The Corporation and Transactional Political Speech

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Abstract:
Corporations enjoy virtually unlimited First Amendment protections under the current law. Corporate personhood and the constitutional rights of corporations have become polarizing and controversial topics, especially in the wake of the Citizens United Supreme Court ruling. However, this area of law has been gradually developing well before that case was ever argued.

A review of the Citizens United line of cases explains how the law has evolved to this point. Furthermore, exploration of organizational concepts of corporations and other business entities illustrates significant differences between them and natural persons. These inherent traits of corporations make their speech primarily transactional in nature, and make them poorly suited to engage in political speech. Despite the ruling in the Citizens United case, the very nature of a corporation makes it both prudent and constitutionally permissible to apply regulations and restrictions to corporate political speech more strictly than they are applied to natural persons.

The Corporation and Transactional Political Speech

C. Timothy Murphy III

In 2010, the U.S. Supreme Court decided *Citizen’s United v. Federal Election Commission*. The Court’s controversial 5-4 decision greatly expanded corporations’ First Amendment rights, granting them a virtually unlimited right to political speech. The dissent does a better job of articulating the issues in a clear and complete fashion; the majority got it wrong. The majority’s analysis erred because they failed to consider organizational theory concepts in order to correctly distinguish transactional political speech, and they did not properly consider how such speech can and should be regulated. The majority should have concluded that corporate political speech that is transactional in nature is distinguishable in a constitutionally permissible way and is subject to government regulation.

*Citizens United Issues and Background*

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Citizens United produced and sought to air a documentary about Hillary Clinton regarding her candidacy for the Democratic presidential nomination. They were concerned that this would subject them to penalties for airing a prohibited electioneering communication under 2 U.S.C. § 441b. This law prohibited "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and is made within 30 days of a primary or 60 days of a general election.\(^1\) In *Citizens United*, they sought declaratory and injunctive relief against the F.E.C. regarding this documentary.\(^2\) The Supreme Court did not decide this case on narrow grounds, and instead reviewed the constitutionality of the law.\(^3\) In doing so, they reviewed several Supreme Court opinions dealing with challenges to campaign finance laws.

In *Buckley v. Valeo*, the Court recognized a "sufficiently important" governmental interest in "the prevention of corruption and the appearance of corruption, and this interest justified regulation of speech."\(^4\) The Court also stated that direct contributions to candidates could be distinguished from independent expenditures, claiming that the potential for quid pro quo corruption was not present with independent expenditures.\(^5\) Congress recodified the limitations on independent corporate and union expenditures shortly after this case.\(^6\) It was then challenged again, in *First National Bank of Boston v. Bellotti*. Here, the Court said that the government cannot restrict political speech based on the speaker’s identity as a corporation.\(^7\)

These rulings held until *Austin v. Michigan Chamber of Commerce* was decided. These precedents were overruled because the court identified a governmental interest that was not cited

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\(^1\) 2 U.S.C. § 434(f)(3)(A)
in previous cases, an antidistortion interest. In \textit{Austin}, the Court found a compelling government interest in preventing “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.”\footnote{\textit{Austin v. Michigan Chamber of Commerce}, 494 U.S. 652, 660 (1990).} This holding was largely responsible for the Court’s upholding of limits on electioneering communication in \textit{McConnell v. Federal Election Commission}.\footnote{\textit{Citizens United v. Fed. Election Comm'n}, 130 S. Ct. 876, 886 (2010).}

In \textit{Citizens United}, the majority rejected the rationale found in \textit{Austin} and in \textit{McConnell}, arguing that “the worth of speech ‘does not depend upon the identity of its source, whether corporation, association, union, or individual.’”\footnote{\textit{Citizens United v. Fed. Election Comm'n}, 130 S. Ct. 876, 904 (2010), quoting \textit{Buckley v. Valeo}, 424 U.S. 1, 48-49 (1976).} They further argued that “[t]he First Amendment’s protections do not depend on the speaker’s ‘financial ability to engage in public discussion.’”\footnote{\textit{Buckley v. Valeo}, 424 U.S. 1, 49 (1976).} The objections to campaign finance limits all seemed to come down to one singular idea; there must be a strict rule of equality under the First Amendment among all speakers. It is this idea that lead to the majority’s error.

A rule of strict equality among speakers is a good thing when applied to different individuals. It would be contrary to our core democratic principles to restrict a natural person’s voice based on his or her identity. After all, the idea of a democracy is that no one person’s voice is more important than anyone else’s, regardless of some classification such as ethnicity or religious beliefs. However, this strict rule of equality among speakers is a very bad thing when applied to corporations and other organizations. Such a rule means that there is no permissible basis on which to discriminate between speakers and that the government cannot put their finger

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on the scales to equalize the power of different speakers for any reason. This ignores more than just the vast wealth and power that corporations can accumulate; it ignores the very nature of a corporation. Corporations are not just more powerful than individuals, they are inherently different. Corporate political speech is distinguishable in a constitutionally permissible way from other speech because of these inherent differences.
Legal theorists have long wrestled with the problem of how to conceptualize what a corporation actually is. As far as the First Amendment is concerned, the *Citizens United* majority effectively classified corporations to be the same in the eyes of the law as a flesh and blood person. This perspective ignores all nuances and subtlety that should be considered when determining what a corporation actually is and instead it treats corporations as if they were actual people. This conclusion is incorrect because corporations are very different from people and there is good reason to treat them differently. They have very different incentives and very different motivations for their speech. This conclusion ignores these differences, and could also prove to be quite dangerous, especially when considering the nature of the legal attributes that make corporations distinct entities from actual people. As Justice Stevens says in his dissenting opinion:

> The fact that corporations are different from human beings might seem to need no elaboration, except that the majority opinion almost completely elides it. *Austin* set forth some of the basic differences. Unlike natural persons, corporations have "limited liability" for their owners and managers, "perpetual life," separation of ownership and control, "and favorable treatment of the accumulation and distribution of assets . . . that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments."¹

He notes several dramatic differences between people and corporations under the law. Furthermore, “the conceit that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court's disposition of this case.”² And aside from being inaccurate to say that they must be treated identically under the

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law, these inherent differences between corporations and people make it necessary and prudent for the law to treat corporations differently than a flesh and blood person. Perhaps most importantly, this view is wrong because corporations are very different from natural people in that their range of concerns and motivations is institutionally constrained.

First and foremost, corporate political speech is profit-driven, not ideological in nature. While individual donors can and do engage in electioneering activity with their own economic self-interest in mind, there are additional factors that contribute to an individual’s own personal politics. An individual is motivated not only financially, but by their own morals and ethics, as well as their own personal ideas of fairness and social justice. When an individual spends money to further a political cause, the underlying motivations are formed and driven by these separate (and often conflicting) considerations. A corporation, however, is insulated from these complexities.

Political speech from an individual emanates from the crossroads where a diverse and often conflicting group concerns intersect. This is not the case for corporate political speech, as a corporation’s concerns are far less nuanced. There is perhaps no better way to illustrate this pivotal difference between individuals and corporations than the fact that corporations routinely give “substantial sums to both major national parties.”¹ The idea that an ideologically passionate individual would donate to competing political campaigns is ludicrous, but this is the way of the world for corporations. A corporation exists only in the intangible world, its purpose, the pursuit of profit. It is unaffected by vast majority of consequences that any particular public policies might cause. It is important to note that a corporation does not, and in fact cannot, appreciate the consequences of a law or policy unless it specifically relates to its own bottom line.

Thus, corporate speech "is more transactional than ideological."¹ Corporations engage in this transactional political speech to advocate for policies that promote and support their own financial interests. Considering that the motivation behind their political speech is profit driven, they will seek to influence policy in a way that promotes their own profits at the cost of any other interests. Given the nature of the corporation, that the purpose for its very existence is to pursue profit, it is ill suited to consider and advocate on broad matters of public policy.² From the perspective of real flesh and blood people, with multi-faceted and diverse concerns, this means public policy will, to the extent that corporate electioneering activity is successful, undervalue their own overall interests and overvalue corporate interests. As Justice Stevens notes:

> The Court's blinkered and aphoristic approach to the First Amendment may well promote corporate power at the cost of the individual and collective self-expression the Amendment was meant to serve. It will undoubtedly cripple the ability of ordinary citizens, Congress, and the States to adopt even limited measures to protect against corporate domination of the electoral process. Americans may be forgiven if they do not feel the Court has advanced the cause of self-government today.³

Corporations cannot and should not be given the right to unrestricted political speech because it affects the political process to the detriment of real people.

> In fact, it has been proposed that corporations are “externality machines” that create their own benefits and leave others to pay the costs.⁴ This is not because of some alleged malice or negligence on the part of the corporation or those who control it. Rather, it is simply inherent in

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their nature. As Greenfield stated, “the nature of the firm is to create financial wealth by producing goods and services for profit; without regulatory or contractual limits, the firm has every incentive to externalize costs onto those whose interests are not included in the firm’s current financial calculus.”\footnote{\label{fn:Greenfield}Kent Greenfield, “The Puzzle of Short-termism.” Wake Forest Law Review 46, no.3 (Fall 2011): 627-640.} It is this very tendency of corporations that makes them poorly suited to engage in the political process. As their political speech is merely transactional in nature, they will engage in these speech transactions to create financial wealth. It is in their nature, and their best interest, to influence public policy in such a way that the costs associated with this wealth creation will be borne by others, while they reap the benefits. They are not suited for considering broader issues and concerns of public policy because their ability to do so is severely limited. After all, to a corporation, it’s just business.

Failure to exercise this political speech would be a mistake on the corporation’s part, at least from a profit maximization and wealth creation standpoint. This ability is a tool that can be used to influence the environment in which they do business, and quite an effective one at that. Historically, even the odd outlier that seeks to buck this tendency and forego some profit in order to pursue a social goal has faced resistance. Henry Ford’s Ford Motor Company is an example of the rare corporation that was both willing to do this, and was financially successful enough that it could afford undertake such a pursuit. In the early 1900s, the company had acquired a sizable capital surplus, prices for the Model T. car had been reduced, and demand for the vehicle was high. Henry Ford wished to cut shareholder dividends and instead open more plants. The intention was to employ more workers and continue to reduce the price of his cars. Ford stated, “my ambition is to employ still more men, to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this we are
putting the greatest share of our profits back in the business."\(^1\) However, minority shareholders brought suit to prevent this. While the board of the corporation does have great leeway to make decisions under the business judgment rule, the court held that it does not allow Ford to do this because the corporation exists primarily for the profit of the stockholders and not its employees and the community.\(^2\) A corporation cannot reduce or forego profits in order to benefit the public.

Corporations are further under qualified to participate in our political process because of the restrictions, (or lack thereof) on their ownership structure. They can be owned, in whole or in part, by non-resident foreign citizens. These non-resident foreign citizens, much like the intangible corporation they own, do not exist within the boundaries of the United States and thus are largely insulated from the impact that our laws and public policies might have. Granting political speech to corporations means that these non-resident foreign citizens will have a vehicle to influence and infiltrate our government. They, like the corporations they can control, do not have the same varied and diverse political concerns found in real flesh and blood United States residents. Through corporate speech, they are free to promote any candidates or policies they desire from thousands of miles away, while avoiding the locally felt consequences of their effects.

Not all corporations, let alone other juridical entities, are created equally. They come in various sizes, structures, and even motives. Ignoring these differences means the law must, as Justice Stevens points out, “treat a local nonprofit news outlet exactly the same as General Motors.”\(^3\) Rather than clarify the legal issues, the Citizens United decision actually further


obfuscates them.\(^1\) There is no need to treat all corporations the same under the law, much less treat them all as if they were the same as natural people.

In *Citizens United*, the majority claims that the exception for media corporations is “all but an admission of the invalidity of the antidistortion rationale” because “the law exempts some corporations but covers others, even though both have the need or the motive to communicate their views.”\(^2\) Again, their insistence on a strict rule of equality for all speakers is as the root of their error. In *Austin*, the Court noted that this does not automatically make the law unconstitutional; such distinctions can be justified by a “compelling state purpose.”\(^3\) Media companies are inherently different from other corporations, and the *Austin* Court articulated these differences.

> [M]edia corporations differ significantly from other corporations in that their resources are devoted to the collection of information and its dissemination to the public. We have consistently recognized the unique role that the press plays in "informing and educating the public, offering criticism, and providing a forum for discussion and debate."\(^4\)

This distinction between corporations that are in the business of disseminating news to the public and other corporations that are not engaged in such business provides the government with a compelling reason to exempt media corporations from the political speech restrictions and

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justifies different treatment for media corporations under the law.\(^1\) The Court should have upheld the exception on the corporate political speech restrictions for media companies.

Corporations are different from a natural person, both in reality and in their legal status, because they are merely legal fictions. The legal fiction that is corporate personhood has its benefits. In fact, allowing them to own property, as well as to bring lawsuits and be sued, are essential grants by the state to allow them to exist and operate for commercial purposes. However, this does not mean they are automatically entitled to rights enjoyed by natural persons, and granting them the same legal status as natural persons as it relates to free speech is neither prudent nor necessary. They are not entitled to the same constitutional rights. The state has no constitutional obligation to extend any particular right to them. They are inherently entitled to nothing, and receive only whatever the state gives them. Chief Justice Marshall articulated this idea back when our nation was in its infancy.

> 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 creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created.\(^2\)

The majority in *Citizen’s United* conveniently ignored this when it denied the state the ability to regulate political speech of corporations. Corporations are chartered only by statute. They exist only because the state has granted them their existence. By imposing restrictions on the state that prevent regulation of corporations, the majority has swung the pendulum of power away from the state and towards the corporation. Corporations are creatures of the state’s creation, but this broad extension of First Amendment rights means that the state no longer has the power to reign


\(^2\) *Dartmouth College v. Woodward*, 4 Wheat. 518, 636 (1819).
in corporate behavior. This means that corporations are now something akin to an experiment by a mad scientist that has gone terribly wrong. The majority in *Citizens United* has turned corporations into monsters that can no longer be controlled and restrained by their masters.

**Evidence of Corporate Spending Behavior**

The tendency for corporations to donate to both sides of a campaign is a widespread phenomenon. “[I]n 1996 and 2000, more than half of the top 50 soft-money donors gave substantial sums to both major national parties.”¹ This trend has only gotten more extreme in the wake of the *Citizens United* ruling. As of April 30th, 2012, 70 of the top 100 political donors have contributed to both Democrats and Republicans in the 2012 election cycle.² It should come as no surprise that all 100 of the current top donors are organizations such as PACs and corporations, and there is not one natural person amongst their ranks. Playing both sides of the political field is now commonplace for corporations and this strongly indicates that corporate political speech is not ideological in nature, but merely transactional. Furthermore, not only are most of the top donors hedging their bets between both the Democrats and Republicans, but both parties are well aware of this and seek to exploit it.

acceptable to call someone, saying you saw he gave to this person, so he should also give to you or the person's opponent. ¹

_Citizens United_ has already had a dramatic impact on the political landscape in the United States. Political donations have increased massively since the ruling in _Citizens United_.

Here's one way to look at how much more is being spent in the 2012 cycle: A single super PAC, the pro-Mitt Romney Restore Our Future, has already spent more -- $44.5 million -- than all outside groups combined had spent by this point in 2008. That 2008 number, about $30.9 million, is roughly one-quarter of this cycle's overall outside spending total of $122.7 million.

And the $100 million spent just by super PACs this cycle is already $30 million more than the entire sum of all outside spending in the 2004 election, the year that the Swift Boat Veterans for Truth 527 organization made a splash with its attacks on Democratic presidential nominee John Kerry. ²

Big money interests are now free to spend with impunity in the new, unrestricted environment. Furthermore, many of these super PACs are hoarding funds, just waiting for the right time to speak. There are currently 534 super PACs, and only 78 have spent any money on this election so far. ³ These already large accumulations of funds can be bolstered by additional large donations that may come at any time. These large war chests are further leveraged by the fact that they may spring into action at a moment’s notice, as the _Citizens United_ ruling struck down bans on electioneering communications in the periods immediately before elections. While we are just now starting to see the impact that _Citizens United_ will have on the political landscape in

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this country, the early indications are that we have entered a whole new era of American politics. It appears that the floodgates of political spending have been opened.

**Consequences of Unlimited Corporate Spending**

As discussed in previous Supreme Court cases dealing with campaign finance, political donations lead to political favors.

You are doing a favor for somebody by making a large [soft money] donation and they appreciate it. Ordinarily, people feel inclined to reciprocate favors. Do a bigger favor for someone — that is, write a larger check — and they feel even more compelled to reciprocate. In my experience, overt words are rarely exchanged about contributions, but people do have understandings.¹

While explicit quid pro quo arrangements are rare, these “understandings” are apparently quite common. Since political donations lead to political favors, it stands to reason that more political donations lead to more political favors. And now that this environment allows unlimited political donations, it stands to yield unlimited political favors. This is against public policy, as a democracy needs to be about the merits of ideas, not the money behind them.

*Citizens United* supporters will argue that campaign contributions do not determine the results of election. While such claims seem quite specious, it does not actually matter if the contributions impact an election’s outcome or not. Corporate political speech is not about betting on the winning horse and then receiving a pay out. Rather, large donors contribute to both sides to acquire access and influence. Unlimited corporate political speech means that a corporation can now seek to acquire as much access and influence as it can afford. Competing corporations will certainly do the look to do the same. The effect will be a sort of arms race between the

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¹ *McConnell v. Federal Election Comm’n*, 251 F.Supp. 2d at 493 (Kollar-Kotelly, J.) (quoting declaration of Robert Rozen, partner, Ernst & Young 14; see 8-R Defs. Exhs., Tab 33)
wealthiest and most powerful corporations, where each will seek to outspend the others in the political arena. Meanwhile, individuals that lack these same accumulations of wealth will be unable to afford any access and influence of their own.

The majority justified their decision to decide the case on these broad constitutional grounds because a using a more narrowly tailored approach was impossible without “chilling political speech.”\(^1\) They claim this because determinations if any particular instance of political speech is permitted can be a quite complex undertaking. They also claim that litigating in order to concretely determine if the speech is permitted is very time consuming, and cannot be realistically completed in the short window of a campaign season. Such restrictions may silence political speech, since a corporation will not risk speaking if it cannot be sure that such speech is permitted. Justice Scalia has said that “[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.”\(^2\) Furthermore, the majority also says that “[b]y the time the lawsuit concludes, the election will be over and the litigants in most cases will have neither the incentive nor, perhaps, the resources to carry on…”\(^3\) Thus it is impractical, if not impossible to determine if the speech would be permitted in the short timeframe where political speech still has any purpose.

This is poor justification for their ruling, as it ignores the consequences of prohibiting restrictions on corporate political speech. Free speech is an essential element of a successful democracy. It is this free exchange of ideas that allows the citizens to be informed so that they

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can hold their government accountable for its actions.\(^1\) However, in applying the idea that unlimited corporate political speech furthers the successful democracy, the majority goes astray. This view is an oversimplification that misses a key issue. Yes, the ability to communicate ideas freely is necessary, but that alone is not enough. The ability to speak is useless without the chance of being heard. The powerful voices will stifle the rest in a system that permits unrestricted corporate political speech. The end result is the same sort of “chilling” effect on political speech that the majority felt must be avoided. Except in an environment that allows unfettered corporate political speech, it is the corporate voice that is amplified, and it is the voice of the individual that is suppressed.

Furthermore, unlimited political speech is an enabling vehicle for widespread regulatory capture. Regulatory capture is the concept that a state regulatory body can end up advancing the commercial interests of the major firms that it seeks to regulate. The idea is that entities with the largest interest in a particular policy will expend the most effort and energy in attempts to influence that policy. If a regulatory body is successfully “captured” by a group of corporations that it was supposed to be regulating, then its policies will reflect that of the corporations’ interests, and not those of the public.\(^2\) The benefits to the controlling corporations are two-fold; the perception of regulation satisfies popular demand for government oversight, while the reality of the situation is that the regulation tends to serve the corporate interests rather than regulate them.\(^3\) This phenomenon happens to individual government agencies, on a relatively small scale, and it can happen to the government on a much larger scale. This risk has become even more substantial now that corporations can acquire as much access and influence as they can afford.


The repealing of campaign finance laws and removal of restrictions on corporate political speech fits into this paradigm. Unlimited corporate political speech certainly seems to benefit corporations at the expense of the public at large. Now, this unlimited corporate political speech is a tool that the corporations can use to further promote their own policies and extend their influence even further throughout the government. In fact, one might suggest that the removal of these restrictions indicates that large scale government capture is in already progress. The effects of excessive corporate influence in our nation’s public policy are potentially extremely damaging and this influence can have a snowballing effect. As corporations gain more and more control over the government, it stands to reason that they will attempt to further manipulate the environment in which they operate to maintain this control. The risk is that it may be difficult, if not impossible, to undo the damage should portions of the government become sufficiently “captured” by these corporate interests.

**Regulation of Speech**

The Supreme Court notes that corporations have been afforded First Amendment protection.\(^1\) However, the mere fact that a Constitutional right exists does not mean that such a right is unlimited. In *Citizens United*, the problem is in the majority’s all or nothing view of these rights. As Justice Stevens points out in his dissenting opinion, "Our jurisprudence over the past

216 years has rejected an absolutist interpretation" of the First Amendment. However, the
majority in *Citizens United* has strayed from that principle by insisting upon a strict rule of
equality between natural persons and other juridical entities. Just because corporations have been
afforded First Amendment protections, it does not mean that they are, (or should be), afforded
the same level of First Amendment rights as flesh and blood human beings. This is especially
ture when the First Amendment rights of corporations are in conflict with the First Amendment
ights of individuals. The majority’s interpretation of the First Amendment, as applied to
corporations, is flawed because it treats corporations identically to natural persons. However,
“they are not themselves members of ‘We the People’ by whom and for whom our Constitution
was established.”

The Supreme Court has recognized "the ‘commonsense’ distinction between speech
proposing a commercial transaction, which occurs in an area traditionally subject to government
regulation, and other varieties of speech." They have also acknowledged that while commercial
speech is afforded some protection by the Constitution, these protections are not as extensive as
the protections enjoyed by other classifications of expression. Furthermore, they have identified
the four part test that is used to determine if a restriction on commercial speech is
constitutionally permissible. The Supreme Court stated that:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we

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must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.  

Even lawful, non-misleading commercial speech, including corporate political speech, can be regulated as long as it complies with the requirements of *Central Hudson*. Restriction is constitutionally permissible as long as a substantial government interest is involved, the restriction furthers that interest, and the restriction is properly limited in its scope to further this interest. Thus, restriction of commercial speech is constitutionally permissible as long as it furthers a substantial government interest.

Critics of the commercial speech doctrine may argue that this distinction between commercial speech and speech of other varieties is anything but commonsense. Such opposition is not without merit, as such a black and white distinction between commercial and noncommercial speech seems to be a false paradigm. After all, it is easy to imagine examples of speech that both proposes a commercial transaction, as well attempts to make political persuasions. For example, imagine speech by a small business owner that encourages shoppers to patronize locally owned small businesses instead of Walmart, because Walmart runs the local operations out of business and destroys the small town way of life. Such a communication certainly proposes a commercial transaction, and thus falls squarely within the definition of commercial speech. However, it also has political implications, and this type of speech goes straight to the heart of the First Amendment. Admittedly, distinguishing corporate political speech from commercial speech can be a very delicate task.

Determining if a corporate political communication is commercial speech is very subtle and nuanced inquiry. Bright line rules are probably impossible, and so such determinations can

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really only be done on a case-by-case basis. The majority in *Citizens United* suggest that political speech is only truly effective in “short timeframes in which speech can have influence.”¹ Comparing this short timeframe to the lengthy and time consuming process of litigation shows that it is impractical to litigate on this point before the election cycle passes and the short window where the speech could have an impact closes. In fact, Citizens United did not receiving a ruling on their case until two years after the conclusion of primary election that it was targeting.²

Since the timeframes where speech can have an effect is short, and the process to litigate the legality of that speech is comparatively quite long, this content based approach to the regulation of political speech seems unworkable. It just takes too long to determine if a particular instance of speech is classified as commercial speech. However, regulation of speech is not limited strictly to commercial speech. Restrictions on political speech can be legally justified by a compelling state interest.³ While a content based approach to corporate political speech may not be viable, an identity based approach is. Political speech can and should be regulated on the basis that it is a corporation doing the speaking. This is because the very nature of the corporation causes their political speech to be transactional and it is distinguishable from other speech in a constitutionally permissible way. This gives rise to numerous compelling state interests which justify restrictions on their First Amendment rights.

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Compelling State Interests Justify the Restriction of Corporate Political Speech

There are compelling state interests that justify restrictions of corporate political speech. The Supreme Court has recognized an antidistortion interest in limiting political speech; the need to diminish "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas" is a substantial government interest.\(^1\) In fact, given that our democratic political system is the bedrock of our nation, protecting the integrity of it is of grave importance. In fact, there are few (if any) examples of a government interest that is more compelling than this one. Given the corporation’s distorted incentives in the political arena, regulating their right to political speech and restricting their right to influence public policy is imperative to further the state’s interest in protecting the democratic system. The *Citizens United* majority rejects this line of reasoning stating that “[i]f the antidistortion rationale were to be accepted, however, it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form.”\(^2\) The majority’s reasoning is flawed because it glosses over the corporate form as if it were merely a minor detail. It ignores that many inherent differences between corporations and natural persons that justify different treatment.

The need to prevent corruption in the political process is another interest that could be used to justify the restriction of corporate political speech. The Supreme Court has recognized Congress’ legitimate interest in preventing the money that is spent on elections from exerting an ‘undue influence on an officeholder's judgment’ and from creating ‘the appearance of such

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influence’, beyond the sphere of *quid pro quo* relationships. The Court should have found that this is also a compelling state interest. As Justice Stevens as said, “I believe the danger of either the fact, or the appearance, of *quid pro quo* relationships provides an adequate justification for state regulation of both expenditures and contributions.”

The *Citizens United* majority erroneously claims that the only “sufficiently important governmental interest in preventing corruption or the appearance of corruption” is one that is "limited to *quid pro quo* corruption." This perspective on corruption in the political arena was suggested and rejected in *McConnell*.

This all or nothing view fails to acknowledge that corruption is not a simple black and white issue. In reality, corrupt practices are not limited to an explicit exchange of money for a political favor, but they can and do fall anywhere within a wide spectrum of corruption. Justice Stevens beautifully articulated this concept when he said:

> Corruption can take many forms. Bribery may be the paradigm case. But the difference between selling a vote and selling access is a matter of degree, not kind. And selling access is not qualitatively different from giving special preference to those who spent money on one's behalf. Corruption operates along a spectrum, and the majority's apparent belief that *quid pro quo* arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics. It certainly does not accord with the record Congress developed in passing BCRA, a record that stands as a remarkable testament to the energy and ingenuity with which corporations, unions, lobbyists, and politicians may go about scratching each other's backs—and which amply supported Congress' determination to target a limited set of especially destructive practices.

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Of course outright bribery is corrupt, and undermines the system. But to deny that corruption is present just because a relationship between a private organization and a government official stops short of an explicit quid pro quo arrangement is to deny the reality of the situation. Such a claim is tenuous at best, as it is extremely unconvincing that a corporation would spend large sums of money to influence the political process and expect no return on its investment. While more gradual and subtle than outright bribery, this sort of influence peddling can undermine the democratic system too.

Even if corporate political speech is beneficial to the process, or at least harmless, (and such a claim is quite specious), this is not enough justification to decline to control it. It is not enough to merely maintain a political environment that is above corruption. The Supreme Court has said that “[o]f almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.”1 It must be taken further; because even the appearance of impropriety must be avoided. Likewise, it is not enough that the participants in the political marketplace are exposed to the various ideas and viewpoints that exist; they must believe these viewpoints are being discussed genuinely and in good faith. As such,

At stake in the legislative efforts to address this threat is therefore not only the legitimacy and quality of Government but also the public's faith therein, not only "the capacity of this democracy to represent its constituents [but also] the confidence of its citizens in their capacity to govern themselves."2

The Citizens United majority also asserted that despite the mass amounts of wealth accumulated by the corporations, that it is the individual who ultimately has the power in the

electoral process. They argue that the fact that corporations are “willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials.” ¹ However, as the voices of the corporations reach a fever pitch while clamoring for support of the individuals, the roles of the individuals themselves become greatly reduced in the political process. Political apathy and feelings of political powerlessness can set in. "Take away Congress' authority to regulate the appearance of undue influence and ‘the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.’”² The majority claimed that increased political speech by corporations won’t cause voters to withdraw from the democratic process.³ However, their declaration ignores evidence that the electorate itself has indicated otherwise.⁴ Thus, it is of utmost importance that corporate political speech be restricted to prevent the appearance of corruption and to maintain a politically engaged electorate.

Open communication alone is simply not enough for an effective campaigning and electoral process, there must also be trust in the process. When increased communications negatively impact this public’s trust, these two considerations must be balanced. Corporate political speech leads the electorate to the cynical belief that the system is for sale, destroying the public’s trust in the democracy. The restriction of corporate political speech is a necessary to ensure that the system is as trustworthy as possible. The majority was wrong to rule as if this is not a problem, and remove the state’s ability to fight it. The state has a compelling interest in stopping both political corruption as well as the appearance of impropriety. Rather than roll back

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restrictions that serve to limit this kind of behavior, the government must be permitted to take steps to prevent this type of abuse.

Unlimited corporate political speech does not promote a healthy democratic process. In actuality, it hinders it. Justice Stevens argues that restricting corporate political speech will actually “facilitate First Amendment values by preserving some breathing room around the electoral ‘marketplace’ of ideas.” ¹ While this may seem counterintuitive on its face, supporting this breathing room around ideas is of utmost importance to the First Amendment. The Court should recognize the compelling state interest in preserving this “marketplace of ideas.” In fact, “the distinctive threat to democratic integrity posed by corporate domination of politics was recognized at "the inception of the republic" and "has been a persistent theme in American political life" ever since.” ² Protecting the marketplace of ideas from corporate domination is not a recent development or a knee-jerk reaction reflecting a deviation from stare decisis, but a longstanding tradition of our nation.

In Justice Kennedy’s opinion of the court, he states that “it is our law and our tradition that more speech, not less, is the governing rule.” ³ This statement makes for an excellent sound byte, and in a utopian society it would be true. However, such a claim is more idealistic than realistic. It is misleading, and it blurs the issue rather than clarifies it. It is true that, in a vacuum, more political speech is better than less. However, political speech does not exist in a vacuum, and more speech does not come without costs and tradeoffs. Justice Stevens touches on this very idea.

If individuals in our society had infinite free time to listen to and contemplate every last bit of speech uttered by anyone, anywhere; and if broadcast advertisements had no special ability to influence elections apart from the merits of their arguments (to the extent they make any); and if legislators always operated with nothing less than perfect virtue; then I suppose the majority's premise would be sound. In the real world, we have seen, corporate domination of the airwaves prior to an election may decrease the average listener's exposure to relevant viewpoints, and it may diminish citizens' willingness and capacity to participate in the democratic process.\(^1\)

While the theory that more speech leads to better democracy seems sound, if not self-evident, it has counterintuitive effects in practice. The voices that can yell the loudest, or in this case, the ones that can most afford to dominate the airwaves, are the voices that will be heard. Allowing corporations unfettered access to political speech can lead to corporate domination in the arena of political speech. This can crowd out relevant viewpoints and reduce or eliminate the possibility for public deliberation on their merits. This problem is exacerbated because, as Justice Stevens says, individuals do not have unlimited free time to consume and contemplate every piece of political speech. Thus, more speech does not mean that more speech is actually heard, much less properly digested, independently corroborated, and carefully considered. Rather, it’s far more likely to increase confusion in the political marketplace, and separating the good information from the bad will become increasingly difficult.

In the majority opinion in *Federal Election Commission v. Massachusetts Citizens for Life, Inc*, Justice Brennan said that

> The resources in the treasury of a business corporation, however, are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence,

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even though the power of the corporation may be no reflection of the power of its ideas.\footnote{Federal Election Comm’n v. Massachusetts Citizens for Life, Inc., 479 US 238, 258 (1986).}

Thus, unfettered corporate political speech means that the best ideas will struggle to be heard unless they are backed by those that can properly finance their dissemination. This outcome is undesirable, as the idea of a government that is representative of people it governs is dependent on a system where ideas succeed or fail because of their merits, not the funding and connections of those who back them. Restricting corporate expenditures on political speech aids the political process by helping ensure that the competition is between ideas, not resources. This furthers this compelling state interest in maintaining the marketplace of ideas.

**Restricting Corporate Political Speech**

The right to free speech, as protected by our First Amendment, is a highly valued and virtually sacred element of our system of government. It is essential for the free exchange of ideas, and no truly democratic government can exist without it. It is the bedrock of the people’s ability to self-govern and it prevents the government from silencing political dissidents. It is perhaps the most fundamental difference between our political system and that of more totalitarian regimes seen around the world. The majority in *Citizen’s United* seemed to allude to this idea in their opinion when Justice Kennedy said that “the right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.”\footnote{Citizens United v. Fed. Election Comm’n, 130 S. Ct. 876, 898 (2010).} Given that free speech is such a required precondition for self-government, First Amendment protections are necessary.
In *Citizens United*, the majority recognized this premise, but they came to an improper conclusion when they refused to allow corporate political speech to be restricted. Corporate political speech can be distinguished from other forms of speech in constitutionally permissible ways. It is both prudent and permissible to restrict its influence on the political system. The specter of totalitarianism is a grave threat to any democratic government, and the free political speech is the best method we have to ward it off. The people’s right to free speech is sacrosanct, and the government may not infringe upon it. A corporation’s First Amendment rights are not unlimited, nor should they be. The very nature of a corporation makes their speech inherently different from that of a natural person. Yet, allowing corporations unlimited speech ultimately encroaches on the people’s right to free speech. It would be unconstitutional if the state attempted this, and they cannot simply turn a blind eye and give corporations the means to do it instead. The erosion of the people’s right to free speech is toxic to our way of life. It is just as damaging when the voice of the individual is drowned out by corporate political speech as if it were silenced through the use of force by the state.