GOVERNMENTAL SPEECH IN THE DEMOCRATIC PROCESS

Government, in order to be effective, must actively communicate with its citizens.[1] The first amendment, however, neither protects nor expressly prohibits governmental speech.[2] Courts have interpreted the first amendment to restrict governmental expression that interferes with private speech[3] or the democratic process,[4] but have not formulated constitutional guidelines for the use of public resources to promote controversial ideas.[5]

This Note explores constitutional restraints on government's ability to use public funds for such purposes. Part I examines government's role in the "marketplace of ideas." Part II describes the forms of authority government relies on to justify expenditures for expressive activity. Part III analyzes recent court opinions imposing constitutional restraints on various forms of governmental speech. Finally, Part IV concludes that gov-

1. Government communicates with the public in "the form of oral communications, such as speeches, statements, press conferences, and fireside chats, as well as written communications, such as pamphlets, books, periodicals, and other publications." T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION, 697 (1970). *See also infra* note 5.

2. The first amendment states, "Congress shall make no law . . . abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. *See, e.g.,* Columbia Broadcasting System v. Democratic Nat'l Comm., 412 U.S. 94, 139 n. 7 (1972) (Stewart, J., concurring) ("The purpose of the first amendment is to protect private expression. . . ."); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 193 (1945) (first amendment does not regulate government expression which in no way restrains private expression); Muir v. Alabama Educ. Television Comm'n, 688 F.2d 1033, 1038 (5th Cir. 1982) ("To find that the government is without First Amendment protection is not to find that the government is prohibited from speaking. . . .").

3. *See infra* notes 43-55 and accompanying text.

4. *See infra* notes 36-49 and accompanying text.

5. Government must communicate with the public. Government officials, however, may use tax dollars improperly to promote their partisan goals, enhance their careers, or act against the reputation of others. F. HAIMAN, SPEECH AND LAW IN A FREE SOCIETY 410 (1981). Government also may use its power to communicate to destroy the underpinnings of democratic government. "The power to teach, inform, and lead is also the power to indoctrinate, distort judgment, and perpetuate the current regime." Yudof, *When Government Speaks: Toward a Theory of Government Speech and the First Amendment*, 57 TEX. L. REV. 863, 865 (1979) [hereinafter *Government Speech*]. *See generally* M. YUDOF, WHEN GOVERNMENT SPEAKS 51-66 (1983) (discussing the vast opportunities for abuse of government communication). Scholars have advocated differing views of the constitutional propriety of government expression. *See, e.g.,* F. HAIMAN, *supra*; M. YUDOF, *supra*; Kamenshine, *The First Amendment's Implied Political Established Clause,* 67 CALIF. L. REV. 1104 (1979); Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980); Ziegler, *Government Speech and the Constitution: The Limits of Official Partisanship*, 21 B.C.L. REV. 578 (1980).

ernmental communication that advocates a position on a ballot issue is per se unconstitutional. In addition, governmental speech concerning issues not before the electorate merits cautious scrutiny to ensure that such speech does not interfere with private expression.

I. GOVERNMENT'S ROLE IN THE MARKETPLACE OF IDEAS

In many instances, governmental speech furthers first amendment goals. Governmental speech adds to the information available in the marketplace of ideas, for example, and thereby facilitates informed public decisionmaking.[6] Governmental speech may bolster the persuasive force of individual voices, permitting them to compete with more powerful groups,[7] or operate as a check on forceful corporate speakers.[8] Because government possesses superior resources, relative to most other speakers, however, the possibility of government monopolizing the marketplace of ideas exists. Ideally, a free marketplace, where private expressions compete equally with governmental speech, limits government's power to persuade the public.[9]

The marketplace of ideas theory, however, does not determine the extent to which government may participate in the marketplace. Nor has the Supreme Court directly addressed the issue. The Court has stated that government may not prescribe an official position on politics, nationalism, religion, or other matters of opinion.[10] Government, however, may use its resources to foster its own objectives and, in reality, often supports one position over another in an attempt to instill certain values in the public.[11]

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6. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ."); P.A.M. News Corp. v. Butz, 514 F.2d 272, 277 (D.C. Cir. 1975) (government's actions in distributing information "furthers a cornerstone of the first amendment—the maximum distribution of information in the marketplace.").

7. Yudof, *Government Speech*, *supra* note 5, at 866-67.

8. *Id. See infra* notes 12-16 and accompanying test for a discussion of corporate speech.

9. *See* Red Lion Broadcasting Co. v. Federal Communication Comm'n, 395 U.S. 367, 390 (1969) (first amendment preserves an uninhibited marketplace and does not allow monopolization by the government).

10. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that school children may refuse to salute the American flag). Commentators have interpreted *Barnette* as prohibiting government from compelling persons to affirm a belief in a government position or view. *See* M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 4.09D n. 283 (1984).

11. *Barnette* only prohibits government coercion, not government persuasion. NIMMER, *supra* note 10, at § 4.09D n. 283; Shiffrin, *supra* note 5, at 566-71.

In *First National Bank of Boston v. Bellotti*,[12] the Supreme Court suggested that government may enjoy a first amendment right to free speech.[13] Holding that the first amendment protects the political speech of private corporations,[14] the Court stated that the identity of the speaker does not determine the "inherent worth" of the speech.[15] Assuming that government speech also has "inherent worth," the identity of government as the speaker should not matter. The Court further stated, however, that it would have considered arguments to limit speech if the corporate speech threatened to denigrate rather than serve first amendment interests.[16] This dictum may check government domination of the marketplace of ideas.[17]

II. GOVERNMENT ADVOCACY: STATUTORY AUTHORITY

Permitting government to communicate freely on political issues may allow government to wield excessive power in the marketplace of ideas and undermine the democratic process.[18] State courts have limited government's power by disallowing the use of public funds for the advocacy of issues currently before the electorate. These courts usually avoid the constitutional issues, however, focusing instead on whether government held statutory authority to speak.[19]

In the early cases, courts refused to permit governmental speech unless they found clear statutory authority for its exercise. In *Mines v. Del Valle*,[20] the California Supreme Court found the use of public funds to advocate the adoption of a proposition "manifestly unfair and unjust to

12. 435 U.S. 765 (1978).

13. *See generally* Yudof, *Government Speech*, *supra* note 5, at 866-67; Ziegler, *supra* note 5, at 602.

14. *Id.* at 795. In *Bellotti*, the Court struck down a state law prohibiting corporations from expending funds to influence the vote on an issue before the electorate. *Id.*

15. *Id.* at 777.

16. *Id.* at 789.

17. *But see* Buckley v. Valeo, 424 U.S. 1 (1976). In *Buckley* the Court invalidated government restrictions on powerful sources of private speech. The restrictions were intended to enhance the speech of less powerful competing sources. The Court stated that such restrictions were "wholly foreign to the First Amendment." *Id.* at 48-49. The *Buckley* holding suggests that restrictions on government speech may be equally impermissible. Commentators suggest that *Buckley* and *Bellotti* can be reconciled by comparing the scope of the restrictions. Ziegler, *supra* note 5, at 599-601.

18. *See* Kamenshine, *supra* note 5, at 1105 (government monopolization may give government the power to manipulate and subvert the process by which people hold government accountable). *See also supra* note 5 and accompanying text.

19. *See infra* notes 20 - 33 and accompanying text.

20. 201 Cal. 273, 257 P. 530 (1927).

the rights" of opponents.[21] The court stated that it would not sustain such governmental action unless the legislature granted the power in "clear and unmistakable language."[22] Similarly, in *Citizens to Protect Public Funds v. Board of Education*,[23] the New Jersey Supreme Court found that a school board had implied authority to expend funds to inform voters about a bond proposal but not to advocate voting for or against the proposal.[24] The court concluded that expenditures to support one side of a political issue required express statutory authority.[25]

Although these early cases suggest that government may expend funds to advocate a political position if clear statutory authority exists, recent cases question whether government speech is ever permissible. In *Stern v. Kramarsky*,[26] New York taxpayers sued to enjoin a state agency from supporting a proposed equal rights amendment to the state constitution that required voter approval.[27] Although state law granted the agency broad authority to promote and protect human rights, the court found the agency's promotion of political issues inconsistent with the democratic process. The court ruled that neither the statutory language nor the statutory scheme allowed an administrative agency to promote passage of a proposed constitutional amendment.[28] The court concluded

21. *Id.* at 287, 257 P. at 537.

22. *Id.* In *Mines*, the governing board of a municipally owned public utility expended public funds to promote a municipal bond issue related to expansion of the utility. The board claimed that their broad authority "[t]o construct, operate, maintain and extend" operation allowed the challenged expenditure. *Id.* at 281, 257 P. at 534. *See also* Shannon v. City of Huron, 2 S.D. 365, 69 N.W. 598 (1896) (municipal corporation has only the powers expressly conferred by positive enactment); Port of Seattle v. Superior Court, 93 Wash. 267, 160 P. 755 (1916) (government authority only if expressly granted). *See generally* Note, *The Constitutionality of Municipal Advocacy in Statewide Referendum Campaigns*, 93 HARV. L. REV. 535 (1980).

23. 13 N.J. 172, 98 A.2d 673 (1953).

24. *Id.* at 180-81, 98 A.2d at 677.

25. *Id.* In *Citizens to Protect Public Funds*, the school board used public funds to publish a booklet pertaining to a school building proposal to be financed through a bond issue. The entire booklet provided factual information except for the inclusion of the phrase "Vote Yes" in two places and a one page depiction of the hardships that would result from defeat of the proposal. *Id.* at 175, 98 A.2d at 674. The board's enabling statute authorized the expenditure of funds on items incident to "the building, enlarging, repairing, or furnishing of a [schoolhouse]." The court found that this authority implied the power to make reasonable expenditures "for the purpose of giving voters relevant facts." *Id.* at 179, 98 A.2d at 676. The court reasoned that public funds "belong equally to the proponents and opponents of the proposition," and the use of public funds to support one side of the issue would jeopardize the propriety of the entire expenditure. *Id.* at 180-81, 98 A.2d at 677.

26. 84 Misc. 2d 447, 375 N.Y.S.2d 235 (1975).

27. *Id.* at 449, 375 N.Y.S.2d at 236-37. The agency made available flyers and pamphlets prepared by other organizations and financed a series of radio and television broadcasts. *Id.*

28. *Id.* at 450, 375 N.Y.S.2d at 237.

that government must remain neutral on all ballot issues.[29]

Similarly, in *Anderson v. City of Boston*,[30] the Massachusetts Supreme Judicial Court enjoined the city from expending funds to urge voter approval of a state constitutional amendment.[31] The city claimed authority under the state's home-rule amendment to allocate funds for this purpose. The court ruled that a broad grant of home-rule authority did not allow city government to advocate a position on an issue facing the voters. The court found such authority inconsistent with comprehensive legislative regulation of election financing which encompassed political contributions and expenditures.[32] The court noted that, even assuming first amendment protection of municipal speech, the state held a compelling interest that would justify such a restraint on government speech.[33] The court's analysis, however, suggests that the court would not have permitted the city's campaign even in the absence of conflicting state legislation.

III. GOVERNMENT ADVOCACY: CONSTITUTIONAL RAMIFICATIONS

Taken together, existing state court opinions do not clearly indicate whether the constitution prohibits governmental speech. Those courts that have considered the constitutional ramifications of such speech have failed to articulate a clear standard. Courts have judged the permissibility of governmental speech differently depending on whether government advocates a position on an issue requiring voter approval or an issue not before the electorate.

Courts never have permitted government to advocate a position on an issue before the electorate. Several courts have held that this form of governmental speech conflicts with the general principles of democratic

29. *Id.* at 452, 375 N.Y.S.2d at 239. The court suggested that the constitution of New York prohibits promotional activity on the part of the government. *Id.*

30. 376 Mass. 178, 380 N.E.2d 628 (1978).

31. *Id.* at 184-85, 380 N.E.2d at 633-34. The amendment concerned real property classification. The city funded an office to provide information concerning the proposed amendment and material urging its approval. *Id.*

32. *Id.* at 185, 380 N.E.2d at 633. The court noted that the legislation did not specifically regulate municipal expenditures for the purpose of influencing election results. The court concluded that this omission indicated that "the Legislature did not even contemplate such municipal action could occur." *Id.*

33. *Id.* at 192, 380 N.E.2d at 637. The court found that the state has "a substantial, compelling interest in assuring the fairness of elections and the appearance of fairness in the electoral process." *Id.* at 193, 380 N.E.2d at 638.

process embodied in the constitution.[34] The Supreme Court has recognized the necessity for governmental neutrality in elections to preserve the integrity of the electoral process,[35] and state courts have implied that any governmental interference with the voters' free choice is unconstitutional.

In *Stern v. Kramarsky*,[36] for example, the New York Supreme Court found governmental advocacy on a ballot issue an improper government function.[37] The court reasoned that permitting government to use public funds to support any issue demeans the democratic process.[38] The California Supreme Court, in *Stanson v. Mott*,[39] relied on similar reasoning to enjoin a state agency from expending public funds to promote passage of a bond act.[40] The court stated that "free and pure extension of the voters' choice" constitutes a "fundamental goal of a democratic society."[41] This fundamental principle implies that government may not "take sides" in an election or confer an advantage on one of the competing factors.[42]

In *Mountain States Legal Foundation v. Denver School District #1*,[43] the Colorado federal district court, in dicta, approved the *Stanton* constitutional rationale. The court stated that the use of public resources "to propagandize against a proposal" would violate fundamental principles

34. *See infra* notes 36 - 55 and accompanying text.

35. *See* United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 564-65 (1973). In *Letter Carriers*, the Court upheld provisions of the Hatch Act prohibiting federal employees from taking an active part in political campaigns. The Court held this prohibition as necessary to protect against actual and perceived unfairness in the system. *Id. See also* Note, *supra* note 22, at 554 (noting that Supreme Court cases concerning the proper role of government in elections suggest "that those processes must be zealously protected if voters are to accept their results as legitimate.").

36. 84 Misc. 2d 447, 375 N.Y.S.2d 235 (1975).

37. *Id.* at 452, 375 N.Y.S.2d at 239.

38. *Id.* The court stated that it would be a "dangerous and untenable precedent to permit the government or any agency thereof, to use public funds to disseminate propoganda in favor of or against any issue or candidate. This may be done by totalitarian, dictatorial or autocratic governments but cannot be tolerated, directly or indirectly, in these democratic United States of America." *Id.*

39. 17 Cal. 3d 206, 551 P.2d 1, 130 Cal. Rptr. 697 (1976).

40. The California Department of Parks and Recreation expended public funds to promote a bond act to provide funds for future acquisition of park land. *Id.* at 209, 551 P.2d at 4, 130 Cal. Rptr. at 700. The bond issue passed and the plaintiff filed a taxpayers suit seeking to hold the director of the state agency personally liable for improperly spent funds. *Id.*

41. *Id.* at 219, 551 P.2d at 10, 130 Cal. Rptr. at 705.

42. *Id.*

43. 459 F. Supp. 357 (D. Colo. 1978).

underlying the Constitution.[44] Publicly financed opposition to the exercise of the peoples' right to petition for governmental change, the court reasoned, would restrain private speech in violation of the first amendment.[45] In addition, the court noted that the expenditure of public funds to oppose citizens' efforts to participate in the democratic process would violate those basic precepts of our democratic system that the guaranty clause ensures.[46]

Although courts have implied that governmental speech on ballot issues cannot withstand constitutional scrutiny, courts rarely have considered constitutional challenges to such speech on nonballot issues. In *Burt v. Blumenauer*,[47] however, the Oregon Supreme Court enunciated a flexible standard to judge the permissibility of any form of government speech. The court acknowledged the propriety of some forms of governmental speech provided that such speech was not intended to perpetuate current governmental officials in office.[48] Although the court recognized that the proposed test would require a difficult line-drawing process, it did not attempt to draw that line. The court, therefore, left open the issue of when government speech on a nonballot issue will pass scrutiny.[49]

The California Court of Appeals, in *Miller v. California Commission*

44. *Id.* at 360. The Denver Board of Education used public funds to urge the defeat of a proposed state constitutional amendment that would affect the authority of all branches of state government to spend public funds. *Id.* at 358. The court issued an injunction based on the finding that the school board lacked the statutory authority to spend public funds as the board proposed. *Id.* at 359.

45. *Id.* at 361.

46. *Id.* The court stated that where the proposal before the voters fundamentally alters the authority of government, publicly financed opposition by government shifts the ultimate source of power away from the people. Rather, the court reasoned, the people as the grantors of that power hold the right to freely petition to improve the exercise of the power. *Id.*

The *Stern*, *Stanson* and *Mountain States* courts all invalidated the government speech at issue based on a finding that government lacked the statutory authority to speak. The courts' discussion of constitutional issues, therefore, are dicta. *See supra* notes 26 - 28 and accompanying text for a discussion of *Stern*. In *Stanson*, a provision in the legislative act approving the bond issue for submission to the voters authorized the agency to expend funds for "advance planning." 17 Cal. 3d at 214, 551 P.2d at 6, 140 Cal. Rptr. at 702. The court stated that it "need not resolve the serious constitutional question . . . because the legislative provisions relied upon . . . do not authorize such expenditures. . . ." *Id.* at 219, 551 P.2d at 10, 130 Cal. Rptr. at 706.

47. 299 Or. 55, 699 P.2d 168 (1985).

48. *Id.* at 61, 699 P.2d at 175.

49. *Id.* At one extreme lies speech in which government may clearly engage, presumably speech that falls within the daily routine of government offices. At the other extreme lies speech that is clearly prohibited, such as government advocacy intended to perpetuate itself in power. In *Burt* the court did not explain where the line should be drawn, but merely indicated that "advocacy by 'government' as institutions" calls constitutional principles into question. *Id.* at 61, 699 P.2d at 175-76.

on the Status of Women,[50] directly addressed this issue. In *Miller*, a state commission used public funds to promote ratification of a state equal rights amendment.[51] Ratification required legislative, not voter approval. The commission's enabling statute expressly authorized the commission to promote its viewpoint on issues within its jurisdiction.[52] The taxpayer plaintiffs claimed that the first amendment prohibits government from expending tax dollars to advocate its viewpoint. The court ruled that government may advocate a position on an issue not before the electorate "provided it does not drown out private communication."[53] Although the first amendment does not allow government to silence others, the court reasoned, government may add its own voice to the marketplace of ideas.[54]

Unfortunately the *Miller* court did not provide clear guidelines for determining when government speech drowns out private expression. The court focused, however, on the scale and method of the agency's communication and noted that "neither the scale of [the commission's] speech nor the vehicles employed appear likely to drown out" opposing views.[55]

50. 151 Cal. App. 3d 693, 198 Cal. Rptr. 877 (1984).

51. *Id.* at 696, 198 Cal. Rptr. at 879. The California legislature adopted an act creating the Commission on the Status of Women. The commission established a syndicated newspaper column and printed various materials, including a newsletter, all encouraging the amendment and related legislation. None of these issues were before the electorate. *Id.*

52. *Id.* at 697, 198 Cal. Rptr. at 879. The statute stated that "[t]he commission is expressly authorized to state its position and viewpoint on issues developed in performance of its duties and responsibilities. . . ." *Id.*

53. *Id.* at 700, 198 Cal. Rptr. at 882.

54. *Id.* The court stated that the status of women is a legitimate topic of governmental concern upon which government must communicate. The court reasoned that if government cannot address such controversial topics, government cannot govern. The court noted, however, that the constitution prohibits government speech that has "the effect of trammeling the free speech rights of others." *Id.* at 701, 198 Cal. Rptr. at 883.

55. *Id.* at 702, 198 Cal. Rptr. at 883. The court noted, however, that the activity did confer an advantage on the commission's viewpoint. *Id.* Furthermore, the court noted that the plaintiff's complaint was aimed at the commission's ideological content and not with the concept of a commission speaking about women's issues. The court stated that if the plaintiffs wanted to change "the tone of the commission's speech . . . they must seek redress from the Legislature," which ultimately has the power to appoint members of the commission. *Id.*

The plaintiffs in *Miller* essentially adopted a dissenting taxpayers argument. The argument states that individuals with opposing views should not be compelled to finance partisan viewpoints with their tax dollars. In Abood v. Detroit Board of Educ., 431 U.S. 209 (1977), the Supreme Court addressed this concept in a context not involving the government. The Court held that a union cannot compel members to contribute to organizational speech unrelated to the purpose of the organization. Such expenditures abridged the union members' right to refrain from associating themselves with ideas with which they disagree. *Id.* at 235-26. The Supreme Court never has permitted dissenters to block government expression in this manner. *See* Note, *supra* note 22, at 550.

The *Miller* holding, therefore, suggests that government speech on nonballot issues is proper provided it does not effectively silence the free speech of others.

IV. GOVERNMENT ADVOCACY: A CONSTITUTIONAL STANDARD

A. Requisite Authority

Courts generally require that the authority to expend public funds for government speech activity derive from "clear and unmistakable" statutory language.[56] This standard functions as a check on the expenditures of the various government agencies not directly accountable to the people. Courts should continue to require express or clearly implied legislative authorization to ensure that an accountable body first considers the desirability of government speech.

B. Constitutional Limitations

Statutory authorization does not shield governmental speech from constitutional scrutiny. Courts have consistently indicated that government advocacy on ballot issues is unconstitutional based on a perceived threat to the democratic process or a violation of the guaranty and free speech clauses.[57] Although several courts have suggested that such speech may be permissible under certain circumstances,[58] no court has upheld governmental speech designed to influence an election. Because the Constitution mandates a democratic process, courts should never permit governmental speech on a ballot issue.

Although courts may find governmental speech on a ballot issue unconstitutional under the first amendment, the first amendment does not support a per se rule. Rather, it requires courts to determine the point at

56. *See supra* notes 18 - 33 and accompanying text.

57. *See supra* notes 34 - 46 and accompanying text.

58. In *Anderson*, the court did not indicate whether it would have permitted governmental speech if there had been explicit statutory authority for the expenditures and no conflicting state financing statute. *See supra* notes 30-33 and accompanying text. Similarly, in *Burt* the court did not determine the constitutionality of governmental speech in general but did suggest that some forms of governmental speech, even on ballot issues, might be permissible. *See supra* notes 47-49 and accompanying text. In addition, the *Miller* court left open the possibility of permissible governmental speech on ballot issues stating only that such speech created "a heightened need for constitutionally based judicial oversight." 151 Cal. App.3d at 702, 198 Cal. Rptr. at 883. *See supra* notes 50-55 and accompanying text.

which government speech interferes with private speech.[59] Alternatively, the guaranty clause could serve as a powerful limitation on governmental speech.[60] The Supreme Court, however, traditionally has not interpreted the guaranty clause to provide a source of constitutionally enforceable private rights.[61] Arguably, plaintiffs challenging government speech do not seek to enforce private rights but seek instead to maintain the integrity of the democratic process.

Preservation of the democratic process is a powerful justification for a per se rule prohibiting governmental interference in free elections. The principle that people empower government is fundamental to the constitution.[62] Prohibiting government from advocating a position on a ballot issue prevents the use of governmental power to usurp the power of the electorate. The democratic process inherent in our constitutional system thus supports a per se rule against governmental advocacy of election issues.

Government often expends public funds to espouse views unrelated to election issues.[63] Such governmental speech does not directly threaten

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59. *See* cases cited supra note 2. In *Miller*, the California Supreme Court adopted a "drowning out" standard. *See supra* notes 50 -55 and accompanying text.

60. The guaranty clause provides: "The United States shall guarantee to every State in this Union a Republican Form of Government. . . ." U.S. CONST. art. IV. § 4, cl. 1. In *Mountain States*, a Colorado district court noted that government expenditures to oppose efforts to participate in the democratic process violate basic precepts that the guaranty clause ensures. 459 F. Supp. at 361. *See supra* notes 43 - 46 and accompanying text.

61. *See* Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 556 (1962). Bonfield notes that since 1912 the Supreme Court has refused all suits seeking to enforce the guaranty clause. *Id.* The cases he cites generally involve actions in which the plaintiffs have asserted that government's action deprives the plaintiff of a right or benefit.

62. *Cf.* City of Eastlake v. Forest City Enter., Inc., 426 U.S. 668, 672 (1976). The Supreme Court stated that "[u]nder our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create. In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature." *Id.* (citations omitted). As applied to government speech on ballot issues, government should not be permitted to influence matters that the people have reserved to themselves.

Senator William Fullbright once said, "There is something basically unwise and undemocratic about a system which taxes the public to finance a propaganda campaign aimed at persuading the same taxpayers that they must spend more tax dollars to subvert their own independent judgment." 115 CONG. REC. 344 (1969). *See also* Mountain States Legal Foundation v. Denver School Dist. #1, 459 F. Supp. 357, 361 (D. Colo. 1978) (noting that where a proposal is to alter the authority of government, publicly financed opposition shifts the ultimate source of power away from the people).

63. *See supra* notes 47 - 55 and accompanying text.

the democratic process. In *First National Bank of Boston v. Bellotti*,[64] however, the Supreme Court expressed concern that a corporate voice might overwhelm or significantly influence public opinion and threaten public confidence in government.[65] This concern is arguably greater when government is the competing voice. The Court stated that "if there be any danger that the people cannot evaluate the information and arguments advanced, . . . it is a danger contemplated by the Framers of the First Amendment."[66]

Despite this danger, government must inform and communicate with its citizenry.[67] Therefore, courts should presume the validity of governmental speech on nonballot issues and proceed with caution. Such an approach does not accede too much power to governmental speakers because of the checks on governmental persuasiveness that are built into the system. For example, in *Bellotti* the Court stated that the people have the responsibility for judging and evaluating the relative merits of conflicting arguments.[68] In addition, the public can voice its opposition to government's views through the electoral process.[69] The requirement of legislative authorization for government speech[70] also allows the citizenry to police governmental speech through the polls. Courts, therefore, should invoke first amendment protections only if government attempts to control public opinion, overwhelm opposing voices or monopolize the marketplace.[71] Such government activity effectively coerces compliance and subverts the check imposed by the electoral process.

A modified form of the *Miller* "drowning-out" test can effectively determine when government has abused its authority and violated the public's first amendment rights. In applying a drowning-out standard, the

64. 435 U.S. 765 (1978). *See Bellotti* discussed *supra* notes 12 - 17 and accompanying text.

65. 435 U.S. at 789-90.

66. *Id.* at 792.

67. *See* Yudof, *Government Speech*, *supra* note 5, at 865-67. *See also* Delgado, *The Language of the Arms Race: Should the People Limit Government Speech?*, 64 B.U.L. REV. 961 (1984). Delgado notes that "[m]uch that government wishes to say is harmless or is necessary for effective government functioning. For example, government needs to educate, to promote industry and commerce, and to marshall support for its policies." *Id.* at 989.

68. 435 U.S. at 791.

69. This can be accomplished in two ways. First, if courts require express authorization for speech-related expenditures, voters can remove their elected representative. Second, voters can remove the administration responsible for the controversial speech. The California Supreme Court recognized this possibility in *Miller*. *See supra* note 55.

70. *See supra* note 56 and accompanying text.

71. *See generally* Tribe, *Toward a Metatheory of Free Speech*, 10 S.W. U.L. REV. 237, 244 (1978).

Miller court considered the amount of governmental resources expended and the government's chosen method of communication.[72] Courts also should consider the resources available to competing speakers, the government's purpose in advocating its views and the effect on public opinion.[73]

Government can serve as an organized, well-funded system for disseminating information and opinion. If governmental speech competes with an equally organized and funded voice, the drowning-out phenomenon probably will not occur. An organized, well-financed government voice, however, can easily overwhelm private voices that lack resources and access to communication channels. Courts, therefore, must determine whether government has a superior ability to manipulate the marketplace of ideas relative to those likely to hold an opposing view on the matter.[74]

Courts also should consider government's purpose for entering the market. If government enters the marketplace for the specific purpose of opposing a voice, government's action may violate the first amendment. Governmental participation in the marketplace of ideas may cause opposing voices to expend additional resources in order to maintain their previous persuasive force. Similarly, if government "raises" its voice for the specific purpose of overwhelming a subsequent speaker, it may infringe upon that speaker's first amendment rights. Governmental action that targets specific speakers in order to nullify their effectiveness is evidence of drowning-out.

Both government's purpose in speaking and the amount of resources government devotes to the expression of its views are irrelevant, however, if the speech has no effect on public opinion. Public opinion does not necessarily reflect the resources expended on each side of an issue. Government support, however, may permit an intense minority to overwhelm an apathetic majority on an issue.[75] If government aims its resources at willing recipients who already agree with its view, the effect

72. *See supra* note 55 and accompanying text.

73. One commentator has suggested that courts consider the identity of the speaker, the nature of the speech, and the speakers appropriate role in the electoral process. *See* Note, *supra* note 22, at 563.

74. This necessarily can constitute only one factor. An overemphasis on the available competing resources may allow plaintiffs with virtually no resources to quell the most nominal forms of government speech. In addition, government speech may force even a wealthy voice to exhaust resources by close competition not amounting to drowning out.

75. *See* Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505, 571 (1981-82).

of superior governmental resources decreases. Alternatively, government may advocate a position that the public strongly opposes or expend funds to persuade a largely undecided audience. In the latter two instances, governmental competition in the marketplace of ideas is more likely to drown out competing voices.

V. CONCLUSION

The first amendment neither protects nor expressly prohibits governmental speech. Although government must communicate with its citizenry, government's superior resources may allow it to dominate the marketplace of ideas. To ensure that an accountable body has considered the propriety of government speech, courts should require clear statutory authority for government expenditures for political advocacy. Statutory authority, however, does not ensure constitutional validity. Because the constitution demands a democratic process, courts should find government advocacy on issues before the electorate unconstitutional per se. A per se rule will ensure that the electoral process reflects the will of the people. When government advocates a position on a nonballot issue, the first amendment prohibits government from drowning out private speech. To determine whether government drowns out private speech, courts should consider the resources expended by government for political advocacy, the form of that advocacy, the resources available to opposing speakers, government's purpose in speaking and the effect of governmental efforts. Only by closely evaluating government advocacy can courts ensure the fair exchange of public and private opinion in the marketplace of ideas.

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