

Corporate Electioneering: Does it undermine the democratic process?

NCSS Thematic Strand: Power, Authority and Governance

Grade Level: 9-12

Time Required: 2- 50 minute class periods

Purpose, Background and Context:

Discontent over the political influence of “corporate citizens” pervades popular discourse and media during this election cycle. The Supreme Court’s decision in the case of *Citizens United v. Federal Election Commission*, handed down January 21st, 2010 has fueled contemporary concern over corporate influence. The opinion of the Court, written by Justice Kennedy, expanded the right of corporations and unions to engage in political speech as protected by the First Amendment. While corporations and unions may not contribute directly to political parties, the Court’s decision allows for these organizations to use general treasury funds to make independent, but election related expenditures and removes other limits on corporate speech. However, the dissenting judges argued that prior to the *Citizens United* decision corporate political speech experienced few restrictions, but those that existed were put in place to protect the democratic process.

In this lesson students will grapple with the following concern: does corporate speech threaten the democratic process? Students will learn about the *Citizens United* case and examine sources that demonstrate popular concern, in support and against expanded corporate speech.

Objectives & Student Outcomes:

Students will:

- ❖ “Examine persistent issues involving the rights, responsibilities, roles and status of individuals and groups in relation to the general welfare” within the context of the *Citizens United* case (NCSS Standards, p. 144)
- ❖ Gain greater understanding of the role or authority of the Court in the context of the *Citizens United* case.

- ❖ “Prepar[e] and present a paper analyzing persistent public issues or social problems involving government action” in regards to corporate electioneering and campaign finance regulation (NCSS Standards, p. 144).

Materials:

- ❖ Excerpts from the Court’s opinion in *Citizens United* case
- ❖ Excerpts from the Justice Stevens’ dissent in *Citizens United* case
- ❖ Excerpts from the Chamber of Commerce *amicus curiae*
- ❖ Adbusters political graphic of the American flag
- ❖ Picture, “Human rights for human beings only,” from the *Move to Amend* campaign
- ❖ Political Cartoon, “Corporate Speech”
- ❖ Political Cartoon, “Retail Politics”
- ❖ Rubric & Homework handout
- ❖ Case Outline

(Links to images are included)

Procedures:

Day I:

Procedure 1

Project the Adbusters American flag and divide students into pairs. Instruct students to discuss the political graphic and to jot down any questions or observations that reflect their analysis of the cartoon.

[Adbusters Corporate American Flag](#)

Procedure 2

Lead a class discussion on the Adbusters American flag. Depending on student responses, ask questions that clarify their analysis and the graphic.

Procedure 3

Introduce the *Citizens United* case and its significance in the discussion of corporate influence within the United States, particularly on the democratic processes.

Procedure 4

In groups of three or four, have students read excerpts from the Court’s opinion and dissent. Encourage students to work together to read and understand the documents. Have students record, in their own words, the major points of each text.

Day II:

Procedure 5

Ask students to take 2 minutes to review their notes and discuss in groups. Then draw a two-column, two-row table on the board. Label one column “opinion” and one column “dissent”. Ask the class to identify major points made by each side. Use this time to clarify any misunderstandings of the texts.

Procedure 6

Project political cartoons and photograph, which represent popular discontent regarding corporate speech in elections. Have students evaluate the two images in pairs. Instruct students to jot down their analysis of the images.

[“Retail Politics” by Matt Wuerker](#)

[“Corporate Speech” by Dan Wasserman](#)

[“Human Rights for Human Beings”](#)

Procedure 7

Handout Chamber of Commerce *amicus* brief and have student pairs read and evaluate the document. Again have students jot down their analysis of the document.

Procedure 8

In a class discussion, have students explore the arguments added by the additional documents. In the second row of table on the board, record student responses. Use this time to clarify any misunderstandings of the documents.

Procedure 9

Assign homework. Students will write an Op-Ed piece that addresses the following question: *Does corporate electioneering undermine the democratic process?*

Assessment of Outcomes:

Students will be assessed based on notes taken about the documents to interpret the greater context of the *Citizens United* case and corporate electioneering.

Students will write an Op-Ed piece that addresses the following questions: *Does corporate electioneering undermine the democratic process?*

Extensions and Adaptations:

Students can create their own political cartoon that represents their response to the question: *Does corporate electioneering undermine the democratic process?*

Students can research the preceding case law regarding corporate electioneering. Have students create a visual artifact that captures the timeline of cases and decisions. Ask them to predict future cases (e.g. cases that challenge bans on direct contributions) or legislation (e.g. greater oversight to prevent corruption) in response to *Citizens United*.

Students may investigate prominent political action committees and view their election materials. Have students create a profile of the PAC that could be disseminated to the public as an information campaign about the PAC itself.

Resources:

Supreme Court of the United States, *Citizens United v. Federal Election Commission*, Retrieved from <http://www.law.cornell.edu/supct/html/08-205.ZS.html>

Supreme Court of the United States, *Supplemental brief of amicus curiae Chamber of Commerce of the United States of America in support of the appellant*, Retrieved from http://www.campaignfreedom.org/doclib/20091007_USCoCsupplemental.pdf

Adbusters, *Corporate American Flag*, Retrieved from <http://www.adbusters.org/content/corporate-america-flag>

M. Wuerker, *Retail Politics*, Retrieved from http://www.cartoonistgroup.com/properties/Wuerker/art_images/cg4eb28c08e64e5.jpg

D. Wasserman, *Corporate Speech*, Retrieved from http://www.boston.com/bostonglobe/editorial_opinion/outofline/assets_c/2010/01/01.24%20CORPORATE%20SPEECH%20jpg-thumb-609x478-2091.jpg

Occupy New Mexico, *Human Rights for Human Beings only*, Retrieved from <http://www.occupynewmexico.org/wp-content/uploads/2012/01/Move-to-Amend-Rights-for-human-beings.jpg>

Introduction to Citizens United

Citizens United v Federal Election Commission, decided January 21, 2010, ignited public debate over the role of corporations during election periods.

Does corporate electioneering, or active corporate involvement in the election undermine the democratic process?

Details of the Case:

During the 2008 election, Citizens United, a corporation, sought to release a documentary about Senator Clinton (who was running for candidate of the Democratic presidential nomination) that questioned her ability to be president. To distribute the documentary and advertise it, Citizens United wanted to use funds from its general treasury, not its Political Action Committee (special organization under the law where corporations can fund and engage in electioneering). They also sought to make the documentary available within 30 days of a primary election (when candidates for each party campaign for party nomination).

At the time, federal law established:

- ❖ Corporations could not spend from their general funds on “electioneering communications” that refers to a candidate. Corporations could establish separate, unlimited funds though, from stockholders and employees.
- ❖ Could not make or broadcast those communications within 30 days of a primary election.

In a 5-4 decision, the Court held that corporations have the same speech rights as individuals under the First Amendment.

- ❖ The court made it legal for corporations to use unlimited, general treasury funds to make election expenditures (but not directly to candidates).
- ❖ Removed the restriction on when communications may be made

Supporters of the decision argued that the Court’s decision reflected the principles of democracy and best practices in the democratic process.

Opponents of the decision argued that corporations should have more limited speech rights and threaten to corrupt the democratic process.

The opinion of the Court Written by Justice Kennedy

The Court ruled that restrictions on when corporate speech could take place were unconstitutional.

It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held. There are short timeframes in which speech can have influence. The need or relevance of the speech will often first be apparent at this stage in the campaign. The decision to speak is made in the heat of political campaigns, when speakers react to messages conveyed by others.

The law before us makes it a felony for all corporations to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election.

The First Amendment provides that “Congress shall make no law ... abridging the freedom of speech.”

The Court found that current PAC options are inadequate means for corporations to speak.

Current law is a ban on corporate speech, though a PAC (political action committee) created by a corporation can still speak. A PAC is a separate association from the corporation. So the PAC exemption does not allow corporations to speak. PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations.

The court upheld the requirement that speakers be identified with their speech.

Under current law, televised electioneering communications funded by anyone other than a candidate must include a disclaimer that “ ‘ _____ is responsible for the content of this advertising.’ ” It must state that the communication “is not authorized by any candidate or candidate’s committee”; it must also display the name and address (or Web site address) of the person or group that funded the advertisement

Disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

The role of speech in a democracy and rights to speech

Speech is an essential mechanism of democracy. It is the means to hold officials accountable to the people. 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.

Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech.

The Court has recognized that First Amendment protection extends to corporations. The Court has rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not “natural persons.” Political speech is “indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.”

The Government has “muffle[d] the voices that best represent the most significant segments of the economy.” And “the electorate [has been] deprived of information, knowledge and opinion vital to its function.” By suppressing the speech of corporations, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests. Factions should be checked by permitting them all to speak and by entrusting the people to judge what is true and what is false.

When Government seeks to use its full power to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.

Influence and corruption concerns

The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt:

“Favoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and to favor the voters and

contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.”

If elected officials succumb to improper influences from independent expenditures, then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences. The remedies enacted by law must comply with the First Amendment.

Dissent written by Justice Stevens

The dissent felt that the court should have decided the case based on existing law instead of changing the law.

The real issue in this case concerns how, not if, the appellant may finance its electioneering. Citizens United is a wealthy nonprofit corporation that runs a political action committee (PAC) with millions of dollars in assets. Under the Bipartisan Campaign Reform Act of 2002 (BCRA), it could have used those assets to televise and promote Hillary: The Movie wherever and whenever it wanted to. It also could have spent unrestricted sums to broadcast Hillary at any time other than the 30 days before the last primary election. Neither Citizens United's nor any other corporation's speech has been "banned." All that the parties dispute is whether Citizens United had a right to use the funds in its general treasury to pay for broadcasts during the 30-day period.

Essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law.

The dissent argues that corporate speech was hardly limited before the Citizens decision.

Pervading the Court's analysis is the ominous image of a "categorical ba[n]" on corporate speech. This characterization is highly misleading, and needs to be corrected.

In fact it already has been. Statutes provide exemptions for PACs, separate segregated funds established by a corporation for political purposes.

Any corporation's "stockholders and their families and its executive or administrative personnel and their families" can pool their resources to finance electioneering communications. During the most recent election cycle, corporate and union PACs raised nearly a billion dollars. Administering a PAC entails some administrative burden, but so does complying with the disclaimer, disclosure, and reporting requirements that the Court today upholds and no one has suggested that the burden is severe for a sophisticated for-profit corporation.

The laws upheld in previous court decisions leave open many additional avenues for corporations' political speech. It also allows corporations to spend unlimited sums on political communications with their executives and shareholders, to fund additional PAC

activity through trade associations, to distribute voting guides and voting records, to underwrite voter registration and voter turnout activities, to host fundraising events for candidates within certain limits, and to publicly endorse candidates through a press release and press conference.

The dissent argues that the Government already restricts speech. The rights in the First Amendment can be limited.

The First Amendment provides that “Congress shall make no law ... abridging the freedom of speech, or of the press.” Yet in a variety of contexts, we have held that speech can be regulated differentially on account of the speaker’s identity, when identity is understood in categorical or institutional terms. The Government routinely places special restrictions on the speech rights of students, prisoners, members of the Armed Forces, foreigners, and its own employees. When such restrictions are justified by a legitimate governmental interest, they do not necessarily raise constitutional problems.

The same logic applies to this case with additional force because it is the identity of corporations, rather than individuals, that the Legislature has taken into account.

In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters. The financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process. Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races.

It might also be added that corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their “personhood” often serves as a useful legal fiction. But they are not themselves members of “We the People” by whom and for whom our Constitution was established.

It is an interesting question “who” is even speaking when a business corporation places an advertisement that endorses or attacks a particular candidate.

The Court’s opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.

The dissent says that corruption is a strong concern and reason for limiting corporate speech.

On numerous occasions we have 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 influence.’

“The factual findings of the Court illustrate that corporations and labor unions routinely notify Members of Congress as soon as they air electioneering communications relevant to the Members’ elections. The record also indicates that Members express appreciation to organizations for the airing of these election-related advertisements. Indeed, Members of Congress are particularly grateful when negative issue advertisements are run by these organizations, leaving the candidates free to run positive advertisements and be seen as ‘above the fray.’ Political consultants testify that campaigns are quite aware of who is running advertisements on the candidate’s behalf, when they are being run, and where they are being run. Likewise, a prominent lobbyist testifies that these organizations use issue advocacy as a means to influence various Members of Congress.

“The Findings also demonstrate that Members of Congress seek to have corporations and unions run these advertisements on their behalf. Members suggest that corporations or individuals make donations to interest groups with the understanding that the money contributed to these groups will assist the Member in a campaign. After the election, these organizations often seek credit for their support. Finally, a large majority of Americans (80%) are of the view that corporations and other

organizations that engage in electioneering communications, which benefit specific elected officials, receive special consideration from those officials when matters arise that affect these corporations and organizations.”

A democracy cannot function effectively when its constituent members believe laws are being bought and sold.

Amicus curiae: Chamber of Commerce of the United States of America

Summary of Argument:

On December 7, 1911 President Taft called for a national organization to increase involvement of American business in national governance. Unfortunately, government has not always shared President Taft's openness to business participation. At all levels of government, elected officials who oppose business viewpoints have sought to keep them from being expressed. Rather than explicitly taking an anti-business stance, these restrictions often target speech by "corporations" to suppress the business viewpoint.

The electoral advocacy of the Chamber- a not-for-profit corporation- and of millions of its corporate members has been suppressed. This has occurred even though 96% of Chamber members are businesses with fewer than 100 employees.

Suppression has been imposed even when candidates have directly attacked business interests and when corporations have unique and valuable insight into the likely consequences of electing or defeating particular candidates. Although this Court has protected the ability of corporations to discuss "issues," that is no substitute for direct and explicit speech about candidates. Nor is the clumsy and expensive "PAC" (political action committee) option equivalent to the right to publicly, swiftly, and freely address candidates and campaigns.

Strongly interested in restoring corporate speech, the Chamber submits this amicus brief urging this court to hold that the corporate form of a speaker is not a constitutional basis for banning core speech. Previous court decisions should be overruled because they

- erroneously allowed the Government to assume, rather than prove, that independent corporate candidate advocacy will distort elections,

- professed interest in eliminating "distortions" due to "wealth" boils down to an attempt to equalize speech through suppression that is forbidden by the First Amendment,

-and the categorical ban on corporate speech is not, narrowly tailored to prevent the effects of immense wealth because (a) the great majority of corporations are not and never become wealthy, and (b) wealthy individuals spend freely on candidate advocacy, even if their wealth derives from corporations.