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Contemplating the Dilemma of Government as Speaker: Judicially Indentified Limits on Government Speech in the Context of Carter v. City of Las Cruces

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CONTEMPLATING THE DILEMMA OF GOVERNMENT AS SPEAKER: JUDICIALLY IDENTIFIED LIMITS ON GOVERNMENT SPEECH IN THE CONTEXT OF *CARTER V. CITY OF LAS CRUCES*

I. INTRODUCTION

Campaign publicity boldly exhorting "Vote Yes!" for ballot or referendum issues is a familiar sight in American life during election time. Private groups or individuals usually sponsor the messages. Less commonly, a governmental entity is behind the advocacy, using taxpayer money to persuade the electorate to adopt the proposed measure.

In *Carter v. City of Las Cruces*,[1] the plaintiff unsuccessfully sued to enjoin the City of Las Cruces, New Mexico (Las Cruces or City), and its Commissioners from using municipal funds to promote a partisan position prior to an election referendum.[2] The plaintiff objected to the City's aggressive attempts to gain the voters' approval for a publicly owned electric utility,[3] asserting that the City's conduct constituted improper use of public funds and bias for one side of an issue.[4] The City conducted a mass media campaign, used public facilities and employees, allegedly registered as a political action committee, and used over $80,000 in taxpayer funds to promote the utility acquisition.[5] The voters approved the bond, allowing the expenditure of additional millions of dollars from City revenues to carry out the venture.[6]

The legality of the City Commissioner's conduct in *Carter* remains unresolved.[7]

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1. 121 N.M. 580, 915 P.2d 336 (Ct. App.), *cert. denied*, 121 N.M. 644, 916 P.2d 844 (1996).

2. *See id.* at 582-83, 915 P.2d at 337. The New Mexico Court of Appeals remanded the case to the trial court for it to determine whether the action could proceed under section 1983 of the federal Civil Rights Act as a violation of constitutional rights under color of state law. *See id.* The state law injunctive relief request became moot because the election occurred before the court of appeals heard the case. *See id.*

3. According the advertisements of the City of Las Cruces (Las Cruces or City), El Paso Electric, the company that formerly operated utilities in Las Cruces, had been charging Las Cruces utility customers some of the highest rates in the nation and had refused to negotiate with the city to lower the rates. *See* Motion for Temporary Restraining Order and Preliminary Injunction, Exhibit D at 000026, Carter v. City of Las Cruces, 121 N.M. 580, 915 P.2d 336 (Ct. App.) (No. CV-94-605), *cert. denied*, 121 N.M. 644, 916 P.2d 844 (1996). Furthermore, the company which acquired El Paso Electric, after El Paso Electric went bankrupt, allegedly announced an increase in rates effective the beginning of 1995, according to the City's advertisements. *See id.*; *see also infra* note 214.

4. *See Carter*, 121 N.M. at 581, 915 P.2d at 337.

5. *See* Motion for Temporary Restraining Order and Preliminary Injunction, Exhibit I at 000045, *Carter*, 121 N.M. 580, 915 P.2d 336.

6. *See Cruces Dumps Electric Co., Voters in Las Cruces, N.M., Choose to Dump Company In Favor of Municipal Utility*, ALBUQUERQUE JOURNAL, Aug. 31, 1994, at A1, *available in* WESTLAW, Albuqjnl database or Allnewsplus database, 1994 WL 13775227.

7. *See supra* note 2. In *Carter*, the New Mexico Court of Appeals acknowledged that there is some authority for finding that the City Commissioners' conduct was illegal, and that "at some threshold level, a public entity must refrain from spending public funds to promote a partisan position during an election campaign." *Carter*, 121 N.M. at 583, 915 P.2d at 339. The plaintiffs originally sued in federal court. *See id.* at 581, 915 P.2d at 337. Judge Parker of the United States District Court for the District of New Mexico, in this companion case to the *Carter* case before the New Mexico Court of Appeals, observed that constitutional problems may arise

> where governments and governmental employees go beyond either, one, providing neutral information about issues on a ballot or, two, expressing personal views on election issues, as any citizen has the right to do under the First Amendment, going beyond that to the point of using public funds derived in part from taxes paid by those holding opposing views to advocate how the county electorate should vote on the election issue.

Id. at 583, 915 P.2d at 339 (quoting Judge Parker, United States District Court, District of New Mexico in a companion case to *Carter*, without citation); *see* Motions Hearing at 9-10, Carter v. City of Las Cruces (D.N.M. Aug.

Neither the United States Supreme Court nor New Mexico courts have addressed the precise issue of "government speech," the shorthand that courts and commentators use to identify partisan campaign messages sponsored by the government.[8] Jurisdictions that have addressed this issue reveal an almost "uniform judicial reluctance" to sanction these types of government expenditures,[9] applying the premise that partisan campaigning by governmental entities is antithetical to democratic values.[10]

These jurisdictions have reached the almost uniform consensus that, in the context of an election, messages from the government may inform but they may not directly persuade.[11] Judicial opinions attempting to identify impermissible government speech seek to distinguish between education and advocacy.[12] These opinions reveal the commonly held view that although official speech is necessary for governing and education, governmental entities overreach when their communications become coercive or propagandistic during an election.[13] However, court decisions which address the government speech issue fail to fully explain how government partisan advocacy distorts the political process.[14] In addition, courts often base their rulings

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23, 1994) (No. CV 94-0942) (original source of Judge Parker's quotation); *see also* Motion for Temporary Restraining Order and Preliminary Injunction, Exhibit B at 000124-000125, Carter v. City of Las Cruces, 121 N.M. 580, 915 P.2d 336 (Ct. App.), *cert. denied*, 121 N.M. 644, 916 P.2d 844 (1996). Judge Parker also found that there was some law supporting the plaintiffs' constitutional claims in the case before him. *See* Motions Hearing at 10, Carter v. City of Las Cruces (D.N.M. Aug. 23, 1994) (No. CV 94-0942) (original source of Judge Parker's quotation); *see also* Motion for Temporary Restraining Order and Preliminary Injunction, Exhibit B at 000125, Carter v. City of Las Cruces, 121 N.M. 580, 915 P.2d 336 (Ct. App.), *cert. denied*, 121 N.M. 644, 916 P.2d 844 (1996).

8. *See, e.g.*, Burt v. Blumenauer, 699 P.2d 168, 172 (Or. 1985) (en banc); Frederick Schauer, *Is Government Speech a Problem?* 35 STAN. L. REV. 373 (1983) (reviewing MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA (1983)); Edward H. Ziegler, Jr., *Government Speech and the Constitution: The Limits of Official Partisanship*, 21 B.C. L. REV. 578 (1980).

9. *See Burt*, 699 P.2d at 172 (There exists a "uniform judicial reluctance to sanction the use of public funds for election campaigns.") (citing Stanson v. Mott, 551 P.2d 1 (Cal. 1976) (en banc)).

10. *See, e.g.*, District of Columbia Common Cause v. District of Columbia, 858 F.2d 1 (D.C. Cir. 1988) (prohibiting the District of Columbia from expending funds to oppose a citizen initiative on the upcoming ballot); Mountain States Legal Found. v. Denver Sch. Dist. No. 1, 459 F. Supp. 357 (D. Colo. 1978) (enjoining a school board's expenditures used to urge voters to reject an upcoming state constitutional amendment because the expenditures were contrary to state law and the federal Constitution); *Stanson*, 551 P.2d 1 (finding that the state parks department impermissibly expended public funds to support a park bond issue); Miller v. California Comm'n on the Status of Women, 198 Cal. Rptr. 877 (Ct. App. 1984) (finding that the expenditures made by state commission advocating women's equal rights were legal because they were not made before an election); *Burt*, 699 P.2d 168 (declaring that the public health department's partisan expenditures were invalid because the pertinent state statute evidenced a general legislative intent to prohibit the expenditures); Anderson v. City of Boston, 380 N.E.2d 628 (Mass. 1978) (enjoining a municipality's attempt to use taxpayer funds to wage a campaign against a state constitutional amendment concerning taxation), *stayed by*, City of Boston v. Anderson, 439 U.S. 1389, (Brennan, J., as Circuit Justice), *aff'd mem.*, 439 U.S. 951 (1978) (motion to vacate stay order denied); Stern v. Kramarsky, 375 N.Y.S.2d 235 (Sup. Ct. 1975) (declaring that expenditures directed at the outcome of an election could never be authorized). *But see* Alabama Libertarian Party v. City of Birmingham, 694 F. Supp. 814 (N.D. Ala. 1988) (upholding the city's expenditures because they were incident to the city's duties to protect the public's welfare); City Affairs Comm'n of Jersey City v. Board of Comm'rs of Jersey City, 46 A.2d 425 (N.J. 1946) (finding that the county commissioners lawfully expended public monies because a municipality may properly spend taxpayer funds to promote a public purpose).

11. *See, e.g.*, *supra* note 10 and cases cited therein.

12. *See, e.g.*, *supra* note 10 and cases cited therein.

13. *See, e.g.*, *supra* note 10 and cases cited therein.

14. *See* Charles E. Ryan, *Municipal Free Speech: Banned In Boston?*, 47 FORDHAM L. REV. 1111, 1129 (1979) ("The [*Elsenau v. City of Chicago*, 165 N.E. 129 (Ill. 1929),] decision simply avoided any analysis of the manner in which the city's action distorted the role of government."); *see also Anderson*, 380 N.E.2d at 633 (taking

on state political campaign statutes which do not plainly apply to political advertising campaigns of government subdivisions.[15]

This Comment will describe the judicially created limits on government speech and the ways in which government partisan advocacy perverts the political process. Part II describes the analysis that state courts normally apply to evaluate the permissibility of government speech. Part III examines the theoretical and constitutional concerns that arise in these situations. Part IV considers the government's right and responsibility to provide information. Part V discusses whether government speech poses a real problem and evaluates the general rule that courts apply to government speech cases. Part VI concludes that governmental speech has both negative and positive implications for the integrity of our democratic process.

II. THE PROBLEM ADDRESSED UNDER STATE LAW

When confronting the issue of government partisan advocacy, courts have focused on whether the governmental entity acted within its grant of legislative authority. These courts have almost uniformly invalidated the types of campaign expenditures found in *Carter*.[16] For instance, in *Burt v. Blumenauer*,[17] the Oregon Supreme Court confronted a situation similar to *Carter* and inquired whether there was legislative authority for the expenditure.[18] Under this common analysis, if authority exists under an agency or subdivision's statutory mandate, then the court evaluates whether another statute preempts that authority.[19] If the expenditure overcomes both of these hurdles, the court then determines whether the expenditure violates the state or federal Constitution.[20]

A. *The Analysis Applied to Entities Operating Under State Statutes*

When determining whether agency authority exists, courts either find no authority or focus on whether another state statute preempts the authority claimed under a general authorizing provision. For instance, the court in *Burt v. Blumenauer* examined Oregon's statutes to determine whether they preempted the health department's claimed authority.[21] The court applied statutes that prohibited public employees from opposing the adoption of a measure during working hours and concluded that the statute invalidated the department's implied authority in public

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judicial notice that traditionally municipalities have not appropriated funds to influence election results); *Burt*, 699 P.2d at 172 ("Some recent state cases deserve attention, as much as for what they fail to say as for what they say."); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.11, at 1003 (5th ed. 1995).

15. *See infra* Part II.C.

16. *See Burt*, 699 P.2d at 174 ("[T]he cases come to uniform results."); Ziegler, *supra* note 8, at 586-87; Ryan, *supra* note 14, at 1111; *see also supra* note 10 and cases cited therein.

17. 699 P.2d 168.

18. *See id.* at 179.

19. *See* Mountain States Legal Found. v. Denver Sch. Dist. No. 1, 459 F. Supp. 347 (D. Colo. 1978); Miller v. California Comm'n on the Status of Women, 198 Cal. Rptr. 877 (Ct. App. 1984); Mines v. Del Valle, 257 P. 530 (Cal. 1927), *overruled by Stanson v. Mott*, 551 P.2d 1 (Cal. 1976) (en banc); Citizens to Protect Pub. Funds v. Board of Educ. of Parsippany-Troy Hills, 98 A.2d 673 (N.J. 1953).

20. *See Burt*, 699 P.2d at 179, 181 app.; *see also* Ziegler, *supra* note 8, at 589.

21. *See Burt*, 699 P.2d at 179.

health matters.[22] The result of this type of inquiry is that, in the absence of express legislative authorization, most courts limit government speech during an election to neutral informational messages.[23]

In *Stanson v. Mott*,[24] the California Supreme Court initially found that the state parks department had the authority to disseminate information about park bond issues.[25] However, the court limited the department's campaign activities to informational messages and declared that the entity's advertising campaign was improper.[26] The court acknowledged that the parks department could expend money on disseminating neutral information that was relevant to its purpose.[27] The court then explained the difference between neutral information and promotional messages.[28]

B. The Analysis Applied to Home Rule Municipalities

Unlike governmental entities operating entirely under the authority of state law, local governments operating under home rule charters may take any fiscal action that does not expressly conflict with other legislation. Home rule is a state statutory or constitutional grant of general self-government power to a municipality.[29] The essence of home rule power is that municipalities can determine the powers and functions of their local governments with more freedom from state legislative control.[30] Home rule legislation usually permits a municipality to appropriate funds for purposes which are not explicitly stated in the legislative grant of power.[31] Only the Constitution and conflicting legislation potentially limit these appropriations.[32]

Despite the broad grant of power found in home rule charters, courts continue to assume that government speech which is directed at an election is impermissible. In *Anderson v. City of Boston*,[33] the City of Boston, Massachusetts (Boston), which had a home rule statute similar to the one in Las Cruces,[34] argued that its broad home rule

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22. *See id.* at 180 (citing OR. REV. STAT. §§ 250.432 (1), 260.432(2) (1991)). The Oregon statutes at issue also prohibited public officials from requiring their employees to participate in elections. *See Burt*, 699 P.2d at 180.

23. *See Mountain States*, 459 F. at 360 ("If it is assumed that the board of education has the power to spend public funds and use public facilities for the purpose of informing the electorate about this issue, there is strong precedent for requiring fairness and neutrality in that effort."); *Citizens to Protect Public Funds*, 98 A.2d at 677 ("[T]he use of the funds to finance not the presentation of facts merely but also arguments to persuade the voters that only one side has merit, gives the dissenters just cause for complaint. The expenditure is then not within the implied power and is not lawful in the absence of express authority from the Legislature.").

24. 551 P.2d 1 (Cal. 1976) (en banc).

25. *See id.*

26. *See id.* at 11.

27. *See id.*

28. *See id.*

29. *See* NEW MEXICO MUNICIPAL LEAGUE, HOME RULE MANUAL FOR NEW MEXICO MUNICIPALITIES 1 (Oct. 1976).

30. *See* Zeigler, *supra* note 8, at 602.

31. *See id.*

32. *See id.*

33. 380 N.E.2d 628 (Mass. 1978), *stayed by*, City of Boston v. Anderson, 439 U.S. 1389, (Brennan, J., as Circuit Justice), *aff'd mem.*, 439 U.S. 951 (1978) (motion to vacate stay order denied).

34. *See id.* at 632 (citing MASS. GEN. LAWS ch. 89, § 7 (1975)). The Massachusetts general statutes define a home rule municipality's powers as the ability of a municipality to "exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court . . . ." *See id.* at 633. The New Mexico

authority justified its advocacy.[35] Boston had sought to expend municipal funds to urge its inhabitants to vote for a proposed amendment to the state constitution.[36] Even though home rule reverses the presumption that an entity must have express authorization to make an expenditure, in *Anderson* the Massachusetts Supreme Court considered the expenditures inconsistent with a municipality's traditional role.[37]

C. *Statutory Law as Evidence of Legislative Intent to Prohibit Government Partisan Advocacy*

Although the *Anderson* court agreed that Boston's home rule ordinance permitted Boston to spend funds not specifically prohibited by the Massachusetts Legislature, the court found that the expenditures were improper under the state campaign disclosure statutes.[38] Without expressly mentioning municipalities, Massachusetts' state campaign disclosure statutes regulate campaign expenditures and contributions and impose disclosure requirements on political activities by organizations, associations, and other groups, that promote or oppose questions submitted to the voters.[39] The purpose of these statutes is to promote citizen confidence and participation in the electoral process by curbing corporate expenditures.[40] The statutes presume that wealthy and powerful corporations unduly influence the electoral process because their views may drown out other voices.

The defendants in *Anderson* argued that the absence of statutory language referring to municipalities or other government subdivisions indicated that the state campaign disclosure statutes did not apply to municipal campaign activities.[41] The *Anderson* court disagreed.[42] The court viewed the statute as preempting any claimed right to spend public funds.[43] According to the court, the state legislature's failure to mention municipalities in its disclosure requirements was evidence that "the Legislature did not even contemplate such municipal action could occur."[44] For support for its conclusion that the state statutes applied to municipalities, the *Anderson* court relied on campaign statutes regulating the participation of municipal

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Constitution's home rule amendment provides, in pertinent part: "The registered qualified electors of a municipality may adopt, amend or repeal a charter in the manner provided by law." N.M. CONST. art. X, § 6(C). The New Mexico Constitution further provides:

> A municipality which adopts a charter may exercise all legislative powers and perform all functions not expressly denied by general law or charter . . . . No tax imposed by the governing body of a charter municipality, except a tax authorized by general law, shall become effective until approved by a majority vote in the charter municipality.

N.M. CONST. art. X, § 6(D).

35. *See Anderson*, 380 N.E.2d at 632. In *Carter v. City of Las Cruces*, Las Cruces also asserted that it could do anything not expressly prohibited by law or the Constitution. *See* Transcript of Proceedings at 37, Carter v. City of Las Cruces, 121 N.M. 580, 915 P.2d 336 (Ct. App. 1996) (No. CV-94-605).

36. *See Anderson*, 380 N.E.2d at 631.

37. *See id.* at 634 ("We notice judicially that traditionally municipalities have not appropriated funds to influence election results. If the Legislature had expected that municipalities would engage in such activities or intended that they could [the statute] would have regulated those activities as well.").

38. *See id.* at 633-34.

39. *See id.* at 633 (citing MASS. GEN. LAWS ch. 55, § 1 (1975)).

40. *See id.* at 633-43 (citing MASS. GEN. LAWS ch. 55, § 1 (1975)).

41. *See id.* at 633.

42. *See id.*

43. *See id.* at 633-34.

44. *Id.* at 634.

employees in campaigns,[45] which implied a legislative intent to "keep political fund raising and disbursing out of the hands of nonelective public employees and out of city and town halls."[46] In addition, the *Anderson* court extended the state campaign statutes' rationale to situations where a government organizes its own campaign to persuade the voters.[47]

Governmental advocacy cases, including *Carter*, involve the unique situation of a public entity campaigning for its position on an election issue.[48] In a similar context, courts have applied election laws to restrict the political campaign activities of certain classes of public employees.[49] In these cases, courts have inferred a general legislative intent to prohibit expenditures for partisan advocacy, even though the statutes that are used to invalidate the government's actions apply only indirectly.[50] This raises the question of whether any expenditures on partisan advocacy could ever satisfy the a court as proper.

Courts inquire whether authority exists for two explicit reasons. First, courts avoid deciding questions under the federal Constitution if the issue can be resolved on state law grounds.[51] Second, when a government agency or subdivision is created by statute, the entity must act within its legislative grant of authority.[52] As a result, government officials who hold money in trust for the taxpayers may appropriate

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45. *See id.* at 633-34. The *Burt v. Blummenauer* court also found that a statute prohibiting government employees from participating in elections invalidated governmental campaign expenditures. *See* Burt v. Blumenauer, 699 P.2d 168 (Or. 1985) (en banc). The Oregon election finance law applied by the *Burt* court prohibited public employees from engaging in political activities while working and also prohibited "the solicitation of public employees for political activity." *Burt*, 699 P.2d at 180 (quoting OR. REV. STAT. § 250.432(1)(1991)). This statute provides in relevant part that "[n]o person shall attempt to, or actually, *** require a public employee to *** give *** service *** to *** oppose *** the adoption of a measure ***." *Burt*, 699 P.2d at 180 (quoting OR. REV. STAT. § 250.432(1) (1991)).

Compare *Burt* to section 10-9-21(F) of the New Mexico Statutes, which states that "[n]o employee or probationer shall engage in partisan political activity while on duty." N.M. STAT. ANN. § 10-9-21(F) (Repl. Pamp. 1995). This section applies to state employees. *See* N.M. STAT. ANN. § 10-9-4 (Repl. Pamp. 1995); *see also* N.M. STAT. ANN. §§ 10-9-1 through 10-9-25 (Repl. Pamp. 1995).

The Municipal Code of the City of Las Cruces, New Mexico, states:

> (1) No city employee shall hold a political position or engage in political activity which is incompatible or in conflict with his/her city employment; (2) No city employee shall participate in political or electoral issues during regular working hours; (3) No city employee shall use his/her position or the prestige of his/her office either direct or implied, to influence others for political purposes; (4) City employees shall not be coerced to support or oppose any political or electoral issue or candidate for public office, during regular work hours or while in the performance of his/her duties.

LAS CRUCES, N.M., MUNICIPAL CODE, § 24-211 (1996).

46. *Anderson*, 380 N.E. at 634.

47. *See id.*

48. *See* Ryan, *supra* note 14, at 1133 n.176.

49. *See* Stanson v. Mott, 551 P.2d 1 (Cal. 1976) (en banc); Citizens to Protect Pub. Funds v. Board of Educ. of Parsippany-Troy Hills, 98 A.2d 673 (N.J. 1953); Ziegler, *supra* note 8, at 592 ("[T]hese statutes are directed primarily toward restricting the political activities of civil service employees in campaigns involving political parties.").

50. *See* Mountain States Legal Found. v. Denver Sch. Dist. No. 1, 459 F. Supp 357, 359 (D.C. Cir. 1978); Burt v. Blumenauer, 699 P.2d 168, 180-81 (Or. 1985) (en banc); Anderson v. City of Boston, 380 N.E.2d 628, 633-34 (Mass. 1978), *stayed by*, City of Boston v. Anderson, 439 U.S. 1389, (Brennan, J., as Circuit Justice), *aff'd mem.*, 439 U.S. 951 (1978) (motion to vacate stay order denied).

51. *See, e.g.*, Stover v. Journal Publ'g Co., 105 N.M. 291, 297, 731 P.2d 1335, 1441 (Ct. App. 1985) ("Courts will not decide constitutional questions unless necessary to the disposition of the case.").

52. *See Stanson*, 551 P.2d at 8.

funds only if the law provides for this action.[53] On the other hand, municipalities and state agencies have a great amount of leeway to expand their powers. For instance, home rule statutes purport to grant municipalities broad powers[54] and in the case of agencies, legislatures often state broad policy objectives and allow an agency to determine how to implement the policy.[55] The scope of authority of government agencies also may be of particular concern because their officials are appointed and not directly accountable to the voters. Perhaps courts also focus on whether authority exists, in the absence of clear legislation addressing government speech, as a device to reach their almost preordained conclusion that government advocacy before an election is "inherently unjustified."[56]

III. THE PROBLEM ADDRESSED UNDER REPUBLICAN AND CONSTITUTIONAL PRINCIPLES

Government speech poses additional problems because "many of its features go to the heart of democratic theory. The legitimacy of government depends on the consent of the governed, but that consent is influenced, and indeed, sometimes manipulated, by the government itself."[57] Thus, government speech raises special concerns that are absent when a public entity exceeds its authority in non-speech contexts.

A. *"Manufacturing the Consent of the Governed"*

Government attempts to influence the result of an election may control and interfere with the political process. Courts have dubbed government speech on election issues "propaganda."[58] At least one court has considered it equivalent to "manufactur[ing] the consent of the governed."[59] While government by consent requires the free exchange of information, government speech in any form involves influencing the electorate. The Framers of the Constitution viewed government influence on the views of its citizens as a potential threat to democracy, because it could prevent the formation of "genuine citizen opinion."[60]

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53. *See* Ziegler, *supra* note 8, at 586-87.

54. For a discussion of home rule municipalities, see *supra* Part II.B.

55. *See* Ziegler, *supra* note 8, at 580.

56. *See* Ryan, *supra* note 14, at 1129 ("[T]he [*Elsenau v. City of Chicago*, 165 N.E. 129 (Ill. 1929)] court focused almost exclusively on the inherent limitations of municipal power . . . .").

57. LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-4, at 810 n.19 (2d ed. 1988) (citing Mark V. Tushnet, *Talking to Each Other: Reflections on Yudof's* WHEN GOVERNMENT SPEAKS, 1 WIS. L. REV. 129 (1984) (book review)).

58. "Propaganda" has been defined as "[o]fficial government communications to the public that are designed to influence opinion. The information may be true or false, but it is always carefully selected for its political effect." E.D. HIRSCH, JR., ET AL., THE DICTIONARY OF CULTURAL LITERACY 301 (1988).

59. Burt v. Blumenauer, 699 P.2d 168, 175 (Or. 1985) (en banc) ("[E]xcessive or questionable efforts by government to manufacture the consent of the governed calls the legitimacy of its action into question.").

60. Ziegler, *supra* note 8, at 578-79. In 1801, President Jefferson wrote that "it is expected that [a government official] will not attempt to influence the votes of others nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it." Ziegler, *supra* note 8, at 579 n.3 (quoting 1 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 98-99 (1899)). As the California Supreme Court stated in *Stanson v. Mott*:

> A fundamental precept of this nation's democratic electoral process is that the government may not "take sides" in election contests or bestow an unfair advantage on one of several competing

Arguably, the least threatening form of government speech is where government entities advocate for their own measures. Nonetheless, most jurisdictions that have addressed this issue have declared government speech invalid in an election context where the promotional activities were incident to management duties. For example, in *Mines v. Del Valle*, an early case involving expenditures by an agency to promote a bond issue, the Public Service Commission of Los Angeles, California (Commission), tried to convince voters to approve a bond measure to finance the expansion of its power plant.[61] The Commission claimed that the Los Angeles City Charter provisions which governed the general management of power plants provided the authority for it to promote its bond measure.[62] One of the provisions authorized the Commissioners "to 'extend' electric plant[s]."[63] The *Mines* court declared that Los Angeles could use the money in furtherance of its statutory mandate to administer power plants, but only after the money was appropriated and put into the general fund.[64]

In *Stanson v. Mott*,[65] a case occurring a half century later and which overruled *Mines*, the California Department of Parks and Recreation claimed it was engaging in "advanced planning" that was mandated by statute when it promoted the passage of a park bond issue.[66] The court declined to allow partisan speech made for the interest of advanced planning without explicit legislative authorization.[67]

In *Burt v. Blumenauer*, the Oregon Supreme Court also found that a governmental agency's use of taxpayer funds to promote a policy germane to that agency's purpose was improper without public approval.[68] In *Burt*, the court rejected the claim of the defendants (a county health officer and other officials) that the county's duty to promote the public health justified their expenditures of public monies.[69] The health department used taxpayer funds to engage in an aggressive advertising campaign to support an antifluoridation policy, entitled a "fluoridation public information project," using public employees and the broadcast media.[70] The plaintiff contended that county officials could not use public monies to promote one side of an issue

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> factions. A principal danger feared by our country's founders lay in the possibility that the holders of governmental authority would use official power improperly to perpetuate themselves, or their allies, in office . . . . The selective use of public funds in election campaigns, of course, raises the specter of just such an improper distortion of the democratic electoral process.

Stanson v. Mott, 551 P.2d 1, 9 (Cal. 1976) (en banc).

61. *See* Mines v. Del Valle, 257 P. 530, 532 (Cal. 1927), *overruled by Stanson*, 551 P.2d 1. The facts of *Mines* are similar to the facts of *Carter*. In *Mines*, the Public Service Commission of Los Angeles, California (Commission), engaged in extensive promotional activities, such as constructing floats and printing banners and newspaper advertisements, to urge voters to approve a $35,000,000 bond for providing electricity to Los Angeles residents. *See id.* at 532. The Commission allegedly spent over $12,000 on the campaign. *See id.*

62. *See id.*

63. *Id.* at 535.

64. *See id.* at 536.

65. 551 P.2d 1 (Cal. 1976) (en banc).

66. *See id.* at 6.

67. *See id.*; *see also id.* at 10 (stating that express legislative authorization could raise serious constitutional problems).

68. *See* Burt v. Blumenauer, 699 P.2d 168 (Or. 1985) (en banc).

69. *See id.* at 179-80.

70. *See id.* at 168-69.

before the voters.[71] The Oregon Supreme Court invalidated the expenditure.[72] The court stated that while educating the public about health matters is part of the agency's duties, a governmental entity impermissibly augments its power when it promotes a policy rather than presents facts for the citizens to make their own decisions.[73] According to the *Burt* court, this sort of advocacy was aimed inappropriately at getting the public to comply with the agency's chosen measures.[74]

B. Maintaining Governmental Hierarchy

The federal district court in *Mountain States Legal Foundation v. Denver School District No. 1*[75] and the Tenth Circuit Court of Appeals in *Campbell v. Joint District 28-J*[76] based their government speech decisions on the proper place of a subdivision among the state power scheme, but still emphasized a citizen's right to participate in an unbiased process even when an agency is promoting the public welfare.[77] In the first dispute, the Denver School Board claimed that Colorado law, specifically section 1-45-116 of the Colorado Campaign Reform Act (Reform Act),[78] vested it with the authority to make the challenged expenditures.[79] The language of the Reform Act allowed the state, its agencies, or political subdivisions to make campaign contributions to support issues in which they have an "official concern."[80] The school board argued that a proposed constitutional amendment, which would limit methods for increasing taxes, was an official concern for government bodies that depend on taxes to operate.[81]

In response, the district court in *Mountain States* reasoned that if the school board could decide for itself the matters for which it had an "official concern," the board would have unlimited discretion in using its funds and facilities.[82] The court viewed the school board as meddling in the affairs of the entire state.[83] The court stated that

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71. *See id.* at 170.

72. *See id.* at 179.

73. *See id.* at 179-80. "There may be a question about whether authority to motivate individual behavior in matters of health . . . extends to persuading the public to support a chosen government policy." *Id.* at 180.

74. *See id.* at 175-76.

75. 459 F. Supp. 357 (D. Colo. 1978).

76. 704 F.2d 501 (10th Cir. 1983).

77. *See Mountain States*, 459 F. Supp. at 360.

78. The Colorado Campaign Reform Act provides:

> State and political subdivisions—limitations on contributions. (1) No agency, department, board, division, bureau, commission, or council of the state or any political subdivision thereof shall make any contribution or contribution in kind in campaigns involving the nomination, retention, or election of any person to any public office. They may, however, make contributions or contributions in kind in campaigns involving only issues in which they have an official concern.

Mountain States, 459 F. Supp. at 360 (citing COLO. REV. STAT. § 1-45-116 (1973) (current version as amended at COLO. REV. STAT. § 1-45-117 (1997))).

79. *See Campbell*, 704 F.2d at 503.

80. *See id.*

81. *See id.*

82. *See Mountain States*, 459 F. Supp at 359.

83. *See id. But see* Alabama Libertarian Party v. City of Birmingham, 694 F. Supp 814 (N.D. Ala. 1988); City Affairs Comm'n of Jersey City v. Board of Comm'rs of Jersey City, 46 A.2d 425, 427 (N.J. 1946). In *City Affairs*, the court recognized that a subdivision of the state has a right to "self-advancement and self-protection," considering partisan advocacy on the issue of adoption of a constitutional amendment to be a "reasonable and legitimate means" of exercising its power. *City Affairs*, 46 A.2d at 427. The court also stated that "[t]he right of advocacy and defense of the communal welfare in the state legislative forum has long been accorded general recognition." *Id.* at 426.

significant change in the state system which the amendment could bring was not the concern of one unit of government.[84] This would "distort the relationship of governmental agencies to the people who are to be served by them."[85]

The district court in *Mountain States* left open the possibility that some expenditures, such as those on government speech concerning school bond issues, would be appropriate as part of the board's official concern.[86] However, the school board could not take sides, and would have to use "fairness and neutrality."[87] The district court based the requirement of impartiality on principles found in the federal Constitution, such as the First Amendment and the section 4, Article IV guarantee clause, and on James Madison's writings in *The Federalist* papers.[88]

In *Campbell v. Joint District 28-J*, the Tenth Circuit affirmed the district court's holding, but stated that the constitutional questions were unnecessary to its decision.[89] It found that the matter was not an "official concern," and therefore the school board's expenditures were improper, because "[h]ere a change in the tax scheme would not cross [the school board's] desk[] for approval."[90] Concern for fairness to subdivisions of the state, the proper place of an agency within the state power scheme, as well as the board's obligation to remain impartial, formed the basis of the Tenth Circuit's rationale.[91]

In contrast to the court decisions discussed above, the federal district court in *Alabama Libertarian Party v. City of Birmingham*[92] held that situations where an entity advocates the passage of its own proposals are not only consistent with its role, but that it is also part of its *duty* to raise the funds necessary to meet the needs of its citizens.[93] The City of Birmingham (Birmingham) urged the passage of a bond to provide funds for several public projects ranging from museums to sewers.[94] The court stated that the Birmingham may make expenditures to solicit the passage of its own proposals if it cannot directly tax through ordinance.[95] The court ruled that the advertising campaign was incident to the Birmingham's obligation "to determine the needs of its citizens and to provide funds to service those needs."[96]

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84. *See Mountain States*, 459 F. Supp. at 359.

85. *Id.*

86. *See id.* at 360.

87. *See id.*

88. *See id.* at 361 (citing Kohler v. Tugwell, 292 F. Supp. 978, 984 (E.D. La. 1968) (Wisdom, J., concurring), *aff'd per curiam*, 393 U.S. 531 (1969), and THE FEDERALIST NO. 49 (James Madison)).

89. *See* Campbell v. Joint Dist. 28-J, 704 F.2d 501, 505 (10th Cir. 1983).

90. *Id.* The Tenth Circuit further stated that "[the school board] expended public monies and made in-kind contributions in an area which is beyond anything which they could decide in their representative roles." *Id.*

91. *See id.*

92. 694 F. Supp. 814 (N.D. Ala. 1988).

93. *See id.* at 817; *see also supra* note 83 (discussion of *City Affairs Commission of Jersey City v. Board of Commissioners of Jersey City*, 46 A.2d 425 (N.J. 1946)).

94. *See Alabama Libertarian*, 694 F. Supp. at 815 n.2.

95. *See id.* at 817-18.

96. *Id.* at 817.

C. *Government Speech that Thwarts the Exercise of the Electoral Franchise*

1. Changes in Organic Law

Although the *Alabama Libertarian* court upheld a city's advocation of passage of a bond to fund public projects, the *Alabama Libertarian* court did acknowledge that where the election concerned a constitutional amendment, the governmental entity's campaign expenditures may impermissibly interfere with the political process.[97] The *Alabama Libertarian* court specifically noted that *Mountain States* and *Campbell* involved an amendment to the state constitution.[98] Although the proposed amendment in *Mountain States* only indirectly related to public schools, it would have changed the way that governmental members could spend public funds,[99] ultimately restricting the representative government's authority if passed.[100] The *Mountain States* court considered the constitutional amendment to be "an organic systemic change in governance of the people,"[101] necessitating the people, as sovereign, to approve the amendment.[102]

2. Government Speech Opposing Citizen Initiatives and the First Amendment Right to Petition

The federal district court in *Mountain States* stated in dicta that the defendant's campaign violated the First Amendment right to petition.[103] Parties who challenged the school board's expenditures had originally signed petitions to place the proposed amendment on the ballot.[104] Citizen petitions, which carry a required number of signatures, allow the public to initiate changes in law by filing petitions to be approved by the legislature or the electorate.[105] The district court considered the school board's speech in opposition to this initiative to be an infringement on the people's right to petition, even though violations of the right to petition usually involve direct governmental suppression of that right.[106]

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97. *See id.* at 820.

98. *See id.* (citing Mountain States Legal Found. v. Denver Sch. Dist. No. 1, 459 F. Supp. 357 (D. Colo. 1978) and Campbell v. Joint Dist. 28-J, 704 F.2d 501 (10th Cir. 1983)).

99. *See Campbell*, 704 F.2d at 501. The proposed amendment was entitled "An Amendment Adding a New Section 21 to Article X of the Constitution of the State of Colorado Requiring Registered Elector Approval of All State and Local Executive or Legislative Acts Which Result in New or Increased Taxes." *Id.*

100. *See Mountain States*, 459 F. Supp. at 360.

101. *Id.* at 359. In a companion case, the district court stated that the proposed amendment would work a "revolutionary change in the . . . functioning of all governmental activities in Colorado." *See Campbell*, 704 F.2d at 505 (quoting Campbell v. Arapahoe County Sch. Dist. #6, 90 F.R.D. 189, 193 (D. Colo. 1981)).

102. *See id.*

103. *See id.* at 360. The First Amendment's last clause states that "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

104. *See Campbell*, 704 F.2d at 502.

105. A citizen initiative is "[a]n electoral process whereby designated percentages of the electorate may initiate legislative or constitutional changes through the filing of formal petitions to be acted on by the legislature or the total electorate." Alabama Libertarian Party v. City of Birmingham, 694 F. Supp. 814, 819 (N.D. Ala. 1988) (quoting BLACK'S LAW DICTIONARY 705 (5th ed. 1979)).

106. *See Mountain States*, 459 F. Supp. at 360. Abolitionists during the Civil War first used the First Amendment's petition clause to challenge a gag rule that suppressed citizen petitions regarding the abolition of slavery. *See* NOWAK & ROTUNDA, *supra* note 14, § 16.53, at 1188; *see generally* Norman B. Smith, *"Shall Make No*

In *District of Columbia Common Cause v. District of Columbia*,[107] the federal district court also based its decision to invalidate government speech expenditures on the First Amendment right to petition.[108] In this case, the plaintiffs challenged the District of Columbia's efforts to persuade voters to reject a measure that required the city to provide overnight shelter for all homeless people who requested it.[109] The plaintiffs alleged that their challenge vindicated their "direct interest in maintaining the integrity of the initiative and referendum process in the District of Columbia . . . ."[110] The district court agreed, but based its holding on a congressional appropriations statute[111] which expressly forbade the use of publicity or propaganda for purposes of influencing legislation.[112]

In the citizen's initiative context, government speech potentially distorts the right to participate in the political process at two stages: the people's right to participate when they go to the polls, and the people's right to directly participate in the process by initiating the measure. In *Mountain States* and *Common Cause*, the district courts considered publicly financed opposition to measures initiated by the people to be a serious infringement on the right to participate in self-government.[113] Both courts considered these actions to interfere with the people's exercise of their initiative power under the federal and state Constitutions.[114] Although advertising in opposition to a citizen initiative does not directly suppress citizen rights, using public funds to mount a campaign was found by the *Mountain States* court to undermine the "political freedom" of the voters, shifting power away from the people at an integral and influential stage of the process.[115]

D. *Government Speech, the First Amendment Right of Association, and Compelled Expression Concerns*

The *Alabama Libertarian* court's holding can be distinguished from other cases not only for its finding in favor of the governmental entity involved, but also because the holding was founded solely on the federal Constitution. Other courts found a statutory basis for their decisions, using constitutional principles only for support.[116]

Law Abridging": An Analysis of the Neglected, But Nearly Absolute, Right of Petition, 54 U. CIN. L. REV. 1153 (1986).

107. 858 F.2d 1 (D.C. Cir. 1988).

108. *See id.*

109. *See Alabama Libertarian*, 694 F. Supp at 818 (citing *Common Cause*, 858 F.2d at 1).

110. *See Common Cause*, 858 F.2d at 2 (quoting Plaintiff's Complaint at para. 6).

111. *See id.* at 11 (quoting D.C. CODE ANN. § 47-304 (1987) (In the District of Columbia, all monetary expenditures must be approved by the express provisions of a congressional act.)).

112. *See id.* The federal statute governing congressional appropriations stated that "[n]o part of this appropriation shall be used for publicity or propaganda purposes or implementation of any policy including boycott designed to support or defeat legislation pending before Congress or any State legislature." *Id.* (quoting H.R. 5899, 98th Cong. § 117 (1984) (enacted)).

113. *See id.* at 3; Mountain States Legal Found. v. Denver Sch. Dist. No. 1, 459 F. Supp. 357, 358 (D. Colo. 1978).

114. *See Common Cause*, 858 F.2d at 3; *Mountain States*, 459 F. Supp. at 358.

115. *See Mountain States*, 459 F. Supp. at 360.

116. *See* Alabama Libertarian Party v. City of Birmingham, 694 F. Supp. 814, 821 (N.D. Ala. 1988). The court stated that the Colorado court's decision in *Mountain States* was at least partially based on a Colorado statute, making "no obviously clear First Amendment decision." *Id.*; *see Mountain States*, 459 F. Supp. at 359. The *Alabama Libertarian* court further noted that the *Common Cause* court found a statutory basis for its decision. *See Alabama*

In *Alabama Libertarian*, the federal district court addressed the issue of government speech under the First Amendment right of free association.[117] The court stated that the freedom of association guarantee encompasses the related yet often conflicting values of the right to free expression and the right to refrain from expression.[118] Cases addressing compelled expression assume that forcing an individual to endorse a particular view is as great an infringement on First Amendment rights as prohibiting that expression.[119]

The *Alabama Libertarian* court compared two lines of compelled expression cases where the United States Supreme Court struck down the expenditure of taxpayer funds for ideological purposes: (1) cases where plaintiffs challenged the use of their money to support ideological causes;[120] and (2) cases where the government forced a citizen to be associated with an ideological message.[121] In the first line of cases, the plaintiffs challenged a bar association or union's use of compulsory dues to support ideological causes with which the plaintiffs disagreed, claiming that the use of plaintiffs' money amounted to compelled expression.[122] In the second line of cases, the plaintiffs claimed that requiring them to engage in some form of physical expression forced them to voice an official doctrine.[123]

The *Alabama Libertarian* court cursorily dismissed the plaintiff's claim under the second line of Supreme Court compelled expression cases.[124] The court stated that the city's use of taxpayer funds did not require the plaintiff to be a courier for an ideological message.[125] Instead, the court compared the plaintiff's claim to the first line of Supreme Court cases where the government compelled expression through the use of a plaintiff's money.[126] As a result, the court determined that spending public funds to influence an election could only violate the freedom of expression guarantee if the speech was endorsing an ideological cause.[127]

1. Freedom of Association Challenges and Compulsory Dues

Bar and union dues cases, like the plaintiff's challenge in *Alabama Libertarian*, involve situations where members object to bar association or union use of

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Libertarian, 694 F. Supp. at 819; *see also Common Cause*, 858 F.2d at 11. However, the Colorado Supreme Court in *Mountain States* did state that there is "an implicit recognition that such expenditures raise potentially serious constitutional questions." *Mountain States*, 459 F. Supp. at 349-50. Constitutional principles used to support its decision included the First Amendment right to petition and Article IV's guarantee clause, *see* U.S. CONST. art. IV, § 3.

117. *See Alabama Libertarian*, 694 F. Supp. at 816.

118. *See id.*

119. *See id.* at 821 (citing Buckley v. Valeo, 424 U.S. 1 (1976)).

120. *See id.* (citing Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977)).

121. *See id.* at 817.

122. *See, e.g.*, Keller v State Bar of California, 496 U.S. 1 (1990) (bar dues); *Abood*, 431 U.S. 209 (union dues).

123. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705 (1977) (the plaintiffs challenged a New Hampshire law requiring automobile drivers to carry the motto "live free or die" on their license plates); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 629 (1943) (plaintiffs objected to a law requiring recitation of the pledge of allegiance in school).

124. *See Alabama Libertarian*, 694 F. Supp. at 817 (citing *Wooley*, 430 U.S. 705).

125. *See id.*

126. *See id.*

127. *See id.*

compulsory dues to support causes that the members opposed. In these cases, the Supreme Court declared that the use of members' dues in support of ideological causes that are unrelated to the organization's purpose infringes upon an individual's freedom of belief.[128] For instance, in *Keller v. State Bar of California*,[129] the Supreme Court declared that the government could not compel an individual to endorse an ideological position through the use of compulsory bar dues for lobbying on ideological legislation.[130] In bar dues cases, courts have narrowed the scope of a bar association's permissible expenditures to activities that serve the state's interest in regulating the legal profession or improving the quality of legal services.[131]

Like defendants in government advocacy cases, the defendants in bar dues cases attempt to interpret the scope of their authority broadly—for example, the broad authority to lobby for the passage of controversial legislation such as gun control, abortion, and school prayer measures.[132] The Supreme Court has struck down expenditures on these issues as clearly outside of the scope of an entity's power.[133] Similar to government partisan advocacy cases, courts have considered educationally-oriented activities, such as promoting the ethical standards of the bar and continuing legal education programs, as important enough state interests to justify infringing on associational rights by charging mandatory dues.[134]

Drawing from the bar and union dues cases, the *Alabama Libertarian* court considered the "critical issue" to be whether the government used public funds for political or ideological ends.[135] The court upheld the expenditures against a freedom of association challenge because the city used the dissenting taxpayers' funds to support a message which was related to "needs common to us all."[136] The *Alabama Libertarian* court assumed that the speech at issue was neutral because it concerned a public welfare measure, and disregarded the inherently political nature of any speech concerning an election.[137] The court also failed to consider the idea that a governmental entity engages in political speech anytime that it speaks out in a partisan way on a proposed change requiring the consent of the voters. Arguably, such partisan political speech is prohibited by the First Amendment's ban on a government establishing an ideological point of view.[138]

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128. *See* Keller v. State Bar of California, 496 U.S. 1 (1990). Note that the bar dues cases involve only states that have integrated bars with mandatory membership. *See id.*; *see also* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (holding that First Amendment principles prohibited union from requiring contribution of dues to support an ideological cause as a condition of holding a job).

129. 496 U.S. 1 (1990); *see* Arrow v. Dow, 544 F. Supp. 458 (D.N.M. 1982).

130. *See Keller*, 496 U.S. 1; *see also Arrow*, 544 F. Supp. 458.

131. *See, e.g., Arrow*, 544 F. Supp. at 461-63. Similarly, in union dues cases, the Supreme Court requires the activities to be "germane to the union's duties as collective bargaining representative." TRIBE, *supra* note 57, § 12-4, at 805 n.5.

132. *See Keller*, 496 U.S. at 15.

133. *See id.*

134. *See, e.g., Arrow*, 544 F. Supp at 461.

135. *See* Alabama Libertarian Party v. City of Birmingham, 694 F. Supp. 814, 817 (N.D. Ala. 1988).

136. *Id.* at 817.

137. *See id.*

138. *See generally* TRIBE, *supra* note 57, § 12-4, at 804-814.

2. Government Speech and First Amendment Political Establishment Concerns

Scholars have asserted that the First Amendment has an implied prohibition against government establishment of official doctrine. Courts and commentators have labeled this implied prohibition "political establishment," borrowing the name from the First Amendment's religious establishment clause.[139] Political establishment is the "the advocacy of political viewpoints by or with the assistance of government."[140] This limitation is in addition to and consistent with the government's function of protecting individual ideological beliefs.[141] Because the idea of political establishment recognizes that individuals, rather than the government, should judge the merits of arguments,[142] courts have found the issue of First Amendment political establishment relevant to government partisan advocacy cases.[143]

In government partisan advocacy cases, the judicial emphasis on "[t]he importance of governmental impartiality in electoral matters"[144] reflects a recognition that, in our democratic political system, the government cannot establish an official view. For example, in *Stern v. Kramarsky*,[145] the court referred to the responsibility of an arm of state government to maintain neutrality and impartiality with regard to electoral matters.[146] In *Mountain States*, the court pointed out that the school board's activities amounted to an endorsement of "political ideas," which deviated from its obligation to remain neutral with respect to political issues under the First Amendment.[147]

However, not all government dissemination of political views violates the prohibition on political establishment. For example, the government does not force expression of a view simply by advocating a controversial ideological position.[148] Courts assume that individuals can ignore objectionable messages.[149] As discussed above, compelled expression cases involve situations where the government intrudes on the individual by requiring some form of association with the message, such as carrying a message on your property or person, or exacting an appreciable amount of your money to endorse an ideological cause.[150]

While the Supreme Court has held that a citizen must pay income taxes despite disagreement with federal expenditures, such as the welfare system,[151] other courts

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139. *See generally* Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CAL. L. REV. 1104 (1979).

140. *See id.* at 1104.

141. *See* Burt v. Blumenauer, 699 P.2d 168, 176 (Or. 1985) (en banc).

142. *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L.REV. 189, 228 (1984).

143. *See Burt*, 699 P.2d at 176.

144. Stanson v. Mott, 551 P.2d 1, 10 (Cal. 1976) (en banc).

145. 375 N.Y.S.2d 235 (Sup. Ct. 1975).

146. *See id.* at 239.

147. *See* Mountain States Legal Found. v. Denver Sch. Dist. No. 1, 459 F. Supp 357, 360-61 (D. Colo. 1978); *see also* Alabama Libertarian Party v. City of Birmingham, 694 F. Supp. 814, 820 (N.D. Ala. 1988).

148. *See* TRIBE, *supra* note 57, § 12-4, at 807.

149. *See, e.g.*, Packer Corp. v. Utah, 285 U.S. 105, 110 (1932) ("Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer . . . . In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off . . . .").

150. *See* TRIBE, *supra* note 57, § 12-4, at 804.

151. *See* Crowe v. Commissioner of Internal Revenue, 396 F.2d 766, 767 (8th Cir. 1968); *see also* Massachusetts v. Mellon, 262 U.S. 447, 486-87 (1923); TRIBE, *supra* note 57, § 12-4, at 807 n.13.

have rejected the analogy between the collection of bar and union dues and general taxes and have found the expenditure of a member's dues to be more "traceable."[152] The distinction between taxes and union dues is based on the number of taxpayers and the complexity of the federal tax structure, which render individual expenditures on general taxes too inconsequential to raise a constitutional problem.[153] The more relaxed standing rules that courts apply to municipalities demonstrate this distinction, giving a municipal taxpayer more rights to challenge expenditures in the local than in the federal system.[154]

Courts acknowledge that communicating a position on ideological issues is necessary for governing.[155] In *Miller v. California Commission on the Status of Women*,[156] the California State Legislature created a commission (Commission) to study issues relating to women's equality, such as employment and educational conditions.[157] The California Legislature and the voters subsequently passed the state Equal Rights Amendment (ERA).[158] In opposition to the ERA's enactment, the plaintiffs filed an action alleging that the Commission's activities had been responsible for promoting the ratification of the ERA and the adaptation of California's laws to the standard set by the ERA.[159] The plaintiffs objected to the state's establishment of a commission for the promotion of an ideological viewpoint.[160] The court responded that if the government cannot address controversial topics and engage in similar forms of communication, the government cannot govern.[161] The *Miller* court found express wording by the legislature allowing the Commission to advocate its views concerning the status of women.[162] According to

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152. *See* Keller v. State Bar of California, 767 P.2d 1020, 1039 (Cal. 1989) (en banc) (Kaufman, J., dissenting in part), *rev'd and remanded*, 496 U.S. 1 (1990).

153. *See Keller*, 767 P.2d at 1039 (Kaufman, J., dissenting in part).

154. *See id.*; *see also* TRIBE, *supra* note 57, § 12-4, at 807-08 n.14. Courts have stated that "[t]he rule upholding municipal taxpayer standing appears to rest on the assumption that the relatively small number of taxpayers involved, and the close relationship between residents of a municipality and their local government[,] results in a direct and palpable injury whenever tax revenues are misused." Alabama Libertarian Party v. City of Birmingham, 694 F. Supp. 814, 816 (N.D. Ala. 1988) (quoting Taub v. Kentucky, 842 F.2d 912, 918 (6th Cir. 1988)).

155. *See* Miller v. California Comm'n on the Status of Women, 198 Cal. Rptr. 877, 882 (Ct. App. 1984). Controversial speech is determined by measuring "the degree of attention paid to an issue by government officials, community leaders, and the media." *See* Kaminshine, *supra* note 139, at 1113-14. A determination of public importance depends on whether the issue relates to a social or political choice currently confronting a community and the impact, as perceived by the public, that the issue is likely to have in the community. *See id.* at 1114. Given the controversy surrounding the issue in both *Burt* and in *Carter*, and the fact that the speech was directed at influencing the outcome of an election, the government partisan advocacy in those two cases was political and controversial.

156. 198 Cal. Rptr. 877 (Ct. App. 1984).

157. *See Miller*, 198 Cal. Rptr. at 879 (Plaintiff alleged that the state, by authorizing and providing funding for the commission, had unlawfully put its "imprimatur" on the ideological activities which included expressing opinions on issues of women's educational and employment problems, needs, and career opportunities.).

158. *See id.*

159. *See id.*

160. *See id.* at 881.

161. *See id.* at 882.

162. The California Legislature has

> "expressly authorized [the Commission] to state its position and viewpoint on issues developed in the performance of its duties and responsibilities." . . . . The authorization for the [C]ommission to speak its mind 'on issues' developed on these matters can only be interpreted as a legislative warrant to advocate and promote the [C]ommission's positions on these subjects.

Id. at 880 (quoting CAL. GOV'T CODE § 8246(b) (West 1992)) (footnote and citations omitted).

the court, the expenditures were constitutional because they did not tell the citizens how to vote.[163]

However, the New York Supreme Court declared, in *Stern v. Kramarsky*,[164] that agency expenditures on partisan advocacy for state constitutional amendments are an improper agency function under the state and federal Constitution.[165] The court also stated that campaigning for or against constitutional amendments "demean[s] the democratic process."[166] In the context of an election "no agency may misuse any such funds for promoting its own opinions, whims or beliefs, irrespective of the high ideals or worthy cause it espouses, promotes or promulgates."[167]

In contrast to the *Alabama Libertarian* court's identification of the "critical issue" under the First Amendment as whether the expenditure concerned a matter with either an ideological or neutral nature,[168] other jurisdictions have identified the "critical issue" as whether the spending of funds was directed at the outcome of an election and whether the government crossed the line into the realm of establishing official doctrine.[169] For example, the evil in *Miller* and *Stern* was not the ideological bent of the issue or the government speech concerning it, but the context in which the speech was made. Both cases stated that expenditures that are directed at an election are inappropriate when "government speech has entered the lists in a political controversy submitted to a vote of the people."[170]

3. Grounds for Heightened Judicial Review

Courts have articulated reasons why certain forms of government actions, such as the kind at issue in this Comment, particularly interfere with the operation of the political process, warranting heightened judicial scrutiny. In the famous footnote four of *United States v. Carolene Products Co.*,[171] the Supreme Court presented a rationale for determining when a court should exercise heightened judicial review of a legislative enactment.[172] Under this analysis, a court should independently review legislation that disrupts the operation of the political system.[173] For instance, legislation restricting specific constitutional guarantees, namely the first ten Amendments, and legislation discriminating against racial minorities implicitly

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163. *See id.* at 883. *But see* Stern v. Kramarsky, 375 N.Y.S.2d 235 (Sup. Ct. 1975) (wherein the brochures directly told the citizens to vote for the Equal Rights Amendment (ERA)). *Stern* involved expenditures on a proposed equal rights amendment to the New York Constitution. *See Stern*, 375 N.Y.S.2d at 236. The New York Coalition for Equal Rights and the League of Women Voters aired radio and television broadcasts and distributed brochures stating: "It's really quite simple. Either you believe that all people are created equal or you don't. If you do * * * Vote Yes on Nov. 4th." *Id.* (quoting New York Coalition for Equal Rights and the League of Women Voters).

164. 375 N.Y.S.2d 235.

165. *See id.*

166. *Id.*

167. *Id.* at 239-40.

168. *See* Alabama Libertarian Party v. City of Birmingham, 694 F. Supp. 814, 817 (N.D. Ala. 1988); *see also supra* note 135 and accompanying text.

169. *See supra* notes 144-147, notes 164-167, and accompanying text.

170. Miller v. California Comm'n on the Status of Women, 198 Cal. Rptr. 877, 883 (Ct. App. 1984); *see Stern* 375 N.Y.S.2d at 237.

171. 304 U.S. 144, 152-53 n.4 (1938).

172. *See id.*

173. *See id.*

interferes with the political process.[174] Racially discriminatory legislation in the area of voting makes it harder for certain groups to participate in the political process,[175] and legislation that suppresses speech inhibits open debate which is at the heart of the First Amendment.[176]

Legislation that interferes with the political process differs from other forms of restrictive legislation because these other forms are capable, at least in theory, of being checked by the political process.[177] If voters disagree with the legislators responsible for passing the legislation, they can vote them out of office.[178] Restricting communications, on the other hand, inhibits the flow of information between government and individuals that is necessary for making informed choices, and thus prevents meaningful oversight of government activities by an informed electorate.[179]

Scholars and courts compare the effects of a government adding its own voice to the effects of restrictions on communications, asserting that it is a bias comparable to suppressing speech.[180] As authors John E. Nowak and Ronald D. Rotunda have stated, illustrating the effect that restriction of speech has on the political process: "[s]peech is part of the legislative process itself. Restriction of speech alters the democratic process and undercuts the basis for deferring to the legislation that emerges."[181]

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To summarize, although court decisions hold that government partisan advocacy may be inconsistent with principles implied in the Constitution, particularly the First Amendment, courts have not yet developed a constitutional analysis that is specifically applicable to government speech. Instead, courts have generally focused on the same constitutional concerns when considering the integrity of the electoral process, regardless of the issues involved. However, government speech poses unique theoretical problems and conflicts with specific principles implied in the Constitution. For instance, government speech violates the government's duty to remain impartial with regard to elections, potentially distorts the political process in an area in which it cannot correct itself, uses the dues of a dissenting citizen infringing on the right of free association, obscures accountability, and threatens self-perpetuation in power.

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174. *See* NOWAK & ROTUNDA, *supra* note 14, § 16.7(a), at 993 n.2 (citing *Carolene Products*, 304 U.S. at 152-53 n.4).

175. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 996 (9th ed. 1985) (citing Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943)).

176. *See id.*

177. The *Carolene Products* Court considered, but did not decide, "whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation." *Carolene Products*, 304 U.S. at 152-53 n.4.

178. *See* NOWAK & ROTUNDA, *supra* note 14, § 16.6, 16.7, at 991-993.

179. *See* Kamenshine, *supra* note 139, at 1105.

180. *See* Erwin Chemerinsky, *Protecting the Democratic Process: Voter Standing to Challenge Abuses of Incumbency*, 49 OHIO ST. L.J. 773, 777 (1988). Chemerinsky, in the context of candidate elections and abuses of the office for electioneering, asserts that "[t]he matter cannot be left to the political process because the very claim is that the incumbent is subverting that process and preventing it from serving as a true reflection of the popular will." *Id.* at 778. According to Chemerinsky, using government workers to perform campaign tasks while working is one form of abuse by incumbents. *See id.* at 774.

181. Nowak & Rotunda, *supra* note 14, § 16.7(a), at 993.

IV. GOVERNMENT AS SPEAKER

Few cases discuss the government's right to speak under the First Amendment or the First Amendment repercussions of suppressing that speech.[182] Instead, most cases focus on government interference with the political process.[183] The issue of whether the government may assert its own First Amendment rights raises compelling questions about the values that the First Amendment should protect. According to the text of the First Amendment and under traditional First Amendment theory, the First Amendment monitors laws that restrict an individual's expression.[184] However, the Supreme Court has focused on the informational value of the speech itself and the public's right to hear.[185] This raises questions regarding the potential for unjustified suppression of and interference with the government's right to speak.[186]

Courts and scholars that have considered this issue approach the government entity's assertion of First Amendment rights with skepticism. In *Anderson v. Boston*,[187] the Massachusetts Supreme Court declined to address Boston's claim of a First Amendment right to disseminate the information.[188] Rather than addressing the issue of whether Boston had a First Amendment right to speak, the court examined the speech itself, and discussed whether the First Amendment protects the type of information that the city tried to disseminate.[189] The court considered Boston's actions to be political speech, which is at the heart of First Amendment protections.[190] However, the court found that the state interest in the integrity of the

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182. *See* Anderson v. Boston, 380 N.E.2d 628, 635-36 (Mass. 1978) ("[T]here has been almost no judicial consideration of the impact of rights of freedom of speech on the right of State or local governments to use public funds to advocate a position on a question being submitted to the voters."), *stayed by*, City of Boston v. Anderson, 439 U.S. 1389, (Brennan, J., as Circuit Justice), *aff'd mem.*, 439 U.S. 951 (1978) (motion to vacate stay order denied); Stern v. Kramarsky, 375 N.Y.S.2d 235, 240 (Sup. Ct. 1975) (rejecting government defendants' argument that an injunction would abridge their First Amendment rights); *see also* Campbell v. Joint District 28-J, 704 F.2d 501, 503 (10th Cir. 1983) (dismissing defendants' contention that the restriction imposed by the district court violated their First Amendment rights).

183. *See* discussion *supra* Part III.

184. The text of the First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

185. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (protecting the public's right to receive advertisements providing truthful information about prices for prescription drugs); *see also Anderson*, 380 N.E.2d at 636 n.12 (citing Madison Joint Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175 n.7 (1976)) ("[T]he subject of government as a party to communications has continued generally to be neglected in its constitutional aspect."); Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 867 (1979). Yudof asserts that constitutional decisions do not support a government's right to speak: "There may be policy reasons to protect government speech for the good of all, but it is inconceivable that governments may assert First Amendment rights against the interests of the larger community." Yudof, *supra*, at 867-68.

186. *See generally id.*

187. 380 N.E.2d 628.

188. *See id.* at 636.

189. *See id.*

190. *See id.* at 637.

democratic process, and the appearance of fairness, was compelling enough to justify enjoining the expenditures.[191]

Prior to the events in *Anderson*, the United States Supreme Court, in *First National Bank of Boston v. Bellotti*,[192] for the first time extended First Amendment protection to corporations wishing to speak out on campaign issues. In *Bellotti*, the Court invalidated under the First Amendment an earlier version of the Massachusetts statute at issue in *Anderson*.[193] This statute restricted private corporation campaign expenditures on ballot issues which materially affected corporate business assets.[194] In *Bellotti*, a corporation which sought to campaign on a broader range of issues, challenged the expenditure.[195] The Supreme Court invalidated the legislation and stated that the informational value of the company's advocacy justified its protection, regardless of the speaker's identity as a corporation.[196]

Adopting *Bellotti*'s rationale, the City of Boston in *Anderson* argued that if the First Amendment protected the speech of business corporations, then it also should apply to municipal corporations.[197] The events in *Anderson* arose directly out of the *Bellotti* ruling.[198] In *Anderson*, the same corporation embarked on a campaign to defeat a referendum on the 1978 ballot.[199] The corporation objected to the same proposed state constitutional amendment that Boston supported.[200] The measure would have eased the homeowners' tax burden by shifting the bulk of it to business and industry.[201] In response, Boston planned a publicity campaign to promote the proposed amendment.[202] Boston claimed that the advertisements were necessary to counter the corporation's extensive expenditures on the campaign, expenditures which were made possible by the holding in *Bellotti*.[203]

Although the Massachusetts Supreme Court in *Anderson* rejected the comparison between municipal and business corporations and enjoined the expenditures, Justice Brennan, acting as Circuit Judge, in a brief memorandum opinion which was upheld by the whole Court, upheld Boston's right to campaign for the measure.[204] Justice Brennan used language suggesting an implicit recognition of a municipal corpora-

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191. *See id.* The *Anderson* court acknowledged the municipality's First Amendment right to expend funds to influence legislative processes in other contexts, such as lobbying, but distinguished partisan advocacy during an election, stating that "[m]unicipal action concerning legislation has statutory, traditional, and constitutional foundations which are not applicable to municipal action on questions submitted to the people." *Id.* at 635 n.11.

192. 435 U.S. 765 (1978).

193. *See id.* at 766.

194. *See* Ryan, *supra* note 14, at 1125.

195. *See Bellotti*, 435 U.S. at 776.

196. *See id.* "The proper question therefore is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the law] abridges expression that the First Amendment was meant to protect." *Id.*; *see also* GERALD GUNTHER, CONSTITUTIONAL LAW 1369 (12th ed. 1991).

197. *See* Ryan, *supra* note 14, at 1125.

198. *See id.*

199. *See id.*

200. *See id.*

201. *See id.*

202. *See id.*

203. *See* NOWAK & ROTUNDA, *supra* note 14, § 16.11, at 1003 n.1.

204. *See City of Boston v. Anderson*, 439 U.S. 1389, 1390 (motion to stay order by Brennan, J., as Circuit Justice), *aff'd mem.*, 439 U.S. 951 (1978) (motion to vacate stay order denied).

tion's First Amendment right to disseminate its views.[205] Justice Brennan noted that speech to promote a constitutional amendment changing property tax valuations was akin to private corporate speech.[206] According to Justice Brennan, if other interests, including large commercial or industrial agencies, could finance their opposition to a constitutional amendment, then Boston should be able to finance its view as well.[207] Justice Brennan found that the corporation's speech had informational value which helped the public to form judgments about political issues and candidates.[208] Justice Brennan reasoned that if Boston was not allowed to proceed with its promotion of the amendment, Boston would be foreclosed forever from communicating its support to the electorate "as required in the interests of all taxpayers, including residential property owners."[209]

Like *Anderson* and *Bellotti*, *Carter* involved a municipality and a private corporation with strong interests in the outcome of an election.[210] The Las Cruces City Commissioners claimed that they launched a media campaign on behalf of their citizens, who had been paying some of the highest utility prices in the nation to an out-of-state power company.[211] The City asserted the right and obligation to advise its voters about the advantages of acquiring a citizen-owned electric utility.[212] In a letter to its employees, the City Commissioners complained that the private company was planning to wage a multi-million dollar campaign to fight the City's effort.[213] Another group which opposed the utility acquisition, "People Against Costly Municipal Takeover," also allegedly launched its own campaign featuring television spots of people discussing their concerns about the utility acquisition.[214]

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205. *See id.*

206. *See id.*

207. *See id.*

208. *See id.*; *see also* Yudof, *supra* note 185, at 866. Yudof suggests that government speech is necessary to curtail the influence of large corporations who have the power and the money to control the forums of communication. *See id.*

209. *Anderson*, 439 U.S. at 1390.

210. *See* Carter v. City of Las Cruces, 121 N.M. 580, 915 P.2d 336 (Ct. App.), *cert. denied*, 121 N.M. 644, 916 P.2d 844 (1996); *see also supra* note 3 and accompanying text.

211. *See Carter*, 121 N.M. 580, 915 P.2d 336.

212. *See* Transcript of Proceedings at 43, Carter v. City of Las Cruces, 121 N.M. 580, 915 P.2d 336 (Ct. App.) (No. CV-94-605), *cert. denied*, 121 N.M. 644, 916 P.2d 844 (1996).

213. Motion for Temporary Restraining Order and Preliminary Injunction, Exhibit F at 000027, Carter v. City of Las Cruces, 121 N.M. 580, 915 P.2d 336 (Ct. App.) (No. CV-94-605), *cert. denied*, 121 N.M. 644, 916 P.2d 844 (1996); *see* Terrance Vestal, *Electric Utility Bidder Scorns City Meeting*, LAS CRUCES SUN-NEWS, ___ ___, 1994, at A-1, *cited in* Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction, Exhibit C at 000065, Carter v. City of Las Cruces, 121 N.M. 580, 915 P.2d 336 (Ct. App.) (No. CV-94-605), *cert. denied*, 121 N.M. 644, 916 P.2d 844 (1996).

214. *See* Terrance Vestal, *City Unveils Campaign to "Unplug,"* LAS CRUCES SUN-NEWS, ___ ___, 1994, at A-1, *cited in* Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction, Exhibit C at 000065, Carter v. City of Las Cruces, 121 N.M. 580, 915 P.2d 336 (Ct. App.) (No. CV-94-605), *cert. denied*, 121 N.M. 644, 916 P.2d 844 (1996). Las Cruces wanted to "get out from under [the] El Paso Electric Company because [C]ity officials say its rates are some of the highest in the nation." *Id.* When the utility was near bankruptcy, the Las Cruces City Commissioners drafted a proposal to buy the bankrupt utility to create a citizen owned electric utility. *See id.* Central and South West Corporation, a private Texas company, also were potential bidders. *See id.* There was a dispute as to whether rates would increase under the City's or under the private company's proposal. *See id.* While surveys conducted by the private company projected that utility rates would increase by 30% if the City acquired the utility, the City's surveys projected that rates would drop between 20% to 29% if the City acquired the utility. *See id.* Figures on reduced utility rates were part of the City's advertising campaign. *See id.*

Authorities acknowledge that local governments may have a valid basis for making campaign expenditures. As discussed above, home rule charters confer broad law making authority on municipalities.[215] In addition, given their position as a small entity, municipalities and other subdivisions have a significant interest in state constitutional amendments, bond issues, and referendums—an interest akin to,[216] and a conduit for, their constituents' interest.[217]

In *City Affairs Committee of Jersey City v. Board of Commissioners of Jersey City*,[218] an early state case, a municipality used public funds to advocate for the adoption of a state constitutional amendment.[219] The court in *City Affairs* considered "the right of self-advancement and self-protection" to be the "very essence" of a local government's power.[220] The court used language that was sensitive to the value of an informed electorate, but did not expressly mention the First Amendment.[221] According to the court, the city's advocacy was justified in light of the need for "a more intelligent understanding of the issues, which ordinarily are not free from complexity when they involve changes in the state's organic law."[222] Commentators have recognized this very need for information which may be heightened in the context of a referendum, because the voters can not rely on party lines to make their choices.[223]

V. IS "GOVERNMENT SPEECH" AS OMINOUS AS IT SOUNDS OR IS IT RHETORIC LIKE THE PARTISAN MESSAGES IT COMPRISES?

A. *Problems Posed by Government Partisan Advocacy*

Scholars and courts that see a significant problem with government speech distinguish it from other forms of government participation in the political process. Those that would prohibit government speech believe that allowing government partisan advocacy activates the special implications of government speech.[224] As a result, while government partisan advocacy may have informative value, the First Amendment acts to concurrently safeguard the political process.[225] It does so by promoting the free spread of information and opinion about government affairs so that the public can make uncoerced decisions.[226] In addition, at least one court has

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215. For a discussion of home rule charters, see *supra* Part II.B.
216. *See supra* note 154.
217. *See infra* notes 230 and accompanying text.
218. 46 A.2d 425 (N.J. 1946).
219. *See id.* at 427.
220. *Id.*
221. *See id.*
222. *Id.*
223. *See* Ryan, *supra* note 14, at 1120.
224. *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1, 18 (1971).
225. *See id.*
226. *See id.* "[The First Amendment protects] [f]orms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express." *Id.* (quoting Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255); *see also* Ryan, *supra* note 14, at 1116.

held that the principles of representative government found in the Constitution provide an independent basis aside from the First Amendment for invalidating expenditures on government partisan advocacy.[227]

In ballot or referendum elections and other state law approval processes, the political process delegates power directly to the people.[228] For example, the final decision on the utility acquisition in *Carter* rested with the City's inhabitants.[229] The *Anderson* court, and the dissent in *City Affairs*, distinguished between a municipality's traditional role in endorsing the interests of the inhabitants through lobbying, and its obligation to remain neutral on questions submitted directly to the voters.[230] Thus, these cases reveal judicial recognition that in our democratic system, a government's duty to inform is equal to its duty to refrain from endorsing an official point of view in an election context.

The issue of government partisan advocacy before an election brings to light the potential problems posed by government speech in general. Although in *Carter* and similar cases, the government added to the pool of information and did not directly suppress other views, courts and scholars, nevertheless, argue that government speech, in and of itself, has its own coercive quality.[231] They argue that government speech impacts the exchange of information within the political process in a way which is analogous to government suppression of speech.[232]

For instance, government as speaker tends to confuse and prejudice the issues, affecting its hearers differently than other forms of campaign speech.[233] As a result voters may tend to defer to the government's judgment[234]—although the assumption that government has an especially influential effect on the people depends on the

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227. *See* Mountain States Legal Found. v. Denver Sch. Dist. No. 1, 459 F. Supp. 357, 361 (D. Colo. 1978); *see also* Stern v. Kramarsky, 375 N.Y.S.2d 235, 237 (Sup. Ct. 1975) ("Thus the issue raised by the instant application is not one concerning freedom of speech or association, but whether it is a proper function of a state agency to actively support a proposed amendment to the state constitution . . . ."). The *Burt* court highlighted the special problems that government partisan advocacy poses:

> It hardly seems necessary to rely on the First Amendment, at least when government resources are devoted to promoting one side in an election on which the legitimacy of the government itself rests. The principles of representative government enshrined in our constitutions would limit government intervention on behalf of its own candidates or against their opponents even if the First Amendment and its state equivalents had never been adopted.

Burt v. Blumenauer, 699 P.2d 168, 175 (Or. 1985) (en banc).

228. *See* Ziegler, *supra* note 8, at 615; *see also* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 791-92 (1978). In *Bellotti*, the Supreme Court emphasized the First Amendment value of the people being responsible for evaluating the strengths of arguments. *See Bellotti*, 435 U.S. at 791. The Court stated that the government should not assume "the task of ultimate judgment [with regard to political matters], lest the people lose their ability to govern themselves." *Id.* at 792 n.31.

229. *See supra* note 3 and accompanying text.

230. *See* Anderson v. Boston, 380 N.E.2d 628, 635-36 & n.12 (Mass. 1978), *stayed by*, City of Boston v. Anderson, 439 U.S. 1389, (Brennan, J., as Circuit Justice), *aff'd mem.*, 439 U.S. 951 (1978) (motion to vacate stay order denied).

231. *See, e.g.*, Stanson v. Mott, 551 P.2d 1, 10 (Cal. 1976) (en banc) (quoting Gould v. Grubb, 536 P.2d 1337, 1345 (Cal. 1975) (en banc) (Government partisan speech before an election "distorts the preferences of participating voters.")); *see also Stanson*, 551 P.2d at 10 (quoting *Gould*, 536 P.2d at 1348) ("Our state and federal Constitutions mandate that the government must, if possible, avoid any feature that might adulterate or, indeed, frustrate, that free and pure choice . . . .").

232. *See, e.g., Stanson*, 551 P.2d at 10.

233. *See* Ryan, *supra* note 14, at 1134.

234. *See id.*

public's reverence and respect for government.[235] Also, in cases like *Carter*, the government used the "prestige and influence" that accompanies any government endorsement to influence the outcome of the electoral process.[236] Thus, the government may not only affirmatively tell the electorate how to view an issue, but in addition, may use the prestige of government and its "authoritative voice"[237] to obtain the voters' approval.[238]

Commentators further would argue that, under the guise of gaining the public's support and consent, government partisan advocacy helps the government to implement its policies in a manner that ultimately affects the way people are governed.[239] Just as government suppression of dissident speech potentially insulates government from criticism caused by the debate, government advocacy renders the voters, rather than the government, accountable for its policies.[240] This occurs when the voters, responding to the authoritative voice of government advocacy, pass or reject measures through the political process. In addition, a government may have motives for speaking other than the public interest. Government has the power to suppress, and those in power may try to abuse that power.[241]

The value of free expression in our system rests on political outcomes that are responsive to the public will.[242] Government speech, even if its effect is only minimally coercive on public opinion, may be inconsistent with this goal. At the very least, government support for one view distorts the process by forcing the dissenters to subsidize a view with which they disagree and may dilute the dissenters' votes.[243] When government enters the political fray in cases like *Carter*, it interferes' with the exercise of the electoral franchise, a right which is "at the heart of the democratic process."[244] An election is the forum within a democracy where citizens exercise their choice regarding how they shall be governed.

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235. In *Carter*, a greater percentage of people surveyed trusted the City Commissioners more than the private utility company whose promotional efforts the City claimed to be countering. *See* Motion for Temporary Restraining Order and Preliminary Injunction, Exhibit I at 00044, Carter v. City of Las Cruces, 121 N.M. 580, 915 P.2d 336 (Ct. App.) (No. CV-94-605), *cert. denied*, 121 N.M. 644, 916 P.2d 844 (1996). This statistic tends to support the assertion that the citizens of Las Cruces may vote according to the City's position regardless of whether they are adequately informed of the other side of the issue. However, government attempts at persuading the electorate are arguably as valid as any other source from which the voters receive the information.

236. *See* Stern v. Kramarsky, 375 N.Y.S.2d 235, 237 (Sup. Ct. 1975).

237. *See* Ryan, *supra* note 14, at 1134.

238. *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 698 (1970) ("Emanating from a source of great authority in the society government expression carries extra psychological weight for many citizens.").

239. *See* Ryan, *supra* note 14, at 1131.

240. *See* Chemerinsky, *supra* note 180, at 774 ("Accountability is subverted if an incumbent can use the resources of the office to perpetuate his or her occupancy of the office."); Kamenshine, *supra* note 139, at 1105 ("If a government can manipulate that marketplace, it can ultimately subvert the processes by which the people hold it accountable."); *see also Stern*, 375 N.Y.S.2d at 238 (Government advocacy endows "the campaign with all of the prestige and influence naturally arising from any endorsement of a governmental authority.").

241. *See* Ryan, *supra* note 14, at 1133 n.179. "Such a motive may well arise in the context of a referendum that challenges established methods of government that the present bureaucracy may be unwilling to relinquish." *Id.* at 1133.

242. *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 244 (1993).

243. *See* Chemerinsky, *supra* note 180, at 778 ("Those who support challengers have their votes diluted by abuse of incumbency in exactly the same way the malapportionment or stuffing of the ballot box lessens the effectiveness of an individual's vote.").

244. Burson v. Freedman, 504 U.S. 191 (1992) (The state had a compelling interest in protecting a citizen's right to vote in an election conducted with integrity and reliability.).

Government speech is especially inappropriate in an election context where courts have stated that governments may educate, but they may not advocate.[245] The distinction that courts make between education and advocacy recognizes the importance of the free formation of informed opinion which is essential to democracy.[246] The judiciary has recognized that in an election context, allowing a subdivision to engage in partisan advocacy would make "the creature greater than the creator"[247] in a government that is designed so that the source of power originates in the people.[248]

B. Government Speech and First Amendment Theory

Some commentators argue that government speech does not present a serious problem.[249] First, free speech and First Amendment doctrines are based on the assumption that people can appreciate speech for what it is.[250] Courts that have found no First Amendment problem with government speech rely on the premise that an individual has the facility to evaluate among different messages.[251] For instance, the *Alabama Libertarian* court dismissed any claim that government speech coerces the formation of public opinion.[252] The court declared that citizen taxpayers who disagreed with the expenditure could either dissent at the polls of the bond election or when the officials were up for election, the traditional means for eliminating abuses and bad policies in our political system.[253]

Second, government speech in the United States should not be equated to propaganda in other societies, such as totalitarian regimes. These latter societies suppress all other voices besides the state, resulting in a strong control over public opinion.[254] In contrast, the United States is probably the site of more communication against the government than in any other country.[255]

Third, the facts in cases such as *Anderson* and *Carter* arguably show that even if state legislatures enact restraints on government speech, other sources, such as mass media conglomerates and large corporations, threaten to shape and control public

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245. *See* Citizens to Protect Pub. Funds v. Board of Educ. of Parsippany Troy-Hills, 98 A.2d 673, 677-78 (N.J. 1953) (finding implied legislative authorization for the expenditure of funds on an informational booklet about a bond proposal, but invalidating the school board's expenditure because it presented only one side of an issue); Stern v. Kramarsky, 375 N.Y.S.2d 235, 239 (Sup. Ct. 1975) (holding that a state agency may not use public monies to advocate for or against an issue, but it may educate, inform, or act to promote voting on an issue); Burt v. Blumenauer, 799 P.2d 168, 172-73 (Or. 1985) (en banc).

246. *See* Mountain States Legal Found. v. Denver Sch. Dist. No. 1, 459 F. Supp. 347, 360 (D. Colo. 1978).

247. City Affairs Comm'n of Jersey City v. Board of Comm'rs of Jersey City, 46 A.2d 425, 432 (N.J. 1946) (Colie, J., joined by Parker, J., Oliphant, J., and Freund, J., dissenting).

248. *See id.*

249. *See generally* Tushnet, *supra* note 57, at 129; *see generally also* Schauer, *supra* note 8, at 382.

250. *See* Tushnet, *supra* note 57, at 129.

251. *See id.* at 132.

252. *See* Alabama Libertarian Party v. City of Birmingham, 694 F. Supp. 814, 820 (N.D. Ala. 1988).

253. *See Alabama Libertarian*, 694 F. Supp. at 820.

254. *See* Ziegler, *supra* note 8, at 579. Propaganda played a central role in Nazi Germany, demonstrating the negative import officially released propaganda entails. *See id.* at 605. The Nazi Minister of propaganda, summed up the role of propaganda in Nazi society when stating that the state has an "absolute right . . . to supervise the formation of public opinion." *Id.*

255. *See* Schauer, *supra* note 8, at 380.

opinion more dramatically than government messages.[256] Furthermore, courts have not ruled that government speech presents a cognizable First Amendment claim if the challenge is based solely on the First Amendment.[257]

Government speech on both ideological and public safety issues is necessary for governing.[258] Arguably there are legitimate uses of public monies for speech, even if some taxpayers oppose the views that are expressed. The content of government communications varies from conveying purely ideological viewpoints, such as displaying a flag or other national emblem,[259] to providing practical information, such as public service messages about the dangers of smoking.[260]

Government speech is not only necessary to inform the electorate, but also is important to maintain stability by helping to secure the government's power without the pervasive use of force.[261] Furthermore, it can be argued that government must communicate to the public about its policies and approaches to governing. Government projects and the communications concerning them, such as congressional and agency reports, provide the basis for the free and open debate of issues in a self-governing society.[262]

The First Amendment does not prohibit government from spending the taxes of a dissenting citizen when decisions are made by the representative branches.[263] The individual "has implicitly deferred, through the organic law, the question's resolution to the people's representatives."[264] For example, according to the *Miller* court, the plaintiffs' assertion that government cannot address women's equality issues was equivalent to saying that the government cannot form a position on controversial topics[265]—and prohibiting the government from speaking on contentious issues

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256. *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 804-12 (1978) (White, J., dissenting) (noting that, while corporate communications do come under the First Amendment, these communications do not necessarily serve First Amendment values).

Since the 1970s, when *Bellotti* and *Anderson* were decided, the media conglomerates increasingly have dominated the channels of communication, and their influence is expanding to control over elected officials. *See* Ben. H. Bagdikian, *The Lords of the Global Village*, THE NATION, June 12, 1989, at 805, 806. Bagdikian asserts that those that own the output of information consist of:

> A few media multinationals that now command the field . . . [who] have their own political agenda. All resist economic changes that do not support their own financial interests. Together, they exert a homogenizing power over ideas, culture and commerce that affects populations larger than any in history. Neither Caesar nor Hitler, Franklin Roosevelt nor any Pope, has commanded as much power to shape the information on which so many people depend to make decisions about everything from whom to vote for to what to eat.

Id. at 806.

257. *See Alabama Libertarian*, 694 F. Supp. at 814; *see also* discussion *supra* Part III.C and Part III.D.

258. *See* Burt v. Blumenauer, 699 P.2d 168, 172 (Or. 1975) (en banc).

259. *See* TRIBE, *supra* note 57, § 12-4, at 807.

260. *See* Schauer, *supra* note 8, at 374.

261. *See* Ziegler, *supra* note 8, at 604 ("Government expression in a variety of forms is both proper and necessary in a system that attempts to govern itself with a minimum use of force.").

262. *See* NOWAK & ROTUNDA, *supra* note 14, § 16.11, at 1004.

263. *See* Ziegler, *supra* note 8, at 615.

264. *See id.*

265. *See* Miller v. California Comm'n on the Status of Women, 198 Cal. Rptr. 877, 882 (Ct. App. 1984) ("If the government . . . cannot appoint a commission to speak on the topic without implicating plaintiffs' First Amendment rights it may not address any other 'controversial' topics. If the government cannot address controversial topics it cannot govern.").

would prevent the government from governing.[266] Alternatively, if the public objects to the government's speech, they can elect officials who will promote different views.

C. *The General Rule*

The various interests involved in government partisan advocacy cases are the government's right to speak, the public's right to be informed, and the conflicting value of the public's right to be free from a biased political process. Courts attempt to reconcile these various rights by allowing governmental entities to speak while monitoring the tone of their advocacy. In other words, courts require impartiality. As a result, the general rule regarding government speech allows a government to use tax dollars to present its views only if the communication lies outside the context of an election. During an electoral race, a public entity may spend taxpayer funds for informational campaign activities only if the expenditures are related to the entity's purpose, and the entity presents both sides of the issue.

In *Carter*, the New Mexico Court of Appeals, without ruling on the issue, recognized that "at some threshold level a public entity must refrain from spending public funds to promote a partisan position during an election campaign."[267] To determine this threshold level, courts focus on the "style, tenor, and timing of the publication."[268] The timing element literally refers to whether the entity made or attempted to make the expenditure near election time. For instance, the *Stern* and *Miller* courts both considered the propriety of state expenditures that promoted the ERA.[269] *Miller* distinguished *Stern*, which struck down the expenditures, because the expenditures in *Miller* were not directly related to matters submitted to the vote of the people.[270]

The style and tenor elements refer to the vehemency of the advocacy, and whether the entity engaged in persuasive tactics, such as warning the public of the consequences of voting against their position.[271] Government entities may present a fair presentation of facts, but the line between informing and impermissibly persuading can be difficult to determine.[272] The California Supreme Court acknowledged that even in situations where the entity does not tell its citizens to support or to oppose a measure, a presentation could still be an improper campaign activity if the entity does not present both sides of the issue.[273]

The court in *Citizens to Protect Public Funds v. Board of Education of Parsippany-Troy Hills*[274] defined a fair presentation of facts as including the

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266. *See id.*

267. Carter v. City of Las Cruces, 121 N.M. 580, 583, 915 P.2d 336, 339 (Ct. App.), *cert. denied*, 121 N.M. 644, 916 P.2d 844 (1996).

268. *See* Stanson v. Mott, 551 P.2d 1, 12 (Cal. 1976) (en banc).

269. *See* Miller v. California Comm'n on the Status of Women, 198 Cal. Rptr. 877 (Ct. App. 1984); Stern v. Kramarsky, 375 N.Y.S.2d 235 (Sup. Ct. 1975).

270. In *Stern*, the Commission also had published flyers directly telling the voters to "Vote Yes." *See Stern*, 375 N.Y.S.2d at 235.

271. *See Stanson*, 551 P.2d at 11.

272. *See id.*

273. *See id.*

274. 98 A.2d 673 (N.J. 1953).

advantages and disadvantages of a proposal.[275] In the case, the defendant school board claimed it was acting pursuant to its statutory authority to build, enlarge, or repair schoolhouses when it put out a booklet advocating building new school facilities.[276] The court said that spending funds on the booklet would have been permissible, even though it was not expressly authorized under the school board's general power, if the school board had made a fair presentation of the facts, including the increased tax rate and other less desirable consequences.[277] The court also noted the coercive quality of the speech—for example, the booklet contained warnings that voting "no" would cheat children out of their education.[278] Similarly, the advertisements in *Carter* related the advantages of the proposed utility acquisition, without presenting the risks involved in acquiring an electric utility or the possible alternatives to the acquisition.[279]

Courts do not adequately explain why express advocacy coerces the electorate any more than other forms of speech by the government. Consider that the Commission designed specifically for promoting equal gender rights in *Miller*[280] undoubtedly had a profound effect on public opinion. In fact, it probably had more influence than promotional advertisements targeted at an election. While express advocacy, such as "vote yes," may "tend[] to supplant the critical capacity of its hearers,"[281] a presentation that is less strident, but uses facts favoring only its position, may be equally or more persuasive.

The notion that maintaining the appearance of fairness is important in preserving the integrity of the electoral process underlies the court's requirement of a fair presentation of facts. By forbidding express advocacy, courts indicate that they view express advocacy as more harmful to the machinery of government than presenting facts in a way favorable to the government's view. Government stability and legitimacy is largely dependent on public perception, and our society expects the government to remain impartial at least with respect to electoral matters.

VI. CONCLUSION

Carter brought to the fore the ethically questionable conduct of a New Mexico municipality. As one court addressing the issue of government partisan advocacy admonished, when scrutinizing whether government partisan advocacy poses a serious problem, "'unconstitutional practices (often) get their first footing' in their

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275. *See id.* at 677.
276. *See id.* at 674.
277. *See id.* at 677.
278. *See id.*
279. For the advertisement entitled "Pull the Plug on Rumors and Misinformation," see Motion for Temporary Restraining Order and Preliminary Injunction, Exhibit D at 000026, Carter v. City of Las Cruces, 121 N.M. 580, 915 P.2d 336 (Ct. App.) (No. CV-94-605), *cert. denied*, 121 N.M. 644, 916 P.2d 844 (1996). In oral argument, the City claimed that its advertisement was a neutral presentation of both sides of the issue. *See* Transcript of Proceedings at 42-43, Carter v. City of Las Cruces, 121 N.M. 580, 915 P.2d 336 (Ct. App.) (No. CV-94-605), *cert. denied*, 121 N.M. 644, 916 P.2d 844 (1996).
280. *See* Miller v. California Comm'n on the Status of Women, 198 Cal. Rptr. 877 (Ct. App. 1984).
281. *See* Ryan, *supra* note 14, at 1133 n.176.

'mildest and least repulsive form.'"[282] Government entities frequently attempt to influence elections through partisan advocacy in some form, and their actions may seem relatively harmless. Few would dispute, however, that public faith in the integrity of the electoral process has faded in past decades. The decline in voting since the 1960s reflects a public indifference to, and perhaps disillusionment with, the political process. It also may reflect a feeling that participation is meaningless because the government is increasingly dominated by other interests, such as private corporations.[283]

Courts have stated that prohibiting government partisan advocacy before an election preserves fairness and the *appearance* of fairness. However, on the one hand, the judicial assumption that government speech is unfair because it distorts the formation of consent conflicts with the First Amendment assumption that individuals can recognize speech for what it is.[284] On the other hand, the judicial concern with preserving the appearance of fairness acknowledges that government partisan advocacy looks bad. Courts are not entirely exaggerating when they equate these messages to propaganda. The uproar in Las Cruces that generated the challenge in *Carter* reveals that a significant number of people were upset about the government's expenditures.

The electoral process legitimates the government in power.[285] Governmental participation in political controversies by contentiously advocating one side of an issue deviates from the neutral role that a government is expected to assume. It degrades the public's perception of the government and the entire political process. The Supreme Court has recognized a strong governmental interest in preserving the integrity of the democratic process with laws that preserve the appearance of fairness in our government and protect the exercise of the voting franchise.[286]

Some commentators assert that government speech has not been challenged on a large scale because it does not present a significant enough problem and speculate that the lack of challenges may attest to the strength of our system.[287] Those who wish to either emphasize or, conversely, devalue its implications cannot deny that speech is a powerful tool of manipulation. However, those who consider government speech to be only a trivial problem acknowledge that speech is as elusive as it is powerful.

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282. Stanson v. Mott, 551 P.2d 1, 16 (Cal. 1976) (en banc) (quoting Boyd v. United States, 116 U.S. 616 (1886)); *see also*, TRIBE, *supra* note 57, § 12-4, at 809-10 & n.19 ("[T]he most troubling instances of governmental expression are often the most subtle and insidious.").

283. *See* Bagdikian, *supra* note 256, at 112 (attributing the decline in voter turnout and citizens making an effort to vote to commercial television's political dominance beginning in 1960). "National political campaigns [have become] . . . waged mainly through ten, twenty, and thirty second commercials." *Id.*; *see* Burt v. Blumenauer, 699 P.2d 168, 175 (Or. 1975) (en banc) ("[O]ne purpose of government in our society is . . . to moderate among competing private interests and voices . . . .").

284. *See* TRIBE, *supra* note 57, § 12-4, at 809 n.16; *see also* Schauer, *supra* note 8, at 381-82.

285. *See* Henry Louis Gates, Jr., *Marketing Justice*, THE NEW YORKER, Feb. 24, 1997, at 11. "Does anybody imagine that we have free elections because they yield the best policies?" *Id.* Gates, in a critique of the jury system that is relevant to the electoral system, asserts that "jury service represents the one chance most citizens ever get to perform a substantive government function." *Id.*

286. *See* Burson v. Freedman, 504 U.S. 191 (1992).

287. *See generally* Tushnet, *supra* note 57, at 134 ("[T]he degree of pluralism in the United States means that substantive government speech is not a real problem. In most situations there are opponents and critics who have enough access to the means of communication to assure that no substantive speech will be so loud as to drown out opposition.").

Having courts determine the difference between neutral factual information and biased persuasion leaves them with the task of making arbitrary distinctions and perhaps invites manipulation of the standards. It also ignores First Amendment concerns with vagueness and the tendency of all forms of communications, whether covert or overt, to sway public opinion.

First Amendment decisions promote more speech as the most feasible and effective means of insuring a government that derives its power from the people.[288] Eliminating government partisan advocacy, assuming a prohibition is workable, may promote the integrity of the democratic process by requiring the government to remain impartial with electoral matters to aid the public's perception. However, prohibiting government partisan advocacy under the assumption that it poses a serious threat to the political process belies the First Amendment premise that the public can evaluate for themselves the merits of opposing arguments.

LEIGH CONTRERAS

288. *See* Wood v. Georgia, 370 U.S. 375, 389 (1962)("Under our system of government, counterargument and education are the weapons available to expose these matters, not abridgement . . . of free speech . . . .").