

# Regulation of political speech

[Literature](#)



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Can governments regulate the political speech of corporations through restrictions on independent corporate expenditures? Over the course of the past twenty years, the U. S. Supreme Court constantly increased constitutional protection of corporate speech under the First Amendment and repeatedly struck down regulations on commercial speech as violating the First Amendment. Although the Supreme Court recently held statutory restrictions on corporate expenditures for electioneering communications to violate the right to free speech, it is still controversially discussed whether such restrictions can be upheld under the First Amendment.

However, supporters of such restrictions ignore that the First Amendment is written in terms of speech and not of speakers and does not distinguish between different classes of speakers. Thus, restrictions on political speech cannot be justified solely based on the speaker's corporate identity or its financial ability and inconsistent with the objective of preserving the integrity of the political process.

Introduction. The freedom of speech is understood as an essential mechanism of democracy, for the free and public discussion of governmental affairs enables citizens to make informed choices among candidates for office.

Owing to fundamental changes in society political views are increasingly expressed through organizations and corporations. In this respect, the protection of corporate speech under the First Amendment is widely recognized. Restrictions on corporate expenditures for political speech reduce the quantity of speech and thus restrict political speech itself. Along these lines, in *Citizen United v. Federal Election Commission*, the Supreme

Court struck down statutory restrictions on corporate expenditures for electioneering communications as violating the First Amendment.

However, this decision was widely criticized, in particular, President Barak Obama blamed it as “ open[ing of] the floodgates for special interests [...] to spend without limit in [United States] elections” and contended that American elections should not be “ bankrolled by America's most powerful interests”. Notwithstanding the governmental interest in preventing corruption in the electoral process, the First Amendment does not distinguish between different classes of speakers and grants a corporation the same political speech rights as a natural person.

To that effect, I intend to assess whether restrictions on corporate expenditures as imposed by the Bipartisan Campaign Reform Act of 2002 (BCRA) can be justified under the First Amendment. The paper has three main parts. To begin with, I quickly analyze how far the provisions on corporate expenditures contained in the BCRA restrict the right of corporations to free speech under the first amendment.

In part II, I examine the main arguments to justify such restrictions on corporate speech and raise some objections against them and finally, in the last part of the paper I examine to which extent the restrictions imposed by the BCRA are narrowly tailored to and consistent with the objectives they intend to achieve. I. Analysis of the Restraint The BCRA prohibited the use of corporate general treasury funds for electioneering communications and only allows expenditures by segregated corporate funds through political action committees (PACs).

As PACs are burdensome and expensive to administer they reduce the quantity of speech, for the quantity of speech is limited by financial resources available for the expression of political ideas. Consequently, expenditure restrictions function as a barrier to corporate speech and thereby prevent corporate voices from reaching the public and advising voters and deprive the public of its right to decide which speech and speakers are worthy of consideration. Therefore, restrictions on corporate expenditures also restrict political speech itself.

Such restrictions can only be justified if they further a compelling interest and are narrowly tailored to achieve this interest. II. Compelling Governmental Interest In line with *Austin v. Michigan Chamber of Commerce*, it is argued that restrictions on corporate expenditures serve a compelling interest in preserving the integrity of the electoral process. As corporations, unlike individuals, possess more power and financial resources than most individuals they can exercise a greater influence on public political debates. To that effect, restrictions on corporate expenditures are claimed to be necessary to avoid quid pro quo corruption, namely to prevent corporations from exercising undue influence on officeholders inducing them to “act contrary to their obligations of office by the prospect of financial gain” - or in other words to prevent corporations from “buying” favors from a candidate. Opponents of expenditure restrictions contend that independent expenditures are not as dangerous as contributions, for they are not prearranged with the candidate and might even turn out to be to the detriment of the candidate for such lack of prearrangement.

However, I am not prepared to agree with this contemplation. As corporations usually inform candidates about their conduct, independent expenditures can have the same effect as direct contributions. On that note the court emphasizes in *McConnell v. Federal Election Com'n* that independent expenditures can be even more effective to induce then-elected officials to exercise their duties in favor of their corporate care-givers, because candidates know very well who their friends are.

Notwithstanding the desirability to prevent corruption, the First Amendment does not distinguish between powerful and less powerful speakers but stands against attempts to disfavor certain subjects or viewpoints and protects an open marketplace of ideas where speakers can engage in 'vigorous' advocacy. Therefore, it is inconsistent with attempts to restrict the speech of some to enhance the speech of others and the right to free speech cannot be made dependent on a person's financial ability to engage in public discussion.

In line with this, the Supreme Court held in *Buckley v. Valeo* that individuals and unincorporated groups are free to spend unlimited amounts to promote a candidate or his views. In this light, the potential for corruption cannot be said to be higher than in case of expenditures by individuals and there is no reason why corporate expenditures should be limited while a billionaire can lawfully spend millions to promote a candidate and exercise the same potential influence on the public debate.

In addition, expenditure restrictions are claimed to be justified by a compelling interest to protect shareholders from being compelled to fund

corporate speech, although their investments in the corporation only reflect economic choices, but not necessarily support for the corporation's political ideas. Unlike individual speakers, corporations only operate to make profits and their participation in elections is transactional rather than ideological as they usually give money to candidates from both sides.

At that, the special advantages of the corporate form - like limited liability and favorable treatment of the accumulation and distribution of assets - improve a corporation's abilities to attract capital. Therefore, it is argued that resources a corporation acquired in the economic marketplace provide an unfair advantage on the political marketplace, because State law only allows corporations to be dominant in the economy, but not in politics.

Although shareholders are free to sell their shares and cease the support of a corporation, they might be reluctant to withdraw their investment as this might force them to sacrifice profits from the corporation's nonpolitical operations. However, this approach ignores that all speakers, even individuals, use money amassed on the economic marketplace to fund their speech. For instance, the political speech might be funded through speakers' salaries although their employer does not necessarily support their views or might be financed by loans from creditors who do not necessarily support the speakers' views.

III. Are Expenditure Restrictions Narrowly Tailored? Even assuming that the aforementioned interests could be considered compelling, the provisions of the BCRA are not narrowly tailored to achieve those interests. They are overinclusive because they include small corporations that do not possess

the financial ability to exercise a dominant influence on the political debate and non-profit organizations.

On the other hand, they are underinclusive for they exclude media corporations, although in particular modern media empires amass immense wealth and unreviewable power and are equally if not better equipped to influence the public political debate than other corporations. Many media corporations are owned or controlled by corporations that have diverse and substantial investments and participate in endeavors other than news.

As a result, a corporation owning a media business and a non-media business could exercise its control over the media to advance its overall business interests whereas other corporations would be prohibited from promoting the same issue. Lastly, political speech is so integrated into this country's culture that speakers will always find a way to circumvent campaign finance laws. Conclusion Restrictions on corporate expenditures for electioneering communications can no longer be upheld under the First Amendment. Likewise, no other restrictions on free speech can be imposed solely based on the corporate identity of the speaker.

Nevertheless, I do not believe that the special interests of powerful corporations are likely to take over control of the electoral process, since disclaimer, disclosure, and reporting standards ensure the integrity of the political process and allow voters to make a sophisticated choice. However, if Congress considers corporate expenditures to pose a threat to the integrity of the electoral process it is free to limit expenditures of all speakers, including individuals, or to impose heightened disclosure or reporting

standards, provided they can identify a compelling interest for such restrictions.

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