

GOVERNMENT SPEECH AND THE CONSTITUTION: THE LIMITS OF OFFICIAL PARTISANSHIP

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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. I am reminded of W.C. Fields' admonition: "Never give a sucker an even break."

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INTRODUCTION

Perhaps the most sacred precept of the American credenda is found in the expression "sovereignty of the people." The notion that public officials possess only the appearance of sovereignty while genuine authority remains in the hands of the governed is at the heart of our republican form of government.¹ The idea that democratic government ultimately rests upon the leadership and support of genuine citizen opinion is fundamentally expressed in the strict constitutional guarantees of freedom of speech and freedom of the press.² The threat to a democratic structure of power posed by the ability of

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**115 CONG. REC. 36, 344 (1969).

¹ On the theory of democratic government, Yves R. Simon states: that the men in power are delegated by the people, that they are given definite missions by the people, and that in the fulfillment of their missions they remain strictly subordinated to the people that delegated them. Thus the governing person is a leader entirely under the control of those whom he leads. Authority belongs not to the leaders but to the led. Or perhaps it should be said that real leadership, the one which is unseparable from authority, belongs not to the government but to the governed.

Y. SIMON, *PHILOSOPHY OF DEMOCRATIC GOVERNMENT* 146 (6th ed. 1966) [hereinafter cited as SIMON]. On the process of amending the powers of representative government, James Madison wrote:

As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived; it seems strictly consonant to the republican theory, to recur to the same original authority, . . . whenever it may be necessary to enlarge, diminish, or new-model the powers of government.

THE FEDERALIST NO. 49, at 339 (J. Madison) (J. Cook ed. 1961).

² With respect to the first amendment, the United States Supreme Court has stated, "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 n.31 (1978) ("Government is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves."); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (self-government suffers when those in power suppress competing views on public issues "from diverse and antagonistic sources").

government to impede or influence the formation and expression of citizen opinion through official action was a principal concern of our country's founders.³

In this respect, a characteristic distinguishing democratic from totalitarian government is that while a democracy attempts to facilitate and ascertain public opinion and establish policy in accordance therewith,⁴ an autocracy attempts to engineer public opinion in support of its decisions.⁵ Accordingly,

To link oneself with the masses, one must act in accordance with the needs and wishes of the masses. All work done for the masses must start from their needs and not from the desire of any individual, however, well-intentioned. It often happens that objectively the masses need a certain change, but subjectively they are not yet conscious of the need, not yet willing or determined to make the change. In such cases, we should wait patiently. We should not make the change until *through our work*, most of the masses have become conscious of the need and are willing and determined to carry it out.

MAO TSE-TUNG'S QUOTATIONS: THE RED GUARD'S HANDBOOK (1967) (emphasis added), cited in Lewis, *The High Court: Final . . . But Fallible*, 19 CASE W. RES. L. REV. 528, 569 n.173 (1968).

³ See THE FEDERALIST NOS. 52, 53 (J. Madison). In 1801, President Jefferson issued the following order:

The President of the United States has seen with dissatisfaction officers of the General Government taking on various occasions active parts in elections of the public functionaries, whether of the General or of the State Governments. Freedom of elections being essential to the mutual independence of governments and of the different branches of the same government, so vitally cherished by most of our constitutions, it is deemed improper for officers depending on the Executive of the Union to attempt to control or influence the free exercise of the elective right. This I am instructed, therefore, to notify to all officers within my Department holding their appointments under the authority of the President directly, and to desire them to notify to all subordinate to them. The right of any officer to give his vote at elections as a qualified citizen is not meant to be restrained, nor, however, given, shall it have any effect to his prejudice; but it is expected that he will not attempt to influence the votes of others nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it.

10 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 98-99 (1899).

⁴ See *Gould v. Grubb*, 14 Cal. 3d 661, 677, 536 P.2d 1337, 1348, 122 Cal. Rptr. 377, 388 (1975). Observing that "[a] fundamental goal of a democratic society is to attain the free and pure expression of the voters' choice of candidates," the California court concluded that "our state and federal Constitutions mandate that the government must, if possible, avoid any feature that might adulterate or, indeed, frustrate, that free and pure choice." See generally Rourke, *How Much Should The Government Tell?* 44 SATURDAY REVIEW 17 (1961).

⁵ The totalitarian "father knows best" doctrine is practiced in both Russia and China. Professor Berman writes:

The implication of the Soviet concept of . . . [law] is that people in general do not know their rights and duties but must be taught them, and that these rights and duties are not something which they possess, but rather are instruments used by the state to inculcate the legal and social psychology which the leaders believe to be proper.

Berman, *Soviet Justice and Soviet Tyranny*, 55 COLUM. L. REV. 795 (1955), cited in Lewis, *The High Court: Final . . . But Fallible*, 19 CASE W. RES. L. REV. 528, 569-70 (1968).

when the people are sovereign, Paul Louis Courier once wrote, government is like a coach driver hired and paid by those whom he drives. The coach driver leads, but only where his patrons want to go and by the ways of their own choice.⁶ Since the horse and carriage days of Courier's time, modern government has become increasingly administrative, however, and the responsibilities of public officials have greatly expanded.⁷ It is now common legislative practice to delegate to a government agency the responsibility to achieve a broad policy objective with the precise methods of implementation left to the agency's discretion.⁸ Government agencies increasingly interpret this delegation of responsibility to include the power to engage in political campaigns on issues related to an agency's delegated task.⁹ The government's use of public resources to manufacture citizen support for a partisan viewpoint on political issues raises serious questions concerning the integrity of the democratic process. It is a truism that, if a governing structure based upon widespread genuine citizen opinions is to survive as a viable democracy, it must place legal restraints on the government's ability to manipulate the formulation and expression of that opinion.

Our legal system in the past has responded to the problem of government officials exploiting their authority for partisan ends largely by invalidating the negative restraint of official censorship. Although more subtle than censorship, official partisanship thorough the affirmative act of disseminating propaganda in support of a partisan viewpoint may pose as great or greater danger to political rights of free expression.¹⁰ The affirmative use of official

⁶ Paul Lewis Courier, *Lettres an re'dacteur du Censeur*, Lettre X, 10, Oeuvres 62-63 (Paris: Firmin Didot, 1845), cited in SIMON, *supra* note 1, at 147-48. In this regard, it is interesting to note that just five years after adoption of the Constitution, the Supreme Court of the United States rejected the idea of the United States government or any of its officials as "sovereign." The people of the United States, as Mr. Justice Wilson noted "have reserved the supreme power in their own hands; and on that supreme power made the State dependent, instead of being sovereign. . . ." *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 457 (1793).

⁷ On this point Robert Lorch writes:

Among the revolutions of our time is an administrative revolution. Administrators are no longer merely administrators in the old sense of the word. They are now heavily involved in doing what the Fathers of the Republic surely would have called legislative and judicial. Anyone who still believes that law-making is mostly done by legislatures or that controversies are mostly settled in the courts, is far behind the times.

R. LORCH, *DEMOCRATIC PROCESS AND ADMINISTRATIVE LAW* 9 (1973).

⁸ See Miller, *The Public Interest Undefined*, 10 J. PUB. L. 184 (1962). See generally J. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* (1978); D. WALDO, *THE ADMINISTRATIVE STATE* (1957).

⁹ See, e.g., *Mountain States Legal Foundation v. Denver School Dist. 1*, 459 F. Supp. 357 (D. Colo. 1978); *Stanson v. Mott*, 17 Cal. 3d 206, 551 P.2d 1, 130 Cal. Rptr. 697 (1976); *Miller v. Miller*, 87 Cal. App. 3d 762, 151 Cal. Rptr. 197 (1978); *Krantzler v. Board of County Comm'rs*, 354 So. 2d 126 (Fla. 1978); *Anderson v. City of Boston*, 78 Mass. Adv. Sh. 2297, 380 N.E.2d 628 (1978); *Stern v. Kramarsky*, 84 Misc. 2d 447, 375 N.Y.S.2d 235 (Sup. Ct. 1975).

¹⁰ See T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 698-99 (Vintage ed. 1971) [hereinafter cited as EMERSON]. As Professor Emerson has observed, [t]he system of freedom of expression is normally viewed from the

authority and public resources for partisan ends surely deserves closer scrutiny by the legal community.¹¹

This article will analyze the statutory and constitutional restraints on official partisanship.¹² In view of increasing citizen support for direct voter participation in the resolution of political questions, particular attention will be given to government attempts to influence the outcome of referenda and elections of a similar character. The United States Supreme Court has yet to rule on many of the questions raised by official partisanship, but state case law and several relevant federal decisions provide some guidance for an analysis of the constitutional and statutory issues involved. Part I of the article sets the context for later discussion; focusing on examples of official partisanship it attempts to define the nature of the problem. Part II examines the adequacy and constitutionality of existing statutory restraints and suggests the need for further legislation. Part III examines constitutional restraints on official partisanship under the first amendment and the guaranty clause. Based on the statutory and constitutional restraints, it will be suggested that official partisanship is not speech protected by the first amendment, and, in fact, that amendment rights of the citizens themselves militate against permitting unrestrained official partisanship.

I. THE CONTEXT

The mechanics of official partisanship are limited only by government's imagination and the tools at hand. The following scenario illustrates some of the possibilities for such government action. The legislature of a particular state calls a referendum to allow its citizens to speak directly on a proposed amendment to the United States Constitution. The proposed amendment would establish a ceiling on federal spending. The President of the United States, who believes that the amendment is not in the country's best interests, issues a statement directing the heads of all federal departments and agencies

laissez-faire perspective. Attention is focused upon the rights of the private participants in the system and upon the obligation of the government to refrain from interference with, to protect, to eliminate distortions in, and to affirmatively promote the system. The reality is, of course, that the government itself participates in the system, both as communicator and listener. This government participation is active, varied and extensive.

Id. at 697.

¹¹ As Professor Chaffee points out, government as a party to communications "is a subject hitherto neglected." 2 Z. CHAFFEE JR., *GOVERNMENT AND MASS COMMUNICATIONS* 723 (1947). Professor Emerson similarly states: "Though government participation in a system of freedom of expression is of great and growing significance very little attention has been paid to it. No comprehensive effort to appraise the government role or to formulate principles of control has been undertaken." EMERSON, *supra* note 10, at 698.

¹² "Official partisanship," as used herein, is defined as the use of public resources by government officials to promote an exclusively partisan viewpoint on structured political issues. In the context of this definition of official partisanship, the phrase "structured political issues" refers to political questions whose resolution is the subject of a pending authoritative political process, including referendum type elections, constitutional amendments, and legislative law making.

"to make the most of public appearance opportunities to demonstrate the administration's position on this amendment" and "to include in public speeches, where appropriate, language emphasizing the importance of defeating the proposed amendment."¹³ A regional director of a federal agency, whose office is located within the state, writes a memo asking each supervisor and manager in the region to comply with the President's directive regardless of personal preference or political opinion.¹⁴ The federal bureaucracy goes into high gear. One federal agency prints and sends into the state, at taxpayer expense, over 78,000 propaganda pamphlets entitled, *Shedding Light on Facts About Federal Spending*.¹⁵ A second federal agency grants thousands of taxpayer dollars to a private organization to urge defeat of the amendment.¹⁶ A third federal agency prints and distributes, at public expense, thousands of copies of a booklet entitled, *Teachers Guide for Government Spending*.¹⁷ The booklets tell school children what will happen to Maxwell the Mouse if a ceiling is imposed on government spending.

At the state level, public officials, who believe that the amendment should be defeated, gear up for a campaign of their own. One state agency prints and distributes, at public expense, an official pamphlet which urges citizens to "VOTE NO" on the proposed amendment,¹⁸ while a second spends taxpayer dollars to finance anti-amendment posters, bumper-stickers, an advertising float, and newspaper, radio and television advertising.¹⁹ A third state agency hires professionals to lobby for the amendment's defeat.²⁰ A fourth uses its facilities for rallies and campaign meetings.²¹ A fifth state agency uses it

¹³ See text and note at note 25 *infra*.

¹⁴ See text and note at note 26 *infra*.

¹⁵ See text and notes at notes 27-31 *infra*.

¹⁶ See text and note at note 32 *infra*.

¹⁷ While the merits of the controversial SST aircraft were being debated, the U.S. Department of Transportation printed and distributed 50,000 copies of a seventy-three page *Teachers Guide for SST*. D. WISE, *THE POLITICS OF LYING* 209 (1973) [hereinafter cited as WISE]. The booklet clearly presented a biased view of the aircraft. One story in the teacher's guide tells of how "Maxwell the Mouse" finds a house soundproofed from jet noises. *Id.* The booklet encouraged students to "play airport" and to test themselves as to how they would "write the advertisements for the first flight on the SST." *Id.*

¹⁸ In New Jersey, shortly before citizens were to vote on a local school bond issue, the local Board of Education printed an 18 page propaganda booklet urging citizens to "vote yes" on the issue. *Citizens to Protect Pub. Funds v. Board of Educ.* 13 N.J. 172, 175, 98 A.2d 673, 674 (1953).

¹⁹ In Los Angeles shortly before citizens were to vote on a bond issue to finance extension of their public utility service, the Board of Public Service Commissioners, which managed the utility, authorized the expenditure of utility revenues to finance a campaign to generate voter support for the proposed bond issue. *Mines v. Del Valle*, 201 Cal. 273, 257 P. 530 (1927). Public revenues were used to purchase bumper stickers, posters, advertising floats and newspaper advertising to propagandize in favor of the bond issue. *Id.* at 276, 257 P. at 532. See *Porter v. Tiffany*, 11 Or. App. 542, 502 P.2d 1385 (1972).

²⁰ See *Sims v. Moeur*, 41 Ariz. 486, 19 P.2d 679 (1933).

²¹ In 1978, shortly before citizens in Colorado were to vote on an amendment to that state's constitution which would impose restrictions on the expenditure of public funds, the Denver Board of Education passed a resolution officially opposing the amendment and specifically approving the use of school "equipment, materials,

facilities to distribute private campaign materials which urge defeat of the amendment.²² The public schools compel children to listen to the radio broadcasts of opponents of the amendment.²³ The largest city in the state donates over one hundred thousand dollars to a statewide Mayor's Association, hires two political consulting firms, and establishes an "Office of Public Information on Government Spending" in a political campaign to defeat the amendment.²⁴ The scenario outlined above is not an Orwellian fantasy. Every government action mentioned has occurred in different contexts. For example, just such a directive by the President²⁵ and memo by the regional director of a federal agency²⁶ were issued in support of the Equal Rights Amendment.

A second example occurred in June of 1976, shortly before Californians voted on a statewide referendum on nuclear power plants, when the United States Energy Research and Development Administration (ERDA) printed and distributed in California over 78,000 pamphlets *Shedding Light on Facts About Nuclear Energy*.²⁷ These pamphlets, described as "religious leaflets,"²⁸ were designed to influence voter opinion on the safety of nuclear plants. A congressionally requested investigation by the General Accounting Office (GAO) concluded that the ERDA pamphlets were "propaganda."²⁹ The GAO found that the pamphlets "did not discuss the issues in sufficient depth to provide an objective statement on the current state of nuclear power."³⁰ Further, the GAO found that ERDA had "presented certain facts and omitted others in a way which resulted in a misleading document."³¹

A third example took place in 1975, shortly before Kentucky citizens voted in a statewide referendum, and the United States Law Enforcement Assistance Administration funneled a federal grant of over one hundred thousand dollars to a private organization known as Kentucky Citizens for Judicial Improvement, Inc.³² This organization employed the grant to pro-

supplies, facilities, funds, and the employees" to urge defeat of the amendment. *Mountain States Legal Foundation v. Denver School Dist. #1*, 459 F. Supp. 357, 358 (D. Colo. 1978).

²² See *Stern v. Kramarsky*, 84 Misc. 2d 447, 375 N.Y.S.2d 235 (Sup. Ct. 1975).

²³ Among other actions, a local Board of Education in New Jersey compelled school children to listen to a radio broadcast over a public address system which discussed the merits of a proposed school bond. *Citizens to Protect Pub. Funds v. Board of Educ.*, 13 N.J. 172, 176, 98 A.2d 673, 674-75 (1953).

²⁴ See *Anderson v. City of Boston*, 78 Mass. Adv. Sh. 2297, 380 N.E.2d 628 (1978).

²⁵ ERA, *The Bureaucrats Exert Pressure for Endorsement*, *The Cincinnati Enquirer*, Feb. 5, 1979 at A-10.

²⁶ Bureau of Reclamation Lower Colorado Regional Office, U.S. Department of the Interior, Memorandum LC-515 970.4 (Oct. 23, 1978).

²⁷ U.S. ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION, *SHEDDING LIGHT ON FACTS ABOUT NUCLEAR ENERGY* (1976), reproduced in GENERAL ACCOUNTING OFFICE REPORT NO. B-130961 (Sept. 30, 1976).

²⁸ *Id.* at 26.

²⁹ *Id.* at iv.

³⁰ *Id.* at 35.

³¹ *Id.*

³² U.S. LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, GRANT NO. 74-DF-04-0014. The alleged purpose of the grant was for the "education of the citizenry" about "judicial modernization." *Id.*

note the referendum of an amendment to the Kentucky Constitution altering the Kentucky judicial system. These are but three acts of official partisanship upon which the scenario is based; others are merely noted. All are now a matter of record.

Every governing regime is likely to engage in some degree of official partisanship. In fact, it would be almost impossible to exclude official partisanship from any practical governing arrangement, even a representative democracy. Under our constitutional system some forms of official partisanship are tolerated. For example, elected officials often endorse a particular viewpoint on controversial questions during their campaign for re-election and in support of the election of other members of their political party. But voters in the experienced democracy quickly learn to discount many political statements made in the context of an election. Many voters simply assume that the official seeking re-election will view the past with pride and point to the future with confidence while the candidate out of office will deplore the past and view the future with alarm. This is the routine drama of representative politics, and though the incumbent is at an advantage as a result of holding office, it is difficult to imagine a practical governing arrangement that would eliminate this advantage. Moreover, so long as elected officials limit their use of public resources in this regard to the publicly financed amenities of elected office, such as office space and a telephone, this form of official partisanship is acceptable as inherent in the nature of political office. More importantly this limited form of official partisanship by elected officials is acceptable because it poses little threat to the integrity of the democratic process, if the amenities of elected office are allocated on a non-partisan basis and are limited to the minimum necessary for effective operation of the representative system. Once elected officials reach beyond the amenities of elected office, however, or use public resources to promote a partisan view on structured political questions, official partisanship is at odds with the democratic notion that public policy rests upon genuine citizen opinion.

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

It is essential, and at the same time difficult, to control public agencies' practice of official partisanship because of the frequent delegation of authority to such agencies to perform a variety of informational functions. Many government agencies are authorized to investigate the nature of a public problem and to recommend alternative solutions or to adopt and implement regulatory programs. Most public agencies are required to inform the public of their policies, rules, procedures and decisions.³³ Other agencies are dele-

gated authority to warn citizens of potential dangers to public health and safety or to disseminate information to assist private research and business operations.³⁴ These information and communication activities are not only consistent with democratic theory but are necessary to the effective operation of a democratic system.³⁵

There are instances, therefore, in which government funds are used lawfully to express views on matters of importance, where taxpayers may disagree with those views.³⁶ With respect to structured political questions, however, the law must draw a line between publicly financed government communications informing the public of the internal workings of government, such as hearings, debates, rules and decisions, and publicly financed government campaigns which interfere with the external political process by attempting to affect the outcome of citizen opinion and elections.³⁷ If the democratic

³³ See 5 U.S.C. § 552 (1976).

³⁴ It should be pointed out that in recent years the governmental "information" function increasingly involves public relations communications whose purpose is merely self-serving agency image-making. For example, a 1971 study by the Office of Management and Budget found that NASA with a 12.2 million public relations budget and a staff of 359 ranked only third among all federal agencies in accountable public relations expenditures. Wise, *supra* note 17, at 209. Like most federal agencies, NASA has undertaken, and continues, a massive effort to protect what some citizens believe is an inflated and wasteful budget. NASA promotes its own worth in films, booklets, and color lithographs produced and circulated at taxpayer expense. NASA's August 1976 catalog of "Educational Publications" lists, for example a pamphlet entitled *New Horizons* which, according to NASA, highlights "NASA's contributions to the solution of pressing national problems." Also listed is *Skylab and the Sun*, a booklet, according to NASA, describing "what mankind stands to gain from the skylab experience."

³⁵ Professor Emerson states:

Participation by the government in the system of expression is an essential feature of any democratic society. It enables the government to inform, explain, and persuade—measures especially crucial in a society that attempts to govern itself with a minimum use of force. Government participation also greatly enriches the system; it provides facts, ideas, and expertise not available from other sources. In short, government expression is a necessary and healthy part of the system.

EMERSON, *supra* note 10, at 698.

³⁶ See text at notes 241-42 *infra*. While the focus of this article is government speech relating to structured political questions, the general development and implementation of sophisticated propaganda techniques by government outside of the traditional educational context is itself a subject which merits closer attention. For example, an Office of Management and Budget study in 1971 disclosed that HEW had a public relations budget of \$27.4 million and a staff of 737. Wise, *supra* note 17, at 210. HEW's recent propaganda efforts have been largely directed toward America's children. One such undertaking is its 1976 "integrated children's television series for minority and non-minority children." U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, DESCRIPTIONS OF CHILDREN'S TELEVISION SERIES 1 (Oct. 1976) (produced under the Emergency School Aid Act). This series was produced, in HEW's words, "with a home viewing audience in mind." *Id.* One television series entitled *Carrascolendas* is targeted for children 3 through 9 years of age and stresses, in HEW's words, "affective (emotional) and attitudinal concerns." *Id.* Regardless of whether one agrees with the goals of these campaigns, the implications of such efforts by Washington bureaucrats to shape the "emotional and attitudinal" makeup of America's children through home television viewing should give one pause for concern.

³⁷ Admittedly, it is difficult to draw a precise line between those government communications whose primary purpose is to inform and those government actions

process is to operate with a minimum of distortion, government information and communication functions in connection with structured political questions must be limited by law to those activities necessary for the effective operation of the process.

In summary, the use of public resources by government officials, especially those officials occupying non-political agency positions, to influence the development or expression of citizen opinion upon structured political questions runs counter to fundamental democratic precepts. As we have seen, such official partisanship is very real. The remainder of this article explores the existing legal restraints upon the unfettered exercise of political partisanship by government officials, beginning with the statutory restraints and ending with the constitutional restraints.

II. STATUTORY RESTRAINTS

Courts traditionally are inclined to decide cases whenever possible by statutory construction rather than by ruling on constitutional issues.³⁸ For the most part, in cases involving official partisanship, courts have followed this tradition of avoiding unnecessary constitutional rulings by basing their decisions on the statutory authority of the government agency involved.³⁹ This section discusses existing statutory restraints on public agencies and their employees with respect to official partisanship, and examines the adequacy and constitutionality of these restraints.

A. Lack of Delegated Authority

Citizens have successfully challenged acts of official partisanship with the argument that the delegation of authority in the agency's enabling statute acts as a statutory restraint upon the agency's use of public monies.⁴⁰ These challenges are based upon two fundamental legal principles. The first is the tenet of public law that a government agency is a creature of statute and, as such, may exercise only those powers expressly conferred or necessarily implied in a delegation of authority.⁴¹ The second principle supporting these challenges is that government officials hold public money in trust to be spent only for

whose primary purpose is to persuade. Statements circulated by the government for whatever reason are likely to have consequences upon citizen opinion formation. In many cases, however, the line between information and propaganda will be clear, such as when a public agency urges citizens to "vote no" on an issue, or when the information disseminated is misleading in a partisan manner. Drawing the line in close cases is no more difficult than making the decisions required in so many other areas of law where careful consideration must be given to the factual context of particular events. See text at notes 68-74 *infra*.

³⁸ See *United States v. Thirty-seven Photographs*, 402 U.S. 363 (1971) wherein the Supreme Court states: "it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." *Id.* at 369.

³⁹ See, e.g., *Mountain States Legal Foundation v. Denver School Dist. #1*, 459 F. Supp. 357 (D. Colo. 1978); *Stanson v. Mott*, 17 Cal. 3d 206, 551 P.2d 1, 130 Cal. Rptr. 697 (1976).

⁴⁰ See, e.g., *Miller v. Miller*, 87 Cal. App. 3d 762, 151 Cal. Rptr. 197 (1978).

⁴¹ See *Soriano v. United States*, 494 F.2d 681, 683 (9th Cir. 1974).

purposes authorized by law.⁴² In this regard, the law which could authorize such expenditures is the delegation of authority in the agency's enabling statute. Under these two principles, courts have invalidated acts of official partisanship as unauthorized and thereby illegal when engaged in by government agencies,⁴³ local boards of education,⁴⁴ municipalities,⁴⁵ and government corporations.⁴⁶ Typically, public agencies have defended such challenges with the arguments that expenditures for official partisanship are authorized as an inherent power of the agency to promote the public interest on issues related to the agency's delegated task⁴⁷ or as a power necessarily implied in an express grant to the agency of informational authority.⁴⁸ Both of these arguments have met with little success in the courts, which uniformly hold that the authority to promote a partisan viewpoint on a structured political question is created only by an explicit grant of such authority to the agency.

⁴² See, e.g., *Stern v. Kramarksy*, 84 Misc. 2d 447, 452, 375 N.Y.S.2d 235, 239 (Sup. Ct. 1975); *Porter v. Tiffany*, 11 Or. App. 542, 502 P.2d 2385 (1972).

⁴³ See, e.g., *Sims v. Moeur*, 41 Ariz. 486, 19 P.2d 679 (1933).

⁴⁴ See, e.g., *Mountain States Legal Foundation v. Denver School Dist. #1*, 459 F. Supp. 357 (D. Colo. 1978).

⁴⁵ See, e.g., *Anderson v. City of Boston*, 1978 Mass. Adv. Sh. 2297, 38 N.E.2d 628 (1978).

⁴⁶ See, e.g., *Porter v. Tiffany*, 11 Or. App. 542, 502 P.2d 1385 (1972).

⁴⁷ See, e.g., *Sims v. Moeur*, 41 Ariz. 486, 19 P.2d 679 (1933). In *Sims* the state workmen's compensation commission spent monies from the workers' compensation fund in a campaign to defeat a voter referendum measure which, if approved, would have abolished the commission. Specifically, the commission had hired lobbyists to campaign against the referendum and had financed voter "propaganda" circulars and letters, as well as newspaper and radio advertising. *Id.* at 490, 19 P.2d at 680-81. Rejecting the commission's argument that it possessed inherent authority to make such expenditures in the public interest, the Arizona Supreme Court reasoned that the right to spend public funds for political purposes "[i]f that right exists at all, . . . must be found in the statutes defining the powers and duties of the commission in relation to the compensation fund." *Id.* at 493, 19 P.2d at 682. The court ruled that the relation of the commission to the compensation fund was "one of peculiar confidence and trust" and, thus, held that the fund could not be used for any purpose not "expressed or necessarily implied in the act creating the fund." *Id.* at 496, 19 P.2d at 682.

⁴⁸ See, e.g., *Citizens to Protect Pub. Funds v. Board of Educ.*, 13 N.J. 172, 179-80, 98 A.2d 673, 676-77 (1953). In what may be earliest case on point, the Supreme Court of Washington in 1916 affirmed in *Port of Seattle v. Superior Court*, 93 Wash. 267, 160 P. 755 (1916) a lower court injunction which prohibited the Port of Seattle, a government corporation, from spending public funds to defeat a referendum measure affecting that corporation. The referendum proposed increasing the board of port commissioners from three to seven members and limiting the total bonded indebtedness of the port. No express authority existed in the corporation's enabling statute to justify the expenditures, but the corporation claimed it possessed implied authority to promote the "best interests" of the corporation, including the expenditure of its funds to defeat a referendum measure affecting the powers of the corporation. Rejecting this argument, the Washington court held that regardless of what the port commissioners might determine to be in the best interests of the business of the port, such a public corporation, as a creature of the state has no inherent or implied authority to spend public money for "political purposes." *Id.* at 273, 160 P. at 757. Such authority, the court concluded, "is limited to the powers expressly granted or necessarily inferred from express grants." *Id.*

An early decision often cited, is the 1927 California case, *Mines v. Del Valle*.⁴⁹ The Los Angeles board of public service commissioners, the governing body of a municipally owned public utility, had used the utility's revenues to promote the passage of a bond issue aimed at raising funds for expanding its electrical generating system. To persuade residents of the city to vote in favor of the bond issue, the board expended public revenues to print and distribute cards, labels, circulars, handbills, banners and automobile windshield stickers, and to construct a float, as well as purchase newspaper advertising. The commissioners defended their actions on the basis of their broad authority "[t]o construct, operate, maintain and extend . . . electric plants, works, systems and equipments."⁵⁰ The Supreme Court of California rejected this argument and held the campaign expenditures improper. The court emphasized that the opponents of the bond issue had as much right to the public funds as did the proponents.⁵¹ The California court ruled that the commissioners' partisan expenditure of the funds "cannot be sustained unless the power . . . is given to [the] board in clear and unmistakable language."⁵² Since the commissioners' authority to "extend"⁵³ the municipal electric service did not meet this rigorous standard of specificity, the court held the expenditures improper.

Perhaps the leading case on point is the 1953 decision of the New Jersey Supreme Court in *Citizens to Protect Public Funds v. Board of Education*.⁵⁴ In that case, the New Jersey court considered the legality of a school board's expenditure of public funds for the publication of an 18-page booklet concerning a school board building program which was the subject of an upcoming bond election. Most of the booklet contained factual information as to the need for the proposed school facilities and the cost of the proposed project, but three of the booklet's pages contained the simple exhortation "Vote Yes," "Vote Yes," and another page warned that dire consequences would result "if You Don't Vote Yes."⁵⁵ Justice Brennan, writing for the New Jersey Supreme Court, stated, "the board made use of public funds to advocate one side only of the controversial question without affording the dissenters the opportunity by means of that financed medium to present their side, and thus imperiled the propriety of the entire expenditure."⁵⁶ Reasoning that "[t]he public funds entrusted to the board belong equally to the proponents and opponents of the proposition, and the use of the funds to finance not the presentation of facts merely but also arguments to persuade the voters that only one side has merit, gives the dissenters just cause for complaint."⁵⁷ Justice Brennan concluded that such an expenditure was not within the implied

⁴⁹ 201 Cal. 273, 257 P. 530 (1927).

⁵⁰ *Id.* at 281, 257 P. at 535.

⁵¹ *Id.* at 287, 257 P. at 537.

⁵² *Id.*

⁵³ *Id.* at 282, 257 P. at 535.

⁵⁴ 13 N.J. 172, 98 A.2d 673 (1953).

⁵⁵ *Id.* at 180, 98 A.2d at 677.

⁵⁶ *Id.* at 180-81, 98 A.2d at 677.

⁵⁷ *Id.* at 181, 98 A.2d at 677.

power of the board and was improper "in the absence of express authority from the Legislature."⁵⁸

The New Jersey court found that the agency's enabling statute did not expressly authorize such an expenditure. Although the court noted that the board's general authority to engage in "the building, enlarging, repairing or furnishing of a schoolhouse"⁵⁹ implied an authority to make reasonable expenditures "for the purpose of giving voters relevant facts,"⁶⁰ the board's implied authority to provide public information did not extend to statements intended to persuade voters to one side of a political question.⁶¹ Under the court's interpretation of this implied delegation of informational authority, the board of education might expend public funds to espouse views both pro and con on the bond issue, but "the expenditure of public funds in support of one side only in a manner which gives the dissenters no opportunity to present their side . . . is outside the pale."⁶²

The New Jersey court's ruling in *Citizens to Protect Public Funds* has been followed by all of the recent cases on point.⁶³ The great weight of authority now holds that the right of a public agency to engage in official partisanship can exist only if such authority is explicitly delegated to an agency. This limitation on public agencies is true even if the funds expended for partisan ends are not wholly public monies. Two early cases, *Sims v. Moeur*⁶⁴ and *Mines v. Del Valle*,⁶⁵ rejected the argument that a more liberal approach to official partisanship is appropriate when the funds expended are not derived by direct taxation. In *Sims*, an employee compensation fund was derived in part through employer premiums⁶⁶ and, in *Mines*, the revenues used were the result of charges to the utility's customers.⁶⁷ Both courts ruled that the manner in which funds were derived did not broaden the authority of the public agency to which they were entrusted. The two decisions, therefore, stand for the proposition that the authority of a public agency to expend its funds to promote a partisan viewpoint can exist only by virtue of a specific, explicit grant of such authority, regardless of how its funds are derived, and regardless of whether the agency is acting in a governmental or proprietary capacity.

⁵⁸ *Id.*

⁵⁹ *Id.* at 179, 98 A.2d at 676.

⁶⁰ *Id.*

⁶¹ Justice Brennan stated:

The need for full disclosure of all relevant facts is obvious, and the board of education is well qualified to supply the facts. But a fair presentation of the facts will necessarily include all consequences, good and bad, of the proposal, not only the anticipated improvement in educational opportunities, but also the increased tax rate and such other less desirable consequences as may be foreseen.

Id. at 180, 98 A.2d at 677.

⁶² *Id.* at 182, 98 A.2d at 678.

⁶³ See, e.g., *Stanson v. Mott*, 17 Cal. 3d 206, 551 P.2d 1, 130 Cal. Rptr. 697 (1976); *Anderson v. City of Boston*, 78 Mass. Adv. Sh. 2297, 380 N.E.2d 628 (1978); *Porter v. Tiffany*, 11 Or. App. 542, 502 P.2d 1385 (1972).

⁶⁴ 41 Ariz. 486, 19 P.2d 679 (1933).

⁶⁵ 201 Cal. 273, 257 P. 530 (1927); see text at notes 49-53 *supra*.

⁶⁶ 41 Ariz. at 503, 19 P.2d at 685.

⁶⁷ 201 Cal. at 280, 257 P. at 534.

Recognizing the severe limitations imposed on an agency's activity by requiring explicit grants of authority, courts have distinguished informational functions of an agency from authority to propagandize on political questions. In the recent case of *Stanson v. Mott*,⁶⁸ the California Supreme Court ruled that explicit statutory authority is necessary for a state agency to expend public funds to promote passage of a bond issue affecting the agency's activities, but that it would be a public disservice to bar public agencies from full and impartial disclosure of information relevant to the bond issue.⁶⁹ When a public agency gives a "fair presentation of the facts" in response to a citizen's request for information, the agency "pursues a proper 'informational' role."⁷⁰ Similarly, "when requested by a public or private organization, [an agency may properly] present [its] view of a ballot proposal at a meeting of such organization."⁷¹ In close cases, the court stated, "the determination of the propriety or impropriety of the expenditure depends upon a careful consideration of such factors as the style, tenor and timing of the publication."⁷² The California court concluded that "no hard and fast rule governs every case."⁷³

As the *Stanson* court recognized, the restraint placed upon official partisanship by the absence of an express delegation of authority to the agency to expend public funds in a partisan manner is weakened by the exception for informational communications. Most government agencies are delegated an informational function.⁷⁴ Therefore, when an expenditure of public resources is challenged as official partisanship and outside the agency's scope of authority, the court will be presented with the dilemma of determining whether the agency communication's primary purpose was to inform or to persuade. Because of the difficulty of this task, a court may be persuaded that some acts of official partisanship fall within the information role delegated to the agency. Thus, if official partisanship is to be effectively restricted, its opponents may be required to base their challenges on more conclusive sources of law than the principle of delegated authority.

Moreover, two incidental questions arise which make the delegated authority theory even less effective when a private party challenges acts of official partisanship. The questions relate to the standing of a private party to bring such a suit and the appropriate remedy if the expenditures are determined to be unlawful. With respect to citizen standing, a survey of state cases indicates that the overwhelming majority of state courts recognize taxpayer

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

⁶⁹ *Id.* at 221 n.6, 551 P.2d at 11 n.6, 130 Cal. Rptr. at 707 n.6.

⁷⁰ *Id.* at 221, 551 P.2d at 11, 130 Cal. Rptr. at 707.

⁷¹ *Id.*, 551 P.2d at 11-12, 130 Cal. Rptr. at 707-08.

⁷² *Id.* at 222, 551 P.2d at 12, 130 Cal. Rptr. at 708 (footnote omitted).

⁷³ *Id.* In *Stanson*, however, the use of public funds to purchase bumper stickers, posters, advertising floats or television and radio spots and the dissemination, at public expense, of campaign literature prepared by private proponents was unquestionably improper campaign activity. *Id.* at 222-23, 551 P.2d at 12, 130 Cal. Rptr. at 707.

⁷⁴ See text and notes at notes 33-37 *supra*.

standing and allow private citizens to bring such actions.⁷⁵ Approximately three-fourths of the states allow their citizens, as taxpayers, to maintain actions against government officials to prevent the illegal expenditure of public funds.⁷⁶ At the federal level, however, a taxpayer does not have standing to challenge the illegal expenditure of public funds by a federal official when suit is based exclusively on the ground that the expenditure was not authorized by statute. The United States Supreme Court has expressly limited taxpayer *qua* taxpayer standing to suits where federal expenditures are challenged as contrary to specific constitutional limitations upon the taxing and spending powers of Congress.⁷⁷ For a citizen to have standing to challenge the expenditure of federal funds for official partisanship on statutory grounds, the citizen-plaintiff must show that he is "injured in fact" by the agency's action.⁷⁸ The more restrictive federal approach to standing has discouraged citizen challenges, and has contributed to the dearth of reported decisions dealing with acts of official partisanship by federal agencies.⁷⁹

Similarly, the remedy available to the citizen in both federal and state court actions may be flawed. Even if an expenditure of public funds for official partisanship is determined to be illegal, an adequate remedy often may be fashioned only if the action is timely. If the action is commenced at the time of, or prior to, the expenditure, an injunction may be obtained prohibiting initial or further expenditure of funds.⁸⁰ It also may be possible after an election to secure a declaratory judgment and an injunction if similar illegal expenditures are threatened in the future.⁸¹ It is unlikely, however, that a private party will persuade a court to set aside the outcome of an election because of acts of official partisanship. Most courts hold that a person seeking to have an election invalidated must show that the illegal acts affected the outcome⁸² of the election. A possible remedy after the fact in many states is limited to a suit to hold the responsible public official personally liable to repay funds expended for acts of official partisanship. In most states, either by judicial decision or by statute, public officers who have charge of public funds are charged with the duty of trustee to disburse and expend the money for the purposes and in the manner prescribed by law and may be held liable

⁷⁵ See, e.g., *Farley v. Cory*, 78 Cal. App. 3d 583, 144 Cal. Rptr. 923 (1978). See Collins and Meyers, *The Public Interest Litigant in California, Observations on Taxpayers' Actions*, 10 Loy. L.A. L. 329, 331 (1977).

⁷⁶ *Id.*

⁷⁷ *Flast v. Cohen*, 392 U.S. 83 (1968).

⁷⁸ See generally K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* 182-89 (1978) [hereinafter cited as DAVIS].

⁷⁹ See *Mulqueeny v. National Comm'n. on the Observance of Int'l. Women's Year*, 1975, 549 F.2d 1115 (7th Cir. 1977).

⁸⁰ See, e.g., *Mountain States Legal Foundation v. Denver School Dist. # 1*, 459 F. Supp. 357 (D. Colo. 1978); *Stern v. Kramarsky*, 84 Misc. 2d 447, 375 N.Y.S.2d 235 (Sup. Ct. 1975).

⁸¹ See, e.g., *Stanson v. Mott*, 17 Cal. 3d 206, 551 P.2d 1, 12-13, 130 Cal. Rptr. 697, 708-09 (1976).

⁸² See, e.g., *Brennan v. Black*, 34 Del. Ch. 380, 104 A.2d 777 (1954); *Wright v. Board of Trustees*, 520 S.W.2d 787 (Tex. 1976).

if they divert the trust funds from authorized purposes.⁸³ States have allowed taxpayer standing for private citizens to bring such suits and have applied the above rule to acts of official partisanship.⁸⁴ In addition, state officials who have authorized the expenditure of funds for acts of official partisanship have been removed from office for malfeasance⁸⁵ and have been successfully prosecuted under criminal statutes prohibiting the misuse of public funds.⁸⁶ Despite these remedies directed against the officials, however, adequate relief may not be afforded in certain instances without affecting the election result.

B. Specific Statutory Restraints

A second occasional restraint on acts of official partisanship arises from specific statutory prohibitions. Legislation restricting the political activities of government employees exists at the federal level and in all fifty states.⁸⁷ As a rule, however, these statutes do not explicitly proscribe official partisanship as defined herein;⁸⁸ nor do their prohibitions apply to all agencies or government employees. Rather, these statutes are directed primarily toward restricting the political activities of civil service employees in campaigns involving political parties. Nevertheless, this legislation should not be overlooked as a possible ground for challenging government expenditure of public monies in connection with constitutional amendments, referenda, or other elections of similar character. This is particularly true in the few jurisdictions which do not recognize taxpayer standing to challenge such partisan activity as outside the scope of the agency's authority.⁸⁹ If a statute within these jurisdictions prohibits the use of public resources for political activity in connection with questions not specifically identified with political parties, an aggrieved private party may have standing to maintain an action when the statute is violated.⁹⁰ At the federal level, there are two statutes⁹¹ which arguably prohibit certain

⁸³ See, e.g., *Stanson v. Mott*, 17 Cal. 3d 206, 551 P.2d 1, 130 Cal. Rptr. 697 (1976).

⁸⁴ *Id.*

⁸⁵ See, e.g., *Sims v. Moeur*, 41 Ariz. 486, 489, 19 P.2d 679, 680 (1933).

⁸⁶ See, e.g., *People v. Battin*, 77 Cal. App. 3d 635, 143 Cal. Rptr. 731, cert. denied, 439 U.S. 862 (1978).

⁸⁷ See generally *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

⁸⁸ See text at note 8 *supra*.

⁸⁹ See text and notes at notes 76-79 *supra*.

⁹⁰ See, e.g., *National Ass'n. for Community Dev. v. Hodgson*, 356 F. Supp. 1399 (D.D.C. 1973).

⁹¹ In addition to the two statutory restraints discussed in the text above, a restriction on official partisanship may appear as an "anti-lobbying" provision in the agency's appropriation legislation. For example, in *Mulqueeny v. National Comm'n on the Observance of Int'l Women's Year*, 1975, 549 F.2d 1115 (7th Cir. 1977), see text at note 102 *infra*, a general anti-lobbying provision was construed by the circuit court to embrace acts of official partisanship attempting to affect the outcome of "any legislation, or the adoption, ratification, or defeat of any proposed Constitutional amendment by any legislative body." *Id.* at 1119-20. In other instances, an anti-lobbying provision may be limited to attempts to affect legislation pending before Congress. For

acts of official partisanship by federal officials. The two statutes are the Hatch Act⁹² and an obscure criminal law entitled "Lobbying with appropriated moneys."⁹³ Also, it is not uncommon at the federal level for appropriation acts to contain specific anti-lobbying provisions.⁹⁴

Section 9(a)(1) of the Hatch Act expressly prohibits federal employees from using their "official authority or influence for the purpose of interfering with or affecting the result of an election."⁹⁵ Although the Hatch Act is not specifically directed at the problem of official partisanship as defined in this article—the use of public monies by government officials to promote a partisan viewpoint on structured political issues—section 9(a)(1) can be construed to prohibit official partisanship by federal officials with respect to elections that are not identified with political parties. Section 18 of the Act supports this construction. Section 18 exempts political activity in regard to structured political questions⁹⁶ from section 9(a)(2)'s prohibition of employee participation in political campaigns.⁹⁷ No provision in the Act similarly exempts structured political questions from section 9(a)(1)'s prohibition against "interfering with or affecting the outcome of an election."⁹⁸ Thus, section 9(a)(1) of the Act can reasonably be read to prohibit acts of official partisanship with regard to election issues not identified with particular political parties.

Under this construction of section 9(a)(1) of the Hatch Act, an aggrieved private party has standing to maintain a suit to enjoin violations of this provision of the Act. The traditional test for citizen standing to enforce this type of federal statute requires two showings. First, the citizen is required to demonstrate an "injury in fact." Second, the citizen is required to show that the

example section 607(a) of the Treasury, Postal Service, and General Government Appropriation Act of 1976 provides: "No part of any appropriation contained in this or any other Act, or of the funds available for expenditure by a corporation or agency, shall be used for publicity or propaganda purposes designed to support or defeat legislation pending before Congress." Pub. L. No. 94-91. Often an anti-lobbying provision may not exist at all in a particular agency's appropriation legislation. An anti-lobbying provision was not inserted in the Energy Research and Development Administration's fiscal year 1976 appropriation legislation. Part of the funds appropriated were used by the agency to print and distribute propaganda pamphlets in connection with a statewide referendum in California on nuclear power plants. GENERAL ACCOUNTING OFFICE REPORT NO. B-130961, at 32 (Sept. 30, 1976). See text at notes 27-31 *supra*. Also, it is possible that a general anti-lobbying provision may be construed to embrace acts of official partisanship in connection with state legislative action but not with respect to state referendum type elections. Even if a general anti-lobbying provision does exist, the *Mulqueeny* case exemplifies the problems with respect to standing that citizens may face in maintaining a suit to enjoin violations of such a provision. See text at notes 102-15 *infra*.

⁹² 5 U.S.C. § 7324 (1976).

⁹³ 18 U.S.C. § 1919 (1976).

⁹⁴ See text following note 133 *infra*.

⁹⁵ 5 U.S.C. § 7432(a)(1) (1976).

⁹⁶ 5 U.S.C. § 7326 (1976). Specifically exempted is political activity in regard to "constitutional amendments, referendums, approval of municipal ordinances, and others of a similar character." *Id.*

⁹⁷ 5 U.S.C. § 7324(a)(2) (1976).

⁹⁸ 5 U.S.C. § 7324(a)(1) (1976).

existing sanction, in this case removal from office, inadequately ensures the effect intended by Congress.⁹⁹ A citizen opposing the viewpoint promoted by a federal agency on a political question may be able to show the "injury in fact" required for standing, since the effect of the citizen's efforts and his probability of success are likely to be diminished as a result of the agency's action.¹⁰⁰ In this regard, the citizen's interest in competing in the political arena free of government financial support for selected political groups appears to be within the zone of interests protected by section 9(a)(1) of the Act. Moreover, the injury to the citizen appears to be the type which the Act is intended to forestall.¹⁰¹

At least one federal court, however, has ruled that such an injury to a citizen's political interests does not constitute the "concrete and perceptible injury" necessary to meet the "injury in fact" requirement for standing. In *Mulqueeny v. National Commission on the Observance of International Women's Year*, 1975,¹⁰² the United States Court of Appeals for the Seventh Circuit denied standing to two Illinois citizens who claimed that expenditures by the Commission for the purpose of promoting passage of the Equal Rights Amendment violated statutory prohibitions on the Commission's use of appropriated funds for lobbying activities. The statute in question provided that no funds authorized under the Act "may be used for lobbying activities."¹⁰³ This provision was included at the insistence of congressmen who feared that the Commission would use public funds to promote ratification of the Equal Rights Amendment.¹⁰⁴ The plaintiffs were chairpersons of the Illinois branch of "Stop ERA," an organization actively campaigning against ratification of the proposed Equal Rights Amendment. The Seventh Circuit construed the plaintiffs' claim that acts of official partisanship by the commission harmed their efforts to defeat ratification on the amendment as essentially a claim that their efforts ultimately might prove fruitless. The court ruled that the plaintiffs lacked standing since the alleged harm was in the nature of an "abstract injury" to the interest of "concerned bystanders."¹⁰⁵

Also clouding the question of private party standing to prosecute official partisanship under the Hatch Act is whether the "zone of interests" test for standing articulated by the United States Supreme Court in 1970 is still followed by that Court or other federal courts.¹⁰⁶ Recent federal decisions on citizen standing to challenge federal agency action have adopted, in addition to injury in fact, the requirement of a probability of benefit from judicial

⁹⁹ See, e.g., *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967).

¹⁰⁰ See *Joseph v. United States Civil Serv. Comm'n*, 554 F.2d 1140 (D.C. Cir. 1977); *McKenna v. Reilly*, 419 F. Supp. 1179 (D.R.I. 1976) (by implication); *National Ass'n For Community Dev. v. Hodgson*, 356 F. Supp. 1399 (D.D.C. 1973).

¹⁰¹ See *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 564-65 (1973); cf. *National Ass'n For Community Dev. v. Hodgson*, 356 F. Supp. at 1404.

¹⁰² 549 F.2d 1115 (7th Cir. 1977).

¹⁰³ Pub. L. No. 94-167, 89 Stat. 1003 (1975).

¹⁰⁴ *Mulqueeny v. National Comm'n on the Observance of Int'l Women's Year*, 1975, 549 F.2d at 1118 n.9.

¹⁰⁵ *Id.* at 1121.

¹⁰⁶ See DAVIS, *supra* note 78 at 184-87.

intervention.¹⁰⁷ The *Mulqueeny* court ruled that this part of the standing test was not met.¹⁰⁸ The court said, "[i]t is wholly conjectural whether the exercise of remedial powers possessed by the federal court, as desired by plaintiffs, would result in the maintenance of the status quo in the Illinois legislature's posture on the issue of ratifying the Equal Rights Amendment."¹⁰⁹ The court further stated that "[i]t is [highly] plausible that, were the injunction relief requested by plaintiffs granted, the legislature would nevertheless elect to ratify the ERA."¹¹⁰

The *Mulqueeny* decision can be criticized for both its logic and law. The injury in fact to the plaintiffs was not the possibility of some future action by the Illinois legislature but the diminished effectiveness of plaintiffs' opposition and the illegal advantage to the amendment's private proponents by reason of the Commission's illegal promotion of the amendment.¹¹¹ This injury is as concrete as an injury to a business's economic interest in being free from illegal government competition.¹¹² Furthermore, the United States Supreme Court has expressly held, with respect to the requirement of "injury in fact," that "an identifiable trifle is enough for standing."¹¹³ The Court has indicated that the injury can be in the nature of a reduced probability of favorable action.¹¹⁴ Regardless of the correctness of the *Mulqueeny* decision, however, that case and others clearly point out the confusion with respect to the law of standing that now exists in the federal courts.¹¹⁵ Given this confusion, even if a federal court would construe section 9(a)(1) of the Hatch Act as prohibiting acts of official partisanship by federal officials in connection with referendum-type elections, as suggested earlier, it is not altogether clear that an aggrieved private party would be granted standing to enjoin a violation of the Act.

A similar potential problem exists with respect to the standing of a private party to maintain a suit to enforce the federal criminal statute entitled "Lobbying with appropriated moneys."¹¹⁶ Except in certain limited situations, this rather obscure criminal statute prohibits the use of appropriated

¹⁰⁷ *Id.* at 187-89.

¹⁰⁸ 549 F.2d at 1121-22.

¹⁰⁹ *Id.* at 1121.

¹¹⁰ *Id.*

¹¹¹ A proper interpretation of the plaintiff's injury in *Mulqueeny* establishes a clear causal connection between that injury and the conduct of the defendant sought to be enjoined. The chain of causation is substantially similar to the chain of causation against which the statutory language was designed to protect and which Congress thereby must have considered plausible. The legislative history of the statute was replete with expressions of fear that public funds would be used to lobby in favor of the amendment. *Id.* at 1118 n.9.

¹¹² See, e.g., *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150 (1970); *Hardin v. Kentucky Utils. Co.*, 390 U.S. 1 (1968).

¹¹³ *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973).

¹¹⁴ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 280-81 n.14 (1978), cited in DAVIS, *supra* note 78, at 188.

¹¹⁵ See DAVIS *supra* note 78, at 184-87.

¹¹⁶ 18 U.S.C. § 1913 (1976).

funds "directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a member of Congress, to favor or oppose, by vote or otherwise, any legislation of appropriation . . ." ¹¹⁷ A federal employee who violates the statute may be removed from office and may be "fined not more than \$500 or imprisoned not more than one year, or both." ¹¹⁸ Since the statute is limited to federal legislation it would not apply to attempts by federal agencies to influence the outcome of state legislation or elections. ¹¹⁹

At least one federal court applying the "zone of interests" standing test has allowed a private party to enforce this criminal statute. In *National Association For Community Development v. Hodgson*, ¹²⁰ several private organizations, allegedly representing unemployed persons, brought suit against the United States Department of Labor and a private organization which represented various state employment agencies. Plaintiffs claimed that the Department of Labor's finding of the defendant organization's lobbying activities violated the federal criminal statute entitled "Lobbying with appropriated moneys." ¹²¹ The defendants moved to dismiss the suit contending in part that the criminal statute was not enforceable by civil suit and that the plaintiffs lacked standing to maintain the action. The United States District Court for the District of Columbia denied the motion. The court held the statute was enforceable in a civil suit under the criteria established by the United States Supreme Court in *Wyandotte Transportation Co. v. United States*. ¹²²

¹¹⁷ The statute reads:

No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to Members of Congress on the request of any Member or to Congress, through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business.

Whoever, being an officer or employee of the United States or of any department or agency thereof, violates or attempts to violate this section, shall be fined not more than \$500 or imprisoned not more than one year, or both; and after notice and hearing by the superior officer vested with the power of removing him, shall be removed from office or employment.

Id.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ 356 F. Supp. 1399 (D.D.C. 1973).

¹²¹ 18 U.S.C. § 1913 (1976).

¹²² 389 U.S. 191 (1967). The Supreme Court held that a criminal statute may give rise to a civil cause of action under the following conditions: (1) where criminal liability was inadequate to insure the full effectiveness of the statute which Congress

On the standing issue, the *Hodgson* court held that the allegations of the plaintiff organizations satisfied the requirements of the "zone of interests" test for standing. The court found that the defendants' promotion of specific legislation, opposed by the plaintiffs, was sufficient "injury in fact." In the court's view, the lobbying activities of the defendant competed unfairly with the lobbying activities of the plaintiffs since the defendants' activities drew resources from federal funds while the plaintiffs' did not.¹²³ Moreover, the court found that the injury was within the zone of interests protected by the statute. The court stated that the plain meaning of the statutory language and its general purpose indicated an intent to prevent corruption of the legislative processes through government financial support of an organization lobbying before Congress. In the district court's words, the statute precluded "the drowning out of the privately financed 'voice of the people' by a publicly funded special interest group."¹²⁴

Even assuming that a private party may prevail on the standing issue, it is not altogether clear that the courts will impose an effective remedy for a violation of the anti-lobbying statute. A case in point is *American Public Gas Association v. Federal Energy Administration*.¹²⁵ In *American Public Gas*, the United States District Court for the District of Columbia refused to grant injunctive relief on the ground that the "public interest" outweighed the probable benefit of available remedies. Plaintiffs, organizations representing natural gas purchasers, sought to enjoin the Federal Energy Administration (FEA) from further publication and distribution of an 18-page booklet promoting legislative deregulation of the price of natural gas. Plaintiffs argued, and the court agreed, that the booklet attempted to influence Congress to deregulate the industry.¹²⁶

The district court, however, refused the plaintiffs' plea to enjoin distribution or, in the alternative, to order the defendants to delete the objectionable portions from subsequent distributions.¹²⁷ Since much of the booklet had "no lobbying intent or effect"¹²⁸ and was "an obviously superficial treatment of the natural gas problem"¹²⁹ and "hardly the type of document that would strike a person as being particularly authoritative on the question,"¹³⁰ the district court held that the actual and potential injury to the plaintiffs and the

had intended; (2) where the interest of the plaintiffs falls within the class of interests that the statute was intended to protect; and (3) where the alleged harm that had occurred was of the type that the statute was intended to forestall. *Id.* at 202.

¹²³ 356 F. Supp. at 1404.

¹²⁴ *Id.* The *Hodgson* court further held that, despite the limitation of the statute's penal sanction to federal employees, the statute's prohibition on the use of federal funds for lobbying could support an injunction against the acts of persons other than federal employees. *Id.* at 1406, 1407.

¹²⁵ 408 F. Supp. 640 (D.D.C. 1976).

¹²⁶ *Id.* at 641.

¹²⁷ Prior to the suit, the FEA had distributed over 8,000 copies of the booklet to Congressmen, citizens, federal agencies, and private organizations. *Id.* The plaintiffs, nevertheless, argued that an injunction of further distribution was necessary to avoid whatever influence the booklets might produce on congressional action.

¹²⁸ *Id.* at 642.

¹²⁹ *Id.* at 641-42.

¹³⁰ *Id.* at 642.

public did not outweigh the additional expenditure of public monies required to delete questionable portions of the booklet in further distributions.¹³¹ With respect to the plea for an injunction from further distribution of the entire booklet, the court pointed out that the FEA was under a statutory duty to disclose whatever information was necessary to inform the public of the issue. The court stated: "To enjoin distribution of the entire pamphlet, therefore, would be to impede substantially the task of the FEA under this provision of the act in order to attempt to minimize the presumed slight violation of the statute and the slight actual effect that the violation might have."¹³² The "public interest," the court concluded, "argues strongly against" such an injunction.¹³³

To summarize, the existing statutory restraints on government expenditure of public monies to influence the outcome of structured political questions are ineffective. As we have seen, the courts widely hold that the authority to expend funds to promote a partisan viewpoint on structured political questions may not be implied from, but must be explicit in, an agency's enabling statute. A weakness in this theory of an inherent statutory restraint, however, arises when the courts must distinguish the unauthorized propaganda function of official partisanship from the authorized informational function of the agency. In cases in which the distinction is difficult to draw, courts may be unwilling to act, in the interest of protecting the agency's information-giving role. Similarly, although some specific statutory restraints exist, their effect is limited. By and large, these statutes are directed toward curtailing the political activities of non-political employees in campaigns involving political parties, not in referendum-type elections. In addition, the federal statutes arguably restraining political partisanship may be unavailable for private party enforcement and in any case may not provide an adequate remedy. As with the treatment of an inherent limit on the scope of an agency's authority, the courts may be unwilling to enforce the specific statutory remedies in the interest of protecting the agency's information-giving function.

C. Suggested Legislation

In view of the absence of explicit, comprehensive legislation prohibiting official partisanship by public agencies in connection with structured political questions, and considering the potential problem of citizen standing to enforce existing statutory prohibitions, there is a need for further legislation from Congress and the states. Without restricting the right of public officials and employees to engage in political activities on their own time, with their own money, such legislation should expressly prohibit public agencies from acting to affect the outcome of constitutional amendments, referenda, and other issue type elections. Sanctions for violation of the act might include repayment of funds expended in violation of the act,¹³⁴ removal from office,¹³⁵

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See, e.g., *Krantzler v. Board of County Comm'rs of Dade County*, 354 So.2d 126 (Fla. 1978).

¹³⁵ See, e.g., *Sims v. Moeur*, 41 Ariz. 486, 19 P.2d 679 (1933).

and criminal penalties.¹³⁶ The legislation should specifically provide standing for aggrieved citizens to enjoin violations of the act or to compel repayment by the responsible public official of the funds expended in violation of the act. A draft of such an act is set out below. It is not intended as model legislation but is an attempt to further crystalize discussion with respect to provisions that might be included in legislation prohibiting acts of official partisanship by public agencies.

USE OF PUBLIC FACILITIES OR FUNDS FOR POLITICAL PURPOSES

Declaration of Objectives and Policy: The objectives of this Act are to protect the integrity of representative government, to assure that political campaigns and elections are free of government interference and influence, and to assure that government operates in a manner so as to protect the governed, not the governing, by—

- (1) requiring that the public be provided with full and accurate information on political questions;
- (2) requiring that public facilities and funds be used only for purposes authorized by law;
- (3) requiring that public officials and employees be made accountable for their use of public resources and funds;
- (4) requiring that all persons and groups be treated fairly by government in connection with legislation, political campaigns, and elections, including elections of other processes relating to constitutional amendments, referenda, approval of bond issues, taxes, or municipal ordinances, and others of a similar character; and
- (5) prohibiting the use of public facilities or funds directly or indirectly, to attempt to affect the passage or defeat of legislation or the outcome of elections including elections or other processes relating to constitutional amendments, referenda, approval of bond issues, taxes, or municipal ordinances, and others of a similar character.

Truth in Government: No government official or employee shall knowingly furnish false information on any political question or knowingly omit material facts on any political question when providing information to members of the public or their elected representatives.

Lobbying and Propaganda: Public facilities and funds shall not be used directly or indirectly by government officials or employees to promote one side only of a political question in an attempt to affect the passage or defeat of legislation or the outcome of a political campaign or election, including elections or processes relating to constitutional amendments, referenda, approval of bond issues, taxes, or municipal ordinances, and others of a similar character.

¹³⁶ See, e.g., *People v. Battin*, 77 Cal. App. 3d 635, 143 Cal. Rptr. 731, cert. denied, 439 U.S. 862 (1978).

Exceptions: Nothing in this act shall be construed to prevent elected officers or members of the legislative branch from carrying out their constitutional or statutory duties with respect to legislation or from stating their personal views of political questions nor to prevent public officials or employees from communicating to members of the legislative branch on the request of any member thereof, through the proper official channels, or from requesting legislation or appropriations which they deem necessary for the efficient conduct of the public business.

Remedies and Sanctions: Any public official or employee who violates or attempts to violate any provision of this Act shall be personally liable for the value of the public resources or funds expended in violation of this Act and shall be fined not more than \$1,000 or imprisoned not more than one year, or both; and after notice and hearing by the superior officer vested with the power of removing him, shall be removed from office or employment or suspended without pay for not less than thirty days.

Citizen Suits: Any person may commence a civil action on his own behalf to enjoin the violation of any provision of this Act and to compel the responsible public official or employee to repay the value of public resources or funds expended in violation of any provision of this Act.

D. Government Free Speech

In response to the above attempts to restrain official partisanship, government defendants have raised the first amendment issue to the government agency or employee's right to freedom of speech. Although there are no conclusive decisions on this issue, several courts have addressed the question whether a prohibition of official partisanship violates the government's first amendment rights. With respect to the free speech right of government employees, the United States Supreme Court in the 1974 case of *United States Civil Service Commission v. National Association of Letter Carriers*,¹³⁷ held that section 9(a)(2) of the Hatch Act does not violate the first amendment rights of government employees. Section 9(a)(2) of the Act forbids federal employees to "take an active part in political management or in political campaigns."¹³⁸ The Supreme Court noted that the government interest in regulating the conduct and the speech of its employees is significantly different from its interest in regulating the speech of the citizenry in general.¹³⁹ Thus, the Court held that "plainly identifiable acts"¹⁴⁰ of political management and campaigning by employees in connection with elections involving political parties may be prohibited. As the Court stated:

It seems fundamental . . . that employees . . . should administer the law in accordance with the will of Congress, rather than in accordance with their own or the will of a political party. They are ex-

¹³⁷ 413 U.S. 548 (1973).

¹³⁸ 5 U.S.C. § 7324(a)(2) (1976).

¹³⁹ 413 U.S. at 564.

¹⁴⁰ *Id.* at 567.

pected to enforce the law and execute the programs of the Government without bias or favoritism for or against any political party or group or the members thereof.¹⁴¹

Surely, if political activity of government employees not involving the use of public resources or funds may be proscribed, as the *Letter Carriers* decision holds, it seems equally proper to proscribe government employees from using public resources to promote a partisan viewpoint in political campaigns.

In the 1975 case of *Stern v. Kramarsky*,¹⁴² a New York trial court considered, and rejected the argument that acts of official partisanship by employees in connection with such elections are protected by the first amendment. The *Stern* court granted a preliminary injunction restraining the Commissioner of the state's Division of Human Rights and the Division itself from officially "supporting, promoting, campaigning or otherwise acting to achieve passage"¹⁴³ of a proposed Equal Rights Amendment to the New York Constitution. The New York trial court held that the first amendment rights of the Commissioner and the Division's employees were limited to "supporting or opposing the Equal Rights Amendment in their individual capacities as private citizens."¹⁴⁴ In the court's view, the issue was "not one concerning freedom of speech or association, but whether it is a proper function of a State agency to actively support a proposed amendment to the State Constitution which is about to be presented to the electorate in a State-wide referendum."¹⁴⁵ The court held the division was not authorized to expend public funds directly, through promotional and advertising activities, or indirectly, through the use of government employees or facilities, to secure voter approval of the proposed amendment. The court stated, "no agency may misuse any such funds for promoting its own opinions, whims, or beliefs, irrespective of the high ideals or worthy cause it espouses, promotes, or promulgates."¹⁴⁶

Presumably, the New York court's ruling that a public employee's right to engage in political activity is limited to the employee's individual capacity as a private citizen would restrict certain forms of employee political expression during working hours.¹⁴⁷ While the New York court's prohibition on government employees using public funds to engage in partisan activity is not likely to extend to an employee wearing a small lapel button, it clearly would cover the wearing of a large "VOTE YES" placard or the distribution of partisan literature during working hours. The wearing of a lapel button may well

¹⁴¹ *Id.* at 564-65. Even the dissenting Justices in *Letter Carriers* were in agreement with the goal referred to by the majority as "this great end of Government—the impartial execution of the laws." *Id.* Justice Douglas stated in the dissenting opinion "no one could object if employees were barred from using office time to engage in outside activities political or otherwise." *Id.* at 597.

¹⁴² 84 Misc. 2d 447, 375 N.Y.S.2d 235 (Sup. Ct. 1975).

¹⁴³ *Id.* at 453, 375 N.Y.S.2d at 240.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 449-50, N.Y.S.2d at 237.

¹⁴⁶ *Id.* at 452-53, 375 N.Y.S.2d at 239-40.

¹⁴⁷ See, e.g., *People v. Battin*, 77 Cal. App. 3d 635, 143 Cal. Rptr. 731, cert. denied, 439 U.S. 862 (1978); *Anderson v. City of Boston*, 1978 Mass. Adv. Sh. 2297, 380 N.E.2d 628 (1978).

be protected personal expression,¹⁴⁸ while the latter acts are likely to be considered unprotected political conduct.¹⁴⁹

The free speech issue also can arise in the context of government agencies, rather than employees. Several statements of the United States Supreme Court lend support to the notion that government agencies have a first amendment right to engage in official partisanship. The Supreme Court has repeatedly held that the first amendment gives the public access to discussion, debate, and the dissemination of information and ideas.¹⁵⁰ More recently, the Supreme Court has stated that "the inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source."¹⁵¹ The Supreme Court also has stated that states are not "free to define the rights of their creatures without limits."¹⁵² These latter statements appear in the 1978 case, *First National Bank of Boston v. Bellotti*¹⁵³ which invalidated restraints on the political speech of private corporations. In view of these statements, it could be suggested that restraints on the political speech of government agencies, particularly municipal and government proprietary corporations are improper.

Such an argument was made in the 1978 Massachusetts case, *Anderson v. City of Boston*.¹⁵⁴ In *Anderson*, the Massachusetts Supreme Judicial Court was squarely faced with the question whether constitutionally protected speech includes the right of a municipality to engage in official partisanship in connection with a referendum issue of admitted public importance where the legislature of the state has said that it may not. Plaintiffs, taxpayers of the City of Boston, brought suit to enjoin acts of official partisanship by the city in connection with a statewide referendum to amend the Massachusetts Constitution by changing the tax classification of property. The city-created Office of Public Information on Classification utilized public facilities, funds and employees to propagandize in favor of the amendment. The city also entered into two contracts, each totaling over one hundred thousand dollars with political consulting firms in an effort to secure voter approval of the amendment. The Massachusetts court rejected the city's contention that under the so-called Massachusetts Home Rule Amendment it possessed the authority to expend public funds to support approval of the tax amendment. The Massachusetts Home Rule Amendment permits a municipality to appropriate funds for purposes other than those explicitly mentioned in the legislative grant. The *Anderson* court, however, found that the legislative grant to the City of Boston was not included in a comprehensive piece of legislation regulating election financing enacted after the Home Rule Amendment. Therefore, the *Anderson*

¹⁴⁸ See *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 579 (1973); 5 C.F.R. § 733.111(a)(3) (1980).

¹⁴⁹ See, e.g., *People v. Battin*, 77 Cal. App. 3d 635, 143 Cal. Rptr. 731, cert. denied, 439 U.S. 862 (1978); *Anderson v. City of Boston*, 1978 Mass. Adv. Sh. 2297, 380 N.E.2d 628 (1978).

¹⁵⁰ See, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

¹⁵¹ *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

¹⁵² *Id.* at 779 n.14.

¹⁵³ 435 U.S. 765 (1978).

¹⁵⁴ 78 Mass. Adv. Sh. 2297, 380 N.E.2d 628 (1978).

court concluded, the election financing legislation manifested "an intention to bar municipalities from engaging in the expenditure of funds to influence election results."¹⁵⁵ The court stated that "[i]f the legislature had expected that municipalities would engage in such activities or intended that they could, [the legislation] would have regulated those activities as well."¹⁵⁶

The city further argued that the first amendment prohibited the state from denying the city the right to expend public funds to influence the results of the referendum. Initially, the court stated that the first amendment, by its terms and traditional applications, "has nothing to do with a State's determination to refrain from speech on a given topic or topics and to bar its various subdivisions from expending funds in contravention of that determination."¹⁵⁷ The court questioned whether government expenditure of funds is protected speech under the first amendment since the means by which a speaker acquires funds to finance political expression is one step removed from the protected expression itself. Nevertheless, the court did not expressly rule on whether government appropriation of funds for official partisanship constitutes protected speech.¹⁵⁸ The court held that, even if appropriation of funds by a municipal corporation to engage in partisan speech is expression protected by the first amendment, there are demonstrated compelling state interests which justify the refusal to grant the municipality the authority to engage in official partisanship. The *Anderson* court found the state's interest in "assuring the fairness of elections and the appearance of fairness in the electoral process"¹⁵⁹ and "assuring that a dissenting minority of taxpayers is not compelled to finance the expression on an election issue of views with which they disagree"¹⁶⁰ to be sufficiently compelling to restrain potentially protected expression.

It might be argued that the compelling state interests found to exist by the Massachusetts court in *Anderson* do not exist when a government proprietary corporation derives its funds from revenues rather than from taxation. This distinction, however, has been rejected by the few courts that have considered it. Without discussing the first amendment implications of a case involving official partisanship, the Supreme Court of Arizona ruled that funds held by a government agency are "public funds" regardless of the source, and that such public funds may be expended only for purposes authorized by law.¹⁶¹ In a case involving official partisanship by a government proprietary corporation, the Supreme Court of Washington held that it was "absurd" to suggest that a government corporation could expend funds for unauthorized

¹⁵⁵ *Id.* at 2305, 380 N.E.2d at 633.

¹⁵⁶ *Id.* at 2306, 380 N.E.2d at 634.

¹⁵⁷ *Id.* at 2312, 380 N.E.2d at 637.

¹⁵⁸ On this point the court stated "[s]urely, the First Amendment does not justify the stealing of funds or of a printing press because the defendant was planning to use the funds or the printing press to publish his views on a subject of public concern." *Id.* at 2314 n.15, 380 N.E.2d at 637 n.15.

¹⁵⁹ *Id.* at 2315, 380 N.E.2d at 638.

¹⁶⁰ *Id.* at 2319, 380 N.E.2d at 629.

¹⁶¹ *Sims v. Moeur*, 41 Ariz. 486, 503, 19 P.2d 679, 685 (1933).

purposes simply because it was engaged in a commercial enterprise in competition with private businesses.¹⁶²

Thus, although any significant restraint of government agency or employee use of public resources to promote a partisan view on a structured political question must meet and overcome the defense of government free speech, such a task does not appear substantial. The few cases that have ruled on the agency free speech issue indicate that official partisanship is not expression protected by the first amendment's guarantees. In fact, it may be said that the first amendment itself is the source of a constitutional restraint upon official partisanship. The next section will consider the limits on official partisanship imposed by the Constitution.

III. CONSTITUTIONAL RESTRAINTS

Government expression in a variety of forms is both proper and necessary in a system that attempts to govern itself with a minimum use of force.¹⁶³ The effective operation of a governing structure where self-determination is pursued through the cycle of citizen opinion, elections, and representation demands that public officials be permitted to express their views freely on even the most controversial topics. The citizens' informed participation in the governing process often requires that citizens benefit from the experience of their elected officials. To ensure this informational input, the immunity doctrines applicable to high level public officials in all three branches of government serve to protect such expression.¹⁶⁴ Moreover, the effective operation of such a governing system often requires that public facilities and funds be used to encourage citizen discussion and evaluation of that expression.¹⁶⁵ But to recognize the broad right of government to engage in expression only serves to raise the more fundamental question as to when, if ever, government speech is constitutionally improper.

Addressing this issue in his book, *The System of Freedom of Expression*, Professor Emerson asserts that "the government's right of expression does not extend to any sphere that is *outside the governmental function*."¹⁶⁶ As an example of this limitation, Professor Emerson states that "government would not be empowered to engage in expression in direct support of a particular candidate for office" since "it is not the function of government to get itself reelected."¹⁶⁷ Professor Emerson's limitation on government political conduct is supported by the first amendment,¹⁶⁸ the guaranty clause¹⁶⁹ and simi-

¹⁶² *Port of Seattle v. Superior Court*, 193 Wash. 267, 271, 160 P. 755, 756 (1916). See *Porter v. Tiffany*, 11 Or. App. 542, 502 P.2d 1385 (1972).

¹⁶³ See EMERSON, *supra* note 10, at 698.

¹⁶⁴ *Id.* at 701-06.

¹⁶⁵ See *Methodist Fed'n For Social Action v. Eastland*, 141 F. Supp. 729, 731 (D.D.C. 1956).

¹⁶⁶ EMERSON, *supra* note 10, at 699.

¹⁶⁷ *Id.* The United States Supreme Court has expressly held that, even in the area of speech-plus, for government action to be valid government must have a legitimate basis for acting. *O'Brien v. United States*, 391 U.S. 367 (1968).

¹⁶⁸ U.S. CONST. amend. 1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of

lar state constitutional provisions. If Professor Emerson's proposed limitation on official partisanship in support of a particular candidate is correct, and several courts have indicated sympathy for this position,¹⁷⁰ the question arises whether a constitutional limitation on government expression also exists with respect to acts of official partisanship in connection with other types of structured political questions. The remainder of this article will inquire whether it is a proper government function to engage in partisan conduct to effect the outcome of legislation, issue type elections, or constitutional amendments.

The first amendment and the guaranty clause reject the totalitarian notion of Paul Joseph Goebbels that the state has an "absolute right . . . to supervise the formation of public opinion."¹⁷¹ In sharp contrast to this totalitarian notion, the democratic process of our republican form of government embodies the notion that the people, not the government, exercise the ultimate judgment on the wisdom and efficacy of public policy.¹⁷² In *Anderson v.*

speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.* The argument is made herein that the first amendment prohibits official partisanship by federal and (through the fourteenth amendment) state agencies in connection with structured political questions. The discriminatory aspect of official partisanship which injures a citizen's political rights by giving an unfair advantage to competing groups in the private political arena could also be challenged in court as a violation of equal protection of the laws proscribed by the fifth and fourteenth amendments. See *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979); *McKenna v. Reilly*, 419 F. Supp. 1179, 1188 (D.R.I. 1976) (allocation of state funds to endorsed party candidate but not to nonendorsed party candidate violated nonendorsed candidate's rights under the first and fourteenth amendments).

¹⁶⁹ U.S. CONST. art. IV, § 4. "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive, (when the Legislature cannot be convened) against domestic Violence." *Id.*

The argument is made herein that, in addition to the first amendment, the guaranty clause should be held to prohibit acts of official partisanship by federal and state agencies in connection with structured political questions in the states. The premise of the argument is that it is contrary to the root philosophy of a republican government to attempt to distort, debase, or diminish citizens' political expression in connection with structured political questions by partisan attempts to promote a particular candidate or viewpoint. Recent federal and state court decisions have indicated that the guaranty clause may be held to protect fundamental political rights of citizens in connection with elections from certain types of government conduct. See, e.g., *Mountain States Legal Foundation v. Denver School Dist. # 1*, 459 F. Supp. 357, 361 (D. Colo. 1978); *Burger v. Judge*, 364 F. Supp. 504 (D. Mont. 1973); *Kohler v. Tugwell*, 292 F. Supp. 978 (E.D. La. 1968); *Van Sickle v. Shanahan*, 212 Kan. 426, 511 P.2d 223 (1973).

On the history and potential of the guaranty clause see Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 512 (1962).

¹⁷⁰ See, e.g., *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 467-69 (1952) (Douglas, J., dissenting); *Anderson v. City of Boston*, 1978 Mass. Adv. Sh. 2297, 2312 n.14, 2317 n.16, 380 N.E.2d 628, 637 n.14, 639 n.16; *Stern v. Kramarsky*, 84 Misc. 2d 447, 452, 375 N.Y.S.2d 235, 239 (Sup. Ct. 1975).

¹⁷¹ Nazi Minister of Propaganda, W. SAFIRE, *SAFIRE'S POLITICAL DICTIONARY* 573 (1978).

¹⁷² See notes 1 and 2 *supra*.

City of Boston,¹⁷³ the Massachusetts court held that official partisanship by the City of Boston was unauthorized and improper in connection with a proposed amendment to the Massachusetts Constitution reclassifying property for taxing purposes. As to the first amendment issues, the Massachusetts court not only adopted Emerson's suggested prohibition but extended it to the statewide election on the amendment. The court stated, that "[a] political subdivision is acting outside its government function when it seeks to expend public funds to tell the people how to vote on constitutional referenda issues which would affect provisions for raising tax revenues."¹⁷⁴ The *Anderson* court's extension of Emerson's suggested limitation on government speech to an issue type election is entirely logical, particularly when the issue relates to powers of the government agency engaging in official partisanship. Restraints on official partisanship are even more appropriate when a government agency is the actor since the person in office may be less important than the powers of the office.

The suggestion that the first amendment and guaranty clause prohibit official partisanship, whether related to self-perpetuation in office or to referendum type elections and constitutional amendment processes, is neither novel nor without support in court decisions.¹⁷⁵ As Professor Emerson states:

The government is surely under a constitutional obligation not to use its power of expression, any more than any other power, to abridge freedom of expression. Moreover, there is no real paradox involved in invoking the First Amendment to restrict government expression. The purpose of the First Amendment is to protect private expression, and nothing in the guarantee precludes the government from controlling its own expression or that of its agents.¹⁷⁶

Of course, the first amendment and guaranty clause do not prohibit high level public officials in any branch of government from personally expressing a partisan viewpoint in an attempt to affect the outcome of an election or ratification process. Such expression possesses the quality of personal political expression and is itself protected speech.¹⁷⁷ When, however, such expression is translated into government action, through use of public facilities or funds to finance a political campaign designed to affect the outcome of an election or constitutional amendment process, the expression loses its quality of protected personal expression and, instead, becomes conduct. As conduct, such expression may be proscribed by the courts, like other types of government conduct which violate constitutional rights.¹⁷⁸ If, as suggested herein, this type of official partisanship infringes citizens' rights of political expression and does not have a legitimate government function in a republican form of

¹⁷³ 1978 Mass. Adv. Sh. 2297, 380 N.E.2d 628.

¹⁷⁴ *Id.* at 2317 n.16, 380 N.E.2d at 639 n.16.

¹⁷⁵ See text at notes 207-30 *infra*.

¹⁷⁶ EMERSON, *supra* note 10 at 700.

¹⁷⁷ See *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 579 (1973).

¹⁷⁸ Compare *Tenney v. Brandhove*, 341 U.S. 367 (1951) with *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

government, there would be no constitutional impediment to obtaining judicial relief.¹⁷⁹ It is significant to note in this regard that immunity doctrines protect the expression and conduct of high level public officials only in connection with the performance of a governmental function.¹⁸⁰

On the basis of two federal court decisions involving college newspapers in North Carolina, the argument has been made that the first amendment does not prohibit official partisanship by a federal agency in connection with a referendum type state election.¹⁸¹ In *Joyner v. Whiting*,¹⁸² the United States Court of Appeals for the Fourth Circuit held that the president of a North Carolina university could not, consistent with the first amendment, sever financial support for the official student newspaper because of editorial comments therein which advocated racial segregation. In regard to the issue of government speech, the Fourth Circuit ruled that the first amendment does not prohibit a government instrumentality from spending public money to publish its positions on controversial topics. As there was no proof that the editor of the paper rejected articles that were opposed to his editorial policy,¹⁸³ the Fourth Circuit rested its decision, in part, on the "strong arguments for insisting that [the] columns [of the state sponsored newspaper] be open to the expression of contrary views and that its publication enhance, not inhibit, free speech."¹⁸⁴ Similarly, in *Arrington v. Taylor*,¹⁸⁵ a North Carolina district court held that subsidization of a university student newspaper through mandatory student fees, and university funding and facilities did not violate the first amendment rights of students opposed to the editorial policies of the newspaper. The district court's decision noted that the newspaper "invites and prints views contrary to expressions by those in control"¹⁸⁶ and that the paper was not being used as "a predictable conduit" "¹⁸⁷ for government "to propagate a particular position or point of view."¹⁸⁸ The court held that the function of a student operated newspaper, like a college funded speaker program, is to educate and inform¹⁸⁹ and that the first amendment does not prohibit government subsidization of such a forum where controversial views are expressed.¹⁹⁰

Despite their apparent sanctioning of government speech, neither *Joyner* nor *Arrington* even indirectly supports the view that the first amendment per-

¹⁷⁹ See EMERSON, *supra* note 10, at 706-08.

¹⁸⁰ See *Tenny v. Brandhove*, 341 U.S. 367 (1951); *McGovern v. Martz*, 182 F. Supp. 343 (D.D.C. 1960).

¹⁸¹ This was the position of the General Accounting Office in regard to ERDA's propaganda pamphlets used in the California referendum on nuclear power. GENERAL ACCOUNTING OFFICE REPORT NO. B-130961, at 30-31 (Sept. 30, 1976). See text at notes 27-31 *supra*.

¹⁸² 477 F.2d 456 (4th Cir. 1973).

¹⁸³ *Id.* at 462.

¹⁸⁴ *Id.*

¹⁸⁵ 380 F. Supp. 1348 (M.D.N.C. 1974).

¹⁸⁶ *Id.* at 1362.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 1363.

¹⁹⁰ *Id.* at 1364.

mits official partisanship in connection with a referendum or any type of election. In both cases there was no attempt by government to promote a partisan viewpoint in connection with a structured political question. In fact, both cases support the view that the first amendment prohibits the use of public resources and funds to promote a government point of view in connection with an election.¹⁹¹ Rather, *Joyner* and *Arrington* stand for the principle that government may facilitate free expression through the educational instrumentality of financing a forum for the expression of all views.¹⁹²

It also might be argued that official partisanship, when designed to perform a remedial function, may be not only a legitimate government function but may qualify as a compelling state interest sufficient to justify any infringement of protected political expression which may result from its exercise. Such an argument assumes that the system of freedom of expression under the first amendment and the republican form of government embraced by the guaranty clause permit government subsidization of a candidate or partisan viewpoint to assure that the candidate or partisan viewpoint receives equal or significant support in the private political arena. No doubt, a proper function of government is to protect the framework or system of free expression. The United States Supreme Court has stated that, in addition to individual self-expression, the first amendment protects "public access to discussion, debate, and the dissemination of information and ideas."¹⁹³ A "fairness doctrine" in regard to government owned or financed forums for expression is an example of government action to protect the system of free-expression.¹⁹⁴ Absent a compelling state interest, however, government may not restrict the publication of partisan pamphlets by the supporters of a candidate or political viewpoint to a number commensurate with those published by opponents.¹⁹⁵ Similarly, government should not be able to accomplish the same result indirectly by supporting a particular candidate or viewpoint. The latter type of government intervention in the private political arena infringes the political rights

¹⁹¹ It should also be pointed out that the district court's decision in *Arrington* is not inconsistent with the argument suggested herein concerning application of the Supreme Court's decision in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) to certain taxpayer situations. In *Arrington* the government decision to financially support a forum where others may express their views was an internal educational matter clearly proper for decision by the people's representatives. Financing of the newspaper, in the Court's view, was analogous to paying the salary of a teacher who might indicate his preference, in the classroom, for one point of view over another. 380 F. Supp. at 1363. A different result in *Arrington* would have been proper if part of the student fees had been used by the university to secure voter approval of a bond issue or the election of a candidate to public office. In the latter situations, the government action would address a structured political question clearly improper for resolution by the people's representatives.

¹⁹² *Id.*

¹⁹³ *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) (footnote omitted).

¹⁹⁴ See, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

¹⁹⁵ See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979).

protected by the first amendment or guaranty clause, unless a compelling state interest is offered to justify such intervention.¹⁹⁶

The Supreme Court's decision in *Buckley v. Valeo*¹⁹⁷ indicates that the Court will not sanction a system of public financing which permits governments to use public funds on behalf of a particular candidate or partisan viewpoint which it favors.¹⁹⁸ In *Buckley*, the Supreme Court expressly held that fundamental first amendment rights may not be infringed by a government interest in equalizing the relative ability of individuals and groups to influence the outcome of elections.¹⁹⁹ The Court stated, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."²⁰⁰ Moreover, the Court pointed out that "there is nothing invidious, improper, or unhealthy"²⁰¹ if the resources available to a campaign promoting a partisan viewpoint varies with the size and intensity of private support for the viewpoint expressed.²⁰² As the *Buckley* Court stated, "[i]n the free society ordained by our Constitution it is not the government, but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debates on public issues in a political campaign."²⁰³

As the *Buckley* decision illustrates, the Supreme Court has not been sympathetic to the view that government intervention in the private political arena is justified by an alleged compelling interest in preventing expression by private interest groups from dominating the marketplace of ideas.²⁰⁴ Even if the Supreme Court should hold that there is a compelling state interest in preventing a private group from overwhelming debate and expression, the argument can be made that the constitutionally proper remedy is to restrain the dominating private group rather than to use public resources to promote a partisan viewpoint that many taxpayers may oppose.²⁰⁵ It is unlikely, therefore, even if official partisanship is undertaken to remedy inequitable cir-

¹⁹⁶ *Id.*

¹⁹⁷ 424 U.S. 1 (1976).

¹⁹⁸ See *McKenna v. Reilly*, 419 F. Supp. 1179 (D.R.I. 1976); *Stanson v. Mott*, 17 Cal. 3d 206, 219 n.5, 551 P.2d 1, 10 n.5, 130 Cal. Rptr. 697, 706 n.5.

¹⁹⁹ 424 U.S. at 48-49, 54-57.

²⁰⁰ *Id.* at 48-49.

²⁰¹ *Id.* at 56.

²⁰² *Id.*

²⁰³ *Id.* at 57 (footnote omitted). The Supreme Court in *Buckley* did uphold the constitutionality of a federal scheme providing public financing for elections campaigns. *Id.* at 86-109. The financing scheme, however, did not provide public funds to only one of a number of competing candidates but rather provided public funds to all qualified candidates. *Id.* at 86-91. The Court also upheld in *Buckley* the constitutionality of restricting contributions by persons to candidates for elective office based on the compelling state interest in preventing the reality or appearance of corruption through the creation of campaign debts. *Id.* at 27. However, referendum type elections and constitutional amendment processes do not present comparable problems. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978).

²⁰⁴ See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 789-92 (1978); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

²⁰⁵ See text at notes 234-45 *infra*.

cumstances of political speech, that its proponents could demonstrate a sufficient government interest to overcome countervailing first amendment values.

Principal among those first amendment interests which are infringed by official partisanship are the free speech rights of the citizens who oppose the partisan view promoted by the government. The constitutional injury to these citizen opponents is the diminution of the likelihood of success of their viewpoint and the corresponding unfair advantage granted to their competitors in the private political arena.²⁰⁶ The courts which have confronted issues regarding the constitutionality of this remedial type of official partisanship uniformly have ruled that such conduct violates either the first amendment or the guaranty clause. In *Stern v. Kramarsky*,²⁰⁷ a New York trial court enjoined the state's Division of Human Rights from using public funds to support, promote, or campaign for the passage of a proposed Equal Rights Amendment to the New York Constitution. Plaintiff, president of an organization representing women's groups opposing the amendment, alleged that the defendant promoted the amendment by pamphlets and radio and television advertising.²⁰⁸ The court granted plaintiff's request for a preliminary injunction stating:

The spectacle of state agencies campaigning for or against propositions or proposed constitutional amendments . . . , albeit perhaps well-motivated, can only demean the democratic process. As a State agency supported by public funds they cannot advocate their favored position on any issue or for any candidates, as such. So long as they are an arm of the state government they must maintain a position of neutrality and impartiality.²⁰⁹

Without citing a specific constitutional provision, the court appeared to rely on Professor Emerson's notion that this type of official partisanship is improper since it is not a legitimate government function. In this regard, the New York court stated:

It would be establishing a dangerous and untenable precedent to permit the government or any agency thereof, to use public funds to disseminate propaganda 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.²¹⁰

²⁰⁶ Several courts have recognized just such an injury to first amendment rights. See, e.g., *Mountain States Legal Foundation v. Denver School Dist. # 1*, 459 F. Supp. 357 (D. Colo. 1978); *McKenna v. Reilly*, 419 F. Supp. 1179 (D.R.I. 1976); *Stanson v. Mott*, 7 Cal. 3d 206, 551 P.2d 1, 130 Cal. Rptr. 697 (1976).

²⁰⁷ 84 Misc. 2d 447, 375 N.Y.S.2d 235 (Sup. Ct. 1975).

²⁰⁸ In *Stern* the plaintiff submitted to the court copies of flyers and pamphlets prepared by supporters of the Equal Rights Amendment which were being made available to the public at the defendant's offices. One such flyer stated " 'It's really quite simple. Either you believe that all people are created equal or you don't. If you do * * * Vote Yes on Nov. 4th.' " *Id.* at 449, 375 N.Y.S.2d at 237.

²⁰⁹ *Id.* at 452, 375 N.Y.S.2d at 239.

²¹⁰ *Id.*

This is true, the court pointed out, "even if the position advocated is believed to be in the best interests of our country."²¹¹

The Supreme Court of California assumed a similar position in the 1976 case of *Stanson v. Mott*.²¹² The legality of an expenditure of public funds by the director of the state's Department of Parks and Recreation to secure voter approval of a proposed bond issue was questioned in *Stanson*. The plaintiffs alleged that the Department director used public funds and government employees to prepare and distribute materials which promoted the bond issue.²¹³ Addressing the constitutional issues raised by this type of official partisanship, the California court pointed out that "the importance of governmental impartiality in electoral matters"²¹⁴ had been explicitly expressed in a number of its recent decisions. Quoting an earlier decision, *Gould v. Grubb*,²¹⁵ the court stated that "our state and federal Constitutions mandate that the government must, if possible, avoid any feature that might adulterate or, indeed, frustrate, [a] free and pure [expression of the voters'] choice [of candidates]."²¹⁶ The first amendment, the court stated, "precludes the government from making public facilities available to only favored political viewpoints; once a public forum is opened, equal access must be provided to all competing factions."²¹⁷ Official partisanship in connection with referendum type elections raised, in the California court's view, potentially "serious constitutional question[s]."²¹⁸ The California court stated:

A fundamental precept of this nation's democratic electoral process is that the government may not "take sides" in election contests or bestow an unfair advantage on one of several competing factions. A principal danger feared by our country's founders lay in the possibility that the holders of governmental authority would use official power improperly to perpetuate themselves, or their allies, in office. . . ; the selective use of public funds in election campaigns, of

²¹¹ *Id.* The reasoning of the court also included the fact that "public funds are trust funds and as such are sacred and are to be used only for the operation of government." *Id.* Since "people of all shades of opinion and belief contribute these funds from one source or another," for a public agency to use the funds to influence public opinion on such matters "inhibits the democratic process through the misuse of government funds and prestige." *Id.*

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

²¹³ In *Stanson* funds from the bonds were to be used to purchase park land and recreational facilities. The defendant was alleged to have used public funds for writing, printing, and distributing partisan materials; distributing partisan materials prepared by private supporters of the bond issue; speaking engagements and travel to promote passage of the bond issue; and was alleged to have used government employees during working hours to promote the bond issue. Relying on *Mines v. Del Valle*, 201 Cal. 273, 257 P. 530 (1927), the California court ruled that the director did not have authority to expend public funds to secure voter approval of the bond issue since such authority was not granted to the Department in "clear and unmistakable language." *Stanson v. Mott*, 17 Cal. 3d at 219-20, 551 P.2d at 10, 130 Cal. Rptr. at 706.

²¹⁴ *Id.* at 219, 551 P.2d at 10, 130 Cal. Rptr. at 706.

²¹⁵ 14 Cal. 3d 661, 677, 536 P.2d 1337, 1348, 122 Cal. Rptr. 377, 378 (1975).

²¹⁶ *Stanson v. Mott*, 17 Cal. 3d at 219, 551 P.2d at 10, 130 Cal. Rptr. at 706.

²¹⁷ *Id.*

²¹⁸ *Id.*

course, raised the specter of just such an improper distortion of the democratic electoral process.²¹⁹

Thus, the *Stanson* court would examine government action in this area strictly.

A third case addressing the constitutional ramifications of official partisanship is the 1978 case of *Mountain States Legal Foundation v. Denver School District 1*.²²⁰ In *Mountain States*, the United States District Court of the District of Colorado enjoined a local school district from using public facilities and public funds to defeat a proposed amendment to the Colorado State Constitution. If successful, the amendment would limit the power of all levels of state government to spend public funds. Several weeks before the election, the school district adopted a resolution officially opposing the amendment and urged its defeat. In addition, the district resolution specifically approved:

The use of so much of the School District equipment, materials, supplies, facilities, funds and employees necessary to

1. Distribute campaign literature to School District employees, and the parents of children in the schools.
2. The use of telephones and facilities of the School District during non-working hours by volunteers for the purpose of contacting the public to urge the defeat of this amendment.²²¹

The school district claimed authority to engage in official partisanship under a statutory provision which provided that the state, its agencies, and political subdivisions may "make contributions . . . in kind in campaigns involving only issues in which they have an official concern."²²² The district court rejected this argument holding that a proposed amendment to the state constitution on a general election ballot is not a matter in which the local school district had an official concern. The court recognized that adoption of the amendment would affect the conduct of the affairs of school districts. Nevertheless, the court said that to consider "a proposal for an organic and systematic change in governance of the people of Colorado"²²³ to be "a matter of the official concern of a single unit of government is to distort the relationship of government agencies to the people who are to be served by them."²²⁴ The court further commented that "the dimensions of the governmental power granted to a school district is a matter of concern of the people as grantors, not the board as grantee."²²⁵

In considering the issue of government free expression, the district court ruled that an interpretation of the statute in question "as a grant of express authority for a partisan use of public funds in an election of this type would

²¹⁹ *Id.* at 217, 551 P.2d at 9, 130 Cal. Rptr. at 705.

²²⁰ 459 F. Supp. 357 (D. Colo. 1978).

²²¹ *Id.* at 358. In *Mountain States*, the school district further authorized the use of a school lunch room and auditorium by the "No on 2—2 Won't Do" Committee, a private organization opposed to the amendment. *Id.*

²²² *Id.* at 359.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.* at 359-60.

violate the First Amendment to the United States Constitution.”²²⁶ The district court stated:

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 [first amendment] freedoms. Specifically, where the proposal in question—placed before the voters in the exercise of the initiative power—seeks fundamentally to alter the authority of representative government, opposition to the proposal which is financed by collected funds has the effect of shifting the ultimate source of power away from the people. Do not the people themselves, as the grantors of the power of government, have the right to freely petition for what they believe is an improvement in the exercise of that power? Publicly financed opposition to the exercise of that right contravenes the meaning of both the First Amendment to the United States Constitution and Article V, Section 1 of the Constitution of Colorado.²²⁷

In the court's view, expenditure of public funds in opposition to a constitutional amendment “violates a basic precept of this nation's democratic process”²²⁸ and “would seem so contrary to the root philosophy of a republican form of government as might cause this court to resort to the guaranty clause in article IV, section 4 of the United States Constitution.”²²⁹ The district court concluded by finding that a refusal to restrain the school district from official partisanship would result in irreparable injury. In the court's view the electorate's right to a free discussion of whether to approve or disapprove of the proposed amendment without partisan participation by the school district would be irretrievably lost without the intervention of the court.²³⁰

The foregoing cases clearly suggest that the first amendment and the guaranty clause protect the right of citizens to be free from official partisanship in connection with structured political questions since such conduct may diminish the effect of opposing citizens' political expression and give an unfair advantage to competing groups in the private political arena. The cases also suggest that this type of official partisanship is not a proper function of government in a republican form of government where self-determination is pursued through democratic processes. In this respect, there is no logical distinction between elections involving constitutional amendments²³¹ and those involving issues of official concern to a particular federal and state agency.²³² The injury to opposing citizens' interests in political expression is the same in both instances. For the same reason, official partisanship by federal and state

²²⁶ *Id.* at 360.

²²⁷ *Id.* at 360-61.

²²⁸ *Id.* at 361.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ See *Mountain States Legal Foundation v. Denver School Dist. 1*, 459 F. Supp. 357 (D. Colo. 1978).

²³² See *Stanson v. Mott*, 17 Cal. 3d 206, 551 P.2d 1, 130 Cal. Rptr. 697 (1976).

agencies in connection with state proposals or ratification of federal constitutional amendments should be prohibited. In all of these cases, fundamental rights are infringed and there is no compelling state interest to justify the harm.²³³

A further argument can be made that the acts of official partisanship mentioned above violate the system of freedom of expression protected by the first amendment in yet another manner. Since official partisanship uses public funds to finance a partisan viewpoint with which certain taxpayers disagree, those taxpaying opponents are, in effect, coerced to finance a political expression they oppose. The Supreme Court has long held that government cannot compel a person to express political or ideological views which that individual finds unacceptable.²³⁴ The rationale, as Thomas Jefferson stated, is that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."²³⁵

Supreme Court decisions have applied this principle to prohibit organizations to which a person is compelled to belong or to contribute funds, from supporting candidates, political parties, or engaging in other forms of political expression with the funds of a dissenting member or contributor. In *International Association of Machinists v. Street*,²³⁶ a union shop authorized by the Railway Labor Act used the union treasury, to which all employees were compelled to contribute, to finance the campaign of candidates whom some members opposed, and to promote the propagation of political and economic doctrines with which some members disagreed. The Supreme Court recognized that compelling contributions for such purposes presented constitutional "questions of the utmost gravity."²³⁷ Consequently, the Court construed the Act to prohibit political use of compulsory union dues. More recently, in *Abood v. Detroit Board of Education*,²³⁸ the Supreme Court held that a state, acting through a public employee's union, may not require an individual to contribute to the support of a political cause he opposes as a condition of employment. A state statute provided that unions and local government employers might agree to an agency-shop arrangement pursuant to which every employee—even those not union members—must pay to the union, as a condition of employment, union dues or a service fee equivalent in amount to union dues. Rejecting the statute, the Court ruled that use of funds contributed by dissenting employees for political purposes impermissibly infringed their first amendment right to adhere to their own political beliefs and to refuse to support the political view of others.

As Professor Tribe has pointed out, there is no convincing distinction between these closed-shop cases and situations where a citizen is compelled to

²³³ See text at notes 197-205 *supra*.

²³⁴ *Wooley v. Maynard*, 430 U.S. 705 (1977); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

²³⁵ I. BRANT, JAMES MADISON: THE NATIONALIST 354 (1948) cited in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 n.31 (1977).

²³⁶ 367 U.S. 740 (1961).

²³⁷ *Id.* at 749.

²³⁸ 431 U.S. 209 (1977).

finance, through taxes, government partisan support for a particular viewpoint that the citizen opposes.²³⁹ Professor Tribe states, "any notion that the very relation of taxpayer to government makes the refund argument inherently inapt seems refuted by positioning a hypothetical instance in which, say, half the state budget of New Hampshire goes toward broadcasting 'Live Free or Die' across the countryside."²⁴⁰ Of course, every legislative appropriation uses public money in a manner or for a purpose that some taxpayers may oppose.²⁴¹ Although a representative democracy must operate largely through majority rule, this alone cannot justify an infringement of first amendment rights. Most courts would agree that, as a general rule, taxpayers may be compelled to finance government speech and conduct despite their opposition, whether the conduct in question be flying the flag over government buildings, printing "In God We Trust" on coins and currency, or, to pick an extreme example, the waging of war. There is likely to be equally strong agreement, however, that it is constitutionally improper to compel a citizen to finance, through taxes, partisan government support of a particular candidate or viewpoint that that citizen opposes in an election.

The apparent dilemma of distinguishing proper from improper government conduct in this context is best resolved by focusing on the relationship between the conduct questioned and the function of the people's representatives in our republican form of government. If the controversial government expression or conduct involves a political question which the governing structure, as established by the constitution indicates is a matter for the people's representatives, such as choosing a national symbol, motto, or dealing with foreign adversaries, arguably the first amendment does not prohibit the government from exacting support for the expression or conduct from a dissenting citizen. In this situation, the dissenting taxpayer has implicitly deferred, through the organic law, the question's resolution to the people's representatives. The first amendment, after all, does not prohibit the government from governing, at least until the next election. But if the government expression or conduct involves a political question which the governing structure, as established by the Constitution, indicates is not to be determined by the people's representatives—such as, who the representatives shall be, or the outcome of a referendum type election, or state ratification process—then the first amendment should protect a dissenting taxpayer from being compelled to finance such expression or conduct since it relates to a question that the people's representatives do not have implied citizen consent through the organic law to resolve. This proposed distinction involves a determination of whether a taxpayer is, in effect, estopped from complaining of having to finance government expression or conduct with which he disagrees because the governing structure, established by the organic law, implies his consent that the question involved be determined by the people's representatives.

The United States Supreme Court has recognized and enforced such a distinction under the establishment clause of the first amendment.²⁴² Just as

²³⁹ L. TRIBE, CONSTITUTIONAL LAW 590 n.8 (1978) [hereinafter cited as TRIBE].

²⁴⁰ *Id.*

²⁴¹ See *Buckley v. Valeo*, 424 U.S. 1, 91-92 (1976).

²⁴² See, e.g., *Flast v. Cohen*, 392 U.S. 83 (1968).

the establishment clause leaves religious matters to the people, the governing structure established by our constitutions reserve certain questions to the people or to the states such as choosing the people's representatives or determining the outcome of referendum type elections and proposed constitutional amendments. Therefore, since the people have not implicitly consented through the organic law that their representatives resolve certain political questions, the government cannot, under the first amendment, compel a citizen to finance government expression or conduct directed at the resolution of such a question. Professor Tribe suggested this argument in his observation that "the difference thus far assumed between the establishment and free speech clauses . . . is rendered questionable by the holding of [*Abood*], affirming the right to withhold dues from the dissemination of union messages *unrelated to collective bargaining*."²⁴³

The very expenditure of funds to affect the outcome of a structured political question outside of the congressional function, the matter having been reserved by the governing structure for citizen decision, offends a citizen's right of free speech because, in effect, such action constitutes an unwilling financing of government expression. Surely, the first amendment does not contemplate subordinating a person's right of expression to the government's right of expression, especially on a matter constitutionally beyond the power of government. In *Abood* the Supreme Court indicated that the appropriate remedy in the union cases is a union refund to the dissenting non-member employee equivalent to that portion of his dues used in union political activities.²⁴⁴ By analogy, a dissenting taxpayer may be entitled to a tax refund equivalent to that portion expended for official partisanship unrelated to the representative function. Since the total government expense attributable to such conduct is so small, the refund right implied in *Abood* would be insignificant and the remedy may be impractical. A better remedy would be to strike the entire appropriation and to require voluntary financing of partisan conduct unrelated to the representative function.²⁴⁵

Legislative authorization for public agencies to engage in official partisanship in connection with routine legislative matters does not necessarily raise the constitutional questions presented by the other types of official partisanship analyzed earlier.²⁴⁶ Of course, legislative lobbying by public agencies involves the use of public funds to promote a viewpoint that some taxpayers may oppose. One of the traditional functions of elected and appointed executive officials, however, is to suggest and comment on proposed legislation relating to their delegated responsibilities. The legislature has a significant interest in assuring that candid input is provided on a structured and con-

²⁴³ TRIBE, *supra* note 239, at 590 n.8 (emphasis added).

²⁴⁴ 431 U.S. at 237-42.

²⁴⁵ See *Anderson v. City of Boston*, 1978 Mass. Adv. Sh. 2297, 2320 n.20, 380 N.E.2d 628, 640 n.20; TRIBE, *supra* note 239, at 589 n.5.

²⁴⁶ See, e.g., *Stanson v. Mott*, 17 Cal. 3d 206, 213, 551 P.2d 1, 6, 130 Cal. Rptr. 697, 705 (1976); *Anderson v. City of Boston*, 1978 Mass. Adv. Sh. 2297, 2309 n.11, 380 N.E.2d 628, 635 n.11. State courts are split on the question of whether a public agency may engage in legislative lobbying activities. See *Valentine v. Robinson*, 300 F. 521 (9th Cir. 1924).

tinuing basis on what are often complex and technical issues from supposedly neutral and informed government organizations. The question whether a public agency should be authorized to expend public funds to provide input into the legislative process is largely an internal governmental matter, properly left to the discretion of the people's representatives. Since the legislative process contemplates that interested parties will attend legislative hearings, or otherwise have opportunity to explain the potential benefits or detriments of proposed legislation to specific representatives, public agency lobbying is unlikely to distort the legislative process. It is a hard pressed argument to suggest that legislators are consciously authorizing the expenditure of public funds to subvert their own independent judgment, given the threat of a disgruntled constituency at election time. The source of agency lobbying efforts, of course, should be identified and the agency's input open to public scrutiny. Most importantly, agency lobbying activities in connection with legislation should be limited to participation in the legislative process itself rather than attempting, directly or indirectly, to influence legislation by political campaigns outside the formal legislative process.²⁴⁷ The latter type of agency activity, which is directed at citizen opinion would seem to be a matter not appropriate for decision by the people's representatives but one that our democratic system intends to be left to the untrammelled discretion of the people.²⁴⁸

CONCLUSION

In cases of official partisanship by public agencies in connection with structured political questions, courts have narrowly construed grants of informational authority to exclude the power to engage in political campaigns in favor of, against, any issue or candidate.²⁴⁹ Courts have rejected the notion that public agencies possess an inherent authority to engage in partisan political activities to promote the "public interest" on issues related to the agency's delegated task.²⁵⁰ Because of the grave constitutional questions such a grant of authority would raise, courts hold that the authority to engage in official partisanship in connection with structured political questions can exist only if such authority is granted to the agency in "clear and unmistakable language."²⁵¹ The vast majority of states allow taxpayers' standing to enjoin this type of illegal expenditure of public funds.²⁵² At the federal level, however, taxpayers lack standing in the absence of a specific constitutional allegation against the legislative appropriation itself.²⁵³

In some states, and at the federal level, statutory restraints in the form of criminal prohibitions, Hatch Act-type legislation, or specific anti-lobbying provisions exist prohibiting acts of official partisanship by public agencies in con-

²⁴⁷ See *Miller v. Miller*, 87 Cal. App. 3d 713, 151 Cal. Rptr. 197 (1978).

²⁴⁸ See *Stern v. Kramarsky*, 84 Misc. 2d 447, 375 N.Y.S.2d 235 (Sup. Ct. 1975).

²⁴⁹ See text at notes 40-62 *supra*.

²⁵⁰ *Id.*

²⁵¹ See text at notes 63-67 *supra*.

²⁵² See text at notes 75-76 *supra*.

²⁵³ See text at notes 77-78 *supra*.

nection with structured political questions.²⁵⁴ Citizen standing to enforce such a prohibition is seldom a problem in the states. At the federal level, however, the present confusion with respect to the law of standing makes it uncertain whether a private party could maintain such a suit. In view of recent Supreme Court decisions, a citizen opponent of the viewpoint promoted by an agency through illegal partisan conduct should have standing as a party "injured in fact" by the agency's conduct.²⁵⁵

The United States Supreme Court has yet to rule on the constitutional issues raised by official partisanship in connection with structured political issues. The courts that have considered the question in the context of referendum type elections have indicated that such conduct violates the first amendment and perhaps the guaranty clause.²⁵⁶ On the basis of these opinions it is argued herein that official partisanship in connection with structured political questions violates the first amendment since it infringes the political rights of citizens by diminishing the effect and probability of success of its opponents' protected expression. Moreover, official partisanship violates the first amendment since it provides certain groups, which compete in the private political arena, with an advantage without there being a recognized compelling state interest to justify such intervention.²⁵⁷ Finally, this type of official partisanship also violates the first amendment since opposing taxpayers are compelled to finance partisan government conduct with which they disagree on matters that the governing structure established by the organic law has left to the people rather than to the people's representatives.²⁵⁸ These arguments apply to official partisanship by federal and state agencies in connection with referendum type elections, whether related to constitutional amendments or other issues, official partisanship by a federal agency related to state legislative action on constitutional amendments, and public agency lobbying on routine legislative matters, when the conduct is directed at manipulation of citizen opinion.²⁵⁹

Justice Jackson stated in 1952 that the metamorphosis of administrative agencies into governing institutions "has been the most significant legal trend of the last century and perhaps more values are affected today by their decisions than by those of all the courts."²⁶⁰ For better or for worse, their influence will no doubt continue, in view of the complex social and technological problems that this country faces. Recent cases indicate that government agencies are attempting to extend this influence to the country's basic democratic processes—including legislation, referendum type elections and constitutional amendments.²⁶¹ Official partisanship by public agencies in connection with

²⁵⁴ See text at notes 87-133 *supra*.

²⁵⁵ See text at notes 102-15 *supra*.

²⁵⁶ See text at notes 207-30 *supra*.

²⁵⁷ See text at notes 197-205 *supra*.

²⁵⁸ See text at notes 234-35 *supra*.

²⁵⁹ The above reasoning also would seem to apply regardless of whether the public agency is a municipal corporation, a government proprietary corporation or a common variety executive or regulatory agency.

²⁶⁰ *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

²⁶¹ See cases cited in note 9 *supra*.

these political processes can only demean, distort and eventually destroy, if not the democratic process itself, at least public confidence in the process.

Perhaps more than ever before, public opinion is affected by the leadership and advice of public officials.²⁶² This power should be accompanied by a responsibility that recognizes the simple right of the people not to have proposed official policies forced upon them. This article highlights the need for further legislation prohibiting official partisanship by public agencies in connection with structured political questions²⁶³ and interprets the first amendment and the guaranty clause so as to prohibit this type of government conduct.²⁶⁴ If a republican form of government allows its democratic processes to be undermined by official partisanship it will fast lose the purpose of its power in the fact of its power. If basic governing policy in our democratic system is ultimately to reflect the free choice of citizens, the sovereignty of the people cannot stop at the end of a bureaucratic tether. Arthur S. Miller, a noted constitutional scholar, already believes that in some cases individual liberties are being expanded and protected largely because these freedoms do not threaten the stability of the governing system.²⁶⁵ If he is correct, and I think he is, the constitutionality of government speech in the form of official partisanship may well prove to be an issue in the years ahead which will have a significant bearing on whether our constitutional order, while recognizing that the urgent tasks of government must be accomplished, recognizes that governing power also must be accountable—to the people.

²⁶² See T. EMERSON, *TOWARD A THEORY OF THE FIRST AMENDMENT* 39 (1966).

²⁶³ See Part II Section C *supra*.

²⁶⁴ See Part III *supra*.

²⁶⁵ Miller, *Constitutional Law: Crisis Government Becomes the Norm*, 39 OHIO STATE L.J. 736, 749 (1978).

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