

SOUTER, J., dissenting

SUPREME COURT OF THE UNITED STATES

Nos. 03–1164 and 03–1165

MIKE JOHANNIS, SECRETARY OF AGRICULTURE,
ET AL., PETITIONERS

03–1164

v.

LIVESTOCK MARKETING ASSOCIATION ET AL.

NEBRASKA CATTLEMEN, INC., ET AL., PETITIONERS
03–1165

v.

LIVESTOCK MARKETING ASSOCIATION ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

[May 23, 2005]

JUSTICE SOUTER, with whom JUSTICE STEVENS and
JUSTICE KENNEDY join, dissenting.

The Beef Promotion and Research Act of 1985, known as the Beef Act, taxes cattle sold in or imported into the United States at one dollar a head. 7 U. S. C. §2904(8). Much of the revenue is spent urging people to eat beef, as in advertisements with the slogan, “Beef. It’s What’s for Dinner.” App. 50. Respondent taxpayers, “South Dakota and Montana ranchers and organizations representing their interests,” Brief for Respondents 1, object to the tax because they disagree with the advertisements’ content, which they see as a generic message that “beef is good.” This message, the ranchers say, ignores the fact that not all beef is the same; the ads fail to distinguish, for example, the American ranchers’ grain-fed beef from the grass-fed beef predominant in the imports, which the Americans consider inferior.

The ranchers’ complaint is on all fours with the objec-

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tion of the mushroom growers in *United States v. United Foods, Inc.*, 533 U. S. 405 (2001), where a similar statutory exaction was struck down as a compelled subsidy of speech prohibited by the First Amendment absent a comprehensive regulatory scheme to which the speech was incidental. The defense of the Government's actions in these cases, however, differs from the position of the United States in *United Foods*. There we left open the possibility that a compelled subsidy would be justifiable not only as one element of an otherwise valid regulatory scheme, but also as speech of the Government itself, which the Government may pay for with revenue (usually from taxes) exacted from those who dissent from the message as well as from those who agree with it or do not care about it. Not surprisingly, the Government argues here that the beef advertising is its own speech, exempting it from the First Amendment bar against extracting special subsidies from those unwilling to underwrite an objectionable message.

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

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would affirm the judgment of the Court of Appeals holding the Act unconstitutional, and I respectfully dissent from the Court’s decision to condone this compelled subsidy.¹

* * *

In 1779 Jefferson wrote that “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.” 5 The Founders’ Constitution, §37, A Bill for Establishing Religious Freedom, p. 77 (1987), codified in 1786 at Va. Code Ann. §57–1 (Lexis 2003). Although he was not thinking about compelled advertising of farm produce, we echoed Jefferson’s view four years ago in *United Foods*, where we said that “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 . . .” 533 U. S., at 411. *United Foods* addressed a scheme of enforced exaction virtually identical to the one here, except that the product involved was mushrooms, not beef. There, as here, a federal statute forced a targeted group (mushroom growers) to pay a tax that funded ads promoting its members’ produce at a generic level objectionable to some of them. We held that the mushroom statute violated the growers’ First Amendment right to refuse to pay for expression when they object to its content.²

¹The Government’s petition for certiorari also presented a question as to whether more limited relief might be available, but the Court denied certiorari on that question and hence it is not before us.

²We also noted that while the mushroom growers’ disagreement with the ads’ message “could be seen as minor . . . , there is no apparent principle which distinguishes out of hand minor debates about whether a branded mushroom is better than just any mushroom.” *United Foods*, 533 U. S., at 411. The First Amendment, in other words, is not limited to “serious” or “substantial” disputes about content. Even if it were, the mushroom growers could have argued, as the ranchers could argue

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As the Court says, *ante*, at 5–6, *United Foods* was a descendent of two lines of precedent. The first, exemplified by *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624 (1943), and *Wooley v. Maynard*, 430 U. S. 705 (1977), stands for the principle that government may not force individuals to utter or convey messages they disagree with or, indeed, to say anything at all. The second, comprising *Keller v. State Bar of Cal.*, 496 U. S. 1 (1990), and *Abood v. Detroit Bd. of Ed.*, 431 U. S. 209 (1977), is authority for the related proposition that, absent substantial justification, government may not force targeted individuals to pay for others to speak.

Four years before *United Foods* we held that one such ground was present where enforced contribution to objectionable speech is incidental to a “broader collective enterprise in which th[e] freedom to act independently is already constrained by the regulatory scheme.” *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U. S. 457, 469 (1997). As noted, *United Foods* left open the possibility of another justification, that the objectionable message is “government speech,” which our case law suggests is immune to many types of First Amendment challenge. See *ante*, at 7–8.

Although we declined to address the pertinence of a government-speech justification in *United Foods*, it is crucial to the defense of the statute here because, as the District Court and the Court of Appeals observed (and as the Court appears to agree), these cases are factually on all fours with *United Foods*. See 335 F. 3d 711, 717 (CA8

here, that because they would prefer to say nothing than to convey the message in the ads, the ads violate their First Amendment right not to speak at all. See, *e.g.*, *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U. S. 539, 559 (1985) (“There is necessarily, and within suitably defined areas, a [First Amendment] freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect”).

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2003) (“[W]e agree with the district court that ‘[t]he beef checkoff is, in all material respects, identical to the mushroom checkoff’” program challenged in *United Foods* (quoting 207 F. Supp. 2d 992, 1002 (SD 2002))), quoted *ante*, at 6. Unless, then, the doctrine of government speech is defined in such a way as to justify the targeted compulsion here, the enforced subsidy for beef ads must fail along with the mushroom subsidy. In my judgment the beef subvention should fail, for I, unlike the Court, do not believe that the beef ads qualify for treatment as speech by the Government.

The government-speech doctrine is relatively new, and correspondingly imprecise. In fact, the few cases in which we have addressed the doctrine have for the most part not gone much beyond such broad observations as “[t]he government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.” *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U. S. 217, 229 (2000). 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”³ would be out of the question.

³See *Abrams v. United States*, 250 U. S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas—th[e] . . . best test of truth is the

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See *Keller, supra*, at 12–13 (“If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed”).

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. “When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy.” *Southworth, supra*, at 235; see also *Abood, supra*, at 259, n. 13 (Powell, J., concurring in judgment) (“[T]he reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people”). Democracy, in other words, 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.

The adequacy of the democratic process to render the subsidization of government speech tolerable is, naturally, tied to the character of the subsidy. For when government funds its speech with general tax revenue, as it usually does, no individual taxpayer or group of taxpayers can lay claim to a special, or even a particularly strong, connection to the money spent (and hence to the speech funded). See *Massachusetts v. Mellon*, 262 U. S. 447, 486–487 (1923). Outrage is likely to be rare, and disagreement tends to

power of the thought to get itself accepted in the competition of the market . . .”).

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stay temperate. But the relative palatability of a remote subsidy shared by every taxpayer is not to be found when the speech is funded with targeted taxes. For then, as here, the particular interests of those singled out to pay the tax are closely linked with the expression, and taxpayers who disagree with it suffer a more acute limitation on their presumptive autonomy as speakers to decide what to say and what to pay for others to say. See *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 573 (1995) (“[T]he fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message”).⁴

⁴The Court asserts that in fact there is no difference between a taxpayer’s challenge to speech funded with general revenues, which our precedents foreclose, and a challenge to speech funded with targeted taxes. But the Court’s lone authority for that position, our statement in *United States v. Lee*, 455 U. S. 252 (1982), that “[t]here is no principled way . . . to distinguish between general taxes and those imposed under the Social Security Act,” *id.*, at 260, quoted *ante*, at 11, is unavailing. *Lee* involved a religious objection to paying Social Security taxes, and the Court’s statement in that case was grounded in the recognition that if the Government were required to accommodate the objection, there would be nothing to stop others from raising a similar religious objection to paying “general taxes.” Here there is no comparable danger because of the commonsense notion that individuals feel a closer connection to speech that they are singled out to fund with targeted taxes than they do to expression paid for with general revenues. We recognized this in *Massachusetts v. Mellon*, 262 U. S. 447 (1923), where we noted that the individual taxpayer’s “interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others [and] is comparatively minute and indeterminable.” *Id.*, at 487. This commonsense notion, then, provides a “principled way” to distinguish in this context between targeted and general taxes. The Court in *Lee* seemed to recognize that its reasoning might be limited in this way, as the unredacted version of its statement reads: “[t]here is no principled way, however, for purposes of this case, to distinguish between general taxes and those imposed under the Social Security Act.” 455 U. S., at 260.

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

In these cases, the requirement of effective public accountability means the ranchers ought to prevail, it being clear that the Beef Act does not establish an advertising scheme subject to effective democratic checks. The reason for this is simple: the ads are not required to show any sign of being speech by the Government, and experience under the Act demonstrates how effectively the Government has masked its role in producing the ads.⁵ Most obviously, many of them include the tag line, “[f]unded by America’s Beef Producers,” App. 50–51, which all but ensures that no one reading them will suspect that the message comes from the National Government.⁶ But the

⁵ The Court thinks it is enough that the Government is not required to mislead in this way. *Ante*, at 12, n. 7. This view that the statute is saved because it might be applied without misleading readers apparently reflects the Court’s position that these cases involve a facial challenge. *Ante*, at 13. But the challenge here is to the application of the statute through actual, misleading ads, as shown by a record replete with examples.

⁶Disputing this, petitioners Nebraska Cattlemen, Inc., et al., suggest that any danger of confusion is eliminated by the inclusion in the beef ads of a red check mark with the word “beef” atop it, because this “distinctive checkoff logo is a direct sign that the ads are disseminated pursuant to the federal checkoff program.” Reply Brief for Petitioners in No. 03–1165, at 15–16. It seems to me quite implausible that most

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tag line just underscores the point that would be true without it, that readers would most naturally think that ads urging people to have beef for dinner were placed and paid for by the beef producers who stand to profit when beef is on the table. No one hearing a commercial for Pepsi or Levi's thinks Uncle Sam is the man talking behind the curtain. Why would a person reading a beef ad think Uncle Sam was trying to make him eat more steak?⁷ Given the circumstances, it is hard to see why anyone would suspect the Government was behind the message unless the message came out and said so.

The Court takes the view that because Congress authorized this scheme and the Government controls (or at least has a veto on) the content of the beef ads, the need for democratic accountability has been satisfied. See *ante*, at 11–12. But the Court has it backwards. It means nothing that Government officials control the message if that fact

(or even some) Americans associate a red check mark underneath the word “beef” with the Federal Government. Indeed, it strikes me that even someone generally familiar with the Beef Act and its taxation mandate might not recognize the checkoff logo as signifying Government involvement.

⁷Moreover, anyone who did draw such an unlikely connection would also have to believe that Uncle Sam was having a hard time making his mind up, for other, expressly governmental messages take a different view of how much beef Americans should be eating. Dietary Guidelines for Americans 2005, a publication of the Departments of Agriculture and of Health and Human Services, discusses beef in a chapter entitled “Fats.” [Http://www.health.gov/dietaryguidelines/dga2005/document](http://www.health.gov/dietaryguidelines/dga2005/document) (as visited May 16, 2006, and available in Clerk of Court's case file). The message of that chapter is that most Americans need to reduce their consumption of fats, and should get most of the fats they do eat from sources other than beef, namely fish, nuts, and vegetable oils. See *id.*, at 29–31. That the report, which the Secretaries of Agriculture and of Health and Human Services say “is intended to be a primary source of dietary health information,” *id.*, at i, does not encourage the consumption of beef (as the beef ads do) is clear from the fact that a different chapter, which discusses fruits, vegetables, whole grains, and fat-free dairy products, is entitled “Food Groups to Encourage.” *Id.*, at 23.

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is never required to be made apparent to those who get the message, let alone if it is affirmatively concealed from them. The political accountability of the officials with control is insufficient, in other words, just because those officials are allowed to use their control (and in fact are deliberately using it) to conceal their role from the voters with the power to hold them accountable.⁸ Unless the putative government speech appears to be coming from the government, its governmental origin cannot possibly justify the burden on the First Amendment interests of the dissenters targeted to pay for it.⁹

⁸Notably, the Court nowhere addresses how, or even whether, the benefits of allowing government to mislead taxpayers by concealing its sponsorship of expression outweigh the additional imposition on First Amendment rights that results from it. Indeed, the Court describes no benefits from its approach and gives no reason to think First Amendment doctrine should accommodate the Government's subterfuge. The Court merely observes that no precedent requires the Government to show its hand when it seeks to defend a targeted assessment by claiming government speech. *Ante*, at 12, n. 7. That is of course to be expected, since the government-speech doctrine is so new that the Government has never before enjoyed the opportunity to invoke it in this Court when attempting to justify the type of compelled subsidy struck down in *United Foods*. Since the Court now says the Government need never show its hand in cases like this one, *ante*, at 12–13, there is no chance for an effective political check on forced funding for speech, however objectionable.

⁹That said, I do not mean to suggest that explicitly labeling speech as that of government would suffice when individuals must personally convey government's message, as in *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624 (1943), and *Wooley v. Maynard*, 430 U. S. 705 (1977). The infringement on the speaker's autonomy in those situations is greater than in cases like the ones before us today, so great that it cannot be saved by allowing speakers to inform listeners that they (the speakers) are simply communicating a government message or that they disagree with the message. The Court apparently took the same view in *Wooley*, as it was unmoved by the dissent's observation in that case that New Hampshire drivers were free to "place on their bumper a conspicuous bumper sticker explaining in no uncertain terms that they do not profess the motto 'Live Free or Die.'" *Id.*, at 722

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Nor is it any answer that resourceful taxpayers could discover the Government behind the beef ads by doing research on the implementation of the Beef Act. Of course a taxpayer could discover the facts by looking hard enough, but what would tip off the taxpayer to look? And even if a few taxpayers did unearth the truth it would not matter, for the First Amendment harm cannot be mitigated by the possibility that a few cognoscenti may actually understand how the scheme works. If the judiciary is justified in keeping hands off special assessments on dissenters from government speech, it is because there is a practical opportunity for political response; esoteric knowledge on the part of a few will not do.

In sum, the First Amendment cannot be implemented by sanctioning government deception by omission (or by misleading statement) of the sort the Court today condones, and expression that is not ostensibly governmental, which government is not required to embrace as publicly as it speaks, cannot constitute government speech sufficient to justify enforcement of a targeted subsidy to broadcast it. The Court of Appeals thus correctly held that *United Foods* renders the Beef Act's mandatory-assessment provisions unconstitutional.¹⁰

(opinion of REHNQUIST, J.).

¹⁰ Petitioners also defend the Beef Act by pointing to *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980), where we subjected restrictions on commercial speech to a less rigorous level of review than that applied to restrictions on most other types of speech. But the Court strongly suggested in *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U. S. 457, 469 (1997), and in *United States v. United Foods, Inc.*, 533 U. S. 405 (2001), both that *Central Hudson* scrutiny is not appropriate in a case involving compelled speech rather than restrictions on speech, and that even if some relaxed standard of review analogous to *Central Hudson* were employed the Beef Act would not survive it. See *Glickman*, *supra*, at 474, n. 18 ("The Court of Appeals fails to explain why the *Central Hudson* test, which involved a restriction on commercial speech, should govern a case involving the

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compelled funding of speech”); *United Foods, supra*, at 410 (“[E]ven viewing commercial speech as entitled to lesser protection, we find no basis under either *Glickman* or our other precedents to sustain the compelled assessments sought in this case”). Petitioners do not explain why we should depart from these intimations that restrictions on speech are not judged by the same standard as compelled speech.