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Mia Guizzetti Hayes

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# FIRST AMENDMENT VALUES AT SERIOUS RISK: THE GOVERNMENT SPEECH DOCTRINE AFTER JOHANNIS V. LIVESTOCK MARKETING ASS'N

*Mia Guizzetti Hayes\**

Perhaps you've seen the advertising campaign announcing "Beef: It's What's For Dinner." Is this an innocuous advertising slogan, or something more insidious? Would your answer change if you knew that the campaign was sponsored by the federal government? In 2005, the Supreme Court heard *Johannis v. Livestock Marketing Ass'n*,<sup>1</sup> a First Amendment challenge to generic beef advertisements.<sup>2</sup> The Court determined that the beef advertisements at issue were government speech, and therefore effectively immune from First Amendment scrutiny.<sup>3</sup> But dissenting Justice David Souter posed a lingering question: if "[n]o one hearing a commercial for Pepsi or Levi's thinks Uncle Sam is the man talking behind the curtain . . . [w]hy would a person reading a beef ad think Uncle Sam was trying to make him eat more steak?"<sup>4</sup>

For thirty years, the Supreme Court has recognized advertising as a category of speech that receives some protection under the First Amendment.<sup>5</sup> As it is generally understood, the commercial speech category is composed of speech "with greater objectivity and hardiness" that "'propose[s] a commercial transaction.'"<sup>6</sup> However, application of

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\* Juris Doctor and Institute for Communications Law Studies Certificate Candidate, May 2006, the Catholic University of America, Columbus School of Law. The author thanks Ben Golant for his guidance and friendship, Leah Battaglioli and Kristen Holt for their eagle eyes and expert advice, and Peter Hayes for reminding her to sleep and eat dinner.

1. 125 S. Ct. 2055 (2005).

2. *Id.* at 2058.

3. *Id.* at 2062-66.

4. *Id.* at 2072 (Souter, J., dissenting).

5. See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976); see also U.S. CONST. amend. I ("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.").

6. *Va. Pharmacy*, 425 U.S. at 771 n.24 (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)).

the test for determining whether commercial speech may be regulated is not altogether consistent.<sup>7</sup>

What happens when the government compels individuals and organizations to fund an advertising campaign that ostensibly is of benefit to those private interests, but that in actuality promotes a message with which they disagree? Can they elect not to fund the disputed speech? In 1997, the Supreme Court decided that the government could not compel funding of this sort, but in 2001, the Court

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7. See Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech*, 76 VA. L. REV. 627, 634, 638-39 (1990). Some commentators have enumerated types of speech that the Supreme Court does not consider commercial speech:

It is not speech that money is spent to project; if it were, all paid advertisements would be commercial speech and the Court would run up against *New York Times Co. v. Sullivan* and *Buckley v. Valeo*. It is not speech in a form sold for profit; if it were, most books and newspapers would consist of commercial speech. It is not speech that solicits money; if it were, the Court would be contradicting a line of cases involving political and religious groups, cases like *NAACP v. Button* and *Cantwell v. Connecticut*. It is not speech on a commercial subject, or else business section editorials would be commercial speech; and it isn't even factual speech on a commercial subject, or else business section news reporting would be commercial speech.

*Id.* at 638 (footnotes omitted).

Other commentators have noted the necessity of distinguishing between commercial speech and commercial communications, which do not necessarily enjoy the same First Amendment protection. Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 20 (2000). Commercial communications include the following:

[N]umerous communications among business executives about prices and business practices now regulated by the Sherman Antitrust Act; communications about working conditions and the like now regulated by the National Labor Relations Act; representations about products and services now regulated by the Federal Trade Commission and the Food and Drug Administration; representations about products now regulated by various consumer protection laws, by the Uniform Commercial Code, and by the common law of warranty and contract; statements about willingness to enter into a contract now regulated by the common law of contract; and so on and on.

Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1184 (1988) (footnotes omitted). As Professor Post noted:

Whatever First Amendment protection the commercial communications within this larger universe are entitled to receive, it is clear that they do not receive the specific constitutional safeguards created by commercial speech doctrine.

[The c]ommercial speech doctrine is thus not merely about the boundary that separates commercial speech from public discourse, but also about the boundary that separates the category of "commercial speech" from the surrounding sea of commercial communications that do not benefit from the protections of the doctrine.

Post, *supra*, at 21.

decided that the government could.<sup>8</sup> No longer: with its 2005 decision in *Livestock Marketing Ass'n*, the Court changed course yet again.<sup>9</sup>

Constitutional analysis of compelled funding of speech represents a subset of First Amendment jurisprudence related to compelled speech.<sup>10</sup> Conversely, the recently developed government speech doctrine suggests that the usual modes of First Amendment scrutiny do not always apply when the federal government is the speaker.<sup>11</sup> Compelled subsidies and government speech collided in *Livestock Marketing Ass'n*,<sup>12</sup> a case that determined the constitutionality of government-sponsored advertising campaigns for agricultural products funded via mandatory assessments called checkoffs.<sup>13</sup>

A checkoff program is a statutorily mandated advertising and marketing effort,<sup>14</sup> and federal law directs the producers of various commodities to execute these programs.<sup>15</sup> A checkoff is “the fixed, per-unit fee that producers are required by [federal] law to pay into the program each time they market a unit of the pertinent commodity.”<sup>16</sup> Subject to federal approval that some have described as pro forma,<sup>17</sup>

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8. *United States v. United Foods, Inc.*, 533 U.S. 405, 413 (2001); *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 477 (1997); see also Ian Heath Gershengorn, *Lingering Uncertainty*, NAT'L L.J., Aug. 3, 2005, at 8, 8 (discussing the Supreme Court's recent vacillation when addressing First Amendment challenges to compelled subsidies).

9. See *Johanns v. Livestock Mktg. Ass'n*, 125 S. Ct. 2055, 2065-66 (2005); Gershengorn, *supra* note 8, at 8; see also Linda Greenhouse, *In Free-Speech Ruling, Justices Say All Ranchers Must Help Pay for Federal Ads*, N.Y. TIMES, May 24, 2005, at A17 (discussing that the Court reached its decision “through a new analytical route that is likely to end much of the courtroom conflict, if not the policy debate behind it”).

10. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977).

11. See *Glickman*, 521 U.S. at 482 n.2 (Souter, J., dissenting); *Rust v. Sullivan*, 500 U.S. 173, 193-94, 197-99 (1991).

12. 125 S. Ct. at 2062.

13. *Id.* at 2058-59.

14. Cattlemen's Beef Promotion & Research Bd., *Straight Answers to the Most Frequently Asked Questions About National Checkoff Programs*, <http://www.beefboard.org/Faq.aspx> (last visited Mar. 27, 2006).

15. See Agric. Mktg. Serv., U.S. Dep't of Agric., *Research and Promotion Programs*, <http://www.ams.usda.gov/lsg/mpb/lrsp.htm> (last visited Mar. 27, 2006) (stating that checkoff programs “operate under promotion and research orders or agreements issued by the Secretary of Agriculture and are financed by industry-established assessments”). According to the United States Department of Agriculture (USDA), checkoffs are “requested, administered, and funded by the industries themselves.” *Id.*

16. Bret Fox, Note, *First Amendment Review of Beef Checkoff Assessments; Beef May Be for Dinner, but May Producers Be Compelled To Say So?* *Livestock Marketing Association v. United States Department of Agriculture*, 335 F.3d 711 (8th Cir. 2003), 4 WYO. L. REV. 397, 397 (2004).

17. E.g., *United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001).

checkoff funds “are utilized for research, promotion, and . . . marketing . . . of the commodity.”<sup>18</sup>

In *Livestock Marketing Ass’n*, the Supreme Court determined that checkoff-funded advertising and marketing programs, like the one responsible for the ubiquitous “Beef: It’s What’s for Dinner” campaign, are tantamount to government speech, thus insulated from First Amendment scrutiny.<sup>19</sup> Government speech results when the government propounds a given message, either directly, when it speaks itself, or indirectly, by funding a private speaker.<sup>20</sup> The government speech doctrine is, effectively, an affirmative defense that shields the government from First Amendment challenges.<sup>21</sup> This new rule may well represent a bright line, shedding light on eight years worth of conflicting Supreme Court jurisprudence related to checkoff programs, but the extent of this application is unclear.<sup>22</sup>

This Comment will discuss why the Supreme Court’s recent decision in *Livestock Marketing Ass’n* represents a significant expansion of the government speech doctrine and, possibly, a regressive development in First Amendment jurisprudence. This Comment will track the evolution of First Amendment jurisprudence related to government speech and compelled subsidies leading up to the new, broad definition of what constitutes government speech. This Comment will analyze the majority and minority opinions in *Livestock Marketing Ass’n* through the lens of the Supreme Court’s earlier compelled subsidies jurisprudence in order to determine how the Court intends to reconcile First Amendment rights of private interests with the government interests that justify funding commodities checkoff programs with compelled subsidies. Next, this Comment will examine how the *Livestock Marketing Ass’n* Court misapprehended its own recent jurisprudence. Specifically, this Comment will argue that the majority incorrectly determined that an advertising campaign promoting privately produced beef constitutes government speech, even when the campaign is funded by assessments that target a specific group for a specific purpose, and even when the

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18. Fox, *supra* note 16, at 397. Checkoff programs fund promotional efforts for many American commodities, including “beef, pork, soybean[s], wool/lamb, and mohair.” *Id.* The USDA’s Agricultural Marketing Service “oversee[s] marketing agreements and orders.” Agric. Mktg. Serv., U.S. Dep’t of Agric., An Overview of AMS Programs and Services, <http://www.ams.usda.gov/admin/overview.htm> (last visited Mar. 27, 2006).

19. *Johanns v. Livestock Mktg. Ass’n*, 125 S. Ct. 2055, 2058, 2062, 2066 (2005).

20. See Note, *The Curious Relationship Between the Compelled Speech and Government Speech Doctrines*, 117 HARV. L. REV. 2411, 2412 (2004).

21. See Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 989 (2005).

22. Greenhouse, *supra* note 9.

government fails—or refuses—to identify itself as the proponent of the message. This Comment will then explore the future of as-applied challenges to the Beef Act and other checkoff-funded advertising programs on compelled subsidy grounds. Finally, this Comment will conclude, in accordance with the *Livestock Marketing Ass'n* dissent, that if the government wishes to invoke the government speech doctrine, it must ensure that listeners understand that the government itself is the speaker.

## I. FIRST AMENDMENT CONCERNS UNDERLYING THE GOVERNMENT SPEECH DOCTRINE

### A. *Compelled Subsidies and the Commercial Speech Backdrop*

The Supreme Court's current commercial speech doctrine emerged from the pivotal case *Central Hudson Gas & Electric Corp. v. Public Service Commission*.<sup>23</sup> The Supreme Court brought into sharper focus its earlier determination that advertising is a quasi-protected category of speech subject to fewer safeguards under the First Amendment than other categories of speech.<sup>24</sup> The *Central Hudson* Court declared that a New York Public Service Commission regulation, which prohibited public utilities from advertising their services, violated the utilities' First Amendment right to freely market their services.<sup>25</sup>

The *Central Hudson* Court drew on prior decisions reinforcing the protected status of commercial speech. In particular, the Court noted that it had recognized that speech proposing a commercial transaction

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23. 447 U.S. 557, 566 (1980).

24. See *id.* at 562-64; *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976). In *Virginia Pharmacy*, the Court invalidated a state statute designed to prevent licensed pharmacists from advertising prescription drug prices. *Id.* at 749-50, 770. The Supreme Court observed that consumers have an "interest in the free flow of commercial information, that . . . may be as keen, if not keener by far, than [an] interest in the day's most urgent political debate." *Id.* at 763. In addition, society in general has an interest in the free flow of information because "[e]ven an individual advertisement, though entirely 'commercial,' may be of general public interest." *Id.* at 764. As such, the Court held that the government may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity." *Id.* at 773. In arriving at this decision, the *Virginia Pharmacy* Court also articulated a definition of commercial speech and explained why commercial speech should receive "a different degree of protection" (thus subject to intermediate scrutiny). See *id.* at 771 n.24. But see *id.* at 781, 789-90 (Rehnquist, J., dissenting) (arguing that commercial speech is not protected by the First Amendment, and that restraints on commercial speech are merely forms of economic regulation within the ambit of legislative authority).

25. *Cent. Hudson*, 447 U.S. at 558, 570-71.

differs fundamentally from other protected categories of speech.<sup>26</sup> As such, the Court affirmed its prior determination that commercial speech should be subject only to intermediate scrutiny, and articulated a four-part test for establishing what constitutes regulable commercial speech.<sup>27</sup> Pursuant to *Central Hudson*, the commercial speech at issue "must concern lawful activity and not be misleading," the regulation at issue that seeks to abridge speech must serve a substantial government interest, the regulation must "directly advance the governmental interest asserted," and the regulation must be no "more extensive than is necessary to serve [the asserted government] interest."<sup>28</sup>

### *B. Compelled Subsidies and the Funding of Expressive Activities*

Just as the First Amendment grants freedom to speak, it also grants freedom not to be compelled to speak.<sup>29</sup> Similarly, in addition to recognizing a First Amendment freedom to associate,<sup>30</sup> the Supreme Court has recognized a First Amendment freedom from association.<sup>31</sup> Accordingly, the government may not compel speech or association.<sup>32</sup>

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26. *Id.* at 562-63. The *Central Hudson* Court noted that previous Supreme Court cases related to commercial speech

have recognized "the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.

*Id.* at 562-63 (footnote omitted) (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978)).

27. *Id.* at 564-66.

28. *Id.*

29. *See* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). In *Barnette*, the Supreme Court determined that under the First Amendment, the state could not compel school children to recite the pledge of allegiance. *Id.* at 626-29; *see also* *Wooley v. Maynard*, 430 U.S. 705, 713 (1977) (holding that New Hampshire could not compel citizens to display the state motto "Live Free or Die" on their license plates). In *Wooley*, the Court found the mandated display of the state motto on license plates tantamount to compelled speech, and recognized First Amendment protection of "the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." *Id.* at 715.

30. *E.g.*, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233 (1977) ("Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First . . . Amendment[.]").

31. *Id.*, at 234-36.

32. *See* *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 471-73 (1997).

Whether the government may compel subsidies to fund speech depends on the nature of the speech in question.<sup>33</sup>

The Supreme Court addressed a constitutional challenge involving a compelled contribution to a teachers' union in *Abood v. Detroit Board of Education*.<sup>34</sup> In *Abood*, the Supreme Court considered whether the First Amendment afforded freedom from association and freedom from compelled subsidies to nonunion school employees who were required under Michigan state law to pay a fee to the union that was equivalent to members' union dues.<sup>35</sup> The Court reasoned that although a union may use funds for "ideological causes not germane to" the activity for which payment is compelled, the Constitution mandates "that such expenditures be financed from . . . dues . . . paid by employees who do not object to advancing those ideas and who are not coerced into doing so."<sup>36</sup>

Subsequently, in *Lehnert v. Ferris Faculty Ass'n*,<sup>37</sup> the Supreme Court heard a similar First Amendment challenge when a Michigan state college's faculty union required nonmembers to pay a service fee equivalent to dues paid by union members.<sup>38</sup> Affirming its *Abood* holding with particular emphasis on the germaneness element, the *Lehnert* Court introduced a test to determine whether a challenged expenditure violates the First Amendment rights of those who disagree with it.<sup>39</sup> Following *Lehnert*, a challenged expenditure must be "germane" to the activity for which the funds are collected, "justified" by a vital government interest, and the expenditure must "not significantly add to the burdening of [the] free speech" interests of dissenters.<sup>40</sup> The

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33. See *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 242 (2000) (Souter, J., concurring); *Rust v. Sullivan*, 500 U.S. 173, 193 (1991).

34. 431 U.S. 209, 212-13 (1997).

35. *Id.* at 211-13, 234-36. Some nonunion employees objected to this condition of employment since the fees they paid funded not only collective bargaining, but also political causes not related to collective bargaining activities. *Id.* at 213. Ultimately, the Supreme Court announced that teachers "may constitutionally prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." *Id.* at 234.

36. *Id.* at 235-36. However, directing service fees toward funding collective bargaining is germane to the purpose for which they were collected—funding union activities—therefore this activity is permissible. See *id.* at 221-23.

37. 500 U.S. 507 (1991).

38. *Id.* at 512-13.

39. *Id.* at 516-17, 519.

40. *Id.* at 519; cf. *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 220-21 (2000). Student activities fees have provided ample fodder for compelled subsidies challenges under the First Amendment. *Id.* at 221-23. In *Southworth*, the Supreme Court held that a public university has a right to fund, via mandatory fees, certain student



Supreme Court has sustained similar challenges related to the payment of state bar dues and the use of state-government compelled subsidies to fund political speech.<sup>41</sup>

### *C. Government Speech and the Funding of Expressive Activities*

When the government speaks, the Supreme Court has increasingly refrained from applying First Amendment scrutiny.<sup>42</sup> According to the Supreme Court, the rationale underlying the government speech doctrine is “that ‘when the government speaks, for instance to promote its own policies or to advance a particular idea, it is . . . accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.’”<sup>43</sup> In part because voters can ultimately decide whether the architects of government speech will continue to have a public voice, the Supreme Court has determined that government speech is insulated from First Amendment scrutiny.<sup>44</sup>

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activities espousing views to which students object as long as funds are allocated in a viewpoint neutral manner. *Id.* at 221; *see also* *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834-37 (1995) (holding that a university may not deny funding to a student publication based on the viewpoints expressed in the publication); *infra* note 46.

41. *See* *Keller v. State Bar of Cal.*, 496 U.S. 1, 14 (1990) (holding that compulsory bar dues may be used only to fund activities germane to the legal profession). The Court in *Keller* concluded that a state bar association’s message is not government speech. *Id.* at 10-13. The Livestock Marketing Association utilized this rationale to bolster its argument that the checkoff program was not government speech. *See* Brief for the Respondents at 24-25, *Johanns v. Livestock Marketing Ass’n*, 125 S. Ct. 2055 (2005) (Nos. 03-1164, 03-1165). The Livestock Marketing Association argued specifically:

Subsidies from the public fisc do not . . . *invariably* suffice to insulate control over the content of subsidized speech from First Amendment scrutiny. Rather, they are necessary but not sufficient for a government speech defense to succeed. When such subsidies are not given for the express purpose of promoting a particular government message, but simply to create a forum for private speech or to fund speech on behalf of some private person . . . [courts have] refused to recognize a government speech defense.

*Id.* at 25 n.13.

42. *See* Note, *supra* note 20, at 2411 & n.4.

43. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541-42 (2001) (first alteration in original) (quoting *Southworth*, 529 U.S. at 235).

44. *Id.* On numerous occasions over the past two decades, the Supreme Court has considered how the government may regulate speech subsidized by general tax dollars. In *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983), the Supreme Court upheld a congressional regulation that forbade § 501(c)(4) nonprofit organizations that engage in lobbying from receiving tax-deductible contributions but permitted § 501(c)(3) organizations that do not engage in lobbying to receive tax deductible contributions. *Id.* at 543, 550. Pursuant to *Taxation with Representation*, the government

### *1. Private Entities, Public Funds: The Government Speech Doctrine in Rust v. Sullivan*

A pivotal case in the relatively new jurisprudential arena of government-funded speech is *Rust v. Sullivan*.<sup>45</sup> *Rust* is particularly important because although the decision did not specifically rely on the government speech doctrine, it has been interpreted to clarify that when private entities receive government funding to promote a government message, the resulting speech is government speech, not private speech.<sup>46</sup> In *Rust*, the Supreme Court held that the Department of Health and Human Services (HHS) may, under Title X of the Public Health Service Act, promulgate regulations to prohibit organizations receiving federal funding from providing abortion counseling and referrals.<sup>47</sup>

The *Rust* Court determined that the First Amendment does not apply to government funding of a private speaker as long as the government is effectively the speaker.<sup>48</sup> The Court noted that the Public Health Service

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may isolate specific groups to enjoy funding and tax benefits, provided that it does this in a content-neutral fashion. *See id.* at 548-49.

However, in *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984), the Court affirmed the district court's decision to overturn a provision of the Public Broadcasting Act that prevented any broadcasting entity receiving federal funds via the Corporation for Public Broadcasting from airing editorials. *Id.* at 366, 402. The Court determined that although the tax-exempt status at issue in *Taxation with Representation* was tantamount to a broad-based government subsidy, the government funding upon which the FCC predicated a complete bar to editorializing might, in some instances, only represent a small portion of a broadcaster's total budget. *See id.* at 399-401. The restriction on editorializing did not represent the federal government's refusal to subsidize certain speech, but rather an unconstitutional abridgement of protected speech. *See id.* at 402.

But the Court recognized a caveat to its content neutrality requirement when it heard *National Endowment for the Arts v. Finley*, 524 U.S. 569, 572-73 (1998). The case arose in response to a federal statutory amendment requiring the National Endowment for the Arts (NEA) to adopt content-based guidelines to govern federal funding of the arts. *Id.* The Supreme Court held that because, in functioning as a patron of the arts, the federal government already made subjective determinations about the quality and content of speech, considering the additional factors did not represent unconstitutional viewpoint discrimination. *See id.* at 585-87; Mary Jean Dolan, *The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech*, 31 HASTINGS CONST. L.Q. 71, 103 (2004) ("In essence, under Finley [sic], where a funding program establishes some necessarily discretionary standard, such as 'excellence,' the government is taking content into account in every funding decision, and doing so does not violate a constitutional requirement of viewpoint neutrality.").

45. 500 U.S. 173 (1991).

46. *Velasquez*, 531 U.S. at 541.

47. *Rust*, 500 U.S. at 192-94.

48. *See id.* at 192-93. Moreover, "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without . . . funding an alternative program." *Id.* at 193.

Act's speech restrictions were only one component of a broader ban on public funding of abortion-related activities.<sup>49</sup> Accordingly, "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program."<sup>50</sup>

## 2. *Whose Speech is it, Anyway?: Limiting the Government Speech Doctrine*

The Supreme Court attempted to define the limits of the government speech doctrine in *Rosenberger v. Rector & Visitors of University of Virginia*,<sup>51</sup> a case stemming from the University of Virginia's denial of funding to a Christian evangelical student newspaper.<sup>52</sup> The Court held that the government speech doctrine did not apply to the University's appropriation of mandatory student activities fees because the University was using the funds not to advance its own message but "to encourage a diversity of views from private speakers."<sup>53</sup> The Court determined that because the University was funding private speech, it was required to do so in a viewpoint neutral manner.<sup>54</sup>

The Supreme Court offered further clarification of the government speech doctrine in *Legal Services Corp. v. Velazquez*<sup>55</sup> when it reasoned that determining whether the funded speech is essentially public or private is key to a government speech analysis.<sup>56</sup> In *Velazquez*, the Court invalidated a federal law preventing Legal Services Corporation (LSC) from funding organizations that represented clients seeking "to challenge welfare agency determinations of benefit ineligibility under interpretations of existing law."<sup>57</sup> According to the Court, even though LSC lawyers received government funding, they did not speak on behalf of the government.<sup>58</sup> The Court added that when the government elects to promote a message via funding "private entities to convey a

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49. See *id.* at 189, 194.

50. *Id.* at 194.

51. 515 U.S. 819 (1995).

52. See *id.* at 822-23, 825-26.

53. *Id.* at 834.

54. *Id.* Writing for the majority, Justice Kennedy suggested that the government's duty to maintain viewpoint neutrality when funding private speech is particularly acute in an academic setting. *Id.* at 835-36.

55. 531 U.S. 533 (2001).

56. See *id.* at 542.

57. *Id.* at 536-38. The Court relied on *Rust* and *Rosenberger* in reaching its decision, holding that "viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, or instances, like *Rust*," where the government conveyed a message via a private entity. *Id.* at 541.

58. *Id.* at 542.

governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.”<sup>59</sup>

#### *D. Compulsory Fees for Advertising in Checkoff Program Cases*

##### *1. Is the First Amendment Implicated at All?: Glickman v. Wileman Bros. & Elliott*

The Supreme Court first addressed the constitutionality of commodities checkoff programs in *Glickman v. Wileman Bros. & Elliott*.<sup>60</sup> A five-to-four Court held that charging mandatory assessments to fund generic advertisements for California tree fruit does not violate the First Amendment rights of dissenting growers and handlers.<sup>61</sup> The *Glickman* Court did not address whether the case implicated the government speech doctrine because the government specifically disclaimed reliance on this argument as a defense in its brief to the Court.<sup>62</sup>

Addressing the First Amendment issues raised, the *Glickman* Court determined that the Ninth Circuit had erred in employing a commercial speech analysis under *Central Hudson*.<sup>63</sup> Furthermore, the Court determined that a compelled speech analysis was not relevant.<sup>64</sup> Rather, the Court found the appropriate inquiry in *Abood*'s germaneness test, and determined that the advertising program funded by compelled subsidies “clearly satisfied” the germaneness requirement.<sup>65</sup> The Court noted that “*Abood* merely recognized a First Amendment interest in not being compelled to contribute to an organization whose expressive

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59. *Id.* at 541 (quoting *Rosenberger*, 515 U.S. at 833).

60. 521 U.S. 457, 468 (1997).

61. *Id.* at 459-61, 477.

62. Brief for the Petitioner at \*25 n.16, *Glickman*, 521 U.S. 457 (No. 95-1184), 1996 WL 494305. In its brief to the Court, the government emphasized that:

[U]nlike in the union and integrated-bar contexts, the constituency of the governing body extends beyond those who contribute financially to its support. Although producers must approve the adoption of a marketing order, that condition does not detract from the status of the marketing order as a governmental regulation.

In the court of appeals, the United States did not advance the argument that the generic advertising supported by the system of assessments on handlers constitutes “government speech” that does not implicate respondents’ First Amendment rights. We similarly do not rely on that argument in this Court as an independent ground of decision.

*Id.* (citations omitted).

63. *Glickman*, 521 U.S. at 474.

64. *Id.* at 470.

65. *See id.* at 473.

activities conflict with one's 'freedom of belief.'"<sup>66</sup> Because the regulatory scheme embodied by the tree fruit checkoff program did not interfere with the rights of individuals to hold core, non-economic beliefs,<sup>67</sup> it did not "engender any crisis of conscience."<sup>68</sup> Consequently, the checkoff did not raise a First Amendment issue.<sup>69</sup> The Court reasoned that the tree fruit checkoff program was merely "a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress."<sup>70</sup> Accordingly, the Court determined that rational basis review was appropriate, and upheld the tree fruit checkoff.<sup>71</sup>

Justice Souter's dissenting opinion in *Glickman* found flaw with the Court's reasoning that the marketing program funded by the checkoff did not implicate a speech element "beyond what it sees as 'germane' to the undoubtedly valid, nonspeech elements of the orders."<sup>72</sup> Additionally, Justice Souter disagreed with the proposition that a First Amendment interest arises in a compelled subsidy context only when the message at issue contains a political or ideological element.<sup>73</sup>

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66. *Id.* at 471.

67. *See id.* at 472. The *Glickman* majority determined that payment of the tree fruit checkoff did not "interfere with the values lying at the 'heart of the First Amendment[—] the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.'" *Id.* (alteration in original) (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977)).

68. *Id.*

69. *Id.*

70. *Id.* at 477.

71. *See id.* at 476-77. Writing for the majority, Justice Stevens asserted:

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.

*Id.* at 469-70 (footnote omitted).

72. *Id.* at 477 (Souter, J., dissenting). In his dissent, Justice Souter further asserted: The legitimacy of governmental regulation does not validate coerced subsidies for speech that the government cannot show to be reasonably necessary to implement the regulation, and the very reasons for recognizing that commercial speech falls within the scope of First Amendment protection likewise justifies the protection of those who object to subsidizing it against their will.

*Id.* at 477-78.

73. *Id.* at 477.

## 2. *A Compelled Subsidies About-Face: United States v. United Foods*

In 2001, the Supreme Court heard *United States v. United Foods*,<sup>74</sup> another case concerning the constitutionality of mandatory checkoff programs.<sup>75</sup> This case presented the Court with an issue similar to that raised in *Glickman*.<sup>76</sup> In *United Foods*, fresh mushroom handlers were unwilling to pay a required checkoff to fund promotional messages devised by the Mushroom Council.<sup>77</sup> Despite the similarity of issues before the Court, the *United Foods* Court did not view *Glickman* as controlling.<sup>78</sup>

As in *Glickman*, the *United Foods* Court did not discuss whether government speech was at issue.<sup>79</sup> Rather, the Court looked to *Abood* and its progeny.<sup>80</sup> Writing for the majority, Justice Kennedy announced that the mushroom checkoff constituted impermissible compelled speech.<sup>81</sup> In an effort to preserve the economic regulation rationale that it had advanced four years earlier, the Court distinguished *Glickman*.

74. 533 U.S. 405 (2001).

75. *Id.* at 408.

76. *Id.*

77. *Id.* at 408-09.

78. *See id.* at 415-16; William Conner Eldridge, Note, *United States v. United Foods: United We Stand, Divided We Fall—Arguing the Constitutionality of Commodity Checkoff Programs*, 56 ARK. L. REV. 147, 175-76 (2003).

79. *United Foods*, 533 U.S. at 416-17. The Court noted that the government raised the government speech defense in its petition for certiorari, but not before the Sixth Circuit. *Id.* at 416. In failing to timely raise the issue, the Court observed that the government “deprived respondent of the ability to address significant matters that might have been difficult points for the Government. For example, although the government asserts that advertising is subject to approval by the Secretary of Agriculture, respondent claims the approval is *pro forma*.” *Id.* at 416-17. Ultimately, the government could not argue that the checkoff-funded mushroom advertising was government speech, since the Court declined to “allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment [of the court of appeals] when those arguments were not pressed in the court whose opinion we are reviewing.” *Id.* at 417.

80. *See id.* at 413. Justice Kennedy observed:

A proper application of the rule in *Abood* requires us to invalidate the instant statutory scheme. Before addressing whether a conflict with freedom of belief exists, a threshold inquiry must be whether there is some state imposed obligation which makes group membership less than voluntary; for it is only the overriding associational purpose which allows any compelled subsidy for speech in the first place.

*Id.*

81. *Id.* According to Justice Kennedy, the mushroom checkoff was “contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity.” *Id.* But *see id.* at 425 (Breyer, J., dissenting) (asserting that the checkoff program “does not compel speech itself; it compels the payment of money”). Consequently, Justice Breyer argued, no First Amendment interest was implicated. *Id.*

The Court noted that the marketing order for the California tree fruit industry at issue in *Glickman* was “ancillary to a more comprehensive program restricting marketing autonomy,”<sup>82</sup> while the advertising supported by the mushroom checkoff at issue in *United Foods* “far from being ancillary, is the principal object of the regulatory scheme.”<sup>83</sup> The Court further noted that although “the rationale of *Abood* extends to the party who objects to the compelled support for this speech,”<sup>84</sup> in the absence of a broader regulatory scheme, there was no basis upon which to evaluate whether the compelled speech was germane to a legitimate governmental purpose.<sup>85</sup>

Justice Breyer’s dissenting opinion relied upon the Court’s *Glickman* decision that checkoff-funded collective advertising did not implicate a First Amendment concern.<sup>86</sup> The dissent recognized no meaningful distinction between regulatory schemes driving the advertising at issue in *Glickman* and the advertising at issue in *United Foods*.<sup>87</sup> Moreover, the dissent echoed the *Glickman* majority’s assertion that a checkoff program is “incapable of ‘engender[ing] any crisis of conscience’”

82. *Id.* at 411 (majority opinion).

83. *Id.* at 411-12; see also Eldridge, *supra* note 78, at 175 (arguing that the *United Foods* decision does not draw a bright-line of per se unconstitutionality for all checkoff programs, and that checkoff programs which devote a significant portion of funds collected to research and other nonpromotional activities are those most likely to pass constitutional muster under *United Foods*).

84. *United Foods*, 533 U.S. at 415-16.

85. *Id.* Following the *Livestock Marketing Ass’n* decision, the Mushroom Council announced that it would resume collecting assessments for advertising and promotional activities in early 2006. Robert Vosburgh, *Mushroom Council To Restart Promotional Activities*, SUPERMARKET NEWS, Oct. 3, 2005, at 54, 54. The Mushroom Council was forced to curtail checkoff-funded advertising in the wake of the *United Foods* decision. See *id.* In the years between *United Foods* and *Livestock Marketing Ass’n*, the Mushroom Council was forced to limit its activities to industry research and development of best practices. *Id.*

86. *United Foods*, 533 U.S. at 419-20 (Breyer, J., dissenting).

87. *Id.* Justice Breyer argued that

[s]everal features of the program indicate that its speech-related aspects, *i.e.*, its compelled monetary contributions, are necessary and proportionate to the legitimate promotional goals that it seeks. . . . [because] compelled contributions may be necessary to maintain a collective advertising program in that rational producers would otherwise take a free ride on the expenditures of others.

*Id.* at 429. In addition, Justice Breyer argued that “those features of the program that led [*Glickman*’s] dissenters to find its program disproportionately restrictive are absent here.”

*Id.* at 430. Furthermore, Justice Breyer argued that even if the advertising program at issue did constitute commercial speech, not merely an element of a system of economic regulation, it would still pass constitutional muster under a commercial speech analysis pursuant to *Central Hudson*. *Id.* at 428-29.

because no political or ideological values are at stake.<sup>88</sup> Since no core beliefs were at issue, Justice Breyer reasoned, the germaneness test of the *Abood* line of cases was inapplicable.<sup>89</sup> Ultimately, Justice Breyer determined that *Central Hudson* provided the appropriate test, and that the mushroom checkoff and attendant promotional efforts would pass intermediate First Amendment scrutiny.<sup>90</sup>

### *E. Challenges to the Beef Act*

Against the backdrop of the Supreme Court's compelled subsidy decisions, the Livestock Marketing Association, a trade association representing livestock markets, initiated a challenge to the Beef Act that reached the Supreme Court.<sup>91</sup> Livestock Marketing Association members took issue with the generic advertising messages ascribed to "America's Beef Producers."<sup>92</sup> They argued that the targeted checkoff and the resultant advertising campaign constituted compelled commercial speech and abridged their First Amendment right not to subsidize private speech with which they disagreed.<sup>93</sup>

88. *Id.* at 423 (alteration in original) (quoting *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 472 (1997)).

89. *See id.* at 422-23. The dissent found a fundamental difference from the *Abood* line of cases since compelled contributions in those instances "were unlawful . . . to the extent that they helped fund subsidiary activities of the organization, *i.e.*, activities *other than* those that legally justified a compelled contribution; and . . . because the subsidiary activities in question were political activities that might 'conflict with one's 'freedom of belief.'"" *Id.* at 423 (quoting *Glickman*, 521 U.S. at 471).

90. *See id.* at 429.

91. *See* *Johanns v. Livestock Mktg. Ass'n*, 125 S. Ct. 2055, 2059 (2005). The Livestock Marketing Association "began as a grass roots organization dedicated to providing auction marketers with access to the latest industry information and a voice in federal and state government." Livestock Mktg. Ass'n, History, <http://www.lmaweb.com/lmahistory.html> (last visited Mar. 30, 2006). Additionally, it "carries out a strong, active government relations program [and has] [a] full-time, experienced vice president for government and industry affairs [who] work[s] with LMA's region executive officers [to] handle[] government and industry representation for LMA member businesses." Livestock Mktg. Ass'n, Government Representation, <http://www.lmaweb.com/lma-government.html> (last visited Mar. 30, 2006).

92. *See* Brief for the Respondents, *supra* note 41, at 1-2 & 1 n.2; Andrew Martin, *Ranchers Have Beef with Meat Ads*, CHI. TRIB., Dec. 9, 2004, at 21. Livestock Marketing Association members, who sell cattle but not beef, objected that the checkoff subsidizes only advertising efforts that support meatpackers and retailers, not livestock marketers. *Id.* Moreover, they asserted that the checkoff "also benefits foreign competitors because it promotes consumption of all beef, rather than just that produced by ranchers in the United States." *Id.*

93. *See* Martin, *supra* note 92. As the Livestock Marketing Association argued:

The promotions issued pursuant to the Beef Act are generic in character—meaning that, among other things, they do not distinguish between the grain-fed U.S. beef produced by respondents and the grass-fed beef produced abroad,



### 1. Background: History of the Beef Promotion and Research Act

Congress established the beef checkoff in 1985 with the passage of the Beef Promotion and Research Act (Beef Act).<sup>94</sup> Key provisions of the Beef Act created a federal policy of promoting the marketing and consumption of beef and beef products.<sup>95</sup> Under the Beef Act, Congress directed the Secretary of Agriculture to issue a Beef Promotion and Research Order (Order) to establish and implement a checkoff program to fund research and marketing activities.<sup>96</sup>

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which respondents regard as inferior. Respondents object to this simplistic "beef is good" message, which obscures the quality differences between U.S. and foreign beef. Beyond the economic perversity of being forced to promote their foreign competition, respondents object to the fact that the promotions are expressly attributed to them through messages, which appear in each television and print advertisement, identifying the ads as "funded by America's Beef Producers." And because respondents, like many cattle producers, place a premium on their independence from the government and its controls and exactions, they are *especially* offended to the degree that these messages are deemed "governmental" in character.

Respondents also object to being forced to associate for expressive purposes with the various organizations, ranging from wholly private to quasi-governmental in nature, involved in collecting and spending their checkoff dollars . . . .

Brief for the Respondents, *supra* note 41, at 2 (citation omitted) (footnote omitted).

94. Beef Promotion and Research Act (Beef Act) of 1985, Pub. L. No. 99-198, 99 Stat. 1597 (codified as amended at 7 U.S.C. §§ 2901-2911 (2000)). Congress passed the Beef Act as part of a broader piece of legislation, the Food Security Act of 1985. *See* Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1354 (1985). The congressional findings underlying the Beef Act included the dietary value of beef and beef products, the importance of beef to the national economy, the need to market beef efficiently, and the need to maintain and expand existing markets for beef. *See* 7 U.S.C. § 2901(a). Accordingly, Congress adopted the following policy:

[I]t is in the public interest to authorize the establishment . . . of an orderly procedure for financing (through assessments on all cattle sold in the United States and on cattle, beef, and beef products imported into the United States) and carrying out a coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products.

*Id.* § 2901(b).

95. 7 U.S.C. §§ 2901(a)(3), 2904(4)(B), (6).

96. *Id.* § 2903. The Beef Act provides in pertinent part:

[T]he Secretary [of Agriculture] shall publish such proposed order and give due notice and opportunity for public comment on such proposed order. Such proposal may be submitted by any organization meeting the requirements for certification under section 2905 of this title or any interested person, including the Secretary.

. . . After notice and opportunity for public comment are given . . . the Secretary shall issue a beef promotion and research order. The order shall become effective not later than one hundred and twenty days following publication of the proposed order.

Pursuant to the Order, the Secretary of Agriculture was empowered to create the Cattleman's Beef Promotion and Research Board (Beef Board), a self-regulating body composed of beef producers and importers.<sup>97</sup> The 108-member Beef Board is responsible for collecting the checkoff, currently set at one dollar per head of cattle for domestic producers, and disbursing the funds.<sup>98</sup> More than half of the money raised via the beef checkoff funds generic advertising messages, including the "Beef: It's What's for Dinner" campaign.<sup>99</sup> In a 1988 referendum, a majority of beef producers voted to continue the checkoff program,<sup>100</sup> and it has remained in place since that time under the Beef Board's stewardship.<sup>101</sup>

## 2. Lower Court Challenges to the Beef Act After United Foods

Following the Supreme Court's *United Foods* decision, a challenge to the Beef Act surfaced in *Livestock Marketing Ass'n v. United States Department of Agriculture*.<sup>102</sup> In *Livestock Marketing Ass'n*, the United States District Court for the District of South Dakota considered the Livestock Marketing Association's First Amendment challenge to the Beef Act and declared the Act's mandatory checkoff unconstitutional

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*Id.*

97. *Id.* § 2904(1); see also Cattlemen's Beef Promotion & Research Bd., Who We Are, <http://www.beefboard.org/whoweare.aspx> (last visited Mar. 30, 2006). The website describes the history, composition, and responsibilities of the Beef Board:

Each of the Beef Board members are appointed by the Secretary of Agriculture from nominations submitted by certified nominating organizations. The nominating organizations represent beef and dairy producers in each state or region. Thirty-seven states have individual members serving on the Board. The remainder of states are divided into three regions. Importer appointments are drawn from nominations by importer associations.

*Id.*

98. See Cattlemen's Beef Promotion & Research Bd., *supra* note 97 ("[T]he checkoff is collected by qualified state beef councils, which retain up to 50 cents on the dollar. The state councils forward the other 50 cents per head to the Cattlemen's Beef Promotion and Research Board, which oversees the national checkoff program, subject to USDA review.").

99. See *id.*; Cattlemen's Beef Promotion & Research Bd., Beef Checkoff Programs, <http://www.beefboard.org/checkoffprograms.aspx> (last visited Mar. 30, 2006); see also Tony Mauro, *Justices Settle Beef Over Meat Ads*, LEGAL TIMES, May 30, 2005, at 12, 12. ("Fees from the beef program have amounted to more than \$80 million a year and go toward scientific research as well as advertising.").

100. See Cattlemen's Beef Promotion & Research Bd., *supra* note 97 ("The checkoff assessment became mandatory when the program was approved by 79 percent of producers in a 1988 national referendum vote.").

101. See *id.*

102. 207 F. Supp. 2d 992 (D.S.D. 2002), *aff'd*, 335 F.3d 711 (8th Cir. 2003), *vacated sub nom.* *Johanns v. Livestock Mktg. Ass'n*, 125 S. Ct. 2055 (2005).

“because it requires plaintiffs to pay, in part, for speech to which the plaintiffs object.”<sup>103</sup> The court further determined that compelled financial support of government beef promotion was not within the ambit of the government speech doctrine.<sup>104</sup>

The United States Court of Appeals for the Eighth Circuit affirmed *Livestock Marketing Ass’n* on appeal.<sup>105</sup> In upholding the district court’s decision, the Eighth Circuit relied in part on the Supreme Court’s decisions in *Glickman* and *United Foods* to determine that “the Beef Act and the Beef Order are unconstitutional and unenforceable.”<sup>106</sup> Unlike the district court, which declined to employ the *Central Hudson* commercial speech analysis, the Eighth Circuit considered “whether the governmental interest in the commercial advertising under the Beef Act is sufficiently substantial to justify the infringement upon appellees’ First Amendment right not to be compelled to subsidize that commercial speech.”<sup>107</sup> The Court modified the *Central Hudson* test to fit a compelled subsidy scenario, and determined that “the government’s interest in protecting the welfare of the beef industry by compelling all beef producers and importers to pay for generic beef advertising is not sufficiently substantial to justify the infringement on appellees’ First

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103. *Id.* at 1002.

104. *Id.* at 1005-06. *Livestock Marketing Ass’n* and the lower court cases that preceded it were not the first challenges to the constitutionality of mandatory checkoffs under the Beef Act. In 1989, the United States Court of Appeals for the Third Circuit heard *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), in which it affirmed a district court ruling that the Beef Act’s checkoff and advertising programs did not violate the beef producers’ First Amendment rights to be free from compelled speech and compelled association. *Id.* at 1134, 1136-37. The Third Circuit reasoned that advertising campaigns undertaken pursuant to the Beef Act did not constitute government speech and did not contravene the First Amendment when the government had a compelling purpose for “the slight incursion on” free speech and association rights. *Id.* at 1132-34. According to the Third Circuit, the Beef Act was ideologically neutral and represented the least restrictive means available to the government to achieve its compelling purpose of promoting the American beef industry. *Id.* at 1137; see also Joseph Wilhelm, Note, *Compelled Commercial Speech Under the Beef Promotion Act Should Be Impermissible*: *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), 59 U. CIN. L. REV. 1021, 1034-37 (1991) (discussing the *Frame* court’s treatment of the government speech doctrine).

105. *Livestock Mktg. Ass’n v. U.S. Dep’t of Agric.*, 335 F.3d 711, 726 (8th Cir. 2003), *vacated sub nom.* *Johanns v. Livestock Mktg. Ass’n*, 125 S. Ct. 2055 (2005). For another case with a similar disposition, see *Michigan Pork Producers Ass’n v. Veneman*, 348 F.3d 157, 159 (6th Cir. 2003), *vacated sub nom.* *Michigan Pork Pullers Ass’n v. Campaign for Family Farms*, 125 S. Ct. 2511 (2005). In *Michigan Pork Pullers Ass’n*, the Sixth Circuit relied on the Supreme Court’s decision in *United Foods* to invalidate a checkoff program for pork that was issued pursuant to the Pork Promotion, Research and Consumer Information Act, and the resulting Pork Promotion Order. *Id.* at 159.

106. *Livestock Mktg. Ass’n*, 335 F.3d at 725-26.

107. *Id.* at 716, 723 (footnote omitted).

Amendment free speech right.”<sup>108</sup> Thus, according to the Eighth Circuit, the beef checkoff could not withstand even intermediate scrutiny.<sup>109</sup>

### 3. *Turning United Foods on its Head: Johanns v. Livestock Marketing Ass’n*

Enjoined by the Eight Circuit from enforcing the Beef Act’s checkoff program, the government petitioned for certiorari.<sup>110</sup> In 2004, the Supreme Court granted the government’s petition<sup>111</sup> and heard oral arguments in *Johanns v. Livestock Marketing Ass’n* that December.<sup>112</sup> The Court decided the case the following spring, vacating the decision of the Eighth Circuit and remanding the case for further proceedings.<sup>113</sup>

108. *Id.* at 725-26.

109. *See id.* at 722-23, 725-26.

110. Petition for Writ of Certiorari at 1-2, *Livestock Mktg. Ass’n*, 125 S. Ct. 2055 (No. 03-1164), available at <http://www.usdoj.gov/osg/briefs/2003/2pet/7pet/2003-1164.pet.aa.pdf>.

111. *See Livestock Mktg. Ass’n*, 125 S. Ct. 2055, *cert. granted sub nom.* Veneman v. Livestock Mktg. Ass’n, 541 U.S. 1062 (2004) (No. 03-1164). By the time the Supreme Court granted certiorari, President Bush had nominated Mike Johanns to replace Ann Veneman as Secretary of Agriculture. *See* Richard W. Steveson & Christopher Drew, *Bush Set To Name Ex-Head of Police for Security Post*, N.Y. TIMES, Dec. 3, 2004, at A1. The Supreme Court also granted certiorari in *Nebraska Cattlemen v. Livestock Marketing Ass’n*, 541 U.S. 1062 (2004) (No. 03-1165). This companion case was joined with *Johanns v. Livestock Marketing Ass’n*. *See Livestock Mktg. Ass’n*, 125 S. Ct. at 2055. In *Nebraska Cattlemen*, Chief Justice of the United States John Roberts argued on behalf of petitioners Nebraska Cattlemen and two South Dakota beef producers while in private practice as a partner at Hogan & Hartson LLP. *See Court Nominee John Roberts Knows Checkoffs*, BEEF, Sept. 2005, at 7, 7. He asserted on behalf of the petitioners that checkoff-funded advertising was government speech not subject to review under the First Amendment. *Id.* Relying on the Supreme Court’s *United Foods* decision, the Eighth Circuit panel ruled in favor of the Livestock Marketing Association. *See Livestock Mktg. Ass’n*, 335 F.3d at 725-26.

112. *Livestock Mktg. Ass’n*, 125 S. Ct. at 2055; *see also* Martin *supra* note 92, at 21.

113. *Livestock Mktg. Ass’n*, 125 S. Ct. at 2055, 2066. Remanded proceedings to determine the constitutionality under the First Amendment of checkoff programs as applied to the Livestock Marketing Association and similarly situated groups were still pending, at the time of writing, in *Livestock Marketing Ass’n* and several other related cases. *See, e.g.*, U.S. Supreme Court, Certiorari—Summary Dispositions (May 31, 2005), <http://www.supremecourtus.gov/orders/courtorders/053105pzor.pdf>. Following its decision in *Livestock Mktg. Ass’n*, the Supreme Court granted certiorari, then summarily reversed and remanded five checkoff cases on its docket. *See id.* The Ninth Circuit held in abeyance an additional beef checkoff case, *Charter v. United States Department of Agriculture*, 412 F.3d 1017 (9th Cir. 2005), pending the Supreme Court’s *Livestock Marketing Ass’n* decision. *Id.* at 1019. Following *Livestock Marketing Ass’n*, the Ninth Circuit remanded *Charter* to the United States District Court for the District of Montana, *id.* at 1019-20, and on November 1, 2005, the case was dismissed and Judge Richard Cebull’s previous order requiring payment of the checkoff was reinstated. Nat’l Cattlemen’s Beef Ass’n, *Charter Challenge Dismissed*, <http://www.beef.org/NEWSCharterChallengeDismissed24200.aspx> (last visited Mar. 31, 2006).

While *Livestock Marketing Ass'n* was the third case in eight years to assess the constitutionality of a federal checkoff program under the First Amendment, it was the first to successfully raise the issue of whether the advertising funded by such a program constituted government speech.<sup>114</sup>

The respondents in *Livestock Marketing Ass'n* argued that the generic promotional messages funded by the beef checkoff conflicted with their efforts to promote specific brands and types of American beef.<sup>115</sup> Moreover, the respondents objected to “being forced to associate for expressive purposes with the various organizations, ranging from wholly private to quasi-governmental in nature, involved in collecting and spending their checkoff dollars” when those organizations espoused marketing messages in direct conflict with those of the Livestock Marketing Association.<sup>116</sup> In a five-to-four decision, the Court broadened its definition of government speech to determine that checkoff-funded advertising for agricultural products indeed constituted government speech, and, as a result, was “exempt from First Amendment scrutiny.”<sup>117</sup> The Court determined that it was of no consequence that the Beef Board collected checkoff funds through “a targeted assessment . . . rather than by general [tax] revenues.”<sup>118</sup> Moreover, the Court indicated that as long as the Beef Board’s enabling statute, the Beef Act, did not require that the government identify itself as the speaker, the absence of attribution did not preclude the government speech defense.<sup>119</sup>

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114. See Mauro, *supra* note 99, at 12.

115. Brief for the Respondents, *supra* note 41, at 1-2. The Livestock Marketing Association’s brief noted the inherent breadth of the checkoff-funded beef advertisements, asserting:

The promotions issued pursuant to the Beef Act are generic in character — meaning that, among other things, they do not distinguish between the grain-fed U.S. beef produced by respondents and the grass-fed beef produced abroad, which respondents regard as inferior. Respondents object to this simplistic “beef is good” message, which obscures the quality differences between U.S. and foreign beef.

*Id.* at 2.

116. *Id.* at 2-3. The Livestock Marketing Association’s brief noted that “NCBA [the National Cattlemen’s Beef Association], in particular, takes partisan political positions — endorsing President Bush’s reelection, for example. No discernable attribution difference, other than a check-mark graphic that is meaningless to the public, distinguishes the checkoff-funded promotions from NCBA’s political messages, which are purportedly not funded by the checkoff . . .” *Id.* at 3 (footnote omitted).

117. *Livestock Mktg. Ass’n*, 125 S. Ct. at 2057-58, 2065-66.

118. *Id.* at 2063; see also HENRY COHEN, CONG. RESEARCH SERV., ORDER CODE 95-815 A, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT 26, <http://www.fas.org/sgp/crs/misc/95-815.pdf> (last updated May 24, 2005).

119. See *Livestock Mktg. Ass’n*, 125 S. Ct. at 2064 n.7.

## II. THE GOVERNMENT SPEECH DOCTRINE IN FOCUS: COMPETING PARADIGMS IN *JOHANNIS V. LIVESTOCK MARKETING ASS'N*

Compelled funding of private speech raises First Amendment concerns, but, following *Livestock Marketing Ass'n*, compelled funding of government speech does not raise those issues.<sup>120</sup> The *Livestock Marketing Ass'n* Court made this determination by accepting the government speech defense proffered by the federal petitioner.<sup>121</sup> However, the primary dissent, authored by Justice Souter, took issue with the majority's willingness to consider checkoff-funded advertising government speech.<sup>122</sup> The dissent concluded that the government must clearly identify itself as the speaker in order to invoke the defense, particularly when a targeted assessment rather than a general tax funds the speech at issue.<sup>123</sup>

### A. *The Livestock Marketing Ass'n Majority*

The *Livestock Marketing Ass'n* Court correctly declined to apply the *Central Hudson* test in a compelled subsidies context,<sup>124</sup> recognizing, perhaps, that a commercial speech analysis is appropriate for speech that proposes a commercial transaction, such as buying prescription drugs at a discounted price or buying a particular brand of cigarette.<sup>125</sup> As the Livestock Marketing Association argued, the beef advertisements at issue did no such thing.<sup>126</sup> Thus, the facts of *Livestock Marketing Ass'n*

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120. *Id.* at 2063.

121. *Id.* at 2060, 2062-63, 2066.

122. *Id.* at 2068-69 (Souter, J., dissenting).

123. *Id.*

124. *See id.* at 2060-62 (majority opinion) (illustrating how the Court used compelled speech cases in its analysis of the constitutionality of the beef checkoff); *see also id.* at 2074 n.10 (Souter, J., dissenting) (stating that "*Central Hudson* scrutiny is not appropriate in a case involving compelled speech and that even if some relaxed standard of review analogous to *Central Hudson* were employed the Beef Act would not survive it").

125. *Id.* at 260-62 (majority opinion); *see also* Brief for the Respondents, *supra* note 41, at 37, 45 (urging the Court to reject a commercial speech analysis); Post, *supra* note 7, at 6, 15-25 (discussing the defining characteristics of public discourse, commercial speech, and commercial communication).

126. Brief for the Respondents, *supra* note 41, at 45. Rather, as the Livestock Marketing Association asserted in its brief to the Court, the messages "that beef is delicious and is 'what's for dinner' hardly represent objective statements comparable, for example, to the price of a product at a particular store." *Id.*

In its petition for certiorari in *Livestock Marketing Ass'n*, the government described the checkoff as a vehicle for public safety awareness, stating that in addition to using the checkoff to fund generic advertising, the Beef Board has used checkoff revenue:

[F]or other sorts of promotion, such as contacts with retailers, as well as research, education, and information projects on such important matters as BSE, or "mad cow disease," and *E. coli* bacteria. Especially at a time of increasing public

did not fit the rationale underpinning the *Central Hudson* rubric.<sup>127</sup> It necessarily follows that the crux of the compelled subsidies challenge in *Livestock Marketing Ass'n* was not the commercial nature of the speech at issue, but the right of dissenters not to speak or fund speech.<sup>128</sup>

The *Livestock Marketing Ass'n* majority responded to the germaneness conundrum by declining to apply the murky *Abood/Lehnert* standard.<sup>129</sup> While the *United Foods* Court relied principally on cases related to speech compelled by private entities,<sup>130</sup> the *Livestock Marketing Ass'n* Court dispensed with the compelled subsidy analysis entirely.<sup>131</sup> The *Lehnert* test that grew out of *Abood's* germaneness principle is fairly straightforward: "[c]hallenged expenditures must be germane to a vital governmental interest and not significantly add to the burden on dissenters' free speech interests inherent in the program."<sup>132</sup> But the *Lehnert* Court offered no clarification of the slippery germaneness standard, nor did it address precisely which free speech interests a compelled subsidy burdens.<sup>133</sup>

*Glickman* and *United Foods* further confused the compelled subsidies analysis by straying from the *Lehnert* test and adding more questions to the mix: "[w]hether the disputed activities [implicate a political or ideological concern that] might cause a crisis of conscience and whether compelled payments also fund non-expressive activities . . . [as] part of a broader regulatory program."<sup>134</sup> In its quest to resolve an increasingly muddled and unworkable standard for compelled subsidies, the *Livestock Marketing Ass'n* Court selected a new solution to an old problem: the government speech doctrine.<sup>135</sup>

concern about food safety and nutrition issues, there is no justification for the evisceration of the Beef Act ordered by the courts below.

Petition for Writ of Certiorari, *supra* note 110, at 29-30 (citation omitted).

127. See Brief for the Respondents, *supra* note 41, at 45. In addition, the respondents noted that "the objective verifiability of a category of speech" should not be relevant to a compelled subsidies analysis. *Id.*

128. See *Livestock Mktg. Ass'n*, 125 S. Ct. at 2064 n.7; Mauro, *supra* note 99, at 12 ("By classifying [the beef checkoff] as government speech, the majority sidestepped commercial speech issues that have made for more-complicated rulings in past cases.").

129. See *Livestock Mktg. Ass'n*, 125 S. Ct. at 2061-62.

130. *United States v. United Foods, Inc.*, 533 U.S. 405, 410, 413-16 (2001).

131. See *Livestock Mktg. Ass'n*, 125 S. Ct. at 2060-62.

132. Gregory Klass, *The Very Idea of a First Amendment Right Against Compelled Subsidization*, 38 U.C. DAVIS L. REV. 1087, 1108 (2005); see also *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991).

133. Klass, *supra* note 132, at 1108; see also Note, *supra* note 20, at 2425-26 (criticizing the germaneness standard).

134. Klass, *supra* note 132, at 1108-09 (footnote omitted). See also Note, *supra* note 20, at 2421-22 (describing the standards used in *Glickman* and *United Foods*).

135. *Livestock Mktg. Ass'n*, 125 S. Ct. at 2062-63.

Writing for the majority,<sup>136</sup> Justice Scalia offered the fact that the Beef Board must answer to the Secretary of Agriculture as evidence that “[t]he message set out in the beef promotions is from beginning to end the message established by the Federal Government.”<sup>137</sup> Moreover, that the very existence of the Beef Order, the Beef Board, and attendant advertising campaign was congressionally-mandated was further rationale for classifying the advertisements as government speech.<sup>138</sup> Therefore, as Justice Scalia reasoned, the advertisements in dispute were government speech, and the Livestock Marketing Association could not sue the government under the First Amendment.<sup>139</sup> The *Livestock Marketing Ass’n* majority found it immaterial that the advertising campaign was funded by private money, and that it resulted from a targeted assessment rather than a general tax.<sup>140</sup>

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136. *Id.* at 2058. Justice Scalia was joined by Chief Justice Rehnquist and Justices O’Connor, Thomas, and Breyer. *Id.* at 2057.

137. *Id.* at 2062. The majority also noted that “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 . . . . [O]fficials of the Department also attend and participate in the open meetings at which proposals are developed.” *Id.* at 2063 (citation omitted).

138. *Id.* at 2062-64.

139. *Id.* at 2063-66.

140. *Id.* at 2063. Three Justices offered brief concurrences. *Id.* at 2066-68 (concurring opinions). Justice Thomas found no meaningful difference between government speech funded by a general tax and government speech funded by a targeted assessment. *Id.* at 2066 (Thomas, J., concurring). Moreover, he found no compelled association because the checkoff-funded advertisements did not “objectively associate their message with any individual respondent.” *Id.* at 2067.

Justice Breyer revived the spirit of his *United Foods* dissent in which he urged that “the challenged assessments involved a form of economic regulation, not speech.” *Id.* at 2067 (Breyer, J., concurring). While he found the government speech rationale acceptable, he joined the majority opinion “[w]ith the caveat that . . . my dissent in *United Foods* offers a preferable approach.” *Id.*

Finally, Justice Ginsburg concurred in the Court’s judgment but did not agree that the “Beef: It’s What’s For Dinner” advertising campaign’s promotion of beef consumption was government speech given the fact that, via the Department of Health and Human Services (HHS) and the USDA’s *Dietary Guidelines for Americans 2005* (*Dietary Guidelines*), the government has clearly espoused an opposite view, advising Americans to limit their beef intake. *Id.* at 2067-68 (Ginsburg, J., concurring in the judgment). Ultimately, Justice Ginsburg found the checkoff to “qualify as permissible economic regulation.” *Id.* at 2068.

Indeed, the *Dietary Guidelines* recommend a diet low in saturated fat and trans fat, both of which can be found in beef. See U.S. DEP’T OF HEALTH & HUMAN SERVS. & U.S. DEP’T OF AGRIC., *DIETARY GUIDELINES FOR AMERICANS*, 2005, at 29-34 (2005), <http://www.health.gov/dietaryguidelines/dga2005/document/pdf/dga2005.pdf>. The *Dietary Guidelines* cite beef as a prevalent source of saturated fat in American diets, second only to cheese. *Id.* at 33 tbl.10. Moreover, the *Dietary Guidelines* isolate beef as a primary source of harmful trans fats:



The *Livestock Marketing Ass'n* majority asserted that because neither the Beef Act nor the Beef Order require the government to identify itself as the speaker in checkoff-funded advertising, the government need not do so, and the attribution issue was moot.<sup>141</sup> This rationale, according to Justice Scalia, was sufficient to overrule the district court's facial invalidation of the statute.<sup>142</sup> Justice Scalia noted that if the respondent had alleged that listeners erroneously attributed the "Beef: It's What's For Dinner" to the Livestock Marketing Association rather than to the government, then "the analysis would be different."<sup>143</sup> However, he dismissed the notion that clear identification of the government as the speaker was a threshold issue critical to the government speech analysis.<sup>144</sup>

### B. *The Primary Livestock Marketing Ass'n Dissent*

In a dissenting opinion joined by Justices Stevens and Kennedy,<sup>145</sup> Justice Souter found the facts of the case to be substantially similar to those at issue in *United Foods*.<sup>146</sup> Justice Souter further argued that the court of appeals correctly held that the Supreme Court's decision in *United Foods* made the Beef Act's mandatory checkoff unconstitutional.<sup>147</sup> Justice Souter noted that while *United Foods* did not reach the government speech defense, because the mushroom checkoff

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*Trans* fatty acids, or *trans* fats, are unsaturated fatty acids that contain at least one non-conjugated double bond in the *trans* configuration. Sources of *trans* fatty acids include hydrogenated/partially hydrogenated vegetable oils that are used to make shortening and commercially prepared baked goods, snack foods, fried foods, and margarine. *Trans* fatty acids also are present in foods that come from ruminant animals (e.g., cattle and sheep). Such foods include dairy products, beef, and lamb.

*Id.* at 69.

141. *Livestock Mktg. Ass'n*, 125 S. Ct. at 2064 n.7.

142. *Id.* at 2064-65.

143. *Id.* at 2064 n.7. An "as-applied" challenge alleges unconstitutionality of a statute based on its application in a specific instance or based on the specific facts of a given case, whereas a facial challenge, as in *Livestock Marketing Ass'n*, considers the overall constitutionality of the statute. BLACK'S LAW DICTIONARY 244 (8th ed. 2005).

144. *Livestock Mktg. Ass'n*, 125 S. Ct. at 2064 n.7.

145. *Id.* at 2068 (Souter, J., dissenting). In addition to joining Justice Souter, Justice Kennedy issued a brief separate dissent in which he wrote that he "would reserve for another day the difficult First Amendment questions that would arise if the government were to target a discrete group of citizens to pay even for speech that the government does 'embrace as publicly as it speaks.'" *Id.* (Kennedy, J., dissenting) (quoting *id.* at 2073 (Souter, J., dissenting)).

146. *Id.* (Souter, J., dissenting).

147. See *id.* at 2070 (asserting that "these cases are factually on all fours with *United Foods*").

in *United Foods* was similar to the beef checkoff at issue, the beef ads were not government speech.<sup>148</sup>

Particularly troubling to Justice Souter was the fact that the “Beef: It’s What’s for Dinner” advertising campaign concealed its government funding because the advertisements touted sponsorship “‘by America’s Beef Producers.’”<sup>149</sup> Justice Souter found the majority’s willingness to employ the government speech defense erroneous not because of any inherent flaw in the defense, but because the government failed to identify itself as the speaker.<sup>150</sup> In Justice Souter’s view, without accurate identification of the source of the speech, the government is not accountable; without government accountability, there is no government speech to enjoy immunity from First Amendment analysis.<sup>151</sup>

148. *Id.*

149. *Livestock Mktg. Ass’n*, 125 S. Ct. at 2072 (Souter, J., dissenting).

150. *Id.* at 2068. Justice Souter expressed:

The Court accepts the defense unwisely. 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 . . . .

*Id.* at 2068-69.

Although Justice Breyer did not address attribution in his concurring opinion, at oral arguments he also appeared to support transparency when the government asserts the government speech defense. See Martin, *supra* note 92, at 21 (“Justice Stephen Breyer suggested that the issue might be resolved by changing the tagline at the bottom of the beef ads to make it clear that the government endorses it.”).

151. See *Livestock Mktg. Ass’n*, 125 S. Ct. at 2068-69; see also Randall P. Benzanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1484-85 (2001) (discussing how the government speech doctrine should be limited); Lee, *supra* note 21, at 1052 (arguing that unless a reasonable recipient can easily recognize that the government is the source of the speech at issue, the government should not be permitted to assert a government speech defense). Professors Benzanson and Buss assert that the:

[G]overnment is quite capable of both detecting expressive meanings given to its acts and either disclaiming them or, if on reflection the government wishes to adopt them as its own message, taking steps to do so explicitly and formally. Requiring that government take positive action to adopt a message as its own would avoid the limitlessness and ambiguity of the attribution determination, substituting for it the more manageable and conventional criterion of government purpose. Government speech, in other words, would occur only

Additionally, Justice Souter distinguished government-sponsored speech funded by a targeted assessment, like the checkoff, from government speech funded by a general tax.<sup>152</sup> According to Justice Souter, when the government funds speech with a general tax, the link between the speech and the compelled funding is sufficiently attenuated.<sup>153</sup> However, when the government funds speech via a targeted subsidy, the speech at issue usually has a direct relationship to the activities of the targeted group.<sup>154</sup> Ultimately, Justice Souter urged that when the government targets a specific group to pay a tax for a specific purpose, it must take special care to ensure that those affected can utilize the democratic process in a meaningful way when they disagree with a message they must subsidize.<sup>155</sup>

### C. A Livestock Marketing Ass'n Postscript: Government Speech, Pending Cases, and Pending Legislation

Both the United States Department of Agriculture (USDA) and the Beef Board applauded the Supreme Court's decision in *Livestock Marketing Ass'n*,<sup>156</sup> while the Livestock Marketing Association and other

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when the purpose of the government action is expressive and the message is identified by the government, not by third parties. . . . Intent, message, and interpretation . . . must coincide for an act to qualify as an act of expression under the First Amendment.

There is no obvious reason why government speech should be exempt from such a rule or definition. Indeed, in view of the dangerous breadth and ambiguity of speech by attribution, and its consequences of displacement of private speech, there is every reason to make government action, in particular, subject to the rigorous application of such a rule.

Benzanson & Buss, *supra*, at 1484-85 (footnotes omitted).

152. *Livestock Mktg. Ass'n*, 125 S. Ct. at 2071 (Souter, J., dissenting). Justice Souter further described how a democracy "ensures that government is not untouchable when its speech rubs against the First Amendment interests of those who object to supporting it; if enough voters disagree with what government says, the next election will cancel the message." *Id.*

153. *Id.*

154. *Id.* Justice Souter emphasized the distinction between activities funded by general tax revenues and activities funded by targeted assessment, asserting that "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." *Id.*

155. *Id.* at 2071-72.

156. See News Release, U.S. Dep't of Agric., U.S. Supreme Court Rules that Beef Checkoff Program is Constitutional (May 23, 2005), [http://www.usda.gov/wps/portal/!ut/p/\\_s\\_7\\_0\\_A/7\\_0\\_1OB?contentidonly=true&contentid=2005/05/0179.xml](http://www.usda.gov/wps/portal/!ut/p/_s_7_0_A/7_0_1OB?contentidonly=true&contentid=2005/05/0179.xml). Following the Supreme Court's decision, Secretary Johanns remarked that "[t]his is certainly a win for the many producers who recognize the power of pooled resources. As this administration has always contended, USDA regards such programs, when properly administered, as

groups compelled to pay commodities checkoffs hoped that they would be able to assert greater control over their checkoff dollars.<sup>157</sup> A challenge to a California commodities checkoff program for the promotion of pistachios is currently being litigated in district court.<sup>158</sup> At

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effective tools for market enhancement.” *Id.*; see also Press Release, Cattlemen’s Beef Promotion & Research Bd., Supreme Court Confirms Constitutionality of Beef Checkoff (May 23, 2005), <http://www.beefboard.org/NEWS/SupremeCourtConfirmsConstitutionalityOfBeefCheckoff21946.aspx>. In response to the Supreme Court victory, Beef Board Chairman Al Svajgr stated:

“[t]his is a victory for all cattlemen in the U.S. . . . Now it is more critical than ever that we come together as an industry to support the checkoff’s educational, research and promotional programs aimed at increasing demand for beef at America’s dining tables. We would call on the LMA [Livestock Marketing Association] and WORC [Western Organization of Resource Councils] to join us in these efforts, with an eye toward increasing long-term profitability for all segments of our industry.”

*Id.*; see also Michael Doyle, *U.S. Can Compel Payment for Ads: Supreme Court Upholds Fees on Farmers To Pay for Beef Promotion Campaign*, MODESTO BEE, May 24, 2005, at A1, 2005 WLNR 8238284 (heralding the Johanns decision as “a legal comeback for the \$45-million-a-year Cattlemen’s Beef Promotion and Research Board”).

157. See Peggy Steward, *Court Upholds Beef Checkoff*, CAPITAL PRESS AGRIC. WKLY., May 27, 2005, <http://www.capitalpress.info/main.asp?SectionID=67&SubSectionID=792&ArticleID=17499&TM=34797>. Following the Livestock Marketing Association’s Supreme Court defeat, Livestock Marketing Association president, Randy Patterson, described checkoff litigation as an “effort to give America’s producers greater say over how their checkoff dollars would be spent, and by whom.” *Id.* Patterson made the following statement:

“We hope that message will not be lost with the U.S. Department of Agriculture, the Cattlemen’s Beef Board and other beef industry leaders. We hope they try and become more inclusive of differing views, and make sure that producers large and small, and from every sector, have a greater voice in checkoff affairs.”

*Id.*

158. See Jon Ortiz, *Grower Fights Marketing Plan*, SACRAMENTO BEE, Oct. 5, 2005, at D2. Paramount Farms is the largest pistachio grower in California and sells its pistachios under the Sunkist label. *Id.* It is attempting to enjoin the California Pistachio Commission from compelling funding of “ineffective promotional programs.” *Id.* Paramount Farms has alleged that it was forced “to pay ‘millions of dollars’” for checkoff-funded advertising efforts it opposed. *Id.* The California Pistachio Commission “assesses growers 3.25 cents per pound of harvested pistachios and uses the money for government lobbying and generic industry ads.” *Id.*

Other post-*Livestock Marketing Ass’n* checkoff cases are pending in the U.S. Court of International Trade. Forrest Laws, *Trade Court To Take Up Cotton Checkoff Lawsuits*, DELTA FARM PRESS, June 17, 2005, at 12, available at [http://deltafarmpress.com/mag/farming\\_trade\\_court\\_cotton/index.html](http://deltafarmpress.com/mag/farming_trade_court_cotton/index.html). Over 100 cotton importers have filed First Amendment challenges to USDA checkoffs adopted pursuant to the Cotton Research and Promotion Act. *Id.* The U.S. Court of International Trade suspended proceedings in the cotton cases pending the outcome of *Livestock Marketing Ass’n*. See *id.* While the cotton checkoff initially applied only to domestic producers, cotton importers must now pay the checkoff, which nets an estimated \$60 million annually to fund

this writing, however, there has been no successful as-applied challenge to a commodities checkoff program post-*Livestock Marketing Ass'n*.<sup>159</sup>

Despite the lack of a successful as-applied challenge, some limitation on the government speech doctrine may be developing beyond the commodities checkoff context.<sup>160</sup> Both Congress and the Government Accountability Office (GAO) are concerned about video news releases (VNRs) which are produced by the government, but not identified as government speech.<sup>161</sup> Legislators and federal regulators are exploring whether to enact disclosure requirements that will ensure that broadcasters inform viewers of sponsor identity when the government is subsidizing the report.<sup>162</sup> In October 2005, the Senate Commerce

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advertising and marketing efforts. *Id.* Some plaintiffs have requested class status, but, as of this writing, the court has yet to make a determination. *Id.*

William P. Crawford, president and CEO of the Cotton Board, noted a distinction between the cotton checkoff litigation and the beef checkoff at issue in *Livestock Marketing Ass'n*:

"More than 100 importers filed lawsuits based on the freedom of speech argument . . . . One importer filed an administrat[ive] case with USDA, but all of the cases are similar, i.e., the checkoff program is unconstitutional based on the First Amendment.

....

In the beef case, you had disgruntled producers and feedlot operations . . . . In our case, only importers have filed actions. We haven't heard of a producer who has intimated he was opposed to the checkoff program."

*Id.*

159. See News Release, Agric. Mktg. Serv., U.S. Dep't of Agric., Judge Cites Supreme Court and Upholds Two Commodity Boards (Sept. 19, 2005), <http://www.ams.usda.gov/news/218-05.htm>. In September 2005, a USDA administrative law judge denied First Amendment challenges to USDA Agricultural Marketing Service marketing orders for producers of watermelons and honey. *Id.* Judge Jill Clifton ruled that, pursuant to *Livestock Marketing Ass'n*, advertisements stemming from the Watermelon Research and Promotion Act and the Honey Research, Promotion, and Consumer Information Act are government speech not subject to First Amendment challenges. *Id.*; see also John Accola, *Judge Upholds Honey Fee: Beekeepers Said Checkoff a Violation of Free Speech*, ROCKY MOUNTAIN NEWS (Denver, Colo.), Sept. 14, 2005, at 2B.

160. See, e.g., Truth in Broadcasting Act of 2005, S. 967, 109th Cong. § 342(a) (2005) (illustrating a proposed amendment to the Communications Act of 1934 which would require federal government-created prepackaged news stories to contain a clear announcement that the government is the speaker).

161. S. REP. NO. 109-210, at 2 (2005).

162. See *id.* at 2-3. But see *More Regulation of Video News Releases (VNRs)*, COMM. DAILY, July 27, 2005, at 13, 13 (noting that the National Association of Broadcasters (NAB) and the Radio and Television News Directors Association (RTNDA) are strongly opposed to the FCC's adoption of sponsorship identification rules for VNRs on freedom of the press grounds, with RTNDA specifically stating that "such a requirement would burden broadcasters and cable operators. . . [and] would violate First Amendment rights by dictating how VNRs are used").

Committee approved the Truth in Broadcasting Act of 2005,<sup>163</sup> legislation that would require the government to identify itself as the speaker when it funds and produces VNRs.<sup>164</sup> In addition, the Federal Communications Commission (FCC) has initiated its own inquiry into VNR production.<sup>165</sup>

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163. Truth in Broadcasting Act of 2005, S. 967, 109th Cong. (2005). The Truth in Broadcasting Act is a measure to quash the proliferation under the Bush administration of mock news segments produced by government agencies and aired by local broadcast stations. S. Rep. No. 109-210, at 7-8; *see also* Toni Johnson & Eleanor Stables, *S967 – Truth in Broadcasting Act of 2005*, CQ BILL ANALYSIS, Oct. 25, 2005, 2005 WLNR 17557221 (“Democratic lawmakers were outraged when federal prepackaged news stories on the Medicare prescription drug program produced by the Department of Health and Human Services (HHS) were aired on local news stations with no indication of their true origin.”).

As instances of federal agency-sponsored “news” have come to national attention, Secretary of Agriculture, Mike Johanns, and the USDA have again been the focus of scrutiny. *See* Andrew Martin & Jeff Zeleny, *USDA Plants Its Own News*, CHI. TRIB., June 16, 2005, at 1. The USDA produced dozens of segments for television and radio broadcast supporting the controversial Central American Free Trade Agreement. *Id.* The USDA’s efforts raised Democratic senators’ hackles, including Senator Daniel Akaka (D-Hawaii) and Senator Mary Landrieu (D-Louisiana), who wrote to Johanns to express their concern that the segments, presented as news reports, were actually “produced and distributed with taxpayer dollars [and] provided to 675 rural radio stations and numerous televisions [sic] stations where they are run, without disclosure of their source.” *Id.* (quoting a letter to Secretary Johanns drafted by the senators). The senators further argued that listeners could reasonably believe that the segments were “news reports rather than political statements from the USDA which are intended to advance a specific trade agenda.” *Id.*

164. S. 967 § 342(a); *see also* Johnson & Stables, *supra* note 163, at 17 (describing the bill’s disclosure requirements which “would instruct relevant agencies to include a clear statement in their prepackaged news stories that the U.S. government prepared or funded the story, but there would be no specific language mandated. . . . [and] would allow the FCC to establish rules to determine when broadcasters and cable and satellite operators could remove or alter the disclaimer”).

165. *See* Request for Comments on the Use of Video News Releases by Broadcast Licensees and Cable Operators, 70 Fed. Reg. 24,791, 24,791-93 (Apr. 13, 2005). Among other issues, the FCC sought public comment regarding whether there were sufficient “mechanisms in place to ensure that broadcast licensees and cable operators receive notice regarding the identity of entities providing programming involving political material or the discussion of controversial issues of public importance.” *Id.* at 24,793.

In a separate statement, FCC Commissioner Jonathan Adelstein expressed his displeasure with the federal government, and made a point to remind broadcasters and producers of content of the FCC sponsorship identification rules already in force:

We have recently received a large number of complaints from the public about VNRs that were created by or for the federal government, and which were broadcast on television stations without identifying the government’s role in developing the VNR. . . . [This] Public Notice is in response to these developments, and reminds broadcast stations, cable operators, and others of their disclosure obligations under our rules, if and when they choose to air VNRs, and to reinforce that we will take appropriate enforcement action against stations that do not comply with these rules.

### III. LIMITING THE GOVERNMENT SPEECH DOCTRINE

In *Livestock Marketing Ass'n*, the government was finally able to proffer a government speech argument in a checkoff case which the Supreme Court was quick to accept.<sup>166</sup> But the majority's government speech analysis is marked by three points of contention. First, the history and structure of the beef checkoff indicates that a private entity, the Beef Board, not the federal government, is speaking.<sup>167</sup> Second, the *Livestock Marketing Ass'n* majority determined that when the government asserts the government speech defense, it need not establish as a threshold matter that it had clearly identified itself as the proponent of the speech at issue.<sup>168</sup> Third, in failing to find a difference between the compelled subsidies at issue in *Livestock Marketing Ass'n* and the general taxes that all Americans are required to pay, the majority ignored the inherent vulnerability of dissenting groups like the Livestock Marketing Association.<sup>169</sup> Accordingly, the Supreme Court should refine its analysis for determining what constitutes government speech so that, in order to entertain an as-applied First Amendment challenge to a commodities checkoff, a court must ask two threshold questions: (1) Who does the

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It's high time for the FCC to remind broadcasters and others subject to our sponsorship identification rules that they have a legal obligation to let their viewers know when they run stories from someone else. People have a legal right to know the real source when they see something on TV that is disguised as "news."

Statement of Jonathan S. Adelstein, to FCC Commissioner, Broadcast Licensees, Cable Operators and Others on Requirements Applicable to Video News Releases and Seeks Comment on the Use of Video News Releases by Broadcast Licensees and Cable Operators (Apr. 13, 2005), [http://www.hraunfoss.Fcc.gov/edocs\\_public/attachmatch/FCC-05-84A3.pdf](http://www.hraunfoss.Fcc.gov/edocs_public/attachmatch/FCC-05-84A3.pdf).

The FCC received eight comments by the June 22, 2005 initial comment filing deadline, and two reply comments by the July 22, 2005 reply comment filing deadline. See Request for Comments on the Use of Video News Releases, 70 Fed. Reg. at 24,791, FCC, Electronic Comment Filing System [Enter Search Criteria], [http://www.gullfoss2.fcc.gov/prod/ecfs/comsrch\\_v2.cgi](http://www.gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi) (type "05-171" under "1.Proceeding") (last visited Mar. 31, 2006).

166. See *Johanns v. Livestock Mktg. Ass'n*, 125 S. Ct. 2055, 2062-66 (2005).

167. See Brief for the Respondents, *supra* note 41, at 4-5. The Livestock Marketing Association pointed out that "[t]he Beef Act does not permit the United States Government to fund any of the activities the Act authorizes. Accordingly, the program is not subject to annual congressional review pursuant to the normal appropriations process." *Id.* at 4 (citing 7 U.S.C. § 2911 (2000)).

168. *Livestock Mktg. Ass'n*, 125 S. Ct. at 2064-65 & 2064 n.7.

169. *Id.* at 2071-74 (Souter, J., dissenting) ("[E]xpression 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.").

audience perceive to be the speaker?; and (2) Is the required contribution at issue a targeted assessment?<sup>170</sup>

*A. The History and Structure of Checkoff Programs Lead to an Answer at Odds with that of the Livestock Marketing Ass'n Majority*

The facts of *Livestock Marketing Ass'n* suggest that while the Beef Board was born of statute, it operates fundamentally as a private entity.<sup>171</sup> Responsibility for checkoff collection belongs to state beef councils, which are obligated to forward fifty cents per dollar to the Beef Board.<sup>172</sup> A private entity collects the federal checkoff, not the federal government, and checkoff money never passes through the United States Treasury.<sup>173</sup> Thus, the checkoff requires private groups, the Livestock Marketing Association, and other similar entities to pay another private entity, the Beef Board, for an advertising campaign.<sup>174</sup> The Livestock Marketing Association argued that the degree to which the federal government is really involved in administering the beef checkoff is minimal, contrary to Justice Scalia's suggestion.<sup>175</sup> If that is the case, then

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170. See *id.* at 2068-74.

171. See Brief for the Respondents, *supra* note 41, at 4; Cattlemen's Beef Promotion & Research Bd., *supra* note 14. The Beef Board itself describes checkoffs as private programs:

A checkoff is an industry-funded generic marketing and research program designed to increase domestic and/or international demand for an agricultural commodity. . . . These programs are similar to businesses funded by shareholders

....

Each checkoff program is supported entirely by its respective industry, which could include U.S. producers, processors, handlers and importers. NO TAXPAYER OR GOVERNMENT FUNDS ARE INVOLVED. . . .

....

Checkoff programs are directed by industry-governed boards, appointed by the U.S. Secretary of Agriculture. These boards are responsible for allocating funds and approving business plans and programs, with USDA approval.

*Id.*

172. See Cattlemen's Beef Promotion & Research Bd., *supra* note 97. The Cattlemen's Beef Promotion and Research Board succinctly describes checkoff collection:

The checkoff is collected by qualified state beef councils, which retain up to 50 cents on the dollar. The state councils forward the other 50 cents per head to the Cattlemen's Beef Promotion and Research Board, which oversees the national checkoff program, subject to USDA review. The 108 members of the Cattlemen's Beef Board represent all segments of the beef industry, including beef, veal and dairy producers and importers, and are nominated by industry organizations and importers and appointed by the U.S. Secretary of Agriculture.

*Id.*

173. See *id.*

174. See *id.*

175. See *Livestock Mktg. Ass'n*, 125 S. Ct. at 2062-63. Justice Scalia asserted that "[w]hen, as here, the government sets the overall message to be communicated and



the *Livestock Marketing Ass'n* majority has cloaked a private program that is subject only to perfunctory government approval in the mantle of government speech.<sup>176</sup>

Moreover, it is relevant that the checkoff program at issue in *Livestock Marketing Ass'n*, is substantially similar to the checkoff programs that gave rise to both *Glickman* and *United Foods*.<sup>177</sup> In those cases, the government speech defense either was not raised, or was raised at the eleventh hour.<sup>178</sup> If the government truly believed the speech at issue was government speech, why did it not raise the defense much earlier in the protracted history of First Amendment challenges to checkoff programs?

### B. Misleading Attribution

In his *Livestock Marketing Ass'n* dissent, Justice Souter did not dismiss the validity of a government speech defense out of hand; indeed, he recognized instances in which it was valuable.<sup>179</sup> However, his dissent appropriately asserted that in order to claim the defense, the government must identify itself as the speaker clearly and unambiguously.<sup>180</sup> While the First Amendment rights of the dissenting livestock marketers were primarily at issue in *Livestock Marketing Ass'n*, Justice Souter alluded to an ancillary right: the right of the audience receiving an unimpeachable

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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." *Id.* at 2063. However, the Livestock Marketing Association suggested in its brief that private industry does much more than merely "assist" the federal government:

USDA has no power to compose or select the messages on which checkoff dollars are spent. Instead, private beef industry contractors submit promotion proposals to the Operating Committee, which then selects among them. The Secretary [of Agriculture's] role is simply to provide or withhold [his] "approval," upon which the projects selected by the Committee "become effective." In practice, such approval is *pro forma*, provided the project does not fall outside the broad parameters of the Act; reflecting this *pro forma* role, implementation of projects sometimes begins even before such approval. The Annual Beef Industry Planning Cycle jointly developed by the Beef Board and NCBA accordingly provides no role for USDA.

Brief for the Respondents, *supra* note 41, at 4-5 (citations omitted).

176. See *supra* note 41.

177. Compare *Livestock Mktg. Ass'n*, 125 S. Ct. at 2058-2059, with *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 460-63 (1997), and *United States v. United Foods, Inc.*, 533 U.S. 405, 408 (2001).

178. *Livestock Mktg. Ass'n*, 125 S. Ct. at 2061 n.3; see also *supra* notes 62, 79 and accompanying text.

179. *Livestock Mktg. Ass'n*, 125 S. Ct. at 2068-70 (Souter, J., dissenting).

180. *Id.* at 2068-69.

message to be informed that the proponent of that message is the federal government.<sup>181</sup>

Without a limiting principle, the government speech precedent of *Livestock Marketing Ass'n* may prove dangerous over the long term.<sup>182</sup> If the government wishes to compel funding of a particular message that it favors, all it needs do is create a checkoff-type program to be administered by a like-minded interest group, and retain the right, however pro forma, to approve the message.<sup>183</sup> *Livestock Marketing Ass'n* does nothing to cure the attribution problem that so troubled Justice Souter.<sup>184</sup> That “[F]unded By America’s Beef Producers” effectively means “Funded by the Federal Government” is ambiguous attribution at best.<sup>185</sup> If the government is clearly the speaker, then it may appropriately plead the government speech defense.<sup>186</sup> If the government cannot successfully prove the threshold matter that a reasonable person receiving the promotional message would observe that the government is the sponsor of the message, then it must not be permitted to take advantage of the government speech defense.<sup>187</sup>

181. See *id.* at 2072-73; Lee, *supra* note 21, at 1052-55 (discussing how a “[r]easonable [r]ecipient [s]tandard” would be instructive in government speech analyses).

182. See Tony Mauro, *High Court Says Beef Is What’s For Dinner*, FIRST AMENDMENT CTR., May 24, 2005, <http://www.firstamendmentcenter.org/analysis.aspx?id=15308>. Thomas Goldstein, the Washington, D.C. attorney who represented the Livestock Marketing Association before the Supreme Court, found the Supreme Court’s decision particularly odious in light of its broader implications, stating that the decision “is likely to be extremely significant for First Amendment jurisprudence, as it signals that the government has a free hand not only to communicate its own views without oversight by the courts but also to require financial support for that communication from a discrete segment of the population.” *Id.* (quoting Thomas Goldstein).

183. See *Livestock Mktg. Ass’n*, 125 S. Ct. at 2062-63; *id.* at 2073 (Souter, J., dissenting).

184. *Id.* at 2073-74 (Souter, J., dissenting).

185. See *id.* at 2072; Gershengorn, *supra* note 8, at 8 (“In broadly limiting generic advertising challenges, the court invigorated a ‘government speech’ doctrine that may have consequences in a host of different contexts that the court and the bar right now can only dimly perceive.”). In response to the Supreme Court’s *Livestock Marketing Ass’n* decision, Institute for Justice lawyer Steve Simpson remarked that “[t]he First Amendment protects the right to dissent as much as the right to speak . . . . Unfortunately, the Supreme Court has just made it a lot easier for government to compel support for the ‘party line’ in a particular industry, and drown out any dissent.” Mauro, *supra* note 99, at 12 (quoting Steve Simpson).

186. See *Livestock Mktg. Ass’n*, 125 S. Ct. at 2068 (Souter, J., dissenting). In his *Livestock Marketing Ass’n* dissent, Justice Souter espoused “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.” *Id.* at 2069.

187. See *id.* at 2073-74; Lee, *supra* note 21, at 1052-55. That the Supreme Court must clearly define the limits of the government speech doctrine is made all the more pointed

*C. Missing the Distinction: A Compelled Subsidy May Burden First Amendment Interests, While a General Tax May Not*

The *Livestock Marketing Ass'n* majority also failed to give adequate weight to the fact that targeted assessments differ from general tax revenues in that only specific individuals must pay targeted assessments, and the government uses them for a particular purpose.<sup>188</sup> The Supreme Court must permit those compelled to fund private speech via targeted assessments to raise a First Amendment challenge.<sup>189</sup> As Justice Kennedy warned in his *United Foods* majority opinion, "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors."<sup>190</sup> Targeted assessments are fundamentally different from general taxes;<sup>191</sup> individuals who object to messages funded by general tax revenues need not have standing to challenge laws indirectly compelling them to subsidize messages with which they disagree.<sup>192</sup>

In *Livestock Marketing Ass'n*, Justice Scalia suggested that permitting a First Amendment challenge in a checkoff case would open the floodgates, so that any person who pays taxes but disagrees with a resulting government message, no matter how indirectly related to the individual's contribution, could refrain from funding that message.<sup>193</sup> But Justice Souter's dissent articulated a middle ground that is far less offensive to the Constitution.<sup>194</sup> Because those forced to pay targeted

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by the fact that Chief Justice John Roberts is intimately familiar with the defense, having advocated in its favor in both *Rust* and *Livestock Marketing Ass'n v. United States Department of Agriculture*, the precursor case to the Supreme Court's *Livestock Marketing Ass'n*. See *Rust v. Sullivan*, 500 U.S. 173, 176, 192-94 (1991); *Livestock Marketing Ass'n v. U.S. Dep't of Agric.*, 335 F.3d 711, 713, 717 (8th Cir. 2003), *vacated sub nom. Livestock Mktg. Ass'n*, 125 S. Ct. 2055. Some comments that Chief Justice Roberts made during October 2005 oral arguments may indicate that he is prepared to seriously consider, and may even have a preference for, broadly affirming the government speech defense. See Linda Greenhouse, *Justices Grapple with Whether Public Employees Enjoy Free-Speech Rights on the Job*, N.Y. TIMES, Oct. 13, 2005, at A19 (noting that during oral arguments in a state employee whistle-blowing case, Chief Justice Roberts suggested that counsel for the state "might have argued that because the speech was paid for by the government, it was government speech and the First Amendment did not apply at all" (quoting Chief Justice John Roberts)).

188. *Livestock Mktg. Ass'n*, 125 S. Ct. at 2071 & n.4 (Souter, J., dissenting).

189. *Id.* at 2071-72.

190. *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001).

191. *Livestock Mktg. Ass'n*, 125 S. Ct. at 2071 (Souter, J., dissenting).

192. *See id.*

193. *See id.* at 2063-64 (majority opinion).

194. *See* Brief for the Respondents, *supra* note 41, at 37; Gershengorn, *supra* note 8, at 8. In its brief to the Supreme Court, the Livestock Marketing Association asserted that limitation on the use of the government speech doctrine would not swallow the defense:

assessments are more likely to suffer direct harm, only they may raise a First Amendment challenge.<sup>195</sup>

The Supreme Court has left the door open to an as-applied challenge to a checkoff program.<sup>196</sup> Thus, it is possible that the Court will have the opportunity to more carefully balance the concerns of the federal government against the concerns of those who are compelled to fund speech with which they disagree.<sup>197</sup> By reconsidering the distinction between targeted assessments and general tax revenues and by considering whether an audience could reasonably perceive that the government is speaking, the Court may incorporate the Souter approach to a compelled subsidies analysis without jettisoning the government speech doctrine completely.<sup>198</sup>

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[T]he First Amendment scrutiny that respondents urge would leave intact government's ability to compel support in appropriate ways for the costs of government speech. Even beyond the plainly permissible use of general tax revenues, some targeted mandatory assessments designed to support government speech could almost certainly withstand the applicable level of First Amendment scrutiny, or even escape such scrutiny altogether.

Brief for the Respondents, *supra* note 41, at 37.

Analyzing the use of cigarette sales to fund federally sponsored antismoking advertising efforts, the respondents concluded:

A principal difference between such taxes and the beef checkoff is that, whereas Beef Act promotions are expressly attributed to producers, few viewers would attribute anti-smoking ads . . . to *smokers*, the parties upon whom cigarette taxes are normally assessed. And even if such a tax were assessed on the cigarette companies rather than on the smokers, the public still would not attribute the message to the companies, inasmuch as that message is transparently against their interests.

*Id.* at 38.

195. See *Livestock Mktg. Ass'n*, 125 S. Ct. at 2071 (Souter, J., dissenting) (arguing that a message funded by a targeted assessment limits the expressive autonomy of those who pay the assessment and that this expressive autonomy is further—and unduly—burdened when the government dissembles or deflects responsibility for the message on to dissenters).

196. See *id.* at 2065 (majority opinion). Such a challenge would stem from a scenario similar to the following: a commodity producer who pays a targeted assessment disagrees with the content of a generic promotional message that appears in advertisements funded by the checkoff. *Id.* at 2066 (Thomas, J., concurring). But members of the audience who receive the promotional message believe that the dissenter is a proponent of the message, perhaps because it is attributed generically to all producers of that commodity. See *id.* As a result of this mistaken attribution, some unnamed harm results. See *id.*

197. See Martin A. Schwartz, *Generic Beef Advertising Ruled 'Governmental Speech,'* N.Y. L.J., Oct. 17, 2005, at 3, 9 ("The Court left open whether the attribution could form the basis for an argument that as-applied, the government is requiring compelled subsidy of private speech in violation of the First Amendment.").

198. See *Livestock Mktg. Ass'n*, 125 S. Ct. at 2070-74 (Souter, J., dissenting). In his dissenting opinion, Justice Souter articulated the rationale behind the government speech doctrine, which defines the appropriate scope of its use:

#### IV. CONCLUSION

While it is settled law that the government cannot compel individuals and organizations to fund purely private speech with which they disagree, commodities checkoffs remain in jurisprudential limbo. In *Livestock Marketing Ass'n*, the Supreme Court attempted to solve the checkoff conundrum of *Glickman* and *United Foods*, settling ultimately on an escape hatch—the government speech doctrine—that only begets further confusion. If promotional messages funded by targeted commodities checkoffs are tantamount to government speech, the Supreme Court must require the government to identify itself. By reexamining Justice Souter's *Livestock Marketing Ass'n* dissent, the Supreme Court can incorporate principles of transparency and fiscal fairness into the nascent government speech doctrine.

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The government-speech doctrine is relatively new, and correspondingly imprecise. . . . Even at this somewhat early stage of development, however, two points about the doctrine are clear.

The first point of certainty is the need to recognize the legitimacy of government's power to speak despite objections by dissenters whose taxes or other exactions necessarily go in some measure to putting the offensive message forward to be heard. To govern, government has to say something, and a First Amendment heckler's veto of any forced contribution to raising the government's voice in the "marketplace of ideas" would be out of the question.

...

The second fixed point of government-speech doctrine is that the First Amendment interest in avoiding forced subsidies is served, though not necessarily satisfied, by the political process as a check on what government chooses to say.

*Id.* (citations omitted) (footnote omitted).