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Tobacco, Taxes, and the First Amendment

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INTRODUCTION

Ask anyone who lives in California and they will tell you their state is very serious about tobacco regulation. The state government not only sees smoking as a hazard to public welfare, but also views the massive financial expenditures associated with healthcare and insurance as an unnecessary burden on California's fiscal budget. To ease the effect of smoking on the health of its citizens and the solvency of the state economy, California has enacted strong anti-smoking legislation aimed at discouraging the purchase and use of tobacco products. Some well-known examples of this legislation in action include prohibitions on smoking in bars and restaurants, distance limitations of forty feet when smoking near a government building, and high taxes on tobacco products.

A more contentious and controversial piece of anti-smoking legislation involves the imposition of a surtax upon the tobacco industry specifically intended to fund anti-smoking advertisements produced by the California Department of Health Services [DHS]. In response, two prominent tobacco companies filed a claim against the state of California in the case of *Reynolds v. Shewry,* arguing that use of the tobacco tax proceeds to fund this campaign is unconstitutional. Their case relies on a unique amalgam of legal precedents that create an intellectual quandary for even the most veteran legal scholars. While the plaintiffs maintained a strong legal argument, the Ninth Circuit Court of Appeal found in favor of the state government. Yet the legal argument employed by the plaintiffs, if closely examined and condensed into a succinct form, contains enough legal significance to justify a contrary decision. However, perhaps because of the disrepute of the tobacco industry, the influence of this ruling on other industries and businesses is overlooked. As Judge Trott questions in his dissent to the *Reynolds* ruling, "[W]hose disfavored

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ox or whose industry or business or lifestyle will be the next to be fatally gored?"[1] The Ninth Circuit Court of Appeals was unwise in creating a decision with such strong implications when their justification came from only indirectly applicable precedents.

This article will examine the factual circumstances leading up to the case of *Reynolds v. Shewry* and shed light on the very complex set of legal standards employed by both parties in this case. Careful analysis will link together the plaintiffs' scattered legal standards, demonstrating the value in claims and the reasons why their standards are more legally sound than those employed in the majority decision of the U.S. Ninth Circuit Court of Appeals.

FACTS OF THE CASE

Proposition 99 was approved by a majority of California voters in 1988. Also known as the Tobacco Tax and Health Protection Act of 1988, it calls for a twenty-five cent surtax to be included in the cost of every pack of cigarettes sold in the state. Revenue from the surtax is deposited into the Cigarette and Tobacco Products Surplus Fund, which is separate from the General Fund that serves as the repository for most state revenue. Twenty percent of the Surplus fund is diverted to a Health Education Account to create "programs for the prevention and reduction of tobacco use."[2]

The California Department of Health Services (DHS) was entrusted with the responsibility to enforce the Tobacco Tax and Health Protection Act of 1988. To accomplish its objective, the DHS created the Tobacco Control Program with the express purpose of "reduc[ing] tobacco use in California by conducting health education interventions and behavior change programs."[3] Specifically, this refers to a media campaign aimed at discouraging the use of tobacco products by emphasizing health risks, with exclusive funding from the Health Education Account.

[1] See section on Judge Trott'

[2] Tobacco Tax and Health Protection Act of 1988, CAL. REV. & TAX CODE § 30122(b)(1) (1998).

[3] CAL. HEALTH & SAFETY CODE § 104375(a) (2004).

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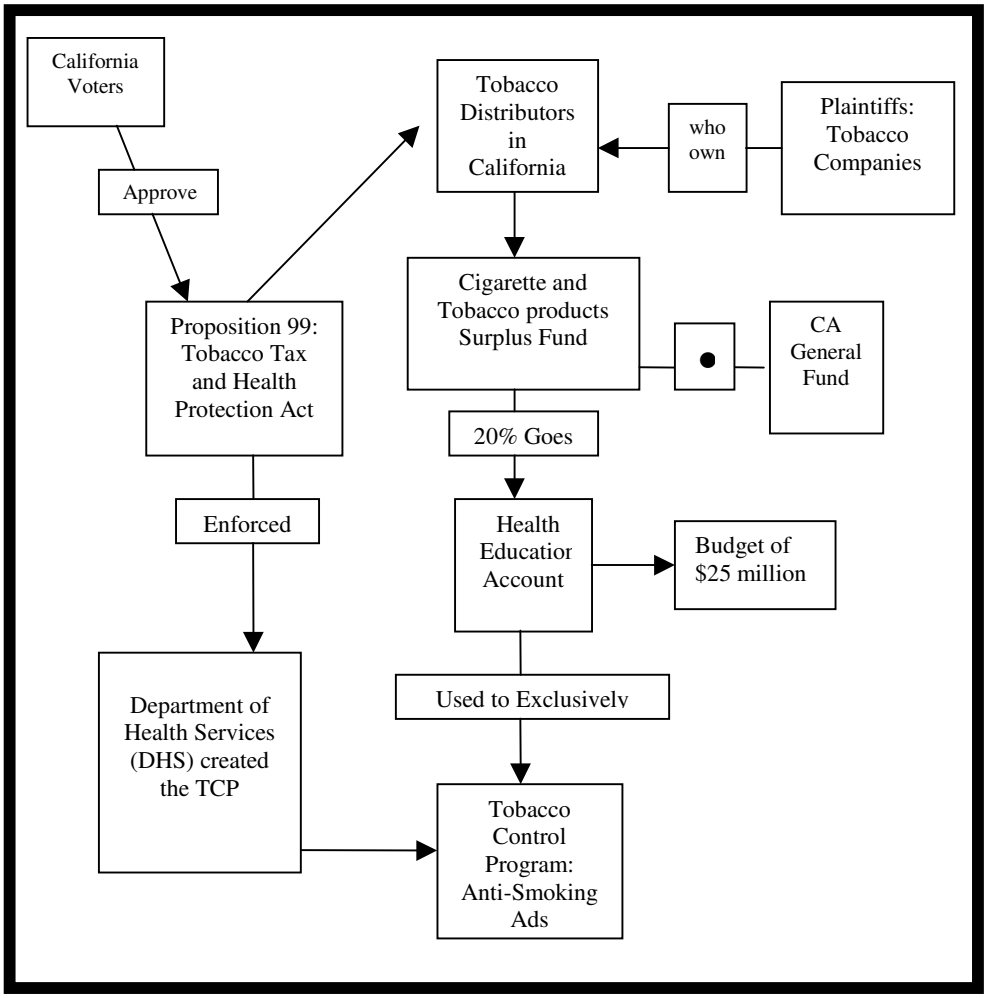

To accomplish its objective, the DHS created a media campaign designed to indirectly promote health awareness without utilizing health education topics highlighting the negative physical effects of tobacco use. By using television commercials that specifically portray the practice of smoking as socially inappropriate and morally questionable, the DHS wished to emphasize the negative social consequences of smoking rather than the specific threat to the public's health and welfare. The DHS hoped this would provide a

more effective message for viewers rather than a traditional campaign focused on the factual health-related disadvantages of using tobacco products. Accordingly, the content of the advertisements was very dramatic. As the District Court opinion explains:

> A recent round of television commercials features an actor playing a public relations executive for the fictional cigarette brand "Hampton," detailing for viewers his unseemly methods for getting people to start smoking. The ads end with the tagline, "Do You Smell Smoke?" implicitly referencing both cigarette smoke and a smoke-and-mirrors marketing strategy. Another ad portrays tobacco executives discussing how to replace a customer base that is dying at the rate of 1,100 users a day. Some of the ads end with images of mock warning labels such as: "WARNING: The tobacco industry is not your friend," or "WARNING: Some people will say anything to sell cigarettes."
>
> Several spots suggest that tobacco companies aggressively market to children. In one particularly striking television ad entitled "Rain," children in a schoolyard are shown looking up while cigarettes rain down on them from the sky. A voice-over states "We have to sell cigarettes to your kids. We need half a million new smokers a year just to stay in business. So we advertise near schools, at candy counters. We lower our prices. We have to. It' s nothing personal. You understand." At the conclusion, the narrator says, "The tobacco industry: how low will they go to make a profit?"[4]

Additionally, the DHS claims full responsibility for the content of their media campaign and endorses its message at the conclusion of every anti-smoking advertisement, noting that it is "Sponsored by the California Department of Health Services."[5]

[4] Reynolds v. Bonta, 272 F.Supp. 2d 1085, 1089 (E.D. Cal. 2003).
[5] *See id.*

Given the content of the anti-smoking advertisements and their decidedly negative implications regarding the tobacco industry, the plaintiffs (R.J. Reynolds Tobacco Company and Lorillard Tobacco Company) surprisingly did not file their claim to challenge the content of the advertisements, nor did they question the State's right to broadcast them. In fact, they do not even question the existence of the surtax itself. Rather, they base their argument solely on Proposition 99 and the use of the surtax to fund the advertisements created by the Department of Heath Services.

Of their five causes of action, the crux of the plaintiffs' argument relies upon a violation of their First Amendment rights. Plaintiffs argue that imposing the surtax specifically on the tobacco industry to fund advertisements that threaten the industry's profitability is a violation of those rights and threatens their ability to do business in California.

Interestingly, the tobacco industry itself is not a direct target of the financial burden imposed by the Proposition 99 surtax. The surtax was specifically aimed at cigarette distributors, and a majority of cigarette distributors in the State of California are cigarette wholesalers (convenience stores, supermarkets, et cetera). The R.J. Reynolds Tobacco Company managed to involve itself in this case since it owns a subsidiary, R.J. Reynolds Smoke Shop, which happens to be a cigarette distributor. Consequently, R.J. Reynolds Smoke Shop is listed as one of the plaintiffs. Lorillard Tobacco Company managed to join in the lawsuit by happenstance: it conducts regular "research and marketing activities in California,"[6] which implies the distribution of cigarettes and thus fits the criteria for the Proposition 99 surtax.

The impact of the surtax upon the plaintiffs is relatively minuscule in comparison to the taxation of cigarette wholesalers statewide. Of the $14,000 the plaintiffs paid in surtax, only $2,800 (i.e., 20% as required Proposition 99) was allocated to the Health Education Account to produce the anti-smoking advertisements. This is also a small portion of the total funds in the Health Education Account; the overall balance of that account was $25 million dollars. The larger account, the Cigarette and Tobacco Products Surplus Fund (which includes the Health Education Account) was expected to earn $125 million dollars from the surtax. Thus the plaintiffs clearly had a large stake in the outcome of this case, despite their relatively small tax burden, since the surtax would fund an account with sufficient resources at its disposal to threaten the tobacco industry's business.

[6] Reynolds v. Shewry, 384 F.3d 1126, 1133 (9th Cir. 2004).

LEGAL STANDARD

Reynolds v. Shewry sets a precedent by presenting the unique argument of the plaintiffs that cannot be easily addressed with existing legal standards. In their majority opinion, the Ninth Circuit finds "the precedent upon which the tobacco companies rely… is a novel argument"[7] that relies on a number of already contentious cases involving associations, taxation, and the right to free speech. This makes it difficult for the plaintiffs to succinctly present their argument, as significant legal interpretations must be made to create a legal standard upon which to examine this case.

However, three interrelated legal standards become apparent in *Reynolds*.

- The primary legal flows from the First Amendment; this is the standard upon which the plaintiffs have built much of their legal argument. They argue the State has misused its power to tax by collecting a surtax solely from tobacco wholesalers, which funds advertisements that use biased statements known as "compelled speech"[8] (since it "compel[s] citizens to express beliefs that they do not hold"). [9]
- The case also implicates a second legal standard dealing with the limitations on the government's power to tax; this standard is used to determine whether the tax revenue may be used to pay for speech the taxpayer disagrees with.
- Finally, the third legal standard is a sub-component of the second, raising the question of when it is appropriate for the government to impose fees upon a group or industry in order to regulate the activities of that group.

These three legal standards, mentioned throughout *Reynolds* and nested within the various case precedents, provide a footing upon which one can analyze the plaintiffs' argument and determine its validity.

[7] *Id.* at 1136.
[8] *Id.* at 1140.
[9] *See id.*

First Amendment Freedom of "Non-Speech"

The First Amendment is the most concrete legal standard used in *Reynolds* and states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[10] To support the relevance of this standard, the plaintiffs rely on *United States v. United Foods* as their central case precedent since they argue that it bears the closest resemblance to their unprecedented legal situation. *United Foods* was filed in response to the federal Mushroom Promotion, Research, and Consumer Information Act of 1990, which the Secretary of Agriculture implemented through the establishment of a Mushroom Council. The Council's representatives were selected by mushroom growers and importers, making them members of a government association.

The Act allowed the collection of mandatory assessments to be used for "projects of mushroom promotion, research, consumer information, and industry information,"[11] which were mainly allocated toward advertisements to promote mushroom sales. However, a mushroom producer refused to pay the mandatory assessment on the grounds that the advertisements constituted a violation of the First Amendment, since the government was sponsoring biased speech. The Supreme Court agreed with the plaintiff in *United Foods*, ruling that such government behavior puts "First Amendment values … at serious risk" by "compel[ling] … a discrete group of citizens to pay special subsidies for speech on the side that [the government] favors."[12] In that specific regard, the Court held that the First Amendment prohibited this form of compelled speech.

United Foods bears a close relationship to *Reynolds* because of the similar circumstances which originally brought *United Foods* before the Supreme Court. The Supreme Court summarized the legal issue presented by *United Foods* as "whether the government may underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class

[10] U.S. CONST. amend. I.

[11] United States v. United Foods, Inc., 533 U.S. 405, 408 (2001).

[12] *Id.* at 411.

of persons, some of whom object to the idea being advanced,"[13] and answered by ruling that the government may not do so.

According to the Ninth Circuit in *Reynolds*, "*United Foods* is a logical extension of a long line of cases that have protected both freedom of expression and freedom of association"[14] by focusing on the relevance of the speech being disputed. Two cases that specifically tackle this issue are *Abood v. Detroit Board of Education* and *Keller v. State Bar of California*. *Abood* and *Keller* both involved private, nongovernmental associations (a teacher's union and the California State Bar, respectively) imposing a mandatory fee or assessment that paid, in part, for speech that "advance[d] political and ideological causes to which some …members did not subscribe." [15]

The Supreme Court ruled in favor of the plaintiffs in *Abood* and *Keller* using the same legal reasoning they employed in *United Foods*. The majority decisions state it is acceptable for associations to impose mandatory fees despite the dissent of members. However, this only applies so long as the use of mandatory fees is "germane" [16] in supporting the fundamental objectives and mission of the association.

Additionally, *Reynolds* makes note of *Wooley v. Maynard* and continues the line of *United Foods'* legal reasoning. *Wooley* involved two married Jehovah's Witnesses who, on the basis of their faith, asserted that it was "objectionable to disseminate [the New Hampshire state motto, "Live Free or Die"] by displaying it on their automobiles …[and] began early in 1974 to cover up the motto on their license plates."[17] The New Hampshire statute made it a misdemeanor to obscure the motto, and one of the plaintiffs brought legal action against the state after he was jailed for refusing to comply with the law. The Supreme Court ruled in favor of the plaintiffs since "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."[18] According to the Supreme Court, the First Amendment creates a right "not" to speak under certain circumstances. The plaintiffs in *Reynolds* rely on this argument to claim

[13] *Id.* at 410.

[14] *Reynolds*, 384 F.3d at 1144.

[15] *Id.* at 1142.

[16] Abood v. Detroit Board of Education, 431 U.S. 209, 235 (1977).

[17] Wooley v. Maynard, 430 U.S. 705, 707-08 (1977).

[18] *Id.* at 714.

their right not to speak via the anti-smoking advertisements, which they alone are forced to fund through the Proposition 99 surtax.

The Power to Tax

The second legal standard, nested within the aforementioned case precedents, involves taxation and what regulations the government is obliged to follow in order to comply with the First Amendment. The plaintiffs in *Reynolds* argued that "imposing an excise tax on a particular industry and then earmarking the use of the tax funds for advertisements that criticize that industry suffices to make the companies similarly situated to the plaintiffs in the compelled speech cases [*Abood, Keller*, *United Foods,* et cetera]."[19] Therefore, the plaintiffs essentially disapprove of the monetary "nexus"[20] between the surtax and the advertisements, as opposed to the actual content of the advertisements themselves.

The plaintiffs argue the State has gone too far in using its power to tax to specifically fund compelled speech. They view the Cigarette and Tobacco Products Surplus Fund as the State's attempt to solely use tobacco industry income to essentially discredit and destroy the industry contributing to that fund in the first place. This is very different from a tobacco industry surtax that would be paid directly into the General Fund, which the plaintiffs prefer.

The plaintiffs believe a General Fund approach would be acceptable for funding anti-smoking advertisements, since the combined monies from the General Fund would be spent in the name of the people of California, who ultimately expect the government to use Proposition 99 to ensure their health and welfare. Therefore, this approach would intermingle the taxable income of the tobacco industry with that of the California taxpayers to create a truly representative and legitimate funding source.

However, the Ninth Circuit holds a contrary opinion on this matter. The court sees "a fundamental difference between the DHS excise tax and spending regime versus the compelled contributions to private associations."[21] The Ninth Circuit reasons that cases involving mandatory fees for private associations fall under stricter standards than cases involving the government's ability to tax, primarily for reasons preserving the government's legitimacy to regulate

[19] *Reynolds*, 384 F.3d at 1149.
[20] *Id.* at 1128.
[21] *Id.* at 1149.

society. The Ninth Circuit also notes that the plaintiffs have filed their case under the assumption that "industries subject to an excise tax are entitled to a special veto over government speech funded by the tax,"[22] yet the court itself believes excise taxes are so common that it would be unreasonable for industries to question the government's tax scheme. The Ninth Circuit finds this line of thinking could devolve government power while empowering industries with the ability to question and curtail certain forms of government speech to the detriment of society.

The Ninth Circuit also cites "a long history of excise taxation directed at particular industries in the name of public health and welfare"[23] and particularly emphasizes *McCray v. United States* and *Patton v. Bradley* as especially relevant to *Reynolds*. The opinions from both cases (regarding excise taxation on artificially colored Oleo margarine and tobacco, respectively) have defined "excise taxes levied in the name of public health [as] constitutionally permissible, even when such taxation has put severe burdens on particular industries."[24]

The Ninth Circuit relies upon these precedents to conclude that "not one court has upheld a right of an industry to block otherwise legitimate government activity simply because the industry pays an excise tax."[25] It presumes this is so because allowing such rights would create a viable mechanism for "private interests to control public messages"[26] that the court understands to be detrimental and counterproductive in properly exercising free speech as outlined by the First Amendment.

Taxation versus Regulation

The final legal standard applicable to the *Reynolds* case is an extension of the taxation standard; it questions when it is appropriate for the government to tax a specific group in order to regulate that group's activities. The plaintiffs argue it is not appropriate for the state of California to use the Proposition 99 surtax to indirectly regulate their industry via the anti-smoking advertisements.

[22] *Id.* at 1158.
[23] *Id.* at 1161.
[24] *Id.* at 1159-60.
[25] *Id.* at 1161.
[26] *Id.* at 1162.

Yet the Ninth Circuit found that it is not "a novel feature of American government to levy an excise tax on a particular industry."[27]

This raises the question as to whether the anti-smoking advertisements even qualify as what the plaintiffs define to be *industry regulation*. The written intent of Proposition 99 is to specifically promote better health through "health education interventions and behavior change programs"[28] rather than the outright regulation of the tobacco industry by restricting their production capabilities or marketing abilities. The Ninth Circuit supports this conclusion as well, noting the plaintiffs "do not argue that the [anti-smoking advertisements themselves are] constitutionally impermissible; nor do they argue that the government has burdened their First Amendment rights through the exercise of its power to tax."[29] However, the plaintiffs see the effects of these anti-smoking advertisements as an indirect regulation of their industry and a violation of their First Amendment rights. The advertisements limit the plaintiffs' ability to sell tobacco products by turning people away from cigarettes using negative messages (which is being accomplished by taxing the tobacco industry itself). This is one of the many subtle but important distinctions to be understood when examining the plaintiffs' legal argument.

Reynolds Case: Judge Trott's Dissent

Judge Stephen Trott believes that in *Reynolds* it was simple for the majority to rule upon since it involved an unpopular tobacco industry, but his dissent poses the hypothetical argument that "tomorrow it will be something else"[30] and he wonders "whose disfavored ox or whose industry or business or lifestyle will be the next to be fatally gored."[31] In the context of the First Amendment claim, Judge Trott disagrees that anti-smoking advertisements characterized as government speech are immune from scrutiny and claims "the Court has not provided a clear explanation of the reach or proper application of the [government speech] doctrine."[32] His dissent also questions the government's claim that there are no First Amendment concerns "when the

[27] *Id*. at 1159.

[28] CAL. HEALTH & SAFETY CODE § 104375(a) (2004).

[29] *Reynolds*, 384 F.3d at 1163 (Trott, S., dissenting).

[30] *Id.* at 1171.

[31] *Id.* at 1172.

[32] *Id.* at 1175-76.

state is the speaker"[33] and emphasizes the significance of the source of funding for the anti-smoking advertisements under the First Amendment legal standard (which the State downplays as a non-issue). Judge Trott sees these arguments as "not consistent with the trajectory and force of the Supreme Court's recent compelled speech jurisprudence"[34] and also finds fault with the defense's complex use of government taxing authority to circumvent the General Fund with a tobacco tax fund.

The question of compelled speech is analyzed by reexamining the plaintiffs' argument, much of which was built on precedents set by the *Abood*, *Keller,* and *United Foods* cases. Judge Trott believes the plaintiffs' argument could hold water given "the puzzle with which the courts have been struggling" in the *Reynolds* case.[35] In his view, the mix of legal precedents that at first appear to be unrelated and difficult to follow, can actually be applied to the plaintiffs' benefit. In Judge Trott's view, " *United Foods* and the [Supreme] Court's previous compelled speech case law can be reconciled and understood… [T]he First Amendment forbids certain compelled assessments"[36] that are intended "to pay special subsidies for speech."[37] The ambiguity of the Supreme Court's interpretation is also to the plaintiffs' advantage since the surtax and speech at issue in *Reynolds* are "questionable under whatever [legal] standard one uses,"[38] notably failing the "germaneness test"[39] of *Abood*. This relationship between speech and taxation is important to Judge Trott, who writes: "unlike a situation in which money is allocated from the general treasury fund, individuals who have specifically been targeted by the speech are forced to pay for the speech."[40]

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[33] Rosenberger v. Rector & Visitors of the Univ. of Virginia, 515. U.S. 819, 833 (1995).

[34] *Reynolds*, 384 F.3d at 1178 (Trott, S., dissenting).

[35] *Id.* at 1180.

[36] *Id.* at 1185.

[37] *United Foods*, 533 U.S. at 411.

[38] *Reynolds*, 384 F.3d at 1186 (Trott, S., dissenting).

[39] *Id.* at 1185.

[40] *Id.* at 1190.

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ANALYSIS

What is striking about *Reynolds v. Shewry* is the sense of injustice being done against the plaintiffs, notwithstanding their role in the tobacco industry or one's opinion on tobacco products. Here we have an industry being exclusively taxed to pay for strongly worded advertisements that are detrimental to their ability to conduct a profitable business. It is supported by the majority of people in the state and the plaintiff companies do not have a voting opportunity to overturn the law behind the tax. In *Reynolds* there are enough case precedents and legal standards to justify a reversal of this surtax, but the Ninth Circuit has seen fit to ignore them on what are arguably spurious grounds. The Ninth Circuit should have done more to examine the plaintiffs' argument and rule in their favor to both settle their dispute and set clear precedent for an unexplored area of the law.

Unfortunately, the Ninth Circuit was not persuaded by the plaintiffs' First Amendment claim regarding the nexus between the surtax and the anti-smoking advertisements. Upon closer examination it becomes clear that the Ninth Circuit's ruling relied on arguable background information, dicta extrapolated from public opinion, and only tentatively applicable case precedents to create a precedent with both powerful and grave implications, despite a fully sustainable legal argument to the contrary.

First Amendment Freedom of "Non-Speech"

Ambiguity of the United Foods Precedent

The major obstacle to the plaintiffs' effective application of the First Amendment via the *United Foods* standard is the Supreme Court's ambiguity behind the application of the *United Foods* precedent to future cases. The Ninth Circuit notes this shortcoming, stating: "not every case in which the government mandates support for speech from a particular group necessarily creates a First Amendment violation."[41] However, the Supreme Court "specifically declined to address" [42] whether the *United Foods* standard would apply to government speech originating from the will of the people. This occurred in *Reynolds* with Proposition 99, which is similar to the case in *United*

[41] *Id.* at 1139.
[42] *See id.*

Foods with the Mushroom Council, where a government agency was charged with enforcing taxation.

The Ninth Circuit's analysis of *United Foods*, in conjunction with its relative inaction in fairly examining the plaintiffs' argument, hints at a lack of initiative to extensively examine the facts. Here we have a relatively new area of the law, where legal standards have not yet been fully codified or structured by the Supreme Court or any other judicial body. The *Reynolds* case could serve as the vehicle for a development of such legal standards to lead the way for similar cases in the future, and the Ninth Circuit would not be ill-advised to experiment with judicial "creativity" under such circumstances. The Ninth Circuit was far too strict in its view of the plaintiffs' argument. The court resisted possible alternatives for the plaintiffs, which may have included a closer examination of whether *United Foods* legal standards and the spirit behind this ruling may apply to a *Reynolds*-type situation.

The Right "Not" to Speak: Wooley v. Maynard

In the same vein of First Amendment rights, the case of *Wooley v. Maynard* is important to note for its precedent defining one's right 'not' to speak. In *Wooley*, the plaintiffs were residents and taxpayers of New Hampshire who refused to display the state motto on their license plate for religious reasons. The Supreme Court upheld their case by encouraging the plaintiffs' right not "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable."[43] This translates well into *Reynolds* since the plaintiffs essentially share the same position. Both are taxpaying entities that are forced to display an unfavorable message that they must exclusively subsidize, and both oppose compliance with a state law since they believe it will negatively impact and threaten their interests. A more interpretive court would use *Wooley* as a standard in the absence of other clear standards that closely resemble the specific issues presented in *Reynolds*. Yet strangely, the majority in *Reynolds* chose not to pursue this course of action since it saw "no claim that the tobacco companies have been forced into expressing any position."[44] Such a decision is unusual, since the surtax imposed upon the plaintiffs pays for government-created advertisements whose position is decidedly against the tobacco industry's views and whose existence violates their right not to contribute to unfavorable compelled speech.

[43] *Wooley*, 430 U.S. at 715.

[44] *Reynolds*, 384 F.3d at 1141.

Taxation

Private Association versus Government Entity

Another obstacle created by the Ninth Circuit was its finding that the plaintiffs' case relies mainly on precedents involving private associations, and that such associations have less control over how they may use their mandatory assessments or fees compared to the government and its ability to tax. While these association cases are similar in format to the *Reynolds* case, none involves an actual government entity. Interestingly, the Supreme Court viewed the California State Bar in *Keller v. State Bar of California* as a very close approximation to a government entity, since it "performs important and valuable services for the State …but those services are essentially advisory in nature"[45] and the ability to impose the will of government upon the legal profession is "reserved by California law to the State Supreme Court."[46] In *Reynolds*, the Ninth Circuit strictly differentiates between voluntary associations and the government, thus voiding any merit that the plaintiffs' case may have.

Here, there is a trend toward a narrow interpretation when the unique circumstances of the case allow and encourage a more liberal examination of the legal questions posed in *Reynolds*. After all, to what extent are voluntary membership associations and the government different? Both have the ability to impose mandatory financial burdens, both have criteria for membership eligibility, both have a purpose and a structural hierarchy, and if desired the members of either body may leave or seek the inclusion of new members. Both are also limited in the type of speech they may create with the funds they collect from their members. In any empirical estimation, a voluntary association is quite similar to a government in that both attempt to regulate the actions and inclusiveness of a group. One of those regulatory tools happens to be the power to impose fees or taxes, and it is unclear why the association cases used by the plaintiffs cannot be even remotely compared to *Reynolds.* In fact, they *can* be compared with some judicial flexibility. The Ninth Circuit majority may see it as a stretch of judicial activism, but it must be repeatedly noted that this case is unique and presents a new argument without legal precedent, therefore requiring a measure of activism itself.

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[45] *Id.* at 1155 n.8.

[46] *See id.*

While the Ninth Circuit is highly conservative when analyzing the plaintiffs' case, it has taken a legal diversion with a surprisingly large amount of dicta regarding limitations upon government speech and the history of excise taxation in the United States. While it had been clearly enunciated by the majority in aforementioned sections of *Reynolds* that the government held a unique right to speech that could not be infringed upon due to the dissent of taxpayers, the court continues to bolster the state's case by pointing toward an unnecessary and large amount of legal text that makes the plaintiffs' argument appear even less credible. It is unfortunate that the Ninth Circuit decided to include such a strong and forceful argument for the state while neglecting to appreciate the clearly difficult and complex position of the plaintiffs with equal zeal.

Public Policy Failings of Proposition 99 and the DHS

Additionally, the Ninth Circuit finds that since the citizens of California (and by extension the State) voted to implement Proposition 99 for pragmatic reasons of health and welfare, it is not necessary to indulge the plaintiffs' argument since those being taxed have spoken at the voting booth. However, the dissenting judge and other astute legal observers will note that Proposition 99 was phrased so that the California voter (especially the non-smoker) has no obligation to pay the surtax. Tobacco wholesalers carry the brunt of the surtax, yet all the business owners in the state could not bring enough citizens to vote against the overwhelming voting majority of the people of California. It is extremely difficult to believe that Proposition 99's populist origins and good intentions discount the argument that the plaintiffs have filed. In fact, it supports their argument by illustrating how the government is taxing a niche industry to destabilize it for health reasons while defending itself from legal action by declaring the State as a whole decided to implement the surtax and is thus free from any 'compelled speech' claims. The dissenting judge is right to call the surtax 'the ultimate cheap shot."[47] Regardless of whatever mandate the State has to impose Proposition 99, the victims of the surtax could never defeat the measure. The tobacco industry and its proponents are far outnumbered by the general population. They must instead bear an unfair burden that the State imposes, and yet they have no power to dispute its legitimacy. This neglected issue is at the heart of the surtax dispute that was before the court, and was not given sufficient legal consideration by the Ninth Circuit majority.

[47] *Id.* at 1191 (Trott, S., dissenting).

Notwithstanding the plaintiffs' already thorough argument, it is interesting that they did not examine whether the enforcement of Proposition 99 by the DHS was within its legal mandate and address that here or in another case altogether. Due to reasons of "limited utility,"[48] the DHS did not produce advertisements specifically focused on the "health education … and behavior change"[49] aspects of smoking as required by Proposition 99. They instead tried to "denormalize"[50] smoking by portraying fictional tobacco companies and their executives as impersonal and devious corporate entities marketing a dangerous substance (namely to children and teenagers) purely for profit, with the implication being that purchasing their product is akin to aiding and abetting an immoral, even criminal, organization. This message, not a factual health education or behavior change regimen, is what makes the anti-smoking advertisements so effective and outside the context of Proposition 99. The DHS should be put under legal scrutiny for a failure to complete its stated mission by appealing to emotions with storylines of fictional characters and companies based upon Big Tobacco's bad reputation rather than sticking to a factual, evidence-based discussion of tobacco and its negative health consequences. This is another contentious issue that should have been addressed by the plaintiffs as an example of excessive government involvement in the tobacco industry's ability to conduct business.

What is of great concern is the Ninth Circuit's assertion: "On this record, we need not determine the metes and bounds of constitutionally permissible government speech; nor need we articulate abstract limits on the state's power to tax."[51] Yet is this entire case and unresolved field of law not about when the government can exercise compelled speech via the taxation of a certain group whose members who do not support the taxation involved? It is decidedly so. The anti-smoking advertisements question what is "constitutionally permissible government speech," while the Proposition 99 surtax controversy is essentially asking whether there need to be "abstract limits" on the unique power of the government to demand taxation. The Ninth Circuit could have, and should have, done more to accommodate the valid claims of the plaintiffs.

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[48] *Id.* at 1130.

[49] CAL. HEALTH & SAFETY CODE § 104375(a) (2004).

[50] *Reynolds*, 384 F.3d at 1130.

[51] *Id.* at 1166.

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CONCLUSION

The case presented before the Ninth Circuit has been ruled upon, and life goes on in California. Yet it could have very well been ruled upon differently. The court was given a case with the unique situation of an industry claiming First Amendment violations based on the government's ability to tax and impose compelled speech. *Reynolds v. Shewry* asked the Ninth Circuit to determine whether the California Department of Health Services was within its legal rights to enforce excise taxes upon the tobacco industry, noting that these same taxes paid for anti-smoking advertisements that undermine the profitability and viability of the tobacco industry itself. *Reynolds* presented a unique insight into an unexplored field of the law, and the existence of so few legal standards and case precedents offered an opportunity to set a precedent for future *Reynolds*-like situations.

However, the Ninth Circuit came to a simpler and less controversial majority decision in favor of the state, which hinders any future establishment of pioneering legal standards. As the dissenter in *Reynolds*, Judge Trott emphasized the inability of this court to make such a decision given the acknowledged lack of concrete legal standards. He also acknowledges a missed opportunity to set a meaningful case precedent and predicts that the controversial judgment of *Reynolds* will be of detriment to other plaintiffs who, in the future, hope to seek relief against the power of the government to tax or impose compelled speech.

The Ninth Circuit had a clear opportunity to broadly interpret the overlapping legal standards to clarify a confusing area of the law, yet it decided to side with the state and support its to impose taxes for the purpose of imposing compelled speech. There were enough applicable case precedents, legal standards, and factual evidence to justify the plaintiffs' complex position in *Reynolds* and effect a contrary ruling. A close study of *Reynolds v. Shewry* leads this author to conclude that courts, given the opportunity to conclusively define an unexplored and debatable field of the law, should be obligated to do so rather than hand down a decision based upon dissimilar or ill-fitting legal precedents. The Ninth Circuit's decision in *Reynolds* was a setback for both the tobacco industry and those concerned about the unregulated power of the government to impose taxes and speech upon disfavored industries, individuals, or causes.

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EDITORS' NOTE:

Although the Ninth Circuit was unpersuaded by the plaintiffs' mix of taxation and compelled speech arguments in the Reynolds case, other plaintiffs have persevered with similar arguments. In May of 2005 (following the writing of this article), the United States Supreme Court ruled on a challenge to the Beef Promotion and Research Act of 1985, which imposes a similar tax assessment on the sale and importation of cattle. The tax collected is used to fund, among other things, promotional campaigns like: "Beef. It's what's for dinner."[52] *The plaintiffs in this case were members of the beef industry who disagreed with this type of generic beef campaign because they felt it insinuated that all beef products were of a similar quality. The plaintiffs argued that the advertisements should be treated as private speech (as opposed to government speech) because they were controlled by the Beef Board and Operating Committee, an arguably non-governmental entity. The majority of the Supreme Court*[53] *held that despite the intermediary involvement of the Beef Board, the advertisements represented the government's own speech, and thus were not susceptible to a First Amendment compelled-subsidy challenge under the United Foods, Keller and Abood line of precedent.*

Similar in structure to the Tobacco Tax and DHS program at issue in Reynolds, the Beef Act directed the Secretary of Agriculture to appoint a geographically representative group of beef producers and importers, nominated by trade associations, to the Beef Promotion and Research Board. The Operating Committee consisted of the Beef Board members as well as additional representatives named by a federation of state beef councils. The Operating Committee then designed the beef promotion campaign, which was to be approved by the Secretary.[54]

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[52] Johanns v. Livestock Mktg. Ass'n, 125 S.Ct 2055 (2005).

[53] Justice Scalia delivered the opinion of the Court, joined by Chief Justice Rehnquist and Justices O'Connor, Thomas and Breyer. Justice Ginsburg filed an opinion concurring in the judgement but not for the reasoning explained here.

[54] *Id.* at 2058.

By the time of litigation, over one billion dollars had been raised by the beef assessment, a substantial portion of which had been used to fund the widespread "Beef. It's what's for dinner," promotion and similar campaigns. [55] *Many of the advertisements contained the attribution: "Funded by America's Beef Producers."*[56]

The beef litigation was pending in the district court when the Supreme Court held in United Foods that the mandatory assessment used for generic mushroom advertising violated the First Amendment.[57] *As our author, Mr. Sathienmars, explains in his article, the United Foods ruling left some doubt as to whether the distinction between "private" speech and "governmental" speech would be relevant to its underlying holding. However, the Livestock Marketing Association opinion forecloses this debate to a great extent by declining to view this as a constitutionally significant distinction. In his majority opinion, Justice Scalia discounted what he viewed as the dissent's "presumptive autonomy [for] speakers to decide what to say and what to pay for others to say."*[58] *Justice Scalia was similarly unimpressed by arguments that the taxed individuals might feel "singled out" or find the exaction of fees from them "galling."*[59] *Concurring in the Court's judgment, Justice Kennedy also saw "no analytical distinction between 'pure' government speech funded from general tax revenues and from speech funded from targeted exactions…."*[60] *In other words, the portion of the Reynolds plaintiffs' argument dealing with the need to intermingle the Tobacco Tax funds with the State's General Fund may not be persuasive to these justices.*

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[55] *Id.* at 2059. For example, during fiscal year 2000, over $29 million of the beef assessments were used in the United States to fund domestic beef advertising. The Board also conducted overseas marketing efforts as well as market and food-science research and informational campaigns for beef producers. *Id.* Under similar statutes, the United States oversees promotional programs for numerous agricultural commodities such as cotton, potatoes, watermelons, popcorn, peanuts, blueberries, Hass avocados, soybeans, honey, eggs, lamb and pork. *Id.* at 2060.

[56] *Id.* at 2059.

[57] *Id.* (referencing United States v. United Foods, Inc., 533 U.S. 405 (2001)).

[58] *Id.* at 2065.

[59] *Id.*

[60] *Id.* at 2066 (Thomas, J., concurring) (citing The Federalist No. 12).

Justice Souter, however, in a dissenting opinion joined by Justices Stevens and Kennedy, had a different focus.[61] *He found the beef ranchers' complaint "on all fours with the objection of the mushroom growers in [United Foods]."*[62] *He cautioned:*

> *[A] compelled subsidy [of government speech] should never be justifiable … unless the government must put that speech forward as its own. Otherwise there is no check whatever on government's power to compel special speech subsidies, and the rule of United Foods is a dead letter. … [Government] must make itself politically accountable by indicating that the content actually is a government message, not just the statement of one self-interest group the government is currently willing to invest with power.*

While the majority and concurring opinions suggested that some cases might implicate facts sufficient to implement this sort of "as applied" challenge to poorly attributed government speech, they did not address the issue on the record created in the Livestock Marketing Association case.[63] *The dissenters, however, would have viewed the record as sufficient to rule in favor of the plaintiffs for this reason alone.*

Interestingly, Justice Souter's relatively brief dissent contains the same quote by Thomas Jefferson found at the beginning of Judge Trott's dissent in the Reynolds case:

> *In 1779 Jefferson wrote that 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.*[64]

This statement of general principle certainly concerns at least three members of the Supreme Court in addition to Judge Trott and our author, Mr. Sathienmars.

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[61] Justice Kennedy filed a dissenting opinion. Justice Souter also filed a dissenting opinion, which was joined by Justices Kennedy and Stevens.

[62] *Id.* at 2068 (Souter, J., dissenting).

[63] *Id.* at 2065-66. The Court acknowledged the argument but did not squarely address it in the Livestock Marketing Association case, stating that the trial court record was not sufficiently developed on the relevant issues.

[64] *Id.* at 2069 (Souter, J., dissenting) (citing 5 The Founders' Constitution, § 37, A Bill for Establishing Religious Freedom, p. 77 (1987)).

In fact, the policy underlying compelled speech may be of concern to the California Supreme Court as well. In 2004 a divided Court wrestled with the argument that statutory exactments taken from California's plum growers to fund generic plum advertising might violate provisions of the California State Constitution.[65] *Because a different legal standard must be applied under California law (i.e., whether the program is supported by "a valid government interest" as opposed to merely private interest), a divided California Supreme Court remanded the case for further development of the factual record. Although the Ninth Circuit Court of Appeal showed less appreciation for the complex mix of case precedents raised by the Reynolds plaintiffs than our author, Mr. Sathienmars, would have preferred, it seems that many jurists are still willing to explore the public policy concerns raised in his article.*

[65] See Gerawan Farming, Inc., v. Kawamura, 33 Cal.4th 1 (Cal. 2004). The state level challenge at issue in the case was raised under Cal. Const., art. I, § 2, subd. (a).