

JOHANNIS V. LIVESTOCK MARKETING ASSOCIATION, 125 S.Ct. 2055 (2005). *Johannis* upheld the Beef Promotion and Research Act of 1985, which establishes a federal policy of promoting and marketing beef and beef products. The Secretary of Agriculture implemented the Act by imposing an assessment, or "checkoff," on all sales and importation of cattle. The assessment funds, among other things, beef promotional campaigns approved by the Operating Committee and the Secretary.

The Court, distinguished *United States v. United Foods, Inc.*, which invalidated a mandatory checkoff that funded mushroom advertising. The Court held that the checkoff was constitutional as government speech. Justice Scalia's majority opinion was joined by Rehnquist, C. J., and O'Connor, Thomas, and Breyer, JJ.

SCALIA, J.:

We have sustained First Amendment challenges to allegedly compelled expression in two categories of cases: true "compelled speech" cases, in which an individual is obliged personally to express a message he disagrees with, imposed by the government; and "compelled subsidy" cases, in which an individual is required by the government to subsidize a message he disagrees with, expressed by a private entity. We have not heretofore considered the First Amendment consequences of government-compelled subsidy of the government's own speech.

....

In all of the cases invalidating exactions to subsidize speech, the speech was, or was presumed to be, that of an entity other than the government itself. Our compelled-subsidy cases have consistently respected the principle that "[c]ompelled support of a private association is fundamentally different from compelled support of government." *Abood*, (Powell, J., concurring in judgment). "Compelled support of government"--even those programs of government one does not approve--is of course perfectly constitutional, as every taxpayer must attest. And some government programs involve, or entirely consist of, advocating a position. "The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies." *Southworth*. We have generally assumed, though not yet squarely held, that compelled funding of government speech does not alone raise First Amendment concerns.

Respondents do not seriously dispute these principles, nor do they contend that, as a general matter, their First Amendment challenge requires them to show only that their checkoff dollars pay for speech with which they disagree. Rather, they assert that the challenged promotional campaigns differ dispositively from the type of government speech that, our cases suggest, is not susceptible to First Amendment challenge. . . . Respondents contend that speech whose content is effectively controlled by a nongovernmental entity cannot be considered "government speech." We need not address this contention, because we reject its premise: The message of the promotional campaigns is effectively controlled by the Federal Government itself. . . . Congress and the Secretary have set out the overarching message and some of its elements, and they have

left the development of the remaining details to an entity whose members are answerable to the Secretary (and in some cases appointed by him as well). . . . Moreover, the record demonstrates that the Secretary exercises final approval authority over every word used in every promotional campaign. All proposed promotional messages are reviewed by Department officials both for substance and for wording, and some proposals are rejected or rewritten by the Department. Nor is the Secretary's role limited to final approval or rejection: officials of the Department also attend and participate in the open meetings at which proposals are developed. This degree of governmental control over the message funded by the checkoff distinguishes these cases from Keller. There the state bar's communicative activities to which the plaintiffs objected were not prescribed by law in their general outline and not developed under official government supervision. Indeed, many of them consisted of lobbying the state legislature on various issues. When, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages.

Respondents also contend that the beef program does not qualify as "government speech" because it is funded by a targeted assessment on beef producers, rather than by general revenues. This funding mechanism, they argue, has two relevant effects: it gives control over the beef program not to politically accountable legislators, but to a narrow interest group that will pay no heed to respondents' dissenting views, and it creates the perception that the advertisements speak for beef producers such as respondents.

We reject the first point. The compelled-subsidy analysis is altogether unaffected by whether the funds for the promotions are raised by general taxes or through a targeted assessment. Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech. And that is no less true when the funding is achieved through targeted assessments devoted exclusively to the program to which the assessed citizens object. The First Amendment does not confer a right to pay one's taxes into the general fund, because the injury of compelled funding (as opposed to the injury of compelled speech) does not stem from the Government's mode of accounting.

Some of our cases have justified compelled funding of government speech by pointing out that government speech is subject to democratic accountability. But our references to "traditional political controls," do not signify that the First Amendment duplicates the Appropriations Clause, U. S. Const., Art. I, §9, cl. 7, or that every instance of government speech must be funded by a line item in an appropriations bill. Here, the beef advertisements are subject to political safeguards more than adequate to set them apart from private messages. The program is authorized and the basic message prescribed by federal statute, and specific requirements for the promotions' content are imposed by federal regulations promulgated after notice and comment. The Secretary of Agriculture, a politically accountable official, oversees the program, appoints and dismisses the key personnel, and retains absolute veto power over the advertisements' content, right down to the wording. And Congress, of course, retains oversight authority, not to mention the ability to reform the program at any time. No more is required.

As to the second point, respondents' argument proceeds as follows: They contend that crediting the advertising to "America's Beef Producers" impermissibly uses not only their money but also their seeming endorsement to promote a message with which they do not agree. Communications cannot be "government speech," they argue, if they are attributed to someone other than the government; and the person to whom they are attributed, when he is, by compulsory funding, made the unwilling instrument of communication, may raise a First Amendment objection.

We need not determine the validity of this argument--which relates to compelled speech rather than compelled subsidy--with regard to respondents' facial challenge. Since neither the Beef Act nor the Beef Order requires attribution, neither can be the cause of any possible First Amendment harm. The District Court's order enjoining the enforcement of the Act and the Order thus cannot be sustained on this theory.

On some set of facts, this second theory might (again, we express no view on the point) form the basis for an as-applied challenge--if it were established, that is, that individual beef advertisements were attributed to respondents. The record, however, includes only a stipulated sampling of these promotional materials, and none of the exemplars provides any support for this attribution theory except for the tagline identifying the funding. . . . Whether the individual respondents who are beef producers would be associated with speech labeled as coming from "America's Beef Producers" is a question on which the trial record is altogether silent. We have only the funding tagline itself, a trademarked term that, standing alone, is not sufficiently specific to convince a reasonable factfinder that any particular beef producer, or all beef producers, would be tarred with the content of each trademarked ad. We therefore conclude that on the record before us an as-applied First Amendment challenge to the individual advertisements affords no basis on which to sustain the Eighth Circuit's judgment, even in part.

Thomas, J., and Breyer, J., filed concurring opinions. Ginsburg, J., filed an opinion concurring in the judgment. Kennedy, J., filed a dissenting opinion.

SOUTER, J., dissenting, joined by Stevens and Kennedy, JJ.:

The error is not that government speech can never justify compelling a subsidy, but that a compelled subsidy should not be justifiable by speech 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. I take the view that if government relies on the government-speech doctrine to compel specific groups to fund speech with targeted taxes, it must make itself politically accountable by indicating that the content actually is a government message, not just the statement of one self-interested group the government is currently willing to invest with power. Sometimes, as in these very cases, government can make an effective disclosure only by explicitly labeling the speech as its own. Because the Beef Act fails to require the Government to show its hand, I would affirm the judgment of the Court of Appeals holding the Act unconstitutional. . . .

The adequacy of the democratic process to render the subsidization of government speech tolerable is, naturally, tied to the character of the subsidy. For when government funds its speech with general tax revenue, as it usually does, no individual taxpayer or group of taxpayers can lay claim to a special, or even a particularly strong, connection to the money spent (and hence to the speech funded). Outrage is likely to be rare, and disagreement tends to stay temperate. But the relative palatability of a remote subsidy shared by every taxpayer is not to be found when the speech is funded with targeted taxes. For then, as here, the particular interests of those singled out to pay the tax are closely linked with the expression, and taxpayers who disagree with it suffer a more acute limitation on their presumptive autonomy as speakers to decide what to say and what to pay for others to say.

When a targeted assessment thus makes the First Amendment affront more galling, it does, or should, follow that greater care is required to assure that the political process can practically respond. . . . Whereas it would simply be unrealistic to think that every speech subsidy from general revenue could or should be scrutinized for its amenability to effective political response, the less-common targeted speech subsidies can be reviewed specifically for their susceptibility to response by the voters, and the intensity of the provocation experienced by the targeted group justifies just such scrutiny.

In these cases, the requirement of effective public accountability means the ranchers ought to prevail, it being clear that the Beef Act does not establish an advertising scheme subject to effective democratic checks. [T]he ads are not required to show any sign of being speech by the Government, and experience under the Act demonstrates how effectively the Government has masked its role in producing the ads. Most obviously, many of them include the tag line, "[f]unded by America's Beef Producers," which all but ensures that no one reading them will suspect that the message comes from the National Government. But the tag line just underscores the point that would be true without it, that readers would most naturally think that ads urging people to have beef for dinner were placed and paid for by the beef producers who stand to profit when beef is on the table. No one hearing a commercial for Pepsi or Levi's thinks Uncle Sam is the man talking behind the curtain. Why would a person reading a beef ad think Uncle Sam was trying to make him eat more steak? Given the circumstances, it is hard to see why anyone would suspect the Government was behind the message unless the message came out and said so.

The Court takes the view that because Congress authorized this scheme and the Government controls (or at least has a veto on) the content of the beef ads, the need for democratic accountability has been satisfied. But the Court has it backwards. It means nothing that Government officials control the message if that fact is never required to be made apparent to those who get the message, let alone if it is affirmatively concealed from them. The political accountability of the officials with control is insufficient, in other words, just because those officials are allowed to use their control (and in fact are deliberately using it) to conceal their role from the voters with the power to hold them accountable. Unless the putative government speech appears to be coming from the government, its governmental origin cannot possibly justify the burden on the First Amendment interests of the dissenters targeted to pay for it. . . . If the judiciary is justified in keeping hands off special assessments on dissenters from government

speech, it is because there is a practical opportunity for political response; esoteric knowledge on the part of a few will not do.

In sum, the First Amendment cannot be implemented by sanctioning government deception by omission (or by misleading statement) of the sort the Court today condones, and expression that is not ostensibly governmental, which government is not required to embrace as publicly as it speaks, cannot constitute government speech sufficient to justify enforcement of a targeted subsidy to broadcast it. . . .