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In the
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1172

THE FIRST NATIONAL BANK OF BOSTON,
NEW ENGLAND MERCHANTS NATIONAL BANK,
THE GILLETTE COMPANY,
DIGITAL EQUIPMENT CORPORATION,
AND
WYMAN-GORDON COMPANY,
APPELLANTS,
v.
FRANCIS X. BELLOTTI, ATTORNEY GENERAL,
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS

Brief for the Appellee

Preliminary Statement

In accordance with the provisions of Rule 40(3) and except as noted in this preliminary statement, the Attorney General of the Commonwealth of Massachusetts accepts the Appellants' reference to opinions below, statement of jurisdiction, reference to the statute involved, statement of issues

presented and statement of the case. The Attorney General states, however, that the jurisdiction of this Court has been improperly invoked (a) because the case has become moot on appeal and (b) because the Appellants seek review of certain questions of state and federal law not properly before this Court on appeal. More specifically, the Attorney General asserts that questions pertaining to the vagueness of the first sentence of Mass. Gen. Laws c. 55, § 8, may not be raised on appeal.

For the convenience of the court, Appellee utilizes the same form of citation to the record as the Appellants. Citations to the Appendix to the Jurisdictional Statement appear as "J.S. App. ____" and citations to the Appendix simply as "App. ____".

Summary of Argument

I.

Appellee's first argument is jurisdictional in nature. The particular controversy between the parties to this appeal expired when the 1976 general election passed and the Appellants had not contributed money to oppose the graduated income tax question. The case became moot at that time, unless it is "capable of repetition, yet evading review." This appeal is not within the narrow range of cases which trigger that exception to the doctrine of mootness because (a) if the issues presented do again recur, it will be in an entirely different context permitting review on a concrete factual record, and (b) the time frame during which the statutory proscription against corporate campaign contributions actually operated was not too short to permit

adequate review. Delay in bringing this case before this Court is a function of the trial strategy of the Appellants and not a consequence of the operation of natural or man-made laws. Appellants cannot remove themselves from the operation of Article III of the United States Constitution merely because that strategy backfired.

II.

Corporations not in the business of communications or speech do not have First Amendment rights. First Amendment rights, encompassing the freedom of unfettered thought, opinion and speech, are peculiarly personal in nature. This Court has repeatedly found that corporations, as artificial entities, do not enjoy other peculiarly personal rights guaranteed to their owners and managers by other provisions of the Constitution. Only corporations in communications or speech-related businesses have been found to have First Amendment rights; and, in these cases, the fact that the party was a corporation was incidental to the questions before the Court.

As the court below found, the "right to hear" is not involved in this case, and unlike a ban on advertising, Mass. Gen. Laws c. 55, § 8, does not deprive the public from receiving any information.

III.

Even if, *arguendo*, corporations have First Amendment rights, those rights are limited to issues materially affecting the corporation's business, profits or assets. Appellants' First Amendment claims stem from the due process of law

clause of the Fourteenth Amendment. While the due process clause may protect the property interests of a corporation, the liberty guaranteed by the due process clause is the liberty of natural, not artificial, persons.

A corporation's powers, purposes and property interests are determined by the State. A corporation's property interests are necessarily limited by its corporate charter. Having voluntarily accepted the benefits that go with the corporate form, corporations must also accept the restrictions placed on their purposes and the use of their funds largely accumulated because of the privileges granted by the State.

Appellants claim that at a minimum the First Amendment should be held to protect corporate speech where corporations "believe" their material interests to be affected. However, a balancing of interests, and not a speaker's belief, determines whether speech is protected by the First Amendment.

IV.

Even if, *arguendo*, corporations have First Amendment rights which are co-extensive with those of natural persons, Mass. Gen. Laws c. 55, § 8, is still constitutional. Because Mass. Gen. Laws c. 55, § 8, permits corporate managers and even corporations to express their political views in many different forms and forums, the statute has only an incidental effect on corporate and corporate managers' speech.

On the other hand, the statute furthers several significant state interests. First, by freeing elections from possible corporate interference, the statute furthers the state's interest in sustaining an active, alert role for the individual

citizen in the election process. This interest is particularly significant in initiatives and referenda, which are the purest form of democracy, introduced as a method for giving individual citizens the last say on particular legislative matters. Second, by preventing corporations from using their influence gained through governmental privileges, the statute furthers the state's interest in sustaining the individual citizen's confidence in government. Third, by prohibiting corporations from spending stockholders' money for political purposes, the statute furthers the state's interest in preventing stockholders from being compelled to furnish contributions for the propagation of political opinions in which they do not believe. Other schemes to protect shareholder rights, such as requiring a majority vote of shareholders for political expenditures or notification to the shareholders, would not effectively protect minority interests that would still be disregarded.

V.

The provision of Mass. Gen. Laws c. 55, § 8, which was applicable to the Appellants' proposed course of action is not vague and contains no evidentiary presumptions. The statute creates two separate but related crimes. The first is general in nature and prohibits certain corporations from making contributions or expenditures to oppose ballot questions which will not "materially affect" their business, property or assets. The second crime is specific in nature and prevents corporate contributions to oppose ballot questions dealing solely with the taxation of individuals. The Appellants brought this litigation because they wanted to follow the course of conduct interdicted by the second crime, but material effect is not an element of that offense.

Hence questions as to the vagueness of the phrase "materially affecting" or the existence of an evidentiary presumption alleviating the Commonwealth's assumed burden of proving a material effect are simply not presented. In any event, the legislative and judicial history of the statute indicates, and the Appellants concede, that the second crime was "tailor-made" to prohibit corporate campaign contributions to oppose a graduated income tax amendment. There is no doubt that the statute afforded Appellants fair notice that such contributions were proscribed.

VI.

By prohibiting contributions by business corporations, but not other artificial entities organized for business purposes, Mass. Gen. Laws c. 55, § 8, does not deny business corporations equal protection of the laws. The classification implicit in the statutory scheme is based on economic differences which make it more likely that corporate contributions, as opposed to contributions by other artificial entities, will undermine the role of the individual voter in the initiative and referendum process and will result in diminution of the political rights of individual stockholders. These factors justify restrictions on business corporations that may not legitimately be applied to other organizations. Even if restrictions could be constitutionally imposed on these other organizations, however, the equal protection clause does not mandate the conclusion that the Commonwealth must proscribe all contributions by unnatural persons or none at all.

Argument

I. The Issues Presented Are Non-Justiciable Because This Case Has Become Moot On Appeal.

The specific dispute which spawned this appeal is over. In November of 1976 the voters of the Commonwealth once again rejected a proposed graduated income tax amendment to the Massachusetts Constitution. J.S. App. 4, n. 6. The Appellants, all Massachusetts corporations which had expressed a desire to make political contributions or expenditures to oppose the amendment and who unsuccessfully appeared before the Supreme Judicial Court to challenge the Commonwealth's right to restrict their activities, refrained from contributing or expending corporate funds to express their opposition. Whatever the outcome of this appeal, there can be no future enforcement efforts as a result of the facts underlying this case because there has been no violation of Mass. Gen. Laws c. 55, § 8. Under these circumstances the case has become moot on appeal.

The rule against deciding moot cases is not discretionary; it is a rule of constitutional dimension having its roots in Article III of the United States Constitution. *See, e.g., Liner* v. *Jafco, Inc.*, 375 U.S. 301, 306 (1964). To the extent that the rule "defines constitutionally minimal conditions for the invocation of federal judicial power, its meaning and scope . . . must be derived from the fundamental policies informing the 'cases or controversies' limitation imposed by Art. III." *Franks* v. *Bowman Transp. Co., Inc.*, 424 U.S. 747, 754 (1976). The "cases and controversies" limitation is a jurisdictional prerequisite to the exercise of federal judicial power and requires that "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Steffel* v.

Thompson, 415 U.S. 452, 459, n. 10 (1974), citing *Roe* v. *Wade*, 410 U.S. 113, 125 (1973). A "rigid insistence" on this requirement is particularly important here, because a major constitutional issue is presented on a less than optimal record. *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

Ordinarily the current controversy requirement is not met, and a case becomes moot on appeal, whenever the party claiming to be aggrieved ceases to have a personal stake in its outcome. *See*, *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974). The Appellants in this case seek to avoid the consequences of mootness by invoking the "capable of repetition, yet evading review" exception to the doctrine. *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). The exception is of no avail to the Appellants.

The instant case was not commenced as a class action, App. 3-9, a factor which "significantly affects the mootness determination." *Sosna* v. *Iowa*, 419 U.S. 393, 399 (1975). In the absence of a class action, the "capable of repetition, yet evading review" exception was limited by the decision in *Sosna* to situations "where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975). Neither of these elements is present in this case.

Whether or not the same controversy will recur is a matter of sheer speculation.[1] The Appellants argue with

[1]This Court is asked to speculate in another significant regard. The judgment of the Supreme Judicial Court effectively constituted a refusal to preclude institution of criminal proceedings against corporations for making contributions violative of Mass. Gen. Laws c. 55, § 8. Appellants ask this Court to conclude that if such proceedings had been

assurance that the issues will arise again because, in their view, a graduated income tax amendment will inevitably again be placed on the Massachusetts ballot. In the past, graduated income tax amendments in one form or another have repeatedly been placed before the voters of the Commonwealth, who have just as consistently rejected them. Appellants' Brief, 20, n. 5. The 1976 election marked the first time, however, that corporate contributions to oppose the amendment had been effectively foreclosed. *See, First National Bank* v. *Attorney General*, 362 Mass. 570, 290 N.E. 2d 526 (1972) (hereinafter referred to as *FNBI*); *Lustwerk* v. *Lytron, Inc.*, 344 Mass. 647, 183 N.E. 2d 871 (1962). In light of the defeat of the amendment at this last election, it is doubtful whether it will again be placed on the ballot. In any event, this is not the kind of election issue which will necessarily recur at regular intervals, as questions pertaining to nomination of candidates or eligibility to vote will. On the contrary, an affirmative vote of two consecutive sessions of the General Court must precede placing the amendment on the ballot. While past history may be instructive in this regard, it simply cannot be conclusively presumed that the legislature will take that action.

Moreover, if a similar controversy does arise between these parties in the future, it will presumably be litigated in a different manner.[2]

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commenced, they would have operated to deprive corporations of asserted constitutional rights. This is a matter of conjecture which does not present a substantial federal question. *See, Abrams* v. *Van Schaick*, 293 U.S. 188 (1934).

[2]In fact the history on which Appellants rely for the assertion that the same controversy will recur belies their conclusion. The history of the graduated income tax amendments is evolutionary. Both the text of the

Given the holding of the lower court, corporations would stand little chance of successfully instituting an action for declaratory judgment if they submitted their case on an agreed statement of facts and merely argued from those facts. Realistically, the issues presented by this appeal can only recur either by way of criminal prosecution or after a civil trial to determine the merits of the corporate claim. Appellants' Brief, 32. Thus, while the issues presented may be capable of repetition, presumably they will reappear before this Court not in the "same action" as that term is used in *Weinstein* v. *Bradford*, *supra*, but in an entirely different context and on a more concrete factual record.

Assuming, *arguendo*, that there is a reasonable probability that the issues presented will arise again between the parties to this appeal, this matter still does not fall within the narrow range of cases which are capable of repetition, yet evading review. That exception to the mootness doctrine is triggered only where the action, order or statute challenged operated during a time period so short that it was virtually impossible fully to litigate its validity. Appellants seek to have this Court determine the question of mootness not on the basis of what actually happened in the underlying litigation, but on the basis of what may happen in similar cases brought in years to come. Appellants' Brief, 22-23. They argue not that the proscription against corporations operated in this case in a time frame too short for complete adjudication, but that in the future case backlogs in the trial courts of the Commonwealth may effectively preclude appellate review. Their prospective examina-

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amendments submitted to the voters and the form of corporate challenges to a restriction on their contributions have constantly changed. *See*, *FNBI*; *Lustwerk* v. *Lytron, Inc.*, *supra*. If the issues are litigated again, history suggests it will not be in the same fashion.

tion of this element of the "capable of repetition, yet evading review" exception is totally inconsistent with the cases or controversies requirement of Article III which informs mootness analysis. *Franks* v. *Bowman Transp. Co., Inc., supra.* Unless this Court is prepared to issue an advisory opinion on supposed facts, inquiry into the time frame available for review must be confined to an examination of the actual course of this litigation.

It is not surprising that Appellants argue from hypothetical facts, because it was their actual treatment of this case which made appellate review impossible. They could have brought suit to challenge Mass. Gen. Laws c. 55, § 8, as early as May 7, 1975. On that date the Massachusetts General Court took the final legislative action necessary to place the graduated income tax amendment on the November 1976 ballot. I Journal of the Senate, 1409-1412 (1975). At that time the 1975 amendment to Mass. Gen. Laws c. 55, § 8, was fully effective.[3] As the Supreme Judicial Court noted in its decision, the Appellants had complete control over the commencement of their litigation and could have sought declaratory relief in the spring of 1975, nearly eighteen months prior to the election. App. 15, n. 15. Instead, they waited nearly a year and filed a complaint on April 9, 1976. App. 1, 2. By choosing to file at that late date, Appellants not only prevented a full trial proceeding but precluded any meaningful opportunity to seek review by this Court. If the suit had begun in May of 1975 and proceeded through all stages at exactly the same pace as this litigation, it could have been submitted to this Court while the controversy was a current one. Thus the limited period for review in this case is a direct consequence of the Appellants' trial strategy and is not a result of the operation

[3]St. 1975, c. 151, became effective on April 28, 1975.

of natural or man-made laws. *Contrast, Roe* v. *Wade,* 410 U.S. 113 (1973); *Dunn* v. *Blumstein,* 405 U.S. 330 (1972).

Appellants should not be extricated from their plight simply by characterizing this as an election case. This Court has not established a unique rule for election matters. Certainly the "capable of repetition, yet evading review" exception has been invoked in the past to assume jurisdiction after the relevant election has passed,[4] but the Court has also sustained mootness claims in such cases.[5] The Court has rejected a talismanic invocation of the election process with its obvious time constraints and has instead analyzed each case on its own merits.

Finally, this is not a typical election case presenting questions about the constitutionality of nominating procedures or voter qualifications which will necessarily recur every two or four years and which implicate the ability of classes of citizens to participate in a democratic election process. The public policy arguments which militate in favor of deciding such cases are totally lacking here, where the difficulty of obtaining appellate review was caused by the Appellants' own delay in bringing suit and where a ruling by this Court will have no direct impact on the elective process. Based on the foregoing analysis, this Court should dismiss this appeal for lack of jurisdiction.

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[4] *American Party* v. *White,* 415 U.S. 767 (1974); *Storer* v. *Brown,* 415 U.S. 724 (1974); *Rosario* v. *Rockefeller,* 410 U.S. 752 (1973); *Dunn* v. *Blumstein, supra*; *Moore* v. *Ogilvie,* 394 U.S. 814 (1969).

[5] *Brockington* v. *Rhodes,* 396 U.S. 41 (1969); *Golden* v. *Zwickler,* 394 U.S. 103 (1969).

II. CORPORATIONS NOT IN THE BUSINESS OF COMMUNICATIONS OR SPEECH DO NOT HAVE FIRST AMENDMENT RIGHTS.

Appellants contend that Mass. Gen. Laws c. 55, § 8, is unconstitutional as a violation of freedom of expression. However, Appellants, as corporations not in the business of communications or speech, do not have First Amendment rights.

Corporations are artificial entities. They are legal fictions created as a convenient way to do business which exist for the benefit of the entire economy. As this Court noted in *Dartmouth College* v. *Woodward,* 17 U.S. (4 Wheat.) 518, 636 (1819):

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.

One of the most important characteristics of a corporation is that it divorces its human owners and managers from the corporate entity.[6] Corporations cannot have opinions. In fact, because of the dispersion of stock ownership and shareholder apathy, opinions purportedly expressed on

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[6] Harry Henn in *The Law of Corporations* 110 (1970) lists the six major attributes of the modern corporation. At least four of these attributes [(1) the power to contract and to take, hold, and convey property in the corporate name; (2) the power to sue and to be sued in the corporate name; (3) perpetual succession; and (4) limited liability] can at least in part be attributed to the desire to keep the corporate entity separate from its human owners and managers.

behalf of a corporation tend to be the personal opinions of its management. Note, "Corporate Political Affairs Programs," 70 Yale L.J. 821, 833 (1961). Mass. Gen. Laws c. 55, § 8, does not prohibit corporate managers from expressing their opinions. Rather, it prohibits corporate managers from using the corporate treasury to express their personal views on election issues not materially affecting the corporation.

This Court has never decided whether corporations enjoy First Amendment rights entitling them to express their opinions on electoral issues. However, this Court has repeatedly found that corporations do not enjoy other peculiarly personal rights guaranteed to their owners and managers by other constitutional provisions. The logic of these cases is totally applicable to the instant case.

In *Bank of Augusta* v. *Earle,* 38 U.S. (13 Peters) 519, 536 (1839), this Court declared that corporations did not enjoy the privileges and immunities of citizens. The Court noted that a corporation is an "artificial being created by the charter," and "[t]he only rights it can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a state." 38 U.S. at 587. In *Paul* v. *Virginia,* 75 U.S. (8 Wall.) 168, 177 (1868), this Court observed that the term "citizen" as found in the privileges and immunities clause "applies only to natural persons . . ., owing allegiance to the State." *See also, Blake* v. *McClung,* 172 U.S. 239 (1898); *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Co-operative Marketing Assoc.,* 276 U.S. 71 (1928); *Hemphill* v. *Orloff,* 277 U.S. 537 (1928); and *Asbury Hospital* v. *Cass County,* 326 U.S. 207 (1945), for later cases declaring that corporations do not enjoy the rights of citizens guaranteed by the privileges and immunities clause.

This Court has also held that corporations cannot claim the Fifth Amendment right against self-incrimination,[7] equality with individuals in the enjoyment of a right to privacy,[8] or even freedom of association.[9] In each instance the Court has differentiated between rights belonging to individuals and those pertaining to corporations, consistently refusing to permit corporations to exercise the personal rights guaranteed to their management. In the context of corporate freedom of association claims in sit-in cases, Justice Douglas asked:

> So far as the corporate owner is concerned, what constitutional right is vindicated? It is said that ownership of property carries the right to use it in association with such people as the owner chooses. The corporate owners in these cases — the stockholders — are unidentified members of the public at large, who probably never saw these petitioners, who may never have frequented these restaurants. What personal rights of theirs would be vindicated by affirmance? . . .
>
> Who, in this situation, is the corporation? Whose racial prejudices are reflected in "its" decision to refuse service to Negroes? The racial prejudices of the manager? Of the stockholders? Of the board of directors? . . .

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[7] *United States* v. *White*, 322 U.S. 694, 699 (1944); *Wilson* v. *United States*, 221 U.S. 361, 382-86 (1911).

[8] *California Bankers Assoc.* v. *Schultz*, 416 U.S. 21 (1974); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 651 (1950).

[9] *Bell* v. *Maryland*, 378 U.S. 226 (1964).

> [H]ow is a "personal" right infringed when a corporate chain store, for example, is forced to open its lunch counters to people of all races? How can that so-called right be elevated to a constitutional level? How is that corporate right more "personal" than the right against self-incrimination? *Bell* v. *Maryland*, 378 U.S. 226, 261-263 (1964) (Douglas, J., concurring).

In at least two lower court cases, courts have concluded that corporations do not enjoy the right to freedom of speech or association. *Joint Anti-Fascist Refuge Committee* v. *Clark*, 177 F. 2d 79, 83 (D.C. Cir. 1949), rev'd on other grounds, 341 U.S. 123 (1951); *Hallmark Productions, Inc.* v. *Mosley*, 190 F. 2d 904, 909 (8th Cir. 1951).

Appellants in their Brief, at 37, 39, make no attempt to distinguish the cases cited in this section of Appellee's Brief, or to explain why the right to freedom of speech is not a personal right. Rather, they have cited cases which purportedly stand for the proposition that corporations do enjoy First Amendment rights. None of the cases cited in Appellants' Brief make any such flat assertion.

All but two of the cases cited by Appellants involve corporations or individuals involved in the communications business.[10] They do not declare that corporations *per se*

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[10] *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936), involved a license fee imposed directly on newspapers. In *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952), and *Kingsley International Pictures Corp.* v. *Regents*, 360 U.S. 684 (1959), the corporations were engaged in the business of distributing motion pictures. A newspaper was the defendant corporation in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). *Pennekamp* v. *Florida*, 328 U.S. 331 (1946), was a contempt action against a newspaper publisher and editor and did not even directly involve a corporation. *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967), was a libel and right to privacy action against a national magazine.

have First Amendment rights, but merely recognize that natural persons retain their First Amendment rights even though they publish or distribute their views under corporate auspices. None of these cases raised the question of the propriety of corporate managers spending stockholder funds for purposes unrelated to the corporation's charter. Instead, in all of these cases, the fact that a party was a corporation was incidental to the questions before the court.

Appellants cite only two cases involving corporations not in the communications business to support the proposition that corporations *per se* have First Amendment rights. Appellants' Brief, 37. In *NAACP* v. *Button*, 371 U.S. 415 (1963), this Court declared Virginia's ban on certain forms of solicitation of legal business unconstitutional. The Court did not find that all corporations have First Amendment rights, but, rather, quite carefully stated that the NAACP, although a corporation, could assert First Amendment rights on its own behalf expressly because "it is directly engaged in those activities [protected by the First and Fourteenth Amendments]." 371 U.S. at 428.

Finally, Appellants have cited the case of *Linmark Associates, Inc.* v. *Township of Willingboro*, 45 U.S.L.W. 4441 (May 2, 1977), where this Court struck down a ban on placing "For Sale" signs in front of people's homes. However, in *Linmark* there was no discussion of a corporation's right to bring the action, and, in fact, the case involved a non-corporate as well as a corporate petitioner. Of more importance, this Court did not find that corporations have First Amendment rights, but, rather, that the Township's ban affected the interest of other members of the community in receiving the information. Despite Appellants' repeated attempts to characterize this case as one

involving "the right to hear," this issue simply is not involved given the facts and parties in this case.

Appellants correctly note that "[t]he court below never once alluded to the right of the people to hear, although this point was stressed throughout plaintiff's presentation . . ." Appellants' Brief, 43. The court below realized that "the right to hear" is not involved in this case. The public's interest in receiving information is one of the important interests embodied in the First Amendment. *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969). This does not mean, however, that a party with no First Amendment rights can invoke these interests. One of the reasons for granting parties First Amendment rights was so that others could hear what they had to say. However, if it should be determined that the corporations in this case do not have the First Amendment rights they are seeking, it does not matter that one of the interests that would be embodied in their rights (if they had them) would be the interests of the other people to hear what they have to say. Furthermore, unlike a ban on advertising, *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), or a ban on "For Sale" signs, *Linmark Associates, Inc.* v. *Township of Willingboro*, 45 U.S.L.W. 4441 (May 2, 1977), which effectively close off the public's ability to obtain certain information, Mass. Gen. Laws c. 55, § 8, effects no such ban. Instead, the law simply forbids corporate managers from spending corporate money to express their personal views. Because the corporate managers are free to express their opinions in their private capacity, the public is not deprived of any information.[11]

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[11]If Appellants' "right to hear" argument is construed to challenge Mass. Gen. Laws c. 55, § 8, as unconstitutional as applied, Appellants have failed to meet their burden of showing that the statute deprives

See Section IV of this Brief, at 31, for a discussion of further ways that even corporations have for making their opinions known.

III. Even If, Arguendo, Corporations Have First Amendment Rights, Those Rights Are Limited To Issues Materially Affecting The Corporation's Business, Profits Or Assets.

The court below concluded that even though in their opinion corporations possess certain rights of speech and expression, those rights are limited to issues materially affecting the corporation's business, profits or assets.[12] Specifically, noting that Appellants' claims stem only from the equal protection and due process of law clauses of the Fourteenth Amendment, J.S. App. 12; Appellants' Brief, 36, the court below declared:

> It seems clear to us that a corporation does not have the same First Amendment rights to free speech as those of a natural person, but, whether its rights are designated "liberty" rights or "property" rights, a corporation's property and business interests are

anyone of hearing their views. It is important to note that even with corporations prohibited from making expenditures or contributions on the 1976 referendum question which would have legalized a graduated income tax, the proposed referendum was nevertheless defeated, indicating that Appellants' views obviously managed to reach the public. J.S. App. 4, n. 6.

[12]Such a ruling offers another way for reconciling the restrictions on corporate speech involved in this case with all of the cases cited by Appellants involving commercial speech. In all commercial speech cases, the corporation(s) (if any) involved necessarily have a direct financial interest in the speech being contested.

> entitled to Fourteenth Amendment protection. *Pierce* v. *Society of Sisters, supra.* See *Bowe* v. *Secretary of the Commonwealth,* 320 Mass. 230, 251 (1946). It is also clear that, as an incident of such protection, corporations possess certain rights of speech and expression under the First Amendment.
>
> Thus, we hold today that only when a general political issue materially affects a corporation's business, property or assets may that corporation claim First Amendment protection for its speech or other activities entitling it to communicate its position on that issue to the general public. This limitation is identical to the legislative command in the first sentence of G.L. c. 55, § 8. Put in another way, the Legislature has clearly identified in the challenged statute the parameters of corporate free speech.[13] (Footnotes omitted.)

Appellee contends that corporations not in the business of communications or speech do not possess any rights of freedom of speech or expression. However, if this argument were rejected, this Court's decisions involving the due process clause make it clear that any such First Amendment rights would be limited to issues materially affecting the corporation's business, profits or assets. Since the court below found that Appellants failed to demonstrate a material effect, they cannot lay claim even to these limited First Amendment rights.

[13] Significantly, as noted by the court below, under this view of the First Amendment, the restrictions this Court placed on campaigning expenditures in *Buckley* v. *Valeo,* 424 U.S. 1 (1976), are not relevant to a decision in this case. J.S. App. 10, n. 11.

In *Hague* v. *Committee for Industrial Organization*, 307 U.S. 496 (1939), the Supreme Court held that a corporation could not maintain a suit to enjoin interference with its freedom of speech and of assembly. As Mr. Justice Stone said in his concurring opinion:

> As to the American Civil Liberties Union, which is a corporation, it cannot be said to be deprived of the civil rights of freedom of speech and of assembly, for the liberty guaranteed by the due process clause is the liberty of natural, not artificial, persons. *Northwestern Nat. Life Insurance Co.* v. *Riggs*, 203 U.S. 243, 255 (1906); *Western Turf Ass'n* v. *Greenberg*, 204 U.S. 359, 363 (1970). *Id.* at 527.[14]

In *Pierce* v. *Society of Sisters of Holy Name*, 268 U.S. 510 (1925), this Court specifically recognized that those rights which corporations do enjoy under the Fourteenth Amendment are related to the direct business and property interests of the corporation. The Court stated:

> Appellees are corporations and therefore, it is said, they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true. [Citations.] But they have business and property for which they claim protection.

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[14] Another view of the Fourteenth Amendment also relevant to this case is found in Justice Rehnquist's separate opinion in *Buckley* v. *Valeo*, 424 U.S. 1, 291 (1976), in which Justice Rehnquist states that in his opinion "not all of the strictures which the First Amendment imposes upon Congress are carried over against the States by the Fourteenth Amendment, but rather that it is only the 'general principle' of free speech . . . that the latter incorporates." (Citations omitted.)

> These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such action. [Citations.] *Id.* at 535.

In the more recent case of *D.D.B. Realty Corp.* v. *Merrill*, 232 F. Supp. 629 (D. Vt. 1964), relying on the *Northwestern Nat. Life Insurance Co.* line of cases, the District Court of Vermont summed up:

> Insofar as the Due Process clause applies to "property", a corporation is considered a "person". Insofar as the Due Process clause applies to "liberty" and "life", a corporation is without standing to sue for the loss of these two elements. . . . On the other hand, there are cases where the artificial body of a plaintiff corporation has been allowed standing to sue for these subjective elements possessed by human beings, although such allowance was often over a vigorous dissent. . . . It is perhaps worthy to note that in many of these latter cases, the "liberty" or "life" claimed to have been impinged is one which an inanimate corporation could possess and does not affect human emotions or sensitivities. *Id.* at 637.

See also, *Mexican-American Federation — Washington State* v. *Naff*, 299 F. Supp. 587 (E. D. Wash. 1969) (denying a corporation standing to challenge the state's constitutional provision regarding literacy in the English language as a voter qualification, even though the express

purpose of the corporation was to represent, promote and achieve the economic, social and cultural interests of all Mexican-American people in the State of Washington).

The *Northwestern Nat. Life Insurance Co.* line of cases makes it clear that the due process rights to which a corporation is entitled are limited to those areas materially affecting the corporation's business, profits or assets. Another line of cases leading to the same conclusion involves the right of the state to impose limitations on corporations. A corporation is a creature of the State. As this Court stated in *Prudential Insurance Co. of America* v. *Cheek,* 259 U.S. 530 (1922):

> [T]he right to conduct business in the form of a corporation . . . is not a natural or fundamental right. It is a creature of the law; and a State in authorizing its own corporations or those of other States to carry on business . . . may qualify the privilege by imposing such conditions and duties as reasonably may be deemed expedient in order that the corporation's activities may not operate to the detriment of the rights of others with whom it may come in contact. *Id.* at 536.

As a creature of the State, the powers of a corporation are simply such as state statutes confer, and the enumeration of them implies exclusion of all others. *Thomas* v. *Railroad Co.,* 101 U.S. 71 (1879); *Pennsylvania Railroad Co.* v. *St. Louis, etc., Railroad Co.,* 118 U.S. 290 (1886). A corporation's specific purposes are set forth in its charter which is created pursuant to the requirements of state law. *Dartmouth College* v. *Woodward, supra,* at 636.

Like everyone else, a corporation's property interests "are not created by the Constitution. Rather, they are created

and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). In sum, a corporation's powers, purposes and property interests are defined by the State. Thus, the due process property rights of corporations must be limited to protecting those property interests determined by the State to be consistent with the corporation's powers and purposes. By definition, a corporation cannot have property interests going beyond its purposes; in other words, a corporation's due process interests must necessarily be limited to matters materially affecting its business, profits or assets.[15] This is the exact conclusion reached by the Michigan Supreme Court in the case of *People* v. *Gansley*, 158 N.W. 195 (Mich. 1916), which examined whether restrictions on corporate expenditures in election campaigns violated the corporation's due process rights. The court reasoned:

> The expenditure of the money of the Lansing Brewing Company for election purposes cannot be deemed to be a property right within the meaning of the Fourteenth Amendment. Such corporations have no right to participate in the elective franchise. We are not dealing with a measure that deprives a corporation of any of its property, or that impairs the value of that property.

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[15]It is interesting to note that in the context of proxy statements corporations have argued that matters of a general political, social or economic nature do not significantly affect their business. In its very first opinion discussing proper subjects for shareholder action under S.E.C. Reg. § 240.14a-8, the Securities and Exchange Commission declared that a corporation need not place on its proxy statement a shareholder proposal calling for elimination of taxation on dividends, because matters of a "general political, social or economic nature" were not a "proper subject" for shareholder action. '45-'47 CCH Dec. ¶75,502 (Jan. 3, 1945).

Neither are we dealing with the deprivation of any right or privilege granted by the laws under which such corporation was created and exists, as was the fact in the cases cited, and relied upon by counsel for respondent. . . .

We agree with counsel for the people wherein they say:

"If the respondent in this case, or the stockholders and officers of the Lansing Brewing Company desired, as individuals, to contribute to the campaign fund, it was their privilege so to do, subject to the regulations imposed by the statute. This artificial person, however, that was created for the purpose of manufacturing beer, has no sueh right; and it lies within the power of the Legislature of this state to say that its funds should not be used for such a purpose." *Id.* at 200, 201.

Appellants, having accepted the privilege of conducting business in the corporate form by voluntarily accepting the benefits that go with the corporate form, must also accept the restrictions placed on their purposes and the use of their funds largely accumulated because of the privileges granted by the State. In Massachusetts, all individuals forming corporations are subject to Mass. Gen. Laws c. 155, § 3, which provides that "[a]ll corporations organized under general laws shall be subject to such laws as may be hereafter passed affecting or altering their corporate rights or duties or dissolving them."

This Court repeatedly has upheld over First Amendment objections regulatory schemes which restrict corporate communication so long as they do not discriminate against communications media. *See, e.g., Associated Press* v. *National Labor Relations Board,* 301 U.S. 103 (1937);

Lincoln Federal Labor Union v. *Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949); *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951); *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U.S. 469 (1941).

On several occasions, this Court has specifically noted that corporations, having accepted the privileges of corporate existence, cannot complain of the limitations necessarily accompanying the limited corporate purpose. In finding that corporations do not enjoy a right to privacy equal to an individual's, this Court just recently declared in *California Bankers Assoc.* v. *Schultz*, 416 U.S. 21, 65 (1974), quoting *United States* v. *Morton Salt Co.*, 338 U.S. 632, 651-52 (1950):

> "While they may and should have protection from unlawful demands made in the name of public investigation, *cf. Federal Trade Comm'n* v. *American Tobacco Co.*, 264 U.S. 298, corporations can claim no equality with individuals in the enjoyment of a right to privacy. . . . They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. . . . Favors from government often carry with them an enhanced measure of regulation. . . . Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest." (Citations omitted.)

Similarly, this Court has declared:

> It would be intolerable that the Congress should endow an association with the right to conduct a public banking business on certain limitations and that the Court at the behest of those who took advantage from the privilege should remove the limitations intended for public protection. It would be difficult to imagine a more appropriate situation in which to apply the doctrine that one who utilizes an Act to gain advantages of corporate existence is estopped from questioning the validity of its vital conditions. *Fahey* v. *Mallonee,* 332 U.S. 245, 256 (1947).

In the election context, this Court declared just last year in *Buckley* v. *Valeo*, 424 U.S. 1, 57, n. 65 (1976), that even though expenditure limitations on candidates were unconstitutional when standing alone, "Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding." *See also*, *Arnett* v. *Kennedy*, 416 U.S. 134, 154 (1974), in which the plurality opinion declared OEO discharge procedures constitutional, noting that because the employee's property rights were defined in part by the statute's discharge procedures, the litigant "must take the bitter with the sweet."

Appellants, conceding for the sake of argument that corporations' constitutional rights might be limited to matters materially affecting their business, raise one additional argument as to why Mass. Gen. Laws c. 55, § 8, is still allegedly in violation of the First Amendment. Appel-

lants claim that at a minimum the First Amendment should be held to protect corporate speech where corporations "believe" their material interests to be affected. Appellants' Brief, 56.

However, the First Amendment has never been held to protect all speech which the speaker "believed" to be proper. Just recently, in the area of libel law, this Court declared in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 347 (1974), that even though a speaker ***believed*** in the truth of a statement asserted, if the statement was nevertheless negligently made, it was not protected by the First Amendment.

Specifically, Appellants seem to assert that to punish corporations for speech that they believe to materially affect their business shifts the burden of materiality onto them. Appellants' Brief, 33. This argument confuses the operation of the act with the procedural posture of this case, which was brought as a declaratory judgment. In order to succeed in this declaratory judgment action, Appellants, who sought below to have Mass. Gen. Laws c. 55, § 8, declared unconstitutional as to them even before it was applied, had the burden of showing that their proposed speech materially affects their businesses. However, in a criminal prosecution under the Act, Mass. Gen. Laws c. 55, § 8, does not shift any burdens of proof, but rather requires, as in any criminal proceeding, for the Commonwealth to prove beyond a reasonable doubt each and every element of the offense. Materiality is not an element of the crime of contributing to oppose a graduated income tax question; lack of materiality would instead be an affirmative defense. Nevertheless, to the extent that the corporations' belief raises a doubt as to materiality, the corporations would be found innocent. The court below correctly concluded:

The plaintiffs further argue that all they need show is a "reasonable belief" that the proposed amendment would materially affect them. While such a belief is relevant to the question whether such an expenditure would be ultra vires, cf. *Lustwerk* v. *Lytron, Inc.*, 344 Mass. 647, 651 (1962), standing alone it is not relevant to the question presented herein. J.S. App. 15, n. 15.

IV. Even If, Arguendo, Corporations Have First Amendment Rights Which Are Co-Extensive With Those Of Natural Persons, Mass. Gen. Laws c. 55, § 8, Is Still Constitutional.

Even if this Court were to find that corporations have First Amendment rights which are co-extensive with those of natural persons, Mass. Gen. Laws c. 55, § 8, is still constitutional. Neither the right to associate nor the right to participate in political activities is absolute. *See, e.g.*, *C.S.C.* v. *Letter Carriers*, 413 U.S. 548, 567 (1973); *Rosario* v. *Rockefeller*, 410 U.S. 752 (1973); *Dunn* v. *Blumstein*, 405 U.S. 330, 336 (1972); *Bullock* v. *Carter*, 405 U.S. 134, 140-41 (1972); *Jenness* v. *Fortson*, 403 U.S. 431 (1971); *Williams* v. *Rhodes*, 393 U.S. 23, 30-31 (1968). Even a "'significant interference' with protected rights of political association" may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational rights.[16] *Buckley* v. *Valeo*, 424 U.S. 1, 25 (1976);

[16] Appellants have attempted to characterize this case as involving prior restraints, thus requiring an even stronger governmental interest to justify the statute. Appellants' Brief, 29-34. However, Mass. Gen.

Cousins v. *Wigoda*, 419 U.S. 477, 488 (1975). Specifically, as this Court stated in *Younger* v. *Harris*, 401 U.S. 37, 51 (1971):

> Where a statute does not directly abridge a free speech, but — while regulating a subject within the State's power — tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so. (Citations omitted.)

In this case, Mass. Gen. Laws c. 55, § 8, has only an incidental effect on corporate and corporate managers' speech. Corporate managers can voluntarily speak independently of the corporation.[17] The court below noted that

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Laws c. 55, § 8, as a criminal statute which punishes individuals only after they have spoken, cannot be characterized as involving prior restraints. As this Court noted in *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975), a system of prior restraints is to be *contrasted* with a system of criminal penalties:

> The presumption against prior restraints is heavier — and the degree of protection broader — than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. (Emphasis in opinion.) *Id.* at 558-559.

[17] Compare this with the situation in *Buckley*, where the Court declared unconstitutional the campaign expenditure limitations since they inhibited "actions voluntarily undertaken by citizens independently of a candidate's campaign." 424 U.S. at 37, 39-51.

there is no language in Mass. Gen. Laws c. 55, § 8, "which would preclude corporate officers, directors, stockholders or employees from expressing their views publicly on the merits of such a proposed referendum by participation in television or radio discussions, news conferences, statements issued to the press or through other similar means not involving contributions or expenditures of corporate funds." J.S. App. 17. In addition, the court below observed that a corporation could express its views on political proposals in "a trade journal, a house organ or a newspaper, published by a corporation." J.S. App. 16. In light of the many means still available to corporations and corporate managers to express their opinions on political issues, any attempt to characterize Mass. Gen. Laws c. 55, § 8, as a total prohibition on corporate involvement in campaigns, more stringent than the expenditure limitations involved in *Buckley*, must be rejected.[18]

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[18] Similarly, this Court apparently found it important in *C.S.C.* v. *Letter Carriers*, 413 U.S. at 556, that the "Hatch Act" did not prohibit public employees from participation in all public activities. The Court specifically noted that:

> . . . The Act did not interfere with a "wide range of public activities." . . . It was "only partisan political activity that is interdicted. . . . [Only] active participation in political management and political campaigns [is proscribed]. Expressions, public or private, on public affairs, personalties and matters of public interest, not an objective of party action, are unrestricted by law so long as the government employee does not direct his activities toward party success." (Citations omitted.)

This Court in *Buckley* rejected Appellee's attempted reliance on *C.S.C.* This Court stated that:

> In upholding the Hatch Act's broad restrictions on the associational freedoms of federal employees, the Court repeatedly emphasized the statutory provision and corresponding regulation permitting an

A. *The State Has Substantial Interests In Preventing Corporations From Making Contributions Or Expenditures To Influence The Vote On Referendum And Initiative Issues.*

The Commonwealth has substantial interests in preventing corporations from making contributions or expenditures to influence the vote on referendum and initiative issues.[19]

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employee to "[e]xpress his opinion as an individual privately and publicly on political subjects and candidates." (Citations omitted.)

Buckley v. *Valeo*, 424 U.S. at 48, n. 54. For the very reasons that this Court found *C.S.C.* inapplicable to *Buckley*, this Court should find *C.S.C.* applicable to this case.

[19] Currently 31 states and the federal government have enacted statutes restricting contributions either by limiting them as to amount or restricting the source from which they are received. All of those jurisdictions, with the exception of the two noted by asterisk, have singled out corporations for special treatment:

Federal Corrupt Practices Act, 2 U.S.C. § 441(b);
Ala. Code Tit. 17, § 286 (1976);
Ariz. Rev. Stat. § 16-471(a) (1976);
Ark. Stat. Ann. § 3-1110 (Supp. 1975);
*Del. Code Tit. 15, § 8004(a) (Supp. 1974);
*Fla. Stat. Ann. § 106.08(1) (Supp. 1975);
Ind. Code Ann. § 3-4-3-3 (Supp. 1975);
Iowa Code Ann. § 56.29 (Supp. 1976);
Kan. Stat. § 25-1709 (1975);
Ky. Rev. Stat. §§ 121.025, 121.035 (Supp. 1976);
La. Rev. Stat. Ann. §§ 18:1482, 1483 (1976);
Me. Rev. Stat. Tit. 21, §§ 1395.2, 1395.3 (Supp. 1976);
Md. Ann. Code § 26-9(b) (Supp. 1976);
Mass. Gen. Laws Ann. c. 55, § 8 (Supp. 1976);
Minn. Stat. Ann. § 210A.34 (Supp. 1973);
Mo. Ann. Stat. § 130.020.5 (Supp. 1976);
Mont. Rev. Codes Ann. §§ 23-4795(1), 23-4744 (Supp. 1972);
N.H. Rev. Stat. Ann. § 70:2(I) (Supp. 1972);
N.J. Rev. Stat. §§ 19:34-35 (Supp. 1976);
N.Y. Election Law § 480 (McKinney Supp. 1972);

These interests are significant enough to justify the limitations placed on both contributions and expenditures. Specifically, as to the limits placed on contributions, in conducting a balancing test, this Court should weigh the fact that "a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support."[20] *Buckley* v. *Valeo*, 424 U.S. at 20-21.

N.C. Gen. Stat. §§ 163-278.14, 163-278.19 (Supp. 1975);
N.D. Cent. Code § 16-20-08 (1975);
Ohio Rev. Code Ann. § 3599.03 (Supp. 1972);
Okla. Stat. Tit. 26, § 15-110 (1975);
Or. Rev. Stat. § 260.472 (1971);
Pa. Stat. Ann. Tit. 25, § 3225(b) (1977);
S.D. Compiled Laws Ann. § 12-25-2 (1969);
Tenn. Code Ann. § 2-1932 (Supp. 1976);
Tex. Civ. Code Ann. Art. 14.06 (1977);
W. Va. Code § 3-8-8 (1975);
Wisc. Stat. Ann. § 11.38(1)(a)(1) (Supp. 1977);
Wyo. Stat. § 22.1-389(c) and (d) (Supp. 1976).

[20] It is important to note that Appellants' history is one of making contributions and not expenditures to influence votes regarding referendum issues legalizing a graduated income tax in Massachusetts. The Appellants state that they desire to "expend monies in an effort to persuade the voters to vote against the proposed constitutional amendment." Appellants' Brief, 9. Similar assertions were made by three of these Appellants in *FNBI*. In fact, the statement of agreed facts in this case illustrates that contributions were made by four of the Appellants in 1972 and not that they made the kind of expenditures their complaint would suggest are in issue in this case. J.S. App. 41, Ex. "D" of the Record Appendix below, at 48-50. The only money Appellants spent in 1972 regarding the graduated tax referendum was in the form of contributions to the Committee for Jobs and Government Economy. J.S. App. 41, Ex. "D" of the Record Appendix below, at 48-50.

1. Mass. Gen. Laws c. 55, § 8, Furthers The Significant Governmental Interest In Sustaining An Active, Alert Role For The Individual Citizen In the Election Process.

Voting is the "fundamental political right, because preservative of all rights." *Yick Wo* v. *Hopkins,* 118 U.S. 356, 370 (1886). The right to vote has been given to individual citizens, but has not been given to corporations. The state has a significant interest in seeing that the individual citizen's role in the electoral process remains paramount and free from interference in any shape, manner or form by a corporate presence.

As this Court stated in describing the purpose of the federal ban on corporate contributions to elections:

> As the historical background of this statute indicates, its aim was not merely to prevent the subversion of the integrity of the electoral process. *Its underlying philosophy was to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government.* (Emphasis added.) *United States* v. *United Auto Workers,* 352 U.S. 567, 575 (1957).

In a similar vein, the first court ever to rule on the constitutionality of the federal ban on corporate contributions to elections declared that corporations "are not citizens of the United States, and, so far as the franchise is concerned, must at all times be held subservient and subordinate to the government and the citizenship of which it is composed." *United States* v. *United States Brewers' Association,* 239 Fed. 163, 168 (W.D. Pa. 1916).

As important as the state's interest is in sustaining the active role of individual citizens in candidate elections, this same state interest in referenda and initiatives, if anything, is greater. Referenda were generally introduced in the progressive era as a way to reduce the influence of special interests. Wolfinger and Greenstein, "The Repeal of Fair Housing in California: An Analysis of Referendum Voting," 62 Am. Pol. Sci. Rev. 753, 767 (1968). The referendum and initiative are the people's forum. They can be considered the purest form of democracy. When the regular political process (which includes interest group and corporate lobbying, as well as political bargaining) fails, the people have been given the final say. What makes referenda and initiatives unique is that they are not a part of the regular political process, subject to regular political influences. The government has a strong interest in keeping this people's forum free from third party influence.

2. Mass. Gen. Laws c. 55, § 8, Furthers The Significant Governmental Interest In Sustaining The Individual Citizen's Confidence In Government.

In *C.S.C.* v. *Letter Carriers, supra,* this Court sustained restrictions on political activity by public employees, declaring, "it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent." 413 U.S. at 565. This Court also noted in *C.S.C.* that one legitimate governmental purpose was to limit the political influence of federal employees on others and on the electoral process. *Id.* at 557, 558. Thus, *C.S.C.* makes it

clear that limiting the political influence of a group with special privileges, in order to restore confidence in government and the electoral process, is a significant governmental interest. Just as political employees have gained by grace of their relationship with the government a position potentially giving them the power to unduly influence an election, corporations, having been endowed by the state with a collective impact on society for economic purposes, *United States* v. *Morton Salt Co., supra,* at 652, have gained the power to unduly influence elections. Just as the government was able to limit the influence of political employees gained through their peculiar relationship to the state, the government should also be able to limit the influence of corporations gained because of special privileges granted for non-political purposes.[21]

Corporations have so significantly influenced initiatives and referenda in the past that their power has inevitably undercut the individual citizen's confidence that as an individual he can still make a difference. Voter choices in referenda and initiatives are likely to be more responsive to group influence than in general election voting, where party identification guides most voters. Wolfinger and Greenstein, *supra,* at 762. Corporations have spared no expense in spending to influence initiatives and referenda. The case at bar provides a good example. In 1972, a proposed amendment to the Massachusetts Constitution which would have authorized the imposition of a graduated income tax was put before the voters. J.S. App. 7. Appellants First National Bank of Boston, New England Merchants National

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[21] *Buckley* is inapposite. This case, like *C.S.C.*, presents the very limited issue of preventing undue influence resulting from the misuse of governmental privileges and powers granted for one purpose but potentially usable for another.

Bank, Wyman-Gordon Company and Gillette Company each contributed $3,000 to the Committee for Jobs and Government Economy to oppose the amendment. J.S. App. 35-37.

The only duly organized non-elected political committee to raise and expend money to oppose the proposed amendment in 1972 in fact was the Committee for Jobs and Government Economy. It raised and expended one hundred twenty thousand dollars in 1972, J.S. App. 41, the bulk of it raised through large corporate contributions. In fact, the Committee raised $112,436.50 in a two-week period between the date of its organization on June 6 and June 19, 1972. *See,* Record Appendix of court below, pp. 48-84.

The only duly organized non-political committee to raise and expend money to promote the 1972 proposal was the Coalition for Tax Reform, Inc. J.S. App. 41. The records on file with state officials indicate it raised and expended only seven thousand dollars in support of the ballot question. J.S. App. 41. Thus, the named corporate plaintiffs in this case themselves may have contributed more money in 1972 to oppose the graduated income tax amendment than all of the measure's proponents combined contributed to promote its passage. Of course, the individual contributions by corporate managers are not a factor in this calculus. In light of this history, restoring confidence to the Massachusetts voter that initiatives and referenda are not controlled by corporations represents an extremely significant governmental interest.

3. Mass. Gen. Laws c. 55, § 8's Prohibition On Corporations Spending The Stockholders' Money For Political Purposes Furthers The Significant Governmental Interest In Protecting Stockholders Who May Hold Political Views Contrary To Those Held By Corporate Management.

Appellants concede that the decision to spend corporate money to oppose a graduated income tax was made by the corporate management and did not involve any stockholder input. Appellants' Brief, 53, n. 31. Such a decision by corporate management, if carried out, would violate the rights of the shareholders to support those political views of their own choosing.[22]

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[22] One commentator has concluded:

> [T]he present power of corporate officials also seems acceptable because it retains a certain legitimacy, based upon a belief that even with this power, management will administer corporate assets in the best interests of shareholders, employees, and others connected with the enterprise. In business affairs, a common interest in profits may assure beneficial administration, and the business expertise of management seems to justify abnegation of shareholder control. . . . But when management purports to speak for the corporation, with corporate assets, on matters of public welfare, the premise of an underlying consensus would seem to break down. Public welfare is a matter of basic values, on which shareholders and employees in a publicly held corporation can be expected to differ. And except for political proposals directly affecting the industry, management cannot be considered expert in these affairs. Note, "Corporate Political Affairs Programs," 70 Yale L.J. 821, 834 (1961).

The case at bar provides a particularly good example of how stockholders and management are unlikely to enjoy a consensus on political issues. The proposed graduated income tax was aimed at shifting some of the tax burden off of lower and middle class individuals and onto

Protection of minorities from the compulsory contribution of money for political purposes not of their own choosing has long been recognized as a legitimate governmental interest. Thomas Jefferson declared "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." I. Brant, James Madison: The Nationalist at 354 (1948).

President Theodore Roosevelt declared in his annual message to Congress on December 5, 1905:

> All contributions by corporations to any political committee or for any political purpose should be forbidden by law; directors should not be permitted to use stockholders' money for such purposes.

Congressman Williams of Mississippi commented during the hearings on the original Federal Act prohibiting corporate campaign contributions:

> [N]o corporation has the right, and no board of directors of a corporation and no manager of a corporation has the right, to embezzle the money belonging to the stockholders of the corporation and to divert it from its legitimate use to a purpose for which the company was not chartered by appropriating it to Democratic, Republican, Populist, Socialist, or any other campaign fund. Hearings before the House

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upper class individuals. It can be assumed that the stockholders consist of upper and middle class individuals, while the corporate management is composed only of the upper class. Thus, in this case, the corporate managers were seeking to use stockholder funds to oppose a measure contrary to the manager's personal interests, but which most likely would have directly benefited many of the shareholders.

Committee on the Election of the President, 59th Cong., 1st Sess. 76; 40 Cong. Rec. 96.

Just this year, this Court in *Abood* v. *Detroit Board of Education*, 45 U.S.L.W. 4473 (May 27, 1977), struck down as unconstitutional the use of union shop dues for political and ideological purposes. The Court held that compelling an individual to make political contributions infringes that individual's First Amendment rights. 45 U.S.L.W. at 4480. The Court declared that "the Constitution requires . . . that such [union] expenditures [for political purposes] be financed from charges, dues or assessments paid by *employees who do not object to advancing those ideas* and who are not coerced into doing so against their will by the threat of loss of governmental employment." (Emphasis added.) 45 U.S.L.W. at 4480. For these same reasons, the Eighth Circuit in *United States* v. *Pipefitters Local Union No. 562*, 434 F. 2d 1116, 1123 (8th Cir. 1970), rev'd on other grounds, 407 U.S. 385 (1972), upheld the Federal ban on union campaign contributions, noting that there is a compelling interest in "protect[ing] union members holding political views contrary to those supported by the union from use of funds contributed by them to promote acceptance of those opposing views."

The logic of these cases protecting union members applies equally to the stockholder's situation. Senator Robert Taft noted in the debates on extending Federal campaign prohibitions to unions that "the prohibition . . . against labor unions using their members' dues for political purposes . . . is eactly the same as the prohibition against a corporation using its stockholders' money for political purposes, and perhaps in violation of the wishes of many of its stockholders." 93 Cong. Rec. 6438 (1947).

Two recent cases have upheld bans on corporate campaign contributions, noting among other reasons the need to protect shareholders who may hold political views contrary to those held by corporate management. In *Schwartz* v. *Romnes*, 357 F. Supp. 30 (S.D. N.Y. 1973), rev'd on other grounds, 495 F. 2d 844 (2d Cir. 1974), the court declared:

> In enacting corrupt practices legislation, the United States Congress and the various state legislatures have sought to protect the elective process from the undue influence which corporations might exercise through financial contributions. In addition, they have sought to prevent corporate officials from devoting the assets of a corporation to political causes with which its shareholders might not agree. See *United States* v. *Congress of Industrial Organizations, supra,* at p. 113, 68 S. Ct. 1349. These overriding governmental interests are sufficient to justify the regulation of corporate participation in electioneering efforts. *Id.* at 36.

United States v. *Chestnut,* 533 F. 2d 40, 50, 51, n. 12 (2d Cir. 1976), cert. denied, 429 U.S. 829 (1976), is of particular significance, because the court specifically noted that nothing in *Buckley* was contrary to upholding a ban on corporate campaign contributions on the grounds of the government's interests in preserving the integrity of the electoral process and preventing corporations from using general funds for political purposes without the consent of the stockholders.

B. *Mass. Gen. Laws c. 55, § 8, Avoids Unnecessary Abridgement Of First Amendment Rights.*

Appellants assert that even if some of the State's interests may be justifiable, the legislature has not even attempted to adopt the least restrictive alternative available. Appellants' Brief, 54, n. 32. However, as this Court stated in *Rosario* v. *Rockefeller*, 410 U.S. 752, 762, n. 10 (1973), "[i]n requiring that the state use to a proper end the means designed to impinge minimally upon fundamental rights, the Constitution does not require that the state choose ineffectual means."

Appellants raise three specific arguments in support of their contention that Mass. Gen. Laws c. 55, § 8, does not employ the least drastic alternatives. Appellants state:

> . . . Section 8 bars, instead of merely limiting, all expenditures on the ballot question at issue. Furthermore, any interest in preventing the use of corporate funds to express political viewpoints contrary to the desires of shareholders might be attempted to be satisfied by requiring a majority vote of shareholders for political expenditures, or perhaps notification to the shareholders. Appellants' Brief, 54, n. 32.

This brief, *supra*, at - , has already discussed Appellants' contention that Section 8 acts as a bar rather than only a limitation on corporate expenditures and contributions. As pointed out, corporate managers as individuals are not limited in any way whatsoever, and even the corporation retains numerous means for conveying the managers' opinions. The district court in *United States* v. *Chestnut*, 394 F. Supp. 581 (S.D. N.Y. 1975), aff'd, 533

F. 2d 40 (2d Cir. 1976), cert. denied, 429 U.S. 829 (1976), upheld the federal ban on corporate campaign contributions and expenditures against a "least drastic alternative" argument. The lower court stated:

> Given the government's legitimate interest in the purposes of section 610, the question is whether the government has chosen the "least drastic means" of protecting these interests or whether it has enacted overly broad prohibitions that unnecessarily impinge upon First Amendment rights. . . . As authoritatively construed by the Supreme Court, the statute only prohibits contributions or expenditures from certain sources. For example, the statute prohibits only union contributions from monies derived from compulsory union dues and assessments. . . . [I]n *United States* v. *C.I.O.*, the Supreme Court held that the statute does not prevent unions or corporation from publishing a regular periodical for union members, shareholders or customers that may contain political commentary. . . . Thus the statute has been construed in a careful fashion to minimize its restrictive impact. *Id.* at 591.

Appellants' proposed less restrictive alternatives do not offer effective means for protecting minority rights. First, Appellants suggest that requiring a majority vote of shareholders for political expenditures would protect those shareholders who hold contrary political views to those of management. However, placing a matter to a vote in the endocractic corporation does not protect shareholder rights. One commentator noted that research has failed to uncover a single shareholder proposal that has been adopted over

the opposition of the management of an endocractic corporation. Note, "Corporate Political Affairs Programs," 70 Yale L.J. at 849. This same commentator cited as some of the reasons for this shareholder impotency the practice of fiduciary and institutional holders always to vote their proxies as requested by management, and the fact that a majority of individual owners holding stock in "street" name fail to designate the manner in which they wish proxies to be voted, thereby permitting banks and brokerage houses to do the actual voting. *Id.* at 849.

Of even more importance, Appellants' "majority vote" proposal does not even conceptually protect minority stockholders. What is at stake is "compel[ling] a man to furnish contributions of money for propagation of opinions which he disbelieves." Thomas Jefferson in I. Brant, *supra,* at 354. The fact that a majority of stockholders support a proposal does not in any way lessen the compulsion inflicted on the minority stockholder. For this reason, the court in *United States* v. *Boyle,* 482 F. 2d 755 (D.C. Cir. 1973), upheld the ban on union campaign contributions over objections that minority interests are adequately protected by the democractic procedures under which a union must operate. The court concluded:

> By definition the protection of minority interests requires that the majority be restrained in exercising its will over the minority. If a union could expend "involuntary" funds upon the vote of a majority of its members, minority interests would not be protected — they would be rendered irrelevant. *Id.* at 763.

Finally, Appellants propose that minority interests could be protected effectively by a system of notification to the

shareholders of political stances taken by the corporate managers. Conceptually, this proposal gives less protection to minority stockholders than a majority voting plan, which, as just discussed, must itself be found wanting. In fact, under this proposal, management could spend the shareholders' money even if a majority of stockholders held a different political view. One commentator has addressed this exact issue of whether notification of political activity would be a valid, less restrictive alternative than a ban on corporate campaign expenditures and contributions. Comment, "The Constitutionality of the Federal Ban on Corporations and Union Campaign Contributions and Expenditures," 42 U. of Chicago L. Rev. 148 (1974). The commentator reasoned:

> [A] notice system fails to qualify as a less drastic means of protecting the dissenting stockholders for two reasons. First, it might reduce the number of investments acceptable to an investor. Although corporate securities are somewhat interchangeable, they are not fungible. The notice system could force the investor to choose between an otherwise optimal investment and his political principles, a dilemma the Act seeks to prevent. The second problem would arise in the transition from the current system to a notice system. Rather than merely choosing among new investment opportunities, current shareholders who object to political contributions made subsequent to the adoption of this alternative scheme would have to sell their investments, subjecting their appreciated value to capital gains taxes. . . . [E]ven if it were less restrictive of the corporation's first amendment rights, the notice scheme is not a comparable alternative to section 610, because it would fail to provide investors who

> object to political contributions with an equal choice of investment opportunities, and would thus not protect minority interests to the same extent as section 610. Therefore, it cannot be considered a less restrictive alternative to the voluntary contribution system. *Id.* at 157, 158.

Thus, Appellants have been unable to present any proposed less restrictive alternatives which would effectively protect the minority interests presently protected by Mass. Gen. Laws c. 55, § 8.

V. The Statutory Provision Prohibiting Corporate Contributions To Affect The Outcome Of Questions Relating Solely To Individual Taxation Is Not Vague And Contains No Evidentiary Presumption.

While the primary thrust of the plaintiff corporations' due process argument is the assertion of a constitutional right freely to contribute money to affect ballot questions, they have also catalogued a series of other imagined due process infirmities. Specifically, they argue that provisions of Mass. Gen. Laws c. 55, § 8, are impermissibly vague, and that the statute contains an unreasonable evidentiary presumption.[23] Neither of these claims is worthy of extended discussion.

[23] The Appellants had argued below that the statute was impermissibly overbroad. They have apparently dropped their overbreadth claim on appeal and this brief therefore does not separately address overbreadth.

A statute is void for vagueness only "if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 402-03 (1969). Statutes must "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." *C.S.C.* v. *Letter Carriers*, 413 U.S. 548, 579 (1973).[24] It is not asserted that Mass. Gen. Laws c. 55, § 8, contains the most precise or appropriate language possible. Recognizing, however, that "there are limitations in the English language with respect to being both specific and manageably brief," *id.* at 578-79, and that "words inevitably contain germs of uncertainty," *Broderick* v. *Oklahoma*, 413 U.S. 601, 608 (1973), it is submitted that the statutory proscription is drawn with the degree of specificity required by the Constitution and that it afforded the Appellants fair warning that their desired course of action was unlawful. *Colten* v. *Kentucky*, 407 U.S. 104, 110 (1972).

The Appellants direct their vagueness challenge at the "materially affecting" phrase which appears in the first sentence of Mass. Gen. Laws c. 55, § 8. Their focus on the alleged vagueness of this statutory term is inappropriate. In construing the challenged statute, the highest court of the Commonwealth has determined that it proscribes two separate but related courses of conduct. The first prohibition is general in nature and runs against corporate

[24] Because we have demonstrated at Parts II and III that the Appellants lack First Amendment rights, cases suggesting a stricter vagueness standard where speech is involved are inapplicable. *Hynes* v. *Mayor of Oradell*, 425 U.S. 610, 620 (1976); *Smith* v. *Goguen*, 415 U.S. 566 (1974).

contributions to favor or oppose ballot questions which will not "materially affect their business, property or assets." The second prohibition is specific in terms and runs against corporate contributions to favor or oppose questions dealing with the taxation of individuals. The Appellants fall within the scope of this second specific prohibition, which requires no showing of a lack of material effect. J.S. App. 24, n. 19. The case before this Court does not properly raise the issue the Appellants have chosen to brief.[25]

In any event, there can be no doubt that the Appellants were fairly put on notice that contributions to oppose the 1976 graduated income tax amendment were prohibited by Mass. Gen. Laws c. 55, § 8. Whether the statute creates one crime or two, the legislative and judicial history of the statute clearly indicates that the law was specifically amended to reach such contributions. See discussion at J.S. App. 5-8. Indeed, the Appellants themselves characterize the statute as one containing "a tailor made prohibition against graduated income tax expenditures." Appellants' Brief, 21, n. 6. Whatever the phrase "materially affecting" might mean, the second sentence of the statute makes it clear that questions pertaining solely to the taxation of individuals do not meet the standard. These Appellants therefore fall within the "hard core" of corporations, whose conduct could not be more clearly prohibited, however the

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[25] It is beyond dispute that the Supreme Judicial Court's determination of the meaning of Mass. Gen. Laws c. 55, § 8, is a matter of state law and is not reviewable by this Court. This Court's power over state judgments is the power "to correct them to the extent that they incorrectly adjudge federal rights. . . . [The Court is] not permitted to render an advisory opinion . . .." *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945). Since the statutory proscription affecting the Appellants is one which does not require a "material effect," consideration of the alleged vagueness of that phrase would be inappropriate on this appeal.

statute were rewritten. *See*, *Smith* v. *Goguen*, 415 U.S. 566 (1974).

As a final due process argument, the Appellants assert that the second sentence of Mass. Gen. Laws c. 55, § 8, incorporates a presumption of fact which is unreasonable and is, therefore, violative of the Fourteenth Amendment. Appellants' Brief, 82-87. More specifically, the corporations argue that the sentence relieves the prosecution of its burden of proving beyond a reasonable doubt that a particular ballot question will not materially affect a defendant corporation.

This argument depends entirely on the premise that Mass. Gen. Laws c. 55, § 8, creates a single crime, *i.e.*, that of contributing or expending corporate funds to influence the outcome of ballot questions which questions will not materially affect corporations. This premise is expressly rejected not only by the court below, but also by the Appellants themselves. Appellants' Brief, 15, 85.

As contrued by the highest court of the Commonwealth, the second sentence of Mass. Gen. Laws c. 55, § 8, contains no evidentiary presumption. Instead, it creates a specific crime. The lack of a material effect is not an element of that crime. J.S. App. 28. The device of a presumption to aid in the prosecution of a case is therefore not utilized by the statute, and Appellants' irrebuttable presumption analysis is simply inapposite.

Even if the statute did erect such a presumption, it would not necessarily fail. A legislatively imposed presumption will pass constitutional scrutiny if it can be said "with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Leary* v. *United States*, 395 U.S. 6, 36 (1969). The Appellants have suggested nothing credible here or in the court below to rebut the legislative judgment that the

taxation of individuals has no material effect on corporations. A dispute among experts as to the indirect impact of such taxation is an insufficient factual basis for invalidating a statute advancing clearly legitimate state interests.

VI. The Equal Protection Clause of the Fourteenth Amendment Is Not Violated By A Statute Prohibiting Contributions To Affect Ballot Questions Made By Business Corporations.

The equal protection clause of the Fourteenth Amendment does not prevent the establishment of classifications which may result in unequal treatment of various classes. Instead, it prohibits the enactment of laws containing irrational and arbitrary classifications. *McGowan* v. *Maryland*, 366 U.S. 420, 425-26 (1961). It further mandates that, within a particular class, the law must be evenly applied.

Guidance for judicial inquiry in equal protection cases involving elections is provided in *Dunn* v. *Blumstein*, 405 U.S. 330 (1972), where this Court stated, "we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification." *Id.* at 335. This section of Appellee's brief tracks the analytical approach adopted in that case.

A. *The Character of the Classification*

Mass. Gen. Laws c. 55, § 8, proscribes conduct by business corporations incorporated or doing business in the Commonwealth. That conduct would be lawful if engaged

in by individuals, labor unions, non-profit corporations and certain other business entities. The classification implicit in this proscription is based on economic differences and not on suspect criteria. Distinctions based on race, illegitimacy, alienage and arguably on gender are suspect and are subjected to strict judicial scrutiny.[26] *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973). Classifications based on economic differences, on the other hand, are normally reviewed under traditional "minimum rationality" standards. *Liggett Co.* v. *Lee,* 288 U.S. 517 (1933).

Business corporations differ from the entities with which they desire to be grouped in a number of significant ways. First, laws pertaining to taxation and tort liability have tended to encourage the accumulation of vast sums of money in corporate hands. Second, the expenditures of business corporations are by definition spurred by the profit motive. Third, business corporations hold and expend funds belonging to shareholders whose political views may be antithetical to those of the corporate managers and who ordinarily have invested in a particular corporation for purely financial reasons. These economic factors, in differing combinations, differentiate business corporations from each of the other artificial entities with whom they claim parity.

Labor unions, for instance, normally do not hold vast sums of money. They are associations of individuals united for the common purpose of improving their employment rights which also operate various social services for their

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[26] *See, Loving* v. *Virginia,* 388 U.S. 1 (1967) (race); *Levy* v. *Louisiana,* 391 U.S. 68 (1968) (illegitimacy); *Sugarman* v. *Dougall,* 413 U.S. 634 (1973) (alienage); *Frontiero* v. *Richardson,* 411 U.S. 677 (1973) (gender).

members. They have no shareholders.[27] Partnerships, whether limited or general, do not enjoy the same tax benefits as corporations and ordinarily do not hold vast sums of money. They also lack shareholders.[28] Non-profit corporations in the Commonwealth are not motivated by profit considerations and may, in fact, be created for the explicit purpose of furthering the political beliefs of their members. *See, NAACP* v. *Button*, 371 U.S. 415 (1963).

Based on the foregoing, even the Appellants cannot quarrel with a characterization of the classification as an economic one.

B. *The Individual Interests Concerned*

Whether or not the parties agree on a characterization of the classification as economic, there is certainly no agreement as to the existence of individual interests. When a fundamental interest is affected by a classification, the Court again engages in a strict scrutiny inquiry, *see, e.g., Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966), and the Appellee freely concedes that freedom of speech is a fundamental right requiring application of the strict scrutiny test. *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 17 (1973); *Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92, 101 (1972).

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[27] For a discussion of the differences between labor unions and business corporations in the context of political contributions *see*, Rauh, "Legality of Union Political Expenditures," 34 S. Cal. L. Rev. 152, 162, n. 49 (1961).

[28] In fact, the lack of shareholders distinguishes all other entities from business corporations except business trusts and real estate investment trusts. J.S. App. 22-23.

As we have previously shown, however, corporations not engaged in the business of communication or speech simply do not possess freedom of speech. Part II, *supra*. Assuming, *arguendo*, that they possess such a freedom, its scope is limited to situations where its exercise is necessary to protect the business, property or assets of corporations. Part III, *supra*. The lower court found that the corporations before this Court on appeal had failed to sustain their burden, as plaintiffs in a civil action, of proving that the graduated income tax amendment question would materially affect their business, property or assets. Hence no individual interests operate on the side of the Appellants.

This is not to say, however, that individual interests are unaffected by the challenged classification. The exclusion of corporate contributions to oppose ballot questions affects a number of individual interests which are served by the challenged classification. Those interests not only militate against application of a strict scrutiny test; they are themselves the governmental interests which justify the ban on corporate contributions.

C. *The Government Interests Asserted In Support Of The Classification*

In Part IV, A, of this Brief we have articulated the interests which justify restricting the political "speech" of corporations in the face of a First Amendment challenge. We have shown that Mass. Gen. Laws c. 55, § 8, is intended to sustain the role of the individual citizen in the election process, particularly in the area of the popular initiative and referendum which are intended to be the "people's process." Part IV, A, 1. We have also demonstrated the need to maintain the individual citizen's confi-

dence in government by eliminating the unrestricted flow of corporate funds to politicians and political causes. Part IV, A, 2. Finally, we have shown that the ban on corporate political contributions is necessary to protect stockholders from the coerced use of their funds for the promotion of political views antithetical to their own.[29] Part IV, A, 3. These identical interests warrant singling out business corporations for special attention.

The lower court itself recognized that these interests justified disparate treatment for business corporations. It held that business corporations were properly distinguished from most other artificial entities organized or doing business in the Commonwealth, simply because the other entities lack shareholders. J.S. App. 22. This distinction is inapplicable only to business trusts and real estate investment trusts (REIT's). Even business trusts and REIT's stand on a different footing than business corporations, however. Differences in their organizational structure submit them to varying degrees of regulation by federal and state governments and the tax consequences of their organization differ slightly from those of business corporations. This bears directly on the possibility that they will accumulate large sums of money capable of being expended for political purposes.

Whatever the technical distinctions among these entities might be, the fact remains that only business corporations have in the past exerted what may be deemed undue influ-

[29] Never is the need to protect minority stockholders more obvious than when a question concerning the taxation of individuals is involved. In such situations the existence of even an indirect impact on business corporations is speculative. Meanwhile, the personal interests of corporate managers are directly implicated. Thus the objectivity of a management decision to favor or oppose such a question is highly suspect.

ence in the political sphere. The record in this case amply illustrates that the 1972 campaign to oppose a graduated income tax amendment was dominated by corporate funds, not funds from REIT's or business trusts.[30] Nor is the experience on this particular question unique; the pattern of corporate spending in initiative campaigns is common to all jurisdictions which have provisions for submitting questions to the voters and which do not restrict corporate contributions.[31]

The Massachusetts legislature may justifiably have concluded on this basis alone that spending by REIT's, business trusts and other artificial entities simply does not pose a serious threat to the integrity of the initiative process. In any event, "[i]t is no requirement of equal protection that all evils of the same genus be eradicated or none at all." *Railway Express Agency, Inc.* v. *New York,* 336 U.S. 106, 110 (1949). It is no indictment of the Massachusetts statutory scheme that it could have gone further and proscribed contributions and expenditures by other business entities as well. The legislature may act selectively, and a prohibition otherwise within its power will not fail merely because it does not also reach every other class whose conduct may be interdicted. *United States* v. *Maryland Savings-Share Insurance Corp.,* 400 U.S. 4 (1970); *United States* v. *Petrillo,* 332 U.S. 1, 8-9 (1947); *Sproles* v. *Binford,* 286 U.S. 374, 396 (1932). In fact, the particularity of the

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[30] The campaign finance reports of the committee organized to oppose the 1972 graduated income tax amendment are referenced in the appendix, App. 25, but because of their length have been omitted from the document itself. They appear as Exhibit D at pp. 48-84 of the Record Appendix submitted below.

[31] *See, e.g.,* State of California Fair Political Practices Commission, "Campaign Contribution and Spending Report," March 14, 1977.

statute may be its greatest virtue, for as the opinion of the lower court suggests, the General Court of Massachusetts has "clearly identified . . . the parameters of corporate free speech." J.S. App. 13. Further proscriptions may have the effect of impinging on the rights, if any, of other business entities.

Conclusion

For the foregoing reasons, this case has become moot and this appeal should be dismissed. In the alternative, this Court should affirm the judgment of the Supreme Judicial Court of Massachusetts, because Mass. Gen. Laws c. 55, § 8, is consistent with the First and Fourteenth Amendments.

Respectfully submitted,
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