors argue that "forcing the disclosure of information in commercial speech should be limited to truthful, factual information that preserves the fair bargaining process."[801] In their opinion, forced counter-advertising relaying health information would be a permissible area for government-mandated communications, but advertisements encouraging consumers to refrain from drinking or smoking would not. A number of organizations have argued otherwise, including the National Council on Alcoholism and Drug Dependence and Mothers Against Drunk Driving. These groups and others petitioned the FCC in 1997, seeking a ruling that broadcast licensees who air advertisements for alcohol must also broadcast counter-advertisements free of charge.[802] (This was the practice when for cigarette advertising on television until these ads were

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[799] Ibid., 515.
[800] Ibid., 516-617.
[801] Ibid., 516.
[802] Ibid, n. 259.

banned on broadcast media.) The government has also compelled commercial speech in a handful of corrective advertising situations where misleading advertising had a "residual" effect on consumers so that stopping the misleading ads was not sufficient to educate consumers.

The courts have yet to establish whether the media will be able to refuse government-mandated counter-advertisements containing messages designed to convince the public to abstain from using alcohol and cigarettes. Some guidance is provided by the *Tornillo* case, which stuck down a Florida right of reply statute. The U.S. Supreme Court held that newspaper editors are entitled to refuse to publish replies to articles critical of political candidates. The government can argue that *Tornillo* should be distinguished from the counter-advertisements because the speech in *Tornillo* is political rather than commercial speech. If the government can establish that its counter-advertisements are government speech, this will distinguish the facts from *Tornillo* even further, since the courts may recognize that government speech is immune from First Amendment scrutiny.

The 1969 *Red Lion Broadcasting* case is also of interest because the Supreme Court in that decision upheld the right of the FCC to require a broadcasting company to offer equal air time to a third party that the broadcaster or a party using a licensee's facility had attacked during a broadcast. This case can also be distinguished from government-imposed counter-advertising, because the "personal attack rule" regulated speech that expressed political or ideological viewpoints and not commercial speech. (The Court relied upon the concept of "spectrum scarcity" to justify its ruling.)

Further development of the government speech principle could provide guidance on how government-imposed counter-advertisements will be treated by the courts. In its next review of a case challenging a mandatory commodity promotion program, the U.S. Supreme Court will have an opportunity to define "government speech" since the USDA has argued in every pending case that generic commodity advertising constitutes government speech that is immune from First Amendment scrutiny. If the Supreme Court finds that the generic advertising funded by compelled commodity assessments falls outside the definition of government speech, it may be able to avoid taking the next step of deciding whether all government speech is immune from First Amendment protection. (A threshold question, in the view of Schoen, Hogan and Falchek, is whether the government speech in question serves to "enhance the dissemination of accurate and useful information to consumers."[803])

The United States Supreme Court has yet to clarify the level of government involvement or control that will trigger the government speech immunity. It is expected that this could be one factor included in a working definition of "government speech" that will hopefully be established by the Court. In the absence of clear direction, the parties in the pending checkoff cases are presenting evidence on this point.

The pro-checkoff parties are seeking to prove heavy involvement and control of the checkoff programs and the anti-checkoff parties are trying to show the opposite. The heightened risk to freedom of speech arises because the government has claimed control sufficient to establish government speech after the fact. The commodity checkoff programs were characterized as self-directed with oversight by the government and

[803] Schoen, Hogan and Falchek, 515.

endorsed by producers based on that understanding. The strategic move by government to control the programs at a level necessary to control the speech does not bode well for other programs in which the government is involved in an oversight capacity. All programs of this nature (including those in telecommunications, health and medical industries, etc.) would need to be on guard for a similar strategic move that would result in government interference in private communications. Increased regulatory oversight and control by a government agency would increase the chances for the government oversight to parlay itself into government speech.

If the government speech activities in the commodity programs (i.e., the generic advertising) is not subject to any First Amendment scrutiny, government authority and control is greatly enhanced in the agricultural commodity environment. This would suggest that the government might find similar success in other sectors. In addition, the government could create it own forums for the exchange of messages (online forums or physical facilities) and allow only speakers whose messages are consistent with the government speech to participate. It is conceivable that private parties would then need to engage in counter-speech to respond to the government's message.

The purpose of the generic advertising in the commodity programs is persuasive in nature. It is designed to convince consumers to buy more agricultural commodities. This serves as a model for authorizing government to engage in a range of other persuasive communications characterized as government speech without First Amendment limitations. (Anti-checkoff challengers argue that the generic advertising in several industries is outright misleading in delivering the message that the commodities are all alike when clear differentiations exist.) In addition, the government has never

identified itself as the source of the generic advertising messages. Accepting such disguised government speech as an acceptable standard, would require consumers to assume that any commercial message may be the government speaking. (How many citizens today would assume that the government was the source of a message urging them to consider "Beef, it's what's for dinner" or asking if they "Got Milk?")

The U.S. Supreme Court has indicated that a primary objective of the First Amendment is safeguarding the public's interest in the free flow of truthful commercial information.[804] If the producer funded generic advertising created by the checkoff programs is deemed to be government speech, there is a likelihood that the free flow of truthful commercial information in the agricultural commodity industries (and possibly in other industries) will, at minimum, experience governmental interference. Given that the USDA is allied with a strong dominant industry bloc, the interference could rise to the level of monopoly or displacement of speech in some cases.

The Battle Continues

> *"People usually think this checkoff thing is a kind of side issue. And, in a sense, it is. We view it as one battle in a lot larger war. But, it's a strategic war. They've got our money."*[805]
>
> *~ Jeanne Charter*

The greatest weakness of the AgriBiz position and its major roadmap, the industrial agriculture model, lies in its assumption that better productivity and better efficiency are the primary goals for agricultural progress. Justification for AgriBiz is based strictly on a quantitative approach rather than a qualitative approach. The AgriBiz status quo reflects an overwhelming focus on achieving greater and greater returns for

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[804] See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 764 (1976).

[805] Charter interview, 18.

retailers and packers at the expense of the producer groups in a manner that seems to beg for antitrust enforcement scrutiny and enforcement. There is little or no flexibility within the structure itself for different approaches, even though some of the trade industry leadership may personally aspire to tolerance and industry diversity.

The AgriChoice position's greatest weakness is that it is out of step with the current business models as illustrated most dramatically by the example of the success of the WalMart retail store chain replacing the mom and pop general stores. Supply chain management, vertical integration and concentration is the present paradigm for demonstrating business acumen and success.

Is the conundrum created by two divergent agricultural models irreconcilable? AgriBiz and AgriChoice both involve the use of agricultural resources in combination with a set of management practices to generate income to support an ongoing agricultural industry. They seek to accomplish this through sharply differing structural industry models. But they could theoretically share a common foundation. That common foundation could be a public policy commitment to: 1) maintain competitive market structures by forbidding anticompetitive conduct through antitrust laws, and 2) seek fairness and equity in the marketplace by enacting industry and topic specific legislation to provide a balance between the interests of contending groups of economic actors.[806]

The industrial agricultural model followed by AgriBiz could function successfully if it were grounded in a commitment such as this, but it has no incentive to do so. Through inaction, short staffing and policy decisions, the USDA and GIPSA have failed

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[806] U.S. Congress, Senate, Senate Appropriations Subcommittee on Agriculture, Rural Development and Related Agencies, hearing on Concentration and Competition in Agriculture, testimony of Peter C. Carstensen, 17 May 2001; available from http://www.antitrustinstitute.org/recent/120.pdf; Internet, accessed 7 July 2003.

to enforce the Packer and Stockyard Act. Through limited resources and lack of judicial decision-making, the USDA has failed to pursue enforcement against monopolistic behavior of cooperatives under the Capper-Volstead Act. And through a combination of its weak internal processes and the USDA's strong alliance with the dominant industry power blocs in livestock and dairy, the USDA has failed to perform its referendum responsibilities in these industries.

In short, there has been little reason for AgriBiz to adopt policies and practices consistent with furthering competition or ensuring fairness and equity. Instead, economic and political goals push the industrial agriculture bloc to use all means available to achieve even greater concentration and centralized ownership, exert greater control over the lower levels in the agricultural chain and increase their returns. Their strategies have included aggressive efforts to continue the checkoff programs through referendum challenges and through the legal argument that generic commodity advertising is government speech. In the livestock industry, the beef industry bloc and the pork industry bloc vigorously opposed legislation providing for a ban on meatpacker ownership of livestock, resulting in the deletion of the proposed language from the Farm Bill of 2002.

However, the war of position against the industrial agriculture bloc moved to the courts, a terrain in which the State (acting through the U.S. Supreme Court and lower courts) does not appear to have aligned itself with the dominant industrial agriculture bloc. The struggle for hegemony in this terrain presents the potential for creating change in the commodity production system. The engines for change are two counter-hegemony movements, the checkoff cases fighting for the right to be free from compelled speech

and the captive supply cases attacking the anticompetitive behavior of the meatpackers. Both are moving through the courts with strong degree of success.

CHAPTER 10

BROADER IMPLICATIONS OF THE RESEARCH APPROACH

This research on the broader context and meaning of a First Amendment line of cases was based on the assumption that legal battles over constitutional issues signify struggles in other arenas of American life. As an example, the civil rights cases referenced at the beginning of this dissertation represent past and present conflicts arising from deep divisions among American people with unequal power.[807]

The researcher developed an approach that, for clarity, will be identified as the "Gramscian/Galbraith Legal Context Analysis" and referenced informally as the "legal context analysis." This study successfully demonstrated that the approach provided an effective, structured means to explain the complex realities of the compelled commercial speech cases and suggested that it can be applied equally well to explain other constitutional political struggles that manifest themselves in the courts.

The legal context analysis facilitated an examination of the structural organization and power relationships that govern the production of commodities in five industries. It revealed sharp political, economic, social and cultural differences between dominate groups exercising hegemony and subordinate groups seeking transformative change or counter-hegemony. These conflicts, arising from different values and ideologies, were

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[807] The affirmative action cases of *Grutter v. Bollinger* and *Gratz v. Bollinger*, decided by the U.S. Supreme Court on June 23, 2003, signified political and social conflicts over civil rights that have continued to divide and polarize Americans. In upholding the affirmative action practices of the University of Michigan Law School and striking down the affirmative action procedures followed by the University of Michigan undergraduate school, the U.S. Supreme Court once again expressed its constitutional values in the area of civil rights. See *Grutter v. Bollinger*, No. 02-241, 2003 U.S. LEXIS 4800; 71 U.S.L.W. 4498 (U.S. Supreme Court, decided June 23, 2003); *Gratz v. Bollinger*, No. 02-516, 2003 U.S. LEXIS 4801, 71 U.S.L.W. 4480 (U.S. Supreme Court, decided June 23, 2003).

the puzzle pieces that fit together to explain how an environment and a set of political and economic circumstances created an issue ripe for constitutional review.

As a threshold step in this study, the researcher selected a line of cases in which the courts had addressed the constitutionality of laws related to First Amendment free speech rights, i.e., the cases challenging the compelled funding of generic advertising through commodity checkoffs. This required a preliminary study to: 1) define the relevant cases addressing the specific constitutional issue (compelled commercial speech), 2) gain a general understanding of the opposing legal positions of the parties as presented in their official legal documents, and 3) identify the constitutional doctrines that the U.S. Supreme Court and lower courts used in deciding the cases. (Some basic knowledge about broader political contests relating to the constitutional topic would assist a researcher at this stage, but is not required. Since all legal battles over constitutional issues signify underlying political, economic and cultural conflicts, the researcher can assume that later stages of the research will illuminate such conflicts.)

In determining that compelled commercial speech cases were appropriate for this study, the researcher observed that various individuals, groups and the U.S. government had sought judicial intervention in their disputes over the constitutionality of commodity checkoffs since 1986. The legal positions of the parties were clarified in seventeen different cases. Finally, the constitutional doctrines applied by the U.S. Supreme Court and the lower courts during those years in such cases were not consistent, indicating judicial conflict in addition to the broader political contests that appeared to be involved.

The next pivotal step in developing the legal context analysis involved using the Gramsci theory of hegemony to guide and inform the evidence gathering and analysis.

Gramsci's theory explained how hegemony operated within large social formations, while this study focused on hegemony in agricultural commodity production. Therefore, the researcher extended Gramsci's concept of hegemony to encompass "Gramscian power blocs" as shown in Figure 3. The Gramscian power bloc is analogous to the "historic bloc" that Gramsci used to describe a group comprised of civil society and the State allied with the central organizers, the bourgeoisie. In the same manner that the historic bloc exercises hegemony over the whole of society, the industrial agriculture bloc and the commodity industry blocs exercise hegemony over all agricultural commodity production.

This expanded Gramscian theory proved to be imminently well suited as a framework for examining the political, economic and cultural conflicts underlying the First Amendment conflicts over checkoffs. It provided a perspective that directed both the collection and analysis of evidence.

In gathering evidence, the theory prompted the researcher to seek out elements of hegemony in the agricultural industry as a whole and hegemony in the political struggles over commodity checkoffs in each commodity industry. This included collecting evidence that would pinpoint which entity was the central organizer. The theory also cued the researcher to look for activities showing counter-hegemony by a subordinate group interested in changing the laws on checkoffs—a group that might have the potential to wield countervailing power to curb economic exploitation by the hegemony.

At the analysis stage, the expanded Gramscian theory ensured that the researcher would focus on two areas: 1) how the dominant power blocs and their allies were organized and how they acted to ensure continued hegemony through consensus,

negotiation, control or coercion, and 2) how the challengers and their allies were organized and how they acted to create counter-hegemony designed to disrupt the hegemony, establish countervailing power and alter the relations of power that govern the organization of the commodity industries and the markets. This focus directed the researcher to consider the strategies of both sides, including their choice of "terrains" to best serve them in their war of position. Such terrains may include the legislature, the media, trade association networks, the courts or agencies of the state, such as the USDA.

The researcher recognized the need for a targeted method to uncover and analyze hegemonic structures within the agricultural industry and details of the political, economic and cultural conflicts arising from such structures. The next step, therefore, was to create a method for gathering and analyzing evidence through use of "investigative" frames (a general investigative frame and a legal investigative frame). The frames served as templates for the researcher to supply with contextual information. The categories in the frames provided meaningful ways to organize a wide variety of facts for effective analysis. Samples of the general investigative frame and the investigative frame are shown as Tables 4 and 5.

Table 4 Format for Investigative Frame

Entities	History	Interests at Stake	Principle Level	Legal Level

Table 5 Format for Legal Investigative Frame

Case	Characteristics of Challengers	History	Interests at Stake for Judiciary	Legal Opinion and Doctrinal Basis	Status of Lawsuit and Relevance

In addition to their value as an organizational tool and as a mechanism for gathering information critical to understanding hegemony in an industry, the investigative frames served three other important functions during the legal context analysis. First, as the general investigative frame was fertilized with interrelated and sometimes contradictory facts, new questions about hegemonic relationships and the issues at stake for the parties began to emerge. This allowed the researcher to develop meaningful, theoretically-informed research questions that could be used to further analyze the body of evidence in the general investigative frame and to collect and examine the evidence in the legal investigative frame from a more critical perspective.

Second, the information in the investigative frames represented a simple acquisition of facts until it was interpreted within the expanded Gramscian hegemony theory and the Galbraith countervailing power concept. The investigative frame with its strategic categories served as a catalyst in infusing the facts with meaning from the theoretical framework. It was a link in permitting the researcher to analyze a complex set of actions and discourse by political players (the reality reported by the evidence) within the theoretical perspective created by an understanding of hegemony and countervailing power, dominant power blocs exercising hegemony, challengers seeking counter-hegemony, strategic maneuvering and wars of position to further the interests of the respective groups (the reality revealed through theoretical enlightenment).

Third, the investigative frames were instrumental in identifying the issues that were in the "zone of conflict" between dominant power blocs and the challengers, participants with unequal power locked in a political contest in a changing agricultural

industry. Issues within the "zone of conflict" arose from clashes in values over things such as:

- the benefits of generic advertising to the industry and the public as balanced against protection of free speech values;
- the value of a majority consolidating the resources of an industry to achieve its goals versus the value of recognizing the democratic voice of all participants in the industry (the value of large research and education advances versus the value of not compelling support by those who disagree with the goals of the majority);
- the value of the industrial agriculture model versus alternative agricultural commodity production models;
- the role of the USDA in favoring agribusiness over support for independent farmers (the value realized by the USDA in the national and international arenas by promoting corporate interests versus the value it would recognize by supporting individual farming interests);
- the role of a government that enforces antitrust laws to ensure that all farmers and the public have the benefits of a competitive and fair market system (the value of permitting an anti-competitive status quo to continue to ensure close relations between corporate and government interests versus the value of breaking up abusive practices);
- differences in how the contributions made by all farmers to American society should be measured (the value of agriculture's gross profit margin versus a measure based on maintaining resources and a quality of life);

- the value of increased efficiency, economies of scale and uniformity arising from concentration and integration versus the value of maintaining crop diversity and long-term land preservation and stewardship;
- the value of increased use of branding versus the value of established practices based on homogenous handling and sales of commodities (such as the commodity checkoffs) and the cost of building and promoting brands;
- the value of foreign trade policies and sourcing low-cost raw food materials from the international market versus the value of policies protecting farmers;
- the value of subsidies for farmers versus the value of an agricultural industry that is strictly market-driven;
- the value to the consumer of source of origin identification for food commodities versus the costs and possible impact to profits if consumers choose not to buy foods from certain sources;
- the value of genetically engineered commodities to consumers, the food production industry and the ability to feed the hungry versus unknown health or agricultural risks and the value of farming with seed supplies that can be saved from year to year; and
- the value of irradiation of livestock and poultry for health and safety versus the value of avoiding an additional processing step that may reduce taste.

The opposing values covered a range of political, economic, social and cultural issues. This list is representative of the range and complexity of the value dichotomies that may be identified when a legal context analysis is performed. Political contests that shift to the courts for resolution by application of the law tend to be complex battles with

numerous issues at the forefront in the zone of conflict. Judges must articulate their understanding of these conflicting values in rendering their decisions. .

It was important in this study for the researcher to identify and discuss only those issues in the zone of conflict that are most meaningful to the First Amendment challenges to the commodity checkoffs. The evidence showed that the five industries involved had different issues that precipitated battles in the zone of conflict. Industry concentration and vertical integration were the major issues in the zone of conflict in the livestock industries where the challengers were the small, independent producers. The zone of conflict for the tree fruit and mushroom industries reflected key issues related to branding and product differentiation. Challengers in these industries sought to stop the use of their dollars for generic advertising in competition with their own branded advertising. A mix of plaintiffs and cases in the dairy industry showed that it was experiencing clashes in values that created a zone of conflict related to all of the key areas—industry concentration, vertical integration, branding and product differentiation.

The "Gramscian/Galbraith legal context analysis" may be used to study other judicial battles over constitutional issues that signify a myriad of conflicts between political and social forces with differing ideologies, economic interests and cultural values. It offers a structured method for gathering and analyzing evidence to facilitate a broader understanding of what is at stake for parties in lawsuits engaged in intense hegemonic struggles over constitutional issues. The method will also assist in tracing the external realities and influences that surround judicial decision making on an issue. Finally, a clear understanding of how political and economic power is exercised between groups who have an interest in a constitutional conflict will assist in analyzing ways in

which the consequences of various legal decisions will affect the parties and society in the immediate and extended future.

The Gramscian/Galbraith legal context analysis is comprised of nine components:

1) a theoretical framework based on Antonio Gramsci's theory of hegemony (expanded to encompass Gramscian power blocs) and John Kenneth Galbraith's concept of countervailing power;
2) a set of objectives specific to the area of conflict being studied (reflecting a preliminary awareness of existing regulatory apparatus and laws of the State and applicable legal principles).
3) a thorough collection of evidence, including interviews;
4) an "investigative frame" (as shown by Table 4) to examine the elements giving rise to the constitutional challenge, with attention to the entities and their alignment for or against the hegemony;
5) a "legal investigative frame" (as shown by Table 5) for tracing judicial decision making in a line of constitutional cases, and for identifying possible influences from the dominant hegemony or societal, legislative or judicial sources;
6) an identification of issues in the zone of conflict based on the investigative frames (and a narrowing of the issues for study and analysis, if appropriate);
7) a formulation of key research questions based on the investigative frames;
8) an analysis of evidence under the Gramscian and Galbraith theories, and
9) a report on the conclusions.

Other constitutional legal conflicts that may be suitable for analysis using the Gramscian/Galbraith legal contest analysis are related to the rights of parties engaged in hegemonic battles regarding such issues as intellectual property in a digital age, restricting adult access to Internet media in order to protect children, freedom of religion, abortion, stem cell research, privacy and other cases involving an established hegemony that is being challenged by a counter-hegemony on constitutional grounds.

The line of the cases challenging the constitutionality of the anti-circumvention provisions in the Digital Millennium Copyright Act[808] can be used to briefly illustrate the broad applicability of the legal context analysis developed in this study.

The constitutional basis for all copyright laws is the intellectual property clause in the U.S. Constitution: "The Congress shall have Power...to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and inventors the exclusive Right to their respective Writings and Discoveries."[809] The area of copyright law was not subject to turmoil until the rapid diffusion of computers and new technology into homes in the United States during the 1990s generated a huge pool of Internet users who have aggressively engaged in "on-line piracy" or the misappropriation of creative material in disregard for copyrighted rights.[810] On-line piracy of music and other materials has created a tension between those who seek to use the Internet and new

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[808] Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat 2860 (1998) (codified as scattered sections in 17 U.S.C.).

[809] U.S. Const., art. I, 8, cl. 8.

[810] However, as Christopher Mays notes in his critique of intellectual property, the definition of "piracy" in terms of theft is not necessarily a technical term, but a rhetorical device that is used by those certain industries to stress the rights of the individual owner. It implies that a property right has been recognized. If no right exists, then there can be no piracy. By framing the debate over use of information in terms of theft and piracy (rather than social utility or access), the rights of copyright owners are privileged above social rights. Under the Gramscian theory, this suggests a strategy by the copyright power bloc to maintain its hegemony. See Christopher Mays, *A Global Political Economy of Intellectual Property Rights: The New Enclosures?* (New York: Routledge, 2000), 150-151.

technology to sustain an "open public domain" model for free exchange of knowledge and those who feel compelled to impose a "closed public domain" model to exercise control over access and copying in reliance on their proprietary rights under copyright law.

The "closed public domain model" is the preferred solution of those with a protectionist viewpoint because, in a digital world, complete control over copying can only be achieved by complete control over access. Proponents of this model successfully persuaded Congress to integrate their views into the current copyright law, the Digital Millennium Copyright Act ("DMCA") passed by the legislature on October 28, 1998.[811]

Those supporting the DMCA are producers of movies, music, books, databases and computer software. Under the Gramscian/Galbraith legal context analysis, these entities form the hegemony in the sphere of society concerned with the production, protection and use of creative works. They rely on the copyright laws to protect their interests. (The fact that the current copyright laws are referred to as the current "copyright regime" is a clear indication of the powerful impact of these laws as a tool for exercising hegemony.) Two major trade associations, The Recording Industry Association of America (RIAA) and the Motion Picture Association of America (MPAA), are clearly major players in the copyright power bloc exercising hegemony. The "Big Five" major record companies dominating the music recording industry (Universal Music Group, Sony Music, Time Warner Music Group, BMG Entertainment and EMI Recorded Music) have also been active in lending their support in legal actions and lobbying for strict copyright laws.

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[811] Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat 2860 (1998) (codified as scattered sections in 17 U.S.C.).

The challengers seeking to establish counter-hegemony against the copyright power bloc include computer technology industries, academics and computer hackers. Library associations have been outspoken against restrictive copyright laws in representing the needs of libraries to have continued access to materials needed to serve their patrons. Some artists and authors are aligned with the copyright counter-hegemony, while others are aligned with the copyright power bloc. (A few artists and authors opposed to the current model of copyright ownership and distribution of creative works have experimented with alternative models that may offer future potential for counter-vailing power.) The public, especially Internet users age 35 or younger, play a role in the effort to establish counter-hegemony against the copyright power bloc, primarily because of the sheer numbers engaging in the downloading and use of copyrighted works..

The "heart of the DMCA"[812] has been identified as the provisions that make it illegal to gain access to a copyrighted work by circumventing a technological measure that "effectively controls access"[813] to such work. These anti-circumvention provisions are deemed by the challengers to create a conflict between property rights of the copyright holder and the political right of free speech. Since the right of access is a key component of free speech rights, it is argued that the DMCA violates these rights. Challengers have also argued that the Digital Millennium Copyright Act's provision preventing access to materials that are subject to fair use is unconstitutional and an infringement of First Amendment rights.

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[812] L. Ray Patterson, "Copyright in the New Millennium: Resolving the Conflict Between Property Rights and Political Rights," *Ohio State Law Journal* 62 (2001): 703-732, 703.
[813] 17 U.S.C. § 1201 (a)(1)(A) (Supp. IV 1998).

A line of cases has developed as the judicial system has begun interpreting the DMCA and its anti-circumvention provisions. They involve efforts by the government to enforce the provisions through criminal actions and efforts by the copyright dominant bloc to stop actions by individuals or groups engaged in decoding programs for purposes they claim are within the scope of the fair use doctrine. The courts have responded to critical issues raised by the DMCA regarding fair use and access.

Those in the group seeking counter-hegemony assert that the DMCA virtually ignored the public interest as it granted sweeping new rights to major stakeholders in the dominant hegemony, the copyright owners, the publishers and distributors. A broad conflict of values centers on how U.S. copyright laws can best balance the need to create incentives for authors to produce while allowing the public to benefit from the increased body of works by maximizing public access. The value that authors have the right to economically benefit from their creative works is pitted against the value that access to information is imperative for producing the knowledge and growth of society.

Without introducing further details, it can be seen that this preliminary sketch of a line of cases in which the parties are engaged in a legal struggle over the constitutionality of the anti-circumvention provisions of the DMCA signifies a broad range of underlying conflicts related to values of proprietary ownership and control of intellectual property versus freedom of access and use of creative works.

The Gramscian/Galbraith theoretical framework focuses the researcher on issues of hegemony and counter-hegemony at preliminary stages of the research. The investigative frame allows the researcher to begin organizing the evidence relating to the key entities and their history of involvement with the production, protection and use of

creative works. The interests at stake for each entity can be explored with attention to the public positions of the entities and the unspoken political and economic interests that have contributed to the political contests and prompted the legal actions. Actions of the legislature and the courts could be influenced by external influences, such as the U.S. signing of the WIPO Copyright Treaty on December 20, 1996.[814] There are indications that Congress is a strong ally of the copyright dominant bloc.

The legal investigative frame should be particularly useful in this case to clarify the rulings on the law and legal principles (such as the fair use doctrine) and the values that the judges are expressing through their opinions. The Gramscian and Galbraith theories and the investigative frames suggest issues that are within the zones of conflict and help the researcher develop research questions that require a deeper analysis of the evidence on ownership, protection and use of creative works.

The context legal analysis developed in this dissertation assumes that every constitutional legal challenge will signify underlying political conflicts that can be understood by exploring relationships and actions based on hegemony and counterhegemony. In concluding that Gramsci's theories remain viable in today's political environment, Richard Bellamy and Darryl Schecter state:

> [T]he dialectic between State and civil society to which he [Gramsci] drew attention continues to be of fundamental importance for understanding the nature and exercise of political power within industrial societies. Existing State formations are currently undergoing dramatic and often contradictory transformations, assailed as they are by international pressures from without and increasingly localized national pressures from within...the general problem he

[814] Paul Goldstein, *International Copyright: Principles, Law, and Practice* (New York: Oxford University Press, 2001), 32.

sought to address—namely, the construction of a viable democratic political culture suited to a socially and economically diverse society—is more pressing than ever.[815]

[815] Richard Bellamy and Darrow Schecter, *Gramsci and the Italian State* (New York: Manchester University Press, 1993), 167.

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APPENDICES

APPENDIX A
DEFINITIONS

Agribusiness – Businesses related to agriculture and the food chain, including agricultural production, processing and distribution, biotechnology, precision farming (global positioning tools), farm and financial management, agricultural trade, pharmaceuticals, chemicals, land development, agricultural e-commerce, environmental impact management, risk management, utilization of agricultural byproducts and agricultural systems management.

"AgriBiz" – Term used by author of this dissertation to describe a network of groups that form the "industrial agriculture bloc" that exercises dominant hegemony in the agricultural industry and is also an influence in the checkoff hegemony. The dominant ideology of the AgriBiz hegemony in agriculture is centered around the corporate or industrial agriculture model, a business model which has been widely adopted in the business community as a means to compete globally and serve the culture and ideology of American consumerism.

"AgriChoice" - Term used by researcher writing this dissertation to identify the counter-hegemony movement within the agricultural industry to recognize the rights of independent ranchers and farmers to be have access to competitive markets, to support sustainable agriculture as a viable alternative model to industrial agriculture, and to engage in farming without coercive measures to participate in vertical integration and concentration.

Amicus Curiae Briefs – "Friend of the court" briefs filed by an individual or organization not a party to a lawsuit to present arguments on a case before the court.

Captive Supply – The USDA defines "captive supply" as "cattle that are controlled by or committed to a packer more than 2 weeks prior to slaughter." See United States Department of Agriculture GIPSA Report, *Evaluation of Agency Efforts to Monitor and Investigate Anticompetitive Practices in the Meat Packing Industry* (Wa. D.C.: GPO, February 1997).

Agricultural Marketing Orders – Instructions issued by a Secretary of Agriculture at the federal or state level for regulating the marketing and distribution of commodities. Approximately three dozen commodities are subject to extensive federal regulation under "marketing orders."

***Central Hudson* Test** – An intermediate scrutiny test developed by the Supreme Court of the United States in 1980 in the case of *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* for determining whether a statute or regulation restricting commercial advertising violates the First Amendment. Under this test, commercial speech does not violate the First Amendment if: 1) it concerns lawful

activities and is not misleading, 2) the government interest is substantial, 3) the regulation advances the governmental interest asserted (i.e., there is a reasonable fit between regulation and policy goal), and 4) the regulation is no more extensive than necessary.

Checkoffs - Term used to describe the mandatory commodity assessments used primarily for generic product advertising that is intended to maintain and expand the market for commodities. In addition to generic advertising, checkoff money is used for administrative salaries, research and educational activities. Examples of generic advertising slogans include: "Got Milk?" "The Other White Meat" and "Beef, It's What's for Dinner." Checkoff programs are based on marketing orders that were first implemented in legislation dating back to 1937 or on more recent stand-alone legislation.

Commodities – Livestock, raw milk, crops, fruits and vegetables.

Commodity Checkoffs – Mandatory assessments levied on commodities producers to support generic commodities advertising. While commodity checkoffs are use primarily for the promotion of commodities through generic advertising, they are also often used for research, education and administrative purposes.

Commodity Industry Bloc – A power bloc comprised of the dominant groups (or "fractions" according to Gramsci) within a particular commodity industry who are aligned through alliances and ideology and exercise hegemony over the industry.

Commodity Producers – Farmers, ranchers or growers who produce livestock, raw milk, crops, fruits or vegetables.

Compelled Commercial Speech – Generic advertising of commodities resulting from mandatory assessments on commodity producers.

Concentration – Decreasing the number of business units or enterprises in a business field while increasing the size of each.

Contract Producers – Farmers, ranchers or growers who produces a commodity under a production contract.

Counter-hegemony – Efforts by subordinate groups to effect change in the dominant hegemony controlling the social-political formation of society or controlling other domains, such as commodity production. The challengers engage in a hegemonic struggle with the power bloc exercising hegemony by using moral and philosophical arguments, economic strategies, state apparatus, the courts and other means to break the hegemony. In Gramsic's writings, the counter-hegemony was directed against a political-economic hegemony exercised by a "historic bloc."

Countervailing Power – A regulatory mechanism that occurs when strong buyers assert themselves against the market power of suppliers or producers of consumer goods. The condition of countervailing power can also occur when the buyer is a manager and the seller is a seller of labor. The group seeking countervailing power is usually a larger disadvantaged group that is facing a small, more advantaged group.

Factory Farm – Production of animals or plants for use in the food chain using business practices of assembly line uniformity, large volumes, structured business practices and homogenous outputs. Livestock grown under this model are kept in large confinement facilities to create consistency in the processed food and take advantage of economies of scale.

Family Farm – The USDA defines a family farm as:

> An agricultural business which 1) produces agricultural commodities for sale in such quantities so as to be recognized as a farm rather than a rural residence; 2) produces enough income (including off farm employment) to pay family and farm operating expenses, to pay debts, and to maintain the property; 3) is managed by the operator; 4) has a substantial amount of labor provided by the operator and family; and 5) may use seasonal labor during peak periods and a reasonable amount of full-time hired labor. See United States Department of Agriculture, *Agriculture Fact Book 2000* (Wa. D.C.: GPO, November 2000).

Fraction – A group within a dominant hegemony that Gramsci calls a hegemonic class.

Globalization – The process of making something worldwide in application. In agriculture, this refers to a worldwide system of sourcing raw materials, producing, processing, selling and transporting food products and related chemicals, equipment and biotechnological in the global borderless marketplace.

Government Speech – Communication resulting from the government's affirmative decision to express itself. Examples: Recruiting posters saying "Join the Army"; advertisements to "Buy U.S. Savings Bonds," USDA nutrition guidelines, instructions regarding taxes or Medicare, etc. The USDA has argued that generic commodities advertising is government speech while the challengers assert that such advertising is collective private speech.

"Gramscian/Galbraith Legal Context Analysis" – A structured research method for gathering and analyzing evidence to facilitate a broader understanding of what is at stake for parties in lawsuits engaged in intense hegemonic struggles over constitutional issues.

Hegemony - A concept developed by the Italian theorist, Antonio Gramsdas, as an expansion of Marxist theory. Hegemony exists when a provisional alliance of social and political groups is formed and gains legitimacy and dominance through political, intellectual and moral leadership. People are united through a shared world view that is reinforced by consensus between state and private institutions.

Historic Bloc – Term used by Antonio Gramsci to refer to the social formation of a civil and political group around a hegemonic project.

Industrial Agriculture Bloc – A power bloc of individuals in agriculture, business, academia, biotechnology research, chemical and pesticide development and government that are centrally organized around the hegemonic project of industrial agriculture. The central organizers are concentrated and vertically integrated commodity producers.

Industrial Agriculture Model - A business and technological approach to agriculture that includes elements such as: economic growth, profit, industrial process, and conversion of natural foods into commercial products by using methods and systems that are governed by productivity and efficiency objectives. Crops grown using the industrial agriculture model are often characterized by monoculture (growing one crop on vast amounts of farmland). The industrial agriculture approach also promotes the use of pesticides and biotechnology to seek more homogeneity.

Investigative Frame – Term used by author of this dissertation to identify a structured approach used to organize facts and study the relationship between First Amendment compelled speech cases and a hegemonic conflict within the agriculture industry.

Land Grant Universities – Universities and colleges that received federal funding under the Morrill Acts of 1862 and 1890 for developing programs in the areas of agriculture homemaking and mechanical arts. States and territories also received land from the federal government for this purpose.

Legal Investigative Frame – Term used by author of this dissertation to identify a structured approach used to study a line of cases, the historical facts, the interests at stake for the judiciary and other key elements.

Livestock Packers and Processors – The business entities in the beef and pork food production chain that slaughter, process and package cattle and hogs.

Marketing Orders – Regulatory schemes designed to achieve orderly marketing goals through government regulation of agricultural commodities including: 1) regulation of supply and quality, and 2) consolidation of commodity payments for promotion and research. They arise when an industry actively initiates the through an industry initiative, approval by the Secretary

Retailers - Business organizations that sell commodities to ultimate consumers.

Sustainable Agriculture – An approach to farming and production of food that stresses the long-term habitability of the world and promotes environmentally sound farming practices that conserve and renew the earth's resources.

"State" - A set of organizations invested with the authority to make binding decisions for people and organizations located within a particular territory and to implement these decisions using force, if necessary.

Transnational Corporation – A corporation that competes on a global scale with few or no national alliances. The business organization is accountable solely to deliver profits to shareholders and directors residing in different countries. The emergence of trans-national corporations with extensive abilities to influence trade and economic policies has created a new global power base that has arguably supplanted nation states. The transnational corporation is the entity around which other groups ally themselves in the "industrial agriculture bloc."

Vertical Integration – A business model that occurs when one entity controls one or more steps in production from the raw materials to the consumer. This reduces the number of business transactions and their associated costs and creates a shortened supply chain.

APPENDIX B
ANNOTATED LIST OF COMPELLED COMMERCIAL SPEECH CASES

United States v. Rock Royal CO-OP, Inc., 307 U.S. 533 (1939). The government sought to collect mandatory fees from several milk processors in accordance with a milk order and the 1937 Agricultural Marketing Agreement Act. The milk processors agued that" 1) their due process rights were violated under the 5th Amendment, 2) the Tenth Amendment prohibited the federal government from fixing the price of milk prior to the commencement of interstate commerce, and 3) that the authority accorded the Secretary of Agriculture violated their property rights under the Fourteenth Amendment. This authority included the right of the Secretary to delineate marketing areas, to implement marketing orders based solely on the consent of the producers and not the processors, and to authorize bloc voting by farming cooperatives on behalf of their members. The District Court held for the challengers, but the Supreme Court overruled in favor of the government.

United States v. Frame, 885 F.2d 1119 (3rd Cir. 1989) The Third Circuit applied the Central Hudson test and found the Beef Promotion and Research Act was constitutional. However, the court was unwilling to accept the government's argument that the promotional expression of the Cattleman's Board constituted "government speech."

Cal-Almond v. United States, 14 F.3d 429 (9th Cir.1993), cert. denied, 519 U.S. 963 (1996). Under the Central Hudson test, the Ninth Circuit held that the First Amendment rights to freedom of expression and association of two groups of almond handlers were violated by the California Almond Marketing Order. The court found that the evidence on record indicated that the regulations in reality hindered the efforts of the handlers to increase sales and returns to growers.

Wileman Bros. & Elliott, Inc. v. Espy, 58 F.3d 1367 (9th Cr. 1995), *rev'd sub nom. Glickman v. Wileman Bros. & Elliott,* 521 U.S. 457 (1997). In keeping with its decision in the Cal-Almond case, the Ninth Circuit held that federal marketing order for California tree fruit was unconstitutional due to its failure to meet the second and third prongs of the *Central Hudson* test.

Glickman v. Wileman Brothers & Elliott, Inc., 521 U.S. 457 (1997). This case gave the Supreme Court a chance to resolve the conflict between the Third and Ninth Circuits. In a 5-4 decision, the Supreme Court held that the mandatory assessments on fruit growers did not raise First Amendment issues, and analyzed the case under a freedom of association theory. It noted that the assessments did not impose a restraint on the plaintiffs' freedom to communicate, did not compel them to engage in actual or symbolic speech and did not compel them to endorse or finance political or ideological views that were not germane to the purposes for which the compelled association was justified. The

court also emphasized that this marketing order involved a complex regulatory scheme, of which the generic commodity advertising was only one part.

Goetz v. Glickman, 149 F.3d 1131 (10th Cir. 1998). Kansas cattle farmer claimed his First Amendment rights were violated by beef checkoffs. District Court ruled in favor of USDA. Tenth Circuit upheld ruling of District Court, but relied on Glickman v. Wileman, to conclude that the lower court incorrectly applied *Central Hudson* test.

Gallo Cattle Co. v. Ca. Milk Advisory Bd., 185 F.3d 969 (9th Cr. 1999). The Ninth Circuit Court of Appeals held that the marketing order in question requiring mandatory assessments for generic advertising did not violate the First Amendment rights of the milk producer. The Court applied the three-part test from *Glickman v. Wileman*, but did not address whether a complex regulatory scheme (such as the marketing scheme in *Wileman*) was prerequisite for applying *Wileman.*

Cal-Almond Inc. v. United States, 192 F.3d 1272 (9th Cr. 1999), cert. denied, 120 S.Ct. 2215 (2000). Ninth Circuit held that an almond marketing order does not violate the First Amendment by imposing mandatory assessments on individual almond handlers to fund collective generic almond promotion.

Gerawan Farming v. Lyons, 42 Ca. 4th 468 (2000). The California Supreme Court held that the mandatory assessments against plum growers under the California Plum Marketing Program (of which 55% of the revenue was used for generic advertising) did not raise First Amendment free speech issues under the U.S. Constitution as interpreted by the U.S. Supreme Court in the *Glickman v. Wileman* case. However, the California Supreme Court strongly criticized the *Wileman* ruling and reached the conclusion that the mandatory assessments implicated Gerawan's free speech rights under the California Constitution.

Gerawan Farming, Inc. v. Lyons, Super. Ct. No. F031142 (5th Appellate Dist., State of Cal. 2001). Upon remand from the California Supreme Court, the state appellate court adopted an intermediate scrutiny balancing test for evaluating the constitutionality of the plum marketing order under the free speech clause of the California State Constitution. It held that checkoff program was unconstitutional.

United States v. United Foods, 533 U.S. 405 (2001). The U.S. Supreme Court held that the mandatory assessments against mushroom growers imposed by the Mushroom Promotion, Research, and Consumer Information Act of 1990 for purposes of generic advertising were unconstitutional. It distinguished this case from *Glickman v. Wileman* on the grounds that the primary purpose of the assessments against the mushroom growers was to solicit funds for generic advertising rather than to support a complex regulatory scheme like the one regulating the fruit growing industry. The Supreme Court declined to hear the government's argument on "government speech" on the grounds that it was raised for the first time after the court granted certiorari. It affirmed the 6th Circuit decision overturning the district court's finding of summary judgment in favor of the

government and sent the case back to the district court. The government has sought to continue the case and introduce a government speech defense on the grounds that the Supreme Court decision only denied summary judgment for the defendant and was not dispositive of the case. Two actions pending in the Western District Court of Tennessee are dormant while awaiting the decision of the Sixth Circuit Court of Appeals in *Michigan Pork Producers v. Campaign for Family Farms.*

Livestock Marketing Association v. United States, Livestock Marketing Association v. USDA, *Nos. 02-2769 and 02-2832, 2003 U.S. App. LEXIS 13630 (8th Cir. 2003).* District court decision rejecting the government speech argument and holding beef checkoffs unconstitutional was upheld by the Eighth Circuit Court of Appeals on July 8, 2003.

Jean Charter and Steve Charter v. United States, 230 F. Supp. 2d 1121 (D. Montana 2002). District Court decision on November 1, 2002, recognizing government speech and holding beef checkoffs unconstitutional is currently being appealed in the Ninth Circuit Court of Appeals. Briefing concluded in July 2003 and oral arguments are expected to be scheduled for fall 2003.

Michigan Pork Producers v. Campaign for Family Farms, 229 F. Supp. 2d 772 (W.D. Mich. 2002), as corrected October 31, 2002. Decision holding pork checkoffs unconstitutional is being evaluated by the USDA and the federal Justice Department with regard to whether the government will file an appeal. An appeal in the Michigan case was argued before the Sixth Circuit Court of Appeals on March 14, 2003. This is the court that held the mushroom checkoffs unconstitutional in the recent *United Foods* case.

Joseph P. Cochran, et al. v. Ann Veneman, et al. and Fred Lovell, 2003 U.S. Dist. LEXIS 4361 (Middle Dist. Penn. 2003). Joseph and Brenda Cochran and the Center for Individual Freedom brought suit in the U.S. District Court in Scranton, Pennsylvania. The plaintiffs filed a motion for summary judgment and the defendents then filed a motion to dismiss or in the alternative, for summary judgment. As dairy producers required to pay checkoffs under the Dairy Promotion Stabilization Act of 1983, plaintiffs claimed the commodity checkoffs violated their First Amendment rights. The District Court granted the defendants' motions for summary judgment and upheld the diary checkoffs on the grounds that the regulatory environment for the dairy industry (which consists of eleven federal marketing orders) more closely resembles the facts in *Glickman v. Wileman* that the facts in *United States v. United Foods.* Joseph and Brenda Cochran filed an appeal with the United States Court of Appeals for the Third Circuit.

Delano Farms Company, et al. v. California Table Grape Commission, No. 00-16778 (9th Cir. January 27, 2003). The challengers, Delano Farms, Susan Neill Company and Lucas Brothers, sells table grapes under brand names. The Ninth Circuit appellate court held that the facts of this case were more similar to *United Foods* than *Wileman*, because: "the scheme does not collectivize the industry, about 90% of the assessment money is spent on generic promotional activities, and there is no antitrust exemption." Delano Farms at 9. The court referred to its earlier 1999 decisions in *Gallo Cattle*

Company v. California Milk Advisory Board and *Cal-Almond Inc. v. U.S. Department of Agriculture* and stated that it did not need to reexamine its analyses in those cases in light of the *United Foods* case, because they are distinguishable from United Foods based on the fact that both involve marketing orders under the same 1937 statute that was controlling in *Wileman.* The Ninth Circuit reversed the lower court ruling granting the Grape Commission a dismissal, so the case has returned to the district court for trial.

In Re Washington Apple Advertising Commission, No. CS-01-0278-EFS (E.D. Wa. March 14, 2003). The Washington Apple Advertising Commission contacted parties and initiated this lawsuit to determine the constitutionality of its checkoff program. The federal district court granted a preliminary injunction to apple producers who challenged the Washington state apple checkoff program. The court found that the apple checkoff activities did not constitute government speech, that the Apple Commission was not a governmental entity, and that the Apple Commission was not disseminating the government's message because it did not meet the prerequisite of government control of the entity. The Commission has shut down its offices.

State of Fla., Dept. of Citrus v. Graves Brothers Company, Tampa Juice Services, et al., No. 2DO03-2276, 2d Dist. Court of App., Florida.
The circuit court determined that the State of Florida's activities in collecting a "box tax" from citrus fruit growers and generating generic advertising to promote Florida citrus fruit was not government speech because if was not funded by the general revenue funds of the state. The court then subjected the case to a First Amendment review and found that the box tax was unconstitutional under *United Foods* and *Glickman.* It granted the plaintiff fruit growers' motion for partial summary judgment. The State of Florida has appealed.

Pelts & Skins, L.L.C. v. James Jenkins, Jr., Secretary of the Louisiana Department of Wildlife and Fisheries, No. 02-384-A, 2003 U.S. Dist. LEXIS 7014 (Middle Dist. Louisiana 2003). The district court granted summary judgment to the plaintiff, an alligator farmer who objected to paying mandatory fees to the state of Louisiana for generic marketing of alligator products without differentiation as to type, quality or brand. The court rejected the government speech defense on the grounds that there is a "close nexus between the alligator producers and the message funded." *Pelts & Skins* at 21. It found that the alligator industry resembled the facts in the *United Foods* case than the *Glickman* case. The Department of Wildlife and Fisheries has filed an appeal with the Fifth Circuit Court of Appeals.

Cases Addressing Freedom of Association and Compelled Funding:

Abood v. Detroit Board of Education 431 U.S. 209 (1977) Union-management agency shop agreements, which require that every employee pay the union a service charge equal to the amount of union dues, impinge on employees' right to be free from compelled affirmation of belief and compelled association for expressive purposes.

Wooley v. Maynard, 430 U.S. 705 (1977). State law requiring citizens to bear state slogan, "Live or Die," on automobile license plates implicates First Amendment rights because law requires individuals to participate in the dissemination of an ideological message.

Roberts v. United States Jaycees, 468 U.S. 609 (1984). Court upheld an order of the Minnesota Department of Human Rights compelling the Jaycees to admit women in local chapters. Although the Court found that the constitutional rights of the Jaycees were not sufficiently violated, Justice Brennan's opinion contained the following points that provided guidance for future compelled association cases: 1) freedom of association is constitutionally protected, 2) freedom of association presupposes a freedom not to associate, and 3) the appropriate standard for analyzing an infringement on the right of association is whether it serves a compelling state interest.

Keller v. State Bar of Cal. 496 U.S. 1 (1990). Court unanimously rejected the California State Bar Association's efforts to utilize compulsory dues to finance political and ideological activities favored by less than the majority of its members.

Lehnert v. Ferris Faculty Association, 500 U.S. 507 (1991). Court relied on *Abood* and *Chicago Teachers Union v.Hudson*, 475 U.S. 292 (1986) in holding that fees used for lobbying activities are not sufficiently connected to collective bargaining to compel employees to comply.

Smith v. Regents of Univ. of Cal., 4 Cal 4th 843 (1993). Judgment of the Court of Appeal affirmed with respect to its ruling on collecting mandatory student activities fee. The Regents of the University of California may impose the fee

Board of Regents of the Unviersity of Wisconsin System v. Southworth, 529 U.S. 217 (2000). The Supreme Court held that the First Amendment was not violated when a public university charged students mandatory fees to fund extracurricular speech, provided that the university exercised viewpoint neutrality in allocating the funding to the student organizations engaging in such speech. Government speech is mentioned in this case in the following dicta:

> Our decision ought not to be taken to imply that in other instances the University, its agents or employees, or—of particular importance—its faculty, are subject to the First Amendment analysis which controls in this case. Where the Unviersity speaks, either in its own name through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be altogether different...(citations omitted). The Court has not held, or suggested, that when the government speaks the rules we have discussed come into play. *Southworth* at 234-235.

APPENDIX C
CRITERIA FOR ANALYZING COMPELLED COMMERCIAL SPEECH CASES

1) Does the court recognize that the compelled commercial speech case involves a First Amendment issue?
2) If so, what standard of First Amendment protection does the court apply in its decision-making? Does the court apply the Central Hudson test for commercial speech and analyze the case using the established intermediate scrutiny standard for First Amendment protection of commercial speech? Or does the court apply the *Abood* analysis for analyzing freedom from compelled speech and compelled association by using the strict scrutiny standard as outlined in the *Roberts* case?
3) What justification does it the court offer for selecting its First Amendment standard for analysis?
4) Does the court state a rationale for treating commercial speech differently than private speech?
5) Are the cases that the court relies upon as precedent sufficiently similar to be controlling?
6) Is this decision consistent with earlier decisions on compelled commercial speech? If not, how is this case distinguished?
7) How does this case fit within the current trend in First Amendment doctrine toward affording broader protection for commercial speech?
8) How does this case fit within the current trend in First Amendment doctrine toward expanding the *Abood* concept to new fact situations?

9) Does the Court identify any underlying public policy, economic or political issues as factors for consideration in reaching its decision?

10) Does the Court acknowledge any of the agricultural industry interests at stake?

11) Does this case contribute to the predictive value of the current line of compelled commercial speech cases?

12) Does the Court recognize the USDA's argument for government speech as a legitimate defense to the First Amendment claims? Does the Court apply the defense in reaching its decision?

13) Does this case serve as a "catalyst" or a "brake" in the process of generating change in a) the agricultural hegemony, or b) First Amendment commercial speech doctrine?

APPENDIX D
SAMPLE INTERVIEW QUESTIONS

1) Are you familiar with commodity checkoff programs? How would you describe them?
2) Do you feel that commodity checkoffs have a positive impact on the industries they support? If so, what are the benefits? If not, why do you think they fail to add value?
3) How do commodity checkoffs impact various agricultural producers? (large producers, corporate producers, independent ranchers, farmers and dairy farmers)
4) Do you agree with the way in which the revenues from commodity checkoffs are being spent by respective industries? Why or why not?
5) Do you agree with the messages and focus of today's generic commodities advertising? If not, what alternative message would you like to see advertised?
6) What specific groups do you feel represent the various interests in the agricultural industry with respect to commodity checkoffs? (Government, industry trade groups, grassroots groups, parties to lawsuits, etc.)
    a) What goals are openly expressed by each group?
    b) Are there any unstated objectives that you can also identify?
7) What interests do you think are at stake for each of these groups in the current conflict over commodity checkoffs?
    a) What does each group stand to lose?
    b) Which groups have shared interests?
8) Which groups do you think have the most power? The least power? Why?

9) Do you think this will change in any way if commodity checkoffs are held unconstitutional? Why or why not?

10) What factions within the agricultural industry are openly in conflict over checkoffs?

11) Do you see this as a recent development or are the differences longstanding?

12) With which groups are you most closely aligned? Why?

13) Should the groups representing the various industries do anything to accommodate the unhappy minorities? If so, what would be appropriate?

14) What alternatives to the current commodity checkoff programs do you feel might be worth pursuing?

15) When did you first become aware that the First Amendment free speech argument was a viable position in the conflict over commodity checkoffs?

   a) What was your reaction to the use of a First Amendment argument by challengers?

   b) Do you feel that requiring mandatory payments for generic advertising is a violation of First Amendment rights?

16) Do you think that commercial speech or advertising should receive the same level of protection as political or private speech? Should advertisers have the same freedom to publicly share messages as individual speakers?

17) How much protection do you feel should be afforded *compelled* commercial speech? Should the courts recognize the right of a commodity producer not to engage in the advertising of messages such producer does not support?

18) Should commodity producers be entitled to opt out of commodity checkoff programs? What effect will this have on the overall results of the programs?

19) What kinds of changes are occurring in the agricultural industry? (Please elaborate based on your background and expertise.) What do you think is driving these changes?

20) Which changes are positive and which are negative for...

a) the future of agriculture in the U.S.?

b) the future of the independent farmer or rancher?

c) the future potential to sustain a desirable quality of life for commodity producers?

d) the future of the U.S. as a global agricultural competitor?

e) the future ability to maintain a healthy ecosystem for commodity production?

21) Is generic advertising useful in responding to these changes? In what ways?

22) Do you feel the current laws adequately address the issues raised by these agricultural changes? What further legislation would you like to see enacted? Is such further legislation moderately needed or urgently needed?

23) Do you agree with the way in which the past and present Secretaries of Agriculture (Daniel Glickman and Anne Veneman, respectively) have handled the referendum challenges to commodity checkoffs? Why or why not?

24) Do you agree with the USDA's aggressive efforts to fight the challenges to commodity checkoffs in the courts? Why do you think the USDA is fighting so hard?

25) Are you familiar with the "government speech defense" that is being used by the USDA?

26) What is your opinion of this defense? Do you agree with the argument that generic advertising created by commodity producers is "government speech"? Why or why not?

27) If the courts accept the government speech argument, what will be the consequences?

a) Do you foresee any changes in the decision-making and power exercised by the groups involved in the commodity checkoff programs?

b) If so, do you think these would be positive changes?

28) What is your opinion about the recent Supreme Court case (*United States v. United Foods*) holding that the mushroom checkoffs assessed against the mushroom growers in Tennessee are unconstitutional?

29) Do you believe that mandatory commodity checkoffs are compelled speech?

30) What is your opinion on other pending cases filed by parties using First Amendment arguments to challenge checkoffs in the dairy, pork and beef industries? (Interviewer will mention recent status and developments in pending cases.)

31) What consequences do you think will occur if the Supreme Court ultimately holds that mandatory assessments are unconstitutional?

32) If you are familiar with the *Central Hudson* intermediate standard for protection of commercial speech? What consequences do you think will arise if the Supreme Court switches to a stricter standard for protecting commercial speech?

33) Who else would you suggest I contact in exploring this research subject?

VITA

Retha J. Martin came to academia from the legal field after a career as a copyright and trademark attorney spanning twenty years from 1980 to 2000. She is a member of the Illinois bar and has worked both in private practice with an intellectual property law firm in Chicago and in corporate practice representing two major corporations, Kimberly-Clark Corporation and Whirlpool Corporation. From 1988 to 2000, she was the head of a corporate legal function at Whirlpool Corporation serving clients in a global environment. She is recognized for leading an international litigation team that successfully argued before the Supreme Court of India in an unfair competition action against a trademark infringer, obtaining a landmark ruling benefiting all trademark owners in India.

Ms. Martin served on the board of directors for the International Trademark Association (INTA) from 1993 to 1996 and participated on numerous INTA committees. In 1995 and 1996, she led an INTA team that met with Taiwanese trademark officials to promote changes to modernize Taiwan's trademark laws. She was nominated in 1998 for Southwestern Michigan Professional Woman of the Year. Ms. Martin has made speaking appearances and represented clients in a wide range of international forums in Europe, Asia and South America.

Rekindling academic interests in 2000, Ms. Martin completed a doctoral program in Communications at the University of Tennessee. She taught a senior level class in Mass Communications Law and Ethics for three semesters. Academic honors include: Outstanding Ph.D. student for 2000-2001, University of Tennessee Provost Citation for Extraordinary Professional Promise in April 2002, Graduate Student Research Award for

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Ms. Martin's research is focused on First Amendment issues in mediated and interpersonal communications and technology and its impact on society, including issues related to information policy, commercial speech, privacy, censorship and intellectual property. She is a member of the Association for Education in Journalism and Mass Communication, National Communication Association and Eastern Communication Association. Five of her peer-reviewed research papers have been selected for presentation at various conferences during 2001 and 2002 covering topics such as: "Trademarks and the First Amendment: The Anatomy of a Conflict;" "Goodbye Old Rules, Where are the New Rules? The Impact of the Federal Trademark Dilution Act of 1995 Through the Eyes of In-House Corporate Counsel;" "Commercial Speech Caught in the Crosshairs;" and "Justice for All: Campaign 2000 Media Coverage of Potential Impact of Judicial Nominations During the Next Presidency."

Ms. Martin earned her bachelor's degree in Communication Arts from Taylor University, Upland, Indiana, and a juris doctorate degree from Indiana University at Indianapolis.

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