

# GOVERNMENT ELECTION ADVOCACY: IMPLICATIONS OF RECENT SUPREME COURT ANALYSIS

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Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities.

—*Police Department of Chicago v. Mosley*, 408 U.S. 92, 96 (1972).

“Compelled support of government”—even those programs of government one does not approve—is of course perfectly constitutional, as every taxpayer must attest. And some government programs involve, or entirely consist of, advocating a position.

—*Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 559 (2005).

## INTRODUCTION

The purpose of this Article is to identify a constitutionally consistent approach to the problem of government election partisanship in light of the Supreme Court's First Amendment and election jurisprudence bearing upon the question of government efforts to influence the outcome of the electoral process. In this regard, the Court's recent decisions in *Pleasant Grove City v. Sumnum*,<sup>1</sup> *Citizens United v. FEC*,<sup>2</sup> and *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*<sup>3</sup> are especially illuminating.

Consider a county transportation agency seeking passage of a ballot measure to fund road improvements. Opponents object to the measure on the basis that better management of existing funds is needed and that funding should instead be directed to alternatives to automotive transportation. Thirty days before the election, the county agency sends a mailer to every voting household in the county and posts the same material on its official website reminding people to vote and advising them of certain “facts” about the ballot measure. The agency states its conclusion that, due

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1. 555 U.S. 460 (2009).

2. 130 S. Ct. 876 (2010).

3. 131 S. Ct. 2806 (2011).

to inadequate existing funds, without passage of the measure it will be necessary to forego certain highway work. As a result, roadways will be unsafe, accidents will occur, and people will be injured and die. The materials are illustrated with graphic photographs of gaping potholes and roads in terrible condition, a list specifying road repair projects throughout the county that will not be performed if the measure fails, and numerous depictions of visceral highway carnage. They contain no mention of the opposing perspective.

Most of us would agree that, in spite of any façade of informational objectivity and lip service to a duty to inform the voting public, the materials in question amount to an effort by the agency to influence the electorate in favor of the ballot measure in question. But is the agency's expenditure on the mailer and the posting on its website unconstitutional?

Most lower courts considering the question have treated government election partisanship as constitutionally unsupportable. They have grappled with pinpointing the precise constitutional infirmity and with determining when government has crossed the line—most accepting an objective reasonableness standard—while some have sought comfort in a *per se* rule. Other courts, relying upon a less-than-rigorous conception of the government speech doctrine, have perceived no constitutional difficulty with such government election advocacy. The United States Supreme Court, in spite of the split in lower court authority, has never directly addressed the problem—neither in the form of campaign regulations nor as a question of a constitutional limitation preventing government from lending support to one contending faction on a matter under consideration by voters. The United States Constitution contains no definite reference to the problem. Nevertheless, distinct outlines of the Court's treatment of the role of government in the election context lead inescapably to the conclusion that the government's role as speaker will be treated no differently than its role as regulator.

In the nation's lower courts, there are two basic judicial approaches with respect to government efforts to influence the electorate. The vast contrast in reasoning is aptly illustrated by the legal views taken by two courts considering government speech in the election context. The first court, representing the minority view, considers government as a valuable contributor, entitled, like any invested private speaker, to participate in the pre-election process:

Clearly, the City has the responsibility to determine when improvements are necessary or desirable and to express its determination of those needs to the public. In order to implement such proposed benefits, a municipality must attempt to secure the funds from its citizenry. The ads at issue in the instant action merely amount to a solicitation of the necessary funds. Those

taxpayers who disapprove of the proposed benefits have two opportunities to dissent: (1) They may dissent at the polls on the issues involved and (2) they may dissent at the polls when City officials seek re-election.

One could reasonably suggest that to forbid defendants the right to support by advertising their position, initiated by their own resolution or ordinance, would be violative of their own First Amendment rights.<sup>4</sup>

That court continued:

It would be a strange system indeed which would allow the City to determine its needs, allow it to adopt ordinances calling for elections to fulfill those needs, allow it to bear the expense of those elections, and then require it to stand silently by before the issues are voted on. Obviously, the City is not neutral under such circumstances and should not be required to appear so.<sup>5</sup>

Without regard for the context of the speech, this perspective accepts that government, like any private actor in pre-election debate, may participate in that process.<sup>6</sup> Government is viewed as having a right—and

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4. *Ala. Libertarian Party v. City of Birmingham*, 694 F. Supp. 814, 820 (N.D. Ala. 1988); *see also* *Sutcliffe v. Epping Sch. Dist.*, 584 F.3d 314, 318, 335 (1st Cir. 2009) (rejecting a citizen group's challenge to pre-election publication by the school board and town of a one-sided newsletter, mailings, and a website supporting passage of certain warrant articles); *Kidwell v. City of Union*, 462 F.3d 620, 626 (6th Cir. 2006) (characterizing a government agency as serving the citizenry by promoting ballot measures in which the agency is interested: "Governments must serve their citizens in myriad ways, including by provision of emergency services, and these activities require funding through taxation. Union's speech related to emergency service and tax initiatives thus fits squarely within its competence as governor and was made in the context of 'advocat[ing] and defend[ing] its own policies.' The issues on which the city advocated were thus germane to the mechanics of its function . . . ." (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000))); *Schulz v. New York*, 654 N.E.2d 1226, 1232 (N.Y. 1995) (Ciparick, J., dissenting) (opining that a school board's newsletter seeking to dispel what the board regarded as "myths" in the pre-election debate was proper government speech); *City Affairs Comm. v. Bd. of Comm'rs*, 41 A.2d 798, 800 (N.J. 1945) ("We think municipalities may . . . present their views for or against proposed legislation or referendum to the people of questions which in their judgment would adversely affect the interests of their residents. To accomplish this purpose we think they may incur expenditures . . . and that to do so is a proper governmental function.").

5. *Ala. Libertarian Party*, 694 F. Supp. at 821.

6. A proponent of this view is Laurence Tribe, who argued that when government spends public funds to propagate a political message, "[T]he fact that some people object to this expenditure of their tax money . . . is likely to be deemed irrelevant." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 590 (1978). In this view, those disagreeing with a public agency's viewpoint may not silence government's voice, "nor may they insist that government give equal circulation to their viewpoint" so long as the government speech does not threaten to drown theirs out. *Id.* How a court would gauge when other speech has been drowned out is a conundrum. Under the majority view, the difficulty in determining when drowning is imminent is avoided by a flat prohibition against government partisanship. *See* Steven Shiffrin, *Government Speech*, 27 *UCLA L. REV.* 565, 595–602 (1980).

even the duty<sup>7</sup>—to inform, educate, and persuade on matters of public controversy, including during an election. Its role involves guiding a public unfamiliar with what is in its best interest to recognize this.

The second judicial perspective, adopted by the majority of courts, evinces suspicion of government's participation in the election process, considers government favoritism in the process unlawful, and circumscribes government's role<sup>8</sup> to impartially informing the electorate:

The theme which predominates in these cases, and one which is reinforced by logic and common notions of fair play, is simply stated. While the county not only may but should allocate tax dollars to educate the electorate on the purpose and essential ramifications of referendum items, it must do so fairly and impartially. Expenditures for that purpose may properly be found to be in the public interest. It is never in the public interest, however, to pick up the gauntlet and enter the fray. The funds collected from taxpayers theoretically belong to proponents and opponents of county action alike. To favor one side of any such issue by expending funds obtained from those who do not favor that issue turns government on its head and is the antithesis of the democratic process.

. . . [G]overnment must permit the people to be heard and, in fact, to make the ultimate decision at the ballot box. If government, with its relatively vast financial resources, access to the media and technical know-how, undertakes a campaign to favor or oppose a measure placed on the ballot, then by so doing government undercuts the very fabric which the [C]onstitution weaves to prevent government from stifling the voice of the people. An election which takes place in the shadow of omniscient government is a mockery—an exercise in futility—and therefore a sham. The appropriate function of government in connection with an issue placed before the electorate is to

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7. *Ala. Libertarian Party*, 694 F. Supp. at 817.

8. The Founding Fathers regarded government as the chief threat to the governing power of the people. See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 102, 103, 108 (1960). Meiklejohn was ironically a proponent of the minority view. See LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA* 247 (1991). Meiklejohn identified the key concerns driving the majority perspective: For the Founders, government's function was conceived as a delegation of certain governing powers to legislative, executive, and judicial agencies that remained under the active control of the voting politic. MEIKLEJOHN, *supra*, at 99. He elaborates:

The intent of the Constitution is that, politically, we shall be governed by no one but ourselves. . . . We are the sovereign and the legislature is our agent. And as we play our sovereign role in what Hamilton calls "the structure and administration of the government," that agent has no authority whatever to interfere with the freedom of our governing.

*Id.* at 106.

enlighten, NOT to proselytize.<sup>9</sup>

The leading case articulating this latter view is the California Supreme Court decision *Stanson v. Mott*.<sup>10</sup> The perspective evinces a profound distrust of the machinations of government agents, their potential for defeating the will of the People, and an emphasis upon protecting the process of governance by the People.<sup>11</sup>

The Supreme Court's treatment of the limits upon government's role in the regulation of speech in the election process evinced in *Sumnum*, *Citizens United*, and *Arizona Free Enterprise* provides a strong indication as to its relative receptivity to the minority and majority approaches to governmental support of one faction in an election contest.

In *Sumnum*, the Court gave considerable sway to a government agency's ability to express a viewpoint and exclude others' views under the "government speech" doctrine.<sup>12</sup> The *Sumnum* Court was careful, however, to emphasize that there are limits upon what government can say, while remaining very unclear about what some of those limits might be.<sup>13</sup> The question, then, is whether the Court's analysis in *Sumnum* underscores an approach giving government license to put in its "two bits" during election battles or if such intervention in election contests will be treated equally as off-limits for government speech as it is for non-neutral regulation of private speech. Revealingly, the Justices displayed considerable unease with

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9. *Palm Beach Cnty. v. Hudspeth*, 540 So. 2d 147, 154 (Fla. Dist. Ct. App. 1989) (involving alleged county expenditures to promote passage of a measure creating a health care district).

10. 551 P.2d 1 (Cal. 1976).

11. This apprehension is well-grounded in historical evidence, scientific studies, and common sense. The Gulf of Tonkin and the Watergate cover-up are more egregious examples of government efforts to manufacture the consent of the governed. As one court recognized, "Events of the past few decades have demonstrated that government is quite capable of misleading the public and defaming its citizens." *Nadel v. Regents of Univ. of Cal.*, 34 Cal. Rptr. 2d 188, 198 (Ct. App. 1994). But it is not merely that government conceals and misleads; it also makes mistakes. Most government agents may not purposefully distort, manipulate, or suppress information valuable to the voter making a decision at the ballot box. Perfectly well-meaning government officials are a more likely problem. Their investment in a particular ballot measure inevitably predisposes them to be biased, to discount other perspectives, and to slant their approach in discussing it with the voting public. In addition, because they are insulated, they may be mistaken, misinformed, or unwittingly primed by institutional forces to mislead the voting public. And, even while motivated by the purest of motives, the result is to improperly influence the views of voters on particular issues, to interfere with the free and unadulterated choice of the voters, and, ultimately, to undermine the principle of popular sovereignty. See *infra* notes 170–174 and accompanying text.

12. *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 467–69 (2009).

13. *Id.* at 469–70.

treating monuments as per se vehicles of government speech, denoting by way of concurrences that a more contextual, ad hoc approach would be favored in evaluating whether speech should be regarded as private or governmental in most situations.

*Citizens United*, which struck down regulatory restrictions on corporate and union election spending, might be construed as portending either of two contradictory approaches by the Court. On the one hand, the Court's rationale that more speech is better, applied to corporations and other fictitious entities, conceivably could be extrapolated and applied to municipal corporations and other public entities and agents. On the other hand, the Court's assessment of the proper role of government in relation to the election process and the marketplace of ideas suggests that it regards government actors very differently than private actors seeking to influence the outcome of a political battle.

In *Arizona Free Enterprise*, a 5–4 decision like *Citizens United*, the Court addressed a state campaign finance scheme designed to prevent corruption engendered by big money campaign contributions and the unlevel playing field between wealthy and poor candidates.<sup>14</sup> The Court struck down legislation that established public matching funding for candidates whose opponents' spending (including spending by others on their behalf) exceeded a certain cap.<sup>15</sup> The Court concluded that Arizona's campaign finance plan was unconstitutional on a First Amendment basis, holding that the law substantially burdened the free speech rights of the candidate spending private funds without any compelling State interest for doing so.<sup>16</sup> But the Court's free speech analysis is lacking and augurs that it may have been searching for a sounder constitutional basis for its holding. The underlying concern leading to its decision is entirely more consistent with a different basis—one in which government support of private factions in an election contest violates fundamental constitutional principles.

This Article will evaluate the two judicial approaches to the problem and their theoretical roots. It will scrutinize the proposed constitutional bases for precluding government efforts to manipulate the consent of the governed in elections with special attention to the validity of a compelled speech analysis. The distinction between an elected government promoting its policies and a government program or candidate that is the subject of an election will be considered in terms of a requirement of governmental neutrality inherent in the rule of law and implicit in the Constitution.

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14. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2813–14, 2825 (2011).

15. *Id.* at 2813.

16. *Id.*



The Article will also examine the means for enforcing a requirement of government neutrality, illustrated by lower court approaches to the problem. Finally, the Supreme Court's treatment of First Amendment and election issues will be dissected to illuminate how the Court might treat the problem after *Citizens United*, *Arizona Free Enterprise*, and *Sumnum*. The Article will conclude that the Court's recognition of the inevitable infirmities entailed in governmental regulatory efforts to level the playing field in elections will similarly lead the Court to regard affirmative governmental efforts to adjust electoral response as failing to pass constitutional muster.

## I. THE MINORITY PERSPECTIVE ON GOVERNMENT EFFORTS TO INFLUENCE ELECTION RESULTS

### A. *Political Theory Underlying the Approach*

The minority view that government's role vis-à-vis the citizenry should not be confined to that of a neutral regulator of the political process and a mere functionary of the electorate has venerable origins. It proceeds from several key presumptions: (1) government expertise is capable of divining the political truth on a particular issue; (2) left to themselves, voters are not capable of voting correctly; (3) government has a proper role of educating voters concerning what decisions are in their best interests, and; (4) voters should trust and look to government to find out how they should think about an issue.

The presumptions underlying the minority view have roots that developed in Western tradition alongside the very different view accepted by Madison and Jefferson, which formed the basis for American constitutional democracy. Its origins can be traced to such philosophers as Hegel, who stated that the individual finds his liberty in obeying the State and the fullest realization of his liberty in dying for the State,<sup>17</sup> and Rousseau, whose conception of freedom entailed the individual's submission to a general will.<sup>18</sup>

Under the minority view, the concept of popular sovereignty presupposes that there is a common point at which men's wills necessarily coincide.<sup>19</sup> But even the People may not realize the general will; it is necessary to guide them.<sup>20</sup> The approach is based upon "the assumption of

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17. See generally GEORG HEGEL, *PHILOSOPHY OF RIGHT* (1952).

18. See J.L. TALMON, *THE ORIGINS OF TOTALITARIAN DEMOCRACY* 38 (1960).

19. *Id.* at 250–51.

20. The blind multitude does not know what it wants, and what is its real interest. Left to themselves, the People always desire the good, but, left to themselves, they do

a sole and exclusive truth in politics.”<sup>21</sup> This perspective is organic: It conceives of the individual as an indivisible part of a whole and the State as the infallible corpus embodying the general will.<sup>22</sup>

Following the turn of the century, a movement rose to prominence in the United States that challenged the conceptions of the Founders. The Progressive Movement, disillusioned with the ability of constitutional government to address the needs of the citizenry and enamored of scientific methods,<sup>23</sup> directly rejected what it perceived as a failed constitutional vision in favor of an organic vision with instrumentalist prerogatives:

The Progressives took up the theme that the Constitution is process without purpose—whatever purpose there is in the world is assigned by evolutionary or progressive history, not framers of constitutions. The explicit goal of Progressivism was to free the Constitution from its moorings in the founding, most particularly from what were termed the “static” doctrines of the Declaration and its reliance on natural right.<sup>24</sup>

Progressives placed their faith in the ability of government agencies, rather than the reason of the voters, to assess what the best interests of the People may entail.<sup>25</sup>

not always know where that good lies. The general will is always right, but the judgment guiding it is not always well informed. It must be made to see things as they are, sometimes as they ought to appear to them.

*Id.* at 47–48. Ideally, the State actualizes the general will in its decisions by recognizing what is best for the citizenry collectively. KENNETH N. WALTZ, *MAN, THE STATE, AND WAR* 173–75 (1959); BENITO MUSSOLINI, *THE DOCTRINE OF FASCISM* 13–18 (1935).

21. TALMON, *supra* note 18, at 1.

22. WALTZ, *supra* note 20, at 175 (elaborating Rousseau’s analysis of the significance of inculcating patriotism or public spirit to social unity and in creating devotion by the citizenry to the welfare of the whole as embodied by the State); *see also* JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 38–39 (Willmoore Kendall trans., 1954).

23. *See generally* THE PROGRESSIVE REVOLUTION IN POLITICS AND POLITICAL SCIENCE: TRANSFORMING THE AMERICAN REGIME (John Marini & Ken Masugi eds., 2005). The Progressives emphasized Darwin as revealing a dynamic process of social change throughout history. The emerging field of sociology captured the Progressive imagination as well, and the emphasis upon society as a biological entity in which individuals were interdependent organs supplanted the Founders’ emphasis upon the individual. The notion that the individual was paramount was rejected as antiquated in favor of Rousseau’s conception that freedom, far from being inherent, is something that exists by virtue of society and flows from the State. From this perspective, an individual rights perspective stood in the path of instrumental social reform and, therefore, of greater freedom.

24. Edward J. Erler, *Marbury v. Madison and the Progressive Transformation of Judicial Power*, in THE PROGRESSIVE REVOLUTION IN POLITICS AND POLITICAL SCIENCE: TRANSFORMING THE AMERICAN REGIME, *supra* note 23, at 163, 201; *see also* DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 3, 211–47 (1997).

25. *See* Erler, *supra* note 24, at 201; RABBAN, *supra* note 24, at 211–47. *See generally* RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* (2006).

The effect of the Progressive Movement upon American law was profound and, in particular, produced a deep and unresolved contradiction in constitutional thought with respect to the role of government in leveling the playing field in electoral battles.<sup>26</sup> This Progressive vision of the respective roles of government and the People is ultimately what underlies the minority lower court approach.

*B. Constitutional Bases for Government Efforts to Influence the Electorate: First Amendment Protection for Government Speech*

As a preliminary matter, we should dispense with the minority view notion that government enjoys a right to speak out on election issues. Aside from the plain lack of textual support for a government right to free speech from a First Amendment that speaks in terms of forbidding the State from abridging speech rights, the notion runs against the grain of basic constitutional principles. The Constitution speaks in terms of powers and rights. Conceptually, people have rights and relinquish them to grant powers to government. This is not to say that government has no constitutionally protected ability to speak. The recently developed government speech doctrine recognizes that government agents, consistent with principles of popular sovereignty, are able to promote policies of those voted into power by the People—including social, economic, political, and other agendas—until they face being voted out of office. But this does not entail a First Amendment right.<sup>27</sup> It derives from the same places any government ability to promote its policies does.<sup>28</sup> For the states, this is the police power. For the federal government—at least since 1937—this comes from the Commerce Clause<sup>29</sup> as amplified by the Necessary and Proper

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26. See Steven J. André, *The Transformation of Freedom of Speech: Unsnarling the Twisted Roots of Citizens United v. FEC*, 44 J. MARSHALL L. REV. 69, 81–107 (2010). See generally Tiffany R. Jones, *Campaign Finance Reform: The Progressive Reconstruction of Free Speech*, in THE PROGRESSIVE REVOLUTION IN POLITICS AND POLITICAL SCIENCE: TRANSFORMING THE AMERICAN REGIME, *supra* note 23, at 321.

27. *Estiverne v. La. State Bar Ass'n*, 863 F.2d 371, 379 (5th Cir. 1989) (“While the [F]irst [A]mendment does not protect government speech, it ‘does not prohibit the government, itself, from speaking, nor require the government to speak. Similarly, the First Amendment does not preclude the government from exercising editorial control over its own medium of expression.’” (quoting *Muir v. Ala. Educ. Television Comm’n*, 688 F.2d 1033, 1044 (5th Cir. 1982))).

28. Just as government “as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties,” it follows that, “[w]ithin this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its policies.” *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000).

29. U.S. CONST. art. I, § 8, cl. 3.

Clause.<sup>30</sup>

Rights—which run in favor of persons, citizens, and states—should be contrasted with powers that are vested in government and are structurally controlled by *inter alia* dispersing the enumerated or implied power among the Legislative, Executive, and Judicial Branches to check and balance (i.e. limit) the exercise of power. The correct conceptualization of the constitutional source of government speech is that it is a power, not a right.<sup>31</sup> Because the constitutional basis for allowing government speech is not the First Amendment, the underlying principles are not the same.<sup>32</sup>

With the waning of the *Lochner* era, the power of government to act upon social, moral, and economic issues—even where such action conflicts with private economic interest—has come to be more accepted. Government action in the form of speech that seeks to promote public policy objectives comports with common sense, and the Supreme Court has upheld this conduct.<sup>33</sup> The essential importance of government’s ability to speak has been framed as obvious: “Indeed, it is not easy to imagine how government could function if it lacked this freedom.”<sup>34</sup> Undoubtedly for this reason, there is no prohibition in the Constitution directed against government taking a position on matters of public policy. Likewise, there is nothing specifically prohibiting government from acting through speech or other means to influence the formulation of public policy at its most seminal point: elections.

## II. THE MAJORITY VIEW: GOVERNMENT NEUTRALITY AND THE COMPELLED SPEECH ANALYSIS

### A. *The Political Theory Underpinning the Majority Approach*

The majority view of government’s role in the constitutional scheme and, in particular, in the election process, is the antithesis of the minority conception of the relationship between the People and government. The Founders’ conception regarded the individual as an independent sovereign unit rather than as a component of a whole body. The perspective is steeped in Montesquieuan treatment of conflictual social and political

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30. U.S. CONST. art I, § 8, cl.18; *see also* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

31. *See infra* note 194.

32. Compared to the speech of private speakers, a government agency’s own speech is “controlled by [very] different principles.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995).

33. *See generally* *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005).

34. *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009).

relations and Lockean natural law notions of social contract, individual autonomy, and liberty.<sup>35</sup> The conception proceeds from the premise that man is able to govern himself by virtue of the capacity of reason. The purpose of the State is to protect the individual and his property.<sup>36</sup> Rather than the collective body or State having absolute power over the People, the People have the absolute right to rid themselves of an unsatisfactory government.<sup>37</sup> This approach rejects the ideas of State infallibility and a single political truth and regards popular government as fallible and governance as an experimental, trial-and-error type of process.<sup>38</sup> Law is perceived positivistically as man-made determinations resulting from this process. Under this individualistic approach, while the citizen may distrust the ability of government officials—within the limited scope allowed them—to act in the best interests of the People,<sup>39</sup> he or she has the opportunity to oversee policy and correct official deviations, failures, and excesses at the ballot box.

Accordingly, from the perspective of the majority-view holders as well as the Founders, the following presuppositions prevail: (1) that the People alone are responsible for discovering the political truth on a particular issue, (2) that government's proper role is to remain impartial on issues before the People and to neutrally provide access to facts in its possession to inform the electorate, (3) that government should not be trusted to be involved in the process of deciding election issues that concern its future, and (4) that its involvement in that process would prevent and create corrosive distrust in the validity of the process of self-governance.

*B. Isolating a Constitutional Basis for Restricting Government Involvement in the Process of Governance by the People*

The state and lower federal courts that adopt the majority view have

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35. HENRY STEELE COMMAGER, MAJORITY RULE AND MINORITY RIGHTS 4–6 (1950).

36. See JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT 8 (Prometheus Books 1986) (1690).

37. See generally THE DECLARATION OF INDEPENDENCE (U.S. 1776).

38. See WILLIAM EBENSTEIN, TODAY'S ISMS 162, 163 (6th ed. 1970).

39. Jefferson epitomized this distrust, writing:

[T]hat it would be a dangerous delusion were a confidence in the men of our choice to silence our fears for the safety of our rights: that confidence is every where the parent of despotism; free government is founded in jealousy and not in confidence; it is jealousy and not confidence which prescribes limited constitutions to bind down those whom we are obliged to trust with power: that our Constitution has accordingly fixed the limits to which and no further our confidence may go . . .

Thomas Jefferson, *Kentucky Resolutions of 1798 and 1799*, in THE VIRGINIA AND KENTUCKY RESOLUTIONS OF 1798 AND '99 17–18 (1834).

suggested various constitutional moorings for restricting government speech in the election process. Although the First Amendment is frequently mentioned as providing the controlling principle of law in these cases, the textual nexus is not elaborated.<sup>40</sup>

The ostensible reason courts fail to venture into “how” and “why” the First Amendment precludes government election activity is the absence of any obvious nail on which a court may hang this hat. The Free Speech Clause prevents government from interfering with speech, but does nothing to directly prevent government from speaking.<sup>41</sup> In effect, government intrusion into the marketplace of ideas—counteracting some views and supplementing or amplifying others—can be said to interfere with the speech of private factions every bit as much as government acts to hush

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40. Nor do the cases limit reliance upon the First Amendment to a free speech rationale premised upon unfairness to the slighted campaign. The Petition Clause has been cited as well. *See* *Mountain States Legal Found. v. Denver Sch. Dist. No. 1*, 459 F. Supp. 357, 358 (D. Colo. 1978).

41. Nor does “speech” per se serve as the operative judicial concern. In fact, the cases acknowledge that there is no impropriety involved when government agents acting in their official capacity express views supportive of one faction in an election contest. Although the effective power and prestige of government unquestionably impacts public opinion, the practical difficulty in assessing the damage and delineating when the civil servant is speaking as a citizen enjoying First Amendment protection versus speaking in an official capacity has caused courts to give a wide berth to such activity. *See, e.g., Pickering v. Bd. of Educ.*, 391 U.S. 563, 573–75 (1968); *Colo. Taxpayers Union, Inc. v. Romer*, 750 F. Supp. 1041 (D. Colo. 1990) (discussing the governor’s advocacy against a proposed constitutional amendment); *Choice-in-Educ. League v. L.A. Unified Sch. Dist.*, 21 Cal. Rptr. 2d 303, 313 (Ct. App. 1993) (holding a public agency’s expenditure to broadcast a meeting in which it endorsed a position on a ballot measure “served purposes unrelated to its advocacy of a partisan position on the Initiative”); *League of Women Voters v. Countywide Crim. Justice Coordination Comm.*, 250 Cal. Rptr. 161, 182 (Ct. App. 1988) (finding that a board adoption of a position on a ballot measure did not involve an expenditure of public funds and “[w]hile it may be construed as the advocacy of but a single viewpoint, there is no genuine effort to persuade the electorate such as that evinced in the activities of disseminating literature, purchasing advertisements or utilizing public employees for campaigning during normal working hours”); *Harrison v. Rainey*, 179 S.E.2d 923, 924–25 (Ga. 1971) (noting that a county’s adoption of a resolution and a proposed constitutional amendment and legislation changing the form of county government posed no constitutional problem, but expenditures for promotion did); *King Cnty. Council v. Pub. Disclosure Comm’n*, 611 P.2d 1227 (Wash. 1980) (discussing a county council decision to endorse an anti-pornography initiative). Public officials and governing bodies can speak their minds on election issues, so long as they do not put public money where their mouths are. A more tangible measure than the providing of moral support is utilized by the courts—the commitment of public resources. But even then, the courts disregard commitment of public resources where these are associated with an elected official’s office and are incidentally implicated. *See League of Women Voters*, 250 Cal. Rptr. at 178–79; *Coffman v. Colo. Common Cause*, 102 P.3d 999, 1007 (Colo. 2004).

certain speakers by regulatory measures.<sup>42</sup> Or it can be regarded as augmenting the debate—providing the electorate with the benefit of valuable additional matters to consider.<sup>43</sup>

Recognizing the logical leap required to apply First Amendment principles, some courts look elsewhere with similarly ambivalent results. Some states have statutory or constitutional provisions that address the use of public funds in elections.<sup>44</sup> Other courts look to the Guarantee Clause.<sup>45</sup> The court in *Burt v. Blumenauer*<sup>46</sup> addressed a county “fluoridation public information project” set up to extol the virtues of fluoridation.<sup>47</sup> The plaintiff challenged the agency’s activities at a point when an anti-fluoridation measure was on the ballot.<sup>48</sup> The court found that an issue was presented for the trier of fact as to the agency’s election advocacy.<sup>49</sup> Pointing to Article IV, Section 4 of the U.S. Constitution, the court stated,

It hardly seems necessary to rely on the First Amendment . . . . 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.<sup>50</sup>

Likewise, in *Mountain States Legal Foundation v. Denver School District No. 1*,<sup>51</sup> a case dealing with a school board committing school facilities and supplies

42. See *infra* note 90.

43. A recent article analyzing the problem in terms of First Amendment values argues that government transparency in issue (ballot measure) elections serves instrumental free speech concerns. Helen Norton, *Campaign Speech Law with a Twist: When the Government is the Speaker, Not the Regulator*, 61 EMORY L.J. 209 (2011).

44. Minority view cases sweepingly dispense with arguments proposing a constitutional basis for restriction by asserting that the only courts finding such a limitation have grounded their holdings upon state laws. See, e.g., *Cook v. Baca*, 95 F. Supp. 2d 1215, 1227–28 (D.N.M. 2000). Closer examination reveals that this disingenuously characterizes cases that look to a statutory provision allowing the expenditure. As shown by the *Cook* court’s footnote, these cases actually hold that absent explicit statutory authority, the expenditure presents a constitutional issue. *Id.* at 1227 n.16. Additionally, the majority view cases actually leave open the “serious constitutional question” posed by a clear and express statutory provision allowing such an expenditure. *Stanson v. Mott*, 551 P.2d 1, 10 (Cal. 1976); see also David P. Haberman, Note, *Governmental Speech in the Democratic Process*, 65 WASH. U. L.Q. 209, 209–11, 220–21 (1987) (arguing that the constitutional mandate of democratic elections requires a per se rule that government election advocacy is unconstitutional notwithstanding statutory authority).

45. U.S. CONST. art. IV, § 4, cl. 1.

46. 699 P.2d 168 (Or. 1985).

47. *Id.* at 169 (internal quotation marks omitted).

48. *Id.* at 170.

49. *Id.* at 181.

50. *Id.* at 175.

51. 459 F. Supp. 357 (D. Colo. 1978).

to defeat a state ballot measure affecting funding, the court recognized that an expenditure of public funds to oppose a proposed constitutional amendment violates “a basic precept of this nation’s democratic process,” and averred, “Indeed, it would seem so contrary to the root philosophy of a republican form of government as might cause this Court to resort to the guaranty clause in Article IV, Section 4 of the United States Constitution.”<sup>52</sup> Mention is also made of ensuring the legitimacy of government by protecting the fairness of elections and the appearance that election results are fairly achieved.<sup>53</sup>

The reference to “basic precepts” is fairly common. It expresses the idea that the concepts of popular sovereignty and limited government are the fundamental bedrock that the Constitution is built upon. Thus, since our entire republican form of government derives from these basic premises, their stature exceeds that of mere constitutional rights. Government conduct in derogation of such basic precepts is an affront not merely to basic liberties but to the Constitution itself.

*1. Common Lower Court Acknowledgement of a Fundamental Mandate of Government Neutrality in the Election Setting*

Whatever the constitutional basis for their decisions, the lesson taught by majority view courts is that government must remain neutral when the sovereign People are in the process of governing. With respect to a public agency’s newsletter, the New York State Court of Appeals held that “the paper undisputably convey[ed] . . . partisanship, partiality . . . [and] disapproval by a State agency of [an] issue.”<sup>54</sup> In so holding, the court

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52. *Id.* at 361.

53. *Anderson v. City of Boston*, 380 N.E.2d 628, 638 (Mass. 1978). The court in *Stanson* emphasized the “importance of government impartiality in electoral matters.” *Stanson v. Mott*, 551 P.2d 1, 10 (Cal. 1976). The Court relied upon its decision in *Gould v. Grubb*, where the Court held invalid a city’s policy that afforded an incumbent top position on the ballot, stating:

A fundamental goal of a democratic society is to attain the free and pure expression of the voters’ choice of candidates. To that end, 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; the state must eschew arbitrary preferment of one candidate over another by reason of incumbency or because of alphabetical priority of the first letter of his surname. In our governmental system, the voters’ selection must remain untainted by extraneous artificial advantages imposed by weighted procedures of the election process.

*Gould v. Grubb*, 536 P.2d 1337, 1348 (Cal. 1975).

54. *Schulz v. New York*, 654 N.E.2d 1226, 1231 (N.Y. 1995) (alterations in original) (quoting *Phillips v. Maurer*, 490 N.E.2d 542, 543 (N.Y. 1986)) (internal quotation marks omitted).



applied the state's constitutional standard for permissible governmental election activities: "[t]o educate, to inform, to advocate or to promote voting on any issue may be undertaken, provided it is not to persuade nor to convey favoritism, partisanship, partiality, approval or disapproval by a State agency of an issue, worthy as it may be."<sup>55</sup> A New Mexico court considering a city's distribution of materials that were factual and accurate, but one-sided, recognized: "Although it may be a fine line between education, on the one hand, and advocating a partisan position, on the other, courts have enjoined officials from crossing it."<sup>56</sup> The court in *Smith v. Dorsey*,<sup>57</sup> another case addressing a school board's expenditure for the purported "education" of voters, stated: "In a nutshell, the school board can inform, but not persuade."<sup>58</sup>

These courts identify from a policy standpoint the danger involved in government electioneering. A federal court considering the same situation addressed in *Dorsey* enjoined a school district's use of supplies, equipment, and facilities to campaign against a Colorado constitutional amendment to limit governmental power to spend public funds. The court stated:

It is the duty of this Court to protect the political freedom of the people of Colorado. . . . A use of the power of publicly owned resources to propagandize against a proposal made and supported by a significant number of those who were taxed to pay for such resources is an abridgment of those fundamental freedoms. Specifically, . . . opposition to the proposal which is financed by publicly collected funds has the effect of shifting the ultimate source of power away from the people.<sup>59</sup>

Similarly, the *Burt* court noted, "In a democracy, . . . the legitimacy of the chosen policy rests on the consent, if not consensus, of the governed; excessive or questionable efforts by government to manufacture the consent of the governed calls the legitimacy of its action into question."<sup>60</sup>

Scholars considering the issue have also warned of the hazard presented by partisan government conduct: "[P]ermitting the government to depart from a neutral position would threaten both the reliability of the election result as an expression of the popular will and the appearance of integrity crucial to maintaining public confidence in the electoral process."<sup>61</sup>

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55. *Id.* (alteration in original) (quoting *Stern v. Kramarsky*, 375 N.Y.S.2d 235, 239 (Sup. Ct. 1975)) (internal quotation marks omitted).

56. *Carter v. City of Las Cruces*, 915 P.2d 336, 339 (N.M. Ct. App. 1996).

57. 599 So. 2d 529 (Miss. 1992).

58. *Id.* at 541.

59. *Mountain States Legal Found. v. Denver Sch. Dist. No. 1*, 459 F. Supp. 357, 360–61 (D. Colo. 1978).

60. *Burt v. Blumenauer*, 699 P.2d 168, 175 (Or. 1985).

61. Note, *The Constitutionality of Municipal Advocacy in Statewide Referendum Campaigns*, 93

Likewise,

The government's use of public resources to manufacture citizen support for a partisan viewpoint on political issues raises serious questions concerning the integrity of the democratic process. It is a truism that, if a governing structure based upon widespread genuine citizen opinions is to survive as a viable democracy, it must place legal restraints on the government's ability to manipulate the formulation and expression of that opinion.<sup>62</sup>

And,

The structure of American constitutional government and underlying historical assumptions about the relationship between the governed and the governors justify an interpretation of the [F]irst [A]mendment that encompasses limits on government expression. This view is consistent with older notions that the Constitution embodies norms against government secrecy, and that the [F]irst [A]mendment restrains, rather than enhances, government powers.<sup>63</sup>

Also,

Governmental intrusion into the system of political expression impinges

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HARV. L. REV. 535, 554, 554 n.112 (1980) (observing that "[t]he [United States Supreme] Court has explicitly recognized that the validity of elections as bona fide expressions of the popular will depends as much upon citizens' faith that the electoral process is free from government tampering as on the actual fairness of that process").

62. Edward H. Ziegler Jr., *Government Speech and the Constitution: The Limits of Official Partisanship*, 21 B.C. L. REV. 578, 580 (1980). The problem with government agents acting impartially in expressing views on issues facing the electorate is manifold:

More threatening to the integrity of the democratic process than official partisanship by elected officials is the use of public resources by non-political officials and agencies to create voter support for a particular viewpoint. Since public agencies speak with official authority and operate with substantial resources, any partisan view espoused by an agency may gain undeserved public acceptance. Worse, official partisanship by public agencies insulates public policy from democratic choice. Toleration of this type of official partisanship preserves the governing structure's democratic form without its democratic function. Since a fundamental goal of a democracy is to promote free and genuine citizen opinion, the notion that the non-political aspects of government can take sides in election contests or bestow an advantage on one of several competing factions must be emphatically rejected.

*Id.* at 584.

63. Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 898 (1979). Professor Yudof also stated that, with respect to the hazard of overstating the significance of government's informational function,

[I]mplications of a public right to know do not justify a constitutional right for governments to engage in extensive communications activities. The right to know formulation simply obfuscates the analysis of how and why governments should have rights against the community under a [F]irst [A]mendment adopted to limit government power.

*Id.* at 869.

upon first amendment purposes and principles in two respects. First, speech by government inhibits the process of the political mechanism itself. . . .

. . . .

A second difficulty arising from government speech is that it elevates the position and the prestige of government to a potentially dangerous level.<sup>64</sup>

The concern with maintaining government neutrality that may be distilled from the foregoing compendium of cases and commentators is the avoidance of a danger associated with partisan government election activity—that of diverting electoral control away from the People into the hands of those elected officials momentarily entrusted with power.<sup>65</sup> Thus, while the majority view cases have been far from uniform or analytically coherent in articulating a constitutional basis for the rule that government may not use public resources to meddle with the decisional process of the electorate, they are consistent in concluding that there is something anathema with governmental tampering affecting the ability of the People to govern themselves.

## 2. *Navigating and Discovering Coherence and Consistency in the Court's Forum Analysis, Government Speech Doctrine, and Compelled Speech Cases*

Locating a solid constitutional basis for government election neutrality is not possible without navigating the stormy waters surrounding the rocky shoals of several significant Supreme Court doctrines. From successfully doing so, we extract certain key guiding principles. We need to commence with the Court's forum analysis.

It may appear *Miami Herald Publishing Co. v. Tornillo*<sup>66</sup> is dispositive of the government agency's right to publish whatever it wants to say about a

64. Jay S. Bloom, Comment, *Unconstitutional Government Speech*, 15 SAN DIEGO L. REV. 815, 833–34 (1978); see also Leigh Contreras, *Contemplating the Dilemma of Government as Speaker: Judicially Identified Limits on Government Speech in the Context of Carter v. City of Las Cruces*, 27 N.M. L. REV. 517, 540–41 (1997); Alyssa Graham, Note, *The Government Speech Doctrine and Its Effect on the Democratic Process*, 44 SUFFOLK UNIV. L. REV. 703, 719–25 (2011) (expressing current concern over the distortive effect of government speech upon the electoral process).

65. This danger was described by the court in *Stanson*:

[S]uch expenditures raise potentially serious constitutional questions. 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 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) (citations omitted).

66. 418 U.S. 241 (1974).

ballot candidate or measure without affording equal time to countervailing views. That case, dealing with a “right of reply” requirement that a newspaper publisher provide equal space to a candidate where criticism of the candidate is published, vindicated the publisher’s right to refuse to print the opposing point of view.<sup>67</sup> Upon further consideration, two significant differences are apparent. The newspaper was published by a private speaker<sup>68</sup> and the basis for the holding was the First Amendment. By contrast, a government publication critical of a candidate or financial support of a ballot initiative is not protected by any constitutional right.<sup>69</sup>

What the Court would later label a “private forum” is the constitutionally protected domain of the individual who owns it. In the context of publicly controlled forums, different considerations have been held applicable to content regulation<sup>70</sup> in publicly controlled nonpublic forums,<sup>71</sup> public forums,<sup>72</sup> and quasi-public forums.<sup>73</sup>

The evolution of the Court’s varied forum analysis is informative with respect to the significance of government neutrality in two important aspects: Government regulation and government speech. In terms of government regulation, the Court has steadfastly adhered to the idea that government may not favor one viewpoint over another. And, in terms of overlapping considerations relating to government speech, the Court has emphatically recognized that there are certain things about which a public agency simply cannot speak without offending constitutional principles. However, it has not been very clear about what those things are.

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67. *Id.* at 258.

68. *See* *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 20–21 (1986) (holding that a public utility’s monthly billing mailer amounted to a private forum such that it was not required to include the views expressed by others).

69. *See supra* notes 27–32 and accompanying text; *infra* note 267 and accompanying text.

70. Even in the public forum, regulation of non-content aspects of speech is allowed. *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) (holding that reasonable “time, place and manner” restrictions pose no First Amendment problem).

71. *See, e.g., Greer v. Spock*, 424 U.S. 828 (1976) (discussing content regulation at a military base). A government informational publication generally falls under this rubric. A private interest group, for example, would have no right to demand equal time to extol the virtues of organic farming in a USDA publication for farmers describing department experts’ views on safe pesticides and methods of application. *See, e.g., Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 683 (1998).

72. *See, e.g., Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983).

73. *See, e.g., Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341 (Cal. 1979), *aff’d*, 447 U.S. 74 (1980); *Fashion Valley Mall, LLC v. NLRB*, 172 P.3d 742 (Cal. 2007).

a. *Forum Analysis and Government Neutrality*

In *Marsh v. Alabama*,<sup>74</sup> the Court held that a company town that exhibited all the features of a city and had assumed civic responsibilities—including law enforcement—normally assumed by a public municipality was concomitantly bound by the constitutional obligations of local government—including the prohibition on the suppression of the exercise of freedom of speech. Subsequently, in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*,<sup>75</sup> the Court declared a shopping center to be the “functional equivalent” of a “business block”—open to the public and similarly subject to constitutional duties.<sup>76</sup> It upheld the right of labor picketers to picket a business in the private shopping center.<sup>77</sup>

The Court seemed to backpedal in *Lloyd Corp. v. Tanner*,<sup>78</sup> holding that antiwar protesters were not entitled to First Amendment protection when handing out leaflets in a privately owned shopping center.<sup>79</sup> The Court limited *Logan Valley* to speech related to the shopping center’s operations.<sup>80</sup> Shortly thereafter, a novel and significant development occurred in *Police Department of Chicago v. Mosley*.<sup>81</sup> In *Mosley*, a Chicago ordinance prohibited demonstrations near schools, but excepted “peaceful picketing of any school involved in a labor dispute.”<sup>82</sup> Absent a rational basis for distinguishing between labor and other demonstrations, the protestors were denied the equal protection of the law.<sup>83</sup> Justice Marshall, writing for the Court in rejecting the school’s prohibition on any picketing other than labor-related picketing, advanced a broad vision of the political role of government as neutral in regulating speech, the marketplace of ideas, and the electoral process, stating that “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>84</sup>

*Hudgens v. NLRB*<sup>85</sup> followed *Mosley*. *Hudgens* overruled *Logan Valley*, rejecting a First Amendment right of access, including access for picketing

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74. 326 U.S. 501 (1946).

75. 391 U.S. 308 (1968).

76. *Id.* at 325.

77. *Id.* at 309.

78. 407 U.S. 551 (1972).

79. *Id.* at 570.

80. *Id.* at 564–66.

81. 408 U.S. 92 (1972).

82. *Id.* at 93.

83. *Id.* at 100.

84. *Id.* at 95–96.

85. 424 U.S. 507 (1976).

related to the shopping center operations.<sup>86</sup> Under *Mosley*, no rational difference in treatment could be asserted under the First Amendment based upon the content of the speech.<sup>87</sup> So, if the protesters in *Lloyd* “did not have a First Amendment right to enter that shopping center to distribute handbills concerning Vietnam, then the pickets in the present case did not have a First Amendment right to enter this shopping center for the purpose of advertising their strike . . . .”<sup>88</sup>

*b. Emergence of the Government Speech Doctrine*

The content-neutrality doctrine would be undermined by the development of the government-speech doctrine. Embracing the idea that government is free to express its own viewpoint, courts shrank from the perspective that where government opens a venue to one view, it must make it equally available to all perspectives.<sup>89</sup>

The critical distinction that emerges here—and which is often missed in judicial consideration of the election context—is whether government is regulating private speech or is speaking on its own behalf.<sup>90</sup> The requirement of viewpoint neutrality has been abandoned in situations involving government carrying out public policies—pursuing goals that have already been democratically resolved.<sup>91</sup> A public agency is free to use private speakers to convey its message, and it may disfavor certain

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86. *Id.* at 520–21.

87. *Mosley*, 408 U.S. at 95–96.

88. *Hudgens*, 424 U.S. at 520–21.

89. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (“Once it has opened a limited forum, however, the State . . . may [not] discriminate against speech on the basis of its viewpoint.” (citations omitted)).

90. The idea is that government speech does not restrict private speech, while regulations do: “[O]ur cases recognize that the risk that content-based distinctions will impermissibly interfere with the marketplace of ideas is sometimes attenuated when the government is acting in a capacity other than as regulator.” *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 188 (2007). The reality—that government speech is, in effect, no different in terms of suppressing private speech than content-based regulations—is increasingly being recognized. See *Developments in the Law, State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1293 (2010); Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 698 (2011) (“Government speech not only distorts the marketplace of ideas, in many cases it directly *regulates* individual private speakers—either forbidding them to express viewpoints they support or compelling them to express viewpoints they do not support.”).

91. Compare *Bonner-Lyons v. Sch. Comm. of Boston*, 480 F.2d 442 (1st Cir. 1973), and *Stanson v. Mott*, 551 P.2d 1, 10 (Cal. 1976), with *Vargas v. City of Salinas*, 205 P.3d 207, 230 n.18 (Cal. 2009) (illuminating a dramatic change in treatment of the nonpublic forum analysis by courts from an emphasis upon the viewpoints aired to a focus upon the speaker (government) controlling its own forum).

viewpoints in doing so. Thus a government agency campaign to promote the consumption of red meat may exclude the views of vegetarians regarding the moral, environmental, and personal health problems associated with increased red meat in the American diet. In such situations, courts regard a government-created soapbox no differently than any privately created forum.<sup>92</sup>

The *Mosley* neutrality doctrine preceded this development and found fertile soil in the Court's treatment of nonpublic and public forums. A distinction was drawn between traditional public forums such as parks, street corners, public marketplaces<sup>93</sup>—where content-based limitations upon speech must serve a compelling state interest and be narrowly drawn<sup>94</sup>—and other places where government could impose greater restrictions. Limited forums are places the public entity has opened for certain expressive activity.<sup>95</sup> While the public entity may limit the topics and impose time restrictions and other guidelines, it must remain neutral as to viewpoint.<sup>96</sup> Additionally, facially neutral limitations may not be imposed where they are actually motivated by the “ideology, opinion, or perspective” of the speaker.<sup>97</sup>

With respect to nonpublic forums, restrictions on content need only be reasonable and not be an effort to restrict a particular view.<sup>98</sup> The reasonableness of a restriction upon access to a nonpublic forum is evaluated “in the light of the purpose of the forum and all the surrounding circumstances.”<sup>99</sup> The Court has found reasonable the exclusion of a union

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92. See, e.g., *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding a restriction upon doctors receiving funding under the Public Health Service Act from counseling their patients regarding abortion). *But see* *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (holding that attorneys are not government speakers but instead speak on behalf of the private client, hence the range of their advocacy may not be restricted in legal services cases).

93. *Frisby v. Schultz*, 487 U.S. 474, 480 (1988); *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939).

94. See *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

95. *Perry*, 460 U.S. at 45–46. An example would be a governing board meeting.

96. *Id.* at 46 n.7. Examples of impermissible viewpoint discrimination have arisen in the context of government efforts to avoid an Establishment Clause violation by precluding religious organizations from access to facilities. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845–46 (1995) (striking down a state university rule limiting funding for student publications to only secular publications); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 396–97 (1993) (striking down a restriction on after-hours use of school space to secular groups).

97. *Rosenberger*, 515 U.S. at 820.

98. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 812 (1985).

99. *Id.* at 809.

from internal school staff mailboxes,<sup>100</sup> the limitation upon publicly owned billboards to nonpartisan advertisements,<sup>101</sup> and a ban upon fund-raising in federal offices by legal defense and political organizations.<sup>102</sup> In each case, the reason for the restriction was regarded to be within the government agency's discretion.<sup>103</sup>

So how does this help in evaluating whether government may use public funds to support a partisan position on an election issue? The Court's analysis has developed to the point that it is actually quite informative relative to this question. A number of aspects of the Supreme Court's forum analysis compel the conclusion that a public agency is not able to support one faction in an election contest in the same way the private newspaper publisher did in *Tormillo*. Even use of a government agency's newsletter—a nonpublic forum—to support one candidate or one ballot measure over another does not escape the neutrality requirement.

*c. Application of the Neutrality Doctrine to Government Speech that Conflicts with Rights: The Establishment Clause Cases*

It is helpful to start with the case of *City Council of Los Angeles v. Taxpayers for Vincent*,<sup>104</sup> where a political candidate sued because a city ordinance prevented him from putting up his campaign signs on public property—specifically utility pole crosswires.<sup>105</sup> The ordinance applied to all signs regardless of viewpoint and was premised upon aesthetic and safety concerns.<sup>106</sup> The Court recognized the property in question was a nonpublic forum and, since the regulation was neutral as to content, it looked to the framework set forth in *United States v. O'Brien*<sup>107</sup> to determine

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100. *Perry*, 460 U.S. at 46.

101. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 301–04 (1974).

102. *Cornelius*, 473 U.S. at 813.

103. In *Perry*, the school sought to avoid controversy. *Perry*, 460 U.S. at 52. In *Lehman*, the government agency sought to avoid confusion of government with partisan causes. *Lehman*, 418 U.S. at 300–01. In *Cornelius*, the federal government sought to avoid the appearance of federal support for partisan causes. *Cornelius*, 473 U.S. at 813.

104. 466 U.S. 789 (1984).

105. *Id.* at 792–93.

106. *See id.* at 804.

107. 391 U.S. 367 (1968). In upholding conviction of a defendant for burning his draft card, the Court stated the test for government regulation of its nonpublic property:

[The] regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

*Id.* at 377.



whether there was a rational basis for the restriction on speech. The Court had little difficulty in finding that a public agency's interest in dealing with visual blight was sufficient.<sup>108</sup> It contrasted situations where regulations were motivated by a desire to "suppress support for a minority party or an unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas."<sup>109</sup>

But let's tweak the facts a tad. What about a situation where government uses its nonpublic forum to convey a viewpoint about the election—a newsletter or website, a mailer, the publicly owned signs in *Lehman v. City of Shaker Heights*,<sup>110</sup> or the utility poles in *Vincent*?<sup>111</sup> Overlapping considerations of the government speech doctrine come into play at this point. The fact that government does the talking is not material. Government may let a private speaker do its talking for it—favoring one private group with use of public property to express its views while excluding the opposing group.<sup>112</sup> Implicit in the analysis of *Lehman* and *Vincent*, however, is the recognition that there is something intuitively wrong with government departing from a neutral role in the election context by allowing one candidate to purchase space on its billboards, but not another, or even donating space to one faction. In such situations, the government's illegitimate interest in expressing its viewpoint, whether directly or indirectly by surrogate, invalidates its partisan conduct.<sup>113</sup>

The Court's jurisprudence involving Establishment Clause considerations is apt and particularly illuminating here. The Court's treatment of government support of religion is analogous to the situation of government support of one faction in an election contest for a number of reasons. Not only do both situations implicate a fundamental ban upon conduct by government, but both situations concern discriminatory government action. And they both implicate value judgments by public servants regarding what is "true" in life.<sup>114</sup> In addition, the methodology adopted by the Court for ascertaining when government has endorsed a

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108. *Vincent*, 466 U.S. at 807.

109. *Id.* at 804 ("The general principle that has emerged from this line of cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.").

110. 418 U.S. 298, 301–03 (1974).

111. *Vincent*, 466 U.S. at 792–93.

112. *Cf. Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 547–50 (1983) (reasoning that government can choose to restrict the speech of charitable organizations by selectively placing conditions on its grant of public funds to those organizations).

113. *Id.*

114. In *Cantwell v. Connecticut*, the Court declared: "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields, the tenets of one man may seem the rankest error to his neighbor." 310 U.S. 296, 310 (1940).

religion is entirely suitable for making the same assessment for when government has supported a candidate or ballot proposition. The decisions elucidating this methodology illustrate the salient distinction the Court has drawn between government support of a viewpoint in the forum analysis versus its government speech analysis. They also delineate the threshold for government speech that exceeds constitutional limitations.

*Rosenberger v. Rector & Visitors of the University of Virginia*<sup>115</sup> is the counterpoint to *Vincent*. Rather than restricting a nonpublic forum from all viewpoints, a college allocated funding to student publications with the exception of those containing a religious message. Ostensibly this was done to avoid an Establishment Clause violation. But as the Court has made clear, a viewpoint is a viewpoint for free speech purposes, and government may not discriminate because religious overtones may emanate from one.<sup>116</sup> The Court found the public agency's argument that the agency should be able to control messages it subsidizes (a government speech analysis) inappropriate.<sup>117</sup> The context was regarded instead as involving a forum for private speech opened by the school.<sup>118</sup> Under the forum analysis, government was required to remain neutral toward all viewpoints.<sup>119</sup> Where such neutrality is maintained, there is no Establishment Clause or other First Amendment problem.<sup>120</sup> But where the nonpublic forum is utilized by the government agency for viewpoint-based discrimination, the First Amendment is offended.<sup>121</sup>

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115. 515 U.S. 819 (1995).

116. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) (striking down an exclusion of the Ku Klux Klan's cross from a public forum that allowed private displays of both secular and religious natures); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 397 (1993) (striking down a school district's policy of opening facilities for after-school use by community organizations but not religious groups); *Bd. of Educ. of Westside Comm. Sch. (Dist. 66) v. Mergens*, 496 U.S. 226, 253 (1990) (overturning a school district's denial of a student group's application for permission to form a Christian club); *Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (rejecting a college's policy of excluding religious activities from facilities made available for other activities).

117. *Rosenberger*, 515 U.S. at 841–42.

118. *Id.* at 842–43.

119. *Id.* at 834 (“It does not follow, however, . . . that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers. A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles.”).

120. *Id.* at 838–46.

121. See, e.g., *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985).

*Rosenberger* ought not to be taken for the proposition that government may never exclude religious speakers from a limited forum, although how this would work is problematic.<sup>122</sup> The Court has emphasized that a government agency may limit the subject matter of the forum.<sup>123</sup> Just as a school can exclude union literature from internal mailboxes to prevent controversy,<sup>124</sup> a city may exclude political advertisements in its buses to avoid the appearance of government partisanship<sup>125</sup> and the federal government may exclude solicitations to employees by legal and political causes.<sup>126</sup> A public agency may likewise exclude religious subjects<sup>127</sup> from a forum for neutral and reasonable reasons to, *inter alia*, avoid an Establishment Clause problem.<sup>128</sup> But eschewing the appearance of partisanship to avoid a constitutional problem such as the one intimated in *Lehman* is 180 degrees from the situation involving government partisan support.<sup>129</sup> The Court's handling of the question of government support of

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122. See, e.g., *Locke v. Davey*, 540 U.S. 712, 725 (2004) (holding that the exclusion of a state-funded scholarship for use to pursue a degree in devotional theology did not violate the Free Exercise Clause based upon the state's substantial interest in avoiding an establishment of religion).

123. *Rosenberger*, 515 U.S. at 829; see also *Cogswell v. City of Seattle*, 347 F.3d 809, 815 (9th Cir. 2003) (stating, "In order to preserve the limits of a limited public forum, however, the State may legitimately exclude speech based on subject matter where the subject matter is outside the designated scope of the forum" and upholding limitation upon ballot statements to candidate self-discussion).

124. *Perry*, 460 U.S. at 47.

125. See *infra* note 129.

126. *Comelius*, 473 U.S. at 813.

127. The Court's effort to distinguish between subject and content breaks down in practice. Consider a public forum limited to discussion of ballot measures or a school board meeting limiting discussion to agenda items. There really seems to be no considered basis for preventing a speaker from injecting religious views—even sermonizing—into the discourse. Where religious views color the speaker's perspective on a subject, any limitation on those views becomes content discrimination. Drawing the line necessarily entails one normative position evaluating another. The distinction between content and subject matter blurs when we are contemplating speech proceeding from any ideological perspective.

128. *Pleasant Grove City v. Summum*, 555 U.S. 460, 485–87 (2009) (Souter, J., concurring); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761–62 (1995) ("There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech."); *Bd. of Educ. of Westside Cmty. Sch. (Dist. 66) v. Mergens*, 496 U.S. 226, 275–76 (1990) (Stevens, J., dissenting).

129. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (upholding a ban on political advertisements on paid spaces offered on government owned public transportation, observing the desirability of avoiding "lurking doubts about favoritism, and sticky administrative problems . . . in parceling out limited space to eager politicians"); see also *Ysursa v. Pocatello Ed. Ass'n*, 555 U.S. 353, 358–59 (2009) (upholding Idaho's ban on payroll deductions for political purposes, adopted to avoid the appearance of partisanship,

religious activity is where we need to focus.

The Court's treatment of government support of sectarian religious views in both the government speech and the forum contexts is illustrated by a number of cases. The determinative consideration in assessing government speech is whether it amounts to approval of religion. *County of Allegheny v. ACLU*<sup>130</sup> involved a county's preferential display of a crèche on its courthouse's "Grand Staircase."<sup>131</sup> The favoring of sectarian religious expression was held to be an Establishment Clause violation.<sup>132</sup> By contrast, the crèche in *Lynch v. Donnelly*,<sup>133</sup> which was part of the town's traditional holiday display and did not involve a governmental endorsement of religion,<sup>134</sup> entailed no Establishment Clause violation.<sup>135</sup>

In the forum context, meanwhile, government neutrality is the key consideration. The display of a cross in a public park with a neutral policy allowing private use to express views was held not to constitute an Establishment Clause violation in *Capitol Square Review and Advisory Board v. Pinette*.<sup>136</sup> Unlike the *exclusive* access to the staircase in *City of Allegheny v. ACLU*, a neutral access policy posed no constitutional problem.<sup>137</sup>

### 3. *The Compelled Speech Doctrine as the Constitutional Basis for a Mandate of Government Neutrality*

In order to reconcile the majority view that government's proper role in

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observing, "Idaho is under no obligation to aid the unions in their political activities. And the State's decision not to do so is not an abridgment of the unions' speech; they are free to engage in such speech as they see fit. They simply are barred from enlisting the State in support of that endeavor").

130. 492 U.S. 573 (1989).

131. *Id.* at 578.

132. *Id.* at 578-79.

133. 465 U.S. 668, 671 (1984).

134. *Id.* at 685-87.

135. *Id.* at 671-72.

136. 515 U.S. 753, 770 (1995). The issue of viewpoint discrimination in the government denial of the application was not before the Court.

137. *Id.* The panacea of neutrality has not been accepted by all members of the Court dealing with the forum analysis. In *Board of Education of Westside Community Schools (Dist. 66) v. Mergens*, concern over allowing high school students to form a religious club having the same access to meeting facilities as other "noncurricular" groups organized by students without posing an Establishment Clause problem prompted two Justices to concur in the judgment in order "to emphasize the steps [the school] must take to avoid appearing to endorse the [religious] club's goals." 496 U.S. 226, 263 (1990) (Marshall, J., concurring). The concern was with a facially neutral policy that in effect worked to favor a religion: "If public schools are perceived as conferring the *imprimatur* of the State on religious doctrine or practice as a result of such a policy, the nominally 'neutral' character of the policy will not save it from running afoul of the Establishment Clause." *Id.* at 264.

the constitutional scheme precludes it from manipulating public opinion bearing on the exercise of the franchise with the government speech doctrine's support of the validity of government's ability to promote policies to the citizenry, we need to consider one more aspect of the Supreme Court's free speech jurisprudence—the prohibition against compelled speech.

This Article does not presume to wrestle with reconciling the role of government as a speaker in non-election contexts with the individual's right to freedom of conscience.<sup>138</sup> However, one accepted distinction drawn in the compelled speech cases is pertinent and illuminating. Government efforts to sway public opinion and to use tax dollars to support causes abhorrent to some has been well accepted: “With countless advocates outside of the government seeking to influence its policy, it would be ironic if those charged with making government decisions were not free to speak for themselves in the process.”<sup>139</sup>

But such promotion of government policies as a general rule is distinguishable from the compelled speech involved in collection of a mandatory fee to finance private, political, or ideological causes.<sup>140</sup> Something more than the mere fact that government is seeking to influence the populace needs to be at stake for such efforts to intervene in the election battle to be considered unconstitutional.<sup>141</sup> Let us consider what that might be.

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138. See generally Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1 (2000); Kelly Sarabyn, *Prescribing Orthodoxy*, 8 CARDOZO PUB. L., POL'Y & ETHICS J. 367 (2010); Recent Case, *Uncovering Coherence in Compelled Subsidy of Speech Doctrine: Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. 2055 (2005), 29 HARV. J.L. & PUB. POL'Y 1107 (2006).

139. *Keller v. State Bar of Cal.*, 496 U.S. 1, 12 (1990).

140. This was recognized in *Abood v. Detroit Board of Education*, 431 U.S. 209, 259 n.13 (1977) and *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 550–51 (2005); see also *Smith v. Regents of Univ. of Cal.*, 844 P.2d 500, 506 (Cal. 1993) (explaining the difference between government policies and compelled speech).

141. Professor Shiffrin explains:

Indeed, compelled contributions to ideological causes with which some taxpayers violently disagree are the norm, not the exception. Even when opposition to such causes is sincerely founded on religious grounds, it is without free speech force. The Christian Scientists, for example, have serious and sincere objections to the use of their tax funds to support government hospitals and government funding of medical care; the Quakers oppose military funding; Catholics oppose public funding of abortions; fundamentalists oppose the teaching of evolution. No case law supports their “right” to enjoin such programs or a right to refund to a pro rata portion of their tax dollars. The fact that contributions are compelled cannot be considered sufficient to justify restrictions on government activities or government speech. Thus something beyond the fact of financial compulsion would be necessary . . . .

Shiffrin, *supra* note 6, at 593.

The majority view, in keeping with its distrust of government motif, recognizes that one such point for limiting government speech is when the People seek to govern—during elections.<sup>142</sup> But what rationale can be identified for treating government efforts to affect public policy during elections differently than at most other times?

Sound constitutional principles can be identified requiring that at some level government speech be limited.<sup>143</sup> The Court in *West Virginia State Board of Education v. Barnette*<sup>144</sup> observed the constitutional bounds of government efforts to create consensus: “We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.”<sup>145</sup> This high valuation of individual autonomy and healthy suspicion of government being placed on a political par with the sovereign electorate is the source of the constitutional limitation placed by the majority view upon partisan government involvement in the election process. Therein lies the link with the compelled speech analysis, as will be seen.

*Citizens to Protect Public Funds v. Board of Education*,<sup>146</sup> a case heavily relied upon by the Court in *Stanson*, premised its reasoning that government speech in the election context was fundamentally unlawful upon a compelled speech<sup>147</sup> analysis.<sup>148</sup> But some dots still need to be connected to

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142. See *Keller v. State Bar of Cal.*, 767 P.2d 1020, 1031 (Cal. 1989) (recognizing that a special rule applies to the election setting); see also Yudof, *supra* note 63, at 915 (“Government attempts to influence election results, a critical point in the demo[c]ratic process, are particularly suspect.” (footnote omitted)).

143. “The structure of American constitutional government and underlying historical assumptions about the relationship between the governed and the governors justify an interpretation of the first amendment that encompasses limits on government expression.” Yudof, *supra* note 63, at 898.

144. 319 U.S. 624 (1943).

145. *Id.* at 641.

146. 98 A.2d 673 (N.J. 1953).

147. The Court in *Abood v. Detroit Board of Education* considered the use of dues by mandatory membership organizations to advance political causes opposed by some members. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). In finding a violation of the members’ First Amendment right of association, the Court looked to its holding in *Buckley v. Valeo* that the right to contribute to an organization for the purpose of spreading a political message is protected by the First Amendment. *Id.*; *Buckley v. Valeo*, 424 U.S. 1 (1976). The Court stated:

The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State. And the freedom of belief is no incidental or secondary aspect of the First

comprehend why a compelled speech approach is a sound basis for treating election speech differently from the government speech ordinarily acknowledged by the Court as appropriate for promoting government policies.

The salient difference expressed in the majority view cases relating to government attempts to foist policy views upon the citizenry during elections is tied to fundamentals of constitutional governance. Government efforts to influence the citizenry regarding political or ideological causes during elections *are not* the support of adopted government policies or programs. In elections, government efforts to persuade occur in an as-of-yet unresolved battle fought between private factions over matters upon which the electorate is seeking to govern.<sup>149</sup> Consequently, such efforts amount to compelled support of private speech—subsidization of non-governmental political causes with which many voters may disagree. The fact that the public agency may believe its efforts to influence the People are warranted by the common good makes no difference. The question of what is in the best interest of the commonweal is still a subject of public debate among private factions. And, because the issue is before the popular electorate for decision, it is beyond the purview of public officials to intervene in an act of the sovereign.

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Amendment's protections:

“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”

*Abood*, 431 U.S. at 234–35 (citations omitted) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

The analogy between *Abood*, the later case of *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961) (discussing the use of union members' dues to finance candidates' campaigns), and the use of citizens' tax dollars to fund campaign activity is unavoidable. The proper use of public funds to promote *government* policies is distinguishable from the compelled speech involved in the collection of a mandatory fee to finance *private* political or ideological causes. *Abood*, 431 U.S. at 259 n.13; *Smith v. Regents of Univ. of Cal.*, 844 P.2d 500, 506 (Cal. 1993). Government support of one faction during an election campaign falls under the latter category.

148. “The public funds entrusted to the board belong equally to the proponents and opponents of the proposition, and the 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.” *Stanson v. Mott*, 551 P.2d 1, 8 (Cal. 1976) (quoting *Citizens to Protect Pub. Funds v. Bd. of Educ. of Parsippany*, 98 A.2d 673, 677 (N.J. 1953)).

149. This presumes a differentiation between the making of laws (by the sovereign People or elected representatives) and government's role in implementing them once they are made.

#### 4. *Constitutional Considerations Relating to the Role of Government in Elections*

The preservation of the dividing line between government's promotion of policies and its influencing of the sovereign electorate is imbued with paramount constitutional importance. This legal-political dichotomy, which is a necessary corollary of the rule of law, contemplates that arbitrary, political considerations should not intrude into legal processes; judges should not inject personal feelings into applying the law. Conversely, it contemplates that government officials should not extend special legal dispensations to family and friends. Maintaining this dichotomy requires that courts in the constitutional system of governance be charged with keeping the political process neutral and that government agents be constrained from affecting the normative evaluation underway. It is this latter aspect of the rule of law that is of concern when it comes to assessing government speech in the pre-election setting.

Partisan government speech is not censorship per se as it does not prevent citizens from speaking.<sup>150</sup> But it has the same purpose and effect as the regulation of speech designed to achieve an ideal of fairness that was addressed in *Citizens United*. On the face of it, the delegation of the role of arbiter of public discourse to a government bureaucrat may not seem particularly ominous. Certainly the minority view accepts the role of government in shepherding public opinion to appreciate the common good as proper. After all, public administrators' *raison d'être* is their expertise in carrying out the details fulfilling broad goals of public policy as determined by the sovereign voters. Should we not trust their training, experience, and ability for making such sensitive evaluations?

The answer lies in comprehending the civil servant's role in the grand scheme of constitutional self-governance. The subject being delegated for the administrator's discretion here is *not* merely the details. It is instead related to the broad, substantive policy determinations that are the province of the electorate, not the bureaucrats. Questions of what is important to consider in this primary context are not matters of mere implementation.

Theoretically, the problem with government agents seeking to influence the outcome of an election in the same manner as private actors boils down to essential precepts of liberal thought inherent in the constitutional design of the Founders and resonating in the analysis of the *Citizens United* majority. To reiterate, this philosophical outlook essentially conceives of the individual as autonomous and free and capable of self-governance by

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150. As one commentator observed, it does not really raise a First Amendment issue. Fredrick Schauer, *Is Government Speech a Problem?*, 35 STAN. L. REV. 373, 384-85 (1983).



virtue of the capacity of reason. Government is a creature existing solely by virtue of an agreement (social contract) entered by individuals and is afforded only limited power to intrude upon the natural freedoms of individuals. Administrative implementation of broad policy determinations made by the electorate is essential. It is equally essential that government functionaries not derogate or impose upon the sovereign's free exercise of reason in the process of arriving at those broad determinations.

##### 5. *International Recognition of the Imperative of Government Election Neutrality*

United States courts are not alone among nations adhering to the rule of law in recognizing the imperative of segregating government agents from the electorate's decisionmaking process. Elsewhere it is regarded as a prerequisite to the exercise of popular sovereignty that government's role in that process be circumscribed and remain neutral. Adherence to a standard of government neutrality is found in England, the European Union nations, and elsewhere.<sup>151</sup> Reflecting sensitivity to the timing of such government activity, government agencies in the United Kingdom may not publish partisan material within four weeks of an election.<sup>152</sup> The Supreme Court of Ireland recognized that "use by the Government of public funds to fund a campaign designed to influence the voters . . . is an interference with the democratic process."<sup>153</sup> Since 1908, Canada's civil service has maintained a non-partisan character.<sup>154</sup> Nigeria similarly restricts the civil servant from taking a political position.<sup>155</sup> Recognition of the importance of government election neutrality is found in the election observation handbook published by the Organization for Security and Cooperation in

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151. The author acknowledges the research done by counsel for the Pacific Legal Foundation in *Vargas v. City of Salinas*. Brief for Pacific Legal Foundation as Amicus Curiae Supporting Appellants, *Vargas v. City of Salinas*, 205 P.3d 207 (Cal. 2009) (No. S140911). For an analysis of differences in the way European nations of varied political traditions treat civil servant neutrality, see Jolanta Palidauskaite, *Codes of Conduct for Public Servants in Eastern and Central European Countries: Comparative Perspective* (2005) (paper presented at the European Group for Public Administration Annual Conference, Oeiras), available at <http://www.oecd.org/mena/governance/35521438.pdf>. With the gradual economic, social, and even political unification of Europe in recent decades, a call has been made for a common standard of impartiality to avoid the politicization of government employees. See Eur. Parl. Ass., *Civil Service Reform in Europe*, Doc. No. 9711 (2003), available at <http://assembly.coe.int/Documents/Workingdocs/doc03/EDOC9711.htm>.

152. Political Parties, Elections and Referendums Act, 2000, c. 41, § 125 (Eng.).

153. *McKenna v. An Taoiseach*, [1995] 2 I.R. 10, 42 (Ir.).

154. *Osborne v. Pub. Serv. Comm'n*, [1991] 2 S.C.R. 69 (Can.); see also MEGAN FURI, PUBLIC SERVICE IMPARTIALITY: TAKING STOCK 9, 9–19 (2008) (tracing the history of Canadian legal treatment of public official partisanship).

155. See *Indep. Nat'l Electoral Comm'n v. Musa*, [2003] 3 NWLR 72 (Nigeria).

Europe (OSCE). The OSCE deems equal conditions for election participants to be a key to fair elections, stating:

[T]he state media should meet its special responsibility for providing sufficient, balanced information to enable the electorate to make a well-informed choice. Regulations on campaign financing should not favour or discriminate against any party or candidate. There should be a clear separation between the state and political parties, and *public resources should not be used unfairly for the benefit of one candidate or group of candidates*. The election administration at all levels should act in a professional and neutral manner . . . .<sup>156</sup>

Similarly, the European Union handbook for election observation specifies as considerations in assessing whether an election is fair whether voter education is handled in an impartial manner, whether campaign regulations are implemented and enforced “in a consistent and impartial manner,” and whether public funds and other resources are “being used to the advantage of one or more political contestants.”<sup>157</sup>

The theme that resounds throughout these laws, standards, cases, and comments is that government neutrality in elections is essential. The alternative threatens the reliability of election results as the true expression of the sovereign peoples’ will and undermines the integrity of the electoral process. The concerns are very real and are raised by any governmental conduct seeking to influence the outcome of the electoral process.

#### 6. *The Practical Infeasibility of Neutral Government Involvement in Election Contests*

Part III of this Article discusses the Supreme Court’s rejection of regulatory efforts to level the pre-election playing field. The problems inherent in such regulatory intervention in the electoral process are informative with regard to partisan government efforts to affect election results. The problems encountered with government involvement in the pre-election repartee are not purely theoretical or exclusively those of constitutional legal principles. Government partisanship—whether by affirmative speech or by negative suppression of speech—is not necessarily manifested as outright government corruption in seeking to preserve

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156. ORG. FOR SEC. AND COOPERATION IN EUR., ELECTION OBSERVATION HANDBOOK 18 (5th ed. 2007) (emphasis added).

157. EUR. COMM’N, HANDBOOK FOR EUR. UNION ELECTION OBSERVATION 51–53 (2d ed. 2008) (“The fairness of a campaign will be undermined where state resources are unreasonably used to favour the campaign of one candidate or political party. State resources—such as the use of public buildings for campaign events—should be available on an equitable basis to all contestants.”).

avored factions in power.<sup>158</sup> Even with the Hatch Act,<sup>159</sup> its state equivalents, and the curtailment of patronage systems,<sup>160</sup> the influence of the political process upon the function of the civil servant remains unavoidable.<sup>161</sup>

An election is a process of weighing normative values. It represents society's assessment of what issues are to be given a political dialogue and what form that should take. The determination of what values are to be prioritized in that process is itself a normative weighing process.<sup>162</sup> In this regard, the government agent given the task of moderating the public debate is subject to all the same vicissitudes affecting members of the voting public and more. Apart from the fundamental problem of innate bias that clouds the judgment of anyone placed in such a position, the government agent is also subject to institutional forces rendering him or her unsuited for the task of determining what views merit greater or lesser attention. Some of these may be identified.

Members of government agencies are impacted by pluralistic considerations that press upon the agency and the powerful tendencies toward capture of the regulator by the regulated<sup>163</sup> and concern with self-preservation<sup>164</sup> that skew governmental outlook. The shared insider outlook, or groupthink,<sup>165</sup> prevailing in any bureaucratic setting is itself a substantial impairment of the administrator's judgment applied in such a

158. The problems associated with partisanship on the part of civil servants are tied to an inability to separate politics from administration. Kenneth Kernaghan, *Political Rights and Political Neutrality: Finding the Balance Point*, in FEAR AND FERMENT: PUBLIC SECTOR MANAGEMENT TODAY 131, 142 (John D. Langford ed., 1987).

159. 5 U.S.C. §§ 7321–26 (2006).

160. *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

161. Rafael Gely & Timothy D. Chandler, *Restricting Public Employees' Political Activities: Good Government or Partisan Politics?*, 37 HOUS. L. REV. 775, 803–21 (2000).

162. The Court recognized the multi-faceted, normative evaluations (that inevitably must go beyond merely calculating a candidate's net worth) involved in assessing where "fair" lies when it struck down the Millionaire's Amendment of the Bipartisan Campaign Reform Act. Pub. L. No. 107-155, 116 Stat. 81 (2002). That law supplemented the campaign war chest of an opponent of a candidate spending more than \$350,000 in personal funds with more than the normally allowed amount in contributions. *See Davis v. FEC*, 554 U.S. 724, 742 (2008).

163. *See* Marver H. Bernstein, *Independent Regulatory Agencies: A Perspective on Their Reform*, in THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 14 (Richard D. Lambert et al. eds., 1972).

164. ROBERT MICHELS, *POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY* 24, 98, 104, 121 (Eden Paul & Cedar Paul trans., 1999) (1915).

165. IRVING L. JANIS, *VICTIMS OF GROUPTHINK: A PSYCHOLOGICAL STUDY OF FOREIGN-POLICY DECISIONS AND FIASCOES* 8 (1972); ANTHONY DOWNS, *INSIDE BUREAUCRACY* 102, 103–07 (1967).

sensitive context as evaluating the merit of others' opinions. That the channels of government may be manipulated and influenced by private wealth and other powerful private forces is no revelation to anyone.<sup>166</sup> Institutional prerogatives, especially where the agency in question is invested in an issue, make the regulatory agency's task in remaining impartial an unrealizable proposition as well.

Studies of voting behavior identify group voting participation as increased: (1) where interests are strongly affected by government policies; (2) where there is access to information about the relevance of political decisions to its interests; (3) by exposure to social pressures to vote; and (4) by the amount of opposing pressure brought to bear on voters.<sup>167</sup>

Analysis of the first two factors discloses the inevitability of government officials' personal bias infusing any handling of the procedures relating to the electorate's consideration of information concerning a candidate or an election measure. The personal stake of the proponent agency is evident in how it affects its members' voting behavior. Lipset addressed the first factor affecting voting behavior and pointed out the special situation of the government worker:

Although it may be argued that everyone is affected by government policies, some groups are more affected than others, and these groups might be expected to show a higher turnout at the polls than the public at large. The purest case of involvement in government policies is naturally that of government employees whose whole economic position and working life is affected. Data from national and local elections in both the United States and many European countries show that government employees have the highest turnout of any occupational group.<sup>168</sup>

The member of the public agency immediately grasps the relationship between failure of a revenue increase and their job. It means change—whether through belt-tightening, finding more efficient means of accomplishing work, or cutting lower priority programs. It also means overcoming natural bureaucratic intransigence to accomplish change. This restructuring of the personal microcosm of the public servant is doubtless an unpleasant prospect. Thus, the proposition that the public administrator is equipped to divorce him or herself from personal concerns, fairly evaluate the broader impacts of a ballot measure or a candidate's success, and ascertain what information is germane, requires emphasis, or

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166. Addressing this evil was the entire point of the Federal Election Campaign Act (FECA). *See generally* 2 U.S.C. §§ 431–442 (2006).

167. SEYMOUR MARTIN LIPSET, *POLITICAL MAN: THE SOCIAL BASES OF POLITICS* 186–219 (1960).

168. *Id.* at 186.

should be de-emphasized for the voters is more than dubious. Even if the regulator could remain neutral, the inevitable appearance of bias would taint public confidence in the fairness of the process.

Lipset's analysis of the studies of voting behavior yields the conclusion that groups that are better informed are more likely to vote.<sup>169</sup> In explaining the second factor, he compared government workers with other groups:

Two groups may have an equal stake in government policies, but one group may have easier access to information about this stake than the other. The impact of government policies on government employees, for example, is not only objectively great, but transparently obvious . . . . On the other hand, the impact of a whole collection of government policies (tariffs, controls, anti-trust policies, taxation, subsidies, etc.) on a worker or white-collar employee may be very large, but it is hidden and indirect.<sup>170</sup>

In other words, while the government employee may be better positioned than others to access data relevant to the electorate's decision, the relationship between the impacts associated with how a candidate fares or the passage or failure of the ballot measure are usually far more attenuated for John Q. Citizen as contrasted with those felt by the government employee. This is true in the case of a bond measure spearheaded by the agency to accomplish a coveted project or a tax measure designed to bring revenue into the public agency's coffers to accomplish goals esteemed by the agency. For example, passage of the measure may be felt by the proponent civil servant directly in terms of greater job security, improved working conditions, increased benefits, higher wages, etc. Other citizens may indirectly and eventually observe some increase in services from which they may personally benefit.<sup>171</sup>

In a nutshell, a civil servant evaluating what information should be placed before the voters is akin to a mother judging her daughter's beauty pageant. The bureaucrat is more directly and personally impacted by the success or failure of a ballot measure or a candidate.<sup>172</sup> This personal stake

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169. *Id.* at 191.

170. *Id.*

171. Conversely, the failure of the measure or a candidate tied to a certain agenda is directly felt by the public employee who may have to work harder or experience less favorable conditions, reduced income or benefits, or even the loss of a job. Personal investment in envisioning, planning, and believing in a proposal or platform is also at stake. Other citizens may eventually observe a lighter tax burden and may or may not observe some difference in the public agency's performance. They probably share no personal investment in the outcome of the election.

172. This is why government agents are at risk of succumbing to their natural biases and self-interests. This is the area where government employees are going to find personal normative inclinations and political ambitions interfere with their ability to provide

colors the perspective of the regulatory agency rendering it unable to impartially evaluate broader social, economic, and other impacts associated with an election measure.<sup>173</sup> Far from experience making the government body a reliable source of balanced voter information,<sup>174</sup> its inevitable and inherent bias prevents it from dispensing impartial information and from treating the election process fairly.

As an ideal, the concept of leveling the playing field by compensating for advantages of power and economics has definite appeal. The inevitable flaw in its implementation is illustrated by *Smith v. Dorsey*,<sup>175</sup> a case where the Supreme Court of Mississippi addressed a school board's expenditure related to a bond referendum.<sup>176</sup> The campaign was justified as necessary to compensate for voters' lack of "correct" information.<sup>177</sup> The decision

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complete, fair, and impartial information to the citizenry. Because government agents are inevitably going to be inclined in the pre-election context to promote personal beliefs concerning the commonweal, to err, to omit, and to distort their evaluation of the effects of a particular election outcome, this is the one area where it is critical to severely restrict their involvement with that process. Limiting their role prevents public servants from using public funds to mold public opinion to their own on election issues. And it prevents the erosion of confidence in the electoral process and the undermining of the legitimacy of the process that is the natural product of the appearance of such impartiality.

173. The bureaucrat's decision on what the public good requires is necessarily a political one. Recognition of this fact caused one jurist to rebuke the position that government may promote the public good during elections: "I do not endorse a distinction between electioneering expenditures for the common needs of citizens versus expenditures for political purposes. To determine that something is in the common needs of citizens is itself a *political* decision." *Kidwell v. City of Union*, 462 F.3d 620, 632 (6th Cir. 2006) (Martin, J., dissenting).

174. A large amount of literature demonstrates the importance of reliable information for voters to make wise decisions on ballot propositions. See generally SHAUN BOWLER & TODD DONOVAN, *DEMANDING CHOICES: OPINION, VOTING, AND DIRECT DEMOCRACY* (1998) (analyzing how citizens logically decide what voting measures they may support); ARTHUR LUPIA & MATHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW?* (1998) (exploring how citizens make decisions based on combining insights from political science, economics, and the cognitive sciences); Arthur Lupia & John G. Matsusaka, *Direct Democracy: New Approaches to Old Questions*, 7 ANN. REV. POL. SCI. 463 (2004).

175. 599 So. 2d 529 (Miss. 1992). The school board spent funds for a "documentary" concerning the bond issue, to pay poll workers to go door-to-door, answer phones, put up posters, and pass out pamphlets for four months preceding the election, and for a fish fry for the poll workers. *Id.* at 539–40. Incredibly, with respect to the \$9,427.50 documentary, the record was devoid of the actual film or any details concerning its contents except the superintendent's self-serving statement "that the documentary was non-partisan." *Id.* at 549. The court necessarily found it was permissible: "Finding nothing in the record to contradict this assertion, we accept it at face value." *Id.*

176. *Id.* at 539–40.

177. *Id.* at 540.

notes, “According to Dr. Smith, the campaign workers and other promotional efforts were in response to distortions in the community generated by Mississippi Power and Light concerning the impact of a bond referendum on the local tax base.”<sup>178</sup>

The court did not accept the rationale that it was up to the public agency to equalize “distortions” it perceived in the flow of information in the marketplace of ideas.<sup>179</sup> It rejected the claim “that an unbiased, nonpartisan presentation of the facts was the Board’s aim.”<sup>180</sup> After reviewing cases from other jurisdictions considering government’s role in election contests, the Mississippi high court accepted the requirement that a government agency’s informational role is not one of actively seeking to achieve a fair playing field but requires it to remain neutral:

We find compelling wisdom and sound logic in this line of cases which recognizes a balanced, informational role in educating the local community about referendum proposals. A fair and balanced presentation of the facts would also include relevant information addressing the tax impact as well as proposed community benefits. A line does exist between a fair presentation of the facts in an innocent informational role and a concerted campaign designed to achieve the objectives of the proponents.<sup>181</sup>

#### 7. *Judicial Enforcement of the Requirement that Government Remain Neutral in Elections*

The majority-view courts have generally accepted the idea that to cross the line, the form of governmental support must involve some tangible commitment of public resources beyond mere public pronouncements.<sup>182</sup> These courts have undertaken the task of providing guidance for a trier of fact to determine when government has crossed the line. In doing so, some

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178. *Id.*

179. *Id.* at 549.

180. *Id.* at 540, 549.

181. *Id.* at 542–43.

182. *See supra* note 41. This is in part a vestige of the historical origins of taxpayer suits concerning government expenditures on election campaigns. Citizen suits for disgorgement of such improperly spent funds were not tied to First Amendment issues or concerns with preserving the sanctity of the electoral process. Dillon’s rule, the early view of municipal authority dating to 1865, severely limited government speech on the basis that a municipal corporation possesses no inherent powers. JOHN F. DILLON, 1 COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 448–51 (5th ed. 1911); *see also* *Elsenau v. City of Chi.*, 165 N.E. 129 (Ill. 1929). Such expenditures were *ultra vires* as exceeding the basic authority of the public entity. Although this approach to the problem of government election speech has not been completely abandoned, *see Ameritel Inns, Inc. v. Greater Boise Auditorium District*, 119 P.3d 624, 625 (Idaho 2005), it has fallen by the wayside with the rise of the welfare state and the recognition that government has implied powers to meet its vastly expanded duties.

courts have sought to avoid a case-by-case approach by looking to the form of the government conduct at issue. This can involve rigid formulations to precisely evaluate when unlawful expenditures have occurred.

*a. Assessing the Contextual and Per Se Approaches*

The better rule involves a contextual analysis considering the alleged government support in light of the content and the surrounding circumstances. This rule, stated initially by the court in *Stanson*, assesses the substance of what a government actor has done by objectively evaluating the “style, tenor and timing” of the government activity.<sup>183</sup> The court in *Stanson* applied this approach to find that an alleged \$5,200 expenditure by the Director of the State Department of Parks to promote passage of a bond measure providing funds for acquisition of park lands could be unlawful.<sup>184</sup> The promotional activity involved the Department mailing its own materials favoring the bond act, as well as materials created by a private organization formed to promote the act’s passage, paying for travel expenses for speaking engagements to promote the act, and using agency staff time to promote its passage.

The futility of seeking to categorically anticipate and define all forms of unlawful government partisanship stems from the unlimited number of ways in which government agents may support an election cause. The methods for providing support to one faction in an election contest are not susceptible to compilation in a list.<sup>185</sup> Like the Hydra, every time one of myriad techniques is eliminated, more emerge to replace it. From fish fries<sup>186</sup> to election eve mailers<sup>187</sup> to strategically timed agency policy statements<sup>188</sup> to lopsided presentation of facts<sup>189</sup> and so on, the methods of providing support are legion.<sup>190</sup> Presumptions that official publications are

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183. *Stanson v. Mott*, 551 P.2d 1, 12 (Cal. 1976) (“[T]he determination of the propriety or impropriety of the expenditure depends upon a careful consideration of such factors as the style, tenor and timing of the publication; no hard and fast rule governs every case.”).

184. *Id.* at 12–13.

185. This has made the task of codifying such a standard impossible.

186. See *Dorsey*, 599 So. 2d at 539.

187. See *Sweetman v. State Elections Enforcement Comm’n*, 732 A.2d 144, 150–51 (Conn. 1999) (regarding yet another school board pamphlet seeking to convince voters of the negative consequences that would ensue if a measure was voted down).

188. See *Burt v. Blumenauer*, 699 P.2d 168, 179 (Or. 1985).

189. See Angela C. Poliquin, Note, *Kromko v. City of Tuscon: Use of Public Funds to Influence the Outcomes of Elections*, 46 ARIZ. L. REV. 423, 424 (2004).

190. The methods may be subtle as well. Rather than bluntly stating, “Vote for Candidate X,” a government agency may spend funds to call attention to a concern of public interest that is a bone of contention in the election battle, such as potholes. Naturally, the publicity will emphasize in dramatic fashion the horrors of potholes—their danger to



suspect or are neutral are insupportable.<sup>191</sup> Arbitrary time limitations provide no real measure of the effect government support may have upon a particular election contest.<sup>192</sup> Even looking to whether the government action involved only statements of objective facts does not prevent the unfair and one-sided presentation of such facts.

*b. Relevant Considerations in Applying the Prohibition Contextually*

The difficulty in drawing an indelible line between the situation where government action involves providing “neutral information” and the promotion of partisan views on election issues has been recognized elsewhere as well.<sup>193</sup> The determination is going to vary from case to case

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public safety and devastation to property—without directly mentioning a road repair bond measure on the upcoming ballot or a particular candidate’s position on the need for repairs. Alternatively, an expenditure may objectively direct voter attention to the respective candidates’ road maintenance voting records. The favored candidate can easily coordinate a campaign platform to coincide with a government “informational” campaign to strategic advantage. For examples of such crafty attempts to influence voter outlook by manipulating public opinion on issues dovetailing those before the voters, see *Tenwolde v. County of San Diego*, 17 Cal. Rptr. 2d 789, 790–91 (Ct. App. 1993) (concerning the sheriff’s department distribution of postcards that cited judicial failings and urged the chief justice of the state supreme court to resign before a retention election); *California Common Cause v. Duffy*, 246 Cal. Rptr. 285 (Ct. App. 1987); *Dollar v. Town of Cary*, 569 S.E.2d 731 (N.C. Ct. App. 2002); and *Burt*, 699 P.2d at 168.

191. Numerous courts and commentators have parsed the serious constitutional danger posed by partisan government intrusion into the election debate. Significantly, none of these careful students of the problem identifies any less of a danger posed by partisan activity in the form of obvious campaign techniques than in the manner of ordinary governmental communications. On the contrary, greater danger is associated with authoritative, official modes of communication than with transparent political partisanship. See Brian C. Castello, Note, *The Voice of Government as an Abridgement of First Amendment Rights of Speakers: Rethinking Meese v. Keene*, 1989 DUKE L.J. 654, 676–78; Bloom, *supra* note 64, at 833–34.

192. Advance efforts may be employed to soften the voters, mold their outlook, and make them more receptive to a particular ballot position. See *Tenwolde*, 17 Cal. Rptr. 2d at 790–91; *Miller v. Cal. Comm’n on the Status of Women*, 198 Cal. Rptr. 877, 878–79 (Ct. App. 1984).

193. See *Putter v. Montpelier Pub. Sch. Sys.*, 697 A.2d 354, 359 (Vt. 1997) (observing the “nebulous line separating information from propaganda” in a case involving another election affecting school funding in which the school sent a newsletter warning voters of dire consequences if the ballot measures failed); Shiffrin, *supra* note 6, at 655 (concluding that the subject of government speech is far too complex to be amenable to reductionist analysis); Yudof, *supra* note 63, at 899 (describing the line between neutral and partisan information as “exceedingly difficult to make”); Ziegler, *supra* note 62, at 615 (discussing the “apparent dilemma of distinguishing proper from improper government conduct”); John A. Lambent, Comment, *Using Public Money to Influence the Electorate: Is There Corruption Which Needs Correction?*, 22 PAC. L.J. 249, 257 (1991) (observing, “The court [in *Stanson*] never explicitly defined ‘promotional’ and ‘informational,’ and stated that the line between the two is not clear”).

because the circumstances in each case differ. While it is not feasible to anticipate all the possible ways such impartial support may occur under all possible circumstances, the prohibition is clear enough. The ways in which it may be violated are simply not susceptible to itemization.<sup>194</sup> Thus, ad hoc review is unavoidable.

Courts seem to have no difficulty with “empirical data” or “purely factual” material presented in an impartial manner which “suggest[s] no position for or against.”<sup>195</sup> The contextual standard contemplates that even purely factual details can be incomplete or otherwise presented in such a manner as to depart from neutrality and amount to an attempt to influence voter conduct.<sup>196</sup>

The need for an objective contextual approach to account for such manipulations of form is aptly illustrated by the facts of a North Carolina case. The court in *Dollar v. Town of Cary*<sup>197</sup> dealt with a town’s campaign on the eve of a council election “to better inform citizens about growth management issues.”<sup>198</sup> To accomplish this supposed educational campaign, the town council appropriated \$200,000 for “among other things[,] ‘direct mail, media buys, and contracted services.’”<sup>199</sup> Growth management was an election hot button issue. The court looked beyond the façade of the nonpartisan rhetoric and applied a contextual analysis:

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194. Granting relief where such a violation is found is another matter. The courts are disinclined to invalidate election outcomes. *See, e.g., Quinn v. City of Tulsa*, 777 P.2d 1331 (Okla. 1989). In terms of disgorgement of funds by the responsible public official(s), identifying partisan government conduct does not predetermine liability. A strict liability standard has been declined in favor of a reasonable man negligence standard: should the public official under the circumstances, exercising due care, have known that the use of public resources would tend to unfairly support one side in the election contest? *See Keller v. State Bar of Cal.*, 767 P.2d 1020, 1032–33 (Cal. 1989), *rev’d on other grounds*, 496 U.S. 1 (1990); *Stanson v. Mott*, 551 P.2d 1, 15–16 (Cal. 1976).

195. *See, e.g., Godwin v. E. Baton Rouge Parish Sch. Bd.*, 372 So. 2d 1060, 1064 (La. Ct. App. 1979) (discussing still another school board using facilities and issuing brochures to influence voters on a ballot measure impacting school revenues); *Stanson*, 551 P.2d at 11 n.6.

196. *See Sweetman v. State Elections Enforcement Comm’n*, 732 A.2d 144, 165 (Conn. 1999).

197. 569 S.E.2d 731 (N.C. Ct. App. 2002).

198. *Id.* at 732 (citations omitted).

199. *Id.* (alteration in original).

The determination of whether advertising is informational or promotional is a factual question, and factors such as the style, tenor, and timing of the publication should be considered. . . . It is not necessary for the advertisement to urge voters to vote “yes” or “no” or “for” or “against” a particular issue or candidate in order for the advertising to be promotional.<sup>200</sup>

Applying the contextual approach, the court affirmed the trial court’s granting of a preliminary injunction.<sup>201</sup> Had the court adhered to a content-only approach, the town council’s ruse to mask election advocacy as an educational program and thereby use public funds to perpetuate in power those sharing its perspective would have succeeded. Similarly, in *Burt v. Blumenauer*, the court recognized that while generally educating the public about health matters is a proper part of a government agency’s duties, the agency’s promotion of a policy germane to such a purpose would be improper where it supported one side of an issue before the voters.<sup>202</sup>

A contextual approach has similarly been applied to enjoin the misuse of the franking privilege for campaign purposes. The court in *Hoellen v. Annunzio*,<sup>203</sup> addressing the argument that its inquiry should be restricted to whether the content of a mailer expressly advanced the congressman’s candidacy, held that “logic dictates that we should not close our eyes in the face of extrinsic evidence which reveals that an appearance of official business is nothing more than a mask.”<sup>204</sup>

In formulating its contextual “style, tenor and timing” approach, the California Supreme Court in *Stanson* relied upon a decision by Justice Brennan, written when he sat on the New Jersey Supreme Court. That

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200. *Id.* at 733.

201. The court cut through the town council’s strategy of elevating form over substance, holding:

The advertisements were to run . . . coinciding with the Council elections where the smart/managed growth concept was a contested issue between candidates. We agree with the trial court that this evidence reveals “it is more likely than not that a . . . jury would find that a primary purpose of this [Campaign] is to influence [the Town’s] voters in favor of ‘slow growth’ or ‘managed growth’ candidates in the [2001 Council] election.” . . . The advertisements, in the context of the Council elections, appear to be more than informational in nature and instead implicitly promote the candidacy of those Council candidates in sympathy with the Council’s position on the Town’s growth. It is not material that the advertisements did not directly support one candidate over another; they promoted only one point of view on an important campaign issue.

*Id.* at 733–34.

202. 699 P.2d 168, 179–80 (Or. 1985).

203. 468 F.2d 522 (7th Cir. 1972).

204. *Id.* at 526.

case, *Citizens to Protect Public Funds v. Board of Education of Parsippany-Troy Hills TP*,<sup>205</sup> illustrates the variegated considerations involved in assessing whether a public agency's action is neutral or, all things considered, serves to unfairly advantage one faction in the election contest. *Citizens to Protect Public Funds* involved a school board's actions in the face of a school bond election.<sup>206</sup> The board disseminated a booklet.<sup>207</sup> Some pages directly exhorted "vote yes."<sup>208</sup> The California Supreme Court, recognizing the ease with which a public agency can avoid employing such blunt language, turned its attention to the other aspects of the New Jersey school board's publication.<sup>209</sup>

The bulk of the booklet consisted of information about the cost of the proposed building project and assertions regarding the need for new facilities.<sup>210</sup> The materials warned of the dire consequences that would ensue in the advent of the bond's failure.<sup>211</sup> This was too much for Brennan, who held such advocacy crossed the line, observing that the materials did not involve "presentation of facts merely but also arguments to persuade the voters that only one side has merit."<sup>212</sup> In view of the less obvious advocacy contained in the materials in *Citizens to Protect Public Funds*, the *Stanson* court recognized that the subtlety of persuasive techniques a government agency could employ necessitated a nuanced evaluation as to whether the agency had provided a balanced presentation of the facts, including "all consequences, good and bad, of the proposal,"<sup>213</sup> or whether the agency was seeking to persuade.<sup>214</sup> A "careful consideration" of the relevant facts is needed to make this determination.<sup>215</sup>

Applying the *Stanson* approach, a jury would not focus upon putative motive, form, or who did the actual speaking, but upon what a reasonable

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205. 98 A.2d 673 (N.J. 1953).

206. *Id.* at 674–75.

207. *Id.* at 674.

208. *Id.*

209. *Stanson v. Mott*, 551 P.2d 1, 8 (Cal. 1976).

210. *Id.*

211. *Id.*

212. *Citizens to Protect Public Funds*, 98 A.2d at 677.

213. *Stanson*, 551 P.2d at 11 (quoting *Citizens to Protect Public Funds*, 98 A.2d at 676–77).

214. *Id.* at 12 n.8.

215. *Id.* at 12. Such an evaluation of contextual considerations would not generally seem amenable to determination as a matter of law. *But see* *Peninsula Guardians v. Peninsula Health Care Dist.*, 134 Cal. Rptr. 3d 837, 837 (Ct. App. 2011) (finding materials conveying one-sided views on the need for a hospital project were informational as a matter of law—a conclusion made all the more questionable in view of the trial court's determination that disputed issues of fact existed permitting a trier of fact to find otherwise on this point).

person would objectively conclude the effect of the government action would be. It might consider whether the school board acted in strategic proximity to the election date. Timing is likely much more a consideration of persuasion than informing, and an “informational” mailer timed to arrive just before absentee ballots issue would be a red flag. The tenor of the governmental action can be gauged in terms of what this author calls the “Chicken Little” factor—in other words, whether the presentation is calm, matter of fact, and unemotional, or whether it conveys the impression that the sky is about to fall. Sensationalism and dire warnings of catastrophe designed to reach voters at an emotional level are red flags. In terms of style, the trier of fact can consider whether the government action is designed to inform or persuade. In other words, does it resemble tested campaign methods? If literature, is it presented in a slick, glossy, and sensational form? Are disputed views in the election presented as facts and without offering the countervailing point of view? Or is it unadorned, objective information designed to allow the voter to make up her own mind? These are the guidelines accepted by the better view approach in American lower courts to ascertain whether a governmental expenditure is designed to persuade or is proper, neutral (informational) conduct.

*c. The Inadequacies of an Approach that Emphasizes the Form of the Government Action over Its Substance*

The deficiencies of an approach focusing on the form of the message are pointed out by the New York high court in applying a constitutional prohibition against use of public funds for campaigning to a state agency newsletter disseminated on the eve of an election.<sup>216</sup> Rather than focusing

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216. *Schulz v. New York*, 654 N.E.2d 1226 (N.Y. 1995). The court considered a newsletter containing the following material cited by the court:

“Led by the Bush Administration, Republicans in New York and across the nation are seeking to slash assistance to the needy. [ ]The Republicans appear to have devised a strategy of using distortions and half-truths about Medicaid and welfare to divide the people in a key election year.”

The newsletter also reported the Governor’s criticism of “President Bush and the Republicans for using welfare as the ‘Willie Horton issue of the 1992 campaign.’”

While [the newsletter] did properly urge the public to vote and to “[s]tudy the candidates,” it also sought to enlist the public’s support in opposition to the alleged Republican position on the welfare and Medicaid reform issues. Thus, the newsletter urged: “[y]ou can also write at any time to your local representatives. Tell them that welfare and Medicaid is a lifeline during troubled times, and that they shouldn’t pull in the lifeline while so many people are in need.” Moreover, it proceeded to ask the public to “vote for the men and women who put people before politics,” a thinly veiled entreaty to vote against the previously disparaged Republican stance on the issues addressed.

on content or what the listener might think, the court looked to objective considerations concerning context:

[W]e conclude that the document transgresses the constitutional boundary. It was disseminated on the eve of the Presidential campaign of 1992. Its subject matter covered one of the issues already then of primary interest in that campaign—welfare reform. Although the newsletter contained a substantial amount of factual information which would have been of assistance to the electorate in making an educated decision on whose position to support on that issue, the paper undisputably convey[ed] . . . partisanship, partiality . . . [and] disapproval by a State agency of [an] issue.<sup>217</sup>

The court looked outside the four corners of the newsletter and emphasized the overriding need for government to be neutral in performing an informational function.<sup>218</sup> The court cited with approval *Stern v. Kramarsky*'s<sup>219</sup> admonition against partisanship: "To educate, to inform, to advocate or to promote voting on any issue may be undertaken, provided it is not to persuade nor to convey favoritism, partisanship, partiality, approval or disapproval by a State agency of any issue, worthy as it may be."<sup>220</sup>

Another problem with focusing exclusively or primarily upon textual considerations is more basic. Such an approach does not address public resources diverted to provide support of a non-textual nature. Obviously support of one side in an election contest does not need to involve speech. It can take such forms as allocating funds and allowing use of public property or employees to support one campaign against another. These forms of support are often no more readily susceptible to clear delineation in advance than those involving words of advocacy.<sup>221</sup>

*d. Confusion with Campaign Finance Legal Standards*

One problem of form that has caused judicial consternation has been a curious tendency to bootstrap legal requirements applicable to campaign

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Finally, [the] newsletter contained a tear-sheet message to be sent to the Governor for the individual recipient among the public to sign and fill in . . .

*Id.* at 1231 (citations omitted).

217. *Id.* (alterations in original) (citations omitted) (internal quotation marks omitted).

218. *Id.* at 1230–31.

219. 375 N.Y.S.2d 235 (1975) (holding a state agency's promotion of passage of an equal rights amendment to the New York state constitution by pamphlets and radio and television advertisements was unlawful).

220. *Schulz*, 654 N.E.2d at 1231 (quoting *Stern*, 375 N.Y.S.2d at 239) (internal quotation marks omitted).

221. "The mechanics of official partisanship are limited only by government's imagination and the tools at hand." Ziegler, *supra* note 62, at 581.

finance regulations—specifically, the “express advocacy” requirement identified by the Supreme Court in *Buckley v. Valeo*<sup>222</sup> as essential to salvage the Federal Election Campaign Act from constitutional infirmity. In *Kromko v. City of Tucson*,<sup>223</sup> the Arizona Court of Appeals considered information disseminated by the city of Tucson and its city manager concerning two related ballot propositions—an increase to a business tax by one-half percent and a transportation plan.<sup>224</sup> The message was spread via pamphlets, television announcements, and websites.<sup>225</sup> The information was presented in a one-sided manner.<sup>226</sup>

The *Kromko* court, although finding that the applicable statute there derived from “language in *Buckley* itself as well as cases decided later,” rejected an “express advocacy” standard for gauging whether the city had crossed the line: “such a narrow construction of the statute leaves room for great mischief. Application of the statute could be avoided simply by steering clear of the litany of forbidden words, albeit that the message and purpose of the communication may be unequivocal.”<sup>227</sup> Instead, the court looked beyond a “magic words” standard to an approach that incorporated contextual factors.<sup>228</sup> The court determined that “the message must be examined within the textual context of the medium used to communicate it.”<sup>229</sup> What exactly this cryptic test might involve is not explained in the decision, but the court rejected the challenge to the communications there on the basis that “reasonable minds could differ” as to whether the communications encouraged a vote for the propositions.<sup>230</sup> The California

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222. 424 U.S. 1 (1976). What makes this proclivity to confuse the requirement of government neutrality with campaign regulatory standards curious is that the purpose of the *Buckley* “express advocacy” requirement was to prevent government from chilling protected citizen speech. It simply has no application to a requirement with an objective of preventing unlawful and constitutionally unprotected government speech. *Id.* at 48–49.

223. 47 P.3d 1137 (Ariz. Ct. App. 2002).

224. *Id.* at 1138–39.

225. *Id.* at 1139.

226. Poliquin, *supra* note 189, at 424.

227. *Kromko*, 47 P.3d at 1140.

228. The case was decided in the period before such decisions as *Governor Gray Davis Comm. v. American Taxpayers Alliance*, 125 Cal. Rptr. 2d 534, 551 (Ct. App. 2002) and *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1097 (9th Cir. 2003) rejected an approach to express advocacy which was not limited to magic words. The court looked to the decisions in *Schroeder v. Irvine City Council*, 118 Cal. Rptr. 2d 330, 339 (Ct. App. 2002) and *FEC v. Furgatch*, 807 F.2d 857, 863–64 (9th Cir. 1987) that accepted contextual considerations. The Supreme Court would later accept an objective, contextual “functional equivalent” of express advocacy approach in *McCormell v. FEC*, 540 U.S. 93 (2003) and *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007).

229. *Kromko*, 47 P.3d at 1141.

230. *Id.* The decision’s reasoning has drawn criticism. See Poliquin, *supra* note 189, at

Supreme Court has also rejected a city's effort to supplant its *Stanson* contextual standard with an "express advocacy" (whether "magic words" or "functional equivalent") approach.<sup>231</sup>

*e. The Argument that a Contextual Standard "Chills" Government Speech*

The argument that the contextual standard is vague or ambiguous and chills valuable government speech has been made, but has been met with no acceptance.<sup>232</sup> The argument borders on the bizarre in any event. Aside from the glaring absence of any right being infringed upon or of any state action, there is no chilling of speech per se, only a dampening of the inclination to use the public treasury to purchase a soapbox. It is difficult to even ascertain what is really horrible about chilling expenditures on government pronouncements relating to elections.<sup>233</sup> On the contrary, there is much that may be positive in having government maintain a cautious approach to tapping public funds.

The reality is that the hypothetical public official eager to publicize a particular point, but who has doubts about whether a proposed expenditure crosses the line from being informational to being partisan, will not

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429–33. The court's deference to content apart from context fails to recognize the mischief that may ensue from one-sided presentation of facts. Objectively verifiable information that is presented in a one-sided, splashy manner can have as much or greater deleterious effect on the fairness of the ballot process than express exhortations. For example, emphasis—headlining with bold, color text—of a purely factual statement may amount to a partisan presentation. The non-neutral nature of the presentation may only be recognized by looking outside the text of the materials. This might include considering omitted or deemphasized relevant facts that counter the highlighted fact. A contextual analysis allows the trier of fact to objectively assess what factual information was overemphasized, omitted, or downplayed.

Courts do not adequately explain why express advocacy coerces the electorate any more than other forms of speech by the government. . . . While express advocacy, such as "vote yes," may "tend[ ] to supplant the critical capacity of its hearers," a presentation that is less strident, but uses facts favoring only its position, may be equally or more persuasive.

Contreras, *supra* note 64, at 544.

231. *Vargas v. City of Salinas*, 205 P.3d 207, 225–27 (Cal. 2009).

232. *Sweetman v. State Elections Enforcement Comm'n*, 732 A.2d 144, 157 (Conn. 1999); *Vargas*, 205 P.3d at 227–28.

233. It should be observed that the standard of liability for a public employee's misuse of public funds for election advocacy may involve minimal deterrent effect. Courts have moved away from strict liability toward application of a simple negligence standard. *Compare Mines v. Del Valle*, 257 P. 530, 537–38 (Cal. 1927) (advocating that there is no excuse for a municipal officer to illegally expend the public's money), *with Stanson v. Mott*, 551 P.2d 1, 15 (Cal. 1976) (overruling the *Mines*' strict liability standard for holding public officials accountable for illegal expenditures of the public money). Consequently, the reasonably mistaken public employee would not be liable for the unlawful use of public resources.



suppress the information. She can consult with agency counsel.<sup>234</sup> Assuming doubts remain and she decides not to spend public funds, the public is not going to be deprived of the information. Open government requirements make it available to the citizenry for the asking. As a practical matter, even if no one asks, the information is going to come to light. The civil servant is still going to make it available to the public—through board meetings, in press releases and conferences, and so on. Realistically, she is going to make sure it finds its way to whatever faction is going to be most interested in using it and is most willing to spend private funds to bolster their arguments in the election debate. In addition, if the public servant really wants to, she can open her own purse and spend personal funds on her personal time to get the information she feels is pertinent out to the voters.

### III. TREATMENT OF THE ISSUE BY THE UNITED STATES SUPREME COURT

#### A. *Amenability to Judicial Review of the Problem*

That the constitutional conflict presented by government election factionalism is not enumerated in the Constitution should not present a difficulty for even the most hardened interpretivists on the Court. From *Yick Wo v. Hopkins*<sup>235</sup> to *Baker v. Carr*<sup>236</sup> to *Bush v. Gore*,<sup>237</sup> the Court has been willing to reach beyond the parameters of a clause-bound constitutionalism to protect participatory precepts of constitutional governance.<sup>238</sup>

It is understandable why judicial intransigence is overcome for the sake of preserving the integrity of the electoral process. This integrity is fundamentally important in terms of legitimacy and adherence to the rule of law and the basic ideals of constitutional governance. An electoral process that preserves the ability of the sovereign People to determine the

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234. See *Porter v. Tiffany*, 502 P.2d 1385, 1389 (Or. 1972) (declining to decide if this, unlike the “good faith” of the public employee, would provide a defense, but observing that “[i]n order to rely on advice of counsel as a defense such advice obviously must be followed”).

235. 118 U.S. 356 (1886).

236. 369 U.S. 186 (1962).

237. 531 U.S. 98 (2000).

238. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 74 (1980) (observing that judicial interventionism in the voter qualification and malapportionment areas was not prompted by desire to inflict personal judicial predilections about substantive values upon society, but by the motivation “to ensure that the political process—which is where such values *are* properly identified, weighed, and accommodated—was open to those of all viewpoints on something approaching an equal basis”).

nature of their government free from interference is easily “implicit in the concept of ordered liberty” and “so rooted in the traditions and conscience of our people as to be ranked as fundamental” because it is part of the “matrix, the indispensable condition, of nearly every other form of freedom.”<sup>239</sup> The Court has frequently recognized a significant legislative prerogative in seeking to achieve this objective. It is also a rather straightforward jump to make from existing constitutional concepts. It is akin to finding a “right to read” which, while not specifically enumerated in the Bill of Rights, flows naturally and obviously from First Amendment principles. We cannot have government by the People without preserving from interference the ability of the People to govern.

*B. Citizens United’s Treatment of Free Speech and the Role of Government Agents with Regard to Elections*

In light of the various foregoing judicial efforts tenuously anchoring the limitation upon government election speech in constitutional soil, does the Supreme Court’s analysis in *Citizens United v. FEC*<sup>240</sup> provide some indication that the nation’s high court has embraced any of these approaches?<sup>241</sup> Or does *Citizen United*’s acceptance that artificial entities are not subject to spending limitations in the marketplace of ideas signal the Court’s willingness to extend similar treatment to government actors—freedom from regulation and judicial restriction—in the pre-election melee?

The Supreme Court’s peripheral treatment of the issue in *Anderson v. City of Boston*<sup>242</sup> was some indication that it was not receptive to such an extrapolation of the First Amendment rights of private corporations to

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239. This is the approach to identifying non-enumerated rights articulated by Justice Cardozo in *Palko v. Connecticut*, 302 U.S. 319, 325, 327 (1937) and further developed by the Court in subsequent cases. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (delimiting government’s power to intrude into the personal sanctity of one’s home); *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977) (holding that it is unconstitutional for a state to restrict contraceptive distribution to minors); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (declaring a right to marital privacy).

240. 130 S. Ct. 876 (2010). The Court reaffirmed its decision that election expenditures may not be limited for certain associations (corporations) but not others, in *American Tradition Partnership, Inc. v. Bullock*, 132 S. Ct. 2490 (2012).

241. The Court in *Citizens United* perceived government regulation of speech as the problem, not the cure. Addressing regulatory valuations regarding what speech should and should not be allowed into the public discourse, the Court flatly stated, “Those choices and assessments, however, are not for the Government to make.” *Citizens United*, 130 S. Ct. at 917.

242. 380 N.E.2d 628 (Mass. 1978).

government entities.<sup>243</sup> The case involved the City of Boston establishing an agency utilizing public facilities, funds, and employees to oppose passage of an amendment to Massachusetts's state constitution by changing the classification of property.<sup>244</sup> In the appeal from the judgment of the Massachusetts Supreme Court enjoining the expenditure of city funds in support of a ballot proposal, the U.S. Supreme Court issued a stay order.<sup>245</sup> When the appellant's jurisdictional statement stressed the similarities between the municipal advocacy there and the corporate advocacy involved in *First National Bank of Boston v. Bellotti*,<sup>246</sup> the appeal was unceremoniously dismissed for want of a substantial federal question.<sup>247</sup> The conclusion to be drawn is that the Court, having had an opportunity to consider the matter in greater depth, did not think much of the assertion that a municipality enjoyed a right to use public funds for election advocacy.<sup>248</sup>

*Austin v. Michigan State Chamber of Commerce*<sup>249</sup> and *McConnell v. FEC*<sup>250</sup> demonstrated the Court's amenability to restrictions especially impacting corporate speech where the objective was preserving the integrity of the electoral system. But as the Court made clear in *Citizens United*, it is no longer willing to treat such limitations as reasonable time, place, and manner restrictions validated by a compelling state interest.<sup>251</sup>

The Court's rejection of regulations on corporate campaigning might seem to pull the rug out from under any *Anderson* rationale for declining to extend similar protection to government. But the recognition that

243. See Shiffrin, *supra* note 6, at 571 n.24 (“[S]ome justices initially thought Boston was right, but on reflection concluded that Boston was not only wrong, but was so clearly wrong that no substantial federal question was involved.”); Note, *supra* note 61, at 548 n.76.

244. *Anderson*, 380 N.E.2d at 630.

245. *City of Boston v. Anderson*, 439 U.S. 1389, 1389–91 (1978).

246. 435 U.S. 765 (1978) (striking down a Massachusetts law criminalizing the expense of corporate funds for campaign purposes). *Bellotti* was preceded by a substantial shift in the court's treatment of commercial advertising from *Valentine v. Chrestensen*, 316 U.S. 52 (1942), to *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976).

247. See Yudof, *supra* note 63, at 866 n.10.

248. It should be observed, however, that the state supreme court's holding relied upon a state statute regulating election financing, which was held to preempt the municipality's ability to appropriate the funds to finance the campaign. *City of Boston*, 439 U.S. at 1389–90.

249. 494 U.S. 652, 658–60 (1990).

250. 540 U.S. 93, 207 (2003).

251. *Citizens United v. FEC*, 130 S. Ct. 876, 903, 907–08 (2010). Strict scrutiny applies to expenditures. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007). A looser formulation applies to regulation of contributions. Such restrictions must be “‘closely drawn’” to serve “a ‘sufficiently important interest.’” *Randall v. Sorrell*, 548 U.S. 230, 247 (2006) (citing *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)); see also *Davis v. FEC*, 554 U.S. 724, 740 n.7 (2008) (citing *McConnell v. FEC*, 540 U.S. 93, 136 (2003)).

government speech is not constitutionally protected<sup>252</sup> and is constitutionally limited in the election context to preserve the integrity of that process is supported by an analytic distinction highly evident in the Court's decisions. This understanding is essential to evaluating what happens when the government's power to promote its agenda runs up against the right of citizens to govern themselves. That situation implicates fundamental rule of law precepts relating to government neutrality in the election process and illustrates why, in evaluating the respective interests, it is critical to understand government speech as a power rather than a right.

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252. Many authorities, having given the question careful consideration, have rejected such a notion. See *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) (quoting *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 n.7 (1973) (Stewart, J. concurring)) ("Government is not restrained by the First Amendment from controlling its own expression."); *Warner Cable Commc'ns, Inc. v. City of Niceville*, 911 F.2d 634, 638 (11th Cir. 1990) ("When the . . . speaker is the government, that speaker is not itself protected by the first amendment . . ."); see also *NAACP v. Hunt*, 891 F.2d 1555, 1565 (11th Cir. 1990) ("[G]overnment speech itself is not protected by the First Amendment."); *Student Gov't Ass'n v. Bd. of Trustees of the Univ. of Mass.*, 868 F.2d 473, 481 (1st Cir. 1989) (concluding that the legal services organization run by a state university, as "a state entity, itself has no First Amendment rights"); *id.* at 482 n.10 ("We do not imply that government speech is protected by the First Amendment."); *Sons of Confederate Veterans, Inc. v. Holcomb*, 129 F. Supp. 2d 941, 944, 945–46 (W.D. Va. 2001) (citing *Columbia Broad. Sys.*, 412 U.S. at 139 n.7 (Stewart, J., concurring)) ("It is, of course, a well-settled point of law that the First Amendment protects only citizens' speech rights from government regulation, and does not apply to government speech itself."); David Morgan, *The Use of Public Funds for Legislative Lobbying and Electoral Campaigning*, 37 VAND. L. REV. 433, 467 (1984) ("Extending [F]irst [A]mendment rights to government, therefore, would conflict with the first amendment's fundamental purpose of preserving individual rights.").

Even where lower courts have overlooked the lack of state action and have toyed with the notion that government actions may merit protection in terms of rights in addition to the abundant protections government agents already enjoy merely by virtue of their empowerment as the government, analysis has been framed in terms of citizen rights—the rights of listeners, impairment to the marketplace of ideas, or the notion that government is effectively acting on behalf of certain voiceless or underpowered citizens. See *Kearney v. Foley & Lardner, LLP*, 590 F.3d 638, 644–45 (9th Cir. 2009) (quoting *Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090, 1093 (9th Cir. 2000)) (noting that government entities are conduits for its citizens and may "act on behalf" of them); *Creek v. Vill. of Westhaven*, 80 F.3d 186, 193 (7th Cir. 1996) (suggesting that a "curtailment" in a municipality's right to speak for its citizens is an intrusion of their First Amendment rights). The difficulty in pushing the logic that government is acting on behalf of citizens is that it is too easy to argue that government is always acting on behalf of its citizens. This argument ignores the fact that the controlling forces of government are not entirely representative and merely reflect the political victory of the prevailing contingent in the last election. Another obstacle to Supreme Court acceptance of the notion that government may vicariously enjoy First Amendment protection is that the Court generally treats rights as personal and non-assignable. See, e.g., *Rakas v. Illinois*, 439 U.S. 128, 133–34 (1978) (holding that one person may not invoke another's Fourth Amendment right to be free from unreasonable search).

The distinction is one the Court continues to iterate between governmental regulatory evaluations on the propriety of the public debate versus private assessments on what speech is appropriate in a discourse driven by a free market.

The Court in *Citizens United* invoked distrust of government as a premise for the right to freedom of speech.<sup>253</sup> The Court juxtaposed this with its acceptance of a marketplace of ideas metaphor that is tied to the function of self-governance.<sup>254</sup>

The marketplace of ideas paradigm has ancient roots, but has been recently articulated in the Court's jurisprudence. The attribution of value to discourse as a device for finding truth is classical and was accepted by Plato. Acknowledgment of its import for effective governance developed with the ascendance of the corporate form in an age when novel economic relations gave impetus to new concepts of individual rights and participation in the processes of government.<sup>255</sup> The idea reached its zenith with the publication of Mills's *On Liberty* in the middle of the nineteenth century. It found legal expression in the United States with the famous dissent by Justices Holmes and Brandeis in *Abrams v. United States*,<sup>256</sup> after which the marketplace of ideas metaphor enmeshed itself inextricably with the Court's First Amendment analysis.<sup>257</sup> Ironically, the metaphor was the product of the effort of Progressive legal theorists to obtain protection for proponents of social change who were fair game for persecution under the "bad tendency" test.<sup>258</sup> Because it presents a fundamentally unregulated conception of the power of truth to triumph over lesser competing ideas, latent in the metaphor was an unresolved conflict with the cornerstone of Progressive thought that government regulation is essential to curb the unfairness resulting from economic advantage.<sup>259</sup>

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253. *Citizens United*, 130 S. Ct. at 899.

254. The rationale is that government speech in the election context must be limited because it "threatens the primary object that the freedom-of-speech clause was designed to protect; a free marketplace of ideas necessary to true self-government." Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CAL. L. REV. 1104, 1106 (1979).

255. See generally JURGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* (Thomas Burger & Frederick Lawrence trans., 1989) (1962); Phil Withington, *Public Discourse, Corporate Citizenship, and State Formation in Early Modern England*, 112 AM. HIST. REV. 1016 (2007).

256. 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting).

257. The marketplace paradigm has become so dominant—and competing models so dormant—in free speech jurisprudence that "it is difficult even to identify . . . competing views." CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 4 (1995).

258. André, *supra* note 26, at 82.

259. *Id.* at 82–83.

The acceptance of the idea that the exercise of popular sovereignty requires a free marketplace of ideas does not entail acceptance of the idea that the People are required to be informed.<sup>260</sup> Nor does it contemplate a role for government agents to step in and compensate for perceived informational inadequacies and excesses.<sup>261</sup> The “free market” the Court postulates is unambiguously one that is free from substantive government involvement. The term “free” is emphatically not utilized by the Court in the sense of equalizing private forces.<sup>262</sup> On the contrary, the “free” market of ideas is, with the holding in *Citizens United*, contrasted with situations where the marketplace is interfered with or entered by government actors.<sup>263</sup> From this premise that government meddling is what makes the marketplace of ideas “un-free,” it is apparent that the Court has characterized the voice of government not as another source of information in the marketplace of ideas to be considered by the electorate, but as an aberration in that context.

Proceeding from the Court’s “us versus them” distrust of government orientation, there is no sound basis to entrust government with anything more than a role of neutrality in the election context. Critical to understanding the *Citizens United* majority analysis is comprehending its conception that government’s role in a system of popular sovereignty is not the same as a benevolent dictator or even the same as a fellow citizen. The ability of government agents to speak on an issue is circumscribed by their role.<sup>264</sup> Government’s function is distrusted for its potential to usurp the

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260. Like the freedom not to vote, the unspoken right to remain ignorant or at least to shut out viewpoints one does not want to hear is a guilty American tradition. As Justice Marshall observed, unlike other nations that require the exercise of “rights” (such as the franchise), in our system “we permit our citizens to choose whether or not they wish to exercise their constitutional rights.” *Schneekloth v. Bustamonte*, 412 U.S. 218, 283 (1973) (Marshall, J., dissenting).

261. See generally Robert Meister, *Journalistic Silence and Governmental Speech: Can Institutions Have Rights?*, 16 HARV. C.R.-C.L. L. REV. 319 (1981).

262. The majority’s marketplace of ideas approach adheres to the conception that individuals are capable of evaluating the merits of issues themselves and that government efforts to weight this evaluative process are an intrusion upon political liberty. The Court minority adheres to an egalitarian conception that economic disparities affect the ability of meritorious ideas to receive appropriate reception in the market. See Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143 (2010); André, *supra* note 26, at 122.

263. The Court observed:

When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.

*Citizens United v. FEC*, 130 S. Ct. 876, 908 (2010).

264. *Nev. Comm’n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2350 (2011) (holding that the

power of the sovereign.<sup>265</sup> There is no room in this perspective to provide government agents<sup>266</sup> the role of evaluating what information the public should be considering on a candidate or ballot measure.

Moreover, in light of the requisite level of distrust to be accorded government, public agencies cannot be qualified as “associations of individuals” contributing views in the free marketplace, which was the Court’s lynchpin for extrapolating individual free speech rights to unions and corporations. The Court continues to adhere to the view that “[i]n the free society ordained by our Constitution it is not the government, but the people—individually as citizens . . . and collectively as associations . . . — who must retain control over the quantity and range of debate on public issues in a political campaign.”<sup>267</sup>

*C. Enlightenment from Citizens United’s Perspective on the Role of Government Agents in Modulating Election Speech*

The Court in *Citizens United* does not deeply explore the basis for its distrust of putting government agents in the role of deciding what is or is not good for the public’s consideration. But the Court’s adherence to the liberal view of the Founders that there exists an essential separation between a political realm—where laws are made based upon the judgment of the sovereign electorate weighing the normative considerations pertaining to particular issues and candidates—and a province where laws are neutrally applied and interpreted is plain.

More contemporary liberal thinking—recognizing the inequities arising from the economic disparity that is the progeny of the traditional liberal model—has accepted a Progressive perspective.<sup>268</sup> This latter view regards government regulation as warranted to ensure a more level playing field and to benefit the common good. It considers government agents’ role as

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legislator’s vote is not protected by the First Amendment’s Free Speech clause because “[t]he legislative power . . . is not personal to the legislator but belongs to the people”).

265. This is the danger presented by unrestricted government activity in the election setting: “Freedom to choose and to decide among competing directions and policies which the government should adopt would have little practical significance if those in power were allowed to influence and to coerce the will of the citizens.” Bloom, *supra* note 64, at 833–34.

266. The courts that have considered the question have recognized the difference between a government employee acting as a private citizen or passively answering direct requests for information and the proactive government expenditure of funds to promote a perspective favoring one side in an election contest. *See Stanson v. Mott*, 551 P.2d 1, 9 (Cal. 1976); *Stern v. Kramarsky*, 375 N.Y.S.2d 235, 239–40 (Sup. Ct. 1975).

267. *Buckley v. Valeo*, 424 U.S. 1, 57 (1976); *see also First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 (1978) (“[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments.”).

268. *See supra* notes 27–30 and accompanying text.

one of assessing what is in the public interest and guiding the electorate to that informed and scientifically predetermined conclusion. Taken to its logical conclusion, such a philosophical approach challenges the wisdom of popular sovereignty and limited government, and undermines the rule of law conception that the legal and political realms are to be separate. It is this latter philosophical approach that the *Citizens United* majority rejected with its acceptance of an individualistic, rational, contractualized, marketplace of ideas, trial-and-error approach to free speech, the election process, and governance.<sup>269</sup>

The notion that government should involve itself in divining social truth, and enlightening and molding the opinion of the voting public to such assessments of the social good was declined.<sup>270</sup> Instead, the Court left this process to the private marketplace to be guided by the power of voters' reason and, undoubtedly, the power of immense agglomerations of wealth to drive that process.

The Court in *Citizens United* recognized that in the election context we are not merely dealing with Tribe's characterization of government<sup>271</sup> adding just another voice to the discourse.<sup>272</sup> By eschewing an "anti-distortion" rationale for government regulation of speech, the Court rejected the "right to know"<sup>273</sup> model as a justification for government injecting itself into election debates as a referee to decide what information has been overstated and what information the social good mandates be emphasized. Its dismissal of this approach is in keeping with the Court's prior jurisprudence.<sup>274</sup> The Court has rejected the government's ability to prevent speech from certain speakers.<sup>275</sup> By direct implication, it has

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269. André, *supra* note 26, at 81–87, 103–07; Sullivan, *supra* note 262, at 146–55.

270. Explicit in its analysis is the Court's acceptance of the perspective that "[e]lections are basic means by which the people of a democracy bend government to their wishes" rather than the opposite formulation. V.O. KEY JR., PUBLIC OPINION & AMERICAN DEMOCRACY 458 (1961).

271. TRIBE, *supra* note 6, at 590; *see also* Shiffrin, *supra* note 6, at 595–601.

272. *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010).

273. *See* POWE, *supra* note 8, at 247; MEIKLEJOHN, *supra* note 8, at 19–26. *See generally* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986); Judith Lichtenberg, *Foundations and Limits of Freedom of the Press*, 16 PHIL. & PUB. AFF. 329 (1987).

274. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976); *see also* *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). The converse conclusion is logically unavoidable: government may not enhance the relative voice of some in order to counter the relative voice of others.

275. Lower courts have applied the Supreme Court's reasoning that government should not take on the mantle of official quantifier of speech to the argument that government has an obligation to compensate for under-expressed speech in elections. One court responded:



necessarily rejected the role of the government bureaucrat in assisting the election-related speech of other speakers.<sup>276</sup>

The Court flatly recognized that government regulation of speech, at least in the election context,<sup>277</sup> is censorship<sup>278</sup> and is subject to strict scrutiny. Government's role as arbiter of the public dialogue is circumscribed to one of strict neutrality by virtue of its constitutional function as the servant of the sovereign People in applying and interpreting the laws enacted by the sovereign. The Court effectively rejected the suggestion that the public's right to know should place government in the role of ensuring that the public is properly informed on issues. The *Citizens United* decision makes it plain that bureaucratic determinations concerning what information the public should contemplate are beyond the pale. This function should be activated by the People; if the public wants certain information, it should ask for it. It is not the civic duty of the public administrator to decide when or how to supplement or regulate the content and flow of information on the public's dime.

*D. The Arizona Free Enterprise Case: The Supreme Court Rejects "Neutral" Government Support of Election Factions*

One governmental effort to reduce the disparity between big money-financed electioneering and the campaign efforts of less well-heeled factions was the focus of the Court's attention in *Arizona Free Enterprise*. The Court's consideration of the problem presented by Arizona's legislative scheme for providing public funds to private candidates contained no mention of

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The First Amendment does not have an egalitarian function. It may not be used to equalize an imbalance of resources or to increase or diminish the persuasive power of the competitors for public support. The protection it grants is freedom *to* speak; not freedom *from* conflicting speech. The objective is to preserve a free market for ideas. *Colo. Taxpayers Union, Inc. v. Romer*, 750 F. Supp. 1041, 1045 (D. Colo. 1990).

276. It might be suggested that government's lending support to one position on an election issue is not per se assisting the speakers espousing that view but is in actuality government speaking itself. This would misconstrue government's role in a constitutional scheme as that of a citizen rather than as the servant of the People.

277. The Court emphasized the core nature of election-related speech: "The First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Citizens United*, 130 S. Ct. at 898 (quoting *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (internal quotation marks omitted)).

278. *Id.* at 908. Deciding what information ought to be included in the pre-election debate requires the public official to make value-based judgments concerning speech content and speakers. Whether it involves keeping certain speakers from having input (reducing some speech) or government funding of certain views (supplementing some speech) makes no difference in the final analysis.

public forum analysis or the government speech doctrine.<sup>279</sup> This is remarkable in light of the Court's recognition that under the government speech doctrine government may freely use public funds to promote public policies and even do so by advancing positions on issues contrary to those held by some taxpayers.<sup>280</sup> This was precisely what was at issue in *Arizona Free Enterprise*. Public funds were being provided exclusively to one candidate to allow that candidate to promote his or her position.<sup>281</sup> The Court's constitutional basis for invalidating the subsidization of campaigning was a free speech analysis.<sup>282</sup> But examination of this analysis and the Court's stated concerns reveals that what truly compelled the Court's holding was the offending of a related, but unarticulated, constitutional value.

*1. A Government Speech Analysis Provides No Basis for Invalidating a Campaign Finance Reform Scheme Providing Public Funds to Candidates*

Ordinarily, a government speech analysis would have no qualms with the government expressing a view on a matter of public concern. More precisely, it would see no difficulty with government employing private sources to speak out on an issue.<sup>283</sup> The mere fact that another private speaker's speech is rendered less effective or is offset by the countervailing governmentally funded speech would be of no concern.<sup>284</sup> After all, the First Amendment does not guarantee that one's speech is going to be

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279. The government speech and public forum analyses are illuminated in more detail and dissected in terms of their implications for government support of one side in an election context, *supra*, Part II.B.2-4.

280. The taxpayer has no First Amendment right not to fund government speech and enjoys no heckler's veto over governmental expenditures on views of which she may disapprove. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 562, 574 (2005).

281. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2813 (2011).

282. *Id.*

283. Government's use of private sources to express a view on abortion was not a problem in *Rust*. *Rust v. Sullivan*, 500 U.S. 173, 203 (1991) (holding that the Department of Health and Human Services' regulations requiring recipients of Title X funding to not engage in abortion counseling was constitutional). One court has observed, "Government can express public policy views by enlisting private volunteers to disseminate its message, and there is no principle under which the First Amendment can be read to prohibit government from doing so because the views are particularly controversial or politically divisive." *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 372 (6th Cir. 2006) (addressing a state's issuance of personalized license plates containing a pro-life message, but not a pro-choice message).

284. This was the unavailing complaint in *Johanns*, where beef producers objected that the government's speech promoting beef generally rendered ineffective their efforts to promote the superiority of their particular type of beef. *Johanns*, 544 U.S. at 556.

effective, only that the government may not prevent one from publicly expressing that point of view. So what makes the situation in *Arizona Free Enterprise* deserving of different treatment? It is evident from the Court's reasoning that this has something to do with the election context.<sup>285</sup>

One salient distinction drawn by the Court in the government speech cases comes to the fore. This concerns the difference between government speech and the subsidization of private speech pointed to in *Legal Services Corp. v. Velazquez*.<sup>286</sup> The Court contrasted the situation in *Velazquez* with that in *Rust v. Sullivan*. *Rust* upheld funding restrictions that limited physicians' ability to give patients abortion counseling. *Velazquez* struck down funding restrictions that limited the scope of advocacy by legal services attorneys. The subsidy in *Arizona Free Enterprise* would amount to the funding of private speech, like that in *Velazquez*. Any message conveyed by the publicly funded candidate would not be the government's and would not be subject to government control. This would seem to take the public funding of a candidate's private speech out of the government speech analysis altogether.

## 2. *A Public Forum Analysis Yields No Constitutional Flaw in Providing Public Subsidies to Poor Candidates*

The question then arises whether governmental support of private inveighing upon an issue of public concern opens a public forum requiring it to provide equal access to those holding alternative views. The analysis of this inquiry is controlled by *Arkansas Educational Television Commission v. Forbes*.<sup>287</sup> That case upheld the exclusion of a marginal candidate from a television debate sponsored by a state-owned public broadcaster. The Court rejected the view that the public broadcast was a public forum.<sup>288</sup>

The Court in *Arkansas Educational Television* recognized that where there is no public forum created requiring equal access, the standard for unlawful differential treatment of candidates is much reduced. The inquiry for a

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285. Indeed, Chief Justice Roberts's majority opinion encapsulates the Court's aversion to the Arizona plan in terms that do not ring of protecting individual rights at all. Taking issue with the dissent's position that the subsidy does not restrict speech, but increases it, the decision retorts, "Not so. Any increase in speech resulting from the Arizona law is of one kind and one kind only—that of publicly financed candidates." *Ariz. Free Enter.*, 131 S. Ct. at 2820, 2822. Plainly, the Court is looking askance at government financing of an election faction. Reliance upon considerations of individual free speech rights, however, seems a slender reed to lean upon in finding constitutional infirmity with such government support of one side in an election.

286. 531 U.S. 533, 542 (2001).

287. 523 U.S. 666 (1998).

288. *Id.* at 675, 676–78.

non-forum or non-public forum is whether the exclusion is “based on the speaker’s viewpoint”<sup>289</sup> and whether the exclusion is “reasonable in light of the purpose.”<sup>290</sup> Under such an approach, the Arizona campaign regulation would seem to readily pass muster as both viewpoint neutral and reasonable in purpose.

### 3. *The Court’s Free Speech Basis for Invalidating Arizona’s Campaign Reform Plan*

Now we turn to the actual reasoning behind the Court’s determination in *Arizona Free Enterprise* that Arizona’s effort to address corruption<sup>291</sup> in election campaigning was unconstitutional. The Court analyzed the campaign finance law in terms of whether it imposed a burden upon the free speech rights of the privately bankrolled candidate. Because the campaign regulatory scheme in no way prevented any First Amendment activity, the argument that a privately funded candidate’s free speech rights were impacted is dubious.<sup>292</sup> As the dissent observed, “Arizona’s matching

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289. *Id.* at 682.

290. *Id.*

291. The corruption basis for the Arizona legislation was framed two different ways by the Court: as a means of maintaining a level playing field and as a device for preventing situations where campaign capital can purchase political fealty. Election corruption manifests itself in two ways that concern those supporting regulations to ensure fair elections against the impact of financial might. First, the process itself is subject to distortion from the ability of money to effectively buy votes. The fear is that a well-funded faction pushing a less than meritorious or duplicitous argument can drown out a very valid message conveyed by the underfunded speech of an opposing faction. Second is preventing the corrosive impact of money after an election—keeping a successful candidate from betraying the common good to reward the campaign assistance of a private backer. The necessity of filthy lucre for obtaining votes leaves office seekers (and, to some extent, initiative backers as well) beholden to large contributors instrumental to their success at the polls. The dissent in *Arizona Free Enterprise* observed that even where actual quid pro quo does not result from large private contributions, the public’s confidence in the process is undermined by the perception that corrupt bargains are the product of such monetary assistance to a faction in the election contest. *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2830 (2011) (Kagan, J., dissenting).

292. This evident lack of infringement upon freedom of speech was observed in a concurring opinion in the lower court that stated,

The only speech related concern I can see to the Arizona scheme is that a privately funded candidate has to raise a lot more money to swamp a publicly funded candidate. . . . [H]is or her speech is not limited by this increased burden of fundraising. . . . [T]he First Amendment does not protect the candidate’s interest in winning, just his interest in being heard. There is no First Amendment right to make one’s opponent speak less, nor is there a First Amendment right to prohibit the government from subsidizing one’s opponent, especially when the same subsidy is available to the challenger if the challenger accepts the same terms as his opponent. *McComish v. Bennett*, 611 F.3d 510, 528–29 (9th Cir. 2010).

funds provision does not restrict, but instead subsidizes, speech.”<sup>293</sup>

The Court identified three unconstitutional burdens imposed upon free speech by the Arizona campaign reform scheme. First, unlike the situation in *Davis*, privately funded speech was the catalyst for “the direct and automatic release of public money”—something the Court regarded as “a far heavier burden than in *Davis*.”<sup>294</sup> Here again, no actual restriction upon candidate speech is identified and the Court’s actual concern is the unfairness involved in one candidate receiving public funds while the other has to dip into her own pocket.

Second, the Court observed the situation where a private candidate faces multiple publicly funded candidates. Where the privately bankrolled candidate exceeds the expenditure limit, this will produce matching funds for each opponent he faces. The Court characterized this as pitting the wealthy candidate against “a political hydra of sorts”<sup>295</sup> because each dollar he spends over the limit generates multiple adversarial dollars to counter his campaign efforts. Here again, the electoral unfairness the Court identifies as befalling a wealthy candidate in such a scenario does not involve any direct restriction on the candidate’s ability to speak. Obviously the candidate’s opponents are entitled to speak and may spend their own money or that of contributors without offending the First Amendment. What concerned the Court is where the money spent is not provided by private sources. The poor candidate spending public money to campaign is for some unspoken reason a problem for the Court.

Third, the Court observed that the privately funded candidate cannot control the amount of funds provided to the publicly funded opponent. Even if the candidate stopped spending personal funds at the threshold, the opponent may still receive public funds due to spending on the privately funded candidate’s behalf by independent expenditure groups. While the publicly funded candidate can allocate use of those funds strategically, the privately funded candidate may have no say over how independent groups spend their money.<sup>296</sup> Once again, however, the unfairness of this situation involves no actual restriction upon the candidate’s speech. It merely means that her opponents are better able to speak by virtue of the publicly provided financial wherewithal to disseminate their message.

Perhaps acknowledging the lack of any actual state action restricting candidates’ free speech, the Court invoked the purpose underlying the First Amendment, observing, “[T]here is practically universal agreement that a

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293. *Ariz. Free Enter.*, 131 S. Ct. at 2833 (Kagan, J., dissenting).

294. *Id.* at 2818–19 (majority opinion); *see Davis v. FEC*, 554 U.S. 724 (2008).

295. *Ariz. Free Enter.*, 131 S. Ct. at 2819.

296. *Id.*

major purpose of the First Amendment ‘was to protect the free discussion of governmental affairs,’ ‘includ[ing] discussions of candidates.’<sup>297</sup> This confirms that the Court’s meaning when it speaks of keeping the election debate on public issues “uninhibited, robust, and wide-open”<sup>298</sup> is that this process should be left to private forces and resources—that for it to be a free process, government must be kept out of it.

#### 4. *The Real Reason for the Court’s Aversion to Publicly Funding Economically Disadvantaged Candidates*

As we have seen, the reason for the expenditure in *Arizona Free Enterprise*—to allow the receiving candidate to offset an opponent’s unfair financial advantage—would appear to be beside the point from a free speech, a government speech, or a public forum approach. The real difficulty the Court had with Arizona allowing government to intrude into a contest between private factions by funding one side has little to do with restricting anyone’s speech. Casting the problem with government subsidies as something that “penalizes speech”<sup>299</sup> or creates a “chilling effect”<sup>300</sup> because it allows the opponent to talk back is awkward at best.<sup>301</sup> The Court’s reasoning demonstrates its real concern is that “[t]he direct result of the speech of privately financed candidates and independent expenditure groups is a state-provided monetary subsidy to a political rival.”<sup>302</sup> This concern relates to a constitutional unease with allowing government to participate in a process reserved to private parties: the process of self-governance by the People. In short, the Court identified the wrong reason for finding a very real constitutional problem with Arizona’s campaign finance reform.

#### *E. Illumination Provided by Summum’s Treatment of Government Speech*

*Summum* involved a donation of a monument to a city for its park that

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297. *Id.* at 2828 (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)).

298. *Id.* at 2829.

299. *Id.* at 2821.

300. *Id.* at 2824. The “chill” is the result of the fear that one’s opponent might speak up. One would presume that the real source of such a “chill” would be the fear of the merits of the opponent’s message, not the mere fact that they are saying something.

301. It is akin to saying that a teacher providing special attention to a student with a learning disability imposes a penalty upon all the other students. Of course it does not. The other students still have all the same opportunities and attention. They are not deprived. They are not made to sit in the corner. It is just that one student is getting a little needed, extra help. Likewise, the wealthy election candidate can still speak as long and loudly as she would like. Her opponent just gets some help in doing the same thing.

302. *Ariz. Free Enter.*, 131 S. Ct. at 2821.

contained eleven monuments, including a Decalogue monument.<sup>303</sup> The monument recited the Seven Aphorisms of Summum.<sup>304</sup> When the city declined the donation, the donors sued, charging that the refusal of their (religious) message while the city displayed the private message of the Ten Commandments was unconstitutional viewpoint discrimination.<sup>305</sup> The Tenth Circuit accepted the argument that the park was a public forum and that having opened the forum to one viewpoint, the city was required to allow access to Summum's view as well.<sup>306</sup> It ordered the city to accept the monument.<sup>307</sup> The Supreme Court reversed.<sup>308</sup>

The case raised an Establishment Clause concern over the city accepting one religious monument but rejecting another that espoused the credo of a different religious faith. But the Court took pains to emphasize that the issue had not been raised.<sup>309</sup> Consequently, the analysis was incongruously limited to the question of whether the monuments—and the messages contained therein—were private speech in a government-regulated forum or were government speech.<sup>310</sup> From a forum analysis, the non-neutral treatment of the two monuments' messages would have been a problem.

The Court held that public forum analysis had no application to the case because the speech at issue was properly understood to be government speech.<sup>311</sup> It recognized that the government was entitled to lend its imprimatur to a private message: "Just as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land."<sup>312</sup> The Court held the government's acceptance of a monument effectively denudes it of all private speech characteristics and transmutes it into a purely governmental statement.<sup>313</sup>

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303. *Pleasant Grove City v. Summum*, 555 U.S. 460, 465 (2009).

304. *Id.*

305. *Id.* at 466.

306. *Id.*

307. *Id.*

308. *Id.* at 467.

309. *Id.* at 467–69 (focusing solely on free speech implications).

310. *Id.* at 467.

311. *Id.* at 481.

312. *Id.* at 470–71.

313. *Id.* at 481. The Court did not command a strong majority on this point. Justices Souter and Stevens, who were joined by Justice Ginsburg, expressed reservations about the "recently minted" government speech doctrine. *Id.* (Stevens, J., concurring). Justice Souter specifically balked at a per se rule that all monuments are government speech. *Id.* at 487 (Souter, J., concurring). Justice Breyer counseled that the "government speech" doctrine

The Court was quick to note that government's power to speak was not unlimited, citing Establishment Clause considerations and accountability to the electorate.<sup>314</sup> In other words, public officials should tread cautiously in espousing views that might be offensive to a large segment of the community. While the Court acknowledged the ability of the voters to effectively censor government speech by voting the elected officials who authorized the offensive speech out of office, it did not suggest that the elected officials could use government's power to express private views as a device to influence that vote.

1. *Implications of Summum's Allowance for Government Endorsement of Private Viewpoints*

A number of questions relating to the government speech doctrine were resolved by the Court in *Summum*. It created uncertainty as well. While the Court's acceptance of an approach that treats government endorsement of private speech, at least in the form of monuments, as per se transforming it into government speech adds some aspect of clarity to the doctrine, it also opens a new can of First Amendment worms. While government cannot exclude one view from a forum, it *can* exclude *all* views (except one it favors) from government speech. The potential for oppression is considerable<sup>315</sup> and merits some consideration. Significantly, scant mention and zero basis is provided for the notion that *Summum's* treatment of government speech should not be construed to allow government to discriminate against views expressed by monuments "on political grounds."<sup>316</sup>

The Court has really articulated no coherent limitations for government speech on the basis of political, social, economic content, or other grounds of discrimination except those required by the Constitution. An equal protection approach to viewpoint discrimination has not materialized.<sup>317</sup>

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should be considered a "rule of thumb" and that courts must look past such labels to ascertain whether speech is burdened without an offsetting legitimate government purpose. *Id.* at 484 (Breyer, J., concurring).

314. *Id.* at 468 (majority opinion).

315. See, e.g., Meister, *supra* note 261, at 345–46.

316. *Summum*, 555 U.S. at 484 (Breyer, J., concurring). Justice Stevens' concurrence gives similar short shrift to this concern, undoubtedly reflecting a visceral rather than a reasoned response in the absence of any authoritative support for the assertion that "recognizing permanent displays on public property as government speech will not give the government free license to communicate offensive or partisan messages." *Id.* at 482 (Stevens, J., concurring).

317. The Court has relied upon such an analysis in *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972) and in *Carey v. Brown*, 447 U.S. 455 (1980). But with the advent of the forum and government speech doctrines, the roots for such an approach to develop have been cut. See Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech*, 74



While the argument that governmental political speech interferes with the ability of the People to exercise the right of popular sovereignty is certainly compelling in the election context, the emerging doctrine of government speech seems to accept without qualification the idea that government agents are free to promote policies of those voted into power by the People—including social, economic, political, and other agendas—until they face being voted out of office.

In practical terms, consider a government placard. Make it big and heavy and enduring so there is no question but that it should be considered a “monument.” The message is placed next to Uncle Sam or the Statue of Liberty or some other such patriotic icon and reads, “Communism is bad!” There is no salient difference as far as the government speech doctrine goes from “drugs can kill you,” “cigarettes are unhealthy,” “racism is nasty,” or all sorts of wartime propaganda attacking the national enemy on an ideological level. It is simply a government policy perspective that a particular ideology is deleterious to the commonweal.

What if it is posted in a park, street, or other traditional public forum? And what if the government entity takes back the forum in which it is posted, excluding all contrary viewpoints? And why stop at placards? And why stop at Communists? There seems to be no reason to restrict government from expressing negativity via radio and television bulletins, newsletters, websites, and billboards, and concerning whatever political party is in the minority. The Court has not yet addressed such Orwellian scenarios directly, but the extant logic of its government speech doctrine seems to pose no barrier to government efforts to manipulate popular ideology.

Another unanswered question that received slightly more consideration by the Justices in *Summum* is how to tell when government is speaking its mind via proxy private speakers versus when it is opening a forum to select private viewpoints in a non-neutral fashion.<sup>318</sup> In other words, is government regulating the content of private speech or merely utilizing

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S. CAL. L. REV. 49, 53–56 (2000).

318. Justice Souter recognized that “there are circumstances in which government maintenance of monuments does not look like government speech at all.” *Summum*, 555 U.S. at 487 (Souter, J., concurring). He eschewed a categorical rule in favor of an objective “reasonable observer” test to determine whether the expression in question is “government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land.” *Id.* Justice Breyer echoed this concern, counseling the need to look beyond the labels of “government speech,” “public forums,” “limited public forums,” and “nonpublic forums” with an eye towards [the categories] purposes.” *Id.* at 484 (Breyer, J., concurring).

private speakers as its surrogate?<sup>319</sup> More than one Justice bristled at the idea that government's endorsing one viewpoint over others is adequately addressed in every instance by neatly labeling content that takes the form of a monument to be government speech.<sup>320</sup>

There is no cogent difference between a public subsidy<sup>321</sup> to fund a privately created monument and acceptance of a private donation of a work of art and sticking it on public property for purposes of this analysis.<sup>322</sup> The same problem exists as to whether the decision is to exclude some private speakers from an open public forum<sup>323</sup> or whether private speakers are used as instruments of government policy.<sup>324</sup> The same problem is raised as to whether the status of the donor or artist is that of a private speaker independently participating in the marketplace of ideas or that of a governmental envoy promoting public policies by proxy. The same problem is presented as to whether the government is regulating private speech (requiring that it remain neutral) or is itself weighing in as a

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319. Because government is forbidden to endorse religion, such government support—direct or by proxy—cannot be countenanced under either a forum or a government speech approach. It is *both* viewpoint discrimination under a forum analysis and an Establishment Clause violation under the government speech approach. The same may be said of government largesse favoring one faction in an election. From a forum perspective, it is viewpoint discrimination. From a government speech perspective, it amounts to interference with the political process. The problem of gleaning whether the speech involves government conveying a message versus government discriminating on the basis of content is considered here because of its indirect implications for the adoption of a test to guide lower courts in determining when government speech in elections has gone beyond the pale.

320. See *supra* note 313 and accompanying text.

321. See, e.g., *NEA v. Finley*, 524 U.S. 569, 587–88 (1998) (acknowledging that the First Amendment applies in the subsidy context, but maintaining that “the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake”).

322. The same can be said for a governmental decision to exclusively publish a particular point of view on the entity's bulletin board or in an official publication such as a newsletter or website.

323. See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845–46 (1995) (holding that the exclusion of religious views from university funding for student-run publications is just as offensive to the First Amendment as other viewpoint discrimination); *FCC v. League of Women Voters*, 468 U.S. 364, 402 (1984) (finding that “the specific interests sought to be advanced by § 399's ban on editorializing are either not sufficiently substantial or are not served in a sufficiently limited manner to justify the substantial abridgment of important journalistic freedoms which the First Amendment jealously protects”).

324. See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 203 (1991) (concluding that regulations prohibiting funding to programs proposing abortion as a form of family-planning do not violate First Amendment rights); *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 551 (1983) (determining that prohibitions on funding for lobbying do not infringe First Amendment rights).

participant on the question at hand.<sup>325</sup> And the same problem exists regarding whether speech that has such dual qualities should be relegated to just one category at all. Ad hoc review of the circumstances is necessary to assess whether the government's role is that of a surrogate for private speakers or vice versa.

For example, consider a public mural project—a plan to erect a work of art depicting a famous town historic figure in the city transit center. The plain message honors that person as representative of certain admirable civic virtues. Private sector influences affecting the public entity's motivation for the project and its message may abound; it may be financed by a private donor. This should not be regarded as simply an unconditional endowment of funds; strings may be attached. A particular artist may be specified and that might happen to be someone who specializes in portraiture for the local Ku Klux Klan chapter. It may be required that great grandpa Fred be portrayed in a positive light and that means “no mention of that scandalous business with that slave girl.” A specific location of prominence may be required. The proposal may provoke a reaction from those who object to the historical accuracy of the view expressed and who voice the position that Fred was a slave owner and exploiter of women and the poor and otherwise entirely unsavory in character. The artist's preliminary sketch may be objected to as containing a subtle theme of racial purity. City graffiti artists may ask for equal space for a mural to express their countervailing perspective about the historic figure's legacy and expressing an underlying theme of racial equality.<sup>326</sup>

The vehicle employed by government to convey the message seems to provide no categorical guidance to the analysis. Whether we are dealing with murals, monuments, governmental bulletins, or illuminated blimps, the determination necessarily depends not just upon form, but upon the context and particular circumstances in each case. And even then, it may not be possible to definitively say that the mixed speech in question falls on just one side of the artificial line the Court has created. The purported motive behind the public entity's adoption of the speech is likewise of unlikely value to this inquiry.<sup>327</sup>

Isolating the source or impetus of the speech is not helpful either. One student of the problem has posited that where the speech is not affirmatively initiated by government, the concern that it is discriminating

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325. Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 152 (1996).

326. Assuming the city allows the counter-monument, this raises the question of whether it has thereby opened a forum.

327. See Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 437 (1996).

among private viewpoints rather than making its own public policy statement is greater. In such cases, it is argued, the Court's rationale that the privately initiated speech should be regarded as government speech has "expanded government speech doctrine beyond its justifications."<sup>328</sup> The practical reality of political life and governmental function is that government is itself a hybrid.<sup>329</sup> It is private proponents of particular positions who stalk the corridors of power, finesse their objectives onto the public agenda, and manipulate government agents into adopting ideas to begin with. It is individuals in their capacity as government agents with their own predilections that conceive, advance, and implement such ideas. Inherent in the concept of popular sovereignty is the notion that governing is the process of evaluating and accepting or rejecting private ideas. Attempting to discern the source of speech as governmental or private may hopelessly blur into teleological infeasibility.<sup>330</sup> Undoubtedly, this is why we can see no difficulty with public employees saying whatever they want about election issues on their own time and on their own dime.<sup>331</sup> There may be no feasible way to discern what engendered an adopted policy idea, but it is possible to restrict the use of public resources from advancing private objectives.

The proposal and the decision to accept or deny a content-imbued monument is inevitably the product of private forces. Even where funding is public, unless art can be accomplished by committee, some individual has to conceive the artistic vision. Someone also has to spearhead the proposal—whether an individual inside government or an outsider cozying up to it and manipulating the mucky-mucks and powers-that-be. We just cannot easily pinpoint when government begins and ends because it is composed of people who are not government. Its ideas are the product of voters and elected officials and administrators affected by personal beliefs,

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328. Leading Cases, *Government Speech: Pleasant Grove City v. Summum*, 123 HARV. L. REV. 232, 233, 237 (2009) (criticizing the *Summum* Court's treatment of "hybrid speech"—speech mixing governmental and private messages—and arguing the per se categorization of such speech masks the danger that government is actually discriminating against private viewpoints rather than conveying its own message).

329. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS*, BOOK 2 10 (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone eds. & trans., 1989) (1748) ("In a democracy the people are, in certain respects, the monarch; in other respects, they are the subjects.").

330. In the final analysis, calling for treatment of all privately engendered speech as subject to the neutrality doctrine is no different than removing all government speech from the rubric of the government speech doctrine. It will always be traceable to a private source of origin.

331. This is in contrast to the rigors of neutrality imposed upon the career civil servant in European nations. *See supra* notes 156–57 and accompanying text.

concern for the public trust, the influence of lobbyists, and power brokers who impose their policy interpretations upon the voters' mandate. The realization for those who distrustfully tend to contrast government as a distinct entity apart from the individual citizenry is very much what dawned upon Walt Kelly's character in Pogo: "We have met the enemy, and he is us."<sup>332</sup>

Popular sovereignty comprehends that one group gets to foist its policy agenda upon a minority until it is voted out of office and that this agenda is ultimately private in origin. Acceptance of a monument, like any other government decision, is a product of a political process that involves evaluating public and private concerns, compromise, and a momentary triumph of certain political forces over others. Focusing upon *who* initiated the idea is an inadequate guide for ascertaining whether the content involved should be designated private or governmental. Justice Souter took a more pragmatic approach in *Summum*.

## 2. *An Objective Test for Differentiating Government from Private Speech*

The *Summum* Court's simple answer to the problem of differentiating between state discrimination based upon content and governmental expression—that by deciding to accept the monument the government entity is adopting any speech content associated with it as its own and is divorcing that content from any private sources—accepts a dichotomy between the government and the public that exists more in fantasy than the practical reality of political life. But then, how can we tell the difference? At this point of indistinction, the government speech doctrinal idea that government can espouse a policy view limited only by the Constitution and the vicissitudes of the electoral process crashes up against the forum analysis requirement that government refrain from favoring one viewpoint over others.<sup>333</sup> Here the distinction between government as regulator and government's prerogative to "add its own voice"<sup>334</sup> as speaker appears contrived and seems to hopelessly break down.

In his *Summum* concurrence, Justice Souter glanced at the elephant in the drawing room and sparingly sketched a non-categorical approach. He recognized that the problem is not as simple as adopting a per se rule that monuments are government speech. There were other analytical

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332. WALT KELLY, POGO: WE HAVE MET THE ENEMY AND HE IS US (1972).

333. As one scholar of the problem has observed, determining whether the source of the speech is private or governmental is "complex, contextual, and obscure" without a "simple empirical or descriptive line of demarcation." See Post, *supra* note 325, at 163. Ultimately the determination is the product of "normative and ascriptive judgments." *Id.*

334. TRIBE, *supra* note 6, at 590.

complications besides the one posed by the Establishment Clause question that was conveniently not before the court.<sup>335</sup>

In spite of all the tip-toeing around, it was apparent from the Justices' opinions that the Establishment Clause issue was not overcome by the facile categorizing of the speech in question as governmental. The opinion of the Court flatly acknowledged that "government speech must comport with the Establishment Clause."<sup>336</sup> Justice Stevens, joined by Justice Ginsburg, concurred, noting, "For even if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution's other proscriptions, including those supplied by the Establishment and Equal Protection Clauses."<sup>337</sup>

Justice Souter was no exception, expressing his concerns over the undefined relationship of the government speech doctrine to Establishment Clause requirements. But Justice Souter's concern went beyond averting Establishment Clause ramifications of government speech. It encompassed First Amendment implications for non-neutral treatment of private speech. His methodology is the same for distinguishing private from government speech as for ascertaining a government endorsement of religion:

To avoid relying on a *per se* rule to say when speech is governmental, the best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land. This reasonable observer test for governmental character is of a piece with the one for spotting forbidden governmental endorsement of religion in the Establishment Clause cases.<sup>338</sup>

What is proposed here is a reasonable man approach to determining when government is really just providing a forum for private speech rather than conveying its own message.

Justice Souter's approach plainly contemplates that a trier of fact should, based upon consideration of all the facts relevant to such an inquiry, make the determination of whether the content in question is private or government speech.<sup>339</sup> The approach is indistinguishable from the

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335. *Pleasant Grove City v. Summum*, 555 U.S. 460, 487 (2009) (Souter, J., concurring).

336. *Id.* at 468.

337. *Id.* at 482 (Stevens, J., concurring). Only Justices Scalia and Thomas expressed the view that the Establishment Clause issue should be regarded as a non-issue because of the secular and historic attributes of the Ten Commandments. *Id.* at 482-83 (Scalia, J., concurring).

338. *Id.* at 487 (Souter, J., concurring).

339. Interestingly, Justice Souter does not follow the course of this logic. Rather than deferring to the lower court's factual determination that the monument involved private speech or remanding for a determination on this issue, the concurrence simply concludes

contextual “style, timing and tenor” inquiry widely accepted by the lower courts to ascertain whether government conduct amounts to unlawful election campaign support. Thus, improper government endorsement of religion in violation of the Establishment Clause would be determined in the same manner as improper government support of an election candidate or ballot measure.

The Establishment Clause and the prohibition upon government campaigning both place similar restrictions upon government agents. Unlike statements of individual rights to engage in certain activities, both recognize activities in which the State may not engage. The Establishment Clause was prompted by the fear of the State’s adoption of a religion and the associated persecution of and discrimination against those who are not adherents of government-prescribed theology. The Founders’ fear of government exceeding its proper role in the political process is the danger of cronyism and that those in power will act to feather their own nests and turn government to their own ends and away from the dictates of the People.<sup>340</sup>

The critical question for government campaign speech, as with government religious speech, is one of support by the government agency. An Establishment Clause problem arises through government support of religion. In the case of support for a faction in the election contest, a different but analogous constitutional problem arises. The “endorsement test,”<sup>341</sup> which the Court has applied in situations involving government expressive conduct, is a contextual standard<sup>342</sup> based upon the observations

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that the monument was “government expression.” *See id.* at 487 (referring to the Tenth Circuit’s finding); *see also* Aaron Harmon, *Pleasant Grove City v. Summum: Identifying Government Speech and Classifying Speech Forums*, 4 DUKE J. CONST. L. 57, 66 (2008) (analyzing the lower court treatment of forum analysis and anticipating the Court’s treatment of private monument donation as adopted government speech).

340. *See supra* note 65 and accompanying text.

341. The “endorsement test” was initially developed as an alternative or supplement to the *Lemon* test in *Lynch v. Donnelly*, 465 U.S. 668 (1984). The *Lynch* Court recognized a contextual analysis was essential to this inquiry: “Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion.” *Id.* at 694.

342. *See* *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 629 (1989) (O’Connor, J., concurring) (“To be sure, the endorsement test depends on a sensitivity to the unique circumstances and context of a particular challenged practice and, like any test that is sensitive to context, it may not always yield results with unanimous agreement at the margins.”). By way of illustrating Justice O’Connor’s point and the need to treat the question as factual rather than legal, *see Van Orden v. Perry*, in which Justice Breyer eschewed a “single mechanical formula” and observed the test “must take account of context and consequences,” but nevertheless reached a different result than Justice O’Connor. *Van Orden v. Perry*, 545 U.S. 677, 699–700 (2005) (Breyer, J., concurring); *see*

of a reasonable person as to whether the message or conduct in question appears to endorse or disapprove of a religion.

The style, timing, and tenor approach to ascertain government partisan support is really no different. The approaches look to context and are objective standards whereby a trier of fact considers all relevant facts to determine whether the conduct or message by the government advances (or hinders) one religion or one faction in the election contest.<sup>343</sup> When the Court comes to terms with this uncertain aspect of its government speech doctrine, adoption of such an approach to determine the outside limits of government speech and to differentiate private from government speech seems inevitable.

### CONCLUSION

The Supreme Court majority's reaction to government subsidies for financially disadvantaged candidates in *Arizona Free Enterprise* and its response in *Citizens United* to the idea of government agents serving as arbiters of what election speech deserves more or less attention has definite implications for the Court's acceptance of the perspective that government must remain neutral in the pre-election debate. The driving concerns with maintaining a process reserved to private actors, distrust of governmental valuations of the merits of speech in that process and the omnipresent metaphor of the privately driven marketplace of ideas depart from the minority view lower court cases that conceive of government as properly entrusted with the role of divining the public interest and guiding the electorate toward one conception of the public good. These judgments are ones the Court has declared it is not prepared to allow government agents to make in the election context.

The Court treats government regulations designed to level the playing field by reducing advantages of wealth, strength, and government activity seeking to supplement disadvantaged voices in the pre-election marketplace of ideas no differently. Although acceptance of a uniform constitutional foundation for precluding such governmental intervention in the electoral process has not clearly emerged, a compelled speech analysis presents a solid basis. The lower court majority view decisions have articulated a sound dichotomy between partisan and neutral use of public resources and

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also Erwin Chemerinsky, *Why Justice Breyer Was Wrong in Van Orden v. Perry*, 14 WM. & MARY BILL RTS. J. 1, 11 (2005) ("Context is crucial in determining that there is a governmental symbolic endorsement of religion.").

343. To be sure, Justices Stevens, O'Connor, and Souter, who all specifically rejected a categorical approach, have left the Court. But the compelling objective, contextual test articulated in *Lynch* and *County of Allegheny* remains.



have developed a well-reasoned methodology for identifying when government has departed from strict neutrality by objectively considering the timing, style, and tenor of the government conduct in question. This approach is fully consistent with the Court's analysis of the interrelated concerns involving freedom of speech, the election process, and the constitutional role of government.

The Court's treatment of government speech in *Summum* indicates that the nascent doctrine entails limits upon the scope of a public entity's speech. While the precise limitations remain undefined, the Court will enforce constitutional parameters. Just as the Court's members recognize the Establishment Clause exists as a limitation upon government speech, so too should they be expected to restrict government efforts to influence elections in favor of one faction. At least one member of the Court has gone the next step and has outlined a methodology for ascertaining when government's actions cross this line. This contextual, objective standard is entirely consistent with the "style, timing and tenor" approach that lower courts have already developed to address when government conduct is neutral and proper or amounts to unlawful, partisan election support. The matter is to be determined by the trier of fact based upon consideration of all relevant facts.

Applying this foreshadowed methodology to the county's mailer described at the beginning of this Article would yield the conclusion that, while it is not a direct subsidy to one faction, the county has crossed the line, absent offsetting factors. The timing of the materials is designed to reach voters at the crucial point when they are considering how to cast ballots. The tenor appears attuned to persuade in a one-sided manner (if not to frighten), rather than to objectively inform in a neutral fashion. Finally, the style is sensational and is directed at an emotional level rather than simply presenting information objectively and in a balanced presentation. A jury considering this evidence and following Justice Souter's approach would likely find the government agency had exceeded the proper bounds of government speech.