

ELECTIONS, MONEY, AND THE FIRST AMENDMENT

For more than a century, Americans have debated the role money plays in elections. A controversial Supreme Court First Amendment ruling in 2010 has allowed more money into flood political campaigns today than ever before. What, if anything, should we do about this?

Political campaigns have become increasingly expensive. Barack Obama and Mitt Romney together spent more than \$2 billion during the 2012 presidential election campaign. It was the most expensive election in world history. Also, today it costs an average of \$10.5 million to run for a U.S. Senate seat and \$1.7 million for a seat in the House of Representatives. Though there is disagreement, many voters charge that money corrupts our democracy today and call for new campaign finance reforms.

Money and Free Speech

Since the late 19th century when populist William Jennings Bryan and, a few years later, President Theodore Roosevelt first spoke out against the power of Wall Street banks and big corporations influencing elections, Congress has passed several reforms to campaign finance. Following the Watergate Scandal of 1972, Congress created the Federal Election Commission (FEC) to enforce limits on contributions and disclosure (public reporting) laws.

In its 1976 *Buckley v. Valeo* decision, the Supreme Court ruled that an individual's direct contributions to candidates could be limited without violating his or her free speech rights under the First Amendment. The Court said limiting the amount of money an individual could *directly contribute* to a candidate's campaign reduced the likelihood of corruption or even "the appearance of corruption." The maximum amount someone can give to a candidate in an election today is \$2,700.

The court struck down as unconstitutional any limits on the amount of money individuals and fundraising committees could *independently spend*. Unlike direct contributions to a campaign, independent spending *indirectly* benefits a campaign through the funding of advertising and other political communications.

The court ruled that any such limit restricted the donors' freedom of speech and was a violation of the First Amendment. The court reasoned that this money did not go directly to the candidate and so it was less likely to cause corruption.

2012 Presidential Election - Candidates Spending

Barack Obama

Democratic Party, Priorities USA Action Super PAC



Raised \$1072.6 million

Spent \$985.7 million

Mitt Romney

Republican Party / Restore Our Future Super PAC



Raised \$992.5 million

Spent \$992.0 million

Source: New York Times/ Federal Election Commission

President Barack Obama (2012): Nick Knupffer/Flickr Commons (CC BY-SA 2.0).
Mitt Romney (2011): Gage Skidmore/Flickr Commons (CC BY-SA 2.0).

Traditional PACs

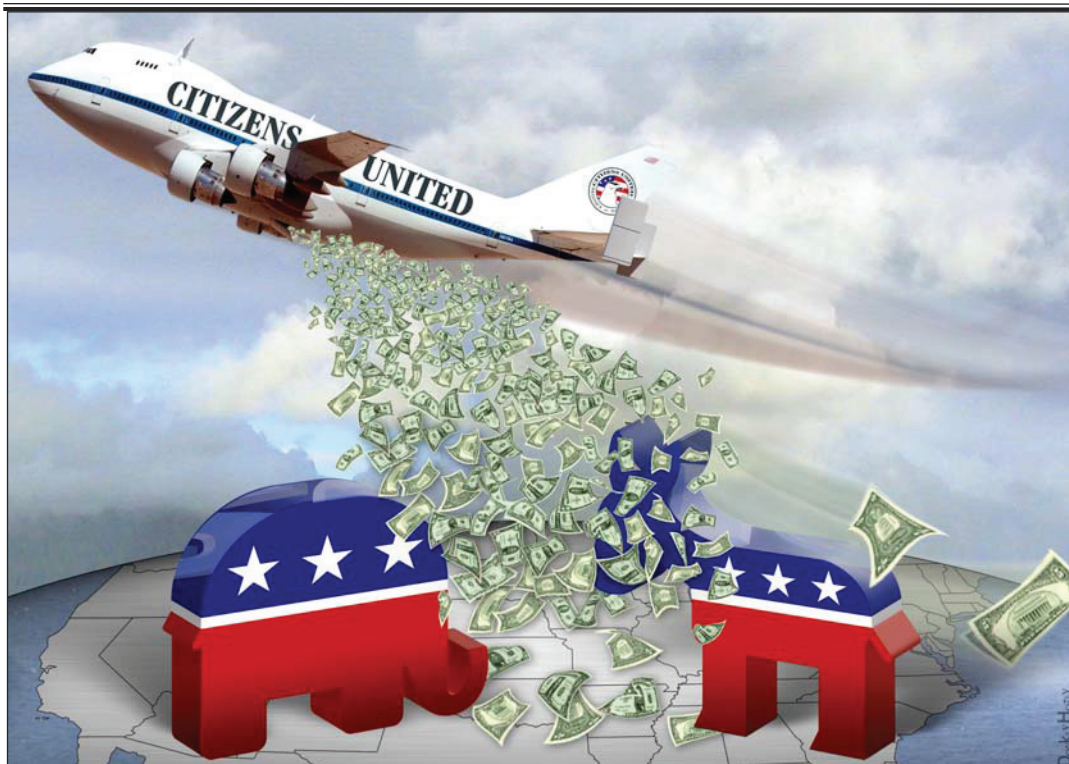
Political action committees (PACs) illustrate how direct contributions and independent spending may work in elections. In 1943, Congress passed a law that prohibited unions from contributing directly to federal candidates. In 1944, the Congress of Industrial Organizations (CIO), a national labor-union group, formed the first PAC to raise money for Franklin D. Roosevelt's re-election. The money for the PAC came from union members' voluntary contributions and not from the treasury of the CIO itself, and so the PAC did not violate the 1943 law.

Since that time, PACs have collected limited political contributions in virtually every federal election from corporate executives, company shareholders, union members, and other individuals, all of whom donate voluntarily. But PACs are independent and may not accept contributions from corporate, union, or other organizational *treasuries*.

PACs may contribute limited money directly to a candidate's campaign in each election and may also independently spend unlimited money to support or oppose candidates (e.g., funding political ads). PACs may not, however, coordinate activities with candidate campaigns.

Citizens United

The 1976 *Buckley* case did not decide whether the First Amendment also protected independent spending



"Citizens United Carpet Bombing Democracy," a political cartoon from January 2012. In the 1870s, cartoonist Thomas Nast began the tradition of using the elephant and the donkey as symbols of the Republican and Democratic parties, respectively. What do you think this cartoon is saying about the Supreme Court's *Citizens United* decision?

by corporations and unions. Supreme Court decisions following *Buckley* said corporations and unions were legally "persons" with the same free speech rights as natural persons.

Other Supreme Court decisions said that big spending by corporations and unions to support candidates would likely have a corrupting "undue influence" on them. Therefore, limiting the free speech of corporation and union "persons" was justified.

In 2002, Congress passed the Bipartisan Campaign Reform Act (BCRA) that prohibited nonprofit organizations from using money from their general treasuries to spend for "electioneering communications" close to an election. *Citizens United* is a conservative nonprofit that, in 2008, filed a complaint in federal court challenging the BCRA's constitutionality.

In 2010, the Supreme Court decided *Citizens United v. FEC*. In this landmark 5-4 decision, the Court ruled that the sections of the BCRA prohibiting nonprofits from making "electioneering communications" is a form of banning speech and therefore violated the First Amendment's free speech protection. The court also held that the government may not limit any independent political spending by nonprofit organizations or corporations and unions. Any of these organizations may also spend money directly from their treasuries.

Writing for the majority, Justice Anthony Kennedy went on to state that corporations, unions, and nonprofits are legally "persons" entitled to the same political speech rights as natural persons, like you or me. While the majority did not exactly say money equals speech, the justices indicated that money was necessary to make political speech effective in an election.

Kennedy further stated that independent expenditures, including those made by corporations, "do not give rise to corruption or the appearance of corruption." He limited the meaning of corruption only to acts of bribery, when a public officeholder accepts money, gifts, or something else of value in exchange for some specific official act. Laws already exist that make bribery a crime.

Nevertheless, the court agreed that the BCRA's campaign disclosure requirements were constitutional since they helped voters make informed choices. The Court did not rule on the constitutionality of barring corporations and unions from using their treasuries to finance *direct contributions* to candidates. This remains illegal.

Justice John Paul Stevens concurred (agreed) that the disclosure requirements are constitutional. He dissented (disagreed), however, from the Court's main decision, arguing that the BCRA did not ban political speech at all. Instead, the law only regulated the spending of money in an election.

He argued that only "human speakers" and not corporations are in danger of having their political speech banned. "Although they make enormous contributions to our society," he wrote, "corporations are not actually members of it." He noted how corporations cannot vote or run for office, and they can even be foreign-owned corporations affecting U.S. elections.

Stevens argued that the majority decision would undermine American democracy. "Our lawmakers have a compelling constitutional basis, if not also a democratic duty," he wrote, "to take measures designed to guard against the potentially deleterious [damaging] effects of corporate spending in local and national races."

Justice Clarence Thomas concurred with the majority decision, but unlike Stevens he dissented from the part about disclosure requirements. He believed that the requirements should be struck down as unconstitutional. He cited previous Supreme Court decisions that upheld the “right to anonymous speech” to provide voters with relevant information.

Moreover, Thomas warned that forced disclosure of donors’ names could lead to retaliation and threats by their opponents. He cited examples of opponents of a state ballot proposition publishing the names and addresses of the proposition’s supporters. Threats and intimidation against the supporters followed. This, he argued, fundamentally restricts speech through fear of retaliation.

Super-PACs and ‘Dark Money’

Soon after the *Citizens United* decision, candidates quickly began to form new fundraising committees called “super-PACs.” Under FEC regulations, super-PACs may receive unlimited contributions from individuals and the treasuries of corporations, unions, and non-profits. They may then spend unlimited amounts of money for TV ads and other independent spending to support or oppose candidates in federal elections. But they still may not give money *directly* to candidates or parties, as traditional PACs do, and are also prohibited from cooperating with candidate campaigns.

Super-PACs are required to publicly disclose their donor contributions and independent expenditures. But donors soon discovered that they could make unlimited contributions to tax-exempt nonprofit groups classified as “social welfare organizations” and avoid the disclosure laws. These contributions have been called “dark money.”

Super-PACs and dark money accounted for the majority of the \$2 billion spent in the 2012 presidential campaigns. Much of the money was used for “attack ads” against candidates the donors opposed.

The Debate over Money in Elections

The *Citizens United* decision sparked a national debate. Many today argue that big money is corrupting America’s elections. They claim that:

- Wealthy donors are more likely to gain greater access to influence elected officials than ordinary voters.
- Elected officials are more likely to act in favor of the special interests of wealthy donors than the interests of the general public.
- Elected officials are more likely to fear that if they oppose the special interests of major donors, those donors will withdraw their support in the next election, or worse, back an opponent.
- Multimillion-dollar spending by super-PACs and dark money is likely to weaken political party control of their platforms, nomination of candidates, and campaign advertising.

Why Do Corporations Have Rights?

The 14th Amendment, ratified in 1868, prohibited states from “. . . depriving any person of life, liberty, or property, without due process of law. . . .” Twenty years later, the Supreme Court in *Pembina v. Pennsylvania* ruled there was no doubt that private corporations are legally persons. “Such corporations,” the court reasoned, “are merely associations of individuals united for a special purpose. . . .” The United States Code, the collection of laws enacted by Congress, has since stated that “. . . the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals. . . .”

The Supreme Court applied some First Amendment rights to corporations in the 1936 case of *Grosjean v. American Press Co.* This decision involved a newspaper that a state government taxed in order to retaliate against its criticism.

In 1976, the court’s *Buckley v. Valeo* decision held that spending money to influence elections is protected as freedom of speech under the First Amendment. *Citizens United* in 2010 applied this right to corporations for “independent expenditures.”

Therefore, corporations legally possess the right of “political speech” the same as natural persons do under the First Amendment. However, corporations do not enjoy all constitutional rights such as the right to vote.

Corporations are legally persons with certain rights, including freedom of speech. Do you agree or disagree with this concept in American law? Why or why not?

However, based on its *Citizen United* decision, the Supreme Court would not consider any of these activities corrupting unless bribery is involved. The *Citizen’s United* decision flatly stated that greater access to candidates enjoyed by wealthy donors or organizations is not election corruption.

Supporters of the *Citizens United* decision warn that to broaden election corruption beyond bribery to include activities such as those listed above would threaten freedom of speech. The American Civil Liberties Union (ACLU) issued a statement in support of *Citizens United*, warning against “campaign finance regulation premised on the notion that the answer to money in politics is *to ban political speech.*”

“Our system of free expression,” the ACLU’s statement continues, “is built on the premise that the people get to decide what speech they want to hear; it is not the role of the government to make that decision for them.”

Supporters also point out that big-money donors are not guaranteed victory for their candidates. More speech can hurt as much as it can help candidates. “Simply put,” says Citizens United President David N. Bossie, “since the *Citizens United* decision there is more free speech in America . . . In fact, the candidates with the biggest super-PAC war chests have often lost.” In the 2016 presidential race, for example, the largest super-PAC supported Jeb Bush with \$100 million, but Bush still had to drop out of the race. ▶

Opponents of the *Citizens United* decision say that big money by itself in today's elections has a corrupting "undue influence" on candidates and elected officials. They argue that Theodore Roosevelt was concerned about large corporation donations, not bribery. A "unity statement" signed by numerous campaign-reform organizations states, "When elected representatives only hear the policy preferences of the very rich it distorts government's responsiveness to the people."

Other opponents argue that big money in elections has caused "political inequality." According to this argument, wealthy donors with their super-PACs, dark money, and negative ads drown out the voices of most citizens. Liz Kennedy of Demos, a campaign-reform nonprofit, cites the 2012 election to show that *Citizens United* has "allowed concentrated big money in politics to increase, further marginalizing those without vast wealth in our political system."

Some reformers say the best solution is to adopt public financing of elections, while others say that it is enough to just strengthen disclosure laws that the

Supreme Court has already ruled to be constitutional. Almost all critics argue that the *Citizens United* decision should be overturned.

But as the ACLU statement notes, the "mixture of money and politics" would not end even if *Citizens United* was overturned. That mixture has a long history, and the best course of action forward remains a central debate of our national politics.

DISCUSSION & WRITING

1. Do you think money has corrupted American elections? Why or why not?
2. Compare traditional PACs with super-PACs. What are the main differences?
2. Do you agree or disagree that the First Amendment's free speech clause should ban any limits on super-PAC contributions and independent spending? Why?
3. Do you think the laws that bar corporations and unions from making any *direct contributions* to candidates should be repealed? Why or why not?

ACTIVITY: To Reform or Not to Reform

Both supporters and opponents of the Supreme Court's *Citizen's United* decision agree that campaign financing should be fair. They might disagree, however, on the best way to achieve fairness. Below are four descriptions of varying options on campaign finance reform, including no reform at all. Which option do you think is the best?

1. Each student will choose one of the options on campaign finance reform and write a brief essay, defending it by using information provided in the article.
2. Students will then meet in small groups to argue for their choices.
3. The groups will report the results of their discussions to the class.
4. Finally, the class will vote on which campaign-finance option is the best.

Campaign Finance Reforms

Overturn *Citizens United*

Add an amendment to the Constitution that overturns *Citizens United* in one or both of the following ways:

- Congress and the states may set reasonable limits on contributions and spending in elections.
- Only human beings are persons who are entitled to freedom of speech under the First Amendment.

Note that an amendment requires two-thirds vote of both houses of Congress plus ratification by three-fourths of the states, or, a constitutional convention that has never been tried.

Establish Public Financing for Elections

Public financing plans may be voluntary or required by law. One plan calls for matching government money with contributions to a candidate up to a certain amount, like \$200 per donor. Another plan provides a set government grant to each candidate and prohibits any other contributions.

Other reformers propose that the government gives every registered voter a voucher worth a specific amount, like \$200. Every voter may use the voucher to contribute to one or more candidates, who then cash the vouchers to use in their campaigns.

Enact Stronger Disclosure Laws

First, repeal the tax-code provisions that allow dark money donors to be hidden from public view. Stronger contribution and spending disclosure laws would also have to require frequent reporting of who gave how much and for what purpose. Such information would have to be easily available to the public.

Oppose Reforms

Reforms that limit money in elections have suppressed free speech, led to PACs that have weakened political parties, and made it more difficult for newcomer candidates to raise money. Reforms for disclosure of donor information have led to retaliation. The government should instead use its resources to investigate and prosecute cases of bribery.

Standards Addressed

Elections, Money, and the First Amendment

National Civics Standard 1: Understands ideas about civic life, politics, and government. **Middle School:** (3) Knows institutions that have the authority to direct or control the behavior of members of a society (e.g., a school board, state legislature, courts, Congress). **High School:** (2) Knows formal institutions that have the authority to make and implement binding decisions . . . (3) Understands the nature of political authority (e.g., characteristics such as legitimacy, stability, limitations).

National Civics Standard 4: Understands the concept of a constitution, the various purposes that constitutions serve, and the conditions that contribute to the establishment and maintenance of constitutional government. **High**

School: (3) Understands how constitutions may limit government's power in order to protect individual rights and promote the common good. (7) Knows the social, economic, and political conditions that foster constitutional government.

National Civics Standard 20: Understands the roles of political parties, campaigns, elections, and associations and groups in American politics. **Middle School:** (5) Knows how and why Americans become members of associations and groups, and understands how membership in these associations provides individuals with opportunities to participate in the political process.

High School: (6) Understands the significance of campaigns and elections in the American political system, and knows current criticisms of campaigns and proposals for their reform. (8) Understands the extent to which associations and groups enhance citizen participation in American political life.

National Civics Standard 25: Understands issues regarding personal, political, and economic rights. **Middle School:** (4) Understands the importance to individuals and society of such political rights as the right to vote and run for public office and the freedom of speech, press, assembly, and petition. **High School:** (6) Understands how personal, political, and economic rights are secured by constitutional government and by such means as the rule of law, checks and balances, an independent judiciary, and a vigilant citizenry.

California H-SS Standard 8.3: Students understand the foundation of the American political system and the ways in which citizens participate in it. (6) Describe the basic law-making process and how the Constitution provides numerous opportunities for citizens to participate in the political process and to monitor and influence government (e.g., function of elections, political parties, interest groups).

California H-SS Standard 12.3: Students evaluate and take and defend positions on what the fundamental values and principles of civil society are (i.e., the autonomous sphere of voluntary personal, social, and economic relations that are not part of government), their interdependence, and the meaning and importance of those values and principles for a free society. (1) Explain how civil society provides opportunities for individuals to associate for social, cultural, religious, economic, and political purposes. (2) Explain how civil society makes it possible for people, individually or in association with others, to bring their influence to bear on government in ways other than voting and elections.

Common Core State Standards

ELA-Literacy.SL.11-12/9-10.1: Initiate and participate effectively in a range of collaborative discussions (one-on-one, in groups, and teacher-led) with diverse partners on grades 11-12/9-10 topics, texts, and issues, building on others' ideas and expressing their own clearly and persuasively.

ELA-Literacy.SL.9-10.1.d: Respond thoughtfully to diverse perspectives, summarize points of agreement and disagreement, and, when warranted, qualify or justify their own views and understanding and make new connections in light of the evidence and reasoning presented.

ELA-Literacy.SL.11-12.1.d: Respond thoughtfully to diverse perspectives; synthesize comments, claims, and evidence made on all sides of an issue; resolve contradictions when possible; and determine what additional information or research is required to deepen the investigation or complete the task.

ELA-Literacy.SL.11-12.3: Evaluate a speaker's point of view, reasoning, and use of evidence and rhetoric, assessing the stance, premises, links among ideas, word choice, points of emphasis, and tone used.

ELA-Literacy.SL.9-10.6: Adapt speech to a variety of contexts and tasks, demonstrating command of formal English when indicated or appropriate. (See grades 9-10 Language standards 1 and 3 . . . for specific expectations.)

ELA-Literacy.SL.11-12.6: Adapt speech to a variety of contexts and tasks, demonstrating a command of formal English when indicated or appropriate. (See grades 11-12 Language standards 1 and 3 . . . for specific expectations.)

ELA-Literacy.RH.9-10.1: Cite specific textual evidence to support analysis of . . . secondary sources, attending to such features as the date and origin of the information.

ELA-Literacy.RH.9-10.2: Determine the central ideas or information of a . . . secondary source; provide an accurate summary of how key events or ideas develop over the course of the text.

ELA-Literacy.RH.9-10.4: Determine the meaning of words and phrases as they are used in a text, including vocabulary describing political, social, or economic aspects of history/social science.

ELA-Literacy.RH.9-10.10: By the end of grade 10, read and comprehend history/social studies texts in the grades 9-10 text complexity band independently and proficiently.

ELA-Literacy.RH.11-12.1: Cite specific textual evidence to support analysis of . . . secondary sources, connecting insights gained from specific details to an understanding of the text as a whole.