

AGRICULTURE IN CRISIS: WHAT CALIFORNIA MUST DO TO PROTECT ITS MOST PRECIOUS INDUSTRY

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I. INTRODUCTION

For many years, California bounced between ranking as the seventh and eighth largest economic power in the world, depending on the rise and fall of China's economy. Recent reports show that the booming California economy has now surpassed both China and Italy to become the sixth largest economy in the world. Our growth as a state has been nothing short of amazing. Millionaires and billionaires seem to be surfacing everywhere like weeds on an abandoned farm.

Why then is production agriculture in the Golden State lagging behind? How is it that an industry with twenty-five billion dollars in farm-gate receipts in 1999¹ (almost twice that of Texas, the nation's number two agriculture state) is experiencing such financial pain?

As we begin a new millennium, California agriculture is in the midst of a critical stage in its evolution. The circumstances that have brought us to this point have been building over decades, often marked by lip service rather than thoughtful analysis by an industry that once was number one in California. Now this same industry strug-

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¹ CAL. AGRIC. STATISTICS SERV., AGRICULTURAL OVERVIEW, 1999, at <http://www.nass.usda.gov/ca/bul/agstat/indexcas.htm> (last visited Mar. 6, 2001) (on file with the San Joaquin Agricultural Law Review) [hereinafter CAL. AGRIC. STATISTICS SERV.].

gles to coexist in an environment that is increasingly urban in its orientation and expectations.

Reflecting on the past thirty years of policy issues addressed at the state level which have been or are critical to many of the hundreds of commodities grown in California, there has not been a time of such across-the-board pessimism as is found today. More importantly, there is good reason for this pessimism.

Talk to bankers, real estate brokers, fertilizer and chemical dealers, and anyone else connected to production agriculture, and it is the same story. The booming economy of California is not reflected in the rural sector of the state.

Is California agriculture the casualty of an increasingly dynamic world marketplace? Is the urbanization of California surrounding us in ways that strangle our ability to succeed? Is the industry contributing to its own financial hardship and decline?

This article will focus on these questions and offer opinion (including a glimpse into the future that may serve the reader in planning and decision making) from a vantage point that includes most, if not all, links in the food chain. By necessity, analysis will be narrowed to a few of the seemingly endless string of issues confronting California agriculture. This article will focus on four topics: Proposition 65,² biotechnology, commodity promotional programs, and public education and issues management. Each is an area of utmost importance to California's agriculture industry. Further, each topic is one that can enhance, through savvy planning by agricultural leaders and effective communication with elected state policy makers, rather than detract from, agriculture's future.

II. PROPOSITION 65 AND CALIFORNIA AGRICULTURE—AVOIDING THE WRECK

California is at a crossroads as Proposition 65³ takes direct aim at the crop protection and nutrition tools so vital to our agricultural in-

² Safe Drinking Water and Toxic Enforcement Act of 1986, CAL. HEALTH & SAFETY CODE §§ 25249.5-25249.13 (Deering 2001) (added by initiative measure, Proposition 65, approved Nov. 4, 1986, effective Jan. 1, 1987) [hereinafter Proposition 65].

³ Proposition 65 has two key components. First, it contains a discharge prohibition: "No person in the course of doing business shall knowingly discharge or release a chemical known to the state to cause cancer or reproductive toxicity into water or onto or into land where such chemical passes or probably will pass into any source of drinking water, notwithstanding any other provision or authorization of law except as provided in section 25249." *Id.* § 25249.5. Second, it contains a warning provision:

dustry. As more and more farm chemicals (i.e., pesticides and fertilizers) come within the cross hairs of this initiative, it is inevitable that some will be subject to the warning requirement and discharge prohibition of Proposition 65. The resulting benefit to public health is questionable at best; the resulting economic harm to production agriculture and related industries, as well as a tarnished image of California grown commodities, is a certainty.

The course charted by government and industry will greatly determine whether California agriculture can coexist with the extreme requirements of Proposition 65. The good news is that we can honor the science and avoid trashing our food supply, but it will take imagination and cooperation from both the public and the private sector.

A. *Bizarre Results*

Proposition 65 is currently being interpreted to require the listing of any chemical that can be shown to cause cancer or reproductive harm no matter how extreme the exposure required to produce the observed result and no matter how environmentally irrelevant. Besides being devoid of any logic or common sense, this unrealistic approach to questions of science overlooks one of the most fundamental tenants of toxicology: "All substances are poisons; there is none which is not a poison. The right dose differentiates a poison and a remedy."⁴

As illustrated below, the state risks undermining its credibility by listing compounds of general usage and enjoyment and devaluing warnings provided for more significant exposures. For instance, the listing of everyday consumer products such as chocolate as a reproductive toxicant is possible, as far fetched as that may sound. Such action would make no sense, but that is exactly where the process is headed.

Consider another example of the extremes of Proposition 65. The state and industry expend significant resources to improve the diets of Californians. Perhaps the most obvious example is the "5 A Day" program⁵ intended to increase the consumption of fresh fruits and veg-

"No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual, except as provided in Section 25249.10." *Id.* § 25249.6.

⁴ Philippus Aureolus Paracelsus (c. 1493-1541).

⁵ See PRODUCE FOR BETTER HEALTH FOUNDATION, EAT 5 A DAY FOR BETTER HEALTH, at <http://www.5aday.com/body.html> (last updated Mar. 13, 2001) (describing this national nutrition education initiative co-sponsored by the Produce for Better

etables through public education. If we do not change course soon, produce grown with Proposition 65 listed chemicals could appear in grocery stores with both a “5 A Day” sign and a birth defects warning.

Such clearly inconsistent messages result in confused consumers and undermined state credibility. There must be a better way.

B. Mistrust and Cynicism

The “state’s qualified experts” who comprise the Science Advisory Board⁶ have listed fewer chemicals in recent years. However, the chemicals listed pursuant to the authoritative bodies mechanism have increased dramatically through a process that remains a mystery to most outside the California Environmental Protection Agency (Cal EPA). While registrants have at least two opportunities for input to the Office of Environmental Health Hazard Assessment (OEHHA),⁷ there is rarely any feedback and decisions are made without explanation.

An excellent example of this black hole process is the consideration for listing by OEHHA of the 65 Toxic Release Inventory (TRI) List chemicals⁸ as required by a judicial ruling.⁹ Public workshops were held, volumes of data were submitted and, ultimately, OEHHA summarily published notices of intent to list specific chemicals.

The one-way street that is the current Proposition 65 process has bred mistrust and cynicism, and it provides a substantial disincentive to the development of science to address questions relative to listing decisions. Science of this type is expensive and will not be undertaken unless the regulated community believes it will be fairly considered by the listing authority. In the end, this failure to adequately explain decisions will deprive the process of the very science that was to be the cornerstone of Proposition 65.

Health Foundation and the National Cancer Institute).

⁶ See CAL. HEALTH & SAFETY CODE § 25249.8 (Deering 2001); CAL. CODE OF REGS. tit. 22, § 12301 (2001).

⁷ See CAL. CODE OF REGS. tit. 22, § 12301(c) (2001) (identifying the OEHHA as the “lead agency” of the Science Advisory Board).

⁸ 42 U.S.C. § 11023(c) (2001); see 40 C.F.R. pt. 372 (2000) (the regulation that added 286 chemicals to the TRI list).

⁹ See *Western Crop Protection Ass’n v. Davis*, slip op. C029727 (Cal. Ct. App. filed Jun. 8, 2000).

C. The "Scarlet Letter"

Whether it is California rice in Japan, tree fruit in Taiwan, or nuts in Europe, our agricultural exports compete in hotly contested global markets. To succeed in this very competitive environment, we depend heavily on our reputation as producers of high quality, wholesome food products.

Proposition 65 poses a real threat to California agricultural exports by casting doubt on the safety of our food products. The minute a chemical is listed, the "scarlet letter" attaches. In the world marketplace, word will spread that California products are grown using materials that the state itself has declared to be hazardous. The immediate effect will be the devaluation of our products. California growers will be left with the disparate position that Proposition 65 should be ignored or that other countries grow products with the same or worse chemicals.

Even in domestic markets, California's agriculture will be severely disadvantaged by the "scarlet letter" effect. Given a choice, food processors will buy commodities grown in other states rather than chance the requirement of a Proposition 65 warning label on their product.

The potential for disruption and severe damage to California agriculture is tremendous unless Proposition 65 is applied to the industry in a thoughtful, scientifically sound, and careful fashion. The risk is exacerbated by the uncertainty caused by the enforcement of Proposition 65 and the failure of OEHHA to establish "no significant risk levels" for listed chemicals.

D. Enforcement

Proposition 65 has spawned a "cottage industry" of attorneys who routinely file sixty-day notice letters and initiate litigation regarding listed chemicals. These cases generally lead to settlement involving some agreement on compliance and a cash payment. Typically, by the rather arbitrary negotiation process, the party bringing the action walks away with far more than the twenty-five percent of the settlement provided in law.¹⁰

This "bounty hunter" approach to enforcement has led to much uncertainty and inequity. A settlement may be negotiated with one party willing to pay while another with fewer resources is saddled with more burdensome requirements in exchange for a smaller payment.

¹⁰ CAL. HEALTH & SAFETY CODE § 25192(a)(2)-(3) (Deering 2001).

Agriculture is particularly vulnerable in this regard. First, it is subject to several very specific regulatory programs that greatly facilitate the efforts of "bounty hunters." One very good example is California's requirement of full use reporting of pesticides¹¹ which provides a readily available list of potential defendants. Second is the nature of agricultural use of listed chemicals. Most industries impacted by Proposition 65 deal only with the warning requirement,¹² with the discharge prohibition¹³ having little real impact. Conversely, in the agricultural setting, most, if not all, of the candidates for listing are of value only when they are dispersed (discharged) into the environment. This is a very big issue now that fertilizers will be carrying warnings due to naturally occurring trace elements.

The industry's exposure is clear. There will be direct losses caused by the imposition of the discharge prohibition. There will be indirect losses resulting from the chemical registrant's voluntarily withdrawing from the California market rather than facing the cost of potential litigation. Warnings will be given to growers who will have little or no knowledge of whether they must pass them on to wholesalers and retailers. Buyers will demand indemnification from sellers. This problem is compounded by the fact that no one can tell agriculture what science-based rules apply since they are all developed through litigation. Furthermore, if history is any guide, it will be years before the state establishes regulatory levels for chemicals listed as reproductive toxicants.

Some may suggest that this is positive and the exact result intended by Proposition 65. However, focusing reliance on fewer production tools is antithetical to the concept of Integrated Pest Management¹⁴ and increases the risk of pest resistance. Further, no one is served by lost productivity resulting from inadequate use of fertilizers.

E. Recommendation

As written, Proposition 65 poses real problems for every industry, especially for agriculture. Unfortunately, it is unrealistic to think that any change to the law will be forthcoming. The wise course would be

¹¹ CAL. FOOD & AGRIC. CODE §§12979, 14011.5 (Deering 2001).

¹² CAL. HEALTH & SAFETY CODE § 25249.6 (Deering 2001).

¹³ *Id.* § 25249.5.

¹⁴ Integrated Pest Management is defined in the Federal Food Quality Protection Act of 1996 as "a sustainable approach to managing pests by combining biological, cultural, physical, and chemical tools in a way that minimizes economic, health, and environmental risks." 7 U.S.C. § 136(r)(1) (2001).

common sense application of the law that honors the spirit of the Proposition without threatening our food supply.

The task is difficult but worth doing. To succeed it must involve disparate groups with a willingness to think “outside the [Proposition 65] box.” However, this alone will not be enough. Fortunately, there are alternatives to the current approach to Proposition 65.

1. Reasonable Interpretation To Avoid Absurd Results

Proposition 65, like all statutes, must be tempered with a healthy dose of reality. The law itself provides that a chemical is to be listed when it has been clearly shown through scientifically valid testing according to generally accepted principles to cause cancer or reproductive harm.

Certainly, the notion that the dose makes the poison, articulated more than 400 years ago, would qualify as one of those generally accepted principles. As such, it would allow consideration of whether the effect appeared at environmentally relevant doses or only in cases of extreme exposure. This approach would prevent the listing of chemicals based on theoretical risk and avoid unjustified warning labels.

2. Open Process For Listing

Today, listing decisions are made without any public analysis of the science and without peer review. The lead agency holds a workshop and requests data from interested parties. Once the deadline for submission has passed, a decision is made which may lead to a listing of the chemical. No information is provided to indicate what science was found persuasive or why any particular data was rejected.

There must be some way for the regulated community to know what went into the decision making process. The lead agency should be required to explain itself in writing prior to listing. The explanation should include a review and summary of all science submitted and a section detailing why the findings of any particular study were accepted or rejected.

In addition, certainty must be brought to the current confusion regarding the standards applied to listing decisions. There has been debate as to not only what the standard is, but also whether it is the same for all listing mechanisms. The confusion centers on the authoritative bodies’ listing process, which is set in regulation¹⁵ and can be changed without resort to amending the law.

¹⁵ CAL. CODE REGS., tit. 22, § 12306 (2001).

The criteria used for listing should be the same for all mechanisms and should be in regulation adopted in compliance with the Administrative Procedures Act.¹⁶ This would bring equity into the system and avoid arbitrary listing decisions.

Only through this type of open process and analysis can the regulated community see that the decisions are based on sound science. Knowing the rules will allow meaningful participation and aid the process by providing direct answers to the most pertinent questions. In addition, seeing that solid science will be given proper consideration will encourage groups to develop science and engage in the process.

3. Alternative Compliance Or Functional Equivalent

Current regulations provide that compliance with state and federal hazard communication standards satisfies Proposition 65 relative to the provision of warnings for occupational exposure.¹⁷ The regulatory provision also makes it clear that posting in compliance with regulations promulgated by the California Department of Pesticide Regulation is sufficient under Proposition 65.¹⁸

Additional opportunities for this functional equivalent concept should be explored. Perhaps food with residue levels below the tolerances set under the Federal Food Quality Protection Act of 1996 (FQPA)¹⁹ could be used to obviate the need to post warnings on produce.²⁰ It might be possible to take a similar approach relative to the discharge prohibition²¹ based on water quality standards established by state and federal agencies. Administrative action to clarify what is a "source of drinking water" could prevent unreasonable impacts on agriculture.²² The science used in the process could be improved by pro-

¹⁶ See CAL. GOV'T CODE §§ 11346-11348 (Deering 2001).

¹⁷ CAL. CODE REGS., tit. 22, § 12601(c)(1)(C) (2001).

¹⁸ *Id.*

¹⁹ Food Quality Protection Act of 1996, Pub. L. No. 104-170, 110 Stat. 1489.

²⁰ For example, add to Title 22 of the California Code of Regulations § 12505 as follows: "A person otherwise responsible for an exposure to a listed chemical which involves the consumption of food, drink or any other consumer product, does not 'expose' an individual within the meaning of Section 25249.6 of the Act to the extent that the person can show that the level of the listed chemical was in compliance with any tolerance established pursuant to the Food Quality Protection Act of 1996 (P.L. 104-170)."

²¹ CAL. HEALTH & SAFETY CODE § 25249.5 (Deering 2001).

²² For example, amend Title 22 of the California Code of Regulations § 12201(f) by adding the following:

'Source of drinking water' means any water that is actually used for do-

viding that only studies done in compliance with Good Laboratory Practices can be used for the listing of pesticides.

III. BIOTECHNOLOGY

Demographers predict that the population of the United States will double over the next 100 years and world population is set to increase 50 percent by 2050. Development and the need for housing will place an inexorable pressure on land that now constitutes a significant percentage of America's treasured open spaces. Simultaneously, more food will be required to support population growth and improving standards of living. If agricultural efficiency remains static, then more land will be needed to grow more food. Faced with the choice of starvation or cutting down forests, mankind will have few options.²³

In 1881 the first hybridized corn was produced.²⁴ Since that time farmers and ranchers have sought improved plant varieties and livestock breeds. Plants and animals with favorable traits are routinely se-

mestic or municipal supply or has been designated as suitable or potentially suitable for domestic or municipal supply by the appropriate Regional Water Quality Control Board. 'Source of drinking water' does not include surface and ground waters where: (A) The total dissolved solids (TDS) exceed 3,000 mg/l (5,000 uS/cm, electrical conductivity) and it is not reasonably expected by Regional Boards to supply a public water system, or (B) There is contamination, either by natural processes or by human activity (unrelated to a specific pollution incident), that cannot reasonably be treated for domestic use using either Best Management Practices or best economically achievable treatment practices, or (C) The water source does not provide sufficient water to supply a single well capable of producing an average sustained yield of 200 gallons per day. (D) The water is in systems designed or modified to collect or treat municipal or industrial wastewaters, process waters, mining wastewaters, or stormwater runoff, provided that the discharge from these systems is monitored to assure compliance with all relevant water quality objectives as required by the Regional Boards, or (E) The water is in systems designed or modified for the primary purpose of conveying or holding agricultural drainage waters. (F) The water is in an aquifer that is regulated as a geothermal energy producing source or has been exempted administratively pursuant to 40 Code of Federal Regulations, Section 146.4 for the purpose of underground injection of fluids associated with the production of hydrocarbon or geothermal energy, provided that these fluids do not constitute a hazardous waste under 40 Code of Federal Regulations, Section 261.3.

²³ Press Release, U.S. Sen. Dick Lugar, Chairman of the Senate Agriculture, Nutrition and Forestry Committee (Jan. 24, 2000) (on file with author).

²⁴ AM. FARM BUREAU FED'N, FARM FACTS 22 (2000), available at <http://www.fb.org/brochures/farmfacts/ff00p22.pdf> (last modified Jan. 30, 2001).

lected for breeding and crossbreeding in search of superior characteristics. It often takes years of selective breeding to secure specific traits.

When applied to agriculture, the science of biotechnology is more precise than traditional crossbreeding and greatly speeds up the process by identifying and applying specific desired traits. For many farmers, biotechnology has basically improved the process that they have been practicing for centuries. This is one of the primary reasons agriculture has been so quick to accept the introduction of this technology. However, as we are learning, this technology, unlike traditional methods of crossbreeding, does not come free of concern and criticism.

A. *Different Agendas*

In the more than 100 years since the introduction of hybrid corn, many things have changed. Today, the most difficult issue to overcome, arguably, is that the average American citizen has become complacent because of the fact that food is cheap and there is plenty of it. Americans, on average, spend less than eleven percent of their income on food and less than any other country in the world.²⁵ A majority of the American population has no concept of hunger. Americans are not concerned with quantity of food; their focus is quality.

Beyond our borders the picture is very different. Around the world, more than 800 million people go to bed hungry. More than 170 million preschool children are undernourished. Some five million die every year from nutrition-related illnesses. More than a half-million children go blind each year from a lack of vitamin A, and iron deficiencies are responsible for anemia among many millions of women and children, making them vulnerable to a host of diseases.²⁶

Biotechnology has much to offer people around the world, but American consumers gain no direct benefit from the genetically-modified food currently available; the benefits virtually all go to the American farmer.²⁷ The clear environmental benefits of biotechnology

²⁵ *Id.* at 2, available at <http://www.fb.org/brochures/farmfacts/ff00p2.pdf>. The United Kingdom spends 11.2%, Australia 14.9%, Japan 17.6%, South Africa 27.5%, and India 51.3%.

²⁶ Per Pinstrup-Andersen, *The Developing World Simply Can't Afford To Do Without Agricultural Biotechnology*, INT'L HERALD TRIB., Oct. 28, 1999, (Opinion), at 9.

²⁷ Gordon Conway, President, The Rockefeller Foundation, Speech delivered to the Edinburgh Conference on the Scientific and Health Aspects of Genetically Modified Foods (Mar. 28, 2000) (transcript available in the San Joaquin Agricultural Law Review office).

are largely discounted in public debates. Reduced tillage is important, but not high enough on the radar screen to significantly impact consumer acceptance. Reduced chemical use is an important issue for many, but with the growing popularity of organic commodities and the image that comes with that sector, biotechnology has not been seen as an appealing substitute.²⁸ There is little doubt that these issues would be important to a citizen in India paying more than fifty-one percent of her income for food. In the United States, Europe and other “developed” nations, however, these are merely issues of luxury and pale in comparison to our worries about the stock exchange and rising gasoline prices. As former Deputy Secretary of the United States Department of Agriculture Jack Parnell²⁹ often states, “When you have a full plate you have a thousand problems, but when you have an empty plate you have only one problem.”

The economic situation of most developing countries makes the debate regarding the development of biotechnology almost seem trivial. Countries like South Africa and China “cannot afford to limit themselves to the industrialized world’s narrow interpretation of risk assessment. Likewise, they cannot afford to allow the Western debate to slow developing countries’ access to already existing and expected future benefits of biotechnology.”³⁰

A recent report issued by Greenpeace states that California agriculture is at a “crossroads” and that the state’s consumers must “choose [between] genetic engineering [and] organic agriculture. Both cannot coexist in the state.”³¹ This is an overstatement that cannot be supported by any objective analysis of available evidence. However, if this technology is to continue, those involved with its development and promotion must handle the issue differently. Consumer confidence must be rebuilt. Programs must be developed that build consumer confidence in the products they purchase. And, perhaps most importantly,

²⁸ Martina McGloughlin, *Without Biotechnology, We’ll Starve*, L.A. TIMES, Nov. 1, 1999 at B7, available at LEXIS, News Library, Individual Publication File (“According to the National Agricultural Statistics Service, 2 million fewer pounds of insecticide were used in 1998 to control bollworm and budworm than were used in 1995, before ‘Bt’ cotton was introduced.”).

²⁹ Jack Parnell was the Deputy Secretary of the United States Department of Agriculture from 1989 until 1991.

³⁰ Jennifer A. Thomson and Zhang-Liang Chen, *Biotechnology Isn’t a Luxury in Some Nations*, L.A. TIMES, Apr. 10, 2000, at B7, available at LEXIS, News Library, Individual Publication File.

³¹ DR. DOREEN STABINSKY, GREENPEACE, *California at the Crossroads: The Impacts of Genetic Engineering on California’s Agriculture* 5 (2000).

these challenges must be approached as opportunities for the technology, not as threats to its existence.

B. A Broken System

On September 22, 2000, Kraft Foods recalled Taco Bell brand taco shells from grocery stores' shelves because tests showed they were made with a genetically engineered corn—StarLink.³² This corn was not approved for human consumption by the United States Environmental Protection Agency (US EPA) because of concern that the added protein might cause allergic reactions in consumers. On October 11, 2000, Safeway, Inc. recalled its store brand taco shells after an anti-biotechnology group announced that they had detected StarLink in Safeway's product.³³ Days later, Mission brand tortillas followed suit, not because StarLink corn had been detected in their product, but because the Safeway shells and the Kraft product had come from the same Texas mill.³⁴ On October 21, 2000, it was reported that The Kellogg Co. shut down one of its cereal plants because it could not guarantee that the corn was free of StarLink.³⁵

In the end, Aventis CropScience Inc., the owner of the StarLink corn variety, in an attempt to relieve consumer concerns, purchased an estimated \$68 million of the corn variety from producers.³⁶ Experts agree this situation could have been avoided had the biotechnology and production agriculture industries been more sensitive to the risks of commingling.

C. Labeling/The Federal Approach

Many anti-biotechnology advocates will argue that mandatory labeling of food products derived from biotechnology is necessary to pre-

³² Melinda Fulmer, *Taco Bell Recalls Shells That Used Bioengineered Corn*, L.A. TIMES, Sept. 23, 2000, at A1, available at LEXIS, News Library, News Group File.

³³ Melinda Fulmer, *EPA to Revoke Starlink Corn Registration to End Planting*, L.A. TIMES, Oct. 13, 2000, at C3, available at LEXIS, News Library, Current News File [hereinafter Fulmer, *EPA to Revoke Starlink*]; *Safeway Recalls Taco Shells That May Contain Genetically Modified Corn* (CNN television broadcast, Oct. 14, 2000) available at LEXIS, News Library, Current News File.

³⁴ Fulmer, *EPA to Revoke Starlink*, *supra* note 33.

³⁵ *Kellogg's Temporarily Shuts Down Plant Because Suppliers Can't Guarantee the Corn They Sell Kellogg's is Free of Starlink*, (CBS television broadcast, Oct. 21, 2000) available at LEXIS, News Library, News File.

³⁶ Melinda Fulmer, *Bioengineered Corn Also Found in Safeway Brand Taco Shells*, L.A. TIMES, Oct. 12, 2000, at C3, available at LEXIS, News Library, Current News File.

vent a future StarLink problem. To the contrary, a mandatory labeling system would not have helped because StarLink was not approved for human consumption and, therefore, would have been unaffected by any such requirement. To understand this rationale, it is important to know the federal regulatory process.

The US EPA, the Food and Drug Administration (FDA), and the United States Department of Agriculture (USDA) share the responsibility for regulating all genetically engineered products. US EPA regulates and registers plant pesticides. "A plant pesticide is defined as a 'pesticidal substance that is produced in a living plant and the genetic material necessary for the production of the substance, where the substance is intended for use in the living plant.'" ³⁷ The most common example of a plant pesticide is Bt, *Bacillus thuringiensis*, "a naturally occurring" soil bacterium with known insecticidal properties. ³⁸ Bt is also "one of the only pesticides allowed in organic production." ³⁹ "Under the authority found in the Federal Plant Pest Act and the Plant Quarantine Act, USDA's Animal and Plant Health Inspection Service (APHIS) issues field-test permits for new plants that have the potential to create pest problems in domestic agriculture." ⁴⁰ The Federal Food, Drug and Cosmetic Act (FFDCA) "gives FDA a broad range of legal authority . . . to require premarket review and approval in cases where protection of public health is required, such as when a substance is added intentionally to a food and there are questions about its safety." ⁴¹

FDA has determined that biotechnology derived foods and feedstuffs are substantially equivalent to conventional foods and should be regulated according to the same standards. Even the respected National Research Council has spoken out regarding the safety of food products derived from biotechnology. "[A]vailable evidence shows that commercially available foods derived from plants which have been genetically modified through modern biotechnology to protect against pests are as safe to eat as those modified through conventional breeding methods." ⁴²

³⁷ SUBCOMM. ON BASIC RESEARCH, U.S. H.R. COMM. ON SCIENCE, 106th CONG., SEEDS OF OPPORTUNITY: AN ASSESSMENT OF THE BENEFITS, SAFETY, AND OVERSIGHT OF PLANT GENOMICS AND AGRICULTURAL BIOTECHNOLOGY, at 23 (Apr. 13, 2000) [hereinafter SEEDS OF OPPORTUNITY].

³⁸ MONSANTO, KEY FACTS ABOUT FOOD & FEED SAFETY: THE PRODUCTS OF BIOTECHNOLOGY (2000).

³⁹ STABINSKY, *supra* note 31.

⁴⁰ SEEDS OF OPPORTUNITY, *supra* note 37, at 20.

⁴¹ *Id.* at 23.

⁴² COMM. ON GENETICALLY MODIFIED PEST-PROTECTED PLANTS, NAT'L RESEARCH

The current regulatory scheme “uses characteristics of the food, not the processes used in its production, as the basis for regulating food products derived through biotechnology.”⁴³ Biotechnology enhanced foods are required to be labeled if the food is significantly altered, could cause an allergic reaction in some people, or other safety problems exist.

D. Labeling/The California Approach

The labeling issue is not new to California. In 1994, the California Interagency Task Force on Biotechnology, created by Governor Pete Wilson, reported to the state legislature that labeling was unnecessary because it “would provide no beneficial health and safety information.”⁴⁴ Notwithstanding the findings of the task force, recent consumer interest in biotechnology brought the issue back to the forefront during the 1999-2000 session of the California legislature. Senate Bill 1513 (SB 1513) was introduced by Senator Tom Hayden⁴⁵ to require “that manufacturers, producers, and distributors of food intended for human consumption label genetically engineered food products.”⁴⁶ This legislation started a flurry of debate around the State Capitol on the issue of biotechnology. Advocates for consumer and environmental interests argued that consumers have a right to know the composition of the food they purchase. Industry and manufacturing representatives argued that the issue was best dealt with at the federal government. Eventually, SB 1513 was defeated in committee.⁴⁷

The industry-preferred approach was introduced in the 2000 legislative session as Senate Bill 2065 (SB 2065)⁴⁸ by Senator Jim Costa.⁴⁹ SB 2065 provides for a comprehensive analysis of biotechnology by

COUNCIL, REPORT IN BRIEF, GENETICALLY MODIFIED PEST-PROTECTED PLANTS 1 (2000).

⁴³ AM. DIETETIC ASS'N, BIOTECHNOLOGY AND THE FUTURE OF FOOD, 95 J. AM. DIETETIC ASS'N 1429, 1431 (1995) *available at* <http://www.eatright.org/abiotechnology.html>.

⁴⁴ CAL. INTERAGENCY TASK FORCE ON BIOTECHNOLOGY, FOOD LABELING SUBCOMMITTEE REPORT 24 (1994).

⁴⁵ Chairman of the Senate Committee on Natural Resources and Wildlife, 1999-2000 Reg. Sess.

⁴⁶ S.B. 1513, 1999-2000 Reg. Sess. (Cal. 2000).

⁴⁷ S.B. 1513 was defeated in the Assembly Agriculture Committee on a vote of 3-2 with 5 aye votes needed for passage. On August 18, 2000, the bill was returned to the Chief Clerk pursuant to Joint Rule 62(a).

⁴⁸ S.B. 2065, 1999-2000 Reg. Sess. (Cal. 2000).

⁴⁹ Chairman of the Senate Committee on Agriculture and Water Resources, 1999-2000 Reg. Sess.

creating an advisory group of state agencies responsible for evaluating the benefits, concerns, and challenges presented by biotechnology, including labeling. The California Department of Food and Agriculture (CDFA), along with the California Trade and Commerce Agency and the California Health and Welfare Agency, are designated co-chairs of the task force that will work with the University of California and other appropriate state agencies.⁵⁰

E. The California Rice Model

The California rice industry introduced Assembly Bill 2622 (AB 2622) in February of the 2000 legislative session to allow the industry to regulate itself by developing a program to address product identity and commingling.⁵¹ California rice is no longer an indistinguishable commodity. Specialty varieties such as Japonica, Akitakomachi, Koshihikari and Calmochi are grown in California for export to the Pacific Rim.⁵² California rice is used in Japan for table rice, sake, rice flour, and snacks. According to the CDFA, California rice exports to Japan were valued at more than \$90 million in 1998.⁵³

AB 2622 established a committee of the California Rice Commission appointed by the Secretary of the CDFA to develop terms and conditions for handling rice to avoid commingling with rice varieties.⁵⁴ Examples of conditions imposed on new varieties may include a prohibition of aerial application of seed, buffer zones, and written plans as to the protocol for cleaning harvesting equipment.

The law also provides rice farmers the ability to certify their rice by the State of California as to variety.⁵⁵ Certification is voluntary but will be utilized throughout the industry as more customers seek assurance that the product they purchase is not commingled.

Ironically, the rice industry introduced this legislation to deal primarily with disease concerns and the possible introduction of varieties grown in other areas of the United States, such as Red Rice,⁵⁶ but may

⁵⁰ CAL. FOOD & AGRIC. CODE § 492(a) (Deering 2001).

⁵¹ A.B. 2622, 1999-2000 Reg. Sess. (Cal. 2000) (introduced by Assembly Member Richard Dickerson).

⁵² See CAL. RICE COMM'N, CALIFORNIA RICE, at http://www.calrice.org/carice/guide/california_rice.html (last visited Mar. 26, 2001); CAL. RICE COMM'N, EDUCATORS, at http://www.calrice.org/educators/fact_sheet.html (last visited Mar. 26, 2001).

⁵³ STABINSKY, *supra* note 31, at 13.

⁵⁴ A.B. 2622, 1999-2000 Reg. Sess. (Cal. 2000).

⁵⁵ CAL. FOOD & AGRIC. CODE §§ 55070-55076 (Deering 2001).

⁵⁶ Red Rice is an annual grass, adapted to an aquatic habitat, that reproduces by seed. The grain shatters easily when ripe. The many types include those with short,

have value in the biotechnology arena as well. While biotechnology rice is not commercially produced in California today, nor is it expected in the near future, the law developed by the California rice industry seems well suited to address consumer concerns.

F. Recommendations

“Condemning agricultural biotechnology for its potential risks without considering the alternative risks of prolonging the human misery caused by hunger, malnutrition and child death is as unwise and unethical as blindly pursuing this technology without the necessary biosafety.”⁵⁷ While easy to say, condemnation remains. How then do we change public attitude?

The biotechnology industry must be inclusive. Consumer ignorance will generate fear. Communication and education are vital. The regulatory scheme did not fail, the identity preservation program did.

Additionally, the identity preservation model developed by the California rice industry may be adaptable to other commodities. The value of this existing example should not be overlooked.

Finally, to focus on labeling as the solution is to miss the point. For instance, in the case of StarLink corn, labeling was not required because it was approved only as a feed commodity. The StarLink problem did, however, expose flaws in farm practices and the nation’s grain handling system that must be resolved.

With these points in mind, California agriculture can engage in purposeful direction as the issues surrounding biotechnology continue. As many who have addressed the issue have recognized, the industry and the government must ensure the consumer is not left in the dark. Education is the key to gaining consumer confidence, and must be incorporated into present and future agriculture-industry decisions.

IV. AGRICULTURAL COMMODITY PROMOTIONAL PROGRAMS, WILEMAN: THE LAWSUIT THAT WOULD NOT DIE

California has long reigned supreme as the premier agricultural production region in the nation as well as the world. With more than 250 commodities currently produced in the state,⁵⁸ and a gross cash income

medium, or long grains; those with straw-colored, red, or black hulls; and those with short or long awns on the spikelet.

⁵⁷ Pinstrup-Anderson, *supra* note 26.

⁵⁸ See CAL. DEPT. FOOD & AGRIC., A COMPLETE GUIDE TO CALIFORNIA COMMODITIES, at <http://www.cdffa.ca.gov/kids/commodities/> (last visited Apr. 13, 2001).

of \$26.7 billion in 1999,⁵⁹ there is no state that is even a close second. Much of this success can be attributed to the existence of mandatory commodity marketing programs. There are currently sixty-one programs addressing California agricultural commodities.⁶⁰ The proliferation of these programs in California is echoed nationwide. Forty-five programs were operating under federal law in 1986. Across the country, the programs operating under state law totaled 316 in 1986 as compared to 241 in 1979.⁶¹ Today, while new programs are currently in the works,⁶² existing programs are in danger of extinction. The constant pressure of litigation threatens to reduce or eliminate the value of these tools.

This section of the article will start with a brief review of the various types of agricultural commodity programs. It will then focus on the current state of the law concerning the constitutionality of commodity marketing programs, the litigation challenges facing them, and what can be done to safeguard new and existing programs from these challenges.

Many farmers believed the commodity marketing programs were a good idea in 1933, and even though times have changed in many respects, the results of recent program continuation referenda indicate continued support.⁶³ Farmers need tools to farm profitably, and that

⁵⁹ CAL. AGRIC. STATISTICS SERV., *supra* note 1.

⁶⁰ There are twenty state commissions, twenty-seven state marketing orders, four state councils, and ten federal commodity marketing programs for California commodities. *Cf.* CAL. FOOD & AGRIC. CODE § 63901 (Deering 2001).

⁶¹ OLAN D. FORKER & RONALD W. WARD, COMMODITY ADVERTISING: THE ECONOMICS AND MEASUREMENT OF GENERIC PROGRAMS 81 (1993).

⁶² Telephone Interview with Steven Donaldson, Research Analyst/Economist, California Department of Food and Agriculture, Apr. 17, 2001 (stating that a Cut Flower Agreement program, with the goal of voluntary participation in quality regulations such as keeping the product cold from field to florist, is in the beginning stages of creation).

⁶³ *See* California Strawberry Commission Producer Referendum (Dec. 15, 1993) (96% voting in favor, representing 98% of the total volume) (on file with the San Joaquin Agricultural Law Review); California Avocado Commission Continuation Referendum (Feb. 9, 1996) (90% of producers voting in favor) (on file with the San Joaquin Agricultural Law Review); California Rice Commission Implementation Referendum (Apr. 2, 1999) (94.2% of producers voting in favor, representing 94% of the total volume) (on file with the San Joaquin Agricultural Law Review); California Asparagus Commission Continuation Referendum (Oct. 4, 2000) (87.7% voting in favor) (on file with the San Joaquin Agricultural Law Review); California Kiwifruit Commission Referendum (Nov. 6, 2000) (94% of producers voting in favor, representing 65.3% of the total volume) (on file with the San Joaquin Agricultural Law Review).

need goes beyond tractors, chemicals, and financing. One must be able to efficiently and effectively move the product through the channels of trade to the ultimate consumer. Increasingly, commodity marketing programs are performing that function by providing a single cohesive message which compliments what would otherwise be a cacophony of mixed, inconsistent, and at times conflicting signals from individual producers. Marketing programs also help to provide an industry with access to the global marketplace, enabling California's producers to better position themselves for international competition.

Generally, commodity marketing programs can be categorized as either federal or state. Federal programs can take the form of either marketing orders or stand-alone statutory programs. State programs can be classified as marketing orders, councils, or commissions created by stand-alone statutes.

A. *The Federal Programs*

The Agricultural Marketing Agreement Act of 1937 (AMAA)⁶⁴ provides the authority for federal marketing orders. The AMAA is an over-arching act that authorizes the Secretary of the USDA to promulgate commodity specific regulations in the Code of Federal Regulations.⁶⁵ Marketing orders must also be approved by either two-thirds of the affected producers or by producers who market at least two-thirds of the volume of the commodity.⁶⁶ Federal marketing orders can provide for joint promotion, advertising, marketing research, production research, designation of unfair trade practices, and minimum pricing and supply controls affecting the producers and processors of a specified agricultural commodity.⁶⁷ The AMAA also empowers the programs to impose mandatory assessments on an industry to fund its activities.⁶⁸ It is this compelled assessment of fees, used to fund generic advertising and promotional activities, which has generally raised the current plethora of constitutional challenges to the programs.

The AMAA is the direct descendent of Congress' initial response to the Depression's impact on agriculture, the Agricultural Adjustment Act of 1933.⁶⁹ The AMAA was enacted to resolve any doubts regard-

⁶⁴ Act of June 3, 1937, Pub. L. No. 137, 50 Stat. 246 (codified as amended in scattered sections of 7 U.S.C.).

⁶⁵ 7 U.S.C. § 608c (2001).

⁶⁶ *Id.* § 608c(9)(b).

⁶⁷ *Id.* § 602s.

⁶⁸ *Id.* § 608c(6)(I).

⁶⁹ Act of May 12, 1933, Pub. L. No. 10, 48 Stat. 31. The 1933 Act was amended

ing the law's continued vitality raised by Supreme Court decisions⁷⁰ invalidating provisions of the 1933 law that had not been amended in 1935.⁷¹ Congress' efforts were vindicated when the Supreme Court upheld the AMAA in 1939.⁷²

Commodities can also be regulated under a federal statutory stand-alone program. These programs are created by both an act of Congress and a vote by a super majority of the affected industry.⁷³ These federal stand-alone statutory programs typically include authority for joint promotion, advertising, research, and educational activities for the benefit of all producers and processors of the designated agricultural commodity.⁷⁴

B. The California State Programs

Like their federal counterparts, California state marketing orders are established by rules promulgated by the Secretary of the CDFR pursuant to an over-arching law, the California Marketing Act of 1937 (CMA).⁷⁵ The CMA authorizes the Secretary of the CDFR to promulgate marketing orders to regulate an industry.⁷⁶ The marketing orders generally provide for joint promotion, advertising, production research, quality regulations, quantity controls, and maturity standards for the producers and/or processors of a specified agricultural product.⁷⁷

One major distinction between state and federal marketing orders is in the area of quality and maturity standards. The AMAA provides specific authority to impose the same or comparable standards on imported commodities as are imposed on domestic production subject to an order.⁷⁸ While state program standards may be imposed upon com-

in 1935. S. REP. NO. 74-1011 (1935). It was reenacted as the AMAA in 1937.

⁷⁰ *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *United States v. Butler*, 297 U.S. 1 (1936).

⁷¹ H.R. REP. NO. 75-468 (1937) and S. REP. NO. 75-565 (1937).

⁷² *United States v. Rock Royal Co-Operative, Inc.*, 307 U.S. 533 (1939); *H.P. Hood and Sons v. United States*, 307 U.S. 588 (1939).

⁷³ *See, e.g.*, 7 U.S.C. §§ 2901-2911 (2001) (beef); 7 U.S.C. §§ 4601-4612 (2001) (honey); 7 U.S.C. §§ 2701-2718 (2001) (eggs).

⁷⁴ *See, e.g.*, 7 U.S.C. §§ 2901-2911 (2001) (beef); 7 U.S.C. §§ 4601-4612 (2001) (honey); 7 U.S.C. §§ 2701-2718 (2001) (eggs).

⁷⁵ CAL. FOOD & AGRIC. CODE §§ 58601-59293 (Deering 2001).

⁷⁶ *See, e.g.*, MARKETING BRANCH, CAL. DEPT. FOOD & AGRIC., MARKETING ORDER FOR PROCESSING STRAWBERRIES AS AMENDED (effective Aug. 23, 1967) (on file with the San Joaquin Agricultural Law Review).

⁷⁷ *See, e.g., id.* at art. III & IV (Grade Standards), art. VII (Research), art. VIII (Advertising and Promotion).

⁷⁸ 7 U.S.C. § 610(j) (2001).

modities entering California from other states,⁷⁹ their authority regarding shipments from foreign countries is less clear.

Commodities can also be regulated by state councils. Councils are very similar to state marketing orders. Councils are administered by advisory bodies made up of industry members who implement the program with the approval of the secretary.⁸⁰ The primary distinction between these programs and marketing orders is the fact that the authority of the council is specifically set forth in statute and may only be changed by a vote of the legislature.⁸¹ While this has the practical effect of making it more difficult to change fundamental provisions of the program, it also adds certainty and may give comfort to those concerned over the ability of any group within the commodity to affect a change in the program. This feature has made councils the choice for industries with diverse interests and a desire to tackle complex and technical problems. California has four councils covering dairy,⁸² beef,⁸³ salmon,⁸⁴ and seafood.⁸⁵ These programs involve people at numerous levels within an industry⁸⁶ and products in various forms.⁸⁷

Finally, a California commodity can be regulated by a state commission, which is a stand-alone statutory program created by both an act of legislature and a vote by a super majority of the affected industry approving the creation of the commission.⁸⁸ Commissions generally authorize the following joint actions of an industry: promotion, advertising, marketing research, production research, education, and the collection and dissemination of crop volume and related statistics.⁸⁹

⁷⁹ See *Fla. Lime and Avocado Growers v. Paul*, 373 U.S. 132 (1963).

⁸⁰ Compare CAL. FOOD & AGRIC. CODE § 58846 (Deering 2001) (describing the duties of Advisory Boards), with CAL. FOOD & AGRIC. CODE § 64151 (Deering 2001) (describing the duties of the Dairy Council).

⁸¹ See, e.g., CAL. FOOD & AGRIC. CODE, ch. 1, div. 22, pt. 2 (Deering 2001) (commencing with § 64001).

⁸² CAL. FOOD & AGRIC. CODE §§ 64001-64322 (Deering 2001).

⁸³ *Id.* §§ 64501-64736.

⁸⁴ *Id.* §§ 76501-76961.

⁸⁵ *Id.* §§ 78401-78588.

⁸⁶ See, e.g., *id.* §§ 64007, 78408.

⁸⁷ See CAL. FOOD & AGRIC. CODE §§ 64301, 64302 (Deering 2001).

⁸⁸ See CAL. FOOD & AGRIC. CODE § 63901 (Deering 2001) (codifying commodity specific councils and commissions operating under specific acts of the California Legislature); see, e.g., *id.* §§ 75001-75176 (California Egg Commission), §§ 75501-75656 (California Apple Commission), §§ 68001-68140 (California Kiwifruit Commission).

⁸⁹ See, e.g., CAL. FOOD & AGRIC. CODE §§ 75592, 75594 (authorizing California Apple Commission production research and promotion), §§ 75091, 75093 (mandating California Egg Commission education and marketing research) (Deering 2001).

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.

C. *Wileman and Its Progeny*

Several lawsuits are in various stages of litigation around the nation addressing the constitutionality of compelled funding for agricultural commodity programs.⁹⁰ The outcome of many of these cases depends on interpretation of the Supreme Court's decision in *Glickman v. Wileman Bros. & Elliott, Inc.*⁹¹

At least thirteen commodity programs⁹² have already faced or are currently facing litigation on the issue of their constitutionality. Nine have already emerged victorious.⁹³ Some of the programs that have previously faced constitutional challenges under the United States

⁹⁰ See, e.g., *United Foods, Inc. v. United States*, 197 F.3d 221 (6th Cir. 1999), cert. granted, 69 U.S.L.W. 3363 (U.S. Nov. 27, 2000) (No. 00-276). In *United Foods*, the Sixth Circuit, in a decision at odds with the Ninth and Tenth Circuits, stated, "[t]he Court's holding in *Wileman*, we believe, is that nonideological, compelled, commercial speech is justified in the context of the extensive regulation of an industry, but not otherwise." *Id.* at 224. Finding that the mushroom industry was not extensively regulated, the Court determined that the "portions of the Mushroom Act of 1990 which authorize . . . coerced payments for advertising are . . . unconstitutional." *Id.* at 225.

⁹¹ *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457 (1997).

⁹² The California Apple Commission, the Almond Board of California, the Beef Promotion and Research Act, the California Egg Commission, the California Table Grape Commission, the California Cling Peach Growers Advisory Board, the California Milk Advisory Board, the California Plum Marketing Board, the California Kiwifruit Commission, the California Grape Rootstock Improvement Commission, the Mushroom Council, the California Tree Fruit Agreement, the Michigan Cherry Committee, the Washington State Commodity Board (i.e. the Washington Hops Commission).

⁹³ The California Apple Commission, the Almond Board of California, the Beef Promotion and Research Act, the California Milk Advisory Board, the California Egg Commission, the Grape Rootstock Improvement Commission, the California Kiwifruit Commission, the California Tree Fruit Agreement, the California Cling Peach Growers Advisory Board.

Constitution face identical challenges under the California Constitution.⁹⁴ The vast majority of these challenges involve the mandatory payment of assessments, which are then used in part to fund generic commodity advertising and promotional programs. The challengers assert that this violates their constitutional rights to free speech and freedom of association.

The issue of whether the First Amendment rights of producers are violated by funding generic commodity promotional and advertising programs with compelled assessments has already been addressed by the United States Supreme Court in *Wileman*. *Wileman* involved federal marketing orders, promulgated under the AMAA, for peaches and nectarines.⁹⁵ These orders authorized mandatory assessments on producers and the use of those assessments to fund generic tree fruit advertisements.⁹⁶ The producers in *Wileman* asserted, among other things, that this violated their First Amendment rights to free speech and association.⁹⁷

In *Wileman*, the Court sought to resolve a conflict between the Ninth Circuit's previous decision in *Wileman Bros. & Elliott v. Espy*⁹⁸ with the Third Circuit's decision in *United States v. Frame*.⁹⁹ Both cases addressed the issue of whether the respective marketing programs violated the challengers' First Amendment rights to free speech and free association. In each case, the court applied the test enunciated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.¹⁰⁰ The two circuit courts reached different results.

In *Central Hudson*, the Supreme Court considered a situation in which the New York Public Service Commission, in a form of prior restraint, completely banned promotional advertising by the utility. In this application, the Court set forth a four-part analysis. For such restraint on commercial speech to overcome the protections of the First

⁹⁴ Compare *Gallo v. Cal. Milk Advisory Bd.*, 185 F.3d 969 (9th Cir. 1999) (holding plaintiff's first amendment rights to free speech and association were not violated under the United States Constitution), with *Gallo v. Lyons*, 24 Cal. 4th 468 (2000) (asserting nearly identical causes of action as were asserted in the federal action, only under the California Constitution).

⁹⁵ 7 C.F.R. pt. 916 (2001); 7 C.F.R. pt. 917 (2001) (initially included plums).

⁹⁶ 7 C.F.R. §§ 916.41, 916.45 (2001); 7 C.F.R. §§ 917.37, 917.39 (2001).

⁹⁷ *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 460-61 (1997).

⁹⁸ *Wileman Bros. & Elliott v. Espy*, 58 F.3d 367 (9th Cir. 1995), *rev'd sub nom.* *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457 (1997).

⁹⁹ *United States v. Frame*, 885 F.2d 1119 (3rd Cir. 1989).

¹⁰⁰ *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

Amendment, the Court held the speech must (1) concern lawful activity that is not misleading; (2) assert a “substantial” governmental interest; (3) if the foregoing are answered affirmatively, the regulation must “directly advance” the governmental interest asserted; and, (4) the regulation cannot be more extensive than is necessary to serve that interest.¹⁰¹ The court was careful to explain that this four-part analysis applied to the “complete suppression of speech.”¹⁰²

The Supreme Court articulated a less protective standard and a three-part test for evaluating the constitutionality of commercial speech regulation. First, the state must “assert a substantial government interest.”¹⁰³ Second, “the regulatory technique [must] be in proportion to that interest.”¹⁰⁴ Third, the incursion on commercial speech must be “designed carefully to achieve the State’s goal.”¹⁰⁵

In *Frame*, the Third Circuit held that the Beef Promotion and Research Act (Beef Act)¹⁰⁶ met the *Central Hudson* test for constitutionality.¹⁰⁷ The court determined that, while the Beef Act did slightly implicate the First Amendment rights of those obligated to participate in the mandatory marketing program, “the government has enacted this legislation in furtherance of an ideologically neutral compelling state interest and has drafted the Act in a way that infringes on the contributors’ rights no more than necessary to achieve the stated goal.”¹⁰⁸

Contrary to the holding in *Frame*, the Ninth Circuit held in *Espy* that the federal marketing order for California tree fruit did not meet the second or third prong of the *Central Hudson* test.¹⁰⁹ The Ninth Circuit stated, “[t]he assessments implicate the handler’s First Amendment rights because they are compelled to provide financial support for particular messages—the generic ads—associated with a particular group—peach and nectarine handlers.”¹¹⁰

Wileman sought to resolve this conflict by creating a new standard for assessing whether free speech and free association rights were vio-

¹⁰¹ *Id.* at 566.

¹⁰² *Id.* at 569.

¹⁰³ *Id.* at 564.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Beef Promotion and Research Act, 7 U.S.C. §§ 2901-2911 (2001) (a stand alone federal statutory program).

¹⁰⁷ *United States v. Frame*, 885 F.2d 1119, 1134 (3d Cir. 1989).

¹⁰⁸ *Id.* at 1137.

¹⁰⁹ *Wileman Bros. & Elliott v. Espy*, 58 F.3d 1367, 1379-80 (9th Cir. 1995), *rev’d sub nom.* *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457 (1997).

¹¹⁰ *Id.* at 1377.

lated by the use of mandatory assessments to fund a generic promotional and advertising program. Unfortunately, the Supreme Court's decision has not helped to stem the flow of litigation targeted at agricultural commodity programs. What the actual program requirements are in order to meet constitutional muster under *Wileman* is currently a hotly debated issue.

The *Wileman* court began its analysis by discussing the ways in which an industry for an agricultural commodity can be regulated under the AMAA and the actual regulations that affect the tree fruit industry.¹¹¹ After this discussion, the Court went on to state that the "legal question that we address is whether being compelled to fund this advertising raises a First Amendment issue for us to resolve, or rather is simply a question of economic policy for Congress and the Executive to resolve."¹¹² The Court went on to state:

In answering the question we stress the importance of the statutory context in which it arises. California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by antitrust laws. The business entities that are compelled to fund the generic advertising at issue in this litigation do so as a part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme. It is in this context that we consider whether we should review the assessments used to fund collective advertising, together with other collective activities, under the standard appropriate for the review of economic regulation or under a heightened standard appropriate for the review of First Amendment issues.¹¹³

It is this language that has created much of the confusion in the application of the *Wileman* analysis.

Courts do not agree on whether a comprehensive regulatory scheme that displaces competition is a necessary prerequisite in order for *Wileman* to apply. While some courts have held that a comprehensive regulatory scheme displacing competition is a threshold test that must be met in order for the *Wileman* analysis to apply,¹¹⁴ other courts have held that this is not necessary.¹¹⁵ Still other courts have not determined whether it is or is not necessary, but have simply stated that in any event, the cases under review concern highly regulated industries such

¹¹¹ *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 461-69 (1997).

¹¹² *Id.* at 468.

¹¹³ *Id.* at 469.

¹¹⁴ *United Foods, Inc. v. United States*, 197 F.3d 221, 224 (6th Cir. 1999), *cert. granted*, 69 U.S.L.W. 3363 (U.S. Nov. 27, 2000) (No. 00-276).

¹¹⁵ *Goetz v. Glickman*, 149 F.3d 1131, 1138-39 (10th Cir. 1998).

that it is not an issue.¹¹⁶

After discussing the regulatory scheme affecting tree fruit, the *Wileman* Court determined that the producers' complaint did not rise to the level of a First Amendment challenge. The Court reasoned that the mandatory funding of the generic advertising program was just one of the many economic regulations affecting the tree fruit industry and should be reviewed in the same manner as a court would review all of the other economic regulations affecting California's tree fruit industry.¹¹⁷ The Court stated:

Three characteristics of the regulatory scheme at issue distinguish it from laws that we have found to abridge the freedom of speech protected by the First Amendment. First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not compel the producers to endorse or to finance any political or ideological views. Thus, none of our First Amendment jurisprudence provides any support for the suggestion that the promotional regulations should be scrutinized under a different standard from that applicable to the other anticompetitive features of the marketing orders.¹¹⁸

This is the three-part test that comprises the heart of the *Wileman* decision.

In assessing the first factor, the court reviewed *Wileman's* assertion that imposition of the Commission's assessments reduced the amount of money producers had to conduct their own advertising, thereby constraining the producer's ability to communicate their message.¹¹⁹ The Court determined that this did not amount to a restriction on speech. "The fact that an economic regulation may indirectly lead to a reduction in a handler's individual advertising budget does not itself amount to a restriction on speech."¹²⁰

Analyzing the second factor, the Court held that the assessments did not infringe on the grower's right to be free from compelled speech.¹²¹ The Court stated:

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

¹¹⁶ *Gallo Cattle Co. v. Cal. Milk Advisory Bd.*, 185 F.3d 969 (9th Cir. 1999); *Cal-Almond Inc. v. United States Dep't of Agric.*, 192 F.3d 1272 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 2215 (2000).

¹¹⁷ *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 476-77 (1997).

¹¹⁸ *Id.* at 469-70.

¹¹⁹ *Id.* at 470.

¹²⁰ *Id.*

¹²¹ *Id.* at 470-71.

require them to use their own property to convey an antagonistic ideological message, . . . force them to respond to a hostile message when they 'would prefer to remain silent,' . . . or require them to be publicly identified or associated with another's message.¹²²

The Court reasoned that: 1) the producers were not required to speak, but were merely required to provide financial support for the advertising; 2) with "trivial exceptions," the generic advertising did not convey any messages with which the producers disagreed; and 3) the advertising was not attributed to the producers, but instead to the California Tree Fruit Agreement.¹²³

The Court also discussed compelled funding cases in other contexts, including its earlier decision in *Abood v. Detroit Board of Education*¹²⁴ and stated that, "*Abood* merely recognized a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's 'freedom of belief.'" ¹²⁵ The theory behind this prohibition is that an individual should not be forced to pay for political or ideological speech that is contrary to his beliefs. The *Wileman* Court held that "requiring respondents to pay the assessments cannot be said to engender any crisis of conscience. None of the advertising in this record promotes any particular message other than encouraging consumers to buy California tree fruit."¹²⁶

After discussing the fact that this case was not comparable to those cases in which an objection was based on political or ideological disagreement with the message, the Court went on to state that even if it was, that would not necessarily transform this into compelled speech in violation of the First Amendment.¹²⁷

[R]ather than suggesting that mandatory funding of expressive activities always constitutes compelled speech in violation of the First Amendment, our cases provide affirmative support for the proposition that assessments to fund a lawful collective program may sometimes be used to pay for speech over the objection of some members of the group.¹²⁸

As long as the assessments are used to fund speech that is germane to the purpose for which the compelled association was justified, the funding of those activities with the dissenters' monies is constitu-

¹²² *Id.*

¹²³ *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 471 (1997).

¹²⁴ *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

¹²⁵ *Wileman*, 521 U.S. at 471.

¹²⁶ *Id.* at 472.

¹²⁷ *Id.*

¹²⁸ *Id.* at 472-73.

tional.¹²⁹ The Court analogized the tree fruit situation to the one challenged in *Keller v. State Bar of California*.¹³⁰ The Court determined that the test stated in *Keller* was clearly met in this instance because, “(1) the generic advertising of California peaches and nectarines is unquestionably germane to the purposes of the marketing orders and, (2) in any event, the assessments are not used to fund ideological activities.”¹³¹

The *Wileman* Court, therefore, held that the mandatory assessments for generic advertising of California tree fruits did not implicate the challenger’s First Amendment rights. The Court stated, “what we are reviewing is a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress. The mere fact that one or more producers ‘do not wish to foster’ generic advertising of their product is not a sufficient reason for overriding the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial.”¹³² This finding means that the regulation is subject to rational basis review, a standard which it easily met, instead of intermediate scrutiny under *Central Hudson*, the standard for commercial speech and a more difficult standard to meet.

The application of this analysis to other agricultural commodity marketing programs has been problematic. While *Wileman* addressed a program created by an AMAA authorized federal marketing order, the Court’s analysis has also been applied to other commodity promotional programs. In *Goetz v. Glickman*,¹³³ a case pending before the Tenth Circuit Court of Appeals at the time *Wileman* was decided and rebriefed in light of *Wileman*’s holding, the Tenth Circuit held the Beef Act’s use of mandatory assessments to fund advertising promoting beef consumption did not raise First Amendment issues.¹³⁴ The Tenth

¹²⁹ *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 473 (1997).

¹³⁰ *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990). In *Keller*, the Supreme Court determined that compelled fees used to fund lobbying on political or ideological issues that were not germane to the state bar’s “purpose of regulating the legal profession or ‘improving the quality of legal services’ ” violated plaintiff’s right to free speech. *Id.* at p. 14. The Court did not strike down the mandatory imposition of fees for all political purposes, it only struck down the use of those fees for non-germane purposes. The State Bar is still free to impose and collect mandatory fees for germane purposes. The Court essentially held that compelling attorneys to pay mandatory fees was constitutional; the non-germane use of a small portion of those fees is not. *Id.*

¹³¹ *Wileman*, 521 U.S. at 473.

¹³² *Id.* at 477.

¹³³ *Goetz v. Glickman*, 149 F.3d 1131 (1998).

¹³⁴ *Id.* at 1139.

Circuit's decision did not address whether a regulatory scheme displacing competition was necessary in order for *Wileman* to apply.¹³⁵ Instead, the analysis focused on the three-part test articulated in *Wileman* and determined the Beef Act met this test. Therefore, there was no violation of the challenger's First Amendment rights.¹³⁶

The Ninth Circuit Court of Appeals, in both *Cal-Almond Inc. v. United States Department of Agriculture*¹³⁷ and *Gallo Cattle Company v. California Milk Advisory Board*,¹³⁸ did not reach the issue of whether a comprehensive regulatory scheme displacing competition is necessary for *Wileman* to apply. If it is, the almond and dairy industries at issue are at least as regulated as tree fruit was in *Wileman*. Both of these cases, therefore, begin with a discussion of the regulations affecting each particular industry.

In *Gallo*, the Ninth Circuit addressed whether a state marketing order, authorized by the CMA and which used mandatory assessments to pay for generic commodity advertising of dairy products, violated the First Amendment. In applying the *Wileman* analysis to the facts of the case, the court stated, "The first step in *Wileman* is an examination of the statutory scheme under which the assessments are made Gallo admits that the California milk producers are regulated to the same extent as, if not more than, the tree fruit growers in *Wileman*."¹³⁹

The *Gallo* court did not address the type or quantity of regulations needed in order for the statutory scheme to qualify under *Wileman*. It only stated that the milk producers were regulated at least to the same extent as the tree fruit growers in *Wileman*.¹⁴⁰ The court went on to hold that the milk producer's First Amendment rights were not violated by the use of mandatory assessments to fund a generic advertising and promotional campaign. The court determined that the three-part test articulated in *Wileman* was met because first, the marketing order did not impose a restraint on Gallo's freedom to communicate. Gallo was free to advertise or otherwise communicate any message to any audience in any manner that it desired. Second, the marketing order did not compel Gallo to engage in any actual or symbolic speech. Third, the marketing order did not compel Gallo to endorse or finance

¹³⁵ *Id.* at 1138-39.

¹³⁶ *Goetz*, 149 F.3d at 1139.

¹³⁷ *Cal-Almond Inc. v. United States Dep't of Agric.*, 192 F.3d 1272 (9th Cir. 1999), cert. denied, 120 S.Ct. 2215 (2000).

¹³⁸ *Gallo Cattle Co. v. Cal. Milk Advisory Bd.*, 185 F.3d 969 (9th Cir. 1999).

¹³⁹ *Id.* at 974.

¹⁴⁰ *Id.*

any political or ideological views that were not germane to the purposes for which compelled association was justified.¹⁴¹

The Ninth Circuit again addressed the constitutionality of marketing orders in *Cal-Almond*. In addressing the regulatory issue, the court confined its sparse analysis to whether “constraints have been placed upon the handlers’ independent action.”¹⁴² The court simply stated,

The Act confers on the Secretary of Agriculture the power ‘to establish and maintain[] orderly marketing conditions for agricultural commodities.’ Pursuant to mandate, the Secretary is empowered to ‘[e]stablish or provid[e] for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of’ almonds, among other commodities Thus, as in *Gallo* and *Wileman*, it would appear that the almond handlers are ‘part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme,’ . . . nor, indeed, does *Cal-Almond* dispute in its briefs on appeal whether handlers are so regulated.¹⁴³

The Ninth Circuit held that because the law creating the program contained language authorizing the regulation of the industry as part of a broader collective enterprise, the *Wileman* analysis was applicable.

The court held that the three-part test articulated in *Wileman* was met; therefore, *Cal-Almond*’s First Amendment rights were not violated.¹⁴⁴ While *Cal-Almond* argued that the third prong was not met because it had ideological objections to the messages funded by the Commission, the court stated, “those objections do not render the advertisements compelled speech in violation of the First Amendment so long as the messages are germane to the purposes of the Almond Order and the Act.”¹⁴⁵ The court determined that the messages were germane to the Almond Order and the Act’s purpose of assisting, improving or promoting the marketing, distribution and consumption of almonds.¹⁴⁶ The court held that because the commodity promotional programs “do not compel speech or the endorsement of non-germane messages, leaving *Cal-Almond* free to advertise however it desires, the Almond Order is ‘a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress.’ ”¹⁴⁷

¹⁴¹ *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 469-70 (1997).

¹⁴² *Cal-Almond*, 192 F.3d at 1274.

¹⁴³ *Id.* at 1274-75.

¹⁴⁴ *Id.* at 1277.

¹⁴⁵ *Id.* at 1276.

¹⁴⁶ *Id.* (citing 7 U.S.C. § 608c(6)(I) (1999)).

¹⁴⁷ *Id.* at 1277 (quoting *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 477

In *United Foods v. United States*,¹⁴⁸ the Sixth Circuit interpreted *Wileman* in a manner inconsistent with previous decisions. The *United Foods* court held that “nonideological, compelled, commercial speech is justified in the context of the extensive regulation of an industry, but not otherwise.”¹⁴⁹ The court stated that compelled funding of advertising, in the absence of a comprehensive regulatory scheme that displaces competition, violates the First Amendment.¹⁵⁰ The court misread and also misquoted *Wileman* to reach this decision. The *United Foods* court stated:

In the *Wileman* case, the Supreme Court emphasized and reemphasized that the compelled advertising program for California tree fruits, under the Agricultural Marketing Agreement Act of 1937, contemplates ‘a uniform price to all producers in a particular market,’ a ‘policy of collective, rather than competitive, marketing’ and an exemption from the antitrust laws in order ‘to avoid unreasonable fluctuation in supplies and prices.’¹⁵¹

This is not correct. This quote from *Wileman* does not reference the particular marketing orders that apply to peaches and nectarines, but instead references the AMAA, and ways in which marketing orders may regulate a market.¹⁵²

This is an important distinction. The marketing orders that regulate peaches and nectarines do not directly regulate the price nor the supply of tree fruits¹⁵³ as in other markets.¹⁵⁴ This may be one reason why certiorari to the United States Supreme Court has been granted.

D. Issues Left Unresolved by *Wileman*

One important issue that could not have been addressed by the Supreme Court in *Wileman*, and which may be dispositive of much of the current litigation in California, is whether there is a greater right to

(1997)).

¹⁴⁸ *United Foods v. United States*, 197 F.3d 221 (6th Cir. 1999), cert. granted, 69 U.S.L.W. 3363 (U.S. Nov. 27, 2000) (No. 00-276).

¹⁴⁹ *Id.* at 224.

¹⁵⁰ *Id.* at 225.

¹⁵¹ *Id.* at 223.

¹⁵² *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 461 (1997).

¹⁵³ See 7 C.F.R. pt. 916 (2001); 7 C.F.R. pt. 917 (2001). In fact, under the analysis put forth in *United Foods*, it is not clear whether the actual regulatory scheme that exists in tree fruit would survive a First Amendment challenge in the Sixth Circuit. Peaches and nectarines are not subject to “a uniform price, or otherwise subsidized through price supports or restrictions on supply.” *United Foods v. United States*, 197 F.3d 221, 223 (6th Cir. 1999), cert. granted, 69 U.S.L.W. 3363 (U.S. Nov. 27, 2000) (No. 00-276).

¹⁵⁴ See 7 C.F.R. §§ 608c(5), (18) (2001) (regulating the price of milk).

free speech and freedom of association under the California Constitution than exists under the United States Constitution. This issue was recently resolved by the California Supreme Court in *Gerawan Farming, Inc. v. Lyons*.¹⁵⁵ In *Gerawan*, the California Supreme Court determined that the state constitution differs from the federal constitution and that mandatory funding for generic advertising by an agricultural commodity marketing program implicated a contributor's right to free speech under the California Constitution.¹⁵⁶ The decision first harshly criticized the holding in *Wileman*.¹⁵⁷ It then applied that analysis to the California Plum Marketing Program at issue. The court held that under the *Wileman* analysis, the program did not violate plaintiff's rights to free speech and association under the United States Constitution.¹⁵⁸

The court continued the analysis in *Gerawan* to determine the same program did implicate free speech rights under the California Constitution.¹⁵⁹ In so holding, the court focused on the broader language contained in article I of the California Constitution, which does not exist in the First Amendment.¹⁶⁰ The court held that "article I's right to freedom of speech, without more, would not allow compelling one who engages in commercial speech to say through advertising what he otherwise would not say, when his message is about a lawful product or service and is not otherwise false or misleading."¹⁶¹

While the court held that *Gerawan*'s free speech rights were implicated, it did not hold that they were violated.¹⁶² In a stunning example of judicial abdication, the court refused to define "what more" is needed. Nor did the court address what standard applies when determining whether a claimant's free speech rights under the California Constitution are violated by the imposition of mandatory funding for a commodity promotional program. Instead, the court left that issue to the Court of Appeal following remand of the case.¹⁶³

By declining to articulate the constitutional standard applicable to compelled funding for generic commodity promotional programs, the

¹⁵⁵ *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468 (2000).

¹⁵⁶ *Id.* at 509.

¹⁵⁷ *Id.* at 503-05.

¹⁵⁸ *Id.* at 506-08.

¹⁵⁹ *Id.* at 509-15.

¹⁶⁰ *Id.* at 489. "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right." Cal. Const. art. I, § 2, subd. (a).

¹⁶¹ *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 510 (2000).

¹⁶² *Id.* at 517.

¹⁶³ *Id.*

California Supreme Court's ruling in *Gerawan* failed to resolve the threat of future litigation. The Court of Appeal is now left to determine whether the test for prior restraint of commercial speech articulated in *Central Hudson*, intermediate scrutiny, should apply, whether it should follow the compelled funding line of cases addressed in *Abood* and *Keller*, rational basis standard, or whether some new standard should be fashioned. Because the programs involve the compelled funding of speech, it appears that the *Abood/Keller* line of cases supplies the standard to be followed.¹⁶⁴

Abood involved an "agency shop" arrangement, authorized under Michigan law, between a local government employer and a union representing local government employees.¹⁶⁵ Regardless of membership status, every employee was represented by the union and was required to pay, as a condition of employment, the union a service fee equal in amount to union dues.¹⁶⁶ The issue was whether the imposition of mandatory dues violated the constitutional rights of those employees who objected to unions or union activities financed by the compulsory service fees.¹⁶⁷ In this manner, the circumstances that led to *Abood* are analogous to those caused by the agricultural commodity programs, in that each member must pay a mandatory fee for activities he or she may or may not agree with. *Abood* held that free speech rights are implicated by compelled funding; however, as long as the funds are used for activities germane to the purpose for which the compelled association is justified, the First Amendment rights of contributors are not violated.¹⁶⁸

In 1990, the United States Supreme Court took the opportunity to further address a compelled funding case when a challenge was made to the activities of the California State Bar in *Keller v. State Bar of California*.¹⁶⁹ In applying what can only be considered a rational basis test, *Keller* held that compelled funding of the Bar's various activities does not violate a participant's speech and associational rights as long as the activity is germane to, and furthers, the State Bar's stated pur-

¹⁶⁴ *Id.* "Consistently with the majority in *Glickman*, I agree that if free speech rights are implicated here, the appropriate standard of review would not be the one developed to assess restrictions on commercial speech (the *Central Hudson* test), but instead the test used to assess compelled funding of speech (the *Abood/Keller* test)." *Id.* at 535 (George, C.J., dissenting).

¹⁶⁵ *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 211 (1977).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 235-36.

¹⁶⁹ *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990).

pose of “regulating the legal profession and improving the quality of legal services.”¹⁷⁰ The court concluded, “State Bar may, therefore, constitutionally fund activities germane to those goals out of the mandatory dues of all members.”¹⁷¹ With respect to germane expenditures, the standard of review was “whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or ‘improving the quality of the legal services available to the people of the State.’ ”¹⁷² In reversing the judgment of the California Supreme Court, the United States Supreme Court expressed specific disagreement with the California Supreme Court’s refusal to apply *Abood* to the activities of the State Bar.¹⁷³

Acknowledging that *Keller* and *Abood* involved “much lighter burdens on speech and associational rights” than those in which ideological or political views are advanced, the court in *Smith v. Regents of University of California*¹⁷⁴ emphasized that under *Abood* and *Keller*:

to be compelled to pay for activities “germane” to those functions does not substantially burden an unwilling supporter’s speech and associational rights. While the unwilling supporter may receive unwanted professional or economic assistance, he or she remains free not to speak or to support others’ speech on political and ideological issues.¹⁷⁵

These compelled funding cases are distinguishable from the earlier decision in *Central Hudson*. *Central Hudson* did not include situations in which a party was compelled to fund collective activities such as those contemplated in the union cases, the integrated bar cases, or in the commodity marketing cases. Neither did the court deem it appropriate to discuss the seemingly separate standard it had articulated three years earlier in *Abood*. Thus, the distinction between the “restricted speech” cases and the “compelled funding cases” was clearly maintained.¹⁷⁶ While the *Gerawan* court discussed commercial speech at length, the deciding factor of which standard should apply to these programs should turn on whether the activity objected to is a prior restraint suppressing speech, as in *Central Hudson*, or involves the compelled funding of speech, as in *Abood*, *Keller*, and *Smith*.

¹⁷⁰ *Id.* at 13.

¹⁷¹ *Id.* at 14.

¹⁷² *Id.* (citing *Lathrop v. Donahue*, 367 U.S. 820, 843 (1961)).

¹⁷³ *Keller*, 496 U.S. at 16.

¹⁷⁴ *Smith v. Regents of Univ. of Cal.*, 4 Cal. 4th 843 (1993).

¹⁷⁵ *Id.* at 855.

¹⁷⁶ See also *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (addressing a prior restraint as to stating alcohol content on label).

Further, as stated by Chief Justice George in his dissent in *Gerawan*:

Moreover, even if I were to agree with the majority that we should reject the reasoning of *Glickman* [*Wileman*] . . . and hold that the marketing program here at issue “implicates” . . . the state constitutional right of free speech under article I, section (2)(a), I would not remand this matter to the Court of Appeal to require that court first to determine, and then to apply, the correct standard of review for evaluating the validity of the marketing order’s impingement upon plaintiff’s state constitutional right to free speech. Instead, I would hold that any impingement is subject to review pursuant to the test set out in *Abood* . . . and *Keller*, and further that, under that standard, the challenged plum marketing program does not violate article I, section 2(a).¹⁷⁷

In its citations to *Abood* and *Keller*,¹⁷⁸ the *Gerawan* majority does not enunciate the standard of review, but it would seem that the implication, and consequent momentum, is that the *Abood/Keller* standard is the one which should be applied.

This standard would be applied in the same manner as that discussed by Chief Justice George in his *Gerawan* dissent:

Under *Abood* and *Keller* as applicable in this context, I believe that our inquiry and the conclusions we draw should be as follows:

(i) Is there a legitimate basis for the compelled association? Yes. The interest in maintaining the stability of markets for California plums justifies legislation that allows producers and handlers to establish compelled associations designed to accomplish that goal.

(ii) Is the generic advertising program germane to the purpose of the marketing order here at issue? Yes. One purpose of the marketing order is to create and support a market for California plums. The advertising program clearly is germane to that purpose; the cost of the advertising programs are ‘reasonably incurred’ . . . to promote that goal.¹⁷⁹

Other issues that must be resolved in order for consistent application of the *Wileman* analysis to exist is: in what light should the regulatory discussion in *Wileman* be viewed? If it is purely dicta, then why is the discussion so extensive? On the other hand, it is not rational to make the degree of regulation that displaces competition in an industry the threshold analysis that determines whether *Wileman* applies. There is a reason for the extensive regulatory discussion, but it is not to provide a threshold test of constitutionality. It is illogical to believe that the amount of regulation an industry faces has constitutional significance.

¹⁷⁷ *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 518 (2000) (George, C.J., dissenting).

¹⁷⁸ *Id.* at 481.

¹⁷⁹ *Id.* at 535 (George, C.J., dissenting).

Plaintiffs in many of the post-*Wileman* lawsuits have argued that a comprehensive regulatory scheme displacing competition is necessary in order for mandatory advertising assessments to not be violative of their free speech and associational rights. In essence, the challengers argue that the state must first significantly displace competition, by limits on pricing and volume controls, before it is free to burden them even further via mandatory funding for collective promotion programs. This cannot be the standard. If it were, then all the government would need to do to take away a group's First Amendment rights would be to heavily regulate them. There are no cases holding that being subjected to economic regulations diminishes one's rights to free speech and freedom of association.

The *Wileman* decision does not require or even imply that subsequently challenged marketing orders be virtually identical or even facially similar to the tree fruit marketing orders at issue in that case. Nor does *Wileman* require that all of the discretionary regulatory tools authorized under the AMAA be actually incorporated into a marketing order before a generic advertising program can pass constitutional muster. In fact, the marketing orders challenged in *Wileman* did not employ all of the tools that the Court listed in that case.¹⁸⁰ There are no regulations directly constraining the volume of tree fruit that can be sold, restricting the supply of tree fruit, or setting minimum prices for tree fruit.¹⁸¹ Tree fruit regulations pertain mostly to quality.¹⁸²

The reason for the *Wileman* Court's discussion of the regulations that affect the tree fruit industry is to provide a context for the Court's decision that the use of compelled assessments to fund generic commodity advertising is a species of economic regulation akin to all of the other regulations that affect the industry and should, therefore, be reviewed as such. This means rational basis review and not the intermediate or strict scrutiny standard applicable to other incursions on First Amendment rights.

The discussion in *Wileman* regarding the regulatory context illustrates the fact that, by the parameters of the statutory structure that enabled the creation of the tree fruit program (the AMAA), any action

¹⁸⁰ See *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 461-64 (1997); 7 C.F.R. pt. 916 (2001); 7 C.F.R. pt. 917 (2001).

¹⁸¹ See 7 C.F.R. pt. 916 (2001); 7 C.F.R. pt. 917 (2001).

¹⁸² There are both specific inspection procedures to ensure the quality of tree fruit and detailed regulations pertaining to quality such as: no split pits, bruises, split skins, pest damage, or rot larger than a specific size. Additionally, certain color and maturity requirements must be met. See 7 C.F.R. §§ 916.356, 917.459 (2001).

taken by the program is already constrained in the manner in which it can speak and act such that the speech must conform to meeting the goals of the program (i.e. it must be germane). This is why the Court termed the advertising and promotional program just another economic regulation.¹⁸³ The fact that the program was created pursuant to the AMAA made it so. The Court recognized that in this situation, where the only activities that a program can engage in must be chosen off of the menu provided by the AMAA, the chances that any germane activity will trample on free speech and free association rights are slim. Accordingly, the Court reviewed the advertising program under the lowest level of scrutiny available, in deference to the legislature and the majority of the industry, as a species of economic regulation.¹⁸⁴ The Court was, never the less, cognizant of the possibility that some activity under the program still might interfere impermissibly with free speech and associational rights. For this reason, the Court applied a germaneness analysis to determine that the advertising did not violate these rights, even if it was political or ideological.¹⁸⁵

Since a program can only engage in activities authorized by the AMAA or its own statute, its actions are necessarily restrained such that its ability to trample on free speech and associational rights is limited. It is not logical to base the constitutionality of a program on the number of regulations it has decided to use to promote its particular commodity, like the court did in *United Foods*. Nor is it rational to assert that the act of choosing one form of regulation specifically authorized by the AMAA is unconstitutional unless some unspecified numbers of other regulations are also chosen for inclusion in a regulatory program.

The *Wileman* Court determined that the advertising program was a form of economic regulation, just as the *Frame* court did.¹⁸⁶ This determination does not hinge on the amount of regulation constraining an industry. The Court did not mean that a collective generic advertising program for an agricultural commodity is an economic regulation, subject to the lowest level of scrutiny, only when the rest of the industry is regulated to a particular degree. Whether an industry determines that the best way to regulate itself is with purely demand side regulations, as opposed to an industry that is regulated both by supply side and demand side regulations, makes no difference constitutionally.

¹⁸³ *Wileman*, 521 U.S. at 477.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 473.

¹⁸⁶ *Id.* at 477.

The regulatory discussion in *Wileman*, therefore, provides only background information. This is the reason that the regulatory discussion is contained in Part III of the opinion, where the Court discussed the context of the decision and framed the issues of the case. In Part IV, where the Court addressed the three factors that distinguish the statute at issue from other laws that they have found to violate the First Amendment, there is no discussion of the collectivization of the industry. Presumably, if the Court had intended to base its decision on the degree of regulation in an industry, instead of stating as a fact that the California tree fruit industry was extensively regulated, it would have explained the significance of that fact to the First Amendment analysis.

Additionally, the Court granted certiorari in *Wileman* to resolve a conflict between the Ninth Circuit's decision and the Third Circuit's decision in *Frame*.¹⁸⁷ *Frame* involved a First Amendment challenge to the generic advertising program for beef that was established pursuant to statute, a stand-alone program that does not extensively regulate competition in the beef industry.¹⁸⁸ The Beef Act is concerned solely with "promotion and advertising, research, consumer information, and industry information" funded through assessments on producers.¹⁸⁹ If the Court's decision in *Wileman* was limited to only those generic advertising programs imposed under marketing orders that comprehensively regulated competition for a commodity, then the circuit conflict identified in *Wileman* would not have been resolved.

Given the current state of the law, the question of what an agricultural commodity program can do to ensure constitutionality must be addressed.

E. Potential Solutions to the Litigation Challenge

Challengers to marketing programs have cited mandatory assessments as their primary objection. One way to avoid constitutional challenges entirely is to create voluntary programs. However, one key reason why mandatory programs have been instituted is to avoid the

¹⁸⁷ *Id.* at 466-67.

¹⁸⁸ 7 U.S.C. §§ 2901-2911 (2001).

¹⁸⁹ 7 U.S.C. 2904(4)(b) (2001); *see* *United States v. Frame*, 885 F.2d 1119, 1122 (3rd Cir. 1989) (The Beef Act "was structured as a 'self-help' measure that would enable the beef industry to employ its own resources and devise its own strategies to increase beef sales, while simultaneously avoiding the intrusiveness of government regulation and the cost of government 'handouts.' ").

free-rider problem.¹⁹⁰ Commodity marketing programs seek to increase the overall consumption of their particular commodity. This is why they engage in generic advertising. The idea is that promotion will increase the total demand for a particular commodity. While each individual producer's portion of the market may remain the same, if the overall market for that product increases, each producer's total sales will also increase.

Voluntary programs would benefit those who do not contribute to the program in two ways: they would benefit from the overall increase in market size, plus they would benefit by keeping the profits that others are donating to the voluntary program. Consequently, free-riders would be enabled to compete more effectively in the marketplace.

If an industry does not mind supporting the free-riders, it could create voluntary associations that would not be subject to constitutional challenges. Because these programs would be voluntary, they would completely sidestep the issues of compelled speech and association. These voluntary programs could take many forms, such as voluntary non-profit trade associations that promote and advertise an industry. They could also take the shape of co-operatives created primarily to promote an agricultural commodity. However, the margins under which most farmers operate are so small that the free-rider problem is a serious one. For this reason, the rest of the solutions address mandatory commodity promotion programs.

If a mandatory commodity marketing program must first be found to have a comprehensive regulatory scheme that displaces competition in order to make the use of assessments to fund a generic advertising program constitutional, then one way to solve this problem is to pass legislation imposing these regulations on an industry.¹⁹¹ This would mean that for each stand-alone statutory program, new legislation must be passed constraining the industry. One of the problems with this solution is that current case law does not make it clear how much regulation is enough in order to meet the test created by the courts.

Another way for stand-alone statutory programs to meet this regulatory test would be to disband and reform each of the state commis-

¹⁹⁰ See FORKER & WARD, COMMODITY ADVERTISING: THE ECONOMICS AND MEASUREMENT OF GENERIC PROGRAMS 10 (1993) (providing a more detailed discussion of the free-rider problem and the creation of commodity programs to counter this problem).

¹⁹¹ The *Gerawan* decision and the granting of certiorari by the United States Supreme Court in *United Foods* calls into question whether a comprehensive regulatory scheme is necessary under the *Wileman* analysis. *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 508 (2000). However, because this issue has not yet been resolved, it is addressed in this article.

sions as marketing orders under the CMA and the federal programs as marketing orders under the AMAA. This would create an over arching statute with the ability to regulate the industry, yet each of the regulations authorized would not have to be actually applied to each order. It appears that this may create enough of a "comprehensive regulatory scheme displacing competition" that it would meet the regulatory tests read by some into the *Wileman* analysis.

Whether this is a palatable option for the industries operating under programs is another issue. Some of today's current state commissions previously existed as state marketing orders. These industries decided to reincarnate themselves as state commissions in order to avoid the red tape and bureaucratic problems that existed when they were marketing orders. For example, many marketing orders complained that they were constrained by only being able to use the Attorney General's office as their lawyers. On occasion, this resulted in the programs being unable to collect delinquent assessments quickly and aggressively due to the excessive caseloads at the Attorney General's office. Therefore, any re-creation of the commissions under the CMA and the AMAA must first begin with a legislative attempt to revise the CMA and AMAA themselves. The commissions must provide enough latitude to function, but impose sufficient restraints so that the regulatory analysis is met.

The main problem with this solution is that it may be very difficult to amend these statutes. Both the CMA and the AMAA regulate numerous programs. Amendment would entail the agreement of multiple industries with diverse interests. There may be another way to avoid this practical and logistical problem.

It may be possible to keep the state and federal stand-alone programs as they are, while creating marketing orders under the CMA and the AMAA that work hand in hand with them. In this plan, the marketing order created under the CMA or AMAA could have a limited function. For example, a marketing order could be created that solely concerns research of better ways to store and produce a commodity. This marketing order would be created under the auspices of the CMA or the AMAA; therefore, it would subject the industry to regulations that "may" regulate the supply of the product while the text of the actual marketing order would not need to contain these regulations. This would seem to meet the parameters of the Sixth Circuit's interpretation of *Wileman*, given Justice Stevens language stressing the fact that marketing orders promulgated under the AMAA

“may include” mechanisms that regulate the supply of the product.¹⁹² It is also clear from the Ninth Circuit’s opinion in *Gallo* that, when viewing the regulations that affect an industry in order to determine whether a comprehensive regulatory scheme exists, the court is not limited to only those regulations contained in the statutory scheme that creates the commission.¹⁹³

There are many strategies that may be used to keep the costs of running this new program to a minimum. For example, the marketing order could specify that the alternate members of the commission are to serve as the members of the marketing order’s advisory board. The commission and the advisory board could hold their meetings on the same day, one in the morning and one in the evening. The marketing order could specify that the administrative affairs of the board would be conducted by the commission staff and at the commission’s offices. This would enable both agencies to share a staff and office space. Assessments under the marketing order could be set at “not more than” a nominal amount, with the ability of the board to vote them at zero. The commission, then, could be authorized to use their assessments to pay for the board’s expenses and activities. This creation of new marketing orders, working hand in hand with the commissions, would alleviate the free-rider problem endemic to voluntary programs while avoiding amending the CMA and the AMAA. It would also be one way in which a program could be sufficiently restrained by regulations, if the Sixth Circuit’s decision in *United Foods* is affirmed and this is necessary, while allowing the program to maintain its original structure.

These new programs may still face challenges. They need to be constitutional under the California Constitution. The California Supreme Court has determined that the right to free speech and associa-

¹⁹² *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 461. The “may include” language is important, as the regulations that actually restrained the tree fruit industry did not “provide a uniform price to all producers,” limit the “quantity of the commodity that may be marketed,” or “make an orderly disposition of any surplus that might depress market prices.” *Id.* See 7 C.F.R. pt. 916 (2001); 7 C.F.R. pt. 917 (2001). By this language the Court is stating that it is not relevant which actual regulations affect an industry, but only that these types of regulations are authorized under the AMAA and, therefore, may regulate an industry; see also *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 508 (2000) (“[A] federal marketing order under the AMAA might have regulated more broadly and deeply than a state marketing order under the CMA. But Marketing Order No. 917 did not in fact regulate so much more broadly and deeply than the California Plum Marketing Program.”).

¹⁹³ *Gallo Cattle Co. v. Cal. Milk Advisory Bd.*, 185 F.3d 969, 974 n.5 (9th Cir. 1999).

tion is implicated by the mandatory funding of generic commodity marketing programs under the California Constitution.¹⁹⁴ It has not, however, determined that those rights are violated by the same, nor which test should be used to make that determination.¹⁹⁵ If it is determined that the standard is intermediate scrutiny under *Central Hudson*, or a more or equally difficult new standard, then the California programs may face serious challenges. One way to avoid these challenges would be to recreate these programs under federal statutes. They could be recreated as federal marketing orders, or as federal stand-alone statutory programs in conjunction with a federal marketing order that works hand in hand with the commission.

With all of the options available to them, commodity promotion programs will continue to exist for as long as their industries believe they serve a useful purpose. Like the resourceful chameleon, however, they may have to change their appearance to conform to the current state of the law.

V. PUBLIC EDUCATION AND ISSUES MANAGEMENT

In today's modern, urban society, it is not unlikely that many people do not know where "the food we eat, the clothing we wear, [and] the material of our homes"¹⁹⁶ come from. One agricultural organization makes the point that as Californians "become [further removed] from their agrarian [past,]" more and more of our agricultural policy-makers are people who have never been to a farm, ranch, or dairy.¹⁹⁷

To many unsophisticated urban and suburban Californians, the term "agriculture" may have little or no meaning. Some may have heard of "biotechnology" or the disappearance of the "family farm," but most do not know what these terms mean or how such terms might affect them. Lack of knowledge invariably results in apathy by those distanced from agriculture as to the plight of those facing firsthand the challenges that comes with growing food and fiber.

A. Existing Efforts to Increase Awareness

California agriculture responds to this unawareness by public outreach and education. Numerous activities and programs exist to edu-

¹⁹⁴ *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 509 (2000).

¹⁹⁵ *Id.* at 517.

¹⁹⁶ See CAL. FOUND. FOR AGRIC. IN THE CLASSROOM, MISSION STATEMENT, at http://www.cfaitc.org/About_the_Foundation/Mission/mission.html (last visited Apr. 6, 2001).

¹⁹⁷ *Id.*

cate the public about the economic and social implications of this critical industry. From the traditional forum of the fair to television programs and Internet resources, the state's agricultural leaders are working to bring agriculture closer to those who otherwise may not realize the importance the industry has in the state and around the world.

1. Network of California Fairs

California fairs are probably the most pervasive and well-recognized tool in the effort to bring agriculture to the masses. The state's eighty fairs educate both rural and urban communities about the importance of agriculture while generating \$1.6 billion in revenue each year.¹⁹⁸ No other regular public activity reaches a more diverse cross-section of the population or gives more urban and suburban residents a firsthand look at agriculture.¹⁹⁹

The CDFFA, in cooperation with the Western Fairs Association and the California State Fair, recently introduced a new project called the Agricultural Literacy and Fairs Alliance in which at least eight country fairs have been tagged to expand agricultural literacy programs for their communities. "[F]ree materials, lesson plans, and educational sessions" will be provided to teachers in an effort to "incorporate history, math, science, language arts, social science, art, and technology into . . . interactive lessons" about agriculture.²⁰⁰

2. Agriculture in the Classroom

"The California Foundation for Agriculture in the Classroom works with K-12 teachers, students, and community leaders," media representatives, and government executives "to enhance education using agricultural examples."²⁰¹ The Foundation's "goal" is to provide education on "the importance of agriculture . . . to every California child."²⁰² As stated in their Mission Statement, "Agriculture is the very basis of civilization – the food we eat, the clothing we wear, the material of our homes, and many of our traditions and values . . . all coming from agriculture and collectively setting the pace for a nation's

¹⁹⁸ CAL. DEP'T OF FOOD AND AGRIC., FAIRS AND EXPOSITIONS, at http://www.cdfa.ca.gov/fairs/org_structure.html (last visited Apr. 6, 2001).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ CAL. FOUND. FOR AGRIC. IN THE CLASSROOM, MISSION STATEMENT, at http://www.cfaitc.org/About_the_Foundation/Mission/mission.html (last visited Apr. 6, 2001).

²⁰² *Id.*

standard of living.”²⁰³ In order to achieve its goals, the Foundation offers teacher training programs²⁰⁴ and a resource guide with lesson plans, commodity fact sheets, newsletters for educators, and a web page²⁰⁵ which includes other agriculture-oriented links and a “Kid’s Corner”²⁰⁶ with games and activities.

3. The Agricultural Network

In 1994, Henry Voss, former Secretary of CDFA, held a summit with more than 200 representatives of agriculture from around the state. The goal was to encourage the industry to examine its public image and to reconnect with the state’s urban and suburban majority. Today, this once informal coalition of individual farmers, agribusiness associations, and commodity groups has evolved into The Agricultural Network (Ag Network).²⁰⁷ Programs sponsored by the Ag Network include California Heartland, and most recently, “Farming is Food, Fiber, Flowers . . . and Fun!”—designed to infuse agriculture into California’s School Garden Project.²⁰⁸ Through the “Food, Fiber, Flowers . . . and Fun!” program, the Ag Network will administer industry contributions of materials and expertise to augment the California Department of Education’s garden grants to schools. This year, 170 schools will benefit from the program.

a. California Heartland

California Heartland, an award winning public television production, is sponsored through the cooperation of the California Farm Bureau Federation, Cal Farm Insurance, The Ag Network, California Integrated Waste Management Board, and others.²⁰⁹ This folksy program

²⁰³ *Id.*

²⁰⁴ See CAL. FOUND. FOR AGRIC. IN THE CLASSROOM, TEACHER TRAINING, at http://www.cfaitc.org/Teacher_Training/teachertraining.html (last visited Apr. 6, 2001).

²⁰⁵ See CAL. FOUND. FOR AGRIC. IN THE CLASSROOM, TEACHER RESOURCE GUIDE, at http://www.cfaitc.org/Resource_Materials/Resource_Guide/resourcguide.html (last visited Apr. 6, 2001).

²⁰⁶ See CAL. FOUND. FOR AGRIC. IN THE CLASSROOM, KIDS’ CORNER, at <http://www.cfaitc.org/Kids/kids.html> (last visited Apr. 6, 2001).

²⁰⁷ A California nonprofit public benefit corporation with tax exempt status pursuant to Section 501(c)(3) of the Internal Revenue Code.

²⁰⁸ CAL. DEP’T OF FOOD AND AGRIC., AGRICULTURAL EDUCATION, at http://www.cdfa.ca.gov/programs/public_affairs/ag_edu_sum.html (last visited Apr. 6, 2001) (describing the School Garden Project as “an effort by the Department of Education to create a school garden in every school”).

²⁰⁹ CAL. HEARTLAND, UNDERWRITERS, at <http://www.californiaheartland.org/under>

visits California farming communities and profiles a variety of families and commodities. The show's budget continues to increase—from \$600,000 the first year to \$1.1 million for 2000-2001—as does its popularity. Viewership hit an all-time high of 1,309,032 during the week of July 14, 2000.

b. School Garden Project

The School Garden Project, sponsored by the California Department of Education,²¹⁰ gives children the opportunity to work together in an outdoor environment and aims to improve student nutrition education. Teachers can incorporate the garden into language and art lessons by having the students create a book about the vegetables they have grown. Mathematics and science can be integrated by having the children count the plants and chart their growth. There may even be an entrepreneurial aspect for children if the end results can be sold to family, friends, or teachers. As with many other state-sponsored programs, however, funding for this program is constantly at risk.

c. Focus Group on Agricultural Education

Another effort sponsored by the California Department of Education was the 1996 Focus Group on Agricultural Education. With the help of The Ag Network, the Focus Group was formed to evaluate “the role, scope, and delivery of agricultural education in California’s public school system.”²¹¹ Central to the stated mission of the group was the need to design a comprehensive program that includes instruction both “about *and* in agriculture—infusing agricultural themes into a broad range of academic areas, as well as providing a strong career development program to meet the needs of a dynamic and competitive agricultural industry in California.”²¹²

The report ultimately issued by the Focus Group called for the development of a comprehensive program of agricultural literacy and awareness through a collaborative effort among educators and industry and proposed that funding be shared among federal, state, and industry sources. The report also found, based on a survey conducted by The Ag Network, that over 270 entities within the agricultural industry al-

writers/index.htm (last visited Apr. 4, 2001).

²¹⁰ See CAL. DEP'T OF FOOD AND AGRIC., SCHOOL GARDEN PROJECT, at http://www.cdffa.ca.gov/kids/school_garden/index.html (last visited Apr. 9, 2001).

²¹¹ Cal. Dep't of Educ., Agricultural Education Focus Group Report (undated).

²¹² *Id.*

ready claimed to be conducting agricultural literacy and awareness programs. These programs, however, tended to be “duplicative and fragmented,” and were lacking in any reliable measure for efficacy.

As a result of the Focus Group report, the Department of Education, the Agricultural Council of California, and The Wine Institute co-sponsored a 1999 Assembly Bill²¹³ which resulted in the enactment of the Agricultural Education Act of 1999 (Act).²¹⁴ Signed into law in October of 1999, the Act makes California the first state in the nation to institutionalize agricultural education in the public schools.

B. Image is Everything

Extensive resources for information, educational materials, and web sites on agriculture are prolific. For example, the web site for the California Foundation for Agriculture in the Classroom had over fifty links on its Educational Resources page.²¹⁵ Why then is California agriculture, which accounts for one in every ten jobs in California, and generates more than \$100 billion in production and related economic activity,²¹⁶ still such a nonissue for most Californians?

One reason may be that agriculture lags behind in the kind of pervasive self-promotion that other industries have recently undertaken. Agriculture has not yet accepted that it needs to generate more than an interest and demand for its products—it must generate an interest and demand for its *existence*. Before legislators and government agencies will hear and respond to the needs of agriculture, they will hear and respond to their constituents. And painful as it may be to admit, Californians today are largely urban or suburban. Knowledge of or interest in agriculture may very well be nonexistent.

C. California Agricultural Alliance

In the early 1990s, it became apparent to some agricultural leaders in California “that all of the good efforts by reactive voluntary and commodity-specific programs ha[d] been inadequate to relieve the pressure that continue[d] to build on such critical issues as land use,

²¹³ A.B. 1645, 1999-2000 Reg. Session (Cal. 1999).

²¹⁴ Agricultural Education Act of 1999, CAL. EDUC. CODE §§ 8980-8982 (1999).

²¹⁵ See CAL. FOUND. FOR AGRIC. IN THE CLASSROOM, EDUCATIONAL RESOURCES, at http://www.cfaitc.org/Ag_Weblinks/educationallinks.html (last visited Apr. 9, 2001).

²¹⁶ *California Agriculture Continues to Lead the Nation: 1998 Production Valued at \$25.9 Billion: Exports at \$6.7 Billion*, at <http://www.cdfa.ca.gov/pressreleases/Cdfa99/cdfa9986.html> (last visited Apr. 4, 2001).

water transfer, animal welfare and pesticides.”²¹⁷ However, many of the large, influential agricultural entities and individuals were loathe to spend their individual resources on public image campaigns that would result in the “free-rider phenomenon”²¹⁸ so well known to agriculture. The gauntlet was thrown down to agriculture as never before—“maintain the status quo or challenge [the traditional] comfort zone [in order to] reestablish [agriculture] as an important component of California society.”²¹⁹ From this challenge, an idea emerged: create a state-wide, industry-wide promotion program, funded by mandatory assessments on all producers. The program would spread “the message” to the increasingly uninformed, often hostile, public. The same public which all too often included urban and suburban legislators and government officials who were now three or four generations removed from the farm.

Proponents of the so-called “Ag Alliance” were convinced that “[e]ach producer must get involved and stay involved. Organizations and their farmer members must embrace a proactive attitude that is long on substance and short on rhetoric.”²²⁰ Gone were the days when commodities could act within their separate identities. It was becoming increasingly clear that the public viewed agriculture “collectively,” not individually.²²¹

As a first step in 1990, proponents successfully lobbied legislation²²² which created the necessary changes to the California Marketing Act of 1937.²²³ Specifically, Section 58608.1, effective January 1, 1991, was added to the Food and Agricultural Code to provide:

‘Educational program,’ unless otherwise defined in this chapter, means a program established by the director pursuant to this chapter that provides for the planning and implementation of activities designed to inform the general public of the processes of producing agricultural commodities and designed to foster cooperation and understanding between urban and rural sectors of society.²²⁴

The other additions and amendments²²⁵ would have allowed the Sec-

²¹⁷ CAL. AGRIC. ALLIANCE, FINAL TESTIMONY SUBMITTED IN SUPPORT OF THE PROPOSED EDUCATIONAL PROGRAM FOR ALL COMMODITIES (1994) [hereinafter FINAL TESTIMONY].

²¹⁸ See FORKER & WARD, *supra* note 190, at 10.

²¹⁹ FINAL TESTIMONY, *supra* note 217, at 1.

²²⁰ *Id.* at 2.

²²¹ *Id.*

²²² A.B. 1959, 1991-1992 Reg. Sess. (Cal. 1991).

²²³ CAL. FOOD & AGRIC. CODE §§ 58601-59293 (Deering 2001).

²²⁴ CAL. FOOD & AGRIC. CODE § 58608.1 (Deering 2001).

²²⁵ CAL. FOOD & AGRIC. CODE § 58654 (Deering 2001) (containing the 1991 amendment to include as purposes of the California Marketing Act of 1937: “(g) In-

retary of the CDFA, in his discretion, to implement the program immediately, but with a caveat that a referendum among affected producers would be held within two years in order to determine whether the program should continue.²²⁶

Ultimately, for a variety of reasons, the Ag Alliance was unable to build the coalition necessary to convince the Secretary to implement an all-commodity promotion program. For some in the industry, there was concern that a mandatory program might be the first step in producing mandatory assessments for other, currently state-funded, issues and programs. Others were simply not persuaded that “image building” would produce the desired return on their investment.

D. Issues Management Versus Crisis Management

Seven years after the industry’s attempt at an all-commodity promotion program, agriculture still sits at the same crossroads. The leadership in California agriculture must decide whether it will continue to act in voluntary, commodity specific ways, or whether it will take the necessary, perhaps painful, steps to position itself for *issues management*, rather than crisis management. Commodity prices are now established globally. However, production costs are still determined in California by legislators and government policy-makers who will only respond to the issues about which voters care.

Interest in and concern for agriculture, the most basic and essential of all industries, should be easy. Unfortunately, the vast majority of Californians do not know what farmers and ranchers do to enhance consumers’ lives. Existing outreach efforts create hope, but have not been enough to turn the tide of public opinion.

The body of law created by the Ag Alliance for an all-commodity promotion program is still, for the most part, intact.²²⁷ It is still poised to create the kind of mandatory public education and promotion program that agriculture needs if it intends to affect state and national policy in the ways which are critical to its survival. Perhaps the realization will finally hit that the circumstances faced by agriculture in California are not a temporary phenomena, but rather a permanent part of the landscape that must be confronted directly and realistically.

form the general public of the process of producing agricultural commodities. (h) Foster cooperation and understanding between urban and rural sectors of society.”); CAL. FOOD & AGRIC. CODE § 58741.1 (Deering 2001) (containing the 1991 addition authorizing “the director [to] establish an educational program . . .”).

²²⁶ CAL. FOOD & AGRIC. CODE § 58993.1 (Deering 2001) (repealed 1997).

²²⁷ CAL. FOOD & AGRIC. CODE §§ 58608.1, 58654, 58741.1 (Deering 2001).

Should that happen, the work of the Ag Alliance can serve as a foundation for achieving education and promotion goals.