Uncle Sam Wants You – To Eat Beef?

by

Rita Cain

Originally published in DRAKE JOURNAL OF AGRICULTURAL LAW
11 DRAKE J. AGRIC. L. 165 (2006)

UNCLE SAM WANTS YOU - TO EAT BEEF?

Rita Cain

I. INTRODUCTION

Consumers might be surprised to discover that ads touting "Beef, it's what's for dinner" actually are messages from the federal government, rather than the beef industry. Nevertheless, that was the Supreme Court's conclusion in *Johanns v. Livestock Marketing Association.*[1] This case addressed whether regulated parties can be compelled by law to contribute to generic industry messages. The Court held that mandatory payments from cattle sellers to fund the beef promotion program raised no free speech violations.[2] Additionally, the generic beef ads were actually government speech, not messages from the Beef Council or any other private party.[3] Also, the Court ruled that the federal government could collect fees to fund these messages just like government collects any other taxes to support its activities.[4]

This article discusses the beef promotion program, the free speech issues surrounding it, and the implications of the Supreme Court decision on government marketing of its policies. The paper proposes that the public should be informed when policy messages such as the beef ads are espoused by its government rather than private parties or industry associations. As a result of the

1. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005).
2. *Id.* at 564-67.
3. *Id.* at 563-63.
4. *Id.* at 562-63.

Court's conclusion in *Johanns*, Congress needs to impose upon itself a mandate that any promotional messages like the beef ads be adequately attributed to government and not to industry.

II. THE FEDERAL BEEF PROMOTION PROGRAM

In 1985, Congress established a federal policy to promote beef products under the Beef Promotion and Research Act ("the Beef Act").[5] Pursuant to the Beef Act, the United States Department of Agriculture ("USDA") requires cattle producers and importers to pay $1 on each head of cattle sold.[6] Commonly known as the "beef checkoff," these funds are designated for "advertising, research, consumer information, and industry information."[7] State beef councils retain half the fee for their consumer education efforts and $.50 is forwarded to the Cattleman's Beef Promotion and Research Board ("the Board").[8]

Under the Beef Act, the Secretary of Agriculture appoints the Board, and it is comprised of geographically diverse beef producers and importers.[9] The Board appoints an Operating Committee made up of ten Beef Board members and ten representatives named by a federation of state beef councils.[10] The Operating Committee, with the approval of the Secretary of Agriculture, generates the generic beef ads (such as the "It's what's for dinner" campaign) and pays for the ads with checkoff funds.[11]

The federal beef promotion program has generated a huge advertising "budget" for the beef industry. From the outset of the federal beef promotion program until 2001, the Board spent $337 million on direct generic beef promotions within the domestic market.[12] In 2004 alone, the assessment generated over

---

5. 7 U.S.C. § 2901(b) (2005).
6. *Id.* at § 2904(8).
7. *Id.* at §§ 2904(4)(B).
8. Cattlemen's Beef Bd., UNDERSTANDING BEEF CHECKOFFS (2006), *available at* http://www.beefboard.org/uDocs/2006understandingthebeefcheckoff.pdf.
9. 7 U.S.C. § 2904(1); *see also* National Cattleman's Beef Association – Beef Board Elects New Members, Elects Leadership, http://beef.org/NEWSBEEFBOARDSEATSNEW MEMBERSELECTSLEADERSHIP3673.aspx (last visited June 13, 2006) (stating current board membership).
10. *Id.* § 2904(4)(A); *see also* National Cattleman's Beef Association – Federation of State Beef Councils, http://www.beefusa.org/affiFederationofStateBeefCouncils.aspx (last visited June 18, 2006)(listing the members of the Federation of State Beef Councils).
11. 7 C.F.R § 1260.167(a) (2005).
12. Ronald W. Ward, Univ. of Fla. Extension, BEEF DEMAND AND ITS RESPONSE TO THE BEEF CHECKOFF, (2001), *available at* http://www.animal.ufl.edu/extension/beef/ documents/ short01/Ward.htm.

$47 million, of which over $26 million was used for generic beef advertising.[13] Multiple models have suggested that the checkoff yielded increased consumer demand for beef and increased producer revenues.[14] Other research, however, could not establish a clear link between generic beef promotions and increased demand.[15]

III. LIVESTOCK MARKETING ASSOCIATION

Livestock Marketing Association ("LMA") is an association of livestock auction marketers. Since 1947 it has worked to maintain a value-based marketing system for cattle and to preserve the integrity of the competitive pricing process.[16]

From the inception of the federal beef promotion program, LMA members objected to funding generic beef advertising. Organic farmers, Angus and Hereford producers, for example, did not want to contribute to generic messages that all beef is equally safe, healthful and high quality.[17] They contended the generic messages under the checkoff program impeded their ability to differentiate the superiority of their specialized beef products.[18]

Similarly, the program generated concerns by some domestic producers that generic ads do not differentiate for consumers the superiority of their product over imported beef.[19] The checkoff fee for the ads is collected from both domestic producers and importers, so the ads did not distinguish "U.S. beef."[20] Some U.S. producers objected to buying ads that promote all beef, as if imported is the same high quality as domestic, especially since mad cow disease is most

---

13. Chris Clayton, *$47.7 Million Planned for Beef Checkoff Programs,* OMAHA WORLD HERALD, Sept. 20, 2003, at 2d.

14. WARD, *supra* note 9.

15. *See* Henry W. Kinnucan, et al. *Effects of Health Information and Generic Advertising on U.S. Meat Demand,* 79 AM. J. OF AGRI. ECON. 13 (1997). A national generic promotional campaign for Bavarian beef was shown to have increased demand, even in the face of the mad cow scare in Europe. Roland *Herrmann,* et al. *Bovine Spongiform Encephalopathy and Generic Promotion of Beef: An Analysis for 'Quality From Bavaria'*, 18 AGRIBUSINESS 369, 383 *(2002).*

16. Livestock Marketing. Association – History, http://www.lmaweb.com/lmahistory.html (last visited Apr. 17, 2006).

17. *Johanns*, 544 U.S. at 556.

18. *Id.*

19. Transcript of Oral Argument at 37, *Johanns*, 544 U.S. 550 (No. 03-1164).

20. *See id.*

commonly associated with European and Canadian beef.[21] According to Harvard constitutional law professor and LMA counsel Laurence H. Tribe:

> [i]n our brief and in my oral argument, we consistently focused on LMA and our other clients' objections to the beef checkoff program because it produces ads that refuse to promote the sale of cattle raised in the USA, but insists on promoting all beef equally– reflecting a viewpoint that inevitably enriches producers and importers of foreign beef, at the expense of U.S. cattle ranchers.[22]

By its own latest survey, the National Cattleman's Beef Board acknowledged that eighteen percent of cattle sellers oppose the checkoff program.[23] Nine percent were neutral or undecided, and seventy-three percent approved of the program.[24] Those supporting the promotion program prioritize beef safety as an essential strategy the checkoff ads should achieve.[25] Thus, cattle sellers in the checkoff program are worried about consumer confidence in beef in the face of mad cow disease. The Board and its supporting members think the generic beef ads improve consumer confidence in beef safety. LMA and other detractors believe the generic beef ads miss the opportunity to improve consumer confidence because they do not promote the safety of domestic beef over imported.

Finally, dairy farmers objected that they were required to pay $1 for every dairy cow sold even though they did not benefit from the beef ads.[26] By contrast, slaughterhouses and meat packers benefit from beef promotion, but do not contribute to the promotion fees.[27]

LMA challenged USDA in federal court on the basis of the 1st Amendment free speech rights of its members.[28] LMA contended that the 1st Amendment prohibits the United States from forcing dissenting industry members to

---

21. *Id.*

22. Press Release, Livestock Marketing Ass'n, Tribe: 'Only Goal' Was to Show Checkoff Violates Ranchers' Rights (Dec. 21, 2004), http://www.lmaweb.com/lmapressarchive.html (last visited Apr. 17, 2006).

23. Press Release, National Cattlemen's Beef Association, Producer Support for Beef Checkoff Hits 10-Year High (Feb. 3, 2005), http://beef.org/NEWSProducerSupportforBeef Checkoff Hits10-YearHigh3655.asox (last visited Apr. 17, 2006).

24. *Id.*

25. *Id.*

26. Transcript of Oral Argument at 38, *Johanns*, 544 U.S. 550 (No. 03-1164).

27. *Id.* Interestingly, LMA Associate members cannot be registered with the Packers and Stockyard Association, further illustrating LMA's perceived antithetical objectives of these two groups. Livestock Marketing Association – LMA Membership, http://www.lmaweb.com/lmamembership.html (last visited Apr. 17, 2006).

28. Livestock Mktg. Ass'n v. USDA, 335 F.3d 711, 715 (8th Cir. 2003).

fund speech to which they object.[29] In 2001, the Supreme Court struck down mandatory assessments imposed on mushroom producers to fund generic mushroom advertising.[30] In *U.S. v. United Foods*, the Court held that the generic advertising program for mushrooms was nothing more than a government-mandated advertising program which violated the free speech rights of individual mushroom farmers who disagreed with the generic ads.[31] By all accounts, the federal statutory schemes for mushroom and beef promotion were virtually identical.[32]

Based on *United Foods*, the South Dakota District Court and the 8th Circuit Federal Court of Appeals ruled that the mandatory assessments to pay for generic advertising of beef were unconstitutional.[33] The beef checkoff system seemed doomed in the face of such a clear-cut precedent as *United Foods*, decided just four years earlier.

IV. BEEF PROMOTIONS AS GOVERNMENT SPEECH

Livestock Marketing Association v. USDA addressed whether members of industry can be required to contribute to advertising messages that are dictated by statute and are overseen by quasi-governmental boards.[34] In *Livestock Marketing*, the USDA contended that the advertising conducted pursuant to the beef promotion program was "government speech."[35] This position was not espoused in *United Foods*, so the USDA appeal in *Livestock Marketing* presented new and different issues for the Court to consider regarding these government-mandated advertising programs.[36]

According to the government speech argument, the United States is entitled to articulate its own message without committing any free speech offense to individuals who disagree with that message.[37] If government is the sponsor of the offending message, not the complaining individuals or groups, then those individuals or groups will not be unfairly associated with a position they fundamen-

29. *Id.*
30. U.S. v. United Foods, 533 U.S. 405, 416 (2001).
31. *Id.* at 415-16.
32. *Johanns*, 544 U.S. at 558; *see generally* Laura Jackson, *The Constitution--It's What's for Dinner.*, 2 WYO. L. REV. 617, 620-21 (2001) (discussing the commercial speech aspect of *United Foods*).
33. *Livestock Mktg. Ass'n*, 335 F.3d at 726.
34. *Id.* at 713.
35. *Id.* at 713.
36. *Id.* at 718.
37. *Id.* at 720 (citing Rust v. Sullivan 500 U.S. 173, 192-95).

tally oppose.[38] In *Johanns,* the USDA acknowledged, in oral arguments before the Supreme Court, that accepting its "government speech" position effectively called for reversal of *United Foods.*[39]

The Supreme Court accepted the USDA position that the beef ads are "government speech" and reversed the 8th Circuit decision in *Livestock Marketing.*[40] The Court's conclusion that the beef ads are government speech was based on the Beef Act statutory scheme that established: (1) the general terms of the promotions, (2) the Secretary of Agriculture's control over the Board, and (3) the Secretary's "absolute veto power" over advertising proposals.[41] The Court noted that it had presumed the mushroom promotions in *United Foods* were private speech when the case was decided in 2001.[42] While *Johanns* did not expressly overturn *United Foods,* the mushroom promotions in *United Foods* would likely now be deemed "government speech" in the face of the conclusion about the beef promotion program that so closely paralleled the mushroom case.[43]

Even if the beef promotions are government speech, LMA argued that the Beef Act established an unconstitutional compelled subsidy by targeting its members to fund a government message they fundamentally opposed.[44] Does a program that targets a particular market segment for funding differ from government messages or programs that are funded out of the general public fees? No, according to the Court:

> The compelled-*subsidy* analysis is altogether unaffected by whether the funds for the promotions are raised by general taxes or through a targeted assessment. Citizens may challenge compelled support of private speech, but have

38. *See generally Livestock Mktg. Ass'n,* 335 F.3d at 719 (the USDA argued that the Supreme Court previously rejected the "coerced nexus" argument).

39. Transcript of Oral Argument at 18, *Johanns,* 544 U.S. 550 (No. 03-1164).

40. *Johanns,* 544 U.S. at 566.

41. *Id.* at 560-61. Years earlier, the Third Circuit had analyzed the question whether beef promotions under the Act were government speech and reached the opposite result. U.S. v. Frame, 885 F.2d 1119, 1132 (3d Cir. 1989). The court concluded the Beef Board was speaking for a small segment of society with discrete interests – beef sellers – whereas government is supposed to speak for the broader society based on common interests. Accordingly, the beef promotions were not government speech. The *Frame* court went on to uphold the Beef Act promotions under the lower commercial speech scrutiny. *Frame,* 885 F.2d at 1137.

42. *Johanns,* 544 U.S. at 559.

43. *Id.* at 572 (Souter, J. dissenting) (in his dissenting opinion, Justice Souter declared the rule in *United Foods* a "dead letter").

44. Transcript of Oral Argument at 54, *Johanns,* 544 U.S. 550 (No. 03-1164).

> no First Amendment right not to fund government speech. And that is no less true when the funding is achieved through targeted assessments devoted exclusively to the program to which the assessed citizens object. [45]

Accordingly, Congress can tap any individuals or groups as the funding source for its messages and programs. The checkoff fees are akin to permissible general taxes paid to support any government activity.[46] Taxpayers who disagree with positions taken by their government have no first amendment basis to challenge funding government speech.[47]

Johanns adds a new piece to an emerging body of government speech law that limits free speech rights of private parties like the cattle sellers. Next, this article will discuss how *Johanns* does not fit any prior government speech analyses and creates new and troubling concerns about government efforts to promote its policies.

V. THE LEGAL HISTORY OF "GOVERNMENT SPEECH" VERSUS FREE SPEECH RIGHTS

The line between private and government speech has been less than clear in past cases and no past "government speech" decision seems to fit the beef promotion program precisely. One of the earliest cases involved a challenge to New Hampshire's state motto, "Live Free or Die," on a state license plate.[48] A Jehovah's Witness in New Hampshire fought for the right to cover up the slogan on plates which were required to be displayed on vehicles.[49] The Supreme Court agreed that the license plate slogan was government speech.[50] Nevertheless, a finding that a message was "government speech" was not conclusive of the citizens' First Amendment concerns.[51] The Court concluded that the state could not use objecting citizens' vehicles like billboards for the state's message.[52] According to *Wooley v. Maynard*, government cannot induce unwilling citizens to act as involuntary messengers for government speech.[53]

---

45. *Johanns*, 544 U.S. at 562.
46. *See id.* at 559.
47. *See id.* at 559.
48. Wooley v. Maynard, 430 U.S. 705, 707 (1977).
49. *Id.*
50. *See id.* at 716.
51. *Id.*
52. *Id.*
53. *Id.*

Livestock Marketing Association argued that, if the beef ads are government speech, then its members are involuntary speakers of the generic beef messages.[54] LMA compared the Jehovah's Witnesses in *Maynard* to the complaining cattle sellers.[55] Both were required by government to put forward a message to which they objected.[56] But the challengers in *Johanns* could not show that they were personally associated with the objectionable message, as the drivers in *Maynard* were associated with the offending slogan attached to their own vehicles.[57] In other words, the *Maynard* plaintiffs were actually compelled to carry forth "Live Free or Die," whereas the cattle sellers only had to fund the offending generic ads.

According to the Court, actual compelled speech is more offensive to free speech rights than compelled subsidies of speech. Compelled payments do not cause expressive harm because there is no nexus between the act of paying and the message expressed.[58] At least no cattle seller could prove that offending nexus, according to the Court. The record did "not show that the advertisements objectively associate their message with any individual respondent."[59]

Ironically, this part of the Court's analysis seems to accept the premise that messages become associated with those who put forward the message to the public. In the beef ads, that would be the beef industry, not the USDA. Nevertheless, the Court ignored the actual attribution in the ads which tells the public that the ads are sponsored by the beef industry.[60] By contrast, the Court

---

54. *See* Transcript of Oral Argument at 32, *Johanns*, 544 U.S. 550 (No. 03-1164).

55. *See id.* at 38, *Johanns*, 544 U.S. 550 (No. 03-1164).

56. *See id.* at 39, *Johanns*, 544 U.S. 550 (No. 03-1164).

57. *Johanns*, 544 U.S. at 564-65.

58. Gregory Klass, *The Very Idea of a First Amendment Right Against Compelled Subsidization*, 38 U.C. DAVIS L. REV. 1087, 1122 (2005).

59. *Johanns*, 544 U.S. at 568 (Thomas, J., concurring). One commentator opines that compelled speech need never become associated with any individual other than government. If a certain speech act is required of everyone and it is publicly known that it is required, it would be unwarranted for any reasonable observer to infer that any particular utterance reflected the sincere, genuine thoughts of the particular speaker. The reasonable conclusion is that the message is attributable only to the state, not to the particular citizen. Seana Valentine Shiffrin, *What is Really Wrong with Compelled Association*, 99 NW. U. L. REV. 839, 853 (2005). This view, however, is premised on the government compulsion for the speech being "clearly delineated." *Id.* As will be discussed below, one of the concerns about the conclusion that the beef promotions are government speech is the complete lack of disclosure and public awareness about the government's role and sponsorship of the ads. *See infra* notes 81-99 and accompanying text.

60. *See Johanns*, 544 U.S. 550.

concluded the beef ads were government speech based on an underlying statutory scheme that is completely unbeknownst to consumers.[61]

Funding associated with speech has spawned other conflicting results. One group of cases involves government grants or subsidies that come with a speech condition attached to the receipt of the government money. For example, doctors receiving government family planning funds challenged the abortion "gag order" attached to funding.[62] The challengers in *Rust v. Sullivan* argued that the government had imposed viewpoint discrimination on the subsidies by not allowing them to discuss the abortion option with patients.[63]

On the contrary, according to the Supreme Court, the United States had a particular family planning policy it was underwriting with the grants.[64] This policy precluded abortion as an alternative.[65] Advancing a programmatic message through funds to private parties is permissible, according to *Rust*.[66] Government is free to have a position and to fund it without violating any free speech rights of fund recipients.[67] Unwritten, but underlying the *Rust* result, is the concept that private individuals or groups should not take government funds if they disagree with the policy that underlies the funding program.

In contrast to *Rust*, *Legal Services Corp. v. Velazquez* disallowed a speech condition for legal aid funding.[68] Attorneys receiving government funding were barred from advancing challenges to existing welfare statutes on behalf of clients.[69] Despite the government's argument to the contrary, the Court held that legal aid funding had no particular underlying programmatic message that justified limiting an attorney's representation of a client.[70] Unlike *Rust*, not only was such a condition unnecessary to define the scope and contours of the funding program, it was actually antithetical to the services that were being funded because the condition excluded particular "vital theories and ideas" from the litigation process.[71]

---

61. *See Johanns*, 544 U.S. at 560.
62. Rust v. Sullivan, 500 U.S. 173, 181 (1991).
63. *Id.* at 192.
64. *Id.* at 193.
65. *Id.*
66. *Id.*
67. *Id.*
68. 531 U.S. 533, 537 (2001).
69. *Id.* at 536-37.
70. *See id.* at 548.
71. *Id.*

In *Johanns*, USDA successfully claimed that a *Rust*-caliber programmatic message underlay the beef promotion statutory scheme, to establish the ads as government speech. Regardless, *Johanns* and *Rust* are markedly distinct. In *Rust*, the government was allowed to use private parties to articulate a message by making restricted speech a condition for government funding.[72] In *Johanns*, the USDA claimed, as its own, speech that was funded by private parties.[73] Unlike the doctors in *Rust*, the USDA was not paying beef sellers to espouse its particular message. On the contrary, the cattle sellers were paying for the ads under a government-mandated system. Most importantly, unlike the doctors in the family planning case, the cattle sellers cannot opt out of the programmatic message of the beef promotions if they want to remain cattle sellers, since the checkoff fees are attached to every sale of every head of cattle. Despite the Court's conclusion that the messages under the beef promotion system are the USDA's own, the private funding in *Johanns* distinguishes it from government speech precedents like *Rust.*

The beef promotion scheme is actually more like mandatory union dues or bar association fees that have been ruled unconstitutional when they are used to fund discretionary political activity.[74] In these cases, the fee payment was mandatory to participate in the chosen profession.[75] In each case, some fees were used to fund the general administrative needs of the group, a permissible use of mandatory fee money, while other fees were used to promote positions or candidates that individual paying members disputed.[76]

In the union and bar fee cases, use of the fees for objectionable political purposes was deemed unconstitutional.[77] The organizations were required to segregate fee money that was used for association administration from funding for political activity.[78] The Court in *Johanns* distinguished these cases because the union and bar association were clearly private parties, not government agencies, despite the statutory basis for both groups' existence and operations.[79]

---

72. *Rust*, 500 U.S. at 203.

73. *See Johanns*, 544 U.S. at 554.

74. *See* Keller v. State Bar of Cal., 496 U.S. 1, 17 (1990); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 242 (1977).

75. *Keller*, 496 U.S. at 5; *Abood*, 431 U.S. at 211.

76. *Keller*, 496 U.S. at 5; *Abood*, 431 U.S. at 213.

77. *Keller*, 496 U.S. at 17; *Abood*, 431 U.S. at 242.

78. Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1426-27 (2001).

79. *See Johanns*, 554 U.S. at 561-62.

Arguably, the beef promotions also are largely the outcome of activity by the private citizens on the Beef Promotion Board.[80] The beef ads are only legally linked to the United States government under a regulatory scheme that is generally unbeknownst to the public. Next, this article discusses the biggest concern stemming from the *Livestock Marketing* result: government speech the public misperceives as private.

VI. "GOVERNMENT" SPEECH BY ANY OTHER NAME IS MISLEADING

The government speech in *Johanns* and *Rust* share an attribution problem. In *Rust*, the government successfully asserted that the subsidies were part of a government family planning programmatic message that did not leave room for abortion counseling.[81] Nevertheless, the doctors in *Rust* were not required to disclose that their medical advice was restricted by the funding program of the United States.[82] When patients were counseled by these clinics and doctors, they were unaware the advice had been molded by the United States.

The beef promotion program is an example of what has been characterized as government "ventriloquism."[83] The LMA correctly pointed out that the beef ads were frequently attributed to the "America's Beef Producers."[84] The Beef Promotion Board is comprised of all private citizens.[85] "Livestock producers have always been led to believe that checkoff programs are run by the producers, not the federal government."[86] The governmental link to these beef pro-

---

80. Even if the Beef Promotion Board is only tangentially government-run, it is still a statutory creation, formed only for the purpose of promoting beef consumption. In other words, it is not an association like the Jaycees or the Boy Scouts "where ideas are formed, shared, developed, and come to influence character." Shiffrin, *supra* note 56 at 865. According to Shiffrin, private social organizations and associations are the places where "[i]deas are tested, developed, and accepted or rejected...." Shiffrin, *supra* note 56 at 865. These associations heavily influence individual views. As such, any compelled participation seriously jeopardizes individual freedom of thought. Shiffrin, *supra* note 56 at 865-66. The concerns about the private versus governmental nature of the Beef Board are not the same concerns that Shiffrin asserts about compelled participation in social or political organizations.

81. *Rust*, 500 U.S. at 190.

82. *See generally* 42 U.S.C. §§ 300 – 300a-6 (1970) (which do not require disclosure of government restrictions).

83. *See* Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 50 (2000) (discussing ventriloquism with respect to government speech).

84. *Johanns*, 544 U.S. at 555.

85. *Id.* at 553.

86. Agriculture Online, Campaign for Family Farms Expresses Outrage, http://www.agriculture.com/ag/story.jhtml?storyid=/templatedata/ag/story/data/agNews_050523crCHECKOFF3.xml&categoryid=/templatedata/ag/category/data/agnewscategory-livestock.xml&page=6 (last visited Mar. 14, 2006).

motion messages is legalistic, technical and completely misunderstood by the public and the industry, at least until the Court's decision.

The USDA argued that the checkmark logo on program ads designated the messages as government speech.[87] In other words, USDA contended that the public understands that these ads reflected the statements of USDA under the statutory checkoff system. In questioning during oral arguments, the justices seemed highly skeptical that the public understood the ads were government messages.[88]

Nevertheless, as a matter of free speech law, the Court was unconcerned if the public misperceives the source of ads. The "correct focus is not on whether the ads' audience realizes the government is speaking, but on the...purported interference with respondents' First Amendment rights."[89] Neither the Beef Act nor the USDA's order establishing the checkoff fees mandated attribution in the ads to the beef industry.[90] In other words, as long as the statute did not actually require the misleading attribution in the ads, then public misperception is irrelevant to the constitutionality of the fee scheme.

Arguably, the majority's approach distances Congress and USDA from the speech by placing the blame for any misattribution on the Beef Promotions Board that generated the ads, not on Congress that wrote the statute or the USDA that administers the program. At the same time, however, Congress and USDA were deemed to have sufficient control over the Board and the ads for the Court to label the promotion program as government speech. The Supreme Court's opinion permits government to have it all ways: enough control over the promotions to elevate them to government speech, thus avoiding any First Amendment complaints of the dissenting industry members, but no responsibility for misattribution in the ads that leaves the public confused about their source.

This lack of transparency regarding government sponsorship of messages is inherently misleading.[91] Without adequate disclosure of the source of any particular message the public cannot evaluate the content and credibility of the message itself.

If the government can hide the fact that it is influencing the ability of private speakers to speak and their messages when they do so, it can skew the speech market and the basis of its political support in unaccountable ways. Thus, accountability depends most fundamentally upon the government adequately

---

87. Transcript of Oral Argument at 26, *Johanns*, 544 U.S. 550 (No. 03-1165).
88. *Id.*
89. *Johanns*, 544 U.S. at 564.
90. *Id.* at 565.
91. *See* Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 1008-09 (2005).

informing the citizenry of the fact that it is speaking when it engages in a government/private speech interaction.[92]

Johanns dissenting justices, Souter, Kennedy and Stevens, would have elevated correct attribution of government speech to the level of constitutional mandate.[93] They considered the beef promotion statute to be unconstitutional because it did not require that the ads reflect government sponsorship. "[A] compelled subsidy should not be justifiable by speech unless the government must put that speech forward as its own."[94] According to these dissenters, inadequate disclosure of government speech can thwart the democratic process. "Democracy...ensures that government is not untouchable when its speech rubs against the First Amendment interests of those who object to supporting it; if enough voters disagree with what government says, the next election will cancel the message."[95]

Contrary to the *Johanns* majority approach, the Constitution provides the only adequate constraint on the government's power to mislead or deceive the public with government-mandated promotional programs. When government speech is not adequately disclosed or is misattributed to private parties, taxpayers and voters cannot confront and challenge their elected officials about an offending message.[96] In other words, Congress must be willing to endure the wrath of PETA and vegans, nutritionists and others when Congress adopts a policy to actively promote one food choice such as beef. When a statutory promotion scheme like the Beef Act does not provide for that accountability, government speech cannot be the mechanism to circumvent challengers' free speech complaints. "[B]efore courts accept any government assertion that a challenged program is immune from First Amendment scrutiny because it involves 'government speech,' they should at least require the government to ensure that its identity as speaker is transparent."[97] Government speech can add an important perspective to the marketplace of ideas, but only if the government sponsorship is transparent.

Justice Ginsburg concurred in the *Johanns* outcome because she (and Justice Breyer) perceived the beef promotion program as permissible economic

---

92. Leslie Gielow Jacobs, *Who's Talking? Disentangling Government and Private Speech*, 36 U. MICH. J. L. REFORM, 35, 57 (2002).

93. *Johanns*, 544 U.S. at 580 (Souter, Kennedy, Stevens, Js., dissenting).

94. *Id.* at 571 (Souter, Kennedy, Stevens, Js., dissenting).

95. *Id.* at 575 (Souter, Kennedy, Stevens, Js., dissenting).

96. Howard M. Wasserman, *Compelled Expression and the Public Forum Doctrine*, 77 TULANE L. REV. 163, 188 (2002).

97. Lee, *supra* note 89, at 1048. Lee argues that the majority approach to attribution in *Johanns* was "misguided, for it failed adequately to account for the essentially private nature of the speech at issue ...." Lee, *supra* note 89, at 989.

regulation.[98] Nevertheless, she was particularly concerned that the beef promotion scheme administered by USDA contradicted USDA dietary guidelines regarding consumption of trans-fats found in beef.[99] The 2005 USDA Dietary Guidelines list fruits, vegetables, low-fat dairy products and whole grains as the "Food Groups to Encourage."[100] Trans fatty acid consumption is to be kept "as low as possible...with most fats coming from sources of polyunsaturated and monounsaturated fatty acids, such as fish, nuts, and vegetable oils."[101] In fact, animal products are shown, in the guidelines, as the second highest source of dietary trans-fats after process cakes, cookies, pies, and crackers.[102] So why is this same federal agency that recommends restricting saturated fats also encouraging beef consumption via the beef promotion program?

Any such alleged inconsistency could be addressed by federal administrators if they were called to answer for it by informed consumers. Again, if the *Johanns* dissenters' concern for a factually-informed public were addressed through mandatory ad attribution, then the public could demand that the USDA reconcile beef promotions with the food pyramid guidelines. Accordingly, if proper attribution is required, the citizenry can protect itself against inconsistent positions by its government.

VII. WHO POLICES DECEPTIVE GOVERNMENT SPEECH?

After *Livestock Marketing*, the pork checkoff promotion program would be treated as another example of government speech.[103] Like the beef ads, the pork promotions mislead about the government source of the messages by stating that they sponsored by the National Pork Board, not the USDA.[104]

But pork promotions that tout pork as "the other white meat" may be more problematic than just misleading consumers about their government source. Arguably, the "other white meat" promotion goes beyond contradicting the USDA guidelines and outright deceives consumers into thinking that pork is a

98. *Johanns*, 550 U.S. at 570 (Ginsburg, J., concurring) (citations omitted).

99. *Id.* at 569-70 (Ginsburg, J., concurring).

100. Dietary Guidelines for Americans 2005 – Food Groups to Encourage, http://www.health.gov/dietaryguidelines/dga2005/document/html/chapter5.htm (last visited June 14, 2006).

101. Dietary Guidelines for Americans 2005 – Fats http://www.health.gov/dietaryguidelines/dga2005/document/html/chapter6.htm (last visited June 21, 2006).

102. *Id.*

103. Prior to the decision in *Johanns*, the Sixth Circuit declared the Pork Promotion, Research and Consumer Information Act unconstitutional based on *United Foods*. Mich. Pork Producers Ass'n v. Veneman, 348 F.3d 157, 159 (6th Cir. 2003) *vacated and remanded by* 544 U.S. 1058 (2005).

104. *See* National Pork Board, http://www.pork.org/ (last visited Jan. 3, 2006).

lean meat equivalent to chicken and fish, which are touted by the guidelines as healthy protein choices.[105]

The Pork Board's own data reveal that no portion of the pig is as lean as white meat of the chicken (i.e. the breast). Their graphics tout eight cuts of pork that are leaner than a chicken thigh or dark chicken meat.[106] Further, these eight comparisons involve the most expensive, boneless cuts of pork like sirloin chops, tenderloins and loin roasts, not the cheaper cuts like ham or bacon.[107] One nutritional study of meats and cholesterol categorized pork as a red meat along with beef and veal.[108] The Center for Science in the Public Interest asked the FTC to halt the "other white meat" ads and require corrective advertising.[109] The FTC responded by referring the matter to the USDA.[110] There is no record the USDA or FTC took any further action on the complaint.[111]

The FTC's deferral to the USDA regarding the pork promotion complaint smacks of the "fox guarding the chicken coop" and reveals an unfortunate problem with the government speech outcome in *Johanns*. Truth in advertising by governmental or quasi-commercial government programs has been difficult to enforce because the federal advertising watchdog, the FTC, does not have jurisdiction over other government agencies.[112] As such, there is no outlet to address alleged deceptive speech by government under the *Johanns* result.

Commentators may disagree on the role of government in advocating particular views on unsettled social issues.[113] Few would likely dispute, however, the need for government speech to be non-deceptive.[114] Unfortunately, the

---

105. *See* National Pork Board – Quick Facts, http://www.pork.org/NewsAndInformation/QuickFacts/porkFactPDFS/pg9.pdf (last visited Apr. 19, 2006) (stating that the Other White Meat campaign has increased recognition of pork as a white meat).

106. *See id.*

107. *See id.* (showing that eight cuts of pork are leaner than a chicken thigh but none are leaner than a chicken breast).

108. Donald B. Hunninghake et al., *Incorporation of Lean Red Meat into a National Cholesterol Education Program Step I Diet: A Long-Term, Randomized Clinical Trial in Free-Living Persons with Hypercholesterolemia,* 19 J. OF THE AM. C. OF NUTRITION 351, 356 (2000).

109. Daniel P. Puzo, *Consumer Group Files Complaint over Pork Ads*, L.A. TIMES, Apr. 5, 1990, at H33.

110. Leila Farzan, *Trimming the Fat Off U.S. Ad Budgets*, CHI. TRIB., Sept. 14, 1995, at N25.

111. *Id.*

112. James Mullen & Thomas A. Bowers, *Government Advertising: A Runaway Engine?,* 8 J. OF ADVER. 39, 40 (1979).

113. *See* Abner S. Greene, *Government Speech on Unsettled Issues,* 69 FORDHAM L. REV. 1667 (2001).

114. *See generally* Randall P. Bezanson, *The Government Speech Forum:* Forbes *and* Finley *and Government Speech Selection Judgments*, 83 IOWA L. REV. 953, 985-86 (1998) (stating

Court's conclusion in *Johanns* allows government to claim speech as its own under statutory schemes, but then disavow any constitutional responsibility for misattribution, contradiction or deception.

VIII. A BETTER GOVERNMENT SPEECH POLICY

A disclosure rationale was central to the Ninth Circuit Court of Appeals' decision to uphold anti-smoking ads in California. In *R.J. Reynolds Tobacco Co. v. Shewry*, tobacco companies paid a portion of California's anti-smoking surtax based on its research and marketing activities.[115] The tax was also assessed against wholesale distributors of cigarettes and on consumers.[116] Anti-smoking ads, paid for by the surtax, intentionally targeted their negative messages at the tobacco industry, rather than just tobacco, cigarettes and smoking in general.[117]

R.J. Reynolds complained that paying for any portion of advertisements that were so contrary to their interests violated their First amendment rights.[118] Just like the cattle sellers in *Johanns*, the tobacco companies claimed a constitutional violation in the link between the excise tax and the government speech to which they objected.[119] In upholding the tax and its use in funding the ads, the Ninth Circuit Court of Appeals emphasized that each of the challenged ads expressly noted it was sponsored by the government entity of the California Department of Health Services.[120] Accordingly, the state was free to spend the surtax funds on it own message:

> [T]here can be no doubt that the tobacco companies' funds are being used to speak on behalf of the people of California as a whole. Any coercion -- that is, the collection of funds used to produce a particular message -- is performed not in the name of [the tobacco companies], but of the state.[121]

The Ninth Circuit had no reason to discuss the problem of false attribution, since the anti-smoking ads were clearly identified as government speech.[122] The Court, however, opined that "[t]he analysis may differ when the government nominally controls the production of advertisements, but as a practical matter has

---

that "the protection granted government speech under the First Amendment, while perhaps presumed, is contingent on such matters as truthfulness and social or cultural utility").

115. R.J. Reynolds Tobacco Co. v. Shewry, 384 F.3d 1126, 1130 (9th Cir. 2004).
116. *Id.* at 1130-31.
117. *Id.* at 1130.
118. *Id.* at 1131.
119. *See id.*
120. *Id.* at 1130.
121. *Id.* at 1136.
122. *See id.*

delegated control over the speech to... only one segment of the population."[123] Arguably, the beef promotion program is one such program only "nominally" controlled by the government, since the Beef Promotion Board is comprised of all private citizens.[124] Nevertheless, the Supreme Court applied the same analysis as the Ninth Circuit regarding the propriety of targeted surtaxes to fund speech contrary to the taxpayer's interest.[125] By contrast, however, the beef ads lacked the clear government attribution found in the tobacco ads.[126]

Presumably, the majority of justices in *Johanns* would not disagree with a policy of open accountability regarding the role of government versus private parties in ad sponsorship. The Court simply did not see the concerns about misattributed government speech rising to the level of a constitutional defect when the confusion was not dictated by the statute itself.[127] Unfortunately, without the availability of constitutional claims, the Court's conclusion creates a vacuum for the public to protect itself from misleading or deceptive government speech.

IX. CONCLUSION

The ruling in *Johanns* likely shields numerous other similar federal and state-mandated agricultural advertising campaigns for products such as corn, eggs, mangoes, popcorn and even alligators.[128] The outcome protects more than $700 million in media revenues that is spent each year under the twelve largest federal agricultural promotion programs.[129] Nothing in the *Johanns* result, however, is limited to the agricultural sector. The Court's opinion opens new opportunities for Congress or states to create statutory promotional schemes which

123. *Id.*

124. *See* Beef Board Elects New Members, Elects Leadership, *supra* note 6.

125. *See Johanns*, 544 U.S. at 559.

126. *See id.* at 553.

127. *See generally* Greene, *Government of the Good*, *supra* note 81, at 51 (stating, "we should view the presence or absence of ventriloquism as a ... point of political theory, but not as a sufficient ground on which to assess the constitutionality of government speech.").

128. The Fifth Circuit struck down a Louisiana law that required alligator hunters and farmers to fund generic advertising. Pelts & Skins, LLC v. Landreneau, 365 F.3d 423, 425 (5th Cir. 2004) *vacated and remanded by* 544 U.S. 1058 (2005). The Third Circuit held that "Got Milk" promotions funded by the Dairy Act checkoff fees were unconstitutional. Cochran v. Veneman, 359 F.3d 263 (3d Cir. 2004), *vacated and remanded by* 544 U.S. 1058 (2005).

129. Alice Chang and Tony Tagliavia, *Johanns, Mike (Agriculture Secy.) v. Livestock Marketing Association, et al. / Nebraska Cattleman, In,* MEDILL SCHOOL OF JOURNALISM – ON THE DOCKET, (July 12, 2004), *available at* http://www.medill.northestern.edu/~secure/docket/mt/archives/00868.php; *see also* Jaret N. Gronczewski, *Got Milk? ... Not Today: The Third Circuit Defends the Free Speech Rights of Small Dairy Farmers,* 50 VILL. L. REV. 1237, 1263 (2005) (stating "it now seems that practical economic considerations will rule the day over the free speech rights that many circuit courts...defended adamantly").

would force industry to fund government messages. For example, AARP, financial service firms or Medicare providers could be obligated to contribute to messages about Social Security reform regardless of whether the message reflects their positions. Energy producers could be obligated to fund government statements about conservation, exploration, or alternative sources, any of which might contradict a party's own business interests or strategies. *Johanns* reveals that the government can tap into significant private resources to fund these promotions without regard to the free speech rights of dissenters. Further, such ad campaigns can be confusing about private sponsorship of the ads or even be deceptive in their content, as long as no statute or regulation dictates a misleading approach and no dissenting contributor is individually labeled as the ad source.

Alternatively, Congress could hold itself to a non-deceptive standard regarding ad attribution, regardless of any constitutional requirement. The recent outcry over government-sponsored video news releases ("VNRs") suggests Congress might analyze and rectify a government speech misconception.[130] These VNRs were shown on newscasts and appeared to be just like any other news segment.[131] As it turned out, however, the pieces were produced by various federal administrative agencies and were broadcast across the country without any acknowledgement of the government's role in their production.[132] Many television stations that broadcast the VNRs knew their federal origins but did not disclose that when the pieces aired.[133]

With respect to four Medicare-related segments, the U.S. General Accounting Office ("GAO"), an investigative arm of Congress, held that government-made news segments may constitute improper "covert propaganda" even if their origin is made clear to the television stations.[134] Disclosure to the public is the critical concern according to the GAO.[135] The Office ordered federal agencies not to use federal appropriations to create the VNRs unless the segments reveal the government source.[136] More recently, the Federal Communications Commis-

130. *See* David Barstow & Robin Stein, *The Message Machine: How the Government Makes News; Under Bush, a New Age of Prepackaged Television News,* N.Y. TIMES, Mar. 13, 2005.

131. *Id.*

132. *Id.*

133. *Id.*

134. *In re* Dept. of Health and Human Servs., Ctrs. of Medicare & Medicaid Servs. – Video News Releases (May 19, 2004) *available at* www.sourcewatch.org/images/f/fd/ GAOMedicareVNR.pdf.

135. *Id.*

136. *Id.*

sion ("FCC") ordered broadcasters to disclose the "the nature, source and sponsorship" of these materials they air.[137]

Perhaps a discussion of the government's role in the beef promotions will generate comparable concern about misattribution in the beef ads. Such a discussion will not provide any rights for dissenting industry members to avoid subsidizing the messages. However, it may provide for disclosure that will disassociate dissenting cattle sellers with the government's generic beef messages.

137. I. *Teinowitz,* and M. C*reamer, Fake News Videos Unmasked in FCC Crackdown,* 76 ADVERTISING AGE 3 (Apr 18, 2005).