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NOTES

THE CONSTITUTIONALITY OF MUNICIPAL ADVOCACY IN STATEWIDE REFERENDUM CAMPAIGNS

Municipal governments regularly communicate ideas and information to their citizens at the public expense. When municipal speakers engage in unchecked political advocacy, however, their speech may arouse serious objections. Although few citizens would disapprove of a mayor's occasional exhortations against littering, for example, all citizens would feel outraged if municipal government officials spent the entire city budget to promote their own reelection.

Although some courts and commentators have recognized the dangers which government speakers may present to democratic values, none have articulated a satisfactory theory to distinguish between permissible and impermissible municipal governmental speech. Theories of local government law have largely ignored municipal speech; theories of free expression, on the other hand, have largely sought to define the limits of government control over individual and corporate speakers. When taxpayers challenge a municipality's expenditure to influence a statewide referendum election, the need for a thoroughgoing analysis of municipal speech becomes particularly acute. Courts adjudicating such challenges must balance the values potentially endangered by a municipality's politically partisan speech against the countervailing rights of citizens to hear information about referendum issues and the rights of municipal employees and officials to express opinions on matters of public interest.

This Note will analyze the constitutionality of municipal advocacy in statewide referendum campaigns. Part I will examine the mode of analysis which state courts have tradition-


2 See, e.g., A. MEIKLEJOHN, POLITICAL FREEDOM (1960); Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1 (1971); Scanlon, A Theory of Freedom of Expression, 1 PHILOSOPHY & PUB. AFF. 204 (1972).
ally used to adjudicate this issue — an approach which has focused not on first amendment issues but on questions of local government law. Part II will focus on the Supreme Court's reasoning in two recent decisions — *Buckley v. Valeo* and *First National Bank v. Bellotti* — and the second, constitutional mode of analysis which those decisions have suggested to courts evaluating municipal referendum advocacy. Part III will discuss the pivotal case of *Anderson v. City of Boston*, a Massachusetts decision illustrating the fundamental conflict between the theories discussed in the first two Parts. Part IV will explore yet a third mode of analysis, which the *Anderson* court suggested might resolve this conflict — an analysis based on the rights of dissenting taxpayers not to finance government viewpoints with which they disagree. The first four Parts jointly argue that no existing mode of analysis has correctly determined when and how municipal governments may permissibly speak in statewide referendum campaigns. Part V will contend that the constitutional doctrine which ultimately decides this issue can be found in Supreme Court decisions defining the government's proper role in the electoral process. The Note will conclude by suggesting how courts may frame a constitutional decree to regulate municipal referendum advocacy in the future.

I. THE POSITIVISTIC APPROACH TO MUNICIPAL ELECTORAL ADVOCACY

Courts adjudicating challenges to municipal spending in statewide election campaigns have traditionally attempted to determine first whether such spending is within the municipality's powers under state law. Their analysis has proceeded from the central tenet of local government law: municipalities are creatures of the state. That principle limits a municipality's powers to those either expressly granted by the state constitution or a state statute or those necessarily implied in any expressly conferred powers. A second rule of local gov-
Government law forbids municipalities from appropriating public funds to pursue even activities authorized by state law unless those activities serve some "public purpose."9 Under these "positivistic" principles, a municipality's right to speak is thus derived solely from the powers granted to it by the state.

This positivistic approach requires a court evaluating a challenge to a municipality's campaign spending to search state law for specific legislative authorization or disapproval of that "speech."10 The court is obliged to ask two questions: whether the city can explicitly derive or fairly imply the power to speak from a legislative grant, and whether the speech itself serves some public or municipal purpose.11 When a state statute explicitly authorizes a particular form of municipal expression, however, courts have often been willing to presume the existence of a public purpose.12 When state legislation has not specifically referred to a particular type of municipal expression, courts have sometimes inverted the test to find that state law has or has not impliedly authorized a municipal act because that act would or would not serve a public purpose.13

municipality's implied powers strictly, resolving all fair doubts about the existence of a particular power against the local government. See, e.g., Beazley v. DeKalb County, 210 Ga. 41, 43, 77 S.E.2d 740, 742 (1953); Father Basil's Lodge, Inc. v. City of Chicago, 393 Ill. 246, 252, 65 N.E.2d 805, 810 (1946). See generally 1 C. Antieau, supra, §§ 5.01-03. The implied powers of home rule municipalities, however, who may exercise powers "not inconsistent with" their states' constitutions or general laws, see, e.g., Mass. Const. art. LXXXIX, § 6 (amended 1966), are generally construed more broadly than those of nonhome rule municipal corporations. See generally 1 C. Antieau, supra, §§ 3.00-4.00.

9 The public purpose doctrine evolved from common law, see, e.g., Town of Gila Bend v. Walled Lake Door Co., 107 Ariz. 545, 490 P.2d 551 (1971); Sharpless v. Mayor of Philadelphia, 21 Pa. 147, 59 A.D. 759 (1853), and has now been recognized in state constitutional clauses requiring that taxes be levied only for public purposes, see, e.g., Mont. Const. art. VIII, § 1. See generally 2 C. Antieau, supra note 8, § 15A.06 (1973); 15 E. McQuillan, THE LAW OF MUNICIPAL CORPORATIONS § 39.19 (3d rev. ed. 1970).

10 The term "municipal speech" shall be used throughout this Note to refer to publicly funded messages disseminated to citizens by officials, employees, or agencies of municipal governments.

11 In some states, the public purpose limitation is supplemented by the closely related requirement that a municipal expenditure aid an identifiable corporate or municipal purpose — one traditionally or necessarily connected with the purpose for which the local government was established. See, e.g., East Tenn. Univ. v. Mayor of Knoxville, 65 Tenn. (6 Baxter) 166, 172 (1873).

12 See, e.g., City of Jacksonville v. Oldham, 112 Fla. 502, 150 So. 619 (1933) (after state legislature passed statute authorizing municipal advertising, advertising held a municipal purpose); Connolly v. Beverly, 151 Mass. 437, 24 N.E. 404 (1890) (after statutory authorization, town held empowered to lobby before state legislature).

13 See, e.g., In re Carrick, 127 N.J.L. 316, 22 A.2d 561 (Sup. Ct. 1941) (municipal officers have implied power to spend public funds to present voters with views against proposed legislation because legislation would threaten city's future); Shannon v. City
Thus, the positivistic approach frequently reduces in practice to the search for a public purpose.

In this search, courts usually defer to existing legislative determinations of public purpose.\(^{14}\) When a state legislature neither authorizes a particular form of municipal speech nor explicitly states what constitutes a valid public purpose, however, the state law doctrines of "implied power" and "public purpose" offer courts an inadequate theory of municipal speech. In such cases, the positivistic approach presents the judge with two choices: either to defer to the municipal legislature's definition of public purpose or to decide for himself whether the challenged municipal speech serves a public purpose. The first option effectively leaves the municipal legislature to judge its own case.\(^{15}\) The second option grants the judge unfettered discretion to apply his own values to determine whether a municipal right to speak exists.\(^{16}\) Either result violates the positivistic theory's central premise: that only state statutory law can determine when cities may speak.

Furthermore, state court decisions evaluating municipal attempts to use public funds to influence elections have demonstrated that a positivistic approach produces inconsistent results. While many judges have invalidated partisan municipal speech for lack of express\(^{17}\) or implied\(^{18}\) authority or for

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of Huron, 9 S.D. 356, 69 N.W. 598 (1896) (city has no implied power to incur indebtedness in campaign to become state capital because object of campaign serves no public or corporate purpose).

\(^{14}\) See, e.g., City of Jacksonville v. Oldham, 112 Fla. 502, 150 So. 619 (1933).

\(^{15}\) In City Affairs Comm. v. Board of Comm'r,s, 134 N.J.L. 180, 46 A.2d 425 (N.J. 1946), noted in 59 HARV. L. REV. 1172 (1946), for example, a city's governing body authorized the expenditure of municipal funds for statewide newspaper advertisements and radio addresses urging defeat of a proposed state constitutional amendment. The state's highest court upheld the municipal action on the ground that the public purpose doctrine requires courts to correct only those municipal legislative actions which are arbitrary or capricious. 134 N.J.L. at 182, 46 A.2d at 427.

\(^{16}\) "The determination of what is and what is not a public purpose ... initially is for the legislature, but in the final analysis ... must rest with the courts." Visina v. Freeman, 252 Minn. 177, 184, 89 N.W.2d 635, 643 (1958). For a persuasive argument that judges' own values are unacceptable as sources of normative values, see Ely, The Supreme Court, 1977 Term — Foreword: On Discovering Fundamental Values, 92 HARV. L. REV. 1, 16-22 (1978).


lack of public or municipal purpose, others have found these elements present and thus condoned such municipal expression. Such inconsistent results have flowed inevitably from the absence of a consistent judicial definition of public purpose. Because courts have understood that public purposes will likely change over time, they have not felt bound to disallow, under the rule of stare decisis, municipal expenditures which previously have been prohibited. Some courts have simply conceded that the public purpose concept "defies absolute definition." As applied, the positivistic approach has thus proved so malleable as to defy prediction.

The positivistic approach provides guidance only when the state legislature has spoken clearly and explicitly concerning the municipal speech at issue. It is a theory of narrow application. Furthermore, such an approach does not even pretend to address the federal constitutional questions that municipal speech may raise. Its only axiom — that cities may speak only when states say they can — recognizes no limit on the type or amount of municipal expression which states may expressly authorize. Thus, the positivistic approach cannot help in building a larger theory of governmental speech that would apply to state and federal, as well as municipal, governmental expression.

19 See, e.g., Elsenau v. City of Chicago, 334 Ill. 78, 165 N.E. 129 (1929); cf. Sims v. Moeur, 41 Ariz. 486, 19 P.2d 679 (1933) (industrial commission's public expenditure for campaign against proposed repeal of state workmen's compensation law did not serve a purpose for which commission was created).

20 See, e.g., City Affairs Comm. v. Board of Comm'rs, 132 N.J.L. 552, 41 A.2d 798 (Sup. Ct. 1945) (municipality deemed to have implied power to use public funds to advocate rejection of a referendum measure), aff'd, 134 N.J.L. 180, 46 A.2d 425 (N.J. 1946) (on grounds that municipal action served a public purpose). Some courts have similarly found municipalities powerless to lobby before national or state legislatures without an express statutory grant, see, e.g., Valentine v. Robertson, 300 F. 521 (9th Cir. 1924); Chicago Park Dist. v. Herczel & Co., 373 Ill. 325, 26 N.E.2d 119 (1940), while others have held that municipalities have an implied power to lobby even without such a grant, see, e.g., Farrel v. Town of Derby, 58 Conn. 234, 20 A. 460 (1889).

21 Compare City Affairs Comm. v. Board of Comm'rs, 134 N.J.L. 180, 182, 46 A.2d 425, 427 (N.J. 1946) ("the promotion . . . of the 'general welfare, security, prosperity, and contentment of all the inhabitants or residents' of the municipality"), with Shields v. City of Philadelphia, 405 Pa. 600, 603, 176 A.2d 697, 698 (1962) (particular improvement may serve a public purpose even without a considerable part of the community enjoying its benefits).


II. THE FORMALISTIC APPROACH TO MUNICIPAL ELECTORAL ADVOCACY

The Supreme Court has never expressly defined the extent of a municipality's first amendment rights. Two recent first amendment decisions, *Buckley v. Valeo* and *First National Bank v. Bellotti*, could, however, be read together to suggest that municipal corporations have broad autonomy to spend money to disseminate political messages in statewide referendum campaigns.

In *Buckley*, the Supreme Court found that expenditure ceilings imposed by federal statute on candidates campaigning for federal office violated the first amendment's guarantee of free expression and association. "[B]ecause virtually every means of communicating ideas in today's mass society requires the expenditure of money," the Court determined that the statutory limits on private political spending directly restrained the quantity and diversity of political expression. The Court concluded, therefore, that any attempt to limit those expenditures should be subjected to exacting first amendment scrutiny.

Two years later, in *Bellotti*, the Court went beyond *Buckley* to suggest that the first amendment's protection of expenditures for political expression does not depend on the identity of the speaker. The Massachusetts Supreme Judicial Court had upheld a state statute banning spending by business corporations intended to influence any state referendum not "materially affecting" corporate property, business, or assets. While conceding that corporations have some first amendment

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24 In City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175 n.7 (1976), the Supreme Court explicitly refrained from deciding "whether a municipal corporation as an employer has First Amendment rights to hear the views of its citizens and employees." One commentator has simply asserted that "[t]he government or polity . . . has no first amendment rights." Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1505 (1975).


28 424 U.S. at 19.

29 Id.

30 Id. at 16.

31 435 U.S. at 777.

rights, the Massachusetts court decided that the fourteenth amendment did not bar the state legislature from defining those rights narrowly.

The Supreme Court rejected the state court's analysis and struck down the law. Writing for the majority, Justice Powell declared that "[t]he proper question . . . is not whether corporations 'have' First Amendment rights," but whether the state ban on corporate expenditures "abridges expression that the First Amendment was meant to protect." Expression does not lose protection merely because it stems from a corporate source. Because Buckley had held that courts should scrutinize regulation of expenditures for political speech as carefully as regulation of speech itself, the Bellotti Court strictly scrutinized Massachusetts' restriction on corporate political spending. It then found that the state's chosen means were poorly tailored to protect the state's asserted compelling interests.

The Court's reasoning in Buckley and Bellotti could be used to support a constitutional argument that the first amendment protects municipal speech. By suggesting that the first amendment protects political speech from any source, Bellotti's reasoning directs courts examining legislative or judicial bans on municipal electoral expenditures to determine initially whether those bans restrict political speech. Buckley's reasoning implies that a city's political speech includes its expenditures to express views on political issues. A court would thus be obliged to subject to exacting scrutiny any means by which a state regulated such expenditures and to find those means unconstitutional if they did not represent the least restrictive alternative available to protect compelling state interests.

33 371 Mass. at 785, 359 N.E.2d at 1270.
34 Id.
35 435 U.S. at 795.
36 Id. at 776.
37 Id. at 777.
38 Id. at 786 n.23 (citing Buckley). See also note 30 supra.
39 The state asserted compelling interests in preventing corporate domination of the political process and in safeguarding the rights of dissenting shareholders. 435 U.S. at 788-89, 792-93. Without disputing the importance of these interests, the Bellotti majority concluded that the first was not at stake because the record showed no present threat of corporate domination of elections, id. at 789-90, and that the state ban was poorly tailored to serve the second interest, being both under- and over-inclusive. Id. at 793-95. But see id. at 819-21, 812-20 (White, J., dissenting).
40 See Buckley v. Valeo, 424 U.S. 1, 16 (1976) (per curiam).
Despite its superficial appeal, such a reading of Buckley and Bellotti proves overly formalistic. From Bellotti, this approach deduces that the first amendment protects disembodied political speech rather than the rights of particular speakers. From Buckley, it deduces that the first amendment protects the money that finances political speech as a means of protecting the speech itself. By combining these two premises, the formalistic approach not only treats all political speakers as equally protected, but also renders the power of a municipal corporation to spend in a referendum campaign effectively coextensive with the constitutional right of an individual to speak. In the process it ignores two simple realities: that the right to spend differs from the right to speak and that municipal governments are not ordinary political speakers.

An individual's right to speak and his right to spend are related but conceptually distinct. A spectrum of four hypo-

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42 Formalistic analysis is generally "equated with rule application, deductive thinking, and the bringing of particulars under universal categories." Paine, Commentary: Instrumentalism v. Formalism: Dissolving the Dichotomy, 1978 Wis. L. Rev. 997.

43 The Bellotti Court's decision to emphasize the constitutional protection due a particular type of speech rather than the constitutional rights of particular speakers has already created practical difficulties in the realm of commercial speech. The Burger Court has offered no principle to separate corporate political speech, which Bellotti deemed worthy of the most exacting first amendment protection, from corporate commercial speech, which the Court has accorded somewhat lesser protection. See, e.g., Friedman v. Rogers, 99 S. Ct. 887 (1979) (upholding constitutionality of state statute prohibiting practice of optometry under a trade name). Ad hoc decisionmaking has resulted. Compare Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (state may constitutionally prohibit lawyer's commercial solicitation of client), with In re Primus, 436 U.S. 412 (1978) (state may not reprimand lawyer for soliciting when she acts not for financial gain, but to further political objectives of legal services organization). When a corporation's political speech also serves its business objectives — for example, when a soft drink company advertises to defeat a state "bottle bill" — the Court's analysis in no way determines what level of constitutional protection should be accorded that speech.

44 Academic commentators and judges alike have sharply criticized the Buckley Court's decision to protect money as strictly as speech simply because political speech often entails expenditure of money. As Professor Freund noted shortly after Buckley was decided: "We know that money talks; but that is the problem, not the answer," quoted in Lewis, The Court on Politics, N.Y. Times, Feb. 5, 1976, at A31, col. 3. See also Buckley v. Valeo, 424 U.S. 1, 263 (1976) (White, J., concurring in part and dissenting in part); L. Tribe, supra note 2, § 13-27; Freund, Commentary, in FEDERAL REGULATION OF CAMPAIGN FINANCE 72, 74 (A. Rosenthal ed. 1972) (arguing that limits on voluntary contributions are no less constitutional than regulations imposed on a soundtruck's decibel level), reprinted in 3 STUDIES IN MONEY IN POLITICS study no. 18 (H. Alexander ed. 1974); Leventhal, Courts and Political Thickets, 77 Colum. L. Rev. 345, 359-62 (1977); Wright, Politics and the Constitution: Is Money Speech?, 85 Yale L.J. 1001 (1976) (attacking Buckley's de facto equation between money and speech).

45 See Freund, supra note 44, at 72 ("The right to speak is . . . more central to the values envisaged by the First Amendment than the right to spend.").
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46 See Wright, supra note 44, at 1019 (arguing that an individual's expenditure of "money may register intensities . . . but money by itself communicates no ideas").

47 See generally L. Tribe, supra note 1, § 12-20; Ely, supra note 24, at 1496-502. This reasoning suggests that, Buckley notwithstanding, some restrictions on expenditures of voluntarily contributed money could survive constitutional scrutiny. See also note 44 supra.

48 This analysis suggests a fundamental flaw in the Supreme Court's first amendment analysis in Bellotti. The Bellotti majority based its decision to protect corporate political speech strictly, regardless of its source, on an "instrumental view" of the first amendment. That view, usually associated with Professor Meiklejohn, deems political speech deserving of constitutional protection primarily because it is "indispensable to [political] decisionmaking in a democracy." See First Nat'l Bank v. Bellotti, 435 U.S. 765, 777 & n.11 (1978). See generally A. Meiklejohn, supra note 2. Such a limited view of the first amendment, however, underemphasizes the intrinsic value of speech in the "evolution, definition, and proclamation of individual and group identity." L. Tribe, supra note 1, § 12-1, at 578. See also T. Emerson, supra note 1, at 6.

When an individual speaks, safeguarding the speech upholds his right to the self-expression manifested in his choice of both the form and the content of his message. When corporations "speak," however, protecting their expenditure need not necessarily safeguard the expressive rights of any individuals other than the corporation's directors. See First Nat'l Bank v. Bellotti, 435 U.S. 765, 804-05 (1978) (White, J., dissenting). The Supreme Court's analysis in Bellotti proves formalistic because it cannot distinguish between those situations where a corporate body communicates a political message on behalf of all of its members with their specific and immediate
coerced many individuals to give him money, then used the funds to disseminate his views about a referendum to an audience which included his "contributors." In such a case, it is unclear why the first amendment's protection for A's right to speak should also condone his expenditure of coerced money to amplify his voice. Although these four situations seem intuitively different, in each case the formalistic approach calls for the strictest scrutiny of any regulation on A's expenditures.

If A were not a private individual, but a municipal official, his speech would present another difficulty. The first amendment recognizes not only the intrinsic value of speech in defining individual and group identity, but also the instrumental value of speech in a democratic society. By recognizing the special value of political speech, the first amendment seeks both to protect the flow of information in the marketplace of ideas and to preserve private control of political discussion. Unlike individual or corporate speech, municipal speech involves direct government intrusion into the dialogue surrounding the political process. Any principled analysis of municipal speech must therefore decide when such governmental intrusion into the machinery of democracy is or is not legitimate. A theory which mechanically applies overly broad rules

consent, see, e.g., NAACP v. Button, 371 U.S. 415 (1963), and those situations in which a few individuals commanding an organization use other people's money and labor to amplify their own voices. To claim that its speech furthers the associational rights of its members, a corporate body must show that relations within the organization are personal, participation is voluntary, contributions are uncoerced, and internal self-corrective processes are free and open. See T. Emerson, supra note 1, at 681-82; P. Freund, ON LAW AND JUSTICE 91 (1968). In Bellotti, however, the Court chose simply to grant corporate speech exacting protection without examining any of these factors.

The means by which a donor acquires funds which are given to finance political expression is one step further removed from the expression itself. Surely, the First Amendment does not justify the stealing of funds or of a printing press because the defendant was planning to use [them] to publish his views on a subject of public concern.


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50 See note 48 supra.


52 "In the free society ordained by our Constitution it is not the government, but the people - individually as citizens . . . and collectively as associations . . . - who must retain control over the quantity and range of debate on public issues in a political campaign." Buckley v. Valeo, 424 U.S. 1, 57 (1976) (per curiam).

53 See pp. 555-57 infra.
cannot provide such distinctions. Like the positivistic approach, the formalistic approach thus proves inadequate to analyze the constitutionality of municipal referendum advocacy.

III. Anderson v. City of Boston

Only a few months after Bellotti was decided, the positivistic and formalistic theories clashed for the first time in Anderson v. City of Boston. Like Bellotti, Anderson grew out of a government perception that corporate spending to influence a referendum result might drown out the voices of individual voters. Since Bellotti had barred the Massachusetts legislature from outlawing corporate referendum expenditures, in the next statewide referendum the city of Boston sought directly to counteract corporate expression. The mayor and city council committed municipal employees, public facilities, and $1.3 million in tax revenues to a campaign urging passage of a state constitutional amendment opposed by business corporations. When eleven taxpayers challenged the appropriation, the city argued that any judicial restriction on its constitutionally protected “speech” would constitute a forbidden prior restraint. Nevertheless, a unanimous Massachus
setts Supreme Judicial Court issued a detailed injunction regulating the city's actions. 60

Justice Wilkins, writing for the court, began by asking whether state law authorized Boston to appropriate funds for electioneering. 61 Finding no explicit statutory grant, the court then read state law to bestow upon the city no implied authority to make such expenditures. The court also implied that the appropriation served no public purpose. 62

The city's novel assertion of a first amendment claim prevented the court from disposing of the case solely on positivistic grounds. Buckley and Bellotti notwithstanding, Justice Wilkins rejected the formalistic assumption that the city's expenditures constituted protected political speech. 63 Instead, he assumed such protection arguendo, 64 then asked whether the state law barring the city's speech could survive strict scrutiny. 65 Asserting that the state had "compelling interest[s] in assuring the fairness of elections and the appearance of fairness in the electoral process" 66 and "in assuring that a dissenting minority of taxpayers . . . not [be] compelled to finance expres-

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60 78 Mass. Adv. Sh. at 2320-24, 380 N.E.2d at 640-42. The court's order enjoined the city from using any appropriated funds to influence the vote on the referendum question. While conceding that some policymakers would be free to act and speak in favor of the amendment, the court declared that no municipal employee could be compelled to do so. It further required that advocates of each side of the election issue be granted equal access to city facilities, equipment and supplies. Id.


62 Id. at 2307 n.10, 380 N.E.2d 634 n.10. The court avoided deciding whether the appropriation served a public purpose, but conceded that "there may well be situations in which a public purpose would be served by municipal advocacy." Id. In those situations, the court declared it would defer to legislative findings of a public purpose. Id. See pp. 537-38 supra.

To this point, the Anderson court's reasoning closely resembled that of the California Supreme Court in Mines v. Del Valle, 201 Cal. 273, 257 P. 530 (1927). In Mines, a taxpayer sued the city's public service commissioners for publicly financing an advertising campaign urging approval of a bond issue to enlarge the city's power system. The defendants alleged that private companies opposing the bond issue had already engaged in a massive publicity campaign to defeat it. Nevertheless, the court held for the plaintiff, noting that expenditure of public monies was unjustified even "for the purpose of correcting the misinformation [already] disseminated" "unless the power to do so is given to said board in clear and unmistakable language." Id. at 287, 257 P. at 537. The second half of the Mines holding, permitting defendants to be held personally liable to repay public funds improperly expended for campaign purposes, has been overruled by Stanson v. Mott, 17 Cal. 3d 206, 551 P.2d 1, 130 Cal. Rptr. 697 (1976).

63 78 Mass. Adv. Sh. at 2314 n.15, 380 N.E.2d at 637 n.15.

64 Id. at 2314, 380 N.E.2d at 637-38.

65 Id., 380 N.E.2d at 638.

66 Id. at 2315, 380 N.E.2d at 638.
sion on an election issue of views with which they disagree, the court concluded the state could withhold authorization even from municipal expenditures strictly protected by the first amendment.

The Anderson court's facile conclusion that state law barred municipal speech merely underscores the indeterminacy of the positivistic approach when applied to municipal speech neither expressly authorized nor prohibited by state law. Though the court could find no reference to the electioneering powers of municipal corporations in Massachusetts' election law, it construed the legislature's silence "not as an indication that municipal action to influence election results was intended to be exempt from regulation," but as a "manifest[ation of] an intention to bar municipalities from engaging in the expenditure of funds to influence election results." Justice Wilkins could as easily have decided that the legislature's silence triggered the state's Home Rule Amendment; such a decision would have affirmed the city's power to decide for itself whether or not to engage in electoral advocacy. In any event, such a questionable construction of state law should never have survived strict first amendment scrutiny. For if

67 Id. at 2319, 380 N.E.2d at 639.
68 Id.
69 See pp. 538-39 supra.
71 78 Mass. Adv. Sh. at 2306, 380 N.E.2d at 634.
72 Id. at 2305, 380 N.E.2d at 633. Had the legislature expected or intended that cities influence elections, Justice Wilkins declared, its election law "would have regulated those activities as well." Id. at 2306, 380 N.E.2d at 634.
73 The Home Rule Amendment, Mass. Const. art. LXXXIX, § 6 (amended 1966), granted Boston the authority to exercise any powers and functions "not inconsistent with" the state's constitution or laws. See note 8 supra. The Anderson court could have declared itself bound by the terms of the Home Rule Amendment to allow the city to act as it wished, simply because state law had not explicitly disallowed municipal referendum advocacy.

Alternatively, had the Supreme Court in Bellotti not explicitly rejected the Massachusetts legislature's "materially affecting" test for business corporations' expression, see pp. 540-41 supra, the Massachusetts Supreme Judicial Court could plausibly have construed state election law to grant municipal corporations only the right to speak on issues "materially affecting" municipal "business, property, and assets." Justice Powell foreclosed that possibility in Bellotti, however, by declaring that the first amendment could not permit state legislatures to "channel the expression of views" in this manner: "If a legislature may direct business corporations to 'stick to business,' it also may limit other corporations — religious, charitable, or civic — to their respective 'business' when addressing the public." First Nat'l Bank v. Bellotti, 435 U.S. 765, 785 (1978) (emphasis added).
first amendment interests are truly at stake,\(^7\) a statute making no mention of municipal advocacy cannot be construed to prohibit protected speech without running afoul of the overbreadth and void-for-vagueness doctrines.\(^7\)

In retrospect, the Supreme Judicial Court's confusion in *Anderson* can be viewed as the inevitable result of a war between theories.\(^7\) The court attempted to evaluate Boston's

\(^7\) Although the court had assumed arguendo that the municipal expenditure was as fully protected as political speech, see p. 546 *supra*, Justice Wilkins did not hide his suspicion "that the First Amendment has nothing to do with this intrastate question." 78 Mass. Adv. Sh. at 2313, 380 N.E.2d at 637.


The *Anderson* court's strict scrutiny in effect amounted only to "ends scrutiny," which failed to test the closeness of fit between the asserted compelling state interests and the means "chosen" by the legislature to protect those interests. In *Bellotti*, however, the Supreme Court had explicitly held that Massachusetts could not protect nearly identical compelling interests by loosely tailored means. *See note 39 supra.*

\(^7\) This confusion apparently afflicted the Supreme Court's disposition of *Anderson* as well. Justice Brennan granted Boston's application for a stay of the state court's injunction order, reasoning that the city should not be gagged when, after "*Bellotti*, corporate industrial and commercial opponents of the referendum are free to finance their opposition." City of Boston v. *Anderson*, 439 U.S. 1389, 1390 (1978). The full Court, however, denied the taxpayers' motion to vacate the stay order by a vote of 6-3. *Anderson* v. City of Boston, 439 U.S. 951 (1978). Justice Stevens, dissenting from the denial, argued that the city's first amendment claims were "frivolous," because the Massachusetts court had legitimately resolved the dispute on state law grounds. *Id.* at 951-52. The full Court apparently accepted Justice Stevens' interpretation, for when the city appealed for plenary review, the Court summarily dismissed the appeal for want of a substantial federal question. City of Boston v. *Anderson*, 439 U.S. 1060 (1979) (Brennan, Blackmun, & Powell, JJ., voting to note probable jurisdiction).

The Court's summary disposition raises more questions than it answers. Paradoxically, Justices White and Marshall and Chief Justice Burger voted both to uphold Justice Brennan's *stay and* to deny Boston's appeal; thus it remains unclear whether a majority of the Court agreed about what theory should apply to the case. A summary dismissal affirms only a state court's ruling and not its reasoning. *See P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System* 113-14 (2d ed. Supp. 1977). Thus, it is possible that the Court disposed of the city's claim as a "novel constitutional claim[ ] which, although 'substantial,' because not governed by prior case law, [was] deemed not 'so substantial as to require plenary consideration.'" Comment, *The Precedential Weight of a Dismissal by the Supreme Court for Want of a Substantial Federal Question: Some Implications of Hicks v. Miranda*, 76 Colum. L. Rev. 508, 518 (1976) (emphasis in original).
speech by reference to two fundamentally incompatible approaches resting on diametrically opposite assumptions. While the positivistic theory recognizes a municipality’s right to speak only when the state grants it the power to spend, the formalistic theory acknowledges a municipality’s inherent power to spend deriving from its independent constitutional right to speak.77 Ironically, a municipality’s expenditure of public money for political expression permits taxpayer challenges under the positivistic theory78 at the same time as it enables municipalities to invoke first amendment protection under the formalistic theory. Any state restriction on municipal political speech would, by definition, be simultaneously valid under the positivistic approach and probably unconstitutional under the formalistic approach. A clash between the two theories necessarily admits of no compromise.

Although the Anderson court’s reasoning was flawed, its conclusion still might have been constitutional. Even if municipal speech is protected by the first amendment, a closely tailored statute explicitly regulating municipal advocacy could survive strict scrutiny if that statute served sufficiently compelling state interests. Thus, the Anderson court’s conclusion would have been constitutionally warranted if either of the two state interests discussed — the interest in protecting the rights of dissenting taxpayers and the interest in preserving the fairness and appearance of fairness of elections79 — proved sufficiently compelling to justify the court’s detailed decree enjoining the speech.80 The next two Parts of this Note will examine those interests.

IV. THE RIGHTS OF DISSenting TAXPAYERS

Long before Anderson, courts invalidating municipal electioneering expenditures had asserted that dissenters should not

77 In Anderson, the City of Boston argued that municipalities are created with independent rights of political expression derived from their citizens' right to speak and from the rights of both their citizens and other audiences to hear. See Brief for Defendants at 29, Anderson v. City of Boston, 78 Mass. Adv. Sh. 2297, 380 N.E.2d 628 (1978). It is not clear, however, why governments should be able to assert the rights of their citizens to hear as the constitutional basis of their own right to speak, especially if not all of those citizens are willing listeners.

78 See note 58 supra. Some states have constitutional provisions expressly authorizing such taxpayer suits against local governments. See, e.g., Ark. Const. art. 16, § 13. See generally C. Antieau, supra note 8, § 16.48.

79 See pp. 546-47 supra.

80 See note 60 supra.
be compelled to finance partisan municipal viewpoints.\textsuperscript{81} These decisions, however, were never explicitly based on federal constitutional grounds.\textsuperscript{82} While the Supreme Court has held that governments may not force individuals to endorse or disseminate messages which they find obnoxious,\textsuperscript{83} it has never explicitly permitted dissenters to block government expression.\textsuperscript{84} In fact, the Court has intimated that too great a recognition of the rights of dissenters would effectively hamstring our system of municipal governance.\textsuperscript{85}

The Anderson court suggested instead that the plight of dissenting taxpayers might be analogized to cases in which dissenting members of nongovernmental organizations asserted a first amendment right not to be compelled to finance organ-


\textsuperscript{82} In Mines v. Del Valle, 201 Cal. 273, 257 P. 530, 537 (1927), the court recognized no constitutional violations, but observed that use of public funds would be "manifestly unfair and unjust" to dissenting electors. Similarly, in Citizens to Protect Pub. Funds v. Board of Educ., 13 N.J. 172, 182, 98 A.2d 673, 678 (1953), then-New Jersey Supreme Court Justice William Brennan relied on "simple fairness and justice" rather than constitutional precedent to bar a township board of education from spending public money to urge passage of legislation over the objection of dissenting voters.

In Mountain States Legal Foundation v. Denver School Dist. No. 1, 459 F. Supp. 357, 361 (D. Colo. 1978), decided shortly after Anderson, a federal district judge preliminarily enjoined a school board's public relations campaign against an initiative measure to amend the state constitution, noting that such a public expenditure "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." The guarantee clause has not, however, traditionally served as a constitutional source of judicially enforceable private rights. See Luther v. Borden, 48 U.S. (7 How.) 1 (1849). See generally Bonfield, The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude, 46 MINN. L. REV. 513 (1962).


\textsuperscript{84} See Wooley v. Maynard, 430 U.S. 705, 717 (1977). See also id. at 720 (Rehnquist, J., dissenting) (government may engage in any mode of publicly funded expression which does not place citizens in the position of actually or apparently asserting that the government's statement is true).

\textsuperscript{85} As early as 1923, the Court recognized that it needed a restrictive approach to taxpayer standing to contain the volume of litigation against governments: "If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same." Massachusetts v. Mellon, 262 U.S. 447, 487 (1923). The Court's standing doctrine has thus largely continued to declare nonjusticiable taxpayer efforts to enjoin state or federal government spending programs. See, e.g., Doremus v. Board of Educ., 342 U.S. 429 (1952). But see note 134 infra. For a recent summary of the Court's standing doctrine, see generally Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 19, 32-81 (1978).
izational expression which they found objectionable. First amendment interests of majority and minority members have clashed in a variety of nongovernmental contexts: voluntary associations, integrated bar associations, business corporations, private and public sector labor unions, and quasi-public utility corporations. In each of these contexts, courts have sought on the one hand to prevent dissenters from silencing the majority without, on the other hand, permitting the majority to ride roughshod over dissenters' interests.

The Supreme Court struck one such compromise in *Abood v. Detroit Board of Education*. The majority opinion articulated what may be called the *Abood* principle: while dissenters may not block their organization's expression, they also may not be compelled to contribute to organizational speech unrelated to the purposes for which the organization was created. The Court concluded in *Abood* that a union's use of compelled fees to fund expression advocating political and

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94 In the context of private business corporations, for example, the Supreme Court has frequently required controlling shareholders to prove good faith and due care to minority shareholders. See, e.g., Pepper v. Litton, 308 U.S. 295, 306 (1939); Southern Pac. Co. v. Bogert, 250 U.S. 483 (1919).
96 The *Abood* Court explicitly refused to "hold that a union cannot constitutionally spend [union] funds for the expression of political views." *Id.* at 235. The first part of the Court's dual holding thus established that a public sector employee union could compel nonmembers to pay charges equal to union dues in order to defray the costs of collective bargaining, without abridging their first or fourteenth amendment associational rights.
97 *Id.* at 236. Prior to *Abood*, the Supreme Court had twice recognized the first amendment implications of this issue, but had engaged in strained statutory construction to avoid deciding it on constitutional grounds. *See Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 238 (1956); International Ass'n of Machinists v. Street, 367 U.S. 740, 768 (1961). See also *id.* at 776–79 (Douglas, J., concurring); *id.* at 788–91 (Black, J., dissenting). *See generally Wellington, Machinists v. Street: Statutory Interpretation And the Avoidance of Constitutional Issues*, 166 U.S. Sup. Ct. Rev. 49.
ideological causes "not germane to its duties as collective-bargaining representative" impermissibly abridged the dissenting employees' constitutional rights to refrain from associating with those espousing demands and ideas with which they disagreed.  

An examination of the assumptions underlying Abood reveals that its guiding principle cannot apply in the realm of municipal speech, for the same reason that the positivistic approach fails to provide deterministic results: "public purpose" cannot easily be defined. The Abood Court assumed that a line could be drawn between speech related and speech unrelated to the organizational purpose of a labor union; courts would be hard-pressed, however, to draw the same line when evaluating the speech of municipal corporations. While labor unions perform a relatively specialized function and pursue a limited range of goals, municipal corporations perform a multitude of public functions and are potentially interested in myriad domestic policy issues.  

The concept of dissenters' rights, as defined by Abood, cannot determine when cities may or may not advocate. Anderson itself demonstrates this reality. The taxpayers in Anderson argued that municipalities are created only to serve the "public purpose," then urged the court to define the public purpose so narrowly as to exclude municipal referendum advocacy. The city officials, on the other hand, asserted that municipal corporations are created to fulfill the "governmental function." They then defined that function so broadly as

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98 431 U.S. at 235-36.
100 Justice Stewart acknowledged, however, that such a line would be difficult to draw for private sector unions and that "in the public sector the line may be somewhat hazier." 431 U.S. at 236.
101 As Justice Powell, concurring in the Abood judgment, noted:
Compelled support of a private association is fundamentally different from compelled support of government. . . . [T]he reason for permitting the government to compel the payment of taxes . . . is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests.

Id. at 259 n.13.
Abood's concern for the associational rights of dissenters also seems particularly inapposite to municipal speech. For if dissenting taxpayers could validly argue that paying local taxes infringed on their right not to associate, then they could use the first amendment to justify nonpayment of any taxes which might eventually finance municipal expression.

103 See Brief for Defendants at 34.
to encompass referendum advocacy. The Anderson court could not meaningfully apply the Abood principle to municipal speech until it had first decided whether or not Boston's advocacy served a valid public purpose or governmental function. Yet the taxpayers' narrow definition of "public purpose" and the city's broad definition of "governmental function" simply reflected their differences about what the proper role of municipal governments should be. The Anderson court had the same unfettered discretion to choose between these definitions that all judges exercise when they resort to the positivistic approach in the face of a silent state statute. Thus, as before, the vagueness inherent in the concept of a municipal purpose ensured an unpredictable result.

Courts cannot regulate municipal speech solely by reference to dissenters' rights. In Anderson, the taxpayers invoked those rights in hopes of adding a constitutional dimension to their essentially positivistic argument. The city officials, on the other hand, refused to acknowledge that those rights can meaningfully limit municipal advocacy. Thus, Anderson shows that an analysis of the rights of dissenting taxpayers advances understanding of the constitutionality of municipal referendum advocacy no further than either the positivistic or the formalistic approach.

V. THE ROLE OF GOVERNMENT IN THE ELECTORAL PROCESS

A. The Constitutional Mandate of Neutrality

The Anderson court pointed to a second compelling state interest justifying careful regulation of municipal speech: the
need to "assur[e] the fairness of elections and the appearance of fairness in the electoral process." While the court did not examine the constitutional doctrine underlying this interest, Supreme Court decisions outlining the proper role of government in elections generally, and in the referendum process in particular, appear based on the notion that those processes must be zealously protected if voters are to accept their results as legitimate. Those decisions may be read as a constitutional mandate of government neutrality in referendum campaigns. Even if well-intentioned, a municipal government's attempt to influence a statewide referendum through its advocacy would therefore unconstitutionally violate that principle.

Government neutrality has long been required in parallel constitutional settings. The Framers of the Constitution argued for government neutrality in partisan elections, fearing that incumbents would use the resources of their offices to perpetuate themselves in power. The Supreme Court has also recognized that permitting the government to depart from a neutral position would threaten both the reliability of the election result as an expression of the popular will and the appearance of integrity crucial to maintaining public confidence in the electoral process. In adjudicating first amendment claims under the religious establishment clause, the Supreme Court has repeatedly insisted that governments speak

view, those who disagree with the government’s viewpoint may not silence the government’s voice, “nor may they insist that government give equal circulation to their viewpoint” so long as the government speech does not threaten to drown theirs out. Recently, Professor Tribe has argued even more strongly that the “challenge of the affirmative state” compels “the paradox that governmental action to facilitate the expression of any idea may depend on coerced contributions from citizens who not only reject the idea but find it deeply offensive.” Tribe, supra note 1, at 245.

109 See note 66 supra.


111 See The Federalist Nos. 52, 53 (J. Madison); 10 J. Richardson, Messages and Papers of the Presidents 98-99 (1899) (President Jefferson).

112 The Court has explicitly recognized that the validity of elections as bona fide expressions of the popular will depends as much upon citizens' faith that the electoral process is free from government tampering as on the actual fairness of that process. If citizens do not trust the referendum process, they may decide to abstain from voting in a referendum, or even not to abide by its result. See United States Civil Serv. Comm’n v. National Ass’n of Letter Carriers, 413 U.S. 548, 565 (1973).
neutral when they speak at all. While the first amendment free exercise clause directs governments to permit private individual choice of religious beliefs, the establishment clause demands that governments not establish any particular religious creed as official orthodoxy. In the religious context, the Court has enforced the Constitution's requirement of government neutrality as a prophylactic means of safeguarding the voluntarism of individual religious expression and association; in the first amendment speech context, judicial imposition of a similar requirement would provide parallel protection for individual rights of political expression and association.

Further justification for judicial imposition of a neutrality requirement may be found in the "process-oriented" theory of constitutional adjudication developed by Professor Ely. Since United States v. Carolene Products Co., the Supreme Court has recognized that a judge's customary duty of deference to legislative judgments is reduced when the legislative decisions under review "restrict[] those political processes which can ordinarily be expected to bring about repeal of

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115 See Walz v. Tax Comm'n, 397 U.S. 664, 694 (Harlan, J.). See also Freund, supra note 113, at 1684; Nonestablishment, supra note 114, at 517.


118 304 U.S. 144 (1938).

undesirable legislation." Professor Ely has argued that Carolene Products requires judges strictly to scrutinize any legislative decisions which directly threaten the integrity of the political process. Because the referendum process represents a prime means by which interest groups may seek to amend state constitutions, repeal undesirable legislation, or otherwise "check our government when it gets out of bounds," this theory suggests that courts may validly subject to strict scrutiny a municipal legislature's decision to influence a statewide referendum result.

When a municipal legislature allocates public resources to advocate a particular referendum result, the policies supporting government neutrality apply with special force. In referenda and initiatives, the statewide electorate assumes a legislative function by voting on measures which either the state legislature or members of the electorate have placed on the ballot. Either the state legislature or the voters, but not city governments, are thus empowered by state constitutions to decide whether or not to submit a referendum proposal to the voters. Cities are usually free to lobby before the legislature to prevent a measure from being put before the statewide electorate in referendum form. But once the state legislature decides to entrust the final legislative decision to the popular electorate, it explicitly removes the decision from the hands of state or municipal officeholders. Permitting those officials to use public funds to attempt to influence the outcome of that decision would partially return them to a role from which they have been excluded by constitutional design. Municipal governments should thus refrain from es-

120 304 U.S. at 152 n.4.
121 See generally sources cited note 117 supra.
122 Representation-Reinforcing Mode, supra note 117, at 477.
123 At least 22 state constitutions expressly provide for initiatives or referenda at the state or local level. In referenda, the legislature submits a proposal to the electorate for approval. In initiatives, a given percentage of the electorate itself places a legislative proposal or constitutional amendment on the ballot. See M. Jewell & S. Patterson, The Legislative Process in the United States 116 (3d ed. 1977).
124 To the extent that this power allocation reflects the state constitution's concern for electoral fairness, that allocation provides a constitutional dimension to the positivistic approach not provided, for example, by the notion of dissenters' rights. See P. 553 supra.
125 See, e.g., cases cited note 20 supra.
127 By seeking to influence the electorate's deliberative process before it engages in its plebiscitary legislative function, the municipality would, in effect, be circumventing state constitutional referendum procedures. That act would violate the spirit
tablishing an official political viewpoint during the time that the popular electorate, rather than its elected representatives, makes law.\textsuperscript{128}

A hypothetical case illustrates how judges may apply the axiom of government neutrality in the electoral process to identify and police impermissible municipal advocacy. Suppose that, following Anderson, a state passed a statute expressly authorizing cities to spend public funds to advocate particular outcomes in statewide referenda. Under a positivistic approach, the express legislative authorization would suffice to validate any ensuing municipal advocacy.\textsuperscript{129} Under a formalistic reading of Bellotti and Buckley, the statute would likely be superfluous since the city's expression would already be constitutionally protected.\textsuperscript{130} Dissenting taxpayers could not invoke the Abood principle either to block the speech or to withhold their tax payments,\textsuperscript{131} for state courts would likely defer to the statute as a legislative determination that municipal advocacy constituted a valid government function or served a public purpose.\textsuperscript{132}

The principle of government neutrality, by contrast, would allow citizens to invoke the first amendment to regulate the speech of their government.\textsuperscript{133} In the case posed, all municipal citizens, not merely dissenting taxpayers, would have consti-
tutional standing to challenge the municipality's speech.\textsuperscript{134} The "process-protecting" principle of neutrality would further direct courts carefully to scrutinize both the motives underlying the state's authorization of municipal referendum electioneering and the effects of the particular instance of electioneering on the fairness and appearance of fairness of the referendum process. To determine whether the municipality had engaged in unconstitutional governmental speech, the court would need initially to decide whether the government message had been disseminated by means sufficiently sensitive to those paramount state interests. The next Section will describe such a set of means.

\textbf{B. A Constitutional Decree to Regulate Municipal Referendum Advocacy}

The Anderson court issued a broad injunction allowing the city to disseminate facts but not opinions on the referendum; to engage in advocacy on nonreferendum issues but not on referendum issues; and to spend money to lobby before state legislatures which it could not spend to speak directly to the public.\textsuperscript{135} Furthermore, the court decreed that city policymakers could continue speaking in support of the amendment during their working hours while indicating that nonpolicy-making employees could not.\textsuperscript{136}

\textsuperscript{134} Strange as it must sound in appraising an amendment which explicitly forbids abridging the freedom of speech, it is nonetheless arguable that the function of [the first] amendment implicitly requires some silencing of the government itself.

\textsuperscript{135} If standing to complain were to be found and a more solid constitutional basis for objection to be had, it would probably be in the theory of the first amendment.

\textsuperscript{136} Municipal citizens could therefore invoke the first amendment to challenge even partisan municipal advocacy expressly authorized by state statute. In other contexts, courts have recognized that a state's control of its municipalities should not be immune from constitutional attack. See Case Comment, \textit{Municipal Corporation Standing to Sue the State: Rogers v. Brockett}, 93 HARV. L. REV. 586, 599 \& n.31.

Van Alstyne, \textit{supra} note 1, at 532-33 (emphasis in original). \textit{See also} T. EMERSON, \textit{supra} note 1, at 700. Recognition that a municipality has a constitutional duty not to establish political viewpoints would provide the "logical nexus between the status asserted and the claim sought to be adjudicated" necessary to justify a grant of standing. \textit{Compare} Flast v. Cohen, 392 U.S. 83, 102 (1968) (granting taxpayer standing, based on first amendment establishment clause, to challenge federal spending program), \textit{with} note 85 \textit{supra}. \textit{See also} L. TRIBE, \textit{supra} note 1, \S 3-22. Municipal citizens could therefore invoke the first amendment to challenge even partisan municipal advocacy expressly authorized by state statute. In other contexts, courts have recognized that a state's control of its municipalities should not be immune from constitutional attack. \textit{See} Case Comment, \textit{Municipal Corporation Standing to Sue the State: Rogers v. Brockett}, 93 HARV. L. REV. 586, 599 \& n.31.


Though the Anderson court supported its injunction with only sparse constitutional precedent, its decree accorded with restrictions on governmental speech upheld in a variety of Supreme Court decisions concerned with the proper governmental role in the electoral process. Those decisions provide state courts with closely drawn standards by which to evaluate the constitutionality of municipal electoral advocacy. Where a court finds government speech unconstitutional, those standards may further guide it in shaping a constitutional decree to regulate expenditure of municipal appropriations, use of municipal facilities, as well as the partisan political activities of nonpolicymaking and policymaking municipal employees in statewide referendum campaigns.

The constitutional principle of neutrality suggests that state courts should regulate municipal speech according to two general standards. First, cities should be obliged to make a "balanced presentation" of the issues surrounding a specific referendum question in all of their publicly financed informational activities. The Supreme Court has imposed a similar requirement in its decisions mandating government evenhandedness when administering "public forums." Second, courts should impose on municipalities a "duty to disclose" the amount, nature, and purpose of each appropriation, transfer, or expenditure of municipal funds made to inform the public about a given referendum question. In Buckley v. Valeo, the Supreme Court validated analogous disclosure requirements which had been statutorily imposed on political candidates. These two requirements would be effective from the day that the legislature placed the referendum question on the ballot until election day. In this manner, the plebiscitary leg-

137 Id.
138 See cases cited note 110 supra.
139 Such a decree, which could involve the continuing active participation of a trial judge throughout the period of a referendum campaign, would be consistent with Professor Chayes' model of a judge's role in "public law litigation." See generally Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976).
141 424 U.S. at 60-84. See also Developments in the Law — Elections, 88 Harv. L. Rev. 1111, 1241-54 (1975).
islature — the electorate — could recognize a period of receptivity to information about proposed legislation in much the same way as an administrative agency recognizes particular time periods for "notice and comment rulemaking." 142

Under these general requirements, proponents of opposing sides of a referendum issue would be entitled to equal opportunity to participate in all publicly funded media presentations. The "public forum" decisions would additionally require that a municipality grant all referendum advocates equal access to municipal facilities to which any are granted access.143 If a city satisfied these requirements, dissenters would have no valid grounds for complaint.144

The countervailing first amendment rights of individuals within the government to speak on matters of public interest would require courts to modify these two general constitutional rules when dealing with municipal employees. Here, too, however, courts should impose restrictions on the speech of municipal employees analogous to statutory restrictions the constitutionality of which the Supreme Court has already affirmed. Those Supreme Court decisions upholding state and federal Hatch Acts — legislation preventing government employees from taking "active part" in partisan political campaigns145 — and those prohibiting discharge of government employees solely because of their political affiliation146 have stressed the urgency of insulating nonpolicymaking government employees from pressure to campaign for their superiors' partisan viewpoints. They jointly suggest that a state court's regulation of nonpolicymakers' political speech would free em-


143 See cases cited note 140 supra. See also Bonner-Lyons v. School Comm., 480 F.2d 442, 444 (1st Cir. 1973); Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967). The requirement of equal access would extend to publicly owned telephones, printed materials, auditoriums, et cetera.


145 Section 9a of the Hatch Act prohibits federal employees from taking "an active part in political management or in political campaigns." 5 U.S.C. § 7324 (a)(2) (1976). The Act also restricts the political activities of state employees working in federally financed agencies and programs. Id. § 1502. The Court has upheld the constitutionality of § 9a on two separate occasions, see United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947), and has affirmed the constitutionality of its state law counterparts, see Broadrick v. Oklahoma, 413 U.S. 601 (1973).

ployees from coercion to serve in political machines. These decisions thereby afford a court the constitutional basis to regulate referendum advocacy of nonpolicymakers by issuing a judicial decree modeled on the Hatch Act. Such a decree would ban outright all "plainly identifiable acts" of "active campaigning" by nonpolicymakers which occur in a certain manner, at certain times, or in certain places. To prevent overregulation of nonpolicymakers' speech, in gray areas courts should place the burden on those challenging municipal advocacy to demonstrate that a nonpolicymaker's acts are incompatible with his official responsibilities.

The court's decree, however, would have to allow policymaking officials149 broader latitude to speak out than it allowed lower echelon employees. Policymakers do not enjoy the same protection against political dismissal which nonpolicymakers enjoy. Thus, affording wider protection to their individual first amendment rights to advocate would simultaneously support the public accountability of the administration they represent while supporting the citizenry's right to hear official expertise on referendum issues. Although policymakers would have the unfettered right to use their own resources to advocate a desired result, courts could forbid them to deploy municipal employees, public facilities, or public funds to dis-

147 United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973). In Letter Carriers, the Court deemed the state's interest in promoting an effective and efficient civil service a compelling interest favoring restriction of policymakers' partisan electoral advocacy. Id. at 564.
148 The Letter Carriers Court upheld the constitutionality of the Hatch Act's limits on "plainly identifiable acts" of political management and political campaigning by federal employees. In the companion case of Broadrick v. Oklahoma, 413 U.S. 601 (1973), the Court declared that municipal employees could constitutionally be prohibited from holding office in citizens' committees favoring political candidates, campaigning door to door, working at polling places, soliciting support for certain candidates, and the like. Id. at 616–17.
149 Policymaking employees include those officials who are appointed or elected to executive or agency positions within the municipal government. See Elrod v. Burns, 427 U.S. 347, 367–68 (1976) (plurality opinion) (suggesting how policymakers may be distinguished from nonpolicymakers).
150 See generally Coven, supra note 142.
seminate their message.\textsuperscript{152} This principle of "non-concentration of resources"\textsuperscript{153} would bar elected officials from expending public resources to propagate personal opinions, thereby properly balancing the public's need to protect the referendum process from abuse against its need to hear expertise which only elected officials may possess.\textsuperscript{154} Because it will be difficult, on the margin, to determine when a policymaker is concentrating public resources to amplify his own voice, courts should place the burden in gray areas on the policymaker to demonstrate that a given use of municipal resources is compatible with his official responsibilities.\textsuperscript{155}

VI. CONCLUSION

This Note has attempted to articulate constitutional principles basic to any broad theory of governmental speech. The positivistic analysis which state courts commonly employed to

\textsuperscript{152} This solution would eliminate many of the first amendment questions raised when individuals spend other people's money to amplify their own voices. See pp. 543-44 \textit{supra}.

\textsuperscript{153} This principle was first suggested by Professor Cox in the context of candidate elections. See Cox, Commentary, in \textit{FEDERAL REGULATION OF CAMPAIGN FINANCE} 68, 69-70 (A. Rosenthal ed. 1972), reprinted in \textit{3 STUDIES IN MONEY IN POLITICS} study no. 18 (H. Alexander ed. 1974).

\textsuperscript{154} Alternatively, states may pursue a legislative solution to this problem by enacting statutes empowering municipalities to establish separate segregated funds for political advocacy, similar to those provided for in the Federal Corrupt Practices Act, 2 U.S.C. § 441b (1976), and numerous state statutes regulating corporate participation in partisan \textit{candidate} elections. Such a statute would permit municipal taxpayers desirous of government advocacy on their behalf to contribute directly to a segregated "municipal speech" fund by checking off a box on their local tax return. Contributors could thereby specifically authorize certain municipal officials to engage in political advocacy when the outcome of controversial statewide referendum elections would seriously affect the municipal welfare. The feasibility of enacting such a state statute, however, would rest in part on whether § 441b and its state law counterparts can survive constitutional attack by business corporations after \textit{Bellotti}. See generally Birnbaum, \textit{The Constitutionality of the Federal Corrupt Practices Act After First National Bank of Boston v. Bellotti}, 28 AM. U.L. REV. 149 (1979).

\textsuperscript{155} These proposed judicial restraints on municipal referendum advocacy may appear severe in view of the Supreme Court's invalidation of a statutory restraint on business corporation referendum advocacy in \textit{Bellotti}. But the \textit{Bellotti} Court's decision to permit possible distortion of the referendum process by business corporations cannot justify permitting additional distortion of that process through unchecked municipal advocacy. Allowing municipalities to intervene in referendum elections on the ground that they are correcting distortions presupposes that municipalities and large private centers of power will always stand on opposite sides of controversial referendum questions; yet all or even many of the various private interests adopting the corporate form may not always choose the same side of any given referendum question. In some cases, those individuals who exercise control over large private corporations might also wield unusual influence over the municipal government itself. Moreover, if both cities and private corporations could spend without limit in
evaluate municipal referendum advocacy prior to Anderson v. City of Boston proves too limited in scope because it examines only the powers granted by states to municipal speakers. The formalistic constitutional approach which may be derived from Buckley v. Valeo and First National Bank v. Bellotti proves overbroad because it focuses only on the first amendment protection accorded to political speech. An analysis relying on the rights of dissenting taxpayers proves too malleable ever to determine whether municipalities may or may not speak. This Note has argued that courts cannot meaningfully evaluate the rights of cities to speak with public funds or the rights of dissenters to block that speech without first discussing the context in which the government speech will have its impact. The Massachusetts Supreme Judicial Court should therefore have decided Anderson by an analysis which considered not merely the identity of the speaker or the nature of the speech, but also the speaker's appropriate role in the electoral context. Had the court applied this analysis, the state's paramount interest in preserving the fairness and appearance of fairness of its electoral process would have proved sufficient to uphold the injunction which the court issued. This Note has argued that, in future cases, a similar decree would represent a constitutional means, closely tailored to the paramount state interest in preserving electoral fairness, by which courts could regulate municipal advocacy.

Ironically, the first amendment justifies the most strenuous restriction of governmental expression in precisely the same context in which it most vigorously protects individual political expression — when voters are about to go to the polls. When municipal governments address referendum issues, courts can and must carefully scrutinize and circumscribe their speech. referendum campaigns, the ability of individual and minority voices to make themselves heard almost certainly would be reduced. See Van Alstyne, supra note 1, at 532–33. Although this Note has assumed throughout the continuing vitality of the Supreme Court's decision in Bellotti, much of the foregoing analysis strongly suggests that the Court's reasoning in that case was overly formalistic. See pp. 542–43 and notes 43, 48, & 154 supra. Business corporations, like municipal corporations, are not ordinary speakers, nor is their expenditure always identical to speech. Courts should therefore examine the Supreme Court's reasoning in Bellotti closely and apply the narrow holding of that case with care.