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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1172

THE FIRST NATIONAL BANK OF BOSTON, ET AL.,
APPELLANTS,

v.

FRANCIS X. BELLOTTI,
ATTORNEY GENERAL, ET AL.,
APPELLEES.

BRIEF OF ASSOCIATED INDUSTRIES OF MASSACHUSETTS, INC. AND OTHERS, AMICI CURIAE

Interest of Amici

This brief, submitted with the consent of the parties, is filed because the amici have a vital interest in the outcome of this litigation. The amici are Associated Industries of Massachusetts, Inc., the Greater Boston Chamber of Commerce and the Massachusetts Taxpayers Foundation, Inc., all of which are associations comprised of corporations,

other businesses and individuals interested in the economic development of the Commonwealth.[1]

Statement of the Case

Stripped of unessentials, the crucial facts are readily summarized. So far as material here, G.L. c. 55, §8 forbids business corporations from expending any monies to communicate their views on *state ballot questions* unless those questions materially affect their "property, business or assets". Section 8 goes on to provide specifically that "[n]o question submitted to the voters solely concerning the taxation of the income, property or transactions" of *individuals* "shall be deemed materially to affect . . . [a] corporation." The validity of this limiting proviso is at issue here.

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[1] More specifically, the amici are as follows:

(a) Associated Industries of Massachusetts, Inc., is a non-profit corporation with approximately 2,500 manufacturing member companies located throughout the Commonwealth. The Association, whose member companies employ the major portion of Massachusetts manufacturing employees, is the recognized spokesman for manufacturing industry in the Commonwealth. Its purposes include: improving the economic climate of Massachusetts in the public interest and advocating fair and equitable legislation and other public policies affecting the interest of its members and their employees.

(b) The Greater Boston Chamber of Commerce is a widely based business organization duly established under the laws of this Commonwealth as a non-profit organization with approximately 1,500 members. Its purpose is to protect and promote the commercial, industrial and public interest of Boston and the greater Boston metropolitan area.

(c) The Massachusetts Taxpayers Foundation, Inc., is a nonprofit corporation with approximately 1400 members representing business corporations, financial institutions, members of the professions and individuals who are concerned with the problems of taxation and public expenditure at both the state and local levels. The Foundation is a recognized spokesman for the Massachusetts taxpayer, files and supports legislation, and publishes research reports and papers on virtually all facets of public finance and taxation.

The November 2, 1976 Massachusetts ballot contained referendum question #2 which proposed adding an amendment to the state constitution. This would authorize the state legislature to formulate a graduated income tax.[2] The First National Bank of Boston and four other corporations[3] wished to contribute to efforts to defeat that proposal, but were barred from doing so because of the §8 proviso. They thereupon commenced an original action in the state supreme judicial court against the attorney general seeking, *inter alia,* a declaration that the proviso denied them their federal constitutional guarantees of freedom of speech and equal protection of the laws. The state court rejected the federal claims. *The First National Bank of Boston, et al.* v. *Attorney General,* Mass. Adv. Sh. 134 (1977). So far as material here, the court simply asserted without discussion (*id.* at 147-48) that corporations have a constitutional right to address the public on "general political issues" only if "they have demonstrated that the proposed amendment does *in fact* materially affect their business."[4] No such proof was present here, the parties having stipulated that a division of opinion among economists existed on the issue. (*Id.* at 138.)

A timely appeal was taken to this Court. On April 19, 1977, this Court entered an order postpoing the question of its jurisdiction to the hearing on the merits and directing the parties to brief and argue the question of mootness. —— U.S. —— (1977). That question arises because on

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[2] The current provisions of the state constitution forbid such legislation. *Mass. Const. Amend. Art. 44.* If the legislature proposes to amend the constitution, it must submit the proposed amendment to the voters. *Mass. Const. Amend. Art. 48,* Init., Pt. 4, §5.

[3] New England Merchants National Bank, The Gillette Company, Digital Equipment Corp. and Wyman-Gordon Co. For convenience, the parties will be referred to by their designations in the original proceedings, i.e., as plaintiffs and defendant.

[4] Emphasis supplied throughout this brief.

November 2, 1976 the Massachusetts voters defeated the proposed constitutional amendment.[5]

Questions Presented

1. Is the case moot because the November 2, 1976 election has passed?

2. In so far as it prevents corporations from expending funds to oppose a referendum on a graduated personal income tax is G.L. c. 55, §8, invalid as a denial of freedom of speech and equal protection of the laws?

Argument

POINT I. THE CASE IS NOT MOOT.

The specific occasion giving rise to this controversy has ended. The November 1976 election has come and gone and the referendum item pertaining to the graduated personal income tax has been defeated by the Massachusetts voters. Despite this fact, this appeal is not moot.

A. *Mootness Inquiry*

As presently construed, article III requires that a "live controversy" exist at all stages of federal court litigation. E.g., *Sosna* v. *Iowa,* 419 U.S. 393, 402 (1975). But it does not follow that mootness occurs because the specific factual controversy has ended. E.g., *Super Tire Engineering Company* v. *McCorkle,* 416 U.S. 155 (1974).[6] One important il-

[5] The state supreme court rejected the federal claims in a brief two page order prior to the election; its full opinion, however, was not filed until February 1, 1977.

[6] In *McCorkle* plaintiff's employers asserted that state welfare regulations entitling striking workers to welfare assistance were inconsistent with federal labor policy. This Court held that termination of the strike before trial did not moot the case, because by its "continuing and brooding presence" (*id.* at 124) the state policy would affect the "ongoing collective [bargaining] relationship" between the parties. (*Id.* at 129). See also *Scott* v. *Kentucky Parole Board,* 429 U.S. 60 (1976) (dissenting opinion).

lustration of that fact is the Court's retention of jurisdiction over controversies "capable of repetition, yet evading review". *Southern Pacific Terminal Co.* v. *ICC,* 219 U.S. 498, 515 (1911); *Sosna* v. *Iowa, supra,* 419 U.S. at 399-401. This well-established doctrine, borrowed from the chancery practice with respect to injunctions, is designed to deal with that class of cases which would otherwise be lost to this Court's review altogether because the specific underlying controversy would end before appellate review could be obtained.

The "capable of repetition yet evading review" doctrine is not an "exception" to article III. The *minimum* requirement of a "live controversy" is satisfied under this doctrine so long as there is a reasonable possibility that the issue is capable of repetition between the existing parties — so long, that is, as there is "a reasonable expectation that the same party would be subjected to the same action again." *Weinstein* v. *Bradford,* 423 U.S. 147, 149 (1975).[7] Where this Court has been satisfied that it was impossible or highly improbable that the controversy could arise again between the specific parties the case has been held moot. E.g., *Weinstein* v. *Bradford, supra, DeFunis* v. *Odegaard,* 416 U.S. 312 (1974); *Craig* v. *Boren,* 429 U.S. 190 (1976); *Juidice* v. *Vail,* 97 S.Ct. 1211, 1215-16 (1977). By contrast, however, jurisdiction has been sustained where there seemed a reasonable likelihood that the issue could recur. E.g., *Moore* v. *Ogilvie,* 394 U.S. 814 (1969); *Dunn* v. *Blumstein,* 405 U.S. 330 (1972); and *Roe* v. *Wade,* 410 U.S. 113, 125 (1973).

The foregoing authorities show that there is a vital difference between the nature and sufficiency of the interest required to initially commence an action and the nature and

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[7] In class actions, if the suit were moot as to the named plaintiffs, the suit could nonetheless continue if the issue were likely to recur as to the members of the class, *Sosna* v. *Iowa, supra; Kremens* v. *Bartley,* 431 U.S. ___ (1977), 45 U.S.L.W. 4451, 4453-54.

sufficiency of the interest required to maintain one properly brought. *If a case is properly brought,* plaintiffs are entitled to an adjudication of their controversy so long as the issue is "reasonably capable" of arising again between the parties. That is without regard to whether a freshly instituted suit would have been dismissed for want of standing or as insufficiently ripe. Thus, in *Roe* v. *Wade,* 410 U.S. 113, 125-128 (1973) this Court refused to permit an attack on an abortion statute by a married woman not pregnant when the suit was commenced but permitted the suit to be continued by a woman who was no longer pregnant when the appeal was heard.

For justiciability purposes, the position of a plaintiff whose case has become moot on appeal is not identical with that of a plaintiff in a freshly instituted action. See Note, *The Mootness Doctrine In The Supreme Court,* 88 Harv.L.Rev. 373, 376-377 (1974). First, there are different considerations with respect to the "impact of actuality". Note, *Cases Moot on Appeal: A Limit on The Judicial Power,* 103 U. of Penn.L.Rev. 772, 774 (1955). Once a proper suit has been commenced and the record framed, there can be no doubt that the Court can render a decision in the context of a concrete, appropriately narrowed factual pattern which, in turn, is illuminated by specifically focused advocacy. *Schlesinger* v. *Reservists Committee to Stop War,* 418 U.S. 208, 217-218 (1974). Where the suit lacks the initial feature of a concrete "live controversy" that certainty is substantially diminished: "the absence of any injury at the outset may signal a lack of the factual concreteness which is an aid to effective adjudication." Harvard Note, *supra,* at 376.

Second, it is one thing to dismiss for lack of ripeness in a case with some contingencies because of the long-standing policy in favor of avoidance of constitutional issues. *Kremens* v. *Bartley,* 431 U.S. —— (1977). It is quite another

matter to invoke that identical policy *with the same rigor* when a live controversy has failed to reach this Court *only* because of the normal delays inherent in the judicial system,[8] particularly where free speech interests are at stake. Parties who have properly commenced a suit are entitled to have their legal controversy resolved "if there is a reasonable likelihood of recurrence". Any other rule would prevent a whole class of plaintiffs from vindicating their constitutional rights solely because the central guardians of those rights — the courts — are too slow. Moreover, any other rule would seriously undermine a central assumption of our political-constitutional order — that this Court will be able to give unity, direction and coherence to federal law. *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 347-48 (1816). And so far as possible, article III should not be read to undercut the central function of this Court in giving "unity and coherence" to federal law. L. Jaffe, *Judicial Control of Administrative Action,* 589-90 (1965). This is particularly true in constitutional cases where this Court has a special function in the maintenance of the constitutional order, a function around which, as Professor Bickel rightly observed, "[s]ettled expectations have formed." Bickel, *The Least Dangerous Branch,* 14 (1962). See also, Monaghan, *Constitutional Adjudication: The Who And When,* 83 Yale L.J. 1363, 1368-71 (1973).

B. *Mootness in the Context of This Case*

This Court has been particularly reluctant to find a lack of a reasonable likelihood of recurrence where interests are implicated which are central of the functioning of an open, democratic process: free speech, *Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539, 546-47 (1976)[8] and elections. Election cases are not moot simply when the specific election is over.

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[8] *Kremens* v. *Bartley,* 431 U.S. ___ (1977), 45 U.S.L.W. 4451, 4454.

[9] See also the Court's liberal construction of the final judgment rule of 28 U.S.C. §1257 where review of free speech claims might otherwise be lost. *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 477-86 (1975).

E.g., *Moore* v. *Ogilvie,* 394 U.S. 814, 816 (1969); *Dunn* v. *Blumstein,* 405 U.S. 330, 333 n.2 (1972); *Rosario* v. *Rockefeller,* 410 U.S. 752, 756 n.5 (1973). *Storer* v. *Brown,* 415 U.S. 724 (1972) is particularly instructive here. *Storer* presented various challenges to the California election laws relating to the placement of independent federal office candidates on the California ballot. The Court addressed the mootness question in a footnote (*Id.* at 737 n.8), observing:

> "The 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections."

In the only cases in which mootness claims have been sustained in the election context it has been because of factors *other than the passing of the election.*[10]

We submit that the present case is controlled by the principles of *Southern Pacific Terminal* and *Storer*:

1. G.L. c. 55, §8 imposes a fixed duty upon the plaintiffs. They are under a *continuing* duty not to make the expenditures sought here.[11] E.g., *Roe* v. *Wade, supra* (plain-

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[10] *Golden* v. *Zwickler,* 394 U.S. 103 (1969) (congressman, target of election handbills, appointed to bench); *Brockington* v. *Rhodes,* 396 U.S. 41, 43 (1969) ("limited nature of the relief sought". Plaintiff sought mandamus to certify him as a candidate.) *Hall* v. *Beals,* 396 U.S. 45 (1969) (because of intervening change in state law plaintiff not a representative of class he sought to represent).

[11] Compare *Weinstein* v. *Bradford, supra* (attack on parole board procedures; prisoner released from custody). *DeFunis* v. *Odegaard, supra* (attack on law school admission procedures; plaintiff to graduate from law school). *Craig* v. *Boren, supra* (male plaintiff complaining of gender based discrimination against males under 21 became 21). In each of these cases subsequent events released the plaintiffs forever from the effects of the disabilities which they had initially challenged.

tiff under a continuing duty not to undergo proscribed abortions). Moreover, the state policy is fixed and definite; it "is not contingent upon executive discretion". *Super Tire Engineering Corp.* v. *McCorkle, supra,* 416 U.S. at 124.[12] And the attorney general has consistently taken the view that the statute will be enforced. Indeed, even if a subsequent attorney general were of the opinion that the §8 proviso was invalid he could not reasonably interpose his judgment given the decision of the supreme judicial court in this case upholding the statute. *Richardson* v. *Ramirez,* 418 U.S. 24, 35 (1974).

2. There is, moreover, a reasonable likelihood of the recurrence of this problem between the parties. This "likelihood" is a matter not to be brushed aside on a generalized premise that plaintiffs may never face another referendum question dealing with the graduated personal income tax, any more than this Court brushed aside the plaintiffs in the cited election cases because they might never be concerned (either as voters or candidates) with a future election or the plaintiffs in *Roe* v. *Wade* because they might never be pregnant again. Mootness inquiry requires a careful, discriminating assessment of the factual likelihood of recurrence.[13] And, as elsewhere, "[p]ast experience will be a helpful, if not always an unerring, guide. . . ." *Storer* v. *Brown,* 415 U.S. 724, 742 (1974). In this case we have a pattern of conduct which has become ingrained in the Massachusetts political order.

The state constitution requires that any proposed constitutional amendment pass *two* consecutive legislative ses-

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[12] Compare *Spomer* v. *Littleton,* 414 U.S. 514 (1974) holding moot a suit challenging the individual behavior in enforcing facially valid statutes of a state's attorney absent allegations that his successor would continue the same policies.

[13] Compare, for example, *SEC* v. *Medical Committee on Human Rights,* 404 U.S. 403, 405-506 (1972) and *DeFunis* v. *Odegaard,* supra, with *Nebraska Press Association* v. *Stuart, supra.*

sions before appearing on the ballot. *Mass. Const. Amend. Art.* 48 Init., Pt. 4, §5. Massachusetts elections in the last decade and a half have witnesses regular (1962, 1966, 1972, 1976) legislative attempts to obtain voter approval of constitutional authority for imposition of a graduate personal income tax. As plaintiffs' brief shows, the legislature in fact continued to propose such an amendment by lopsided majorities despite strong voter rejection. Moreover, there is significant and continuing political support inside the Commonwealth for a graduated income tax.[14] Accordingly, we submit that this case is not one where it is "absolutely clear that the alleged wrongful behavior could not reasonably be expected to recur." *United States* v. *Concentrated Phosphate Export Ass'n,* 393 U.S. 199, 203 (1968).

3. The validity of §8's proviso seems to be one "evading review" in this Court. The heavy penalties for violation of §8 discourages challenge to the statute by way of a violation.[15] And for the plaintiffs to prevail on the theory of the state court there must be a trial on the issue whether a referendum with respect to a graduated income tax would,

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[14] In the court below, the Coalition for Tax Reform, Inc. (CTR), a non-profit corporation organized and existing under the laws of Massachusetts, intervened as a defendant. CTR is a so-called "umbrella" organization of individuals and other membership organizations, set up for the primary purpose of working for passage of the graduated income tax amendment to the state constitution. Its member organizations include the League of Women Voters, the Massachusetts Teachers Association, Americans for Democratic Action, Massachusetts Fair Share, Inc., Common Cause, National Association of Social Workers, Massachusetts Council of Churches, United Peoples, Inc., and others. CTR was the principal advocate of the graduated income tax (GIT) in the 1972 referendum campaign and expects it will be the principal advocate in the 1976 campaign.

[15] Statutes of this character are particularly threatening to constitutionally protected interests. Freund, *The Supreme Court of the United States: Its Business, Purpose and Politics,* 65 (1961). In any event, first amendment considerations strongly favor prospective relief here, particularly since there are no countervailing federalism considerations. Monaghan, *First Amendment "Due Process,"* 83 Harv.L.Rev. 517, 547-49 (1970).

in fact, materially affect a corporation's business. Even if one makes no allowance for the crowded and congested state of the Massachusetts trial calendar, the trial envisaged by the state court is obviously complicated; it necessarily requires testimony with respect to generalized economic and social matters, not with respect to "adjudicative" facts. Following that trial there would presumably be "findings" by the judge, followed by subsequent proceedings in the state supreme court, and finally an appeal to this Court. While one cannot speak with certainty, it is exceedingly doubtful that the case envisaged by the state court could be developed fully in time to be presented and decided by this Court in time to affect any specific ballot referendum. Even if a full factual record is not required, as plaintiffs contend, the same seems true. Plaintiffs, if they are not to be faced with ripeness difficulties, must wait until the referendum is certified for the ballot. *California Bankers Ass'n* v. *Shultz,* 416 U.S. 21 (1974). *O'Shea* v. *Littleton,* 414 U.S. 488, 495-98 (1974).

In any event, we submit that the "evading review" component of the *Southern Pacific Terminal* doctrine is a matter of judicial discretion, not one of article III dimension. In *Franks* v. *Bowman,* 424 U.S. 747 (1976) the Court observed that the "yet evading review" aspect of the doctrine was a "self-imposed limitation of judicial restraint, not one of constitutional dimension." (*Id.* at 756 n.8; see also *id.* at 781 (dissenting opinion). The issue in *Franks* was one "capable of repetition" but not necessarily one "evading future review".[16] Nonetheless, both the majority and dissenting opinions were in agreement that the issue was properly before the Court. On both principle and authority it seems clear that all that is

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[16] *Franks* was, to be sure, a class action, but that is irrelevant. *Southern Pacific* is not a doctrine uniquely related to class actions. It can be invoked by a single plaintiff, or by a class if the issue is moot as to the named plaintiff.

constitutionally required under article III to avoid mootness is that the issue be reasonably capable of repetition between the parties. As *Franks* recognzed the evading review component of *Southern Pacific Terminal* is one of those "prudential limitations", *Warth* v. *Seldin,* 422 U.S. 490, 498 (1975), designed to minimize unnecessary federal judicial intervention into the political order. See also *Kremens* v. *Bartley,* 431 U.S. —— (1977), 45 U.S.L.W. 4451, 4453. As such, it simply creates a presumption that later review is adequate for the full protection of constitutional rights,[17] particularly where legislative policy is still in flux. Harvard Note, *supra* 88 Harv.L.Rev. at 395. Considerations of this character have substantially diminished relevance where first amendment interests are implicated. For this Court has repeatedly shown particular concern for the *in terrorem* effect of overboard restrictions on statutes directly on free speech. Note, *First Amendment Overbreadth Doctrine,* 83 Harv.L.Rev. 844 (1970).

POINT II. G.L. c. 55, §8, VIOLATES THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

If §8's proviso were a restriction upon individuals, its invalidity would be too plain for argument. Nonetheless, the state court upheld the proviso because it found "unpersuasive" any contention that corporate free speech rights "are co-extensive with the rights of natural persons." (1977 Mass. Adv. Sh. at 147). But the conclusion of the proviso's validity does not follow from the court's premise. That a corporation has some constitutionality rooted freedom of speech rights is conceded by the court below. We submit that the right includes speech about public issues which, as here, reasonably appears to affect the corporation's business.

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[17] 1976 Supplement, p. 14 to Hart & Wechsler, *The Federal Courts and the Federal System,* (2ed.)

A. *Corporate Freedom of Speech*

That corporations are "persons" within the meaning of the fourteenth amendment was considered too clear for argument nearly a century ago. *Santa Clara County* v. *Southern Pacific Railroad,* 118 U.S. 394, 397 (1886); see also, *Sinking-Fund Cases,* 99 U.S. 700, 718-719 (1878).[18] Freedom of speech is, of course, part of the "liberty" secured to all "persons" by the due process clause. *Paul* v. *Davis,* 424 U.S. 693, 710 n.5 (1976); Monaghan, *Of "Liberty" and "Property,"* 62 Cornell L.J. 405, 424-25 (1977). Nonetheless, we recognize that simple syllogistic reasoning will not establish either that corporations have a right of free speech or the dimensions of that right. Corporations, "persons" though they be, lack some of the constitutional protection accorded natural persons, for example, the privilege against self incrimination. By contrast, however, they possess protection under the taking clause and some measure of freedom from unreasonable search and seizure. *G. M. Leasing Corp.* v. *United States,* 97 S.Ct. 619, 629 (1977). Whether a particular constitutional right applies to a corporation requires an assessment of the nature of the corporate entity in the context of the right's general purpose. E.*g.*, *Hale* v. *Henkel,* 201 U.S. 43, 76-77 (1906).

In analyzing the corporation's position under the first amendment, we do not write upon a *tabula rasa.* Countless decisions of this Court recognize that corporations have a right to freedom of speech and this, so far as we know, has *without exception* been on the premise that the right comes directly from the federal constitution. Nor has that

[18] For lengthy historical analysis see Graham, *An Innocent Abroad: The Constitutional Corporate "Person",* 2 U.C.L.A. Law Rev. 155 (1955). See also the separate statement of Mr. Justice Jackson in *Wheeling Steel Corp.* v. *Glander,* 337 U.S. 562, 574 (1849).

right been restricted to corporations engaged in the business of dissemination of ideas.[19]

The state court suggests that the corporation's free speech "right" is a "limited one". The court's implicit concession is important: while ordinarily a corporation has only the powers conferred by its corporate charter, it has, in addition, certain rights and immunities also conferred upon it by the constitution of the United States.[20]

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[19] For example, corporate employers have long been recognized as possessing a constitutional right to freedom of speech in connection with opposition to labor union organization. *NLRB* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 617-618 (1969). See also the first amendment protection accorded to labor unions even though their principal activity is not the dissemination of ideas. E.g., *United Transportation Union* v. *State of Michigan*, 401 U.S. 576 (1971). So too have bars urging that restrictions upon topless dancing violate the constitution. *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922 (1975) (plaintiffs are "three corporations which operate bars within the town"). More recently, this Court has held that commercial speech is also within the ambit of the first amendment. *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumers' Council*, 425 U.S. 748 (1976). No serious contention could be made that *Virginia Citizens'* constitutional protection for truthful advertising is unavailable to corporations. See, for example, the cases cited at 425 U.S. at 764-65, and *Beneficial Corp.* v. *FTC*, 542 F.2d 611 (3rd Cir. 1976). Any argument that only corporations engaged in the business of disseminating ideas possess full free speech protection is without any textual or decisional support; it is, moreover, wholly unresponsive to any conceivable conception of the first amendment, which seeks to protect the interest of both the speaker and his audience. *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumers Council, Inc.*, 425 U.S. at 756-57 (1976).

[20] This, in turn, means that suggestions in some nineteenth century decisions that states had "absolute" control over the conditions under which corporations did business are unsound in rationale, although not necessarily in specific holding. Whether viewed as a "privilege" or "right" a corporate charter, like any other state grant, cannot be made subject to an unconstitutional condition. State power over corporations, foreign or domestic, "is subject to the limitations of the supreme fundamental law". *Terral* v. *Burke Construction Co.*, 257 U.S. 529, 532-33 (1922); *WHYY* v. *Glassboro*, 393 U.S. 117, 119 (1968). See generally, Note, *Unconstitutional Conditions*, 73 Harv.L.Rev. 1595 (1960). Clearly, therefore, a business corporate charter could not be conditioned

So far, so good, But the state court then goes on to say — without a single suporting citation of any kind or any supporting intellectual rationale — that the corporation's general speech rights are limited to those issues which, in fact, affect its business.

A corporation is not a "fiction" in the ordinary sense, as Professor Lou Fuller observed in his classic essays. Fuller, *Legal Fictions,* 19 (Stanford 1967). It is simply one institutional form by which the legal order responds to the phenomena of regularly recurring group activity. As this Court observed in *Hale* v. *Henkel, supra,* at 76:

> "a corporation is, after all, but an association of individuals under an assumed name with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body."

The state court, however, put corporations in a class different from other closely analagous groups so far as their public speech "rights" are concerned. In so doing, the state court inverts ordinary first amendment analysis which requires a comparison of the burden on speech with the countervailing governmental interests. *Linmark Associates, Inc.* v. *Willingboro,* —— U.S. —— (1977), 44 U.S.L.W. 4441, 4443; *Elrod* v. *Burns,* 427 U.S. 347 (1976). The state court, however, purports to dispense with any consideration of the sufficiency of state justifications for

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upon a limitation that the corporation support the policies of the incumbent governor, or the views of the Democratic Party, or on support of a graduate income tax. Any such limitation would be an unconstitutional condition violative of the constitutional guarantee of free speech. See here also; the §8 proviso is an unconstitutional condition upon the charter of the business corporations in Massachusetts. This fact is, of course, regularly confirmed every time this Court invalidates on constitutional grounds, a state-law restriction in suits brought by corporate plaintiffs.

interference with the speech by focusing upon an abstract definition of the "right" itself. In so doing, it gives point to Justice Holmes admonition that "[s]uch words as 'right' are a constant solicitation to fallacy". *Jackson* v. *Rosenbaum Co.*, 260 U.S. 22, 31 (1931).

We submit that the approach of the state court is not only singular but highly undesirable. *First,* the "limited right" rationale is inconsistent with the fundamental premise that the first amendment is designed to protect the listener's right, not the speaker's. E.g., *Virginia Citizens' Consumers Council, supra,* note 19; *Linmark Associates, Inc.* v. *Willingboro, supra,* see 45 U.S.L.W at 4445. Why some speakers should have limited "rights" in that context is not readily apparent, particularly when functionally the speaker is no different from other groups. See *Buckley* v. *Valeo, supra,* 424 U.S. at 19, invalidating spending restrictions on individuals *and groups.* See also, *Abood* v. *Detroit Board of Education,* 431 U.S. —, — at n.32 and related text (1977) (spending by union for political purposes assumed to be constitutionally-protected activity).

Second, the line between the general political issues which, in fact, "affect" a business and those which do not is not likely to prove a stable one. *Hynes* v. *Oradell,* 425 U.S. 610, 620 (1976). The reality of this fact is already apparent in Massachusetts. As plaintiffs point out in their brief, just recently the attorney general challenged corporation expenditures in Worcester, Massachusetts, which urged favorable action on a referendum on whether a new civic center should be built. The corporation responded that a new civic center would materially improve the overall climate of the city, and thus ultimately have a substantial economic impact by increasing the corporation's ability to attract and retain personnel. Can the corporation "prove" that fact in any conventional sense? In this case the state court found that plaintiffs had failed to

"prove" that a graduated personal income tax would, in fact, "affect" the business of the plaintiff corporations.[21] Their admittedly reasonable belief was not enough.

This rigorous proof requirement imposes a heavy burden and is, so far as we are aware, without analogue in any decision of this Court. The state requires proof not with respect to adjudicative facts,[22] but with respect to legislative facts. A judge would be asked after an evidentiary hearing to conclude as a "fact" whether certain legislation or other public events would, in fact, adversely affect a corporation's business so as to justify corporate opposition thereto. There is, of course, no reason why different judges could not reach different "factual" conclusions with respect to the same set of facts. We know of no case involving freedom of speech in which there has been analogous judicial inquiry into such open-ended factual determination as a precondition to the exercise of free speech rights.[23] *"Facts of the character required by the state court cannot be "proved" or "disproved" in any conventional sense.* For example, suppose that corporations decided to oppose a particular candidate for public office because of his well-known anti-business views. Clearly the corporations could not "prove" that the candidate's election would, *in fact,* adversely affect their business operations, given the wide

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[21] That conclusion is not without its wry aspects. It was, after all, reached despite the contrary views of the five corporate business plaintiffs who are willing to expend funds in litgation to free themselves from the statutory restriction. Moreover, plaintiffs are fully supported here by the business oriented *amici.*

[22] Those who are typically involved in first amendment cases. E.g., *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969); *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323 (1974).

[23] *Dennis* v. *United States,* 341 U.S. 494 (1951) is arguably an exception to this statement, although the Court excluded from review any question whether the speech of the Communist Party posed, in fact, a clear and present danger of any substantive evil. See, in particular, the concurring opinions of Jackson and Frankfurter, J.J., on the lack of judicial capacity to make such open-ended factual inquiries.

variety of factors and people which determine the content of any specific piece of legislation. Indeed, manufacturing establishments could not oppose a general tightening of the anti-trust laws because they cannot "prove" that more rigorous enforcement of the anti-trust laws would, in fact, affect their business in any adverse sense. Compare *Eastern Ry. Conf.* v. *Noerr Motors, Inc.,* 365 U.S. 127, 137-39 (1960).

If the state court's proof requirement is taken seriously, the net effect of its holding would be restrict non-media corporations to speech akin to their specific commercial advertising, e.g., *Beneficial Corp.* v. *F.T.C.,* 542 F.2d 611 (3d Cir. 1976), cert. den. —— U.S. —— (1977), or specific labor-management problems. *N.L.R.B.* v. *Gissel Packing* Co., 395 U.S. 575 (1969). This fact appears even more clearly from another consideration. The difficult proof question will generate considerable pressure for a court to yield to "rational" legislative fact finding.[24] That, of course, occurred in this very case. (Mass. Adv. Sh. at 150.) But beyond the crushing impact this will have on corporate free speech rights the state court's deference creates another difficulty. The Massachusetts legislature purports to permit a corporation to speak on any general policy issues which, in fact, affect their business or assets. But with respect to a single issue, the graduated personal income tax, the legislature denies a corporation the right to prove that ultimate fact. In so doing, the legislature has created an unconstitutional irrebutable presumption. We are not here pressing any wide ranging theory of irrebuttable presumptions. Any such approach is wholly foreclosed

[24] Even deference to congressional fact finding under *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966) would not extend to curtailments of constitutionally protected rights. *Id.* at 651 n.10. See also Cohen, *Congressional Power To Interpret Due Process and Equal Protection,* 27 Stan.L.Rev. 603 (1975).

by *Weinberger* v. *Salfi,* 422 U.S. 749 (1975); see also *Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307 (1977). But, as *Salfi* itself recognizes, the doctrine retains vitality where fundamental rights are at stake. (422 U.S. at 770-72.) See also *Turner* v. *Department of Employment Security,* 423 U.S. 44, 46 (1975). Here the Massachusetts legislature has made relevant the question whether public speech affects the corporation's business or assets, but with respect to one such issue it purports to foreclose proof on the matter. That seems to us to fall within the core of the remaining doctrine prohibiting irrebutable presumptions.

B. *The Asserted Justifications*

If the case is analyzed in conventional terms, the only remaining question is whether the burden on speech established by the state statute is outweighed by any state justification. E.g., *Linmark Associates, Inc.* v. *Willingboro, supra; Elrod* v. *Burns,* 427 U.S. 347, 371-72 (1976) (plurality opinion). The state court did not articulate any. And, as we shall show, the only *legitimate* state justification is one related to *ultra vires.* But that justification cannot explain the patently underinclusive character of the Massachusetts statute. More fundamentally, any legitimate state concern along these lines, when measured against the constitutional rights at stake, is satisfied so long as the corporation's determination of "affect" is not wholly unreasonable.

1. *Corrupting the Electorate.*

Intervenors in the court below vigorously argued — and we agree — that the §8 proviso's "real" purpose is a legislative fear that corporate wealth would "drown" out the voice of its opponents on the specific issue of a gradu-

ated personal income tax, when that issue reached the electorate. But the "corrupting the electorate with too much information" rationale was not relied upon by the state court. For good reason. It is impossible to square a corruption rationale with the fundamental political and constitutional foundations of our republic institutions. It is, moreover, plainly foreclosed by this Court's decision in *Buckley* v. *Valeo,* 424 U.S. 1, 18-19, where the Court observed, *inter alia,* that

> "A restriction on the amounts of money a person or *group* can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[25]

See also *Schwartz* v. *Romnes,* 495 F.2d 844, 851 (2d Cir. 1974). See also *Pacific Gas & Electric Co.* v. *Berkeley,* 60 Cal. App. 3d 123, 131 Cal. Rptr. 350 (1976); *C. C. Plywood Corp.* v. *Hanson,* 420 F. Supp. 1254 (D. Mont. 1976), appeal pending, 9th Cir. No. 76-3118. Indeed, the *Buckley* condemnation applies *a fortiori* here. The §8 proviso is not an effort to restrict the *amount* of expenditures, as was the statute invalidated in *Buckley,* but the *content* of the speech no matter how little is in fact spent by the corporation.

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[25] *Buckley* referred to restrictions on "individuals *or* groups". Given the interest of the audience in the information communicated, *Virginia Citizens Consumer Council,* by what alchemy does a constitutionally impermissle interest suddenly become transformed into a constitutionally permissible one simply because the identity of the speaker changes from "individuals or groups" to a corporation—a specialized form of group association. There is simply "no justification for treating [plaintiffs] differently in these circumstances simply because [they are] corporations." *G. M. Leasing Corp.* v. *United States, supra* at 645.

Moreover, the corporate wealth justification cannot explain §8's patently underinclusive character. Other substantial aggregate of business wealth, such as real estate investment trusts (REIT's), partnerships,[26] and labor unions are permitted to speak on this issue. Efforts were made to distinguish some of these situations,[27] but the attorney general conceded that REIT's (which have transferable shares) cannot be distinguished from corporations. There are 7,500 such business units in Massachusetts and they possess enormous wealth. (The twenty largest REIT's have assets in excess of $5 billion).

2. *The ultra vires rationale.*

The most obvious defense for a requirement of proof required by the state court is that if corporate speech in connection with the graduated income tax does not "affect" the corporation, it would be "ultra vires". Thus, the §8 proviso simply prohibits corporate management from straying from the purpose of the corporate charter. But the §8 proviso cannot rationally be defended upon such a supposed *ultra vires* basis. Two of the plaintiffs are federally chartered banks and it is not obvious what the authority of state law is to structure the ambit of their authority. More generally, the distinction between corporations and other business units makes no sense in light of such a purpose. Nor does §8 even maintain a consistent policy with respect to business corporations. Nothing prohibits Massa-

[26] It is stipulated that there are some 15,000 partnerships in the Commonwealth.

[27] The attorney general argued that partnerships can be distinguished because they exist independently of statutory permission. But they are subject to extensive regulation, see G.L. chapters 108 and 109 on partnership and limited partnerships. And unless *Lochner* v. *N. Y.*, 198 U.S. 45 (1905), is revived, partnerships could be prohibited entirely, or their existence made conditional upon receipt of a state license or charter.

chusetts business corporations from now engaging in speech against the graduated income tax or from doing so while that issue is pending before the Massachusetts legislature, or even, as the state court recognized (1977 Mass. Adv. Sh. at 152), when corporations are communicating to their stockholders about the referendum. That speech is forbidden *only* when the question leaves the legislative forum and is submitted to the people by way of a referendum. Why the instant at which the forum for discussion shifts to the people at large demonstrates that a corporation's opposition to a graduated income tax no longer legally "affects" it is, frankly, a mystery far too deep for us to penetrate.[28] The present statutory scheme is so irrational that it would deny business corporations equal protection of the laws even if no free speech interests were implicated. And, plainly, the discriminations worked by the §8 proviso are so unreasonably underinclusive that the proviso does not satisfy the exacting scrutiny required when constitutionally protected interests are at stake. *Police Department* v. *Mosley,* 408 U.S. 92, 96-99 (1972).

But there is another and more fundamental objection to any "ultra vires" objection impermissible content discrimination. Out of a wide range of issues which a corporation might feel impelled to speak about, only one — the graduated state personal income tax — is excised and then only if it is before the people by way of a referendum. To repeat, whatever may be the permissible range of content discrimination, see *Young* v. *American Mini Theatres,* 427 U.S. 50 (1976), we are aware of no decision which would remotely support the restrictions here involved. Any presumed legislative goal of ensuring that a corporation not act *ultra vires,* is hardly of the "compelling" *Buckley* v. *Valeo,* 424 U.S. 1, 25, 66-68 (1976) or "overriding" (*Elrod* v. *Burns,*

[28] The explanation, we think, lies in the dynamics of Massachusetts politics. The legislature has generally favored a state constitutional amendment permitting a graduated personal income tax, but these proposals have repeatedly lost on the ballot.

427 U.S. 347, 368 (1976) (plurality opinion) nature necessary to support a material interference with free speech rights, particularly one aimed directly at the content of speech. Any legitimate state interest is satisfied by a requirement that the corporate judgment that its expression of views or a public issue is permissible so long as it reasonably appears to affect its business.

3. *The interest of dissenting stockholders.*

In the court below the attorney general suggested that a permissible purpose for the §8 was to prevent the use of stockholders' money to oppose a referendum issue which some stockholders as individuals might favor. This is, of course, an argument closely akin to an *ultra vires* argument. It is without substance. Surely, no shareholder is meaningfully "coerced" into making a "speech" if the §8 proviso is invalidated — any more than he would be impermissibly coerced if he disagreed with corporate speech which *admittedly* affected the corporation's business. Nor is the shareholder's investment "wasted", any more than it is wasted if the corporation engages in any other conduct which he thinks is unwise or with which he disagrees. Moreover, this is not a case where, as in a unified bar or an agency shop, a member is, in a real sense, involuntarily a part of an organization. *Abood* v. *Detroit Board of Education,* 431 U.S. — (1977). A shareholder's only link is financial; presumably he can sell and invest his money elsewhere.[29]

What is more, the suggested explanation will not explain the irrational character of the present Massachusetts scheme. It will not explain, for example, why other business units — such as Massachusetts real estate investment trust or partners — are not under a similar limitation.

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[29] Moreover, as *Abood* makes plain, the interest of dissenting shareholders could be protected in ways other than a total ban on speaking by the corporation.

Conclusion

The judgment should be reversed.

Respectfully submitted,

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