Governmental Referendum Advocacy: An Emerging Free Speech Problem

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GOVERNMENTAL REFERENDUM ADVOCACY: AN EMERGING FREE SPEECH PROBLEM

Governmental referendum advocacy—government adoption of a partisan position toward a legislative measure submitted to a popular vote—has been criticized by courts and may be proscribed by the first amendment. This Note examines current judicial responses to, as well as first amendment restrictions upon, referendum advocacy. The author concludes that although citizens cannot be forced to contribute tax monies to support a political position with which they disagree, government advocacy may well contribute to freedom of speech and informed decisionmaking—the very rights which the first amendment was designed to protect.

INTRODUCTION

The use of the referendum, the mechanism by which a measure proposed by a legislature or a segment of the population is submitted to a popular vote,¹ may be one of the most significant political developments of the decade.² In 1978, voters in twenty-three states passed judgment on such diverse subjects as tax cuts, gay rights, drinking ages, gambling casinos, public smoking, and land conservation.³ Indeed, if the recently formed Committee for

1. The term “referendum” is used throughout this Note to denote the “practice of submitting to popular vote a measure passed upon or proposed by a legislative body or citizen initiative.” WEBSTER’S THIRD INTERNATIONAL DICTIONARY (3d ed. 1961). It includes not only those legislative measures submitted directly to the voters, but also proposals initiated but already rejected by a legislature.


3. Id. Massachusetts, for example, has a highly developed legal scheme regarding ballot measures, which includes four different types of proposals upon which its electorate can pass judgment: (1) “Initiative,” defined as “[T]he power of a specified number of voters to submit constitutional amendments and laws to the people for approval or rejection.” MASS. CONST. amend. XLVIII; (2) “Referendum,” the “power of a specified number of voters to submit laws, enacted by the general court, to the people for their ratification or rejection,” Id.; (3) “Advisory Vote,” a statewide, nonbinding referendum or initiative, MASS. GEN. LAWS ANN. ch. 54, § 42b (West); and (4) “Public Policy Question,” a nonbinding ballot measure that appears only in a particular legislative district for the purpose of advising a district senator or representative on policy issues.” Id. ch. 53, § 19.

As do many states, Massachusetts restricts voter use of ballot measures:

No measure that relates to religion, religious practices or religious institutions; or to the appointment, removal, recall or compensation of or to the powers, creation of abolition of courts; or the separation of which is restricted to a particular town, city or other political division . . . of the commonwealth; or that makes a specific appropriation of money from the treasury of the commonwealth, shall be proposed by an initiative petition . . . .

MASS CONST. amend. XLVIII, § 1.

The Constitution also prohibits measures related to the right to receive compensa-
Direct Democracy has its way, referendum procedures will eventually be adopted by the federal government and all the states.

The increased use of referendums is, however, troublesome. In this age of media politics, money helps win elections—and money is available in large amounts to governments and corporations, both of which can and often do adopt a partisan position with regard to a particular referendum. In theory, referendums allow citizens to make objective decisions about proposed laws. In practice, if a government agency or corporation, through the practice of referendum advocacy, effectively determines what information voters receive, the decision made may reflect the corporate or administrative viewpoint, regardless of its merits. And,

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4. This Committee was formed for the exclusive purpose of encouraging states and the federal government to enact laws establishing referendum procedures.

5. The Committee recently spearheaded a successful drive to create a referendum procedure for the District of Columbia, and its hopes for future successes have been bolstered by surveys indicating that over 56% of the American people favor the opportunity to vote directly on national legislation. See note 2 supra.


7. There are approximately 300 corporations with assets in excess of $1 billion, while approximately 100,000 corporations possess over $1 million in assets, and 1,000,000 corporations have access to resources in excess of $1000. A. Conard, Corporations in Perspective 152-59 (1976).

In 1977-78, 711 corporations had affiliated political action committees which collected $10.5 million for their chosen candidates and causes. Similarly, 416 trade membership and health organizations, which are amply funded from corporate sources, collected $10.4 million to be spent in aid of favored referendums. See Federal Election Comm’n, Federal Election Committee Regulations 15 (April 1977); Federal Election Comm’n, Committee Financial Activity 2 (1978).

The extent to which corporations have influenced the outcomes of referendums is graphically illustrated by two states’ experiences. California held a referendum asking whether legislative approval should be required for construction of nuclear generating plants. Amicus Curiae Brief by State of Montana at 9, First National Bank v. Bellotti, 435 U.S. 765 (1978) citing California Fair Political Practices Commission, Campaign Contribution and Spending Report—June 8, 1976 Primary Election (1976). During the campaign preceding the vote, an organization called "Citizens for Jobs and Energy" coordinated efforts to defeat the proposal. Of the total $2,771,804 raised by all opponents of the measure, this committee raised $2,630,164, 96% of which came from corporate contributions. Supporters of the measure raised less than $2,000,000, none of which came from corporate contributions. The measure was defeated. Id.

In the same year, Montana also held a referendum on restriction of nuclear development. Opponents of the measure raised $144,300, almost all of which was donated by corporate contributors. Supporters of the measure, which was also defeated, collectively spent $4,570.00. Id. The amicus brief relied on sworn statements contained in the files of the Montana Commission of Campaign Finances and Practices.
when corporations and state agencies dominate communication channels, the marketplace of ideas is potentially depleted, voters frustrated, and the legitimacy of referendum advocacy under-mined.8

By 1977, twenty-nine states and the federal government had passed laws limiting the political expenditures of corporations.9 The Supreme Court, however, has included corporate election spending within the scope of first amendment protections.10 In so elevating corporate election advocacy, the Court not only undermined existing regulation of corporate referendum advocacy, but also created a strong incentive for governments to participate directly in referendum advocacy, and provided a legal theory for cloaking municipal speech with first amendment protection. Thus, whether government referendum advocacy will eventually win acceptance is uncertain. The Supreme Court has, somewhat enigmatically, refused to rule upon its constitutionality,11 and lower courts, when faced with the issue, have reached conflicting conclusions.12

This Note examines current judicial responses to referendum advocacy,13 as well as first amendment constraints upon government subsidization of political viewpoints.14 It is hoped that an articulation of the legal issues which have accompanied the advent of governmental advocacy will be the first step toward their resolution.

I. FIRST NATIONAL BANK V. BELLOTTI:
THE UNCERTAIN FUTURE OF CORPORATE ADVOCACY

The Supreme Court's decision in First National Bank v. Bellotti15 provides a logical starting point for an examination of governmental referendum advocacy. Although Bellotti dealt with corporate partisanship in the electoral process, the decision pro-

9. Id. at 32 n.19; Brief for Appellant 9-10 n.6.
10. For a comprehensive analysis of Bellotti, see Fox, Corporate Political Speech: The Effect of First National Bank, 67 Ky. L.J. 75 (1978), and notes 15-27 infra and accompanying text.
11. See notes 49-53 infra and accompanying text.
12. See notes 54-84 infra and accompanying text.
13. See notes 28-84 infra and accompanying text.
14. See notes 87-156 infra and accompanying text.
vides a framework for analyzing the legitimacy of governmental advocacy.

In *Bellotti*, a number of banks and other business corporations challenged a Massachusetts law that barred corporations from making expenditures to publicize their opinions on any referendum question that did not materially affect the business of the corporation. The Court did not discuss the extent to which a corporation's first amendment rights resemble those of a natural person. Rather, it undertook an exacting scrutiny of the matter and held that the right to speak freely in the political arena cannot be proscribed simply because the speaker is a corporation.

Massachusetts maintained that the state had two compelling

16. *Id.* at 767. The law provided in relevant part:

No corporation carrying on the business of a bank, trust, surety, indemnity, safe deposit, insurance, railroad, street railway, telegraph, telephone, gas, electric light, heat, power, canal, aqueduct, or water company, no company having the right to take land by eminent domain or to exercise franchises in public ways, granted by the commonwealth or by any county, city or town, no trustee or trustees owning or holding the majority of the stock of such a corporation, no business corporation incorporated under the laws of or doing business in the commonwealth and no officer or agent acting in behalf of any corporation mentioned in this section, shall directly or indirectly give, pay, expend or contribute, or promise to give, pay, expend or contribute, any money or other valuable thing for the purpose of aiding, promoting or preventing the nomination or election of any person to public office or aiding, promoting or antagonizing the interests of any political party, or influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation. No person or persons, no political committee, and no person acting under the authority of a political committee or in its behalf, shall solicit or receive from such corporation or such holders of stock any gift, payment, expenditure, contribution or promise to give, pay, expend or contribute for any such purpose.

Any corporation violating any provision of this section shall be punished by a fine of not more than ten thousand dollars or by imprisonment for not more than one year, or both.


17. Under this analysis, in order to justify an infringement upon first amendment rights, the government must show (1) that a compelling interest necessitates the legislation, and (2) that the means employed have been narrowly drawn so that protected rights are not unnecessarily abridged. 435 U.S. at 786.

18. *Id.* at 784.

With respect to the character of the speech, the Court noted:

The speech proposed by appellants is at the heart of the First Amendment's protections. The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period. *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940). The referendum issue that appellants wish to address falls squarely within this description. In appellants' view, the enactment of a graduated personal income tax, as proposed to be authorized by constitutional amendment, would have a seriously adverse effect on the economy of the State . . . . The importance of the referendum issue to the
interests—first, in sustaining the active role of the individual citizen in government, thereby preventing diminution of public confidence in government, and second, in protecting the rights of shareholders whose views differed from those held by corporate management. The Court conceded that the first justification merited serious consideration but only if the state could show that corporate advocacy so influenced referendum votes that democratic processes were "imminently threatened." Since the state was unable to produce adequate legislative findings to clear that hurdle, the argument was rejected. This is not surprising; the Court indicated parenthetically that a government may not restrict the speech of some in order to enhance the relative voice of others.

With respect to the state's argument that the statute protected minority shareholders, the Court assumed arguendo that the asserted interest was compelling but nevertheless concluded that it was an inadequate justification for abridging first amendment rights. The Court was unable to find a "substantially relevant" relationship between the interest asserted and the reach of the statute. The Court concluded that the statute was both overinclusive and underinclusive. The Court said it was overinclusive because it barred advocacy by corporations in which all shareholders endorsed the corporate viewpoint and underinclusive because corporations could still adopt lobbying positions inconsistent with minority shareholders' viewpoints.

It is doubtful, after Bellotti, whether any statute prohibiting corporate referendum advocacy can withstand constitutional challenge. At a minimum, the state would have to demonstrate that corporate expenditures on referendums foreclose effective individual participation. Given the exigencies of politics, this seems impossible. In some instances, no matter how much is spent in support of a referendum, voters will reject it. If, for example, a corporation spent millions of dollars advocating passage of a refer-

people and government of Massachusetts is not disputed. Its merits, however, are the subject of sharp disagreement.

Id. at 776–77.
19. Id. at 787.
20. Id. at 788–92.
21. Id. at 79–92.
22. Id. at 790–91.
23. Id. at 792–96.
24. Id. at 794.
25. Id. at 793.
erendum measure exempting businesses from taxes, voter approval would be highly unlikely.

Assuming that the impetus for regulation of corporate influence upon referendum advocacy still exists, but, after *Bellotti*, direct controls on corporate participation are unconstitutional, governments may seek more subtle methods of tempering corporate referendum advocacy. More importantly, whether wittingly or unwittingly, by emphasizing the importance of first amendment freedoms in the area of referendums, the Court may have bestowed some legitimacy on the proposition that referendum advocacy falls within the sphere of permissible governmental activities.

II. ANDERSON V. CITY OF BOSTON: DODGING THE CONSTITUTIONAL IMPLICATIONS OF GOVERNMENTAL REFERENDUM ADVOCACY

*Anderson v. City of Boston* is the only case in which the Supreme Court has had the opportunity to address the permissibility of governmental referendum advocacy. Even more so than *Bellotti*, however, *Anderson* raises many questions but provides few answers.

A. Anderson In State Court: Avoiding the "Babel of Municipal Huckstering"

In 1978, after the Supreme Judicial Court of Massachusetts declared certain property assessment practices unconstitutional, the city of Boston became legally obliged to assess residential and commercial property proportionately. Discharge of the obligation would have resulted in a transfer of approximately $78 million in taxes from commercial to residential properties. To prevent this transfer, and the anticipated citizen flight from Boston that would accompany it, city officials decided to educate citizens about individual tax savings should a tax reclassification amendment be passed. Consequently, the Boston City Council

26. One such method is increased governmental referendum advocacy in order to dilute the effect of monies spent on publicizing corporate viewpoints. Such a race between government and business to publicize views on an issue could conceivably flood the voters with more information than can be assimilated.

27. 435 U.S. at 767. *See note 63 infra* and accompanying text.


29. *See id.* at --, 380 N.E.2d at 639.

30. *Id.* at --, 380 N.E.2d at 630-32.
enacted an ordinance submitted by Mayor Kevin H. White, authorizing the expenditure of city funds for "the purposes of providing educational materials and disseminating information urging the adoption . . . of a proposed amendment to the Massachusetts Constitution relating to the classification of property for purposes of taxation." Subsequently, expenditures totalling $975,000 were authorized for an "Office of Public Information on Classification." Mayor White also made an additional $122,000 available for the statewide drive on the reclassification amendment, including monies for polling services and education of volunteers.

Richard Anderson and ten other persons sought injunctive relief against these expenditures. The Supreme Judicial Court granted the injunction, which also prohibited the city and its agents from compelling municipal officers and employees to solicit support for the amendment while performing their public duties. In so doing, the court reached two conclusions. First, the city lacked authority under the state constitution to expend funds in support of the classification amendment. Second, the first amendment, applicable to the states by virtue of the fourteenth amendment, did guarantee Boston the right to appropriate funds in support of a referendum. In reaching its first conclusion, the court examined existing legislative authority in Massachusetts to determine the legislative attitude toward referendum advocacy. The court construed the absence of any state statute regulating municipal appropriation of funds in support of referendums as authority for the proposition that such municipal activity could not legitimately occur. The court said that existing statutory re-

31. Id. at __, 380 N.E.2d at 637.
32. Id.
33. Id. at __, 380 N.E.2d at 632.
34. The injunction read as follows:
The City of Boston, its agents and employees, are enjoined from spending the funds appropriated by the city council on June 7, 1978, to meet the current expenses of the Office of Public Information on Classification and are further enjoined from making payments to Lee-Grigsby Associates or to Butcher-Forde Consulting pursuant to the contracts between those entities and the City of Boston . . . . This order should not be construed as implied authority for the city to use municipal employees or to use other appropriated funds for the purpose of supporting the proposed classification amendment. No municipal officer may be required or compelled to devote time during his or her regular working hours to solicit public support for the proposed classification amendment.

35. Id. at __, 380 N.E.2d at 632.
36. Id.
37. Id. at __, 380 N.E.2d at 632–34.
restrictions upon corporate expenditures may apply to municipalities—but, if not, such statutes at the very least demonstrate legislative intent "to keep political fund raising and disbursing out of the hands of nonelective public employees and out of city and town halls."  

In reaching the second conclusion, the court observed, in dictum, that the first amendment may have no bearing when a political subdivision disregards the supreme legislative authority of a state. It did not, however, decide that question. Instead, it stated that even should the first amendment apply, two compelling state interests justified the imposition of restraints upon municipal referendum advocacy.

First, the court noted that the state had a substantial interest in assuring that the electoral process be fair. Since the legislature had decided that this could be best achieved by a "hands off policy," the financing of public debate must reside exclusively in the hands of nongovernmental persons and entities. Second, the state had an equally compelling interest in restricting such advocacy when voters—as they inevitably must—disagree on the merits of a referendum measure. This justification guarantees that dissenting taxpayers not be compelled to finance a viewpoint with which they disagree. Unlike the corporate shareholders in Bellotti, the plaintiff taxpayers in Anderson had no way out—the additional revenues needed to finance the municipal appropriations would be reflected in their taxes.

The city won a stay of the injunction from Justice Brennan. In subsequent proceedings, a motion to vacate the stay was de-
nied and the case was finally dismissed for want of a substantial federal question. In the interim between the denial of the motion to vacate and the final dismissal, the Massachusetts electorate approved the reclassification measure. Thanks to the stay, the city made the authorized disbursement of public funds prior to the vote. Any evaluation of the impact which those disbursements might have had on the outcome of the referendum is, of course, conjecture.

B. Summary Dismissal of Anderson in the Supreme Court: A Suggested Explanation

Uncertainty, of course, surrounds any dismissal for want of a federal question. Several commentators have noted that only one thing can be stated with certainty—such a dismissal represents a decision on the merits. At any rate, a dismissal may occur for one of several reasons: first, precedent indicates that the claim asserted presents no real controversy; second, the claim so lacks substance as to be frivolous; third, the claim is weak on its face and has been presented at a time when the Court is overburdened.

As with any other dismissal for want of a federal question, it is impossible to know which of these grounds triggered the Court’s dismissal of Anderson. Boston argued that the first amendment guaranteed its right to engage in referendum advocacy. Alternatively, Anderson relied on the Massachusetts high court’s opinion that even if first amend-

47. City of Boston v. Anderson, 439 U.S. 951 (mem. 1978). Justice Stevens wrote a dissenting opinion in which Justices Stewart and Rehnquist joined. Justice Stevens reasoned that the subdivisions of a state were at the state’s mercy with respect to the powers they could exercise. He attacked the first amendment claim as frivolous—representing nothing more than an attempt by Boston to seek a grant of power from the Supreme Court that the state of Massachusetts could constitutionally deny. Id. at 347. In what ultimately may prove to be the most significant point in this opinion, Justice Stevens stated, “Federal questions . . . may also arise if a State authorizes expenditures to advance or explain a particular point of view.” Id. at —.


50. R. Stern & E. Grossman, supra note 49 at 323–26; Note, supra note 49 at 490.


52. Id. at Brief For Respondent at 8–12.
ment protections included advocacy, compelling state interests exist to justify abridging that protection.\textsuperscript{53}

Thus, several conflicting explanations for the Court's dismissal of \textit{Anderson} emerge. First, Boston's claim of first amendment protection was, the Court believed, without merit. Second, state court rulings precluded Boston from asserting this claim at all. Third, even if Boston's referendum activities were protected by the first amendment, their abridgement was justified by a showing of compelling state interests. Therefore, after \textit{Anderson}, the question of whether the first amendment protects or prohibits governmental referendum advocacy remains.

\section*{III. Lower Court Treatment of Referendum Advocacy}

The Supreme Court's dismissal of \textit{Anderson} has left the legal world in the dark with respect to the future of referendum advocacy. Therefore, in order to formulate the legal issues which stem from government support of political viewpoints, it is necessary to take a few steps backward and examine the way in which lower courts have treated governmental participation in the electoral process. As the discussion which follows demonstrates, the response has not been favorable.

In \textit{Stern v. Kramarsky},\textsuperscript{54} the court refused to acknowledge the presence of a first amendment question,\textsuperscript{55} and prohibited a New York state agency from advocating the passage of the equal rights amendment. The agency, the New York Division of Human Rights, had used money and personnel to campaign on behalf of the amendment, which was to be submitted to the electorate in a statewide referendum.\textsuperscript{56}

The plaintiffs contended that the Division of Human Rights had used public funds to disseminate propaganda in support of equal rights for women.\textsuperscript{57} In response, the defendant made two major arguments,\textsuperscript{58} namely, that the plaintiffs sought to abridge

\textsuperscript{53} Id. at 13.  
\textsuperscript{54} 84 Misc. 2d 447, 375 N.Y.S.2d 235 (Sup. Ct. 1975).  
\textsuperscript{55} Id. at 449, 375 N.Y.S.2d at 237.  
\textsuperscript{56} Activities in support of the amendment included (1) circulation of a memo to the employees of the Human Rights Division asking that they help to educate the public about the equal rights amendment, (2) a series of television broadcasts which promoted the amendment, and (3) distribution of flyers urging passage of the amendment. \textit{Id.}  
\textsuperscript{57} Id. at 449, 375 N.Y.S.2d at 236.  
\textsuperscript{58} The defendant also argued that the plaintiff lacked standing, the court, however, found that as a taxpayer and as president of an organization campaigning against the E.R.A., plaintiff could maintain the action. \textit{Id.} at 452, 375 N.Y.S.2d at 240.
agency officials' freedom of speech and association, and that the defendants possessed statutory authority to support the amendment.

The court quickly dismissed the first of defendant's arguments. Reasoning that the plaintiffs sought to enjoin the defendant officials' support of the E.R.A. in a professional but not a personal capacity, the court saw no first amendment issue.59

The court also disagreed with the second of defendant's contentions. The relevant statutory authority vested the Division of Human Rights with authority to promote human rights. The court concluded that this authority hardly sanctioned administrative promotional activities in support of proposed constitutional amendments.60

Although holding that a state agency may not use public funds to disseminate propaganda, the court stressed that an agency may appropriate monies to educate and inform the voting public.61 The court further emphasized that nothing in the opinion should be construed to prohibit a governmental body from trying to induce the public to vote in an informed manner.62 The line drawn in Stern is a fine one. Absent first amendment restraints, it could mean simply that governments wishing to engage in referendum advocacy must do so with subtlety.63

Mountain States Legal Foundation v. Denver School District64 illustrates the problems that arise even when a statute appears on its face to authorize governmental advocacy. In 1974, the Colorado General Assembly passed a Campaign Reform Act.65 Although the Act included a provision barring political subdivisions

59. Thus the issue raised by the instant application is not one concerning freedom 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. 
Id. at 449, 375 N.Y.S.2d at 237.
60. Id.
61. Id. at 451, 375 N.Y.S.2d at 239.
62. Id. at 452; 375 N.Y.S.2d at 240.
65. State and political subdivisions—limitations on contributions. (1) No agency, department board, division, bureau, commission, or council of the state or any political subdivision thereof shall make any contribution or contribution in kind in campaigns involving only issues in which they have an official concern. In
from making contributions to candidates, it also provided that political subdivisions "may . . . make contributions or contributions in kind in campaigns involving only issues in which they have an official concern."

In October 1978, the Board of Education for Denver School District Number One, a political subdivision of the state, declared that the defeat of a proposed constitutional amendment, which would have affected the authority of all levels of representative authority in Colorado to spend public funds, was a matter of "official concern." Consequently, the Board of Education approved the expenditure of funds to attempt to defeat the amendment.

A group of residents of the school district sought to enjoin the Board from appropriating funds in an attempt to defeat the amendments. The district court agreed. Resting its decision on statutory grounds, the court concluded that the proposed amendment was not of official concern. Even if it was, continued the

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such instances, unless specifically approved by the governing board or legislative body of the political subdivision involved:

(a) No public funds or supplies shall be expended or used:
(b) No employee or paid officer, other than the candidate, shall work on a campaign during working hours or use any public facility or equipment in a campaign during working hours;
(c) No transportation or advertising involving public property or funds shall be provided for the purpose of influencing, directly or indirectly, the passage or defeat of an issue;
(d) No employee or officer shall be granted leave from his job or office with the public agency, with pay, to work on a campaign.


66. Id.
67. Id. (emphasis added).
68. 459 F. Supp. at 358. The proposed amendment read as follows:
Shall the constitution of the state of Colorado be amended by adding a new article x limiting annual increases in per capita expenditures by the state and its political subdivisions to the percentage increase in the United States Consumer Price Index, except when a larger increase is approved by the voters in the affected jurisdiction in a special election; providing a procedure for emergency expenditures; prohibiting the state from imposing any part of the cost of new or expanded state programs on political subdivisions; requiring adequate funding of new and existing benefit programs; and establishing a maximum limit on the surplus fund for the state and providing that excess revenues collected by the state be returned to the taxpayers?


69. The Board of Education specifically approved the use of school "supplies, facilities, funds and employees" for distributing campaign literature, educating the voting public, and providing public meeting places for those who sought to defeat the amendment. Id.

70. Id. at 359.
court, the first amendment would disallow any but nonpartisan campaign efforts.

The court supported its conclusion that the proposed amendment did not represent a matter of official concern by saying:

What is of "official concern" to a school district board of education is to be determined by reference to the official powers and duties delegated by the general assembly in the school laws. A special election for the sole purpose of voting on a school bond issue is a convenient illustration of a campaign involving "only issues in which they have an official concern." A proposed amendment to the state constitution on a general election ballot is not such a matter . . . (even if it) would affect the conduct of the affairs of school districts together with all other state and local governmental agencies in Colorado."  

The court then attempted to buttress its conclusion that the proposed amendment did not constitute a matter of official concern by arguing that such an interpretation would violate the first amendment.  

The court reasoned that the government may not take sides in an election because the selective use of public funds in a campaign improperly distorts the workings of democracy and contravenes the first amendment. More specifically, the court said that if a government uses public resources to campaign against a proposal supported by taxpayers who contributed to those resources, the first amendment is violated.

Mountain States' constitutional concerns are clear. The court's invocation of precedent, however, is not. Mountain States pointed to two decisions for the proposition that courts have uniformly been reluctant to sanction governmental advocacy because such advocacy raises first amendment barriers. An examination of these cases, however, yields a narrower basis for prohibiting these public funds in election campaigns.

71. Id. at 360.
72. Id.
73. Id.
74. Id. at 361.
75. Id. at 360 (citing Stanson v. Mott, 17 Cal. 3d 206, 551 P.2d 1, 130 Cal. Rptr. 697 (1976); Citizens to Protect Pub. Funds v. Board of Educ., 13 N.J. 172, 98 A.2d 673 (1953).
In *Stanson v. Mott*, the California Supreme Court was called upon to construe the following statute:

> For the purposes of disseminating information relating to its activities, powers, duties or functions, the department may issue publications, construct and maintain exhibits, and perform such acts and carry on such functions as in the opinion of the director will best tend to disseminate such information.

The court concluded that the statute did not permit the use of public funds to urge the passage of a park bond referendum. In so holding, the court indicated that nothing in the statute "purports to sanction election campaign expenditures by the Department of Parks and Recreation; in the absence of such explicit authorization, we conclude that defendant could not authorize the department to spend public funds to campaign for the passage of the bond issue."

The New Jersey Supreme Court reached a similar conclusion several years before *Stanson* in *Citizens to Protect Public Funds v. Board of Education*. The statute at issue there permitted public expenditures incident to "the building, enlarging, repairing or furnishing of a schoolhouse. . . ." The court concluded that these words provided no authority for the school board to fund the production of a booklet supporting a bond issue to finance expansion of an existing school.

The court reasoned that a fair presentation of the issue must include all consequences of the proposal. In such a form, a booklet addressing the financing of the expansion project would have been a legitimate exercise of the board of education's power to initiate the construction program. The booklet at issue, however, fell short of that standard. It merely presented the viewpoint of the school board and offered dissenters no opportunity to express themselves equally through the use of public funds.

Like the *Stanson* court, however, the *Citizens to Protect* court provided an exception. It said that "[t]he expenditure [for exhorting a yes vote] is . . . not within the implied power [of a state agency] and is not lawful in the absence of express authority from

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76. 17 Cal. 3d 206, 551 P.2d 1, 130 Cal. Rptr. 697 (1976).
77. CAL. PUB. RES. CODE § 5096.72(a) (Deering 1976).
78. 17 Cal. 3d at 216, 551 P.2d at 10, 130 Cal. Rptr. at 706.
79. Id.
81. N.J. STAT. ANN. § 18:7-77.7(b) (West 1976).
82. 13 N.J. at 179, 98 A.2d at 676.
83. 13 N.J. at 180–81, 98 A.2d at 677–78.
Thus, in both Stanson and Citizens to Protect, the courts based their decisions not on constitutional grounds, but rather on the absence of specific legislative authority to spend public funds in support of political partisanship. The reliance of the Mountain States court on those two cases is somewhat dubious. The statute at issue in Mountain States explicitly authorized the expenditure of public funds to persuade the populace to support a specific point of view in the voting booth when the matter was an "official concern of the public body." The advocacy in Mountain States was barred not because of the absence of legislative permission but rather because the court concluded that the outcome of the referendum was not an "official concern" of the Denver Board of Education. Such a strained reading of the statute is explicable only in the context of the first amendment hurdles that were raised expressly in the opinion and that are discussed in the following section. Inasmuch as Stanson and Citizens to Protect involved no legislative grant of authority to contribute to campaigns at all, reliance on those cases in Mountain States seems misplaced.

IV. THE FIRST AMENDMENT AND REFERENDUM ADVOCACY

In the absence of judicial consensus, the constitutional permissibility of referendum advocacy is not clear. The only conclusion that may be reached with any degree of certainty is that such advocacy, if constitutional, derives its legitimacy from the first amendment. Therefore, in an attempt to clarify the relationship between first amendment freedoms and referendum advocacy, this section reviews the amendment's text, constitutional history, and selected case law.

A. First Amendment Text

An argument, however slim, can be made that the text of the

84. 13 N.J. at 181, 98 A.2d at 677 (emphasis added).
85. See text accompanying note 66 supra.
86. 459 F. Supp. at 359; see text accompanying note 37 supra.
88. See text accompanying notes 91-96 infra.
89. See text accompanying notes 97-104 infra.
90. See text accompanying notes 104-35 infra.
amendment does not prohibit—and perhaps even legitimates—referendum advocacy. The first amendment reads, in pertinent part, "Congress shall make no law . . . abridging the freedom of speech . . . ." The fourteenth amendment extends this freedom of speech to all "persons." Since 1886, the Supreme Court has interpreted the term "persons" to include corporations, a term which includes both business and governmental corporations. Thus, so the argument goes, the first amendment extends its protection to governmental advocacy.

It can, however, be argued that a "person" within the meaning of the fourteenth amendment does not include governmental corporations. Business and municipal corporations are, after all, radically different. In a business corporation, individuals are associated under a statute in a common enterprise possessed of a common name, a legal capacity to sue and be sued, limited liability, an elected management team, and a package of rights and duties divided into units called shares. A municipal corporation, on the other hand, has been popularly defined as a legal institution, or body politic and corporate, established by public law, or sovereign power, evidenced by a charter with defined limits and a population, a corporate name and a seal . . . and perpetual succession, primarily to regulate the . . . territory or district incorporated by officers selected by the corporation, and secondarily, to share in the civil government of the state in the particular locality.

Thus, when the Supreme Court decided that the first amendment protects corporate speech, it did not necessarily mean to include a governmental corporation.

B. First Amendment History

The relationship between the first amendment and governmental referendum advocacy cannot be determined by simply reading the language of the amendment. The history surrounding its passage similarly provides no conclusive evidence on the amendment's relationship to referendum advocacy. The court in Mountain States relied in part upon Federalist Papers Numbers

91. U.S. Const. amend. I.
92. Id. amend. XIV, § 1.
95. Id. at 2–3 n.3.
96. E. McQuillin, Municipal Corporations 373 (2d ed. 1940).
52 and 53 and a transcript of a speech by one Senator Rives to conclude that the first amendment does not protect governmental referendum advocacy. Federalist Paper Number 52, in which James Madison discussed the House of Representatives, contains a review of the electoral process. It points out that the "federal legislature should be independent of state legislatures and dependent upon the people." Madison asserted that elections were the only means available to ensure that the representatives were in sympathy with and dependent upon the people.

Madison may, indeed, have wished to restrain the power of government. But, beyond suggesting that any exercise of governmental power should be viewed with skepticism, Number 52 provides little indication that the first amendment bars governmental advocacy.

In Federalist Paper Number 53, Madison discussed the relative merits of annual and biennial elections. Some people apparently felt that biennial elections would breed corruption of the new democracy's representatives. Madison disagreed, and argued that a two year term would allow representatives to become acquainted with national needs. Thus, as does Number 52, Number 53 suggests that the powers of the federal government were intended to be restrained, but not that the first amendment was designed to bar referendum advocacy.

The language relied on by the court in Mountain States is that of Senator W.C. Rives during an 1839 debate on a bill prohibiting federal officers from interfering in elections. The speech read:

The President of the United States has seen with dissatisfaction officers of the General Government taking on various occasions

97. 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 (see, e.g., Madison, The Federalist Papers, Nos. 52, 53; 10 J. Richardson, Messages and Papers of the Presidents (1899) pp. 98-99 (President Jefferson)) the selective use of public funds in election campaigns, of course, raises the specter of just such an improper distortion of the democratic electoral process. 459 F. Supp. at 360 (quoting Stanson v. Mott, 17 Cal. 3d 206, 557 P.2d 1, 130 Cal. Rptr. 697 (1976)).

98. THE FEDERALIST No. 52 (J. Madison) 359 (Wright ed. 1961) (emphasis added).

99. Id. at 361-64.

100. THE FEDERALIST No. 53 (J. Madison) 364 (Wright ed. 1961).

101. Id. at 360.

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.103

According to the speech, Jefferson wished executive employees to refrain from electioneering because of its potential impact on the separation of powers and federal structure. President Jefferson’s concerns, as expressed by Senator Rives, did not reflect a desire to protect first amendment freedoms. Jefferson may simply have been preventing executive branch employees from undermining the legislative branch of government. If so, nothing in the statement can be read to prohibit governmental referendum advocacy.

C. Judicial Development of First Amendment Freedoms

Since neither constitutional text nor history defines the relationship between referendum advocacy and the first amendment, this subsection examines major cases dealing with the first amendment in an attempt to determine whether judicially developed principles and policies provide an answer.


Though it deals with a libel question, New York Times deserves attention. It contains a detailed analysis of first amendment values that the Supreme Court relied upon in the landmark political speech case of Buckley v. Valeo.105 In New York Times, the Court had to decide whether the first amendment, as applied to

103. J. Richardson, 10 Messages and Papers of the Presidents 98-99 (1899) (emphasis added).
105. 424 U.S. 1, 14, 49 (1976).
the states by the fourteenth amendment, limited the states' powers to award judgments in libel actions brought by public officials upon a showing that the allegedly defamatory statements were false.\(^{106}\) Before proceeding to the merits, the Court reviewed the first amendment's underpinnings. In so doing, the Court set forth five justifications for the first amendment: (1) to assure the unfettered interchange of ideas in order to encourage political and social change, (2) to make government responsive to the people, (3) to provide the people with the inner satisfaction of voicing their thoughts, (4) to maximize, through a multitude of voices, the chances for reaching correct conclusions, and (5) to protect the government by allowing the people to vent their anger in a constructive way.\(^{107}\)

Debate on public issues, reasoned the Court, should be "uninhibited, robust and wide open."\(^{108}\) Preservation of these values—and the first amendment itself—required invalidation of a state law permitting libel judgments in favor of a public official upon a mere showing that the defendant's defamatory statements about him were false.\(^{109}\)

Theoretically, one could attempt to determine the constitutional permissibility of governmental advocacy by simply assessing the extent to which such advocacy advances the five values outlined in *New York Times.*\(^{110}\) This approach, however, would

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106. The New York Times had published a paid editorial advertisement alleging that police officers had mistreated blacks with the approval of the Commissioner of Public Affairs of Montgomery, Alabama. The jury awarded the Commissioner a judgment of $500,000. *Id.* at 256–59.
107. *Id.* at 269–72.
108. *Id.* at 270.
109. *Id.* at 278–79. The Court reasoned that allowing such a law to stand would restrict the public's access to information by compelling newspaper publishers to be overly careful in assessing what material to print.
110. Under *New York Times*, the first purpose of the freedom of expression is to encourage thought productive of change. By protecting speech (which, of course, provides ideas and stimulates thought), the amendment facilitates a release of information that gives its recipients the opportunity to fashion new ideas. The government possesses an extraordinary capacity for accumulating and disseminating data. *See* H. READ, J. MACDONALD, J. FORDHAM & W. PIERCE, MATERIALS ON LEGISLATION 318–24 (3d ed. 1973). Government referendum advocacy, therefore, may well encourage the release of new information and thus generate thought productive of change.

The second purpose of the first amendment, according to the *New York Times* court, is to encourage government to be more responsive to those it governs. Speech allows citizens to inform elected officials about citizen needs. It allows citizens, by way of the media, to criticize, and urge the defeat of, officials who fail to meet those needs. Governmental referendum advocacy may produce the same end.

The third purpose of the first amendment, under the *New York Times* formula, is to
be unwise, for the opinion contains no standards for analysis. Attempts to predict the impact of governmental advocacy would constitute no more than speculation.

The Supreme Court elaborated upon its reasoning in *New York Times* in *Monitor Patriot Co. v. Roy*,111 where the petitioners, a newspaper alliance, argued that the lower court had improperly refused to apply the *New York Times* standard.112

The respondent, who had been a senatorial candidate when the alleged libel occurred, maintained that the *New York Times* standard was inapplicable because the newspaper’s defamatory remarks had been directed at the plaintiff’s private rather than public conduct.113 The Court held that the *New York Times* rule was applicable in *Monitor Patriot* reasoning that charges of criminal conduct could never be deemed to refer solely to private conduct when directed at a political candidate because such charges bore directly upon the candidate’s fitness for office.114 To justify its holding the Court stressed that the *New York Times* standard had been adopted to ensure that tort law did not chill political discussion.115 The Court also noted that

[I]f it be conceded that the First Amendment was “fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people,” . . . then it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.116

help the citizenry in reaching correct conclusions. People reach conclusions on the basis of information. If there are no constraints on its flow, there is more information on which to base a conclusion. Governmental referendum advocacy arguably increases the flow of information and thereby increases the likelihood that correct conclusions will be reached.

The fourth purpose of the first amendment as articulated in *New York Times* is to ensure that citizens are afforded the opportunity to vent their anger. Since it seems that this purpose is best accomplished when a citizen articulates his sentiments himself—and not through his government—it is questionable whether protecting government referendum advocacy advances this value.

The fifth value of the first amendment found in *New York Times* is to assure that citizens derive satisfaction from voicing their viewpoints. Governmental referendum advocacy furthers this purpose if one assumes that citizens similarly derive satisfaction from a government’s use of tax monies in support of their viewpoints. Of course, this value would be advanced only to the degree that the views espoused by government coincided with those of its citizens.

111. 401 U.S. 265 (1971).
113. 401 U.S. at 273.
114. Id. at 274–77.
115. Id. at 275–76.
116. Id. at 271. *See, e.g.*, Anderson v City of Boston, 78 Mass. —, 380 N.E.2d 678
Thus, in *Monitor Patriot*, the Court once again demonstrated its belief that the dissemination of information about candidates requires the most exacting protection. In so doing, it implicitly emphasized that the first amendment ensures that all thoughts on political matters reach the marketplace of ideas. Thus, in conjunction with *New York Times*, *Monitor Patriot* indicates that first amendment guarantees might theoretically extend to and support government participation in referendum advocacy.

2. *Buckley v. Valeo*

The Supreme Court's opinion in *Buckley v. Valeo* 117 may support the notion that the first amendment protects governmental referendum advocacy. In *Buckley*, the Supreme Court considered three issues concerning the Federal Election Campaign Act and its amendments. 118 The first of these was whether the first amendment permits a government to restrict campaign expenditures by statute in order to ensure that all candidates receive the public's attention. 119 The Court decided that such a statute was impermissible: "That interest [equalizing resources] is clearly not sufficient to justify the provision's infringement of fundamental First Amendment rights." 120 This statement, the impact of which protects first amendment freedoms at the expense of equalizing campaign resources, may sanction governmental advocacy. If money and power are interchangeable, the government cannot silence a powerful speaker (another government) so that less powerful speakers can be heard.

The second provision at issue in *Buckley* set a limit upon the amount any citizen could contribute to a political campaign. 121 Again, the government argued that the need to give each citizen

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120. 424 U.S. at 54.
121. "No person may make any expenditure . . . relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defect of such candidate exceeds $1000." 18 U.S.C. § 608(e)(1) (Supp. IV, 1974) (repealed 1976).
an opportunity to influence an election's outcome justified the provision. Again, the Court disagreed, saying that "[t]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the first amendment."\textsuperscript{122} This language may suggest that the Court would not warmly receive the contention that government advocacy, to the extent that it drowns out other voices, must be banned.

The third provision at issue in \textit{Buckley} placed a ceiling on total expenditures by any one candidate seeking federal office.\textsuperscript{123} The Court struck down this statutory limitation as well—and its language in so doing is illuminating. In a democracy, said the Court, "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 debate on public issues in a political campaign."\textsuperscript{124}

When coupled with the Court's intolerance of governmental restrictions aimed at equalizing political voices, this quote provides a plausible argument that government lacks authority to spend to equalize voices. Because the Court expressed such distaste for the equalizing voices argument, however,\textsuperscript{125} and because the Court emphasized the desirability of a well-informed electorate,\textsuperscript{126} it is unclear whether after \textit{Buckley}, speech loses first amendment protection simply because the person delivering it is the government.

3. \textit{First National Bank v. Bellotti}

Two years after the decision in \textit{Buckley}, the Supreme Court decided \textit{First National Bank v. Bellotti}.\textsuperscript{127} As already indicated, the Court in \textit{Bellotti} struck down a Massachusetts law banning corporate expenditures on matters unrelated to a corporation's business.\textsuperscript{128} In so doing, the Court reaffirmed the position it had taken in \textit{Buckley}\textsuperscript{129}—that the first amendment does not permit restrictions on speech in order to equalize political voices.\textsuperscript{130} The

\begin{itemize}
\item \textsuperscript{122} 424 U.S. at 48-49.
\item \textsuperscript{123} 18 U.S.C. § 608(c) (Supp. IV, 1974) (repealed 1976).
\item \textsuperscript{124} 424 U.S. at 57.
\item \textsuperscript{125} \textit{Id.} at 48-49, 54.
\item \textsuperscript{126} \textit{Id.} at 52-53.
\item \textsuperscript{127} 435 U.S. 765 (1978).
\item \textsuperscript{128} \textit{Id.} at 795. \textit{See} text accompanying notes 15-27 \textit{supra}.
\item \textsuperscript{129} 424 U.S. at 48-49.
\item \textsuperscript{130} 435 U.S. at 791.
\end{itemize}
Court stated that, since speech deserves at least as much first amendment protection as do speakers, corporate referendum advocacy can be suppressed only when it threatens to undermine democratic processes and first amendment interests.

It can be argued that this reasoning applies as well to governmental advocacy. Assuming that government advocacy falls within the first amendment definition of "speech," it appears as entitled to constitutional protections as does corporate referendum advocacy. And, if governmental advocacy does not imminently threaten democratic processes, there seems to be no basis for suppressing it.

Under *Bellotti*, however, it can also be argued that, for this very reason, the first amendment simply does not extend to governmental advocacy. Such advocacy may well threaten democratic processes. Indeed, if one accepts the premise that government neutrality is essential to a democracy, such a proposition is difficult, if not impossible, to refute.

Notwithstanding this potential argument, *Bellotti* provides strong support for the contention that governmental referendum advocacy deserves first amendment protection. First, it reaffirms Buckley's rejection of the equalizing voices argument. Second, it emphasizes that both speech and speakers deserve first amendment protection. Third, by placing a heavy burden of proof upon the state to justify a statutory restriction upon speech, *Bellotti* makes it more difficult to argue that such advocacy jeopardizes political processes.

V. Citizen Consent: A Proposed Prerequisite to Governmental Advocacy

In 1977, holdings in two Supreme Court cases, *Wooley v. Maynard* and *Abood v. Detroit Board of Education*, set limits...
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upon a government’s power to use taxpayer’s funds to advance a particular point of view. In so doing, they may have, in a somewhat paradoxical fashion, conferred a legitimacy upon governmental advocacy to which the populace freely consents.

In Wooley, two Jehovah’s Witnesses were convicted of violating a New Hampshire statute by covering the motto on their license plate which read, “Live Free or Die.” The Maynards argued that the state could not force them to advertise a slogan they found “morally, ethically, religiously and politically abhorrent.” The Supreme Court agreed. It held that a state may not “constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be read and observed by the public.”

In reaching its holding, the Court concluded that New Hampshire’s treatment of the respondents encroached upon their first amendment rights. The Court pointed out that under its decision in West Virginia State Board of Education v. Barnette, the first amendment protects not only the right to proselytize ideological causes but also the right to refuse to foster such causes. The Court then determined that New Hampshire’s interest in promoting administrative convenience and civic values was not sufficiently compelling to justify abridgement of a particular individual’s rights.

138. 430 U.S. at 707. This case did not, however, come to the Court as an appeal from a criminal conviction. Rather, following a conviction for violating a law prohibiting covering the state motto on a license plate, the appellee filed suit in federal district court to obtain injunctive and declaratory relief. Id. at 709 n.5.

139. Id. at 713.

140. Id.

141. Id. at 714–15.

142. 319 U.S. 624 (1943). In Barnette, the Court held that requiring unwilling children to salute the flag constitutes a violation of the children’s right of freedom of expression. Justice Jackson’s famous opinion reads, in part:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our constitution to reserve from all official control.

Id. at 642.

143. 430 U.S. at 714.

144. Id. at 716–17.
Although the Court in Wooley took pains to explain the way in which the first amendment prevents the government from forcing a person to expound certain views, it would be an overstatement to suggest that the case necessarily precludes governmental advocacy. Nonetheless, Wooley does suggest that when the government uses tax money to advance a point of view, it may effectively force a taxpayer to support that point of view. Thus, in a case like Wooley, where the state could not justify its advocacy by showing a compelling interest, it must provide some method to ensure that taxpayers do not subsidize views which they do not endorse.

One method to ensure that a state used only those funds forwarded with the intent to subsidize a particular referendum is to use a tax form checkoff system. Under such a system, any citizen wishing to donate a sum for governmental advocacy would so indicate in a space provided on his tax return. Under such a plan, only the money actually checked off by taxpayers could be spent by the government, and there would be no problems with coercion or tacit approval.145

The Court elaborated on Wooley in Abood v. Detroit Board of Education.146 The appellants in Abood were employed by the Detroit Board of Education under an "agency shop arrangement."147 The appellants maintained that payments exacted from them in lieu of union dues were being used to support political candidates and causes in violation of their first amendment freedom of association.148 Thus, the major issue was whether the first amendment would permit the school board to dismiss employees who refused to pay service fees to be used for political purposes unrelated to collective bargaining.149

The Court pointed out that if this question were answered in the affirmative, employees would be deprived of government employment on the ground that they refused to advance a point of

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147. Under an agency shop arrangement, a union and the local government employer agree that each employee represented by a union (though not necessarily a union member) pay to the union, as a condition of employment, an amount equivalent to union dues. Id. at 211.
148. Id. at 234.
149. Id.
Such a result, said the Court, would violate both the principle of freedom of association and the principle that "an individual should be free to believe as he will and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the state."\(^{151}\)

Consequently, the Court held that any employee of the school board threatened with discharge for failing to make the types of political contributions in question could establish a cause of action under the first and fourteenth amendments.\(^{152}\) By so holding, the Court reaffirmed Wooley and provided additional support for the argument that a government cannot use a nonconsenting taxpayer's funds for referendum advocacy.

The third part of the Abood opinion reviewed two possible remedies for a first amendment violation in the context of political expenditures.\(^{153}\) First, that portion of the exacted funds in the proportion that union political expenditures bear to total expenditures could be refunded, and future assessment similarly reduced.\(^{154}\) Second, such expenditures could simply be enjoined.\(^{155}\)

With reference to taxes, a court adopting the Abood approach could use these remedies to grant relief to a citizen compelled to support views with which he disagreed. As Abood designated such remedies to be the minimum relief available,\(^{156}\) one might conclude that the only way to bar coerced contributions would be to bar all advocacy. This approach, however, by limiting both the right of citizens to fund advocacy and the right of government to engage in advocacy, would seem to be unnecessarily restrictive. A better view is that, under Wooley and Abood, governments can engage in referendum advocacy as long as each citizen retains the right to refuse to contribute his individual tax monies to the effort.

Neither existing law nor the first amendment yield any certain answers to the question of governmental referendum advocacy. It is submitted, in conclusion, that government can engage in such advocacy if it does not force an individual citizen to subsidize

\(^{150}\) Id. at 236.

\(^{151}\) Id. at 235.

\(^{152}\) Id. at 237.

\(^{153}\) Id. at 237–42.

\(^{154}\) Id. at 240 (citing Brotherhood of Ry. and Steamship Clerks v. Allen, 373 U.S. 113, 122 (1963)).

\(^{155}\) Id. at 238.

\(^{156}\) Id. at 240.
views with which he disagrees. Indeed, citizen consent to govern-
ment referendum advocacy allows a maximum of voices to be
heard—and a premium on informed decisionmaking.

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