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Brian P. Morrissey

SPEECH AND TAXES: BALANCING FREEDOM OF CONSCIENCE AND GOVERNMENT SPEECH AFTER *JOHANNS v. LIVESTOCK MARKETING ASSOCIATION*

Brian P. Morrissey, Jr. *

INTRODUCTION

Does the government have the power to compel a targeted group of citizens to bear the costs of disseminating its own speech, even if it speaks anonymously? According to the Supreme Court's recent decision in *Johanns v. Livestock Marketing Ass'n*,[1] the government does. In a case that saw the two evolving First Amendment doctrines of "compelled subsidization" and "government speech" collide, the Court held that while the state cannot compel individuals to finance *private* speech they disagree with, there is no limit, under any circumstances, to the state's power to compel individuals to finance *government* speech, even when it conflicts with their beliefs.[2] This Note seeks to find one.

Perhaps you recall the baritone voice bellowing from your television set over the tune of Aaron Copeland's *Rodeo*, "Beef. It's What's For Dinner."[3] Hard as it is to believe, the long and arduous legal battle that brought *Livestock Marketing* before the Court began with this seemingly innocuous jingle. This and other "beef ads" were created under a program designed by the Beef Promotion and Research Act of 1985 (Beef Act)[4] to promote the consumption of beef as a generic

* Candidate for Juris Doctor, Notre Dame Law School, 2007; B.A., Political Science, College of the Holy Cross, 2004. Thank you to Professor Richard W. Garnett for his encouragement and invaluable insight, to the members of the *Notre Dame Law Review* for their tireless efforts in preparing this work for publication, and most of all, to my family for their love and support in this endeavor and beyond.

1 544 U.S. 550 (2005).

2 *Id.* at 562–63.

3 *Id.* at 554.

4 Pub. L. No. 99-198, §1601(b), 99 Stat. 1354, 1597–98 (codified at 7 U.S.C. §2901 (2000)).

commodity.[5] This "checkoff" program, as it was called, imposed a mandatory tax on all cattle sales and imports to finance its activities.[6] The Beef Act vested control over the program in the Secretary of Agriculture, who established a Beef Board, a committee of beef industry representatives that, among other things, developed the beef ads at issue in the case.[7] The mandatory tax was the exclusive source of funding for the beef ads, and it was imposed exclusively on beef producers.[8] Congress's purpose for establishing the program was to compensate for the lack of advertising by beef producers, who tend to be small proprietors without sufficient resources to market their product to a wide audience.[9]

Two associations of cattle ranchers objected to the tax, not as an improper economic regulation, but as a violation of their First Amendment rights. They claimed to disagree with the content of the Beef Board's ads and, consequently, they argued that the government could not compel them to contribute to the Beef Board's activities.[10]

At first, this claim might seem implausible. After all, cattle ranchers produce beef and the ads simply encouraged people to buy it. Nevertheless, the ranchers argued the Beef Board's ads impeded their efforts because the ads treated beef as a generic commodity, hampering their ability to market their own products as unique.[11] While this still might not appear to be adequate grounds for a First Amendment objection, the Court had recently held that a plaintiff group with a nearly identical dispute had the right to not subsidize private expression it disagreed with, even if that disagreement was only "minor."[12] In *Livestock Marketing*, however, the Court held that the same rule did not apply because, in this case, the ads belonged to the government, and the government is free to say what it will.[13]

The ranchers vehemently disagreed with that classification, arguing that the beef ads consisted of private speech they could not be compelled to support against their will. The ranchers rejected the idea that the ads could be classified as government speech for two

5 *Livestock Mktg.*, 554 U.S. 553–54.

6 7 U.S.C. § 2904(8)).

7 544 U.S. at 553–54.

8 *Id.* at 554.

9 7 U.S.C. § 2901(a)–(b); Brief for the Petitioners at 2–3, *Livestock Mktg.*, 544 U.S. 550 (Nos. 03-1164 & 03-1165), 2004 WL 1876289; *see* Daniel E. Troy, *Do We Have a Beef with the Court?: Compelled Commercial Speech Upheld, but It Could Have Been Worse*, 2005 CATO SUP. CT. REV. 125, 138–40.

10 *Livestock Mktg.*, 544 U.S. at 555–56.

11 *Id.* at 556.

12 United States v. United Foods, Inc., 533 U.S. 405, 410–11 (2001).

13 *Livestock Mktg.*, 544 U.S. at 559.

reasons. First, they argued that the government is only entitled to speak when it does so as a representative of all the people. Since the beef ads were financed by taxes imposed on beef producers alone rather than the nation at large, they argued that the government was not speaking in that capacity.[14] Second, they argued that the beef ads were not government speech because they did not identify the government as the source of their message.[15] Instead, they purported to be "Funded by America's Beef Producers."[16]

The Court rejected the ranchers' arguments and held that the beef ads were indeed government speech because the government retained ultimate control over their message. As long as the government exercises control over its message, it explained, the government retains the power to compel taxpayers to subsidize its speech, even if they disagree.[17] Even when the government only compels a targeted group of taxpayers to subsidize its speech and even when the government does not identify itself as the speaker, the Court explained that the speech will be treated as government speech "exempt" from First Amendment review.[18]

This Note contends that this rule sweeps too broadly and affords excessive power to the government-as-speaker. It is indisputable that the government has the power to compel citizens to subsidize its speech in a variety of cases. However, not all compelled subsidies can be "exempt" from First Amendment review as the Court asserts. This Note argues that the Beef Act was permissible only because it compelled beef producers to subsidize commercial advertisements by the government. Had the Act instead compelled the beef producers to subsidize government speech of a political or ideological bent, the Act would have violated the First Amendment unless the ads identified the government as the speaker. Government can only impose taxes to finance government speech when it remains accountable for the message. However, the government loses all accountability when it speaks anonymously about an ideological topic, particularly when it uses tax dollars extracted from a small minority to do so.

Part I of this Note reviews the individual right not to be compelled to speak or subsidize speech by others. The Court has held

14 *Id.* at 562.

15 *Id.* at 564.

16 *Id.* at 555. The ads did contain a small graphic of a checkmark with the word "BEEF." *Id.* at 555. However, it was not argued that this small designation was sufficient to put viewers on notice that the ads were produced by the government. *Id.* at 577 n.6 (Souter, J., dissenting).

17 *Id.* at 561–62 (majority opinion).

18 *Id.* at 553, 560–66.

that individuals may not be compelled to subsidize a private group's speech unless the speech is germane to a compelling state interest. Part II explains why the individual does not enjoy a similar right not to subsidize government speech. The government must have the ability to speak to its citizens and, necessarily, must compel citizens to pay for that speech even when some of them disagree. However, the government is only justified in imposing this burden on individual consciences when it remains accountable for its message.

Part III examines *Livestock Marketing* and the ranchers' argument that the Beef Act was unconstitutional because the government was not accountable for the ads produced under its auspices. In addition, Part III concludes that the Court was correct to reject that argument and label the ads government speech, even though the Beef Act's checkoff program was financed by a targeted tax rather than a general one, and even though the government did not identify itself as the speaker. However, Part III also concludes that in cases where the government speaks anonymously without a realistic chance of rebuttal, the government distorts the marketplace of ideas. Consequently, Part IV suggests that while commercial speech by the government will always be rebutted, even when it is anonymous, ideological and anonymous government speech will not. Thus, Part IV proposes a rule that, in order to stay within the bounds of the First Amendment, ideological government speech must either be paid for with a general tax or, in the alternative, must clearly identify the government as the speaker.

I. THE RIGHT NOT TO PAY FOR OTHERS' SPEECH—A MATTER OF CONSCIENCE

The Court has explained that the reason why individuals have the right not to subsidize private speech they disagree with is because doing so would infringe upon their freedom of belief.[19] However, the First Amendment does not grant individuals a similar right not to subsidize government speech, regardless of whether they disagree. Primarily, this is because the injury to the individual's freedom of belief is outweighed by society's interest in hearing what the government has to say. Thus, if a limit to the government's power to compel targeted groups to subsidize its anonymous speech exists, that limit must stem from some First Amendment principle other than the individual freedom of belief in which the Court has traditionally based the individual's right not to subsidize speech. This Note submits that such a limit

19 Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234–35 (1977) (citations omitted).

does exist, and that it stems from the First Amendment principle of preserving the marketplace of ideas.

A. *The Right Not To Speak*

The purpose of the First Amendment cannot be reduced to a single phrase, but preserving the freedoms of belief and expression are among its primary goals.[20] Compelled speech violates the First Amendment because it interferes with these two freedoms. The First Amendment presumes every citizen has certain natural rights upon which the state has no power to intrude. Among those rights is the freedom of belief, the individual's right to define his own beliefs free from state control.[21] The First Amendment presumes the individual's pursuit of self-discovery is essential to the human experience and consequently restrains the state from requiring individuals to affirm, convey, or even subsidize beliefs they disagree with.[22]

Similarly but separately, the First Amendment prohibits the state from requiring any individual to support a belief he disagrees with because others, as a result, might attribute that belief to the individual. This would intrude on his right to select his own image to present to the world around him—his freedom of belief.[23]

In addition to protecting individual freedoms, the First Amendment also protects the integrity of the marketplace of ideas in order to preserve society's interest in a free and robust public debate.[24] On one level, the First Amendment presumes the free exchange of ideas will encourage the pursuit of knowledge for its own good. More pragmatically, it presumes the same free exchange of ideas is necessary to provide citizens with the information necessary to participate in democratic life.[25] In either case, the First Amendment seeks to restrain government from distorting the market.

Although the cases that follow discuss the right against compelled speech and the right against compelled subsidization of speech as a matters of individual liberty rather than market distortion, compelled speech can indeed distort the marketplace of ideas. First, when indi-

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20 Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878–82 (1963).

21 Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 627–29 (1982).

22 *See infra* text accompanying notes 56–59.

23 *See* Redish, *supra* note 21, at 601–04.

24 ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 24–28, *excerpted in* THE FIRST AMENDMENT 101, 101–03 (John H. Garvey & Frederick Schauer eds., 1996).

25 *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 587–88 (1980) (Brennan, J., concurring in the judgment); Emerson, *supra* note 20, at 882–84.

viduals are compelled to affirm ideas they disagree with, those ideas gain a market share disproportionate to the actual public support they would otherwise command. Second, individuals compelled to affirm another entity's message may be chilled from subsequently affirming their own. Thus, although the Court has not yet focused on it, the risk that compelled speech will distort the market nevertheless exists and may yet illuminate the decision in *Livestock Marketing*.

It is universally understood that the First Amendment protects the freedom of speech. Less obviously, perhaps, the freedom of speech also includes the freedom *not* to speak, and the First Amendment protects both with equal vigor.[26]

The Court first articulated the individual's right not to be compelled to speak in the landmark case of *West Virginia State Board of Education v. Barnette*.[27] In *Barnette*, the Court struck down a school board resolution requiring all students to salute the American flag or face expulsion after a group of Jehovah's witnesses objected on religious grounds.[28] The Court found that the compelled salute required students to "affirm[] . . . a belief and an attitude of mind,"[29] and impermissibly interfered with the students' "right to differ as to things that touch the heart of the existing order" and was unconstitutional.[30]

The compelled salute violated the First Amendment because it infringed on the students' freedom of belief and freedom of expression. The salute interfered with the students' freedom of belief by requiring them to affirm a state viewpoint that they did not arrive at of their own free will.[31] It interfered with the students' freedom of expression by forcing them to affirm this viewpoint publicly, in front of their peers.[32] Consequently, the image they presented to the outside world was shaped by government control.[33]

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26 Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796–97 (1988) (discussing Wooley v. Maynard, 430 U.S. 705, 714 (1977), and Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974)); *cf.* Mich. Pork Producers Ass'n v. Veneman, 348 F.3d 157, 163 (6th Cir. 2003) (finding speech compulsions to be even more suspect than speech restrictions because "[i]t is one thing to force someone to close her mouth; it is quite another to force her to become a mouthpiece").

27 319 U.S. 624 (1943).

28 *Id.* at 628–29.

29 *Id.* at 633.

30 *Id.* at 642.

31 *See id.* at 633.

32 *See id.*

33 *See id.* at 641.

Nevertheless, the Court found that the greatest flaw in the compelled salute was that it interfered with the students' consciences.[34] The Court remained silent on the risk that the salute would associate the students with the school board's message or distort the marketplace of ideas.

Thirty-four years later, the Court found that just as the state could not compel students to affirm a belief they disagreed with, it could not compel automobile drivers to convey one either. In *Wooley v. Maynard*,[35] the Court struck down a New Hampshire law requiring all state license plates to bear the motto "'Live Free or Die.'"[36] A Jehovah's Witness named Maynard objected on religious grounds.[37] The New Hampshire statute did not require Maynard to actually affirm the government message, but simply required him to carry it on his automobile.[38] Even though the risk that the message would be attributed to Maynard was uncertain, the Court struck the statute down because, like the school board resolution in *Barnette*, the license plate requirement compelled Maynard to serve as an "instrument for fostering public adherence to an ideological point of view" with which he disagreed.[39] Thus, the Court had again characterized the individual's right against compelled speech as an extension of his freedom of belief.[40]

The Court was not unanimous in that position. Justice Rehnquist wrote a vigorous dissent arguing that the requirement did not violate the First Amendment because there was no risk that New Hampshire's message would be attributed to Maynard.[41] To Justice Rehnquist, the individual had no right against compelled speech unless the state in-

34 *Id.* at 642 ("[N]o official . . . can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . .").

35 430 U.S. 705 (1977).

36 *Id.* at 707.

37 *Id.* at 707–08.

38 *Id.* at 720 (Rehnquist, J., dissenting).

39 *Id.* at 715 (majority opinion).

40 *Id.* (finding that the statute "'invade[d]'" the plaintiff's "'sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control'") (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1942)); *see* Gregory Klass, *The Very Idea of a First Amendment Right Against Compelled Subsidization*, 38 U.C. DAVIS L. REV. 1087, 1113 (2005) ("Interference with freedom of belief was also central to the decision in *Wooley v. Maynard* . . . ."); *id.* at 1109 ("The Supreme Court's early compelled speech decisions reflected the idea that compelled speech violates dissenters' freedom of belief.").

41 *See Maynard*, 430 U.S. at 720 (Rehnquist, J. dissenting).

fringed on both his freedom of belief and his freedom of expression.[42]

Justice Rehnquist's analysis of the facts in *Wooley* is persuasive; the risk that New Hampshire's "Live Free or Die" motto would be attributed to Maynard was minimal.[43] As long as it is generally understood that all license plates are produced by the state, it would be illogical to assume that a motorist supports the message. The message belongs to the state that issued the plate. By rejecting Justice Rehnquist's position that a message be attributed to the dissenter before he can claim a right not to carry it, the Court in *Wooley* implied that the right against compelled speech is primarily a function of the dissenter's freedom of belief, and that even state action that merely requires an individual to act as an "instrument" of a message he objects to would violate the First Amendment.[44]

B. The Right Not To Pay for Others' Speech

After *Wooley*, the Court was forced to define what, precisely, being forced to serve as an "instrument" of a message meant. One month later, in *Abood v. Detroit Board of Education*,[45] the Court found that being compelled to pay for speech with which one disagreed satisfied that definition.[46] In *Abood*, the Detroit Board of Education entered into a collective bargaining agreement with a teachers' union certifying the union as the exclusive representative of all Detroit teachers.[47]

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42 *Id.* at 721 (contending that the statute did not fall "within the ambit of *Barnette*" because it did not require the motorist to affirm a belief).

43 *See* Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 840 (2005) ("[T]he fundamental wrong of compelled speech . . . does not depend . . . on outsiders possibly misunderstanding a person's compelled speech as his own. It has more to do with the illicit influence [it] may have on the character and autonomous thinking process of the compelled speaker . . . .").

44 For an alternative to the Court's solution, see Note, *The Curious Relationship Between the Compelled Speech and Government Speech Doctrines*, 117 HARV. L. REV. 2411, 2428 (2004) (proposing that compelled speech requirements germane to an otherwise legitimate government program should be upheld simply as a form of regulation).

45 431 U.S. 209 (1977).

46 *Id.* at 233–35. I refer to the Court's "compelled subsidization" doctrine as an extension of its doctrine on compelled speech. However, there are strong arguments that this should not be the case. *See* Klass, *supra* note 40, at 1110 (finding that "compelled subsidization . . . causes individual dissenters none of the First Amendment harms caused by compelled speech"). *But see* Howard M. Wasserman, *Compelled Expression and the Public Forum Doctrine*, 77 TUL. L. REV. 163, 166–67 (2002) (treating both compelled speech and compelled subsidization under the same umbrella of "compelled expression").

47 431 U.S. at 211–12.

The agreement contained an "agency shop" clause requiring teachers who did not join the union to nevertheless pay service charges to the union equal to the dues paid by actual members.[48] Congress authorized the use of agency shop clauses in public employment contracts because it found that they were necessary to the collective bargaining process and that collective bargaining was necessary to ensure stable labor relations.[49] The fear was that without such clauses, many teachers would decide not to join the union, knowing they could still "free ride" on its efforts.[50] Thus, the agency shop clause compelled them to contribute.

A group of teachers objected to the service charges and filed suit, arguing that the government could not compel them to fund the union's social and political activities because those activities were unrelated to its collective bargaining function.[51] The teachers' complaint differed from the complaints in *Barnette* and *Wooley* in three respects. First, the teachers objected to being made the instruments of private speech by the union, not speech by the government. Second, they argued that the forced payments not only compelled them to support a message, but also compelled them to associate with a private group against their will. Third, they were only compelled to support the union's message by paying for it; they were not compelled to affirm or convey it. As a result, the Court acknowledged that the agency shop clause did interfere with the teachers' First Amendment rights, but found that interference justified by the state interest in protecting collective bargaining.[52] Since all teachers benefited from the union's collective bargaining functions, the state had the power to compel the teachers to pay for those activities.[53] However, the state did not have the power to compel the teachers to contribute to any union activities unrelated to that goal.[54] In articulating what would become an oft-quoted test, the Court held that the state could only compel teachers to fund union speech "germane" to collective bargaining, the state interest that justified the interference with their First Amendment rights.[55]

The Court in *Abood* found that the First Amendment afforded the dissenting teachers less protection than the dissenters in *Wooley* and

48 *Id.* at 211.
49 *Id.* at 220–22.
50 *Id.* at 222.
51 *Id.* at 212–13.
52 *Id.* at 222.
53 *See id.* at 223.
54 *Id.* at 222–23.
55 *Id.* at 235–36.

Barnette because being compelled to finance a message against one's will is less offensive than being compelled to affirm it or carry it on one's property.[56] Nevertheless, the Court still suggested that the extent of the teacher's First Amendment protection stemmed from the same source as the dissenters in the two prior cases—their freedom of belief.[57]

On its facts, *Wooley*'s holding was narrow—the state could not compel Maynard to carry its message on his car.[58] However, *Wooley*'s reasoning was much broader. The Court did not describe Maynard's right as simply the right not to carry a state message in public. Instead, it called it a right "to refuse to *foster*" an "idea [he found] morally objectionable."[59] Read in conjunction with *Abood*, that suggests that the right not to "foster" speech includes the right not to even be made to pay for it.

Due to the fact that the agency shop clause in *Abood* compelled the teachers to contribute to the union, it implicated their freedom to associate as well as their freedom not to speak. The First Amendment protects the individual's right to associate with other people for expressive purposes. This is a function of both the freedom of belief and the freedom of expression—associating with others helps an individual advance his own beliefs, and being associated with a group expresses much about the individual member.[60]

In *Abood*, the Court explained that just as the freedom of speech includes the freedom not to speak, the freedom of association includes the freedom not to associate.[61] It determined that the agency shop clause intruded on that right.[62] Nevertheless, despite this acknowledgment, the Court remained focused on the clause's intrusion upon the teachers' freedom of belief.[63] The Court cited *Barnette*'s oft-

56 *Id.*; *see also* Klass, *supra* note 40, at 1116 (arguing that paying a mandatory fee is of "too little moral content" to qualify as an injury to First Amendment rights).

57 *Abood*, 431 U.S. at 234–36.

58 Wooley v. Maynard, 430 U.S. 705, 707 (1977).

59 *Id.* at 715 (emphasis added).

60 EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES 579 (2d ed. 2005); Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841, 1855 (2001) (describing voluntary association as an expressive act).

61 431 U.S. at 233–35.

62 *Id.* at 233–34.

63 *Id.* at 234–35. The Court did refer to the holding in *Buckley v. Valeo*, 424 U.S. 1, 22 (1976), holding that the act of making a voluntary contribution was protected expression. *Abood*, 431 U.S. at 234. From that, the Court extrapolated that the teachers' making a mandatory contribution to the union implicated the same expressive right. *Id.* Beyond that, however, the Court emphasized the agency shop clause's im-

quoted claim, "'[i]f there is any fixed star in our constitutional constellation, it is that no official . . . can prescribe what shall be orthodox . . . or force citizens to confess by word or act their faith therein,'"[64] and then explained that just as the state has no power to compel an individual to affirm a belief, it has no power to compel him "to contribute to the support of an ideological cause he may oppose as a condition of holding a job."[65]

After *Abood*, the Court considered other cases in which dissenters objected to being made "instruments" of messages with which they disagreed. Interestingly, in all of these cases, the Court discussed the individual's right not to foster objectionable speech as a function of more than just her freedom of belief, but of her freedom of expression and society's interest in an undistorted marketplace of ideas as well.[66] Still, the Court was unclear as to whether it had adopted an

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pact on the teachers' freedom of belief, implying that the harm arising from their compelled subsidization of the union's speech was simply a new manifestation of the harm associated with actually being compelled to speak, as in *Barnette*. *Id.* at 234–35 (describing the principle "at the heart of the First Amendment" that an individual's beliefs should be "shaped by his mind and his conscience rather than coerced by the State").

64 *Id.* at 235 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

65 *Id.*

66 In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), a mall owner objected to the California Supreme Court's interpretation of the state constitution as requiring him to permit individuals to distribute leaflets at the mall. *Id.* at 78–79. Justice Rehnquist, now writing for the majority, rejected the notion that the leafleteers' message would be attributed to the mall owner and thus rejected his First Amendment claim. *Id.* at 88.

In *Pacific Gas & Electrical Co. v. Public Utilities Commission*, 475 U.S. 1 (1986), the utility company PG&E objected to a state regulatory order requiring it to include a pamphlet from a hostile consumer advocacy group along with the monthly bill and newsletter it sent its customers. *Id.* at 5–7. A plurality rejected PG&E's claim, but in doing so, discussed the First Amendment question as one impacting the utility's freedoms of belief, its freedom of expression, and the marketplace of ideas. As to PG&E's freedom of belief, the plurality found that the order required PG&E to "use *its* property as a vehicle for spreading a message with which it disagrees." *Id.* at 17 (plurality opinion). As to PG&E's freedom of expression, the plurality found that, by being forced to carry the consumer advocacy group's pamphlet, PG&E might feel "impermissible pressure" to respond to the group's speech. *Id.* at 15 n.11. As to the risk of distorting the marketplace of ideas, the Court found that the danger that PG&E would alter its own speech in response to the order was "antithetical to the free discussion that the First Amendment seeks to foster." *Id.* at 16.

In *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group, Inc.*, 515 U.S. 557 (1995), a parade organizer objected to Massachusetts's attempt to require the organizer to permit a gay rights group to march in its parade under the auspices of the State's antidiscrimination in public accommodations statute. *Id.* at 561. The Court

approach akin to Justice Rehnquist's in *Wooley*, that conscientious objection alone is not sufficient to trigger an individual right against compelled speech, or whether it had simply come to understand that the right against compelled speech could be implicated by any one of these three interests. In either event, the Court's new analysis of the compelled speech question never migrated to the compelled subsidization cases following *Abood*. Instead, those decisions have offered nothing to rebut *Abood*'s suggestion that the dissenter's right against compelled subsidization of speech is simply a function of her freedom of belief.

For example, in *Keller v. State Bar of California*,[67] a group of attorneys objected to being compelled to contribute to the State Bar Association.[68] The Court held fast to *Abood*, explaining that California could compel attorneys to associate with and contribute to the State Bar Association in order to aid the State Bar Association's efforts to self-regulate the legal industry, which the Court deemed to be a compelling state interest.[69] However, as in *Abood*, the Court held that California could not compel attorneys to contribute to the State Bar Association's political activities that were not "germane" to those efforts, such as lobbying for gun control laws.[70]

The Court in *Keller* did not stray from *Abood*'s conclusion that the primary First Amendment injury suffered by an individual compelled to finance another group's speech is the injury to her freedom of belief.[71] Undoubtedly, the fact that the dissenting attorneys' mandatory contribution publicly associated them with the Bar against their will was an injury itself, but the Court focused more on the dissenters'

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upheld the organizer's claim, finding that Massachusetts could not enforce its antidiscrimination law in this context because the organizer enjoyed the "autonomy to choose the content of his own message," *id.* at 573, and the "right . . . to shape its expression by speaking on one subject while remaining silent on another," *id.* at 574.

67 496 U.S. 1 (1990). In *Keller*, as in *Abood*, the Court held that California could not compel attorneys to contribute to the State Bar Association's expressive activities unless the activities were germane to a compelling state interest. *Id.* at 13–14. It found that California's interests in "regulating the legal profession" and "improving the quality of the legal services" were sufficiently compelling. *Id.* at 13.

68 *Id.* at 4.

69 *Id.* at 13–14.

70 *Id.* at 14, 16; *see also* Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 519 (1991). The Court announced a three-part test that, while seemingly designed for future application, has not been implemented in the Court's three compelled subsidization cases since: "[C]hargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Id.* at 519.

71 *See supra* notes 56–57, 63–65 and accompanying text.

consciences than public perceptions.[72] The key injury, the decision implied, was that the attorneys were forced to become instruments of a message with which they disagreed.

C. *The Right Not To Pay for Others' Speech—Does the Right Extend to Commercial Speech as Well?*

The Court in *Abood* and *Keller* held that the dissenters in those cases had a right not to subsidize political and ideological speech that ran counter to their conscientiously held beliefs. Compelled support of commercial advertisements such as those in *Livestock Marketing*, however, pose a very different question. Commercial advertisements simply propose a transaction and, historically, the Court has afforded them less protection under the First Amendment.[73] After all, it is far more difficult to demonstrate that an offer to sell goods conflicts with one's belief system than that a political lobbying campaign does. Prior to *Livestock Marketing*, the Court offered two divergent answers to this question, leaving the debate wide open by the time that case finally reached the Court.

In *Glickman v. Wileman Bros. & Elliott, Inc.*,[74] the Court confronted the first of three First Amendment challenges to various Department of Agriculture checkoff programs.[75] The Agricultural Marketing Agreement Act of 1937 (AMAA) gave the Secretary of Agriculture power to regulate several agricultural markets, including the market for California tree fruit.[76] In furtherance of the Act, the Secretary ordered California tree fruit handlers to adhere to uniform price, grade, quality, and quantity standards[77] and also initiated an advertising campaign espousing the virtues of "California Tree Fruit" as a generic commodity.[78] The campaign was designed to increase advertising among a tree fruit market comprised of small proprietors who could not afford to do so on their own.[79]

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72 *Keller*, 496 U.S. at 10 (acknowledging Thomas Jefferson's view that "'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical'" (quoting Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234–35 n.31 (1977)).

73 *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562–63 (1980).

74 521 U.S. 457 (1997).

75 *Id.* at 460.

76 7 U.S.C. § 608(1) (2000).

77 *Glickman*, 521 U.S. at 461–63.

78 *Id.* at 462.

79 *Id.* at 461, 462 & n.3; Wileman Bros. & Elliott, Inc. v. Espy, 58 F.3d 1367, 1378–79 (9th Cir. 1995), *rev'd* 521 U.S. 457.

The Secretary appointed committees of industry representatives to implement the orders,[80] which were funded by a mandatory assessment placed on all California tree fruit handlers.[81] Each order required the approval of a supermajority of the affected producers before it could be implemented.[82]

A group of tree fruit handlers objected to the ads' message and filed suit.[83] They contended that the ads implied that "'all California fruit is the same'", a message adverse to their own claim that such fruit was "highly varied," and that theirs was unique.[84]

In a five-to-four decision, the Court rejected the handlers' claim and rebuffed their analogy to *Abood*. The handlers argued that the Secretary's orders compelled them to associate with the committee of industry representatives against their will and that this was unconstitutional because the committee's efforts to create and disseminate ads for generic tree fruit were not "germane" to the goals of the Act.[85] The AMAA explained that its purpose was to "avoid unreasonable fluctuations in supplies and prices,"[86] and to pursue a policy of collective, rather than competitive, marketing in the tree fruit industry.[87] The handlers argued that while the Act clearly authorized collective economic regulation such as price controls, generic advertisements were outside its scope.[88] The Court was not to be persuaded. In fact, it undertook only a cursory "germaneness" analysis before concluding that because the AMAA created a collective enterprise that already constrained the handlers' freedom to act independently in a significant way, any additional infringement caused by their forced contribution to the ads was merely incidental.[89] This was economic regulation, not a compelled subsidy for private speech.[90]

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80 *See Glickman*, 521 U.S. at 462.

81 *Id.* at 461–62.

82 7 U.S.C. § 608c(9)(B).

83 *Glickman*, 521 U.S. at 467.

84 *Id.* at 468 n.11 (quoting Brief for Respondents Gerawan Farming, Inc. et al. at 46, *Glickman*, 521 U.S. 457 (No. 95-1184), 1996 WL 554427). The dissenters also claimed that the ads presented red nectarines, a fruit they did not grow, as superior. *Id.* They also objected to a purported sexually subliminal message in one particular ad that depicted a young girl in a wet bathing suit. *Id.* at 467 n.10.

85 *Id.* at 470–73.

86 Agricultural Marketing Agreement Act of 1937, ch. 296, 50 Stat. 246, 246–47 (codified as amended at 7 U.S.C. § 602(4) (2000)).

87 *Id.* (codified as amended at 7 U.S.C. § 602 (2000)); *Glickman*, 521 U.S. at 461.

88 *Glickman*, 521 U.S. at 470.

89 *Id.* at 469, 472–73.

90 *Id.* at 471.

Writing for the majority, Justice Stevens offered three reasons why the compelled contribution did not cognizably injure the handlers' First Amendment interests. First, he noted that the handlers were not compelled to "repeat an objectionable message out of their own mouths."[91] Of course this was true, but neither were the teachers in *Abood*, and the Court did recognize their First Amendment injury, even though they were not forced to personally affirm the objectionable message.[92] Next, he explained that the contested message in this case was not *ideological*.[93] This seemed to be the dispositive factor in Justice Stevens' view. Compelled support for commercial advertising, he suggested, could not interfere with the freedom of thought *Abood* sought to protect.[94]

The Court's ultimate holding in *Glickman* was that the compelled contributions for generic advertising that the AMAA required were simply ancillary to its collectivist regulatory scheme.[95] That could be interpreted as holding that the ads were "germane" to the Act's purpose under *Abood*.[96] However, Justice Stevens's swift treatment of the germaneness question and the distinction he drew here between ideological and commercial speech strongly imply that compelled support of commercial speech does not even raise *Abood*'s gernmaneness concerns because commercial speech is the type with which one can plausibly disagree. In his words, such compelled contributions do not force a "crisis of conscience."[97]

Finally, Justice Stevens found that the compelled contributions were not likely to force the handlers to "respond to a hostile message when they 'would prefer to remain silent.'"[98] In other words, because the tree fruit ads were not directly attributed to these particular dissenters and because the commercial nature of the ads prevented them from being "hostile" to any of the dissenters' conscientiously held beliefs, the dissenters would not feel morally compelled to respond and publicly disavow their content.

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91 *Id.* at 470–71.

92 *See supra* text accompanying notes 51–55.

93 *Glickman*, 521 U.S. at 469–70, 472. This fact distinguishes *United Foods* from *Wooley*, *supra* notes 35–40 and accompanying text, and *Pacific Gas & Electrical Co.*, *supra* note 66.

94 *Glickman*, 521 U.S. at 470 n.14, 472.

95 *Id.* at 472–75.

96 *See supra* text accompanying notes 55, 85.

97 *Glickman*, 521 U.S. at 472.

98 *Id.* at 471 (quoting PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980)); *see supra* note 66.

In the end, the Court in *Glickman* agreed with *Abood* that the primary First Amendment interest injured by compelled subsidization of speech is the dissenter's freedom of belief. However, it refused to accept the premise that a commercial ad could conflict with the kinds of beliefs the First Amendment is concerned with. Instead, the Court found such messages simply incapable of provoking a "crisis of conscience."[99]

Four years later, in *United States v. United Foods, Inc.*,[100] the Court reviewed yet another agricultural checkoff program and paradoxically, reached the exact opposite conclusion. As in *Glickman*, the Secretary of Agriculture, under statutory authority, required mushroom farmers to pay a mandatory assessment to a council of industry representatives who then allocated the proceeds to generic advertising campaigns.[101] Unlike the regime in *Glickman*, advertising was the sole purpose of this program; it was not ancillary to any larger collectivist regulatory regime. Consequently, a group of mushroom farmers objected on First Amendment grounds. The Court upheld their claim, finding that the program imposed a naked speech compulsion on mushroom farmers that was not "germane" to any interest besides Congress's intent to advertise for mushrooms, an interest that was not sufficiently compelling to satisfy *Abood*.[102]

The Court attempted to distinguish *Glickman* by explaining that the compelled advertising subsidy in that case was ancillary to a complex regulatory framework, while this compelled subsidy stood on its own—it was a forced payment for speech unattached to any other goals.[103] Simple enough, except that the Court in *Glickman* seemed to suggest that compelled subsidies for commercial speech, whether they be ancillary or alone, cannot raise First Amendment issues because dissenters cannot plausibly claim to disagree with a commercial message.[104] The Court in *United Foods* surprisingly took the opposite position. It rejected *Glickman*'s apparent holding that a court could objectively determine whether a particular message would provoke a

99 *Id.* at 472.

100 533 U.S. 405 (2001).

101 *Id.* at 408. The Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. §§ 6101–6112 (2000), *invalidated by United Foods*, 533 U.S. 405, authorized the Secretary to establish a Mushroom Council comprised of industry producers and importers. *Id.* § 6104(a)–(b).

102 *United Foods*, 533 U.S. at 415–16.

103 *Id.* at 406.

104 *See* Klass, *supra* note 40, at 1106 ("[*Glickman*] attempted to establish . . . a rule . . . that the compelled subsidization of commercial advertising cannot give rise to a crisis of conscience and, as a result, cannot violate the First Amendment."); *supra* text accompanying notes 93–94.

"crisis of conscience," and instead concluded that "there is no apparent principle which distinguishes out of hand minor debates [from larger ones]."[105] Thus, it refused to accept the notion that compelled financing of commercial speech could not raise a First Amendment issue. *Abood* did not require speech to be political to be protected, it explained.[106]

That is not to say that the Court held that compelled support for the mushroom ads *did* provoke a crisis of conscience. Rather, it stressed the prudence of keeping the courts out of the mind-reading business, explaining that "the speaker and the audience" assess the value of the information, "not the government."[107]

Thus, at the time when *Livestock Marketing* reached the Court, it was clear that the government could only compel individuals to subsidize political or ideological private speech that was germane to a compelling state interest. It was unclear whether that same restriction applied to compelled support for private commercial advertising. The regime challenged in *Livestock Marketing* was substantially similar to the one struck down in *United Foods*. The Court in *United Foods* characterized the mushroom ads produced under that regime as private speech by the mushroom council and held that the government could not compel dissenting mushroom farmers to subsidize them. In *Livestock Marketing*, the government advanced a new theory, that the beef ads were government speech. This new theory called for a new rule and, as is often the case, the rules of the game change everything.

D. The Checkoff Programs—Private Advertising or Government Speech?

The Beef Act in *Livestock Marketing* created a regime strongly resembling the one struck down in *United Foods*,[108] and the ranchers thus argued that *United Foods*, rather than *Glickman*, should apply.[109] The government's reply was as follows: the ads in *Glickman* and *United Foods* were developed by committees of industry representatives that were appointed by the Secretary. All parties involved in those cases categorized the committees as private organizations engaging in private speech. Now, however, the government argued that the more accurate categorization of the committee at issue in this case (the Beef

105 *United Foods*, 533 U.S. at 411.

106 *Id.* at 413.

107 *Id.* at 411.

108 Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553–54, 558–59 (2005); *id.* at 571 (Souter, J., dissenting) ("The ranchers' complaint is on all fours with the objection of the mushroom growers in *United States v. United Foods*." (citation omitted)).

109 *Id.* at 555–56 (majority opinion).

Board) was as a government entity engaging in government speech. The Court agreed,[110] finding that because the committee was controlled by a politically accountable government official (the Secretary), its speech could be considered government speech.[111]

The Court's determination that the Secretary's control over the Beef Board was sufficient to classify its speech as "government speech" effectively discarded the more rigorous test two circuits had previously used to answer the same question.[112] Those circuits demanded that the government demonstrate it actually exercised "editorial control" over a message before they would label the message as "government speech."[113] The government's mere statutory authority to control the message if it chose to was insufficient.[114]

The ranchers in *Livestock Marketing* seized on that line of reasoning, arguing that because the Secretary exercised only *pro forma* control over the beef ads, they were nothing more than private speech. The Court disagreed, however, and found the Secretary's control suf-

110 *Id.* at 559. In so doing, the Court took up and endorsed an argument the government had advanced too late in the *United Foods* litigation for it to be considered.

111 The Court listed several factors as indicative of the Secretary's control: (1) the Secretary "directed the implementation" of the advertising program, (2) she also "specified, in general terms," the content of the ads, (3) every member of the Beef Board was "answerable to the Secretary," and (4) the Secretary retained "final approval authority" over every ad disseminated under the campaign. *Id.* at 560–62.

112 Livestock Mktg. Ass'n v. USDA, 335 F.3d 711, 719 (8th Cir. 2003) (citing Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085, 1093–94 (8th Cir. 2000)), *rev'd, sub nom.* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550; Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610, 618 (4th Cir. 2002).

113 *Livestock Mktg.*, 335 F.3d at 719. In the absence of a Supreme Court holding, most courts found that advertisements created under the agricultural checkoff programs were not government speech. *Id.* at 718 (citing Pelts & Skins L.L.C. v. Jenkins, 259 F. Supp. 2d 482 (M.D. La. 2003) (concluding that generic advertisements funded by mandatory assessments were not government speech), *In re* Wash. State Apple Adver. Comm'n, 257 F. Supp. 2d 1290, 1305 (E.D. Wa. 2003) (same), and Mich. Pork Producers v. Campaign for Family Farms, 229 F. Supp. 2d 772, 785–89 (W.D. Mich. 2002) (same)).

114 *Sons of Confederate Veterans*, 288 F.3d at 621 (noting that there was only "one occasion" where the DMV commissioner actually rejected a plate design); *see also* R.J. Reynolds Tobacco Co. v. Shewry, 423 F.3d 906, 919 (9th Cir. 2005) (holding that state-produced advertisements critical of the tobacco industry and paid for by the use of cigarette sales taxes were government speech because the government was clearly identified as the speaker but cautioning that "[t]he analysis may differ when the government *nominally controls* the production of advertisements, but as a practical matter has delegated control over the speech to a particular group that represents only one segment of the population" (citation omitted) (emphasis added)).

ficient.[115] The immediate result of the Court's decision is that future challenges to the compelled advertising subsidies required by the agricultural checkoff programs will center on the rather fact-specific question of the Secretary's control over the message. However, the more important doctrinal question is, even accepting that the Secretary does exercise sufficient control over the ads as to label them government speech, whether there is any limit at all to the government's power to compel taxpayers to subsidize such speech. *Livestock Marketing* asserts that there is not. The remainder of this Note endeavors to prove that there is.

II. SUBSIDIZING GOVERNMENT SPEECH—A NECESSARY EVIL

The Court's government speech doctrine is relatively new and not yet fully defined. Nevertheless, it is clear that the government has a largely unlimited power to control the messages expressed in its official organs and the organs it endorses, even if they favor a particular point of view.[116] It is also clear that this power does not extend to cases where the government is simply facilitating private speech.[117] The Court has never announced a definitive test to distinguish government speech from the government's facilitation of private speech, but in *Livestock Marketing*, it found that the Secretary's control over the beef ads was sufficient to label them government speech.[118] This was true even though only a limited constituency—beef producers—was

115 *Livestock Mktg.*, 544 U.S. at 562 ("When, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages.").

116 FCC v. League of Women Voters, 468 U.S. 364 (1984); VOLOKH, *supra* note 60, at 400; *see also* Rust v. Sullivan, 500 U.S. 173, 192–93 (1991) (holding that the government is not required to communicate its message itself, but may pay private parties to do so and thus, in allocating federal grants to family planning services, could condition funding on the service's agreement not to recommend abortion as an appropriate method of family planning); Regan v. Taxation with Representation, 461 U.S. 540, 545 (1983) (holding that Congress had the power to refuse to subsidize the lobbying activities of tax-exempt charitable organizations by prohibiting them from using tax-deductible contributions to support their lobbying efforts).

117 Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 834 (1995) (explaining that government may not discriminate on the basis of viewpoint when it administers a program that indiscriminately "encourage[s] a diversity of views from private speakers"); VOLOKH, *supra* note 60, at 400 (citing Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001)).

118 *Livestock Mktg.*, 544 U.S. at 561–62.

taxed for the ads,[119] and even though the ads did not identify the government as the source of the message.

Different rules apply when the government compels individuals to fund its own speech rather than the speech of others. The government may not compel individuals to subsidize private speech unless it is germane to a compelling state interest.[120] However, the government may compel individuals to subsidize its own message without triggering First Amendment review.[121] Although the dissenter compelled to subsidize a government message is undoubtedly injured, the injury is justified because the government is ultimately accountable to its citizens for the message it conveys.

The ranchers' First Amendment claim in *Livestock Marketing* can be divided into three parts. First, the ranchers argued that the government violated their freedom of association when it forced them to contribute to, and thereby associate with, the Beef Board against their will.[122] Second, they argued that the ads' tagline "Funded by America's Beef Producers," attributed the government's message to them, violating their freedom of expression.[123] Finally, they argued that the forced payment made them instruments of an objectionable message, violating their freedom of belief.[124] However, with the ads recast as government (rather than private) speech, the strength of those claims melted away.

First, while an individual has a right not to associate with a private group such as a teachers union, the Court explained that the individual has no similar right not to associate with government.[125] Thus, by labeling the Beef Board as "controlled by" a government agent, the Court deemed that the ranchers had no right not to associate with it.[126] Second, the Court held that the beef ads were not "sufficiently specific" to be attributed to any particular rancher simply because the ads claimed to be sponsored by "America's Beef Producers."[127] Nevertheless, the Court did reserve the possibility that ranchers could pre-

119 *Id.* at 554.

120 Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235–36 (1977); *see supra* Part I.B.

121 *Livestock Mktg.*, 544 U.S. at 557–59.

122 *Id.* at 555–56.

123 *Id.* at 564.

124 *Id.*

125 *Id.* at 559 ("'[C]ompelled support of a private association is fundamentally different from compelled support of government.'" (quoting *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring in the judgment))).

126 *Id.* at 560. The Court finessed this question when it specifically declined to determine whether the Beef Board was actually a government entity, instead finding that the Secretary's control over it was sufficient to render the question moot. *Id.* n.4.

127 *Id.* at 566–67.

sent an as-applied challenge to a specific ad if it directly attributed its message to them as individuals.[128]

As to the ranchers' claim that the forced payment infringed upon their freedom of belief, *Abood* and *United Foods* had indicated that this freedom alone was the fundamental basis of the right against compelled subsidization.[129] Thus, the government has no power, absent a compelling state interest, to intrude upon this freedom by compelling an individual to subsidize private speech she disagrees with. However, the government has free reign to compel subsidies for its own speech, regardless of the dissenter's beliefs. The explanation the Court has offered is that the government, as the representative of the people, is ultimately accountable to the people for what it says and this accountability ameliorates the dissenter's injury.[130] If accountability is the justification for the government's power, then the question *Livestock Marketing* raises is how the government can be deemed "accountable" for government speech that is paid for by only a small group of taxpayers and that does not identify the government as the speaker.

The government's right to speak flows from practical necessity rather than firm legal principle. The state, if it is to govern effectively, must communicate with its citizens because citizens vest the state with great discretion over issues that materially affect their daily lives. As the Court explained in *Keller*, if the state did not have the ability to speak and to explain its use of that discretion, public debate "would be limited to those in the private sector, and the process of government as we know it would be radically transformed."[131]

If government is to speak, it needs to pay the costs of disseminating that speech and, as such, it is inevitable that it will allocate some tax dollars toward speech that some taxpayers disagree with. According to *Wooley* and *Abood*, that makes those taxpayers "instruments" of the message and interferes with their First Amendment rights.[132] Nevertheless, because it is essential that the government speak, their injury becomes the price of their citizenship—it is among the costs of life in ordered society.

As a matter of practical reality, a dissenting taxpayer cannot have veto power over the messages his tax dollars support. At the outset, administering such a refund system on a national scale would be cha-

128 *Id.* The Court's conclusion here would have been the same even if the ads were labeled private speech.

129 *See* text accompanying *supra* notes 61–65, 107.

130 *See* Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000); *Abood*, 431 U.S. at 259 n.13; *infra* notes 134–135.

131 Keller v. State Bar of Cal., 496 U.S. 1, 12–13 (1990) (citation omitted).

132 *See supra* notes 35–40, 45–55 and accompanying text.

otic.[133] More fundamentally, the government speaks as the people's representative. In a democracy, people elect public officials, and when those officials speak, they simply convey the will of the majority.[134] They remain accountable to the people for what they say. First, when the government devotes taxes towards espousing a specific message, it does so through a transparent budgeting process. Necessarily, government's decision to spend money on the speech requires a parallel decision not to spend the money on something else and the people are able to monitor those decisions. Second, the government remains accountable because the people ultimately retain the power to throw the government out when they tire of its message.[135]

An individual has a liberty interest in not being compelled to subsidize a message with which she disagrees. However, when she is compelled to subsidize a government message, that interest is overcome by society's interest in retaining the government's voice in the marketplace of ideas. When safeguards guaranteeing the government's accountability are in place, her liberty interest is "served," even if "not necessarily satisfied, by the political process as a check on what government chooses to say."[136]

III. *LIVESTOCK MARKETING* —HOLDING THE GOVERNMENT ACCOUNTABLE FOR WHAT IT CHOOSES TO SAY

The government is justified in compelling a dissenter to subsidize government speech only when it is accountable for what it says. The ranchers in *Livestock Marketing* argued that the government was not accountable for the beef ads in that case: (1) because the ads were financed by a targeted tax rather than a general one,[137] and (2) because the government did not identify itself as the speaker.[138] Despite

133 *See Keller*, 496 U.S. at 12–13; *Livestock Mktg.*, 544 U.S. at 574 (Souter, J., dissenting) ("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." (citation omitted)).

134 *Southworth*, 529 U.S. at 235; *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring in the 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."); *see Livestock Mktg.*, 544 U.S. at 574–75 (Souter, J., dissenting).

135 As the Court has explained, "When the government speaks . . . it is, in the end, 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." *Southworth*, 529 U.S. at 235.

136 *Livestock Mktg.*, 544 U.S. at 575 (Souter, J., dissenting).

137 *Id.* at 562.

138 *Id.* at 564.

these concerns, the Court held that the ads were still government speech exempt from First Amendment review. Thus, the Court must have concluded that government accountability was ensured in some other way.

A. *Government Speech Funded by Targeted Taxes—Is the Government Still Accountable if Only Some Citizens Pay for Its Speech?*

The government is accountable for speech funded by a general tax because all citizens are equally burdened and thus, have an equal incentive to monitor the government's speech. Nevertheless, the Court in *Livestock Marketing* held that funding by a general tax was not a prerequisite to labeling a message as "government speech."

1. The Incentive To Monitor Government Speech

Government speech financed by a general tax ensures that every taxpayer has an equal incentive to monitor the government's speech. The Court hinted at how important this safeguard is in providing accountability in *Board of Regents of the University of Wisconsin System v. Southworth*.[139] In *Southworth*, a public university used mandatory student activity fees to fund the expressive activities of various student groups.[140] Although the Court labeled these activities as private speech, it eschewed *Abood*'s "germaneness" test as unworkable in the university setting.[141] Instead, it held that the university could allocate the mandatory fee towards financing student groups' speech as long as it did so in a viewpoint neutral manner.[142]

The University did not argue that the student groups' activities were government speech. However, in dicta, the Court explained that if the speech was "*financed by tuition dollars*" and "the University and its officials were responsible for its content," the Court might have labeled the activities government speech.[143] Although this was only dicta, the Court made a significant distinction between speech funded by "tuition dollars" and speech funded by student activity fees. While all students are compelled to pay both tuition and student activity fees, only tuition (like a general tax) is allocated transparently. University speech programs funded by tuition dollars are included in the University budget, approved by the trustees, and can be reviewed by the public. Necessarily, the University's decision to fund its speech

139 529 U.S. 217.
140 *Id.* at 222–24.
141 *Id.* at 230.
142 *Id.* at 233.
143 *Id.* at 229 (emphasis added).

requires a decision *not* to fund something else, and the public monitors that choice. When the University funds speech through a student activity fee, however, that decision is monitored less closely. The University accounts for the student activity fee in its budget, but once it does, the fee no longer competes with other University programs. When the University allocates that fee to various student groups, it allocates power to some groups at the expense of others. Regardless, that allocation decision only affects student groups. It does not impact other constituencies of the university, such as faculty or alumni, or give them an incentive to monitor.

The Beef Act operates the same way. It only taxes beef producers, and that tax is paid directly to the Beef Board. The tax never passes through the general treasury, and thus does not attract the attention of the everyday taxpayer.[144] The Beef Board is financially self-sufficient—when it uses the tax revenues to finance the beef ads, it does not take money away from any other government endeavor.

Despite the fact that the government will always be accountable for what it says using a general tax, this is not a sufficiently compelling reason to require the government to use a general tax every time it speaks. The Court has explained as much, holding that "the First Amendment [is not required to] duplicate[ ] the Appropriations Clause . . . [such that] every instance of government speech be funded by a line item in an appropriations bill."[145] Instead, there are other ways to hold the government accountable for its speech when it prefers not to require everyone to pay for it.[146]

2. The Dissenter's Injury upon Being Compelled To Pay

Justice Scalia, writing for the majority in *Livestock Marketing*, rejected the ranchers' claim that the government may not impose the costs of a government speech program on a targeted group alone. Recalling *Wooley*, Justice Scalia acknowledged that while government may not require an individual to personally express a message he disagrees with, government is free to single out individuals or groups to pay for that same message.[147]

This holding relies on two distinctions. First, it distinguishes personally expressing a message from merely subsidizing it, finding that the government may compel an individual to do the latter because the

144 Livestock Mktg. Ass'n v. USDA, 335 F.3d 711, 716 (8th Cir. 2003), *rev'd sub nom.* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005).

145 *Livestock Mktg.*, 544 U.S. at 563.

146 *See infra* Part IV.B.

147 *Livestock Mktg.*, 544 U.S. at 557–59.

act of simply making a payment is of sufficiently lower moral value than actually affirming a message that the First Amendment will treat it differently.[148] Second, it distinguishes compelled payments for private speech, which the Court has found "violate[ ] personal autonomy" when unconnected to any legitimate government purpose, from compelled payments for government speech, which raise no similar concerns.[149] In fact, the Court recognized no distinction between compelled payments for government speech extracted from targeted groups and ones imposed on the nation at large. In either case, the Court explained, the compulsion is simply a reality that every taxpaying citizen must face.[150]

Thus, the Court held that the individual and her conscience suffer no greater injury when the government compels her to subsidize its speech through a targeted tax than when it does so through a general tax.[151] Ultimately, this conclusion is necessary, if not totally satisfying. The Court cited three cases to support the proposition, but none truly justifies it.[152] Each precedent simply acknowledges the government's power to compel taxpayers at large to subsidize its

148 *See* Klass, supra note 40, at 1116 (arguing that the principles underlying the First Amendment right against compelled speech do not carry over to the supposed right against compelled subsidization of speech because the compelled act—"paying a mandatory fee"—is of "too little moral content").

149 *Livestock Mktg.*, 544 U.S. at 565 n.8.

150 *Id.* at 559.

151 *Id.* at 562 ("Citizens . . . have no First Amendment right not to fund government speech. And that is no less true when the funding is achieved though targeted assessments . . . [rather than a general tax].").

152 *Id.* at 559. First, the Court cited *Keller*, which explained that "[i]f *every citizen* were to have a right to insist that no one paid by *public funds* express a view with which he disagreed," this "heckler's veto" would prevent the government from entering the public debate altogether. Keller v. State Bar of Cal., 496 U.S. 1, 12–13 (1990) (emphasis added). That statement justifies government's use of general revenues to subsidize its speech, but does not justify the government's use of targeted assessments for the same purpose. The Court in *Keller* noted that "government officials are expected . . . to espouse the views of a majority of their constituents." *Id.* at 12. It is not clear that government can claim the same role when the majority of its constituents are not paying for its speech.

Next, the Court referred to *Rosenberger*, which discussed *Rust*'s holding that government has the power to control what private speakers say when it pays them to carry a government message. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995). *Rust*, however, does not lead to the conclusion that government may target a specific group to subsidize its speech. The speech restriction in *Rust* was a condition attached to the receipt of federal funds. Rust v. Sullivan, 500 U.S. 173, 192 (1991). Thus, unlike the cattle ranchers, those subjected to it had voluntarily availed themselves of a federal program with all the strings, including the speech requirement, attached.

speech. None makes the additional analytical leap to find that the government has the power to do the same to targeted groups. Nevertheless, even if *Livestock Marketing* was the first case to announce such a rule, its announcement was inevitable.

The injury the dissenter suffers when she is compelled to subsidize government speech through a general tax is overcome by society's interest in hearing what the government has to say. If that injury is made worse when she is compelled to subsidize government speech through a targeted tax instead, the increase defies measurement. The dissenter's conscience is injured the moment she is forced to contribute to the message. At that moment she becomes an instrument for the speech and her First Amendment rights are implicated, even if she is only forced to contribute a dime.

Therefore, the ranchers in *Livestock Marketing* had the task of proving why the dissenter's injury is worse when she is only one of a few people compelled to contribute. Dissenting, Justice Souter offered two theories. First, when the government singles out a discrete group to pay for its speech, "the particular interests of those singled out to pay the tax are closely linked with the expression."[153] Second, those who are singled out "suffer a more acute limitation on their presumptive autonomy as speakers to decide what to say and what to pay for others to say."[154] Previously, lower courts had described these observations as a "coerced nexus" between the subsidizer and the speech.[155]

Justice Souter's first point is that when the government conveys a particular message, ("eat beef," for example) and compels a discrete

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Finally, the Court pointed to Justice Rehnquist's dissent in *Wooley*. Justice Rehnquist would have rejected Maynard's First Amendment claim because he did not believe that New Hampshire's message, imprinted on Maynard's license plate, was likely to be attributed to Maynard. Rather, he found Maynard's injury analogous to the injury suffered by the citizens in the following hypothetical: "[W]ere New Hampshire to erect a multitude of billboards, each proclaiming 'Live Free or Die,' and tax *all citizens* for the cost of erection and maintenance, clearly the message would be 'fostered' by the individual citizen-taxpayers and just as clearly those individuals would be 'instruments' in that communication." Wooley v. Maynard, 430 U.S. 705, 721 (1977) (Rehnquist, J., dissenting) (emphasis added); *see supra* notes 41–44 and accompanying text. Justice Rehnquist found no distinction between Maynard's claim and the claim of the taxpayers and would have rejected both. However, his hypothetical billboard tax applied to *all citizens*. Thus, his argument does not go so far as to endorse the government's power to extract the same tax from targeted groups.

153 *Livestock Mktg.*, 544 U.S. at 575–76 (Souter, J., dissenting).

154 *Id.*

155 Livestock Mktg. Ass'n v. USDA, 335 F.3d 711, 719 (8th Cir. 2003), *rev'd sub nom.* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550; United States v. Frame, 885 F.2d 1119, 1131–32 (3d Cir. 1989).

group (like beef producers) to subsidize that message, the group is more "closely linked" with the message because the speech relates to who they are—the speech is about beef and those in the group are beef producers. Perhaps this is true. However, other dissenters feel just as closely linked to government speech funded by general taxes. If the government advocates the benefits of contraception, a proponent of abstinence forced to pay for that speech through a general tax will feel more "closely linked" to it than someone who is ambivalent on the matter. If the government embarks on a campaign to persuade a foreign government to change its social policies, a recent immigrant from that country will feel more "closely linked" to the speech than other Americans because the speech relates to who she is. There is no objective criteria to explain why the link the beef producers feel to the beef ads is any closer than the link the abstinence proponent or the immigrant feels towards government speech that relates to them. The flaw in the "close link" theory is that there is no principled way to identify the point at which the link raises constitutional concerns.

Justice Souter's second point leads to a similar quandary. When members of a discrete group are compelled to fund government speech, he reasons, they suffer a more "acute limitation" on their autonomy as speakers.[156] The point seems to be that targeted individuals subsidize a greater percentage of the disagreeable speech. If a government imposed a general tax for government speech on a nation of one hundred people, each person would only be forced to contribute to one percent of the message. But, if the government only imposed the tax on the ten lawyers in the nation, each would shoulder ten percent of the burden. Thus, while the burden on the general taxpayer is "comparatively minute and indeterminable," the burden on the targeted taxpayer is a heavier load.[157] Again, while this might be true at the extreme, it does not explain precisely when the burden becomes too heavy. The dissenter is made an instrument of the message the moment she is compelled to support it against her will, even when through a general tax. That injury, however, is justified by the government's need to speak. The "coerced nexus" theory contends that when the tax is imposed on a narrower pool of citizens, the dissenting citizen supports a greater percentage of the message and her injury is proportionately increased until, at some point, it becomes unconstitutional.

It would indeed be troubling if the government compelled a single taxpayer to subsidize 100% of a particular message. However, it

156 *Livestock Mktg.*, 544 U.S. at 575–76 (Souter, J., dissenting).

157 *Id.* at 576 n.4 (citing Massachusetts v. Mellon, 262 U.S. 447, 487 (1923)).

would not seem troubling at all if the government targeted a very broad constituency to subsidize a government message related to a common trait. For instance, a "Buckle-Up" campaign funded by auto taxes would not seem to raise any difficulty. Instead, the difficulty arises in identifying the point at which the "coerced nexus" between the subsidizer and the speech is triggered.

The majority in *Livestock Marketing*'s holding allows the government to impose the costs of a speech campaign on a targeted group, no matter how small.[158] The dissent's position does not, but that position ultimately fails to identify the point at which the targeting goes too far. This invites a frustrating and arbitrary line-drawing exercise between permissible targeting and targeting that violates autonomy. To avoid that morass, the only principled conclusion the dissent permits is the one Justice Kennedy entertained in his separate dissent—speech funded by a targeted tax cannot be protected as "government speech" in any case.[159] Thus, the debate between the majority and Justice Kennedy descends into a choice between extremes. Either the government has the power to compel subsidies for its speech from any constituency no matter how small, or the government has no power at all to compel subsidies for its speech by means of anything besides a general tax. While the latter would surely guarantee individual freedom of belief, in practice it would tie the government's hands considerably. Taxes imposed on constituencies such as automobile drivers, homeowners, or corporations could not be used for government speech even though these groups seem too broad to claim a "coerced nexus" with the government's message. Thus, the position Justice Kennedy considered must ultimately fail.

An individual has the right not to be compelled to subsidize speech she disagrees with because the compelled payment violates her freedom of conscience. That violation is sanctioned when the compulsion comes in the form of a general tax. Ultimately, the violation is not made appreciably worse when the compulsion comes in the form of a targeted assessment. The dissenting individual's injury arises from the incompatibility of her conscience with the message she is forced to support, not the number of dissenters compelled along with

158 *Id.* at 565 n.8 ("Apportioning the burden of funding government operations (including speech) through taxes and other levies does not violate autonomy simply because individual taxpayers feel 'singled out' or find the exaction 'galling.'").

159 *Id.* at 570 (Kennedy, J., dissenting) ("I 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.'" (quoting *id.* at 580 (Souter, J., dissenting)).

her or the percentage of the final message that her contribution ultimately supports.

Thus, if there is a limit to the government's power to target discrete groups and compel them to subsidize its speech, that limit comes from a source other than the First Amendment's protection of the freedom of conscience, the sine qua non of the right against compelled speech and subsidization since *Wooley* and *Abood*. Obviously, the government does not have the power to extract taxes from suspect classes under the Equal Protection Clause or to tax a single individual, by himself, into bankruptcy. Neither limit, however, has anything to do with the dissenter's conscience or the government's speech, and both fall outside the scope of the First Amendment. To find a First Amendment limit to this government power requires breaking with *Abood* and isolating some other core principle besides the dissenter's freedom of belief that would justify her right to resist the tax. Justice Souter's dissent, at least indirectly, offered an alternative: the First Amendment's interest in preventing distortion of the marketplace of ideas.

B. Anonymous Government Speech—Is the Government Still Accountable if No One Knows It is Talking?

Justice Souter noted that targeted speech taxes increase the dissenting subsidizer's injury, but was unwilling to commit to the extreme position that government cannot compel targeted groups to subsidize its speech in any circumstances. Instead, he found that the First Amendment harms raised by this practice could be solved if the government affirmatively identified itself as the source of the speech.[160]

The First Amendment tolerates the government's use of tax dollars to fund its own speech because the government is accountable for what it says. While the majority in *Livestock Marketing* found that the government is accountable for any message controlled by a politically accountable official, Justice Souter concluded that the government's accountability could only be achieved when the government "indicat[es] that the content actually is a government message," which will

160 *Id.* at 571–72 (Souter, J., dissenting). It is not certain whether Justice Souter would hold that government must always identify itself before its speech may be labeled "government speech," or whether the rule only applies to government speech funded by targeted assessments. Conversely, in a separate opinion, Justice Ginsburg made clear that she believes that all government speech must be subject to this rule. *Id.* at 569–70 (Ginsburg, J., concurring in the judgment).

sometimes even require the government to "explicitly label[ ] the speech as its own."[161]

Importantly, this rule was quite close to becoming law, as three Justices signed Justice Souter's dissent and a fourth, Justice Ginsburg, endorsed it separately.[162] Consequently, it is conceivable that this rule might still gain a majority in the case of a compelled subsidy for government speech more ideologically charged than the commercial advertisements produced under the Beef Act.

However, the burden imposed by a rule that requires the government to identify itself as the source of all its speech should not be underestimated. While the First Amendment protects the individual's right to engage in anonymous speech, Justice Souter's rule denies the government the same ability. While Justice Souter implied that the purpose behind the rule was to vindicate the ranchers' liberty interest and remove any risk that the beef ads would be attributed to them specifically, I submit that an alternative and perhaps more compelling reason to require the government to identify itself as the source of its speech is the preservation of the integrity of the marketplace of ideas.

1. The Risk of Distorting the Marketplace of Ideas

The beef ads were created by the government, yet purported to be "Funded by America's Beef Producers." When the government places ads such as these in the marketplace of ideas without acknowledging its authorship, it distorts the market to some degree. The ads lead viewers to assume that a group of "America's Beef Producers" believe in the ads' message enough to pay for them. Viewers are not made aware that some producers only contribute because they are required to by law. Consequently, the viewers perceive that public support for the beef ads' message is greater than it actually is. If the government simply labels the ads as its own, however, the problem is solved. Viewers recognize the ads as government speech and assess them while fully comprehending their source. But, when the government speaks anonymously, as it did in *Livestock Marketing*, perceptions are distorted.

In *Austin v. Michigan Chamber of Commerce*,[163] the Court explained that the First Amendment protects against such distortion.[164] In *Austin*, the Court upheld a state statute that prohibited business corporations from using corporate funds to support or oppose candidates for

161 *Id.* at 571–72 (Souter, J., dissenting).
162 *Id.* at 569–70 (Ginsburg, J., concurring in the judgment).
163 494 U.S. 652 (1990).
164 *Id.*

state office.[165] Despite the imposition on the corporation's right of political expression, the Court upheld the ban in the interest of preventing "corruption" in the political arena, defined as "the corrosive and distorting effects of immense aggregations of wealth . . . accumulated with the help of the corporate form and that *have little or no correlation to the public's support for the corporation's political ideas.*"[166]

The Court was concerned that corporate ideas had acquired a market share disproportionate to their actual public support. It reasoned that shareholders associate with corporations to make a profit rather than to espouse political beliefs and, consequently, a corporation's coffers do not accurately represent its shareholders' political views.[167] The same distortion results when the government compels a targeted group to subsidize its speech and does not take credit as the source. For instance, the ranchers in *Livestock Marketing* do not contribute to the Beef Board for the purpose of disseminating shared views. Instead, they associate because they are required to by law.

Importantly, the Court in *Austin* was concerned with distortion in the marketplace of political ideas, a concern that might not trickle down to commercial ads. However, the Court in *Livestock Marketing* asserted that all compelled subsidies for government speech are "exempt" from First Amendment review, regardless of the content of the speech.[168] If the Court is ever required to examine a compelled subsidy for anonymous government speech of a political or ideological tint, it will find *Austin* in tension with that assertion. In such a case, the Court will need to determine whether *Austin*'s interest in calibrating the quantity of corporate speech to its actual public support applies only to corporations or whether it applies to other speakers, such as the government, as well.

In *Austin*, the Court explained that corporations have the capacity to "drown out" other speakers and, thus, their speech must be examined more closely. Similarly, lower courts have held that the government also has the capacity to "drown out" other speakers.[169] On that basis, government speech has the same potential to distort the marketplace of ideas. While that risk may be sufficient to deny the government the power to speak anonymously, such a rule imposes a heavy burden not to be accepted lightly.

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165 *Id.* at 654–55.

166 *Id.* at 659–60 (emphasis added).

167 *Id.* at 665–66.

168 Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005).

169 *E.g.*, Warner Cable Commc'ns, Inc. v. City of Niceville, 911 F.2d 634, 638 (11th Cir. 1990) ("[G]overnment may not speak so loudly as to make it impossible for other speakers to be heard . . . .").

2. The Risks of Prohibiting Anonymous Government Speech

In *Livestock Marketing*, Justice Souter's dissent criticized the government for essentially talking out both sides of its mouth. While the Department of Health and Human Services warned the public against excessive beef consumption, the Department of Agriculture anonymously extolled the virtues of beef in the beef ads.[170] As a result, he concluded, the government escaped accountability for its message and could not justify using the targeted assessment to fund that speech. His proposed solution, a requirement that the government disclose itself as the source of its speech before the speech is exempted from First Amendment review, prevents the government from acting underhandedly in the marketplace of ideas, distorting it, and as a result, impeding citizens' ability to locate the information they need to be able to participate effectively in a democratic republic.[171]

However, denying the government the ability to speak anonymously imposes significant constraints on its ability to function. Before identifying this rule as a limit to the government's power to compel subsidies for government speech, it must be proven to adequately address the First Amendment harms the practice raises while remaining consistent with the theoretical justification for permitting government speech.

The First Amendment grants the individual the right to speak anonymously for two reasons. First, anonymity protects the speaker from immediate retaliation for the content of her speech. Second, anonymity removes the danger that bias against the speaker will eradicate the persuasive ability of her message.[172] Obviously, the government is not vulnerable to retaliation for its speech. However, it is susceptible to bias.[173] As the Supreme Court has explained, anonymity allows an unpopular speaker to guarantee that listeners "will not

170 *Livestock Mktg.*, 544 U.S. at 578 n.7 (Souter, J., dissenting). One could argue even further that the government did more than just speak anonymously, but deliberately sought to deceive the public by attributing the ads to "America's Beef Producers." Perhaps such actions should receive tighter scrutiny than occasions when the government is simply silent regarding the source of its speech. For a more glaring example, consider the Bush Administration's creation of phony newscasts praising federal policies. Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 983 (2005).

171 *See* Lee, *supra* note 170, at 988–89 (arguing that the legitimacy of government speech depends on the public's ability to identify the government as speaker).

172 For a more extensive analysis of these questions, see Richard M. Cardillo, Note, *I Am Publius, and I Approve This Message: The Baffling and Conflicted State of Anonymous Pamphleteering Post-*McConnell, 80 NOTRE DAME L. REV. 1929, 1948–50 (2005).

173 *Id.*

prejudge her message simply because they do not like its proponent."[174] In other words, unpopular speakers have ideas too, and the First Amendment will not deprive those ideas of a fair opportunity to be heard by tethering them to their unpalatable advocates. This rationale applies with equal force to government speech. At times, such as during a war or recession, no speaker is more unpopular than the government and ideas labeled as belonging to the government will struggle to gain traction in the public domain. When those ideas have merit, a rule denying government the power to shield its identity may do more harm than good.

For example, after the Federal Emergency Management Agency (FEMA)'s much-maligned response to Hurricane Katrina, the agency was roundly criticized as incompetent and was not afforded much respect.[175] Had another emergency struck soon after, citizens might have ignored FEMA's calls to evacuate because of its recent debacle. It would then have been beneficial for FEMA to get the message out in some other way, through intermediaries, state officials, celebrities, anyone but the agency in such low public esteem. Thus, in some circumstances, the government's interest in anonymity might justify distorting the marketplace of ideas.

If the requirement that the government identify itself as the source of government speech can operate as an appropriate limit to the government's power to compel subsidies from targeted groups, the requirement must adequately address the First Amendment harms compelled subsidization raises. As *Livestock Marketing* showed, the dissenter's freedom of thought is not injured in a cognizable way when she is compelled to subsidize government speech. In addition, her freedom of expression is not implicated unless the government specifically attributes the message to her. Thus, the only function remaining for Justice Souter's requirement to serve is preventing the risk that anonymous government speech will distort the marketplace of ideas. The risk of market distortion was not discussed in *Abood* and its progeny as a central principle underlying the right against compelled subsidization. However, the Court's previous silence does not suggest that the risk is any less real or that the risk cannot be identified now as a reason to limit the government's ability to compel targeted individuals to subsidize its speech.[176]

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174 McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342 (1995).

175 *See, e.g.*, Scott Shane & Eric Lipton, *Government Saw Flood Risk, but Not Levee Failure*, N.Y. TIMES, Sept. 2, 2005, at A1; Josh White & Peter Whoriskey, *Planning, Response Are Faulted*, WASH. POST, Sept. 2, 2005, at A1.

176 *See supra* note 66 and accompanying text (discussing the Court's more recent recognition of market distortion as a basis for the right against compelled speech).

At base, this source disclosure requirement simply seeks to ensure that the government remains accountable for the content of its speech. As explained in Part III.A, practical concerns argue against enforcing this accountability by requiring the government to fund its speech only through general taxes. While government accountability can be ensured through Justice Souter's source disclosure rule, the rule is in tension with the First Amendment's historical protection of anonymous speech. This protection stems from the traditional understanding that ideas should rise and fall on their own merit and that citizens are both smart and engaged enough to distinguish ideas with merit from those with none.[177] Thus, adopting Justice Souter's source disclosure rule in pursuit of one First Amendment goal would require sacrificing another. Ultimately however, the government can still be held accountable for the content of its speech through a third way. Thus, the source disclosure rule should remain a remedy of last resort.

IV. COUNTER-SPEECH—HOLDING THE GOVERNMENT ACCOUNTABLE IN ANOTHER WAY

Livestock Marketing held that the government may compel targeted groups to subsidize the government's commercial advertisements. This holding is consistent with the principles underlying the First Amendment. First, regardless of whether the compelled subsidy actually interferes with the dissenter's freedom of conscience, the interference is justified by society's interest in hearing what the government has to say. That interference is not made worse, at least not in a measurable way, when the subsidy is compelled through a targeted assessment rather than a general tax. Second, while the government did distort the marketplace of ideas by anonymously disseminating the beef ads, the Court has never found distortion to raise First Amendment problems when the source of the distortion is commercial speech.

Nevertheless, the Court's assertion in *Livestock Marketing* that all compelled subsidies for government speech are "exempt" from First Amendment review is troublingly broad. While the government does

177 *See* Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 804 (1988) (Scalia, J., dissenting) (finding that, in that case, the Court had departed from its "traditional understanding . . . that . . . it is safer to assume that the people are smart enough to get the information they need than to assume that the government [in requiring speakers to identify themselves] is wise or impartial enough to make the judgment for them"). *But see* McConnell v. FEC, 540 U.S. 93, 103 (2003) (upholding a statute that required political campaigns to disclose the names of their donors); Buckley v. Valeo, 424 U.S. 1, 66–68 (1976) (same).

have the power to compel targeted constituencies to subsidize commercial government speech, First Amendment principles make clear that this power does not extend to compelled subsidies for political or ideological government speech.[178]

A. *Counter-Speech, Commercial Speech, and the Limit to the Government's Power To Tax and Speak Anonymously*

Compelled subsidization of government speech is justified as long as the government is accountable for what it says. That accountability can be ensured in three ways. First, government speech funded through a general tax forces all citizens to share the burden equally and gives them an equal incentive to monitor the government's speech. Alternatively, government speech that is attributed to the government alerts those who receive the message of its source and allows them to evaluate it accordingly. Finally, even if neither of those safeguards is in place, the government will remain accountable for its speech funded by a compelled subsidy if adequate opportunities for counter-speech exist.

When individuals speak out against the subsidy and the message it funds, they force the government to become accountable and reverse any distortion of the market caused by the government's anonymous speech. Regardless of the burden that compelled subsidies place on dissenters' consciences, they do not prevent them from engaging in this counter-speech. Thus, in *Livestock Marketing*, although the cattle ranchers were compelled to subsidize the beef ads against their will, they remained free to rebut every assertion the ads made.

However, the effectiveness of counter-speech as a means to ensure the government's accountability and prevent distortion of the marketplace of ideas diminishes when the government's speech is ideologically based. It is more likely and less troubling that the cattle ranchers will publicly rebut the economic message conveyed in the beef ads than that another group will enter the public debate to rebut an ideological message they are compelled to subsidize through a targeted tax. Consider the facts presented by *Summit Medical Center, Inc. v. Riley*.[179] In *Summit*, the State of Alabama required abortion providers to purchase informational materials from the State Department of Health and provide them to their clients. These materials consisted of pamphlets and a videocassette that detailed alternatives

178 *See* Troy, *supra* note 9, at 147 (predicting that because of its breadth, the "Court will almost certainly have to impose some kind of limitation on the government-speech doctrine it espoused in *Johanns*").

179 284 F. Supp. 2d 1350 (M.D. Ala. 2003).

to abortion, informed the woman of the anatomical and physiological characteristics of the unborn child, and concluded with the salvo that "'the State of Alabama strongly urges you'" to contact agencies providing pregnancy services other than abortion before making a final decision.[180] This speech was financed by a compelled minority—abortion providers—but the government accepted full credit for the speech, thus eliminating the risk that the marketplace of ideas would be distorted. Imagine, however, that the materials the abortion providers were compelled to purchase purported to come from "Alabama's Health Care Providers." Would the abortion providers in *Summit* then have a stronger claim than the cattle ranchers in *Livestock Marketing*? I submit that they would, and the reason stems from the nature of the speech they would be compelled to subsidize.

Both the ranchers and the hypothetical abortionists are made instruments of a message they disagree with. While one might plausibly argue that it is normatively worse to be made an instrument of an ideological or political message one disagrees with rather than to be made an instrument of a commercial one, the Court as recently as *United Foods* has declined to evaluate the subjective merits of an individual's purported ideological disagreement.[181] Thus, the reason the government has the power to compel subsidies for anonymous commercial government speech but not for anonymous ideological government speech has nothing to do with the dissenter's conversion into an instrument for the message. Instead, the reason for the difference is that only the government's anonymous ideological speech is likely to distort the marketplace of ideas. It is necessary to provide added protection against the distortion the government's ideological speech can cause because ideological speech implicates the right not to speak[182] in a way that commercial speech does not.

As the Court has explained, an individual compelled to serve as an instrument of a message he disagrees with will often feel compelled to respond.[183] In other words, he will attempt to undo the benefit his compelled subsidy has provided the objectionable message by rebut-

180 *Id.* at 1353–54. Predating the Court's decision in *Livestock Marketing*, the court in *Summit* employed the "coerced nexus" theory and struck the provision down. Although it acknowledged that the materials were government speech, it found that Alabama had no compelling justification for limiting the financial burdens of the speech to abortion providers only, explaining that "[a]lthough the State's interest in monetary savings is legitimate, it cannot overcome the First Amendment interests at stake in this case." *Id.* at 1361.

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

182 *See supra* text accompanying note 26.

183 Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 15–16 (1986).

ting it with his own speech. In doing so, he sacrifices his right not to speak. As a result, he surrenders his control over the identity he presents to the outside world and his freedom of expression. He also assumes the risk that he will be retaliated against for what he has to say. He does this because a message he disagrees with was placed in the marketplace of ideas with his financial support and he feels obliged to strip that message of this advantage and reestablish the market equilibrium that existed before the speech subsidy was imposed.

When the compelled dissenter engages in counter-speech to rebut a political or ideological message he is forced to subsidize, he surrenders his constitutional right not to speak. However, when he engages in counter-speech to rebut a commercial message, he does not make the same sacrifice because the right not to speak does not extend to commercial affairs. To be sure, the Court has made clear that, absent a compelling state interest, the government may not compel an individual to personally express a message, even a commercial one, against his will.[184] Doing so would interfere with the individual's freedom of expression. However, the Court has never gone so far as to identify a constitutional problem with the government compelling a taxpayer to subsidize its commercial speech and thus compelling the taxpayer to rebut the speech with a message of his own. There is good reason for this.

The First Amendment protects the individual's right not to speak on political and ideological matters. In its interest in a free and robust debate, the First Amendment encourages individuals to speak out in support of the views they believe in. Nevertheless, it still protects the individual's right to remain silent because countervailing concerns may lead some prospective speakers to decline the opportunity. An opponent of the death penalty may work at a place, live in a family, or worship at a church where the death penalty is held in high regard. He might not wish to reveal this aspect of his conscience to those around him for fear that they will retaliate, criticize, or shun him. While he might be called a coward, the First Amendment does not require every citizen to be an active player in the marketplace of ideas. To the contrary, were he to be compelled to speak out against the death penalty, the identity our timid speaker presents to the outside

184 Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796 (1988). The *Riley* Court struck down a statute compelling professional fundraisers to disclose the way in which contributions to their charity were allocated to potential donors. Even though the compelled speech was limited to commercial facts, the Court applied strict scrutiny and found that the fundraisers' solicitation was "intertwined with informative and perhaps persuasive speech." *Id.*

world would be transformed, and the First Amendment grants him full autonomy over that presentation. If he chooses to omit his opposition to the death penalty from that public identity, that choice is protected by his right not to speak.

However, the countervailing concerns that counsel the speaker toward silence simply do not apply to commercial speech. While the First Amendment appropriately shields the meek from wearing their political and ideological colors on their sleeves, it need not be concerned with protecting individuals from disclosing their financial interests. While the speaker faces ostracism or retaliation upon disclosing an unpopular political or ideological thought, she faces no similar risk in disclosing her interest in conducting transactions for profit. In America, with its rich capitalist tradition, it is expected and even admired for the individual to defend her own financial well being. Engaging in self-interested commercial speech does not subject the speaker to scorn or retaliation.

The right not to speak is also protected because silence itself is expressive.[185] By choosing *not* to say anything, especially when the moment calls for it, the individual expresses a great deal about herself. Yet deciding not to speak up for one's economic interests reveals little, if anything at all. It simply reveals that those interests must not be the type of interests the speaker is willing to defend.

Consider again the hypothetical abortionists. They decide not to speak in support of or in opposition to legalized abortion. Consciously, they believe that the practice is ethical and that the moral and religious objections to it are misguided. Further, their conduct obviously confirms such a belief. Nevertheless, their silence expresses something too. In declining to take a firm position in the debate, in not contributing to the National Abortion and Reproduction Rights Action League or some other prominent body in the pro-choice movement, they attempt to express something about themselves, perhaps that they are "above the fray" of the back-and-forth politics on this divisive issue. They support and engage in the practice, but are not "militants" in the pro-choice crusade. The First Amendment protects their right to shape their identity as such. The state's requirement that they pay for informational materials that "strongly encourage" women to consider other options and imply that the practice is indeed immoral advances a belief that the abortionists oppose. The message is hostile to their consciences and it is launched into the marketplace of ideas on the strength of funds from their own pockets. This coerces the abortionists into speaking. To strip the government's

185 *See* Klass, *supra* note 40, at 1110.

message of the advantage their compelled payment has provided and to reestablish the market equilibrium that existed before the government allocated their payments towards the objectionable speech, the abortionists are required to speak up. Thus, the subsidy baits the abortionist into the full throws of an active public debate. In jumping in and speaking his mind, the abortionist assumes a new identity. His beliefs are no longer unstated. He stands for something now, and may be scorned or embraced depending on how society absorbs what he has to say.

In contrast, consider the cattle rancher. He chooses not to advertise his products but is then compelled to subsidize a government advertising campaign that describes all beef as homogenous and diminishes his claim that his own beef is unique. On the strength of his compelled payments, the government has advanced an idea inimical to his interests, even if not contrary to his beliefs. In engaging in his own speech and attempting to rebut the government's message, the cattle rancher surrenders his prior silence. But in so doing, he does not make the same sacrifice as the abortionist who is compelled to subsidize ideological speech. By breaking his silence, the rancher does not express anything about himself to the world that the world did not already know. He wants consumers to buy the products he offers for sale. The world already learned this, however, when he put those products up for sale in the first place. The abortionist is different. He performs abortions and in so doing demonstrates that he believes the practice is acceptable. But that act alone does not express how or why he believes this is so. It does not explain whether he believes that a woman has an inviolable right to privacy in her own body or whether he believes the question is simply a policy choice and that the current choice is acceptable. The urge he feels to counter-speak and rebut the government message that he is compelled to subsidize forces him to resolve this ambiguity and express himself where he otherwise would not.

The cattle rancher who feels the urge to commence an advertising campaign for his own products in order to rebut the government's harmful speech does not suffer the same loss. He reveals nothing more about himself when he says "buy my steaks" than he does when he offers steaks for sale without saying anything. By disclosing his interest in selling his product after having *already* entered the commercial marketplace by putting his products up for sale, the rancher has not disclosed anything new about himself that the world did not already know. In terminating his silence, he has not altered his identity and has not surrendered his freedom of expression.

Identifying this distinction between compelled subsidies for commercial speech and speech of an ideological nature does not conflict with the Court's recent inclination to treat restrictions on commercial speech on a more equal footing with restrictions on the historically protected categories of speech.[186] Some argue that restrictions of commercial speech should be treated exactly the same as restrictions on political speech because both evince the government's intent to shield society from certain messages and because failing to protect commercial speech provides a convenient avenue for the government to deny protection to speakers with something unpopular to say.[187] Further, compulsions of commercial speech have, at times, received the same treatment as compulsions of other categories of speech because both interfere with the speaker's freedom of expression.[188] However, a compulsion to subsidize the government's commercial speech and the accompanying likelihood that the compelled subsidizer will feel compelled to rebut the speech does not raise the same concerns as compelled subsidies for political or ideological speech. The compelled subsidizer of the government's commercial speech may rebut the message without revealing anything new about herself that the world did not already know before. Hence, she can be relied upon to speak up and hold the government accountable.

B. A New Solution to a Difficult Problem

Thus, the rule to be applied in such cases is as follows: the government may compel citizens to subsidize its speech as long as it remains accountable for what it says. This accountability can be achieved in any one of three ways. First, the government may finance the speech through a general tax, ensuring that each citizen is equally burdened and each has an equal incentive to monitor the message. If the government instead chooses to compel a targeted constituency to subsidize its speech, it can still be held accountable in two other ways. First, the government can simply identify itself as the speaker and allow recipients to judge its message accordingly. Alternatively, even if the government chooses to remain anonymous, it can still be held accountable for its speech if there is a sufficient likelihood that those

186 *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (finding that a complete statutory ban on price advertising for alcoholic beverages abridged speech in violation of the First Amendment).

187 Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 649–50 (1990).

188 *Riley*, 487 U.S. at 796 (explaining that when commercial speech is "inextricably intertwined" with informative and persuasive speech to form one solicitation, the Court will apply its test for "fully protected expression").

burdened by the message will speak up against it and demand that the government defend its position. This will only occur, however, when the content of the speech is commercial. Taxpayers compelled to subsidize a commercial message hostile to their own position have no right or incentive to remain silent and can be relied upon to challenge the government's speech. Conversely, taxpayers compelled to subsidize ideological or political speech do have both a right and an incentive to remain silent and cannot be relied upon to speak up and hold the government accountable. Further, even if they do speak up, they surrender their right not to speak in a way the compelled subsidizer of commercial speech does not. That additional burden on their First Amendment interest is sufficiently substantial to earn them added protection.

Thus, under this rule, the government would have the power to compel the cattle ranchers in *Livestock Marketing* to subsidize its commercial speech even though the ranchers disagreed with the message and even though the government spoke anonymously. The injury to the ranchers' freedom of conscience is no worse than that of those compelled to pay general taxes and any distortion the beef ads created in the marketplace of ideas can be expected to be reversed by the ranchers' counter-speech.[189]

The State of Alabama, however, would not have the power to compel the hypothetical abortionists to subsidize its ideological speech while remaining anonymous. While it is true that the injury to the abortionists' freedom of conscience is also no worse than a general taxpayer's, in this example, the distortion to the marketplace of ideas caused by Alabama's anonymous speech is unlikely to be cured by the abortionists' counter-speech because countervailing concerns may keep them silent.

The scope of this rule is narrow, however. The State of Alabama would still have the power to compel the abortionists to subsidize its ideological message as long as the State of Alabama simply identified itself as the source of the message. The abortionists have no First Amendment right not to pay for government speech they disagree with. However, society does have the right to hold the government accountable for what it says and the abortionists *do* have a right not to

189 *But see* Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 PEPP. L. REV. 641, 645 (2001). Tribe, who argued the ranchers' case before the Supreme Court, finds that the individual has a "right not to be appropriated or conscripted as a *means* to the state's speech-related ends." *Id.* Thus, he concludes that the state can just as easily achieve its legitimate goals by "speaking with its own voice, at the expense of all taxpayers rather than just those few who are singled out to bear the burden of serving as the state's microphone." *Id.*

be burdened with the responsibility of providing that accountability by engaging in their own ideological counter-speech.

CONCLUSION

The Court in *Livestock Marketing* suggested that all taxes that compel individuals to subsidize government speech are "exempt" from First Amendment review. Despite the apparent breadth of this assertion, this Note reveals that in most situations, this should indeed be the case. However, the government's power to compel targeted groups to subsidize its speech is not without limit. Every time the government speaks, it must ultimately remain accountable for what it says. If the government compels a targeted group to fund its speech on a topic that is not merely commercial, the government must affirmatively identify itself as the speaker or the compulsion must fail as a violation of the First Amendment.