



11350 Random Hills Road, Suite 800, Fairfax, Virginia 22030 Phone (703) 934-6101 Fax (703) 352-3678

fff@fff.org www.fff.org

Coercion: It's What's for Dinner in Postconstitutional America **by Sheldon Richman**

Most recent free-speech controversies have been about government efforts to restrict someone's right to express himself. So it is noteworthy that the U.S. Supreme Court has ruled in a case involving not stifled speech, but rather coerced speech. Alas, it decided the case wrongly.

Everyone has seen the generic TV commercials promoting beef ("It's what's for dinner"). Those ads are paid for by the beef cattlemen. But there's a hitch. Ranchers must help pay the cost even if they don't want to. Each ranch is assessed one dollar per head.

This should immediately raise a question: how can some cattlemen force other cattlemen to pay for something against their will? After all, you and I have no power to force others to help us buy television time, no matter how worthy the cause. If we tried, we would be charged with robbery.

So how do the cattlemen get away with it? Simple. They got Congress to pass a law in 1985. As the *Washington Post* reported,

The Agriculture Department collects the "checkoff" fees, which total more than \$80 million annually, and distributes the money to an industry group appointed by the department to run the program. The program is intended to boost demand for beef and boost profits for producers, said Monte Reese, chief operating officer of the Cattlemen's Beef Board, the group that runs the program.

According to the *Post*,

Similar programs run by federal and state authorities promote pork, milk, eggs, soybeans and cotton. Lower courts have struck down the "Got Milk?" dairy promotion and pork ads promoting "the other white meat."

The Supreme Court is reviewing the latter decision.

Cattle ranchers in South Dakota and Montana oppose the beef program because they dislike the campaign's implied message that all beef — grain-fed and grass-fed, domestic and foreign — is alike. Feeling that their views are ignored by the Agriculture Department and the Cattlemen's Beef Association, the dissenters went to court and prevailed at the district and appellate levels.

The Supreme Court's reversal

The Bush administration (great advocate of freedom that it is) and cattlemen from Nebraska appealed to the Supreme Court. [The ruling](#) in the consolidated cases *Johanns v. Livestock Association* and *Nebraska Cattlemen v. Livestock Marketing Association* was delivered this past May.

Justice Antonin Scalia led a 6-3 majority in upholding the coercive program. He was joined by Chief Justice William Rehnquist and Justice Clarence Thomas. All three are reputed to be committed to a strict interpretation of the Constitution, but this decision should dispel that naive notion. They were joined by Justices Sandra Day O'Connor, Ruth Bader Ginsburg, and Stephen Breyer.

For Scalia,

[The] dispositive question is whether the generic advertising at issue is the Government's own speech and therefore is exempt from First Amendment scrutiny.

You may wonder why it matters whether the message is the government's or a private industry's. Coerced subsidy of speech is coerced subsidy of speech, right? Not for Scalia and his colleagues, who, quoting an earlier case, noted,

Our compelled-subsidy cases have consistently respected the principle that “[c]ompelled support of a private association is fundamentally different from compelled support of government.”

In other words, forcing support for the government's message is constitutionally permissible. Again quoting earlier cases, Scalia writes,

“Compelled support of government” — even those programs of government one does not approve — is of course *perfectly constitutional, as every taxpayer must attest*. And some government programs involve, or entirely consist of, advocating a position. “The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.”... We have generally assumed, though not

yet squarely held, that *compelled funding of government speech does not alone raise First Amendment concerns*.... Citizens may challenge compelled support of private speech, but have *no First Amendment right not to fund government speech*. [Emphasis added.]

Rationalizing coercion

Here Scalia makes explicit what few like to think about: government by nature routinely aggresses against peaceful persons. It takes their money for a variety of purposes, including advocacy, with which they may vehemently disagree, and they have no legal standing to object. So much for the vaunted “rights of the minority” under democracy. It reminds me of what Edmund Opitz wrote in *The Freeman* years ago — that democracy means that 50 percent plus 1 equals 100 percent, while 50 percent minus 1 equals 0 percent.

This would be a less severe problem if all government did was protect life and property. Even then, taxation would not be justified, but at least the government would not be in the advocacy business generally as it is today. Since the state has its hands in everything, it is able to take stands on everything. Take education, for example. The government’s role in providing (what it calls) education gives it a pretext to advocate all kinds of things of an ethical nature. There is no value-free education. Under Scalia’s rule parents and other taxpayers who object to being forced to subsidize offensive advocacy may only submit. Scalia calls this constitutional, but what if the government’s very activity is unconstitutional? Where does the Constitution delegate to Congress the power to persuade us to eat more beef? Alas, the respondents did not ask the Court to rule on that question.

But leaving that aside, does anyone seriously think that the “Beef: It’s What’s for Dinner” campaign is something other than a cattle-industry message? Scalia won’t hear of it:

The message of the promotional campaigns is effectively controlled by the Federal Government itself.

The message set out in the beef promotions is from beginning to end the message established by the Federal Government.... Congress and the Secretary [of Agriculture] have set out the overarching message and some of its elements, and they have left the development of the remaining details to an entity whose members are answerable to the Secretary (and in some cases appointed by him as well).

Moreover, the record demonstrates that the Secretary exercises final approval authority over every word used in every promotional campaign....

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.

Yes, the government is deeply involved in propagating the message. But it is so, precisely because influential cattle interests had their connections in Congress and the Agriculture Department pass the program. (Some congressmen surely voted for the program simply to get other members to vote for *their* pet schemes.) Thus calling the campaign a “message established by the Federal Government” is misleading. No doubt the cattlemen sought the program to overcome what they believed would be a crippling free-rider problem: cattle ranchers would benefit whether or not they contributed to the advertising campaign. But even if there were no other way to overcome that problem (and there are other ways), that would not justify summoning the government for help. A free society lives by persuasion and consent, not power and coercion.

Scalia scoffed at the claim that the program gives authority to politically unaccountable interests, presumably the dominant cattlemen’s organization. On the contrary, he writes, the program is controlled by politically accountable people: members of Congress and the secretary of agriculture. In other words, any cattleman who objects to having his money used for a message he abhors is perfectly free to elect a new Congress and a new president, who will then appoint a new secretary of agriculture. That’s what they call democratic accountability.

The dissenting justices were led by David Souter, who had no doubt that the pro-beef message is seen as a private message: “No one hearing a commercial for Pepsi or Levi’s thinks Uncle Sam is the man talking behind the curtain. Why would a person reading a beef ad think Uncle Sam was trying to make him eat more steak?” Exactly.

This latest ruling from the Supreme Court confirms what we have long known. We are living in postconstitutional America.

*Sheldon Richman is senior fellow at The Future of Freedom Foundation, author of **Tethered Citizens: Time to Repeal the Welfare State**, and editor of [The Freeman](#) magazine.*

This article was originally published in the August 2005 edition of *Freedom Daily*.