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CONSTITUTIONAL LAW—FIRST AMENDMENT—FEDERAL REQUIREMENT THAT CATTLE PRODUCERS FUND STATUTORILY CREATED CATTLEMEN’S BOARD AND BEEF PROMOTION OPERATING COMMITTEE DOES NOT VIOLATE FREE SPEECH OR ASSOCIATIONAL RIGHTS

United States v. Frame (1989)

I. Introduction

The advent of large federal budget deficits in the 1980s has forced Congress to pursue traditional governmental ends through means that do not exacerbate the budget problem. One example is the Beef Research and Information Act (the Act) which requires cattle producers to pay one dollar to a Cattlemen’s Beef Promotion and Research Board on each head of cattle sold in the United States. The Act allows the government to achieve its goal of maintaining and strengthening markets.

2. See id. § 2904(8)(A); 7 C.F.R. § 1260.311(a) (1989). Individuals who purchase cattle from a cattle producer are designated “collecting person[s]” under the Act and are required to collect the one dollar per-head assessment from the producer and remit the assessment to the Cattlemen’s Board. Id. Section 2904(8)(A) sets forth the collection procedure:

(A) the [beef promotion and research] order shall provide that each person making payment to a producer for cattle purchased from the producer shall, in the manner prescribed by the order, collect an assessment and remit the assessment to the Board. The Board shall use qualified State beef councils to collect such assessments.

7 U.S.C. § 2904(8)(A) (1988). In addition, producers are charged a two percent fine each month beginning with the day following the date such assessments were due. 7 C.F.R. § 1260.175 (1989). For a detailed discussion of the statutory scheme of the Beef Research and Information Act, see infra notes 17-20 and accompanying text.

for beef produced in the United States, without having to expend dollars from general revenue funds. Consequently, the deficit is not increased. Prior Supreme Court cases, however, have held that the right to freedom of speech and association secured by the first amendment is implicated when the government forces a citizen to fund organizations that espouse views which that citizen rejects. In *United States v. Frame*, the United States Court of Appeals for the Third Circuit rejected a cattle producer's contention that the Act violated his first amendment rights by forcing him to associate with entities that espoused views with which

3. 7 U.S.C. § 2901(a)(4) (1988). The statute contains an explicit statement of Congressional findings and declaration of policy: "Congress finds that the maintenance and expansion of existing markets for beef and beef products are vital to the welfare of beef producers and those concerned with marketing, using, and producing beef products, as well as to the general economy of the Nation." *Id.*

Congress also made several other findings: that beef and beef products are a valuable part of human diet; that the production of beef and beef products plays a significant role in the nation's economy; and that beef and beef products should be readily available and marketed efficiently to ensure that the people of the United States receive adequate nourishment. *Id.* § 2901(a)(1)-(3).

To achieve these goals, the Act directed the Secretary of Agriculture to issue a Beef Promotion and Research Order. *Id.* § 2903(b). The Act also delineated the fundamental terms of the order. *Id.* § 2904. The Secretary's order implementing the Act, which became effective on July 18, 1986, is codified at 7 C.F.R. §§ 1260.101-.316 (1989).


5. The Supreme Court has held that mandatory assessments implicate free speech and associational rights in two separate contexts: mandatory union dues and mandatory bar association dues. *See*, e.g., *Lathrop v. Donohue*, 367 U.S. 820 (1961) (mandatory bar association dues used to fund apolitical activities held constitutional); *Railway Employee's Dep't v. Hanson*, 351 U.S. 225 (1956) (mandatory union dues infringe free speech and association rights but are constitutional). For a discussion of the Court's decisions considering mandatory funding of unions and bar associations, see *infra* notes 67-79 and accompanying text.

In addition, several circuit courts have held that requiring students in public universities to fund organizations, such as school newspapers, that espouse views rejected by dissenting students, implicates free speech and associational rights. *See*, e.g., *Kania v. Fordham*, 702 F.2d 475 (4th Cir. 1983) (requiring students of public university to fund campus newspaper held constitutional). For a discussion of the circuit court opinions considering mandatory funding of university organizations, see *infra* notes 80-83 and accompanying text.

6. 885 F.2d 1119 (3d Cir. 1989).
he disagreed.\textsuperscript{7}

\section*{II. Discussion}

In \textit{Frame}, the defendant was the owner of a cattle auction sales business in Lancaster County, Pennsylvania, and raised cattle at his residence in Chester County, Pennsylvania.\textsuperscript{8} Under the Act, Frame was required to collect one dollar per head from the proceeds derived from the sale of cattle at his auction barn and to pay the assessments on each head of cattle he sold as a producer.\textsuperscript{9} Since the effective date of the Act, however, Frame had not collected or remitted the required assessments nor filed the required reports.\textsuperscript{10}

In November 1986, the United States brought an action to recover Frame's unpaid dues.\textsuperscript{11} Frame admitted that he had not paid the assessments, but argued that the Act violated his first amendment right to remain silent and to refrain from associating.\textsuperscript{12} The District Court,
however, concluded that the Act did not burden Frame's first amendment rights because the Operating Committee's promotions were disseminated by the government, and that no citizen had the right to refuse to support any federal governmental program because that citizen disagreed with the government's message.13

On appeal, the Third Circuit rejected the District Court's "government speech" holding, but affirmed on other grounds.14 The Third Circuit held that the Act satisfied the three-pronged test utilized to determine the constitutionality of impingements on first amendment associational rights: (1) the impingement was justified by a compelling state interest; (2) the Act was ideologically neutral and; (3) the Act infringed on first amendment rights no more than necessary to accomplish its purpose.15 Justice Sloviter, dissenting, argued that the government had not asserted even a substantial interest, that the Act was not ideologically neutral and that it did infringe on first amendment rights more than was necessary to accomplish its purpose.16

The Frame court began its analysis by explaining the statutory scheme. Pursuant to the Act, a Cattlemen's Beef Promotion and Research Board (Cattlemen's Board) and a Beef Promotion Operating Committee (Operating Committee) were both created.17 The Operat-

13. Frame, 685 F. Supp. at 1481-82. The District Court began by presuming that the "speech . . . is made by the government." Id. at 1482. The District Court then concluded that while the first amendment protects an individual's right to disagree with the government, it would be a "strange result" if an individual could invoke the first amendment to refuse to contribute to the cost of government. Id.

The Act established a Beef Promotion Operating Committee which was responsible for developing plans of promotion and advertising. 7 U.S.C. § 2904(4)(B) (1988). For a detailed discussion of the statutory scheme, see infra notes 17-20 and accompanying text.

14. Frame, 885 F.2d at 1137. For a discussion of the applicability of the government speech doctrine, see infra notes 56-67 and accompanying text.


16. Frame, 885 F.2d at 1143-49 (Sloviter, J., dissenting). For a discussion of Justice Sloviter's dissent, see infra notes 49-56 and accompanying text.


'Qualified State beef council' means a beef promotion entity that is authorized by State statute or a beef promotion entity organized and operating within a State that receives voluntary assessments or contributions; conducts beef promotion, research and consumer and
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ing Committee is responsible for developing plans or projects of promotion, advertising, research and consumer and industry information.\(^8\)

All budgets, plans or projects of the Operating Committee approved by the Cattlemen’s Board become effective only upon final approval by the Secretary of Agriculture.\(^9\) The Secretary is also authorized to remove members of both the Cattlemen’s Board and the Operating Committee if the Secretary determines that the individual’s continued service would be detrimental to the purposes of the Act.\(^{20}\)

Following its discussion of the Act’s statutory scheme, the court then addressed Frame’s first amendment argument. The court began by acknowledging that the first amendment protects a citizen from compelled speech or association and that this protection is implicated when individuals are compelled by the government to finance private groups.\(^{21}\) To support this proposition, the Third Circuit cited *Abood v.*

industry information programs and that is certified by the board pursuant to this subpart as the beef promotion entity in such state.


Members of either entity serve without compensation. 7 U.S.C. § 2904(3) (Cattlemen’s Board); 7 U.S.C. § 2905 (Operating Committee).

18. 7 U.S.C. § 2904(4)(B) (1988). The Operating Committee is also authorized to enter into contracts with established national, nonprofit, industry-governed organizations to implement the Beef Promotion Act. *Id.* § 2906. The Operating Committee’s duties are set out in greater detail in the Secretary’s order. 7 C.F.R. § 1260.168 (1989).

The Cattlemen’s Board is required to administer the order, make rules and regulations to effectuate the terms of the order, elect members to serve on the Operating Committee and to approve or disapprove budgets submitted by the Committee. 7 U.S.C. § 2904(2). The Secretary’s order, as required by the Act, setting forth the powers and duties of the Board is contained in 7 C.F.R. §§ 1260.149-.150 (1989).

19. 7 U.S.C. § 2904(4)(C) (1988). In addition, the Board is required to submit to the Secretary an audit of its activities for each fiscal period. 7 C.F.R. § 1260.150(1) (1989). It must also maintain books and records for the Secretary’s inspection and audit. *Id.* § 1260.150(h). The Secretary must also approve all contracts for the implementation of any plans. 7 U.S.C. §§ 2904(6)(B); 7 C.F.R. §§ 1260.150(f) & (g), 1260.168(e) & (f) (1989).


21. *Frame*, 885 F.2d at 1130. First amendment protection from government compelled speech was first recognized by the Supreme Court in *West Virginia State Board of Education v. Barnette*. 319 U.S. 624 (1943). In *Barnette*, the Court held that the first amendment bars a state from forcing school children to salute and pledge allegiance to the flag. *Id.* at 642. In the next compelled speech case, *Wooley v. Maynard*, the Court held that a state could not compel citizens to display an ideological slogan on the citizen’s automobile license plates. 430 U.S. 705, 713 (1977). The *Wooley* court asserted that the “right to freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.” *Id.* at 714; see also *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 525, 559 (1985) (“‘There is necessarily a . . . freedom not to speak publicly . . . .’”).

In *Abood v. Detroit Board of Education*, the Court found the right to refrain from speaking implicated when employees are forced to finance a union which espouses views which the employees reject. 431 U.S. 209, 234-35 (1977). Specifically, the Court held that state laws authorizing unions and management to
Detroit Board of Education, where the Supreme Court held that state mandated assessment of funds from employees to finance a union’s political and ideological activities, which were extraneous to the union’s collective bargaining duties, violated the dissenting employee’s right to refrain from associating. The concurring opinion in Abood, however, stated that the right to refrain from speaking or associating, commonly referred to as “negative first amendment rights,” is not implicated when the government forces a citizen to support a governmental entity which espouses views the citizen rejects. The district court had relied on this distinction when it held that the promotions sponsored by the Cattlemen’s Board and Operating Committee were messages disseminated by government which Frame could not refuse to support.

The Third Circuit rejected the district court’s conclusion for two reasons. First, the court concluded that the rationale underlying the right to be free from compelled speech or association did not support the district court’s opinion. The court held that where the government enter into “agency shop” agreements, which require every employee to pay the union a service charge equal in amount to union dues, impinge upon the employee’s right to refrain from speaking. The Court reasoned that “contributing to an organization for the purpose of spreading a political message is protected by the First Amendment...because ‘[m]aking a contribution...enables like-minded persons to pool their resources in furtherance of common political goals.’” The First amendment protection from government compelled association was also recognized in Abood. The Court recognized that forcing an employee to finance a union interferes with an employee’s freedom to associate. The right of freedom to refrain from associating was explicitly recognized in Roberts v. United States Jaycees, where the Court noted that “[f]reedom of association...plainly presupposes a freedom not to associate.”


23. Abood, 431 U.S. at 209. The first amendment rights of freedom not to speak or associate are commonly referred to as “negative” first amendment rights.

24. Id. at 259 n.13 (Powell, J., concurring). Justice Powell indicated that while compelled funding of private associations is constitutional only if supported by a compelling state interest, requiring support of government needs no such justification. Id. (Powell, J., concurring) Justice Powell asserted that the reason for permitting the government to compel payment of taxes and to spend money on controversial projects without requiring a compelling state interest is that government is representative of the people. Id. (Powell, J., concurring) A private association, such as a union, according to Justice Powell, is fundamentally different because it “represent[s] only...one segment of the population, with certain common interests.” Id. (Powell, J., concurring) Justice Powell’s proposed distinction was adopted by the Frame court. Frame, 885 F.2d at 1131.

25. Frame, 658 F. Supp. at 1482. Although not citing Abood, the District Court’s opinion implicitly accepted the doctrine of “government speech.” Id. Under this doctrine, compelling citizens to support government, when those citizens reject the messages disseminated by government, does not implicate the citizen’s first amendment rights. For a discussion of the district court’s reasoning, see supra note 13 and accompanying text.

26. Frame, 885 F.2d at 1132. Specifically, the Frame court noted that “the underlying rationale of the right to be free from compelled speech or association...
ment requires a "publicly identified group to contribute to a fund earmarked for the dissemination of a particular message associated with that group," the issue of government speech will not arise. Second, the court found that Justice Powell's justification in *Abood* for distinguishing compelled support of government from support of a private association "does not fit comfortably" with the Beef Promotion Act.

In *Abood*, Justice Powell stated that a union's expressive activities cannot be considered government speech because unions represent only one segment of the population with common interests. Because the Operating Committee was also composed of only one segment of the population, the majority and dissenting opinions in *Frame* both concluded that it was analogous to a union, so that its expressive activities could not be considered government speech.

After rejecting the district court's government speech holding, the Third Circuit considered whether the Act unduly impinged on Frame's negative first amendment rights. The court determined that the Act should be subject to the test set forth by the Supreme Court in *Roberts v. United States Jaycees*. *The Roberts Court held that interference with asso-

leads us to conclude that the compelled expressive activities mandated by the Beef Promotion Act are not properly characterized as 'government speech.'" *Id.* The court failed to state, however, what that rationale was. For a discussion of the rationale underlying negative first amendment rights, see *infra* notes 97-100 and accompanying text.

27. *Frame*, 885 F.2d at 1132. The court argued that the government speech doctrine applied only when a close coerced nexus existed between the compelled funding and the expressive activities:

[T]he right to be free from compelled [association and speech] presuppose[s] a coerced nexus between the individual and the specific expressive activity. When the government allocates money from the general tax fund to controversial . . . expressive activities, the nexus between the message and the individual is attenuated. In contrast, where the government requires a publicly identified group to contribute to a fund earmarked for the dissemination of a particular message associated with that group, the government has directly focused its coercive power for expressive purposes. *Id.* (citations omitted).

28. *Id.* at 1133.

29. *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring). For a further discussion of this distinction, see *infra* notes 57-67 and accompanying text.

30. *Frame*, 885 F.2d at 1133, 1145-46 (Sloviter, J., dissenting).

31. *Id.* at 1133-34.

32. 468 U.S. 609 (1984). In *Roberts*, the Court upheld a state statute that, as interpreted by state agencies and courts, required the Jaycees, a private organization, to admit women as members. *Id.* at 628-29. The Court concluded that the statute infringed on the right not to associate, but held that this encroachment on first amendment rights was justified by the state's compelling interest in eliminating discrimination. *Id.* at 629; see also *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987) (state statute requiring private all male club to admit women constitutional). For a discussion of the potential conflict between the policy of eliminating discrimination and the right of association, see *Linder, Freedom of Association after Roberts v. United States Jaycees*, 82
ciational rights is constitutional only if the interference is (1) justified by compelling state interests, (2) unrelated to the suppression of ideas, and (3) not achievable through significantly less restrictive means. 33

Applying the first prong of this test, the Frame court, strongly influenced by the Act's legislative history, found that the government's interest in maintaining and expanding beef markets was sufficiently compelling to uphold the Act. 34 The court accepted Congress's finding that the continued bankruptcy of cattlemen would endanger both the country's meat supply and the entire economy. 35 The court was also influenced by Congress's hope that maintenance of the beef industry would ensure the preservation of the American cattlemens's traditional way of life. 36 Based on these economic and non-economic considerations, the court held that the Act was justified by compelling state interests. 37

The court next examined whether the Act was unrelated to the suppression of ideas. The court concluded that the purpose of the Act was ideologically neutral by comparing the Act's purpose with the purpose of other compelled expressive activities held unconstitutional. 38 For example, in Wooley v. Maynard, 39 the Supreme Court found unconstitutional a New Hampshire statute requiring vehicles to bear licenses embossed with the motto "Live Free or Die" when the avowed purpose


The Frame court recognized that the Beef Promotion Act implicated the right to refrain from associating and the right to refrain from speaking. Frame, 885 F.2d at 1133. The court also characterized the compelled speech as "commercial speech." Id. As the Frame court interpreted Supreme Court precedent, impingements on associational rights must be justified by a compelling state interest, while impingements on commercial speech rights must be justified by a substantial state interest. Id. at 1133-34. Since the right to refrain from associating was implicated by the Act, the court applied the more stringent compelling state interest test. Id.

33. Roberts, 468 U.S. at 623. For a discussion of Roberts, see supra note 32.
34. Frame, 885 F.2d at 1134-35 ("[T]he national interest in maintaining and expanding beef markets proves . . . compelling.").
36. Id. at 1135 (citing 121 Cong. Rec. H31,436 (daily ed. Oct. 2, 1975) (remarks of Rep. Railsback). The court also suggested that the government's interest in eliminating the problem of "free riders" justified the mandatory assessment. Id. at 1135. The "free rider" problem arose because before the mandatory fee, beef promotions were voluntarily financed, presumably to the benefit of all cattle producers, so that those who did not contribute received a benefit without sharing the costs. Id.
37. Id. The court also noted that the funding mechanism "plays an integral role" in furthering the interests of the Act and that the Cattlemen's Board and Operating Committee "prove similarly crucial to the scheme." Id.
38. Id. at 1137. The Frame court interpreted the second prong of the Roberts test as requiring that the Act be ideologically neutral. Id. at 1134.
of the statute was to promote state pride. Similarly, in *West Virginia Board of Education v. Barnette*, the Court struck down a state requirement that all school children pledge allegiance to the flag when the purpose of the rule was to further national unity. The Third Circuit concluded that the Act was ideologically neutral because its purpose, contrary to the purpose of the requirements in *Wooley* and *Barnette*, was to increase the sale of beef and not to prescribe an official orthodoxy.

Finally, in addressing the third element of the *Roberts* test, the court held for two reasons that the Act impinged on first amendment rights no more than was necessary to accomplish its purpose. First, the court noted that the Act's interference with first amendment rights "appears slight" compared with infringements upheld in prior Supreme Court cases. Second, the court found that the Act would not infringe on Frame's political beliefs because the Act prohibited expenditures for the purpose of influencing governmental action or policy. For these reasons, the court concluded that the Act did not impinge on first amendment rights more than was necessary to accomplish its purpose. Thus,

40. *Wooley*, 430 U.S. at 716. The Court concluded that the state's interest in promoting state pride by disseminating an ideology cannot outweigh an individual's right to avoid becoming the courier for the state's message. *Id.* at 717.


42. *Barnette*, 319 U.S. at 626-27 n.1. Specifically, the West Virginia State Board of Education made several findings:

[That] national unity is the basis of national security; that the flag of our Nation is the symbol of our National unity transcending all internal differences, however large within the framework of the Constitution; that the Flag is the symbol of the Nation's power; that emblem of freedom in its truest, best sense; that it signifies government resting on the consent of the governed, liberty regulated by law, protection of the weak against the strong, security against the exercise of arbitrary power, and absolute safety for free institutions against foreign aggression.

*Id.* at 627 n.1. In invalidating the statute, the Court stated that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein."

*Id.* at 642.

43. *Frame*, 885 F.2d at 1135.

44. *Id.* at 1136-37.

45. *Id.* at 1136. The court noted that unlike unions, which under a state authorized agency shop agreement are entitled to fees from all employees, union or nonunion, the Board will not engage in activities that necessarily implicate a broad range of ideological, moral, religious, economic, and political interests. *Id.* For a discussion of Supreme Court cases upholding state authorized agency shops, see *infra* notes 68-73 and accompanying text.

46. *Frame*, 885 F.2d at 1135. "The order shall prohibit any funds collected by the Board under the order from being used in any manner for the purpose of influencing governmental action or policy, with the exception of recommending amendments to the order." *Id.* at 1136 (citing 7 U.S.C. § 2904(10) (Supp. III 1985)).

47. *Frame*, 885 F.2d at 1137. The court also discounted Frame's argument that applying the statute to him would significantly burden his first amendment
because the Act satisfied the Roberts three prong test, the court rejected Frame's first amendment arguments. 48  

Justice Sloviter, although agreeing that the promotions were not government speech, argued that the Act failed to satisfy each prong of the Roberts test. 49 Instead of applying a compelling interest test, however, Justice Sloviter argued that the Act could not be justified under the less rigorous substantial interest test which is applied to regulations of commercial speech. 50 Justice Sloviter implied that the government has a substantial interest in regulating commercial speech only if the regulation is designed to protect consumers from fraud, illegal activity or harmful health effects. 51 Because the Act would not so protect consumers, Justice Sloviter concluded that it was not justified by a substantial rights by characterizing his objections to the statute as being a dispute over "mere" strategy.  

48. *Id.* at 1137. The court also rejected Frame's other constitutional arguments. First, the court held that the Act was a valid exercise of Congressional power under the Commerce Clause, explaining that the Congress had the authority under the Commerce Clause to promote commerce and that promoting commerce was the purpose of the Act. *Id.* at 1126-27. The court also held that the Act did not unlawfully delegate legislative authority to the Secretary of Agriculture or to the Cattlemen's Board. *Id.* at 1129. Because the Act set forth with unusual specificity the Secretary's duties, and because no legislative authority was delegated to members of the beef industry, the court found no unlawful delegation. *Id.* at 1128-29.  

Frame's challenge under the fifth amendment fared no better. First, the court held that the Act did not violate the equal protection component of the fifth amendment that prohibits the federal government from discriminating between individuals or groups. *Id.* at 1138. Since the Act did not create a suspect classification or impinge upon a fundamental constitutional right, the court applied, and found easily satisfied, a test that required that differences in treatment bear some rational relationship to a legitimate state purpose. *Id.* at 1137. Finally, the court rejected the claim that the Act effected a taking of private property for a private purpose because of Congress's finding that the maintenance of beef markets is vital to the general economy of the nation. *Id.* at 1137-38.  

49. *Id.* at 1144-49 (Sloviter, J., dissenting). Justice Sloviter agreed with the majority that the expressive activities of the Operating Committee did not constitute government speech. *Id.* at 1145-46 (Sloviter, J., dissenting).  

50. *Id.* at 1146 (Sloviter, J., dissenting). Justice Sloviter stated that because the compelled expressions at issue were commercial, the test for regulations of commercial speech was applicable. *Id.* (Sloviter, J., dissenting). In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the Supreme Court held that regulations of commercial speech must be justified by a substantial state interest. 447 U.S. 557, 568 (1980).  

The majority agreed that the Central Hudson standard was applicable, but recognized that because the Act also impinged on associational rights, it must be justified by a compelling state interest. *Frame*, 885 F.2d at 1134 n.12.  

51. *Frame*, 885 F.2d at 1147 (Sloviter, J., dissenting). Although Justice Sloviter noted that government has a substantial interest in protecting consumers from fraud, illegal activity or harmful health effects, she failed to consider whether any other reason, such as protecting the country's largest agricultural industry, might justify regulations of commercial speech. *Id.* (Sloviter, J., dissenting).
government interest.\textsuperscript{52}

Justice Sloviter also disagreed with the majority's characterization of the Act as ideologically neutral.\textsuperscript{53} While the dissent recognized that the beef promotions were less ideological than the motto "Live Free or Die,"\textsuperscript{54} it concluded that the promotions were not neutral because the advertisements promoting beef might offend vegetarians.\textsuperscript{54} Finally, the dissent argued that support for the promotions had grown and there was no evidence that cattle producers would refuse to voluntarily contribute to the fund given the chance.\textsuperscript{55} For these reasons, the dissent concluded that the Act did impinge on first amendment rights more than was necessary to accomplish its purpose.\textsuperscript{56}

III. Analysis

This Casebrief submits that the court's analysis, though flawed, came to the proper conclusion. First, the court failed to properly consider the policy justifying the government speech doctrine and its reasons for refusing to apply the doctrine were unpersuasive. Proceeding on the assumption that the government speech doctrine did not apply, however, the court correctly applied and found satisfied the Roberts test. Finally, the court's conclusion was justified because the Act failed to inflict a cognizable constitutional injury.

The court's analysis of the government speech doctrine was flawed because it failed to consider the justification underlying that doctrine. In Abood, Justice Powell explained that citizens cannot withhold funds from a government whose message they reject because the government is representative of the people.\textsuperscript{57} Underlying this justification of government speech is the premise that in a representational political system the people control government and thus may prevent govern-

\begin{itemize}
\item \textsuperscript{52} Id. (Sloviter, J., dissenting).
\item \textsuperscript{53} Id. (Sloviter, J., dissenting).
\item \textsuperscript{54} Id. (Sloviter, J., dissenting). The advertisements that the dissent referred to stated that "the lowdown on beef is probably less than you think—lower in calories, leaner on fat, lighter on cholesterol than you ever imagined," and "I [Cybil Sheperd] know some people don't eat hamburgers. But I'm not sure I trust them." Id. (Sloviter, J., dissenting). The dissent also pointed out that the health effects of eating substantial quantities of beef is a matter of controversy. Id. (Sloviter, J., dissenting).
\item \textsuperscript{55} Id. at 1148 (Sloviter, J., dissenting). The dissent attempted to distinguish Abood, where compelled mandatory assessments of union dues were upheld, because the purpose of the compulsion was to promote peaceful labor relations while "[t]he function performed by a self-promoting industry group is hardly comparable." Id. (Sloviter, J., dissenting).
\item \textsuperscript{56} Id. (Sloviter, J., dissenting).
\item \textsuperscript{57} Abood, 431 U.S. at 259 n.13 (Powell, J., concurring) ("[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.").
\end{itemize}
ment dissemination of objectionable messages. In other words, the redress of the populace when government propagates unacceptable messages is to change the government, not to refuse to support it. The proper government speech analysis turns, therefore, on whether the expressions of an entity are subject to the government's, and thus the populace's, control. If the expressions are subject to government control, the government speech doctrine should be applied.

This justification of government speech, furthermore, applies to all spending, whether from a general or "earmarked" fund. For example, if a state uses tolls collected from truckers to fund the erection of billboards containing the message "support local truckers," the populace's power to force the state to remove the billboards is not diminished by the fact that only truckers contribute to the fund. The Third Circuit, however, failed to consider how this rationale applies to the Beef Research and Information Act.

Justice Powell's justification of the government speech doctrine dictates that the promotions made under the Act be considered government speech for two reasons. First, Congress has empowered the Operating Committee to make these expressions; accordingly, Congress too may halt the Operating Committee's expression. The ultimate power of determining whether the expressions at issue should be made vests in Congress, and, therefore, in the people. Furthermore, Congress

58. See, e.g., Keller v. State Bar of Cal., 58 U.S.L.W. 4661, 4664 (U.S. June 4, 1990) ("If every citizen were to have a right that no one paid by public funds express a view with which he disagreed, debate over issues of public concern would be limited to those in the private sector, and the process of government as we know it radically transformed."); DeMille v. American Fed'n of Radio Artists, 31 Cal. 2d 139, 150, 187 P.2d 769, 776 (1947) ("In a government based on democratic principles... the individual would raise but a faint cry of invasion of his constitutional rights should he seek to avoid his obligation [to pay taxes] because of a difference in personal views.").

59. The first amendment does not restrict the government's power to determine when it should speak, and thus would not restrict the Secretary's power to determine whether the Operating Committee's promotions should be disseminated. See G. Gunther, CONSTITUTIONAL LAW 1276 (11th ed. 1985) ([The view of the First Amendment as restricting the government only when it plays the role of regulator and not when it itself communicates is an accurate generalization of current law.]) (footnote omitted).

The issue currently being debated among commentators is whether the first amendment restricts the government's expressive powers when the government uses its power to distort or overwhelm the marketplace of ideas. For a discussion of this issue, see M. Yudof, WHEN GOVERNMENT SPEAKS: POLITICS, LAW AND GOVERNMENT EXPRESSION IN AMERICA (1983); Shiffrin, Government Speech, 27 UCLA L. REV. 565 (1980); Ziegler, Government Speech and the Constitution: The Limits of Official Partisanship, 21 B.C.L. REV. 578 (1980).

60. See 7 U.S.C. § 2904(4)(B) (1988) ("The Committee shall develop plans or projects of promotion and advertising . . . "). In addition, both the Cattlemen's Board and Operating Committee are entities created pursuant to a federal statute. See 7 U.S.C. § 2904(1) (Cattlemen's Board); 7 U.S.C. § 2904(4)(A) (Operating Committee).
has required the Secretary of Agriculture to approve all plans, projects and contracts of the Operating Committee.\textsuperscript{61} Thus, the power to prevent the dissemination of these messages also vests in the Executive. In summary, the will of the people could work its effect on either Congress or the Executive with the same result—the Operating Committee's promotions would be discontinued. It is for this reason that the court erred by rejecting the government speech doctrine.\textsuperscript{62}

The court not only failed to identify the policy underlying the government speech doctrine, it also argued unpersuasively that the Operating Committee's promotions were not government speech. First, the court asserted that the government speech doctrine is inapplicable when

\textsuperscript{61} See 7 U.S.C. § 2904(4)(C) (1988); 7 U.S.C. § 2904(6)(A) & (B). Government control under the Act is also manifest in the provisions requiring the Operating Committee and Cattlemen's Board to be staffed by persons appointed by the Secretary and to be ultimately responsible to the Secretary. 7 U.S.C. § 2904; 7 C.F.R. § 1260.212 (1989).

\textsuperscript{62} It should be noted that the Court would most likely hold that the Operating Committee and the Cattlemen's Board were governmental entities for the purpose of constitutional restraints. Under the "joint activity" theory, private persons who participate in joint activity with governmental officials are deemed governmental actors whose actions are subject to constitutional restraints. See United States v. Price, 383 U.S. 787 (1965) (private individuals who conspired with local law enforcement officers to arrange murder of three civil rights workers deemed governmental actors); see also Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (private restaurant leasing space in state building deemed governmental actor when financial viability of building as home for an administrative agency depended on restaurant's success).

Under the joint activity theory, the Operating Committee would be considered a governmental entity and thus would be subject to constitutional restraints. For example, the Operating Committee would be barred from refusing to hire minority owned advertising firms since this action would violate the equal protection component of the fifth amendment which prohibits the government from discriminating against groups. See Washington v. Davis, 426 U.S. 229 (1976); Bolling v. Sharpe, 347 U.S. 497 (1954). In Frame, the government appeared to adopt this theory by arguing that the Operating Committee was an agent of the Secretary of Agriculture. Supplemental Brief For Appellee at 22, United States v. Frame, 885 F.2d 1119 (3d Cir. 1989) (No. 88-1104).

Whether the Cattlemen's Board and Operating Committee would be considered government for purposes of constitutional restraints, however, is not dispositive of the characterization of those entities for purposes of government speech. The determination of whether an entity is governmental in nature for purposes of constitutional restraints usually depends on whether there is a sufficient nexus between the entity and the government. See Gunther, supra note 59, ("[One approach in determining whether an actor is governmental] may be called the 'nexus' approach: it seeks to identify sufficient points of contact between the private actor and the state to justify imposing constitutional restraints ... That search ... permeates most of the cases ... "). In contrast, however, under the proposed analysis, the determination of whether an entity's expressions should be considered government speech depends on whether the government has the unfettered power to determine if the expressions should be disseminated. Nevertheless, under the proposed analysis, the Cattlemen's Board and Operating Committee would be consistently classified as government, whether for purposes of constitutional restraints or for determining the applicability of the government speech doctrine.
there is a close coerced financial nexus between an identifiable group and a message associated with that group. The toll booth analogy given above, however, refutes this proposition. If the state uses tolls collected from truckers to place messages supporting truckers on billboards, the government is clearly the entity disseminating the advertisements; the existence of a close coerced nexus between an identifiable group and the message is irrelevant.

The court also argued that Justice Powell’s explanation of the government speech doctrine “does not fit comfortably” with the Act because the Cattlemen’s Board, like the union in Abood, represents one segment of the population with certain common interests. The union in Abood, however, was not created by, or responsible to, the government, nor were its messages subject to government control. The general populace’s feelings towards the union’s expressive activities are irrelevant; the union can say what it wants without fear of government interference regardless of the number of people it alienates. Thus, that both the union and the Operating Committee are composed of individuals with certain common interests is also irrelevant.

63. Frame, 885 F.2d at 1132. For a discussion of the court’s government speech reasoning, see supra notes 26-30 and accompanying text.
64. Frame, 885 F.2d at 1133.
65. Abood, 431 U.S. at 259 n.11 (Powell, J., concurring).
66. The union, of course, need only be sensitive of its member’s reactions to union sponsored messages.
67. In a recent case, Keller v. State Bar of California, the Supreme Court addressed the issue of government speech in a majority opinion. 58 U.S.L.W. 4661 (U.S. June 4, 1990). In Keller, California lawyers were required by state law to pay dues to the State Bar which was created by California law to regulate the state’s legal profession. Id. The plaintiffs, California attorneys, objected to the Bar’s use of their dues to fund lobbying efforts and other activities on political issues unrelated to the legal profession. Id. at 4662. The California Supreme Court rejected the plaintiff’s argument on the theory that the Bar Association constituted a governmental entity which the attorneys could not refuse to support. Id. The United States Supreme Court reversed.

The Court began its analysis by noting that the State Bar was more analogous to a union than to a governmental entity. Id. at 4663. The Court found it significant that the Bar was funded from dues levied not by the legislature but by the Board of Governors and that the State Bar does not admit lawyers to the practice of law, disbar or suspend lawyers or establish ethical codes of conduct. Id. at 4663. For these reasons the Court concluded that the State Bar was “created [] not to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession.” Id. at 4664. The Court also found that the reason lawyers are required to fund the State Bar is similar to the reason employees are required to fund unions, to eliminate the problem of “free riders.” Id. at 4665. These differences between the State Bar and traditional government agencies lead the Court to reject the Bar’s claim that “it is not subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions . . . .” Id. at 4664.

Although the Supreme Court did not adopt the thesis of this casebrief in Keller, the result is consistent with the proposed analysis. The expressions of the State Bar, like the expressions of the union, are not subject to direct review by a
Although the Frame court did not uphold the Act by finding that the promotions at issue constituted government speech, the court correctly held that the Act satisfied the Roberts test. First, the Act was justified by compelling state interests. This proposition can be tested by comparing the government’s interest in cases in which compelled assessments have been upheld to the government’s interest in the Beef Information Act. Cases in which compelled assessments have been at issue fall into three categories: mandatory union dues, mandatory bar association dues and mandatory student dues in state universities.

Mandatory union dues were first upheld by the Supreme Court in Railway Employee's Department v. Hanson. In Hanson, nonunion employees challenged the Railway Labor Act which, for the purpose of furthering industrial peace, authorized unions and rail carriers to require that all employees pay union dues, initiation fees and assessments. The Court held that Congress's authorization of union-shop contracts, which required workers to financially support unions authorized to act as their collective bargaining agents, did not violate the first amendment.

In a later union dues case, Abood v. Detroit Board of Education, the governmental official for approval or disapproval. Thus, the government has no power to control the dissemination of the State Bar's messages. It is precisely this power which the government does have in the case of the Beef Promotion Act. Because the promotions of the Beef Operating Committee are ultimately subjected to government control, the government speech doctrine applies.

68. 351 U.S. 225 (1956).
69. Id. at 235. The Act's authorization of "union-shop" agreements was designed to further industrial peace by eliminating the problem of "free riders." This term referred to employees who caused resentment in the workplace by refusing to join the union while benefiting from the union's collective bargaining activities. Id. at 231, 233; see also Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, 466 U.S. 435, 447 (1984) ("Congress' essential justification for authorizing the union shop was the desire to eliminate free riders—employees . . . on whose behalf the union was obliged to perform its statutory functions, but who refused to contribute to the cost thereof.").

For a discussion of the Frame court's attempt to demonstrate that the Act also presented a "free rider" problem, see supra note 36.
70. Hanson, 351 U.S. at 258. The Court has recognized that by allowing the union shop, it has "countenanced a significant impingement on first amendment rights." Ellis, 466 U.S. at 455.

In International Association of Machinists v. Street, the Court reaffirmed Hanson, but avoided addressing the question of whether the Constitution permits unions to spend the dissenting employees' monies for political purposes by construing the Railway Labor Act to forbid such spending. 367 U.S. 740 (1960). In Street, railway employees brought an action to enjoin unions from expending monies on political activity. Id. at 744. The Court, while realizing that the constitutional questions presented were "of the utmost gravity," avoided addressing such by construing the Railway Labor Act to forbid expenditures of dissenting employees' monies on political activities. Id. at 749-50, 768-79. The Supreme Court did not address the constitutionality of forced payments for a union's political activities until Abood v. Detroit Board of Education, 431 U.S. 209 (1977), 15 years later.
71. 431 U.S. 209 (1977). In Abood, plaintiffs challenged a state statute which permitted local government employers and unions to require as a condi-
Court reaffirmed Hanson, but held that unions are prohibited by the first amendment from using dissenting employees’ funds for political activity unrelated to collective bargaining. The Abood Court reiterated that interferences with an employee’s first amendment rights are justified by the “legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.”

The constitutionality of mandatory assessment of dues to a bar association was first addressed by the Supreme Court in Lathrop v. Donohue. Justice Brennan, writing for the plurality, acknowledged that the state’s interest in promoting high standards in the legal profession and in efficiency in the judicial system justified the assessment. He declined, however, to rule on whether the use of a dissenting attorney’s fees to further a political agenda violated that attorney’s free speech rights. In the most recent forced funding case, Keller v. State Bar of California, the court unanimously held that this use of a dissenting attorney’s funds to pay for the union’s collective bargaining activities is constitutional so long as the dissenting employee’s dues are not used for political activity unrelated to the union’s collective bargaining activities. The Hanson Court’s determination that the government’s interest in industrial peace justified some infringement of employees’ first amendment associational rights was not questioned.

For a discussion of the Court’s approach to mandatory union dues and a proposed alternative analysis, see Gaebler, Union Political Activity or Collective Bargaining? First Amendment Limitations on the Uses of Union Shop Funds, 14 U.C. Davis L. Rev. 591 (1981).

In Lathrop, plaintiffs challenged an order of the Wisconsin Supreme Court that forbade Wisconsin lawyers from practicing unless they paid a fee to the State Bar. Id. at 822.

Id. at 843 (“We think that the Supreme Court of Wisconsin, in order to further the State’s legitimate interests in raising the quality of professional services, may constitutionally require the costs of improving the profession . . . should be shared by the subjects and beneficiaries of the regulatory program, the lawyers . . . .”).

Justice Brennan declined to address this issue because the problem was not concretely presented for adjudication. Id. at 845. Justices Harlan and Frankfurter, concurring, addressed the constitutional issue and found objectionable the use of mandatory bar association dues for legislative and law reform purposes. Id. at 848 (Harlan, J., concurring). Nevertheless, Justice Brennan left no doubt that mandatory dues could be assessed as long as the monies were used to further the goals of promoting high standards and enhancing judicial efficiency. Id. at 843.

The goals of enhancing professional competence and efficiency in the judicial system were to be furthered by using the mandatory fees to pay for postgraduate education of lawyers, the activities of the Committee on Unauthorized Practice of Law, the Legal Aid Committee and the distribution to the public of pamphlets explaining legal issues. Id. at 839-41.

torney’s fees did violate the first amendment. Nevertheless, Lathrop and Keller made clear that the states’ interest in an integrated bar justifies some resulting infringement on associational rights.

Finally, although the Supreme Court has not ruled on the question, most lower courts have held that the state’s interest in promoting education justifies mandatory student fees to finance entities, such as school newspapers, that espouse views rejected by some students. For example, in Kania v. Fordham, the Fourth Circuit rejected the student-plaintiffs’ claim that use of their dues to finance a school newspaper violated their first amendment rights. The Kania court affirmed the lower court’s finding that the state’s interest in educating its citizens outweighed any harm to the plaintiffs and that the paper was a vital means of advancing this interest.

In summary, courts have held that the government’s interest in industrial peace, high quality legal services and an educated citizenry justifies mandatory fees assessed against the individuals benefited by the services, but have required in some cases that no monies be used for purposes prohibited by law. See 7 U.S.C. § 2904(10) (1988) (“The order shall prohibit any funds collected ... from being used in any manner for the purpose of influencing governmental action or policy . . . . “).

The only case finding mandatory student fees unconstitutional was Galda v. Rutgers. 772 F.2d 1060 (3d Cir.), cert. denied, 475 U.S. 1065 (1985). The Galda case, however, is clearly distinguishable from other cases that upheld mandatory student fees because, in Galda, the fees were used to finance a political action group independent of the University. Id. at 1065-67. This political action group had a distinct ideological agenda aimed at issues not related to the University, the educational benefits of which would not be available to dissenting students. Id.; see Cantor, Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association, 36 Rutgers L. Rev. 3, 48 (1984) (“To the extent that a group directs its activities primarily to a general political audience outside the campus, it is simply serving as a run-of-the-mill political party, not as a service organization, and it ought not to be financed with forced fees.”).

78. Keller, 55 U.S.L.W. at 4664. Abood’s proscription on the use of forced payments to fund political activity, however, is not relevant to the constitutionality of the Beef Research and Information Act because that Act specifically prohibits the use of any mandatorily assessed funds for political purposes. See 7 U.S.C. § 2904(10) (1988) (“The order shall prohibit any funds collected . . . from being used in any manner for the purpose of influencing governmental action or policy . . . . “).

79. The Keller Court, while forbidding the use of forced funding to finance political activities, clearly accepted forced funding to finance activities related to the Bar Association’s proper function. See Keller, 58 U.S.L.W. at 4664 (“[T]he compelled association . . . is justified by the State’s interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues . . . . “).

80. See Comment, Mandatory Student Fees: First Amendment Concerns and University Discretion, 55 U. Chi. L. Rev. 363, 371 (1988) (“Several courts have heard claims challenging the constitutionality of student fees. Almost unanimously these courts have held fees permissible.”).


83. Kania, 702 F.2d at 480.
political purposes. There is simply no qualitative difference between the
government’s interest in protecting the country’s largest agricultural in-
dustry and any of the interests previously used to justify mandatory fees. In addition, the Act embodies a principle inherent in the previ-
ously upheld funding schemes—that persons benefiting from a service should contribute to the costs of providing that service. By finding that
the maintenance of beef markets is vital to the general economy of the
nation and that American citizens should continue to have an adequate
domestically produced food supply, Congress has asserted governmen-
tial interests which must, in light of the previously described interests, be labelled compelling.85

The Frame court also correctly held that the Act was ideologically neutral, the second element of the Roberts test.86 In making this deter-
mination, the Frame court, as suggested by Supreme Court precedent, examined the purpose underlying the Act.87 In Roberts v. United States
Jaycees,88 the Court upheld a Minnesota statute that, as interpreted by
state agencies and courts, required a private organization, the Jaycees, to admit women as members.89 The Roberts Court held that because the
purpose of the state statute, eliminating discrimination, was unrelated to
the suppression of expression, the Minnesota Act was constitutional.90
Furthermore, in the compelled speech cases the purpose of the state
statutes, whether requiring a child to pledge allegiance or a driver to
display a state motto, was clearly to prescribe an official orthodoxy.91
The Frame court correctly concluded, therefore, that the Beef Research
and Information Act was ideologically neutral because its purpose was
to increase the sale of beef, not to suppress expression or prescribe orthodoxy.

Finally, the court also correctly held that the government’s goals

84. See H.R. Rep. No. 452, 94th Cong., 1st Sess., 2 (1975) ("Beef cattle is
the largest sector of American agriculture.").
85. In addition, the Court has held that the government has a substantial
interest in energy conservation. Central Hudson Gas & Elec. v. Public Serv.
Comm’n, 447 U.S. 557, 568 (1980). The purposes of energy conservation and
the Act are analogous—both strive to insure that American consumers continue
to have access to products essential to life. For this reason, Judge Sloviter’s
opinion that the Act is not justified by even a substantial state interest is suspect.
86. Frame, 884 F.2d at 1135. For a discussion of the court’s demonstration
that the Act was ideologically neutral, see supra notes 38-43 and accompanying
text.
87. Frame, 885 F.2d at 1135.
88. 468 U.S. 609 (1984). For a discussion of Roberts, see supra notes 32-33
and accompanying text.
89. Roberts, 468 U.S. at 628-29.
90. Id. at 624.
91. In the compelled speech cases, the Court held that a state could not
force a child to pledge allegiance or a citizen to display a state motto on a license
plate. See Wooley v. Manard, 430 U.S. 705 (1977); West Virginia Bd. of Educ. v.
Barnette, 319 U.S. 624 (1943). For a discussion of the compelled speech cases,
see supra note 21.
could not be achieved through means significantly less restrictive of associational freedoms. Recent Supreme Court cases indicate that the requirement of narrow tailoring should only be used to invalidate regulations in the most egregious circumstances. For example, in *Ward v. Rock Against Racism*, the Supreme Court, in upholding a city regulation that required use of city amplification during performances in a city park, noted "the requirement of narrow tailoring is satisfied 'so long as the... regulation promotes a... government interest that would be achieved less effectively absent the regulation.'" By comparison the government's interest in ensuring that adequate funds be available to finance beef promotions would be achieved less effectively absent the mandatory assessment. In other words, making the viability of beef promotions contingent on voluntary contributions is clearly a less effective way of insuring adequate financing than mandatory assessments. For this reason, the Third Circuit correctly held that there were no significantly less restrictive means to accomplish the Act's goals.

92. *Frame*, 885 F.2d at 1135-37. For a discussion of the court's determination that government's goals could not be achieved through significantly less restrictive means, see *supra* notes 44-48 and accompanying text.

93. 109 S. Ct. 2746 (1989). In *Ward*, a rock group challenged a New York City regulation which required the use of city-provided sound systems and technicians for concerts in Central Park. Id. at 2753. The Court, refusing to apply a least restrictive means analysis, held that "so long as the means chosen are not substantially broader than necessary to achieve the government's interest... the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less... restrictive alternative." Id. Another recent case illustrating the Court's unwillingness to use a narrow means analysis to invalidate a regulation is *State University of New York v. Fox*, 109 S. Ct. 3028, 3033 (1989). The Fox Court, in upholding a regulation forbidding "Tupperware parties" in dormitories, noted that restrictions designed to prevent deceptive advertising "must be... 'no more extensive than reasonably necessary to further substantial interests.'" Id. (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

94. Id. at 2758 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)). The *Ward* Court also noted that "'[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest... the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less... restrictive alternative.'" Id. Another recent case illustrating the Court's unwillingness to use a narrow means analysis to invalidate a regulation is *State University of New York v. Fox*, 109 S. Ct. 3028, 3033 (1989). The Fox Court, in upholding a regulation forbidding "Tupperware parties" in dormitories, noted that restrictions designed to prevent deceptive advertising "must be... 'no more extensive than reasonably necessary to further substantial interests.'" Id. (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

95. This proposition is supported by the failure of cattle producers to approve the beef promotion effort in referendums taken pursuant to the 1976 Act and to the 1978 Amendment. In 1976, only 56.4% of voting cattle producers supported an implementation of the Secretary's Beef Promotion Order, while in the 1978 Act, only 34.5% of the producers voted favorably. *Glaser, supra* note 2, at 74-75. While it is true that producers approved the 1985 Act by 78.9%, these votes, taken together, indicate that support for mandatory assessments was far from overwhelming. *See Frame*, 885 F.2d at 1148 n.3. Therefore, it is logical to conclude that the government's interest would be achieved less effectively absent the mandatory assessment.

96. Although the court's conclusion was sound, its reasons why there were no significantly less restrictive means were not convincing. First, the court argued that this test was satisfied because the Act did not infringe on first amendment rights to the degree countenanced in the union shop cases. *Frame*, 885 F.2d at 1148 n.3.
Finally, the court's deference towards the Act was justified by the insignificant constitutional injury which Frame incurred and by the need to allow Congressional experimentation given the budget deficits. The seriousness of Frame's constitutional injury can be assessed by identifying the policies underlying negative first amendment rights and by determining whether these policies are implicated by the Act. Prominent commentators have recognized that negative first amendment rights do not further the purpose traditionally ascribed to the first amendment—insuring a free and open marketplace of ideas. Instead, forbidding the government from compelling speech or association protects an individual's interest in personal integrity or "selfhood." It is simply not conceivable that Frame's interests in personal integrity, freedom of conscience, spirit or intellect were harmed by requiring him to help finance promotions of a product which he himself produces. Therefore, the policies underlying negative first amendment rights were not implicated by the mandatory assessments imposed on Frame.

F.2d at 1136. What was countenanced in other cases, however, is clearly irrelevant to whether there were less restrictive means available to accomplish the same goal in this case. Second, the court found it significant that the Act forbid expenditures for political purposes. Id. Again, however, the court failed to explain how this supported the proposition that there were no less restrictive means to accomplish the Act's purpose. Finally, the court interpreted Frame's objections to the promotions as being a dispute over strategy and not content. Id. at 1137. The issue of how Frame's objections should be construed, however, is irrelevant to the availability of less restrictive means.

97. See L. Tribe, American Constitutional Law § 15-5 (2d ed. 1988) (asserting that principle underlying Wooley and Barnette is that first amendment protects individuals from "governmental shaping of the mind"); Gaebler, First Amendment Protection Against Government Compelled Expression and Association, 23 B.C.L. REV. 995, 1004 (1982) ("Freedom of expression is not merely an instrumentality to foster intelligent self-government or the advancement of knowledge.").

98. See Tribe, supra note 97, § 15-5, at 1315 ("The constitution has enumerated specific categories of thought and conscience for special treatment: religion and speech. Courts have ... properly generalized from these protections ... to define a 'sphere of intellect and spirit' constitutionally secure from the ... manipulations of government!") (quoting West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)); Gaebler, supra note 97, at 1004 ("[A]lthough compelling one to recite the pledge of allegiance may not interfere with the 'free marketplace of ideas,' it does infringe upon what may be called the individual's interest in selfhood.").

99. The Frame court, by interpreting Frame's disagreement with the beef promotions as being one over mere strategy, intimated that it could not fathom how the Act significantly infringed on his negative first amendment rights. Frame, 885 F.2d at 1137.

100. Indeed some commentators question whether the policies underlying negative first amendment rights are ever implicated when an individual is forced to finance an entity that provides services beneficial to that individual. For example, one commentator has argued:

It is within the prerogative of government to assign certain important functions to private sector service institutions and to allocate the costs of services to all those who benefit in some sense from the performance
this reason, the Third Circuit was justified in finding the Beef Promotion and Research Act constitutional.

IV. CONCLUSION

The Third Circuit incorrectly held that the Operating Committee's promotions did not constitute government speech. The Third Circuit erred by failing to recognize the significance of the government having the ultimate power of determining whether any messages should be disseminated. The Third Circuit, however, correctly upheld the Act by finding that it was supported by compelling government interests, unrelated to the suppression of ideas that could not be achieved through significantly less restrictive means. Finally, the Third Circuit was justified in recognizing that an Act which requires a beef producer to support promotions of beef products fails to inflict a cognizable constitutional injury.

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