The Government Speech Doctrine and Its Effect on the Democratic Process

"*When the government speaks . . . to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.*"[1]

I. INTRODUCTION

Technological advances in an ever-increasing age of communication enable the dissemination of information and opinions by individuals and groups, including the government.[2] The ease of modern communication assists the government in reaching people, which is important because for a republican democracy to function, the government must be allowed to communicate its position.[3] The government relies on words to "explain, persuade, coerce, deplore, congratulate, implore, teach, inspire, and defend."[4] United States courts have formalized and protected the federal government's right to speak through the government speech doctrine.[5] This protection allows the government to freely communicate with the public, while also posing potential problems of undue government interference in the political process.[6]

The government speech doctrine allows the government to promote government policies, or advance particular ideas, without subjecting the

1. Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000).

2. *See* Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1381 (2001) (discussing expanding use of speech by government).

3. *See id.* at 1380-81 (explaining importance of government speech). "Government speech, then, must be understood as essential in a republican democracy, and as a necessary inference from the constitutional structure of American government." *Id.* at 1380. Not only should the government inform the public, but it is also the government's duty to communicate its position to the public. *See* Ala. Libertarian Party v. City of Birmingham, 694 F. Supp. 814, 820 (N.D. Ala. 1988) (holding "the City had the right, if not the duty, to advise its citizens").

4. Bezanson & Buss, *supra* note 2, at 1380 (discussing need for democratic governments to speak).

5. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) (noting need to "recognize the legitimacy of government's power to speak"); *see also Southworth*, 529 U.S. at 229 (noting ability of government to support programs through public funds including defending such programs).

6. *See* 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.11(b) (4th ed. 2009) (discussing benefit and potential problems of increasing government communication); *see also* Daniel W. Park, *Government Speech and the Public Forum: A Clash Between Democratic and Egalitarian Values*, 45 GONZ. L. REV. 113, 142-44 (2010) (noting potential for undermining political process). "[T]he doctrine could be used as a subterfuge for favoring certain private speakers over others based on viewpoint." Park, *supra*, at 142 (internal quotation marks omitted).

government's speech to First Amendment scrutiny.[7] Without the protection of the government speech doctrine, the government would run the risk of being continually accused of violating the First Amendment rights of other private speakers.[8] The doctrine is relatively new, and thus imprecise, with few Supreme Court decisions to guide its use.[9] Courts, however, have used the doctrine with increasing frequency in a wide array of circumstances, often arriving at different outcomes.[10]

One of the major justifications for protecting government speech is the idea that the democratic process serves as a check on the messages of government.[11] If the government can interfere with the political process, however, it will no longer serve as a valid protection from a government-dominated marketplace of ideas.[12] The Republic, our system of government, was designed to protect the minority from the "tyranny of the majority," and the founders did not intend for

7. *See* Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1132 (2009) (noting lack of restriction for government speech under Free Speech Clause); Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000) (expressing government's right to speak).

8. *See* Park, *supra* note 6, at 124-25 (discussing breadth of government speech doctrine); *see also* Andy G. Olree, *Identifying Government Speech*, 42 CONN. L. REV. 365, 367 (2009). "One of the most familiar axioms in all of First Amendment law is the general rule that the government is not allowed to restrict private expression based on viewpoint." Olree, *supra*, at 367. However, the government speech doctrine may protect the government when it chooses to favor one side of a debate over another, simply by claiming the government is speaking, and is thus protected. *See id.*; Park, *supra* note 6, at 124.

9. *See Summum*, 129 S. Ct. at 1139 (Stevens, J., concurring) (describing government speech doctrine as "recently minted"); *Johanns*, 544 U.S. at 574 (Souter, J., dissenting) (describing government speech as "relatively new, and correspondingly imprecise").

10. *See* Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 588 (2008) (noting growing body of government speech litigation). Subjects of such litigation have included specialty license plate messages, access to town and school district websites, acknowledgement of funds from the KKK for Adopt-a-Highway signage and public broadcasting, acceptance of monuments on public land, and holiday display signs. *See Summum*, 129 S. Ct. at 1136 (holding city accepting monument for park is government speech); *Johanns*, 544 U.S. at 567 (recognizing advertising funded by assessments on beef producers as government speech); Sutliffe v. Epping Sch. Dist., 584 F.3d 314, 329 (1st Cir. 2009) (concluding controlling access to town website constitutional exercise of government speech); Choose Life Ill., Inc. v. White, 547 F.3d 853, 863, 865 (7th Cir. 2008) (holding specialty license plates not government speech but nonpublic forum); Ariz. Life Coal. Inc. v. Stanton, 515 F.3d 956, 968 (9th Cir. 2008) (determining vanity license plates primarily private speech); ACLU of Tenn. v. Bredesen, 441 F.3d 370, 377 (6th Cir. 2006) (holding specialty license plates constitute government speech); Robb v. Hungerbeeler, 370 F.3d 735, 738 (8th Cir. 2004) (concluding denying KKK's access to Adopt-a-Highway program not protected by government speech); Wells v. City & Cnty. of Denver, 257 F.3d 1132, 1140 (10th Cir. 2001) (recognizing holiday display as government speech); Knights of Ku Klux Klan v. Curators of Univ. of Mo., 203 F.3d 1085, 1092 (8th Cir. 2000) (holding public broadcast station's underwriting acknowledgement government speech).

11. *See* Norton, *supra* note 10, at 589-90 (noting rationale of political accountability for shielding government speech from First Amendment scrutiny).

12. *See generally* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 574-80 (2005) (Souter, J., dissenting). "Democracy, in other words, ensures that government is not untouchable when its speech rubs against the First Amendment interests of those who object to supporting it; if enough voters disagree with what government says, the next election will cancel the message." *Id.* at 575. "Entrenchment is the antithesis of democracy, and where government speech starts to tread on democratic values, it undermines its own foundation." Park, *supra* note 6, at 144.

the elected majority to easily circumvent the protections the Republic affords.[13] The protection afforded by the government speech doctrine may insulate government's interference with the political process from challenges in court.[14] While the government cannot contribute funds to an individual candidate's election campaign, it is less clear whether the government can expend funds in furtherance of a particular position on another election issue, thus directly intervening in the democratic process.[15]

This Note will first analyze the origins and evolution of the government speech doctrine, and the distinctions between government speech doctrine, compelled speech, and public forum analysis.[16] Next, this Note will explore several states' responses to government speech in the electoral process, and will discuss laws restricting the use of public funds to advocate in elections.[17] Following an examination of state responses, this Note will explore differing approaches courts have taken in examining government's role and behavior in terms of advocacy in elections, and will then examine in detail several recent appellate court decisions discussing these issues.[18] Finally, in the Analysis section, this Note will address the need for a consistent, well-defined approach to government speech in the electoral process, and the need for limits on government advocacy regarding contested issues.[19] The Analysis section will look at the application of alternative approaches while arguing that the government should not be allowed to "campaign" in an election.[20] Finally, this Note will argue that the government, when funding speech on contested issues, should be required to open a public forum allowing equal access to opposing

13. *See generally* THE FEDERALIST NO. 10 (James Madison) (stressing many advantages of constitutionally-created republic over democracy). A republican government makes "it less probable that a majority of the whole will have a common motive to invade the rights of other citizens." *Id.* at 4.

14. *See* Abner S. Greene, *Government Speech on Unsettled Issues*, 69 FORDHAM L. REV. 1667, 1667 (2001) (discussing wide breadth of government speech protected by government speech doctrine). "Because government speech represents the will of the democratic majorities that elected the government in the first place, judicially crafted limits will likely remain limited." Park, *supra* note 6, at 146. It "frustrates a meaningful commitment to republican government because it allows government officials to punish, and thus deter . . . speech that would otherwise inform voters' views and facilitate their ability to hold the government politically accountable for its choices." Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 4 (2009).

15. *See* Note, *The Curious Relationship Between The Compelled Speech and Government Speech Doctrines*, 117 HARV. L. REV. 2411, 2411 (2004) [hereinafter *Curious Relationship*] (noting First Amendment's lack of limits on government speech).

16. *See infra* Part II.A (discussing Court's definition of and tests for government speech); Part II.B (addressing justifications for protecting government speech); Part II.C (comparing government speech, compelled speech, and public forum analysis).

17. *See infra* Part II.D (discussing responses to government speech in elections by Arizona, Colorado, and Massachusetts).

18. *See infra* Parts II.E.1 (examining fairness and justice approach, application and applicability of forum analysis, and electoral problem approach); Part II.E.2 (discussing recent appellate court cases).

19. *See infra* Part III.A (discussing need for consistent approach to government speech in electoral process).

20. *See infra* Part III.B (discussing alternative approaches).

sides.[21]

II. HISTORY

A. What is Government Speech: Origins and Evolution of the Government Speech Doctrine

"Democratic governments must speak, for democracy is a two-way affair."[22] While the formal government speech doctrine is relatively new, the notion of speech by the government, and the problems associated with it, are not.[23] The courts of the United States continue to struggle with the appropriate place for government speech, and, especially in recent years, the Supreme Court has considered the relationship between government speech and the First Amendment in several cases.[24] Unfortunately, the Supreme Court has provided little concrete guidance in defining the limits of the government speech doctrine.[25]

The origin of the doctrine dates back to the second half of the twentieth century, when the Supreme Court first examined government speech in cases dealing with the Establishment Clause and considered the government as a speaker in the marketplace of ideas.[26] In a pivotal case for the doctrine's creation, *FCC v. League of Women Voters of California*,[27] the Court examined a particular section of the Public Broadcasting Act prohibiting noncommercial

21. *See infra* Part IV (concluding government speech opens public forum).

22. Bezanson & Buss, *supra* note 2, at 1380. For democracy to work, the government must be allowed to communicate with those it serves; without such communication, government would be inherently ineffective. *See id.* (discussing necessity of government speech in light of expansive role in modern state). "If private speech were the only permissible speech regarding governing, the role of government would drastically change and the idea that governmental policies reflect and are representative of the majority would be lost." Kidwell v. City of Union, 462 F.3d 620, 627 (6th Cir. 2006) (Martin, J., dissenting) (arguing importance of government speech for effective governance).

23. *See* Citizens to Protect Pub. Funds v. Bd. of Educ., 98 A.2d 673, 677 (N.J. 1953) (holding advocacy activities of school board in vote on bond issue illegal). *See generally* Note, *The Constitutionality of Municipal Advocacy in Statewide Referendum Campaigns*, 93 HARV. L. REV. 535 (1980) [hereinafter *Municipal Advocacy*] (addressing problems of municipal government communication and advocacy).

24. *See generally* Pleasant Grove City v. Summum, 129 S. Ct. 1125 (2009) (declaring ten commandments monument in public park not violative of Constitution); Rust v. Sullivan, 500 U.S. 173 (1991) (determining prohibition on abortion counseling in Title X of Public Service Act valid); Citizens to Protect Pub. Funds v. Bd. of Educ., 98 A.2d 673 (N.J. 1953) (stating use of public funds for distribution of booklet advocating particular election result illegal).

25. *See* ROTUNDA & NOWAK, *supra* note 6 (highlighting lack of Supreme Court cases "directly and clearly" defining limitations).

26. *See* FCC v. League of Women Voters of Cal., 468 U.S. 364, 402 (1984) (emphasizing FCC regulation of noncommercial educational broadcasting stations limited by constitution); Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 611 (2008) (discussing origins of government speech doctrine); Olree, *supra* note 8, at 367-74 (considering relation between government speech and Establishment Clause).

27. 468 U.S. 364 (1984).

educational broadcasting stations from receiving federal funds for public broadcasting that engaged in editorializing.[28] The majority held the ban invalid because it failed to limit anything beyond outright editorial speech, and because there were other regulations in place intended to maintain balance in the marketplace.[29]

The doctrine itself, however, only gained independent prominence in the 1990s, beginning with the *Rust v. Sullivan*[30] decision, which held government speech exempt from First Amendment scrutiny.[31] In *Rust*, the Court examined the validity of prohibiting the use of Title X funds for abortion related activities.[32] The Court upheld the provision as a valid exercise of governmental power, reasoning that the government was not discriminating on the basis of viewpoint and is afforded the freedom to selectively fund programs.[33]

Still, fourteen years after the Court's decision in *Rust*, Justice Souter, in his dissenting opinion in *Johanns v. Livestock Marketing Ass'n*,[34] discussed the relative newness of the doctrine and its imprecise nature, noting that the few times the Court has addressed the doctrine, it has "not gone much beyond such broad observations as '[t]he government as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties.'"[35] Again, in 2009, several justices commented on the unrefined nature

28. *Id.* at 366 (considering whether restriction on speech violates First Amendment).

29. *See id.* at 397-98 (reasoning sacrifice outweighs gains and explaining effective and less drastic regulations already in place). The Court did, however, recognize the potential danger posed by allowing editorials. *Id.* at 398. Similarly, in his dissenting opinion, Justice Stevens noted that the ban served important purposes, such as protecting against the "insidious evils of government propaganda," which the majority undermined by invalidating the ban. *Id.* at 409 (Stevens, J., dissenting).

30. 500 U.S. 173 (1991).

31. *See id.* at 193 (holding selective funding not First Amendment violation); *see also* Corbin, *supra* note 26, at 611 (discussing development of government speech doctrine); Olree, *supra* note 8, at 374 (summarizing origins of government speech doctrine).

32. 500 U.S. at 179-81 (detailing provision of Title X regulations).

33. *See id.* at 193-94 (declaring decision not to fund exercise of right not infringement of right). The Court first explained, "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program." *Id.* at 193. The Court further explained that if it were to hold viewpoint discrimination unconstitutional, too many government programs would be "constitutionally suspect." *Id.* at 194. This case is the first to substantially, though indirectly, address whether the First Amendment serves as a check on government speech. *See Curious Relationship*, *supra* note 15, at 2411 (articulating government speech doctrine originated in *Rust*). The majority held that the First Amendment did not serve as a check on government speech and instead it viewed the regulation not as viewpoint discrimination, but as an example of the government adopting and implementing a policy involving a choice on which goals to advance. *See* Bezanson & Buss, *supra* note 2, at 1390. While *Rust* itself never explicitly addressed government speech, subsequent cases have interpreted and explained the *Rust* decision in terms of the government speech doctrine. *See generally* Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001). "We have said that viewpoint–based funding decisions can be sustained in instances in which the government is itself the speaker . . . ." *Id.* at 541; *see also* Corbin, *supra* note 26, at 612 (discussing *Rust* as one of first government speech cases).

34. 544 U.S. 550 (2005).

35. *Id.* at 574 (Souter, J., dissenting) (quoting Bd. of Regents of Univ. Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2000)); *see also* Corbin, *supra* note 26, at 605 (reiterating lack of contours to government speech

of the government speech doctrine in *Pleasant Grove City v. Summum*.[36] In his concurring opinion, Justice Stevens stated, "our decisions relying on the recently minted government speech doctrine to uphold government action have been few and, in my view, of doubtful merit."[37] Additionally, Justice Souter stated in his concurring opinion that, due to the doctrine's newness, "it would do well for us to go slow in setting its bounds."[38]

The government speech doctrine essentially gives the State, as a speaker, "broad latitude" in content.[39] The doctrine affords the government a greater ability to express itself, and therefore identifying who is speaking becomes a difficult but key issue.[40] It is not always easy to determine when the government is speaking.[41] Because viewpoint neutrality is not required for government speech, or for private speech that expresses a governmental message, but *is* required in other instances, determining who is speaking makes a significant difference.[42]

Whether speech qualifies as government speech turns on government's explicit or implicit approval of the message.[43] Lower courts have attempted to

doctrine).

36. 129 S. Ct. 1125 (2009).

37. *Id.* at 1139 (Stevens, J., concurring) (explaining reliance on government speech doctrine unnecessary).

38. *Id.* at 1141 (Souter, J., concurring). *But see* Patrick M. Garry, Pleasant Grove City v. Summum*: The Supreme Court Finds A Public Display of The Ten Commandments To Be Permissible Government Speech*, 2009 CATO SUP. CT. REV. 271, 293-94 (2009) (noting unanimity of doctrinal and practical aspects of decision). The *Summum* Court worried the floodgates would open if it decided the case differently, because government would not be able to accept any private monument without losing the ability to design and control public spaces, likely leading to no monuments being displayed. *See id.*

39. *See* Mary Jean Dolan, *The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech*, 31 HASTINGS CONST. L.Q. 71, 100 (2004) (explaining latitude of government under doctrine); Norton, *supra* note 10, at 598 (discussing difficulties in accessing message as private verse governmental).

40. *See* Corbin, *supra* note 26, at 605 (exploring difficulty identifying speaker). Speech may be private, governmental, or even mixed speech. *See id.* at 618; *see also* Olree, *supra* note 8, at 369 (detailing issue of identifying government speech).

41. *See* Norton, *supra* note 10, at 590 (noting difficulty in distinguishing between private and government speech).

42. *See, e.g.*, Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 542 (2001) (holding program restricting welfare funded lawyers from challenging welfare laws not government speech); Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 234-35 (2000) (holding University activity fee not government speech because University not speaking when allocation viewpoint neutral); Knights of Ku Klux Klan v. Curators of Univ. of Mo., 203 F.3d 1085, 1093 (8th Cir. 2000) (determining radio station's underwriting acknowledgments government speech by University); *see also* Olree, *supra* note 8, at 368 (emphasizing distinction crucial to outcome).

43. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 562 (2005). "When, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages." *Id.*; *see also* Park, *supra* note 6, at 130 (addressing issues in determining speaker). "[G]overnment speech can take place through third-parties (Rust), can be articulated by funding some speech but not others (Finley; American Libraries Ass'n), can include expression created by private parties (Summum), and does not have to be expressly identified with the government (Johanns)." Park, *supra* note 6, at 130.

create more settled guidelines by establishing a four-factor test for determining whether the speech at issue is governmental.[44] The Supreme Court has yet to endorse the test.[45] A lower court must initially examine the "central 'purpose' of the program in which the speech in question occurs."[46] The court must then look at "the degree of 'editorial control' exercised by the government or private entities over the content of the speech."[47] The court must also determine the identity of the actual speaker.[48] Finally, the court must determine who "bears the 'ultimate responsibility' for the content of the speech."[49]

B. Justification for Protecting Government Speech

The government speech doctrine is justified, in large part, because the electoral process serves as a check on governmental expression.[50] "Democracy . . . ensures that government is not untouchable when its speech rubs against the First Amendment interests of those who object to supporting it; if enough voters disagree with what government says, the next election will cancel the message."[51] Yet, there is potential for abuse.[52] Protecting the government's freedom to express opinions and convey information inherently limits individual freedom.[53] Government neutrality is an important constitutional principle dating back to the time of the framers, who feared

44. *See* Norton, *supra* note 10, at 597-98 (discussing lower courts' approach to determining government speaker). Not all lower courts follow this approach. *See* Olree, *supra* note 8, at 386-88 (noting lack of universal adoption of four pronged test).

45. *See* Olree, *supra* note 8, at 386-88 (discussing four pronged test). Two possible additional factors some lower courts have considered come from the Supreme Court's decision in *Johanns*. *See* 544 U.S. at 562; *see also* Norton, *supra* note 10, at 598 (discussing newer additional factors lower courts may use in determining speaker identity). In *Johanns*, the Court focused on whether "the government sets the overall message to be communicated," and whether the government "approves every word that is disseminated." 544 U.S. at 562 (examining whether certain speech constitutes government speech).

46. Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles, 288 F.3d 610, 618 (4th Cir. 2002) (enumerating test factors).

47. *Id.* (identifying second factor).

48. *See id.* (identifying third factor).

49. *Id.* (identifying fourth factor).

50. *See* Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000) (discussing justification for government speech). "When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position." *Id.*; *see also* Norton, *supra* note 10, at 589 (noting reasoning for shielding government speech from First Amendment scrutiny and benefits of government speech); Park, *supra* note 6, at 145 (highlighting "principle check . . . is the power of the voters").

51. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 500, 575 (2005) (discussing electoral process as justification for government speech doctrine).

52. *See* ROTUNDA & NOWAK, *supra* note 6 (noting difficulty in limiting government speech and stopping government from going too far); Park, *supra* note 6, at 144 (addressing possibility of entrenchment); *see also* Corbin, *supra* note 26, at 605 (discussing potential problems of mixed speech).

53. *See* Bezanson & Buss, *supra* note 2, at 1504 (noting conflict between individual freedom and government speech).

incumbents using the privileges of their offices to maintain power.[54] In *United States Civil Service Commission v. National Ass'n of Letter Carriers*,[55] the Supreme Court spoke directly to the importance of a "government neutral" election process.[56] Potential abuses, such as government taking advantage of its ability to have its speech protected, could come from domination in the marketplace of ideas and the potential skewing of information to perpetuate control, making it difficult or impossible for citizens to change leadership if they become dissatisfied with the government's statements.[57]

C. Alternative Approaches: The Distinction Between Government Speech, Compelled Speech, and Public Forum

Compelled speech, another constitutional doctrine, also deals with government-conveyed messages.[58] In contrast to government speech, which protects the government's right to express its own views on an issue, compelled speech occurs when the government forces a person to support or convey a message.[59] In 1943, the Supreme Court, in *West Virginia State Board of Education v. Barnette*,[60] established an individual's right of protection from compelled speech.[61] The Court held that the government could not force a

54. *See Municipal Advocacy*, *supra* note 23, at 554 (discussing government's role in electoral process); *see also* THE FEDERALIST NO. 10 (James Madison) (cautioning voice of republic stronger than voice of people); Erwin Chemerinsky, *Protecting the Democratic Process: Voter Standing to Challenge Abuses of Incumbency*, 49 OHIO ST. L.J. 773, 776-77 (1988) (addressing framers' intention for government neutrality in elections).

55. 413 U.S. 548 (1973).

56. *See id.* at 565; *see also Municipal Advocacy*, *supra* note 23, at 554 (discussing importance of government neutrality).

57. *See* R.J. Reynolds Tobacco Co. v. Bonta, 272 F. Supp. 2d 1085, 1102 n.20 (E.D. Cal. 2003).

> Implicit in the government speech cases is a suggestion that government is just one more participant in the marketplace of ideas. Such a notion appears to this court to be naïve. It ignores the force of government, as compared to private speech, and, even more importantly, the access that government speech has to free media . . . .

Id.; *see also* Chemerinsky, *supra* note 54, at 778-80 (discussing problems with electoral process serving as check on incumbency abuse). As Chemerinsky notes in reference to incumbency abuse, "the more successful the abuse of incumbency, the less likely it is that a backlash can sway enough voters to outweigh the effects of the unconstitutional practices"; arguably the same can be said for influence using government speech. *See* Chemerinsky, *supra* note 54, at 779. *But see* Marvin Ammori, *Beyond Content Neutrality: Understanding Content-Based Promotion of Democratic Speech*, 61 FED. COMM. L.J. 273, 308 (2009) (noting positive role of government in valuing speech).

58. *See Curious Relationship*, *supra* note 15, at 2422 (defining compelled speech doctrines).

59. *See id.* at 2412, 2422 (defining government speech and compelled speech doctrines). In both scenarios a court faces instances of an expressive government, whether dealing with a positive script, where the government is actually speaking, or a negative script, where the government is preventing speech. *See id.* at 2422.

60. 319 U.S. 624 (1943).

61. *Id.* at 642 (holding compelled flag salute "invades the sphere of intellect and spirit" protected by First Amendment). The *Barnette* case addressed whether a school's requirement that individual students salute the flag constitutes compelled speech. *Id.* at 626. In short, the case dealt with the compulsion of a student to

student to recite the pledge of allegiance because to do so violated the student's rights under the First and Fourteenth Amendments.[62] The Court further expanded the scope of protection from compelled speech in *Wooley v. Maynard*,[63] striking down a New Hampshire statute making it a crime to cover up the state motto on license plates.[64] In *Abood v. Detroit Board of Education*,[65] the Court addressed the use of compulsory union fees to subsidize speech, holding that a non-union member forced to pay a fee to the union could prevent the union from spending the non-member's fees on political contributions.[66] The Court reasoned that compelling political contributions violates the heart of the First Amendment.[67] Compelled speech cases have often involved compulsory fees, and the Court has consistently adhered to *Abood*'s holding that funds cannot be compelled to support ideological causes not germane to the organization.[68]

While the compelled speech and government speech doctrines deal with distinctly different aspects of speech, the courts often intertwine the two.[69] *Johanns v. Livestock Marketing Ass'n* addressed both doctrines.[70] In *Johanns*, the Court addressed whether an assessment on the sale and importation of cattle was unconstitutional compelled speech because it subsidized speech the respondents did not agree with, or if it was constitutional because it funded only government speech.[71] The Court held that government, unlike private

declare a belief. *Id.* at 631. "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." *Id.* at 641.

62. *See id.* at 642 (invalidating state regulation compelling pledge recitation). The Court stated, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id. Barnette* thus broadened the First Amendment's protections by expanding the interpretation of government interference with private speech. *See Curious Relationship*, *supra* note 15, at 2418-19.

63. 430 U.S. 705 (1977).

64. *See id.* at 717 (holding forcing motto on license compelled speech). In *Wooley v. Maynard*, the Court struck down a law making it a crime to cover up the New Hampshire motto, "Live Free or Die," on license plates. *See id.*

65. 431 U.S. 209 (1977).

66. *See id.* at 235 (holding use of fees for political purposes amounts to compelled speech).

67. *See id.* (explaining Court's reasoning). The Court wrote, "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." *Id.* at 234-35.

68. *See id.* at 235-36 (discussing Court's holding, which limits unions ability to compel funds spent on political speech); *see also* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 562 (2005) (holding government funding of beef promotion advertisement not compelled speech); United States v. United Foods, Inc., 533 U.S. 405, 415-16 (2001) (holding required fees for generic mushroom advertising constitute compelled speech); Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 477 (1997) (holding mandatory fee for generic fruit advertising not compelled speech); *Curious Relationship*, *supra* note 15, at 2412 (discussing dichotomy between private speech and government speech).

69. *See Curious Relationship*, *supra* note 15, at 2412 (discussing relationship between compelled speech and government speech doctrine).

70. *See Johanns*, 544 U.S. at 553 (defining issue in terms of government speech).

71. *See id.* at 553-57 (discussing challenged government program and issues before Court).

parties, could compel funding for its own speech without raising First Amendment issues, even though compelled funding of private speech implicates the First Amendment.[72] After examining both doctrines, the Court determined that the protective qualities of the government speech doctrine were more appropriate when examining compelled support of government.[73]

Another constitutional speech doctrine is the public forum doctrine.[74] Today, the government speech doctrine often clashes with the public forum doctrine, with courts choosing to apply the government speech doctrine instead of the traditional public forum analysis, especially in cases of nontraditional forums.[75] The public forum doctrine has a long history "premised on the idea that all citizens have an equal right to speak in the public forum and a right to equal treatment from the government," regardless of their viewpoint.[76] The Court has established three types of forums: traditional public forums, designated public forums, and non-public forums.[77] Even under the least restrictive non-public classification, the government may not discriminate based on viewpoint.[78] When courts make a distinction between government speech and public forum they are "choosing between upholding the egalitarian

72. *See id.* at 557-62 (discussing why government differs from private individuals in compelled speech); *see also* Mia Guizzetti Hayes, Comment, *First Amendment Values at Serious Risk: The Government Speech Doctrine After* Johanns v. Livestock Marketing Ass'n, 55 CATH. U. L. REV. 795, 815 (2006) (illuminating *Johanns*' distinction between compelled government speech and compelled private speech).

73. *See Johanns*, 544 U.S. at 559 (emphasizing constitutionality of compelled support of government programs including those advocating position).

74. *See* Park, *supra* note 6, at 129 (characterizing public forum and government speech cases as subsidy cases). Yet, the two types of cases have different baselines: in public forum cases, government treatment must be equal and viewpoint neutral; in government speech cases, the government speech may exclude whomever it wants. *See id.*

75. *See id.* at 129-32 (asserting government speech cases beginning to replace public forum cases). For example, specialty license plate cases, previously decided under the public forum doctrine, are now being decided as government speech cases because the government approves the message on the license plates. *See id.* at 133-34. Using government speech as protection, the government is free to discriminate based on viewpoint on what may appear in these communicative spaces, license plates. *See id.* Another example of a nontraditional forum where the government speech doctrine is providing protection is town and school district websites. *See id.*

76. *See id.* at 114. The public forum doctrine emerged out of a 1939 case dealing with the rights of unions to organize on city streets. *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 504-05 (1939). While the public forum right is not absolute, regulations may not abridge or deny a person's right to speak, based simply on content. *See* Park, *supra* note 6, at 116. The public forum doctrine was first used in instances dealing with outdoor spaces, however, its use has expanded into less traditional public areas. *See id.* at 117-21 (tracing evolution of public forum doctrine).

77. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-47 (1983) (discussing types of forums); *see* Park, *supra* note 6, at 120-21 (listing three types of forums). *Perry* concerned a union's dispute over access to a school district's internal mailboxes. *See* 460 U.S. at 39-41.

78. *See Perry*, 460 U.S. at 49. Traditional public forums require the government to have a compelling justification for restricting speech. *See* Park, *supra* note 6, at 120. Designated public forums-property opened by the state for expressive activity-also require a compelling justification for restrictions. *See id.* Non-public forums, however, allow the government to act like a private property owner, and thus restrict the subject matter and speaker identity, so long as the distinctions are "reasonable in light of the purpose which the forum at issue serves," and the restriction is viewpoint neutral. *Perry*, 460 U.S. at 49.

principles of the public forum doctrine or democratic principles of the government speech doctrine."[79] The basis of the public forum doctrine is "equal treatment of all people regardless of their particular viewpoint," which is the essence of the First Amendment.[80] The government speech doctrine, on the other hand, allows the government to discriminate by endorsing a message and justifies this discrimination as an expression of democratic will, where the majority rules at the expense of minority viewpoints.[81]

D. Government Speech and the Election Process: State Responses

Government speech in elections can, to some extent, be regulated at the state level; many states have passed laws limiting the use of public funds that might influence the outcomes of elections.[82] This section addresses the approaches of three states: Arizona, Colorado and Massachusetts.[83]

In Arizona, the state legislature passed a statue prohibiting the use of town resources to influence elections.[84] The law itself seems a broad, strong, and outright prohibition of government speech, with the attorney general indicating that even educational materials put out by cities and towns could be included in the prohibition.[85]

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79. Park, *supra* note 6, at 147.

80. *See id.* at 132. "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination." Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 829 (1995) (internal citations omitted).

81. *See* Park, *supra* note 6, at 132. While the government speech doctrine may be democratic, our government is a republic, and the Bill of Rights was enacted to protect the minority, not the majority or the state. *See* David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637, 1641 (2006) (stating "First Amendment confers no protection on state actors"). The Constitution was not intended to protect the government when expressing itself; it is long established that the government does not have First Amendment rights. *Id.* The Speech Clause is intended to act "as a bulwark of protection against-rather than source of rights for-government." *Id.* at 1638.

82. *See* Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1132 (2009) (addressing limits on government speech). The Court stated, "[t]he involvement of public officials in advocacy may be limited by law, regulation, or practice." *Id.*

83. *See, e.g.*, ARIZ. REV. STAT. ANN. § 9-500.14 (2008) (limiting municipal expenditures relating to elections); COLO. REV. STAT. § 1-45-102 (2010) (establishing limits to government campaign expenditures); MASS. GEN. LAWS ch. 55, §§ 1-42 (2007) (establishing campaign finance rules for Massachusetts).

84. ARIZ. REV. STAT. ANN. § 9-500.14 (2008). The statue provides, in pertinent part:

> A city or town shall not use its personnel, equipment, materials, buildings or other resources for the purpose of influencing the outcomes of elections. . . . Employees of a city or town shall not use the authority of their positions to influence the vote or political activities of any subordinate employee.

Id.

85. *See* Use of City or Country Funds to Educate the Public on Ballot Measures, Ariz. Op. Att'y Gen. No. I00-020 (2000) (explaining Arizona Attorney General's interpretation of statute).

> Sections 9-500.14 and 11-410, A.R.S., prohibit cities and counties from using their resources, including spending general fund monies, to influence the outcome of elections. Even educational

In *Kromko v. City of Tucson*,[86] the Court of Appeals of Arizona interpreted the statute when it addressed a city's dissemination of information regarding two issues listed on a special referendum ballot.[87] The court found that the communication from the city did not clearly and unmistakably present a plea for action, and thus did not violate the statute.[88] Additionally, the court noted the statue did not violate citizens' First Amendment rights.[89] The court's looser interpretation of the statute's prohibition, in contrast to the attorney general's, allows for greater governmental influence than the language of the statute implies.[90]

Colorado has a similar statute, the Fair Campaign Practices Act.[91] This act deals generally with fair campaigning, and includes a provision dealing specifically with interference of government officials in the campaign process.[92] "The purpose of [the Fair Campaign Practices Act] is to prohibit the state government and its officials from spending public funds to influence the

> materials that do not expressly advocate for or against a ballot issue may fall within this prohibition, depending on the specific facts and circumstances.

Id.

86. 47 P.3d 1137 (Ariz. Ct. App. 2002).

87. *See id.* at 1138-39 (detailing facts of case). The argument set forth by the plaintiff was that the city was not merely educating the public, but was "advocating a vote in favor of the propositions, using City personal, equipment, materials, and other resources to do so." *Id.* at 1139.

88. *Id.* at 1141. "The communication 'must clearly and unmistakably present a plea for action, and identify the advocated action; it is not express advocacy if reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.'" *Id.* (quoting Schroeder v. Irvine City Council, 118 Cal. Rptr. 2d 330, 341 (Cal. Ct. App. 2002)). In *Kromko*, the court determined that "a reasonable person might conclude that the City was educating the public on the issues, albeit in an entirely positive light." *Id.*

89. *See id.* (deciding statute, as written, interpreted, and applied, did not violate plaintiff's First Amendment rights). The court said the statute "restricts a city's ability to expend public funds precisely in the manner . . . it must in order to avoid violating . . . First Amendment rights," and "strikes a balance between the electorate's rights and the City's obligation to inform the public." *Id.*

90. *See* Angela C. Poliquin, Case Note, Kromko v. City of Tucson*: Use of Public Funds to Influence the Outcomes of Elections*, 46 ARIZ. L. REV. 423, 432 (2004) (arguing "limiting impropriety to 'express advocacy,' may fail to protect public elections from undue government influence"). "*Kromko* suggests that cities in Arizona will have considerable leeway to advocate particular outcomes on ballot questions by disseminating materials containing one-sided or biased information, so long as the materials are arguably intended to inform and not persuade." *Id.* at 433.

91. COLO. REV. STAT. §§ 1-45-101 to 1-45-118 (2010) (establishing, inter alia, limits to government expenditure relating to elections).

92. *See id.* § 1-45-117(1)(a)(I). The act provides, in pertinent part:

> No agency, department, board, division, bureau, commission, or council of the state or any political subdivision of the state shall make any contribution in campaigns involving the nomination, retention, or election of any person to any public office . . . nor shall any such entity expend any moneys from any source, or make any contributions, to urge electors to vote in favor of or against any [ballot issues, referenda, or recalls].

Id.

outcome of campaigns for political office or ballot issues."[93] The interpretation of the law in Colorado has been more stringent than in Arizona.[94] For example, in *Coffman v. Colorado Common Cause*,[95] the Supreme Court of Colorado determined that the state treasurer violated the law by issuing three press releases advocating a political position.[96] Also, in *Campbell v. Joint District 28-J*,[97] the United States Court of Appeals for the Tenth Circuit decided that expenditures by a school district in connection with a referendum proposal, which addressed elector approval of new or increased taxes, violated the statute.[98]

Finally, the approach to government speech in Massachusetts is found in Chapter 55 of the Massachusetts General Laws.[99] The pivotal case interpreting

93. Colo. Common Cause v. Coffman, 85 P.3d 551, 554 (Colo. App. 2003) (interpreting legislation), *aff'd en banc*, 102 P.3d 999 (Colo. 2004); *see also* COLO. REV. STAT. § 1-45-102 (2010) (stating legislative declaration of reasons for statute).

94. *Compare supra* notes 84-90 and accompanying text (discussing approach in Arizona), *with supra* notes 91-93 and accompanying text, *and infra* notes 95-98 and accompanying text (discussing approach in Colorado).

95. 102 P.3d 999 (Colo. 2004) (en banc).

96. *Id.* at 1013. The press releases opposed a ballot initiative concerning school funding. *Id.* at 1000.

> The statutory language of the FCPA unambiguously expresses the general assembly's intent to prevent state agencies and officials from using public funds to influence the outcome of an initiative election. To that end, the FCPA contemplates that when the public funds are used to inform the public about a pending ballot measure, the information provided must represent both sides of the issue.

Id. at 1013. While the State Treasurer was entitled to take a position, the court held that he was not allowed to "invoke the machinery of government to support that position." *Id.*

97. 704 F.2d 501 (10th Cir. 1983).

98. *Id.* at 504. "The Colorado Campaign Reform Act provides that political subdivisions such as appellants may make certain campaign contributions only in the campaigns which involve issues in which they have an official concern." *Id.*

> [A] matter of official concern is one which at the very least involves questions which come before the officials for an official decision. Here a change in the tax scheme would not cross appellants' desks for approval. Appellants expended public monies and made in-kind contributions in an area which is beyond anything which they could decide in their representative roles.

Id. at 505.

99. MASS. GEN. LAWS ch. 55, §§ 1-42 (2007).

> In general, the campaign finance law prohibits the use of public resources for political purposes, such as public employees engaging in campaign activity during work hours or using their office facilities for such a purpose. . . . The law prohibits the use of public funds or other public resources to support or oppose a question put to voters, such as the use of public resources to distribute a mailing days before an election. The law does not, however, prohibit the expression of views by public officials concerning ballot questions to the extent such expression is within the scope of their official responsibilities and protected by the First Amendment.

MASS. OFFICE OF CAMPAIGN & POLITICAL FIN., OCPF-IB-91-01, THE USE OF GOVERNMENTAL RESOURCES FOR POLITICAL PURPOSES 1 (rev. 2007) [hereinafter OCPF REPORT], *available at* http://www.ocpf.net/legaldoc/IB-

the law is *Anderson v. City of Boston*.[100] The case involved a challenge to the city's actions in support of a forthcoming referendum proposal.[101] The Massachusetts Supreme Judicial Court held that the city was in violation of the campaign finance statue and granted an injunction, because the law preempted "any right which a municipality might otherwise have to appropriate funds for the purpose of influencing the result on a referendum question to be submitted to the people at a State election."[102] However, the law does not regulate the use of public funds to lobby at town meetings or by cities or town boards for purposes other than those "designed to influence voters at an election."[103]

E. Government Speech in the Election Process: The Constitution

1. Approaches to Government Speech by the Courts

There are several viewpoints on the proper role of the Constitution and the courts in protecting government speech.[104] Many courts advance an electoral system solution, in which the recourse for people unhappy with what the government expresses is found at the ballot box and not in the courts.[105] This approach is based on the notion that the government "not only [has] the right, but the duty, to determine the needs of its citizens and to provide funds to service those needs"—a right that incidentally includes the right to solicit the votes of those citizens.[106] The Supreme Court has indicated on several

91-01.pdf.

100. 380 N.E.2d 628 (Mass. 1978) (holding Massachusetts campaign finance statue barred city from spending funds to influence referendum).

101. *See id.* at 630. The mayor organized an office to facilitate the city's effort in getting voters to approve the referendum, which dealt with land classification. *See id.* at 631. The city intended to provide telephones and office space, and to distribute printed material to voters. *See id.*

102. *Id.* at 634; *see also Municipal Advocacy*, *supra* note 23, at 545-49 (discussing *Anderson* decision). The *Anderson* Court also addressed the potential First Amendment concerns raised by the city; while leaving open the possibility that the city may have First Amendment rights, the court concluded, "a State-imposed restriction on such an expenditure survives the exacting scrutiny to which such a restriction must be subjected." *See* 380 N.E.2d at 638. The court explained that the Commonwealth has a compelling interest in "assuring the fairness of elections and the appearance of fairness in the electoral process." *Id.* "The Commonwealth has an interest in assuring that a dissenting minority of taxpayers is not compelled to finance the expression on an election issue of views with which they disagree." *Id.* at 639.

103. OCPF REPORT, *supra* note 99, at 4.

104. *See infra* notes 105-107 and accompanying text (discussing electoral system solution); *infra* notes 108-111 and accompanying text (outlining simple fairness and justice approach); *infra* notes 112-114 (discussing compelled speech approach); *infra* notes 115-121 and accompanying text (outlining First Amendment "limited public forum" approach).

105. *See* Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000) (asserting justification for government speech and describing possible electoral recourses); Ala. Libertarian Party v. City of Birmingham, 694 F. Supp. 814, 820 (N.D. Ala. 1988) (stating "[t]hose taxpayers who disapprove . . . may dissent at the polls when City officials seek re-election").

106. *Ala. Libertarian Party*, 694 F. Supp. at 817-818 (explaining protection of government speech fundamental to republic government); *see also* Park, *supra* note 6, at 147 (discussing electoral process as limiting principle).

occasions that the control of government speech is the ballot box.[107]

Justice Brennan advocated another approach while he was a judge on the Supreme Court of New Jersey in *Citizens to Protect Public Funds v. Board of Education*.[108] Writing for the court, he stated, "[w]e are persuaded . . . that simple fairness and justice to the rights of dissenters require that the use by public bodies of public funds for advocacy be restrained within those limits."[109] Brennan's approach is based on theories of equity and fairness, not on constitutional principles.[110] It is unfair, he reasoned, to use public funds to advocate a position before the electorate, when the opposition does not have the same opportunity.[111]

A third approach is to adopt the method used in compelled speech cases.[112] When the government speaks using public funds, it compels taxpayers to support a particular view.[113] While courts have traditionally distinguished compelled speech from government speech, the two often arise in similar contexts, which could justify applying a test similar to the compelled speech test in the context of government speech.[114]

A final approach is to use a First Amendment "limited public forum" analysis.[115] This analysis allows the government "to set reasonable content limitations on the types of speakers and subject matter allowed, so long as the

> [T]he people have the ultimate say in whether the government has gone too far. This limit may be little comfort to minorities that have little hope of gaining the reins of power, but it should be no surprise that a rule based on democratic values ultimately defers to the majority.

Park, *supra* note 6, at 147.

107. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 575 (2005) (Souter, J., dissenting) (pointing to democracy's inherent ability to regulate government speech through elections); *Southworth*, 529 U.S. at 235 (emphasizing government accountability to electorate); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 228 (1977) (noting public officials ultimately responsible to voters). One commenter observed, "[t]he Supreme Court has also recognized that permitting 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." *Municipal Advocacy*, *supra* note 23, at 554.

108. 98 A.2d 673 (N.J. 1953).

109. *Id.* at 678.

110. *See id.* at 677 (arguing unfairness in use of funds to advocate for one side but not other).

111. *See id.* at 678 (stressing "simple fairness and justice to the rights of dissenters").

112. *See supra* notes 58-69 and accompanying text (discussing history of compelled speech cases).

113. *See Municipal Advocacy*, *supra* note 23, at 549-53 (addressing dissenters' rights of taxpayers forced to finance patrician speech).

114. *See* Dolan, *supra* note 39, at 71-72 (discussing examples of government speech such as access to websites); Greene, *supra* note 14, at 1667-69 (comparing government speech to public forum test); *see also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) (discussing public forum test).

115. *See infra* notes 116-123 and accompanying text (discussing public forum analysis). This approach is similar to the approach used in evaluating other First Amendment infringement issues. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802-04 (1985) (providing determining factors on type of forum created); *Perry*, 460 U.S. at 45-47 (establishing public forum test for government property); Dolan, *supra* note 39, at 76-80 (detailing analysis and contours of limited public forum doctrine).

limits are viewpoint neutral."[116] Two examples of cases addressing the forum analysis test are *Board of Regents of University of Wisconsin System v. Southworth*,[117] where the Court applied the test, and *Legal Services Corp. v. Velazquez*,[118] where the Court looked to the test for guidance after rejecting the use of the government speech doctrine.[119] In *Southworth*, the Court suggested the government has a duty to remain viewpoint neutral when allocating funding for private speech.[120] In *Velazquez*, while the Court noted that "viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker," or instances "in which the government 'used private speakers to transmit specific information pertaining to its own program,'" it did recognize that there must be limits to what is considered government speech.[121] The *Velazquez* Court concluded that the speech in question—Legal Services Corporation attorneys funded by the government challenging existing welfare laws—was not government speech, and restricting that speech would control expression in unacceptable ways.[122] Instead, the Court looked to the limited forum analysis and determined that the restriction was unconstitutional.[123]

2. Recent Government Speech Cases

Issues relating to government speech are not diminishing; rather, government speech is increasing.[124] In the recent case of *Sutliffe v. Epping School District*,[125] the Fist Circuit held that a school district did not violate the plaintiff's First Amendment rights when it advocated for budget approval in the town newsletter and website, while "denying plaintiffs access to these same communication channels to express their opposing views."[126] In another case, *Page v. Lexington County School District One*,[127] the Fourth Circuit held that the school district's website was not a public forum, and residents were not

116. Dolan, *supra* note 39, at 72 (describing limited public forum test); *see* Green, *supra* note 14, at 1667 (discussing limits imposed on government control by forum analysis approach); *see also Perry*, 460 U.S. at 46 (holding state can control purpose of forum only in viewpoint neutral manner).

117. 529 U.S. 217 (2000).

118. 531 U.S. 533 (2001).

119. *See id.* (suggesting forum analysis appropriate for restriction on government founded legal services); *Southworth*, 529 U.S. at 235 (explaining forum analysis inapplicable if speech not from government).

120. 529 U.S. at 233-35 (requiring viewpoint neutrality of public universities regarding student speech funded by mandatory student activity fees).

121. 531 U.S. at 542 (quoting Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 833 (1995)) (distinguishing between government merely facilitating private speech and conveying own message).

122. *Id.* at 534 (explaining reasoning for looking to limited forum analysis). The Court determined that allowing restrictions to be placed on the speech of attorneys would alter the traditional roles of attorneys to the detriment of their clients and the system. *See id.*

123. *See id.* (holding based on forum analysis).

124. *See* Corbin, *supra* note 26, at 605.

125. 584 F.3d 314 (1st Cir. 2009).

126. *Id.* at 318, 335.

127. 531 F.3d 275 (4th Cir. 2008).

entitled to access the school's newsletter via its website.[128] Finally, in *Kidwell v. City of Union*,[129] the Sixth Circuit held that a city did not grant differential access to the public by advocating through the town newsletter and local newspaper, nor did it improperly compel support.[130]

III. ANALYSIS

A. The Need for Constitutional Protection of the Electoral Process

Current approaches to government speech are inconsistent and ill-defined, and with the increase in instances of government speech, particularly via channels created by new technology, the existing cases on the government speech doctrine are ill-equipped to handle the challenges due to a lack of clear guidelines, often leading to poorly reasoned decisions.[131] Congress, through legislative action, or the United States Supreme Court, through a definite interpretation of the First Amendment, could create a clear and consistently applied standard for government speech.[132] To limit government interference in the election process, Congress could pass a law—as state legislatures have done—strictly limiting government spending on election issues; however, the effectiveness of this approach may be limited both by federalism principles and relaxed judicial interpretation of the statute's language.[133] Instead, protection from government interference can be found in, and should be based on, the Constitution and the Bill of Rights, which were adopted to restrain federal powers and prevent tyranny by the majority.[134] The courts should take an active role in limiting government speech based on constitutional grounds, as opposed to passively allowing the electoral process to set limits, as they do with other free speech issues.[135]

128. *Id.* at 285 (holding adequately controlled government speech protected from First Amendment scrutiny).

129. 462 F.3d 620 (6th Cir. 2006).

130. *Id.* at 624 (recognizing where government retained sufficient control of message, no public forum created).

131. *See* ROTUNDA & NOWAK, *supra* note 6 (discussing lack of clean definition of government speech doctrine); Corbin, *supra* note 26, at 605 (noting lack of contours to government speech doctrine).

132. *See* Olree, *supra* note 8. *But see* Park, *supra* note 6, at 147-48 (highlighting unlikelihood of limits except in exceptional circumstances). According to Park, one such exceptional circumstance is "an exercise of government speech that threatens the functioning of the democratic system itself." *Id.* at 148.

133. *See supra* notes 105-107 and accompanying text (addressing electoral process as check on government speech); *see also* Park, *supra* note 6, at 147 (discussing possible legislative limit). This method likely offers little protection to the minority, as "rule[s] based on democratic values ultimately defer[] to the majority." Park, *supra* note 6, at 147.

134. *See* Olree, *supra* note 8 (noting First Amendment protects citizens from government interference); *Curious Relationship*, *supra* note 15, at 2411 (stating passage of Bill of Rights constrained federal power).

135. *See supra* note 45 and accompanying text (addressing courts' test for government speech); *see also* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 562 (2005) (discussing newer additional factors in courts' test); *supra* notes 46-49 and accompanying text (explaining lower courts' factor test).

Any suitable test needs to distinguish between merely informing the public and campaigning or advocacy.[136] Although the government has a duty to inform its citizens, it does not have a duty to sway public opinion.[137] "At some threshold level, a public entity must refrain from spending public funds to promote a partisan position during an election campaign."[138] To date, this threshold level remains undefined.[139]

Generally, courts are hesitant to restrict the manner and subject matter of government speech, allowing the electoral process to act as the ultimate check.[140] Nevertheless, when the government's speech relates to elections and issues up for vote, potential distortion and the government's ability to dominate the marketplace of ideas limits the electoral process's effectiveness as a check.[141] The government speech doctrine permits those in power to use government speech to stay in power by denying opposing parties and viewpoints equal access to the public.[142] Some may say this is a "democratic" notion, because the majority elected the government, and thus, the majority speaks when the government speaks.[143] The Constitution, however, protects egalitarian principles, not necessarily "democratic" principles; the framers designed the First Amendment to protect the dissenters and the minority, not the majority, as they need no protection.[144]

136. ROTUNDA & NOWAK, *supra* note 6 (discussing necessary balance between swaying public opinion and informing public). Several cases in different courts highlight the distinction between campaigning and advocacy. *See, e.g.*, D.C. Common Cause v. District of Columbia, 858 F.2d 1 (D.C. Cir. 1988) (holding expenditure by city government to defeat ballot proposal illegal); Stanson v. Mott, 551 P.2d 1 (Cal. 1976) (concluding agency cannot expend public funds to promote partisan position in absence of legislative authority); Citizens to Protect Pub. Funds v. Bd. of Educ., 98 A.2d 673 (N.J. 1953) (recognizing use of public funds to advocate proposition as improper). "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." Mountain States Legal Found. v. Denver Sch. Dist. No. 1, 459 F. Supp. 357, 360-61 (D. Colo. 1978).

137. *See supra* note 22 and accompanying text (discussing need for allowing government to speak).

138. Kidwell v. City of Union, 462 F.3d 620, 633 (6th Cir. 2006) (quoting Cook v. Baca, 95 F. Supp. 2d 1215, 1227 (D.N.M. 2000)).

139. *See* Ala. Libertarian Party v. City of Birmingham, 694 F. Supp. 814 (N.D. Ala. 1988) (considering whether brochure and advertisements related to common needs of citizens or political ideological); *Mountain States Legal*, 459 F. Supp. at 360 (explaining difference between fair presentation of facts and promotion of particular point of view); Kromko v. City of Tucson, 47 P.3d 1137, 1141 (Ariz. Ct. App. 2002) (discussing whether pamphlet distributed by city advocacy or informational).

140. *See supra* notes 108-111 and accompanying text (discussing Citizens to Protect Pub. Funds v. Board of Educ., 98 A.2d 673 (N.J. 1953)).

141. *See Curious Relationship*, *supra* note 15, at 2411. (describing "boundless discretion" courts give government speech).

142. *See supra* notes 11-15 and accompanying text (addressing electoral process's effectiveness as check on government speech).

143. *See Kidwell*, 463 F.3d at 627 (Martin, J., dissenting) (detailing why "governmental campaigning in elections is implicitly prohibited by our constitutional design"). "Free and honest elections are the very foundation of our republican form of government." *Id.* (quoting MacDougall v. Green, 335 U.S. 281, 288 (1948) (Douglas, J., dissenting)).

144. *See supra* notes 79-81 and accompanying text (addressing founding constitutional principles).

The current approach, increasing government speech protection, fails to protect the electoral process from improper government interference.[145] A more stringent test is needed because government interference with the electoral process—a supposed check on unfettered governmental action—negates any benefits provided by the check.[146]

B. Alternative Approaches

1. Brennan's Approach in Citizens to Protect Public Funds v. Board of Education

As discussed above, in *Citizens to Protect Public Funds v. Board of Education*, Justice Brennan approached government speech by looking at "simple fairness and justice to the rights of dissenters."[147] The court held improper the school board's actions in advocating, with public funds, the passage of a bond for a school building.[148] Brennan raises an important argument; public funds "belong equally to the proponents and opponents of the proposition," and dissenters are justified in complaining when public funds are used to finance arguments meant to persuade voters of the merits of one side of an argument instead of merely presenting facts.[149] While the government is elected by a majority, it is elected to represent everyone, even those who disagree with it.[150] The problem with Brennan's "fairness and justice" approach, however, is the lack of basis in constitutional principles.[151]

2. Compelled Speech Applied to Government Speech Cases

One possible alternative approach, applying constitutional standards, is to use a test similar to that used in compelled speech cases.[152] Citizens should not be compelled to pay for something the government is seeking their permission to do.[153] Compelled speech cases require the courts to subject the

145. *See* Olree, *supra* note 8 (discussing problems with current approach). The current test lacks limits but offers wide protection, which is potentially dangerous. *Id.*

146. *See* Kidwell v. City of Union, 462 F.3d 620, 627 (6th Cir. 2006) (Martin, J., dissenting) (describing government advocacy in elections). "[W]hen the government uses tax dollars to enter an electoral contest and advocate in favor of a position or candidate, it distorts the very check on governmental power so central to our constitutional design-the next election-that I must conclude such activity is unconstitutional." *Id.*

147. *See supra* note 108-111 and accompanying text (discussing Citizens to Protect Pub. Funds v. Board of Educ., 98 A.2d 673 (N.J. 1953)).

148. *See* Citizens to Protect Pub. Funds v. Bd. of Educ., 98 A.2d 673, 677 (N.J. 1953).

149. *Id.*

150. *See supra* notes 79-81 and accompanying text (addressing founding constitutional principles).

151. *See supra* notes 79-81 and accompanying text (setting forth constitutional basis for government speech doctrine).

152. *See supra* Part II.C (discussing relation between compelled speech and government speech).

153. *See* Wooley v. Maynard, 430 U.S. 705, 717 (1977) (holding government cannot compel citizens' support of position they disagree with). "The First Amendment protects the rights of individuals to hold a point

government's actions to higher scrutiny when the government is attempting to compel individuals to support or convey a message.[154] In the beginning, the Court broadly applied this protection, but it has since narrowed and clarified the compelled speech doctrine.[155] The Court held, for example, that union members can prevent their unions from using part of their fees to contribute to political speech.[156] The Court stated that this prohibition on the use of funds rests on how germane the use of the funds is to the nature of the organization.[157]

The payment of union fees by non-union members is analogous to the payment of taxes by citizens.[158] Taxpayers cannot prevent the government from using ordinary expenditures to express the government's position, especially in regards to the implementation of government programs and policies.[159] Government must be allowed to convey ideas to the public; elected representatives make up the government and, if the public is dissatisfied with that representation, the proper recourse is the ballot box.[160] When the government seeks permission through an election to do something, the will of the people is often unclear, and the same justification does not exist.[161]

A court would also need to look at the "germaneness" of the expenditure.[162] Courts have allowed fees to be compelled and used for speech if they are germane to the function of the organization, and therefore, a court would need to examine the government's action to determine if the speech being compelled

of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." *Id.* at 715. *But see* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 566-67 (2005) (holding compelled support of government speech constitutional).

154. *See Curious Relationship*, *supra* note 15, at 2422 (noting First Amendment requires scrutiny in such cases).

155. *See id.* at 2418-20; *see also, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234-36 (1977); *Wooley*, 430 U.S. at 717; W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

156. *See Abood*, 431 U.S. at 234 (holding use of fees for political advocacy unconstitutional).

157. *See id.* at 236. The Court limited the constitutional use of fees by stating a use is unconstitutional when it is not germane to the union's duties as a collective bargaining representative. *Id.*; *see also* Keller v. State Bar of Cal., 496 U.S. 1, 14 (1990) (holding unconstitutional funding activities "of an ideological nature which fall outside of [their] areas of activity").

158. *See Abood*, 431 U.S. at 228 (addressing unconstitutional compulsion of union fee for political use); *see also Curious Relationship*, *supra* note 15 (discussing government speech doctrine).

159. *See* Kidwell v. City of Union, 462 F.3d 620, 625 (6th Cir. 2006). The government would not function because the public could prevent the government from ever expressing an opinion. *See id.* "[I]t is imperative that government be free to make unpopular decisions without opening the public fisc [sic] to opposing views." *Id.* "The government, as a general rule, may support valid programs and policies by taxes or other exactions binding or protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to defend its own policies." *Id.* (quoting Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2000)).

160. *See supra* note 12 and accompanying text (discussing electoral justification).

161. *See* Greene, *supra* note 14 (addressing place of government speech doctrine on contested issues). If government-without authorization-essentially compels people to speak, the government is seeking authorization through the election. *See id.*

162. *See supra* note 157 and accompanying text (detailing germane requirement).

is germane to the organization.[163]

If this test were applied to the recent cases discussed above, the decisions would likely turn on the issue of "germaneness."[164] In *Sutliffe*, the town and school district were compelling speech by using taxpayer money to advocate for approval of budget and spending through town newsletters, mailings, and the town website, but the Court would likely conclude that the activities were germane to the "organization" because it is the job of town government and school districts to form budgets and propose spending.[165] In *Page*, the Court would need to determine if spending for opposition to a reform act is "germane" to the role of the school board.[166]

Finally, in *Kidwell*, the city used public funds to promote proposed taxes and oppose citizen initiatives through newsletters and ads in the local paper.[167] The Sixth Circuit concluded, "[t]he issues on which the city advocated were thus germane to the mechanics of its function."[168]

There are serious problems with approaching government speech like compelled speech.[169] The "germaneness" of the activity in relation to the government unit is difficult to determine, especially because, unlike private organizations, the functions of government are broadly defined, and thus the compelled speech approach would still allow governmental units to broadly speak on issues pertaining to their function, and would provide no greater protection from governmental interference in electoral issues than the current approach of leaving the validity of government's speech to be decided at the ballot box.[170]

3. Creating a Forum, Not Just For Government

The Court could also employ a "limited public forum approach."[171] This construct allows the government to advocate for a position while only requiring that it provide minimal access for opposing views, meaning the government

163. *See supra* note 157 and accompanying text (discussing germane requirement). *But see* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 559 (2005) (addressing compelled subsidy in government context). "[C]ompelled support of a private association is fundamentally different from compelled support of government. Compelled support of government . . . is of course perfectly constitutional . . . ." *Id.* (internal citations and internal quotation marks omitted).

164. *See supra* notes 124-130 and accompanying text (discussing recent government speech cases).

165. 584 F.3d 314 (1st Cir. 2009).

166. Page v. Lexington Cnty. Sch. Dist. One, 531 F.3d 275, 278-279 (4th Cir. 2008). It is arguable that the reform act, entitled "Put Parents in Charge," did not deal directly with the running of the schools, so it was not germane to the school board's function. *Id.*; *see supra* note 157 and accompanying text (discussing germane requirement).

167. 462 F.3d 620, 622-26 (6th Cir. 2006) (describing factual background).

168. *Id.* at 626 (distinguishing cases where actions not germane).

169. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 559 (2005) (explaining compelled funding of government speech does not implicate First Amendment concerns).

170. *See supra* part II.C (discussing compelled speech analysis).

171. *See supra* part II.C (discussing "limited public forum" analysis).

could still impose time, manner, and place restrictions.[172] There should be a policy of viewpoint neutrality when it comes to questions being presented to the public, because government funded advocacy for or against questions voted on by the public raises unique constitutional issues.[173]

If this test were applied to the recent cases discussed above, the result would likely be different.[174] In *Sutliffe*, the court rejected the "limited public forum" approach; the town included a link on its website to an outside source, prompting the majority to argue that the town website would be flooded if the government's statements created a public forum. [175] The dissent, however, pointed out this was not the case and argued that the court should instead use the public forum analysis.[176]

Page also addressed the issue of forum creation, where the Fourth Circuit determined that a town did not create a forum by expressing its own views while advocating against a program on a website, through email, and by distributing materials.[177] Despite having a remedy at the ballot box, as the court suggested, these activities constituted an infringement on the First Amendment rights of others because the government chose to put its viewpoint on these channels of communication, and thus created a forum.[178]

Finally in *Kidwell*, a city hung banners, mailed leaflets, advertised in newspapers, and used the town's website to support the council's position.[179] The Sixth Circuit determined that a newsletter is likely not a forum, nor does the use of the town treasury create a forum.[180] The court further argued that if the city's actions created a public forum, the town could not speak for fear of having to open its treasury to the public; however this need not be the case.[181] A town can speak but not advocate, as advocating is defined as expressing a

172. *See* Dolan, *supra* note 39, at 72 (discussing limited public forum implementation); *see also supra* part II.C (analyzing "limited public forum" analysis).

173. *See* Kidwell v. City of Union, 462 F.3d 620, 625 (6th Cir. 2006); *see also* Mountain States Legal Found. v. Denver Sch. Dist. No. 1, 459 F. Supp. 357, 360 (D. Colo. 1978); Stanson v. Mott, 551 P.2d 1, 9 (Cal. 1976); *supra* note 55-57 and accompanying text (addressing importance of government neutral elections).

174. *See supra* notes 124-130 and accompanying text (discussing recent government speech cases).

175. 584 F.3d 314 (1st Cir. 2009) (illustrating lack of uniformity in application of limited public forum analysis).

176. *Id.* at 335-40 (discussing disagreement with majority).

177. *See generally* Page v. Lexington Cnty. Sch. Dist. One, 531 F.3d 275 (4th Cir. 2008). There is no evidence the School District made the decision to incorporate or attach and document based on a third-party request. *See* Page v. Lexington Cnty. Sch. Dist. One, C.A. No. 3:06-249-CMC, 2007 WL 2123784, at *10 (D. S.C. July 20, 2007) (describing rationale underlying holding).

178. *See Page*, 531 F.3d at 285 (holding no forum established by majority). "In sum, we conclude that the School District sufficiently controlled this channel of communication so that its speech remained government speech and it did not create a limited public forum by including links to other websites." *Id.*

179. 462 F.3d 620, 624 (6th Cir. 2006).

180. *See id.* Despite the court's argument that the city "has not opened [the] treasury to the public by making any town funds available to private individuals or groups," in essence what the city did was advocate a particular position on a contested issue. *Id.*

181. *See id.* (explaining town treasury not public forum).

viewpoint.[182] The government is not allowed to justify viewpoint discrimination simply by citing economic factors; economic scarcity is not a compelling justification.[183] If a town wishes to advocate, it must deal with the consequences of opening a forum.[184]

IV. CONCLUSION

Information and advocacy confront citizens daily. Technological changes provide ever-increasing opportunities to gain people's attention. Additionally, courts' increasing reliance on the government speech doctrine provides increased opportunity for the government to circumvent the strictures of the First Amendment. Democracy can effectively limit abuses of government speech, but only so long as the electoral process itself is not influenced by government speech. Protecting government speech that interferes with the electoral process undermines the power of democracy to provide a check on government abuses. Instead of relying solely on the democratic process to curb abuses, the courts should establish definite limits on government speech to prevent government domination of the marketplace of ideas.

Alyssa Graham

182. *See id.*

183. Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 835 (1995). "The government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity." *Id.* (holding scarcity not justification for viewpoint discrimination).

184. *Id.* at 829 (explaining consequence of government speech).