When you hear the term “civil rights,” which rights come to mind? Perhaps they include freedom of speech and assembly, the right to vote, and other actions frequently associated with political participation. More broadly, however, civil rights refer to any legally enforceable freedom of action. Some civil rights — e.g., life, liberty, and the pursuit of happiness — were so fundamental, so inextricably linked to a free society, that the Framers considered them to be inalienable. That is, they could not be voluntarily waived or surrendered. If, for instance, someone consented to labor for another, that consent could be revoked at any time.

To Enlightenment thinkers, classical liberals, British colonists in America, and, later, the Founding generation, the right to private property was intimately connected to the individual. Put another way, it was inalienable. A particular property could of course be sold or otherwise surrendered, but not the right to own and control property per se. John Locke argued that the right to own and control a piece of land, for example, arose by laboring to improve the land or draw resources from it. The Framers also understood property as encompassing much more than tangible objects or land. Conscience, according to James Madison, was “the most sacred of all property.”

Property and its owners, then, were bound together as intimately as individuals and their expressive activities — our freedom of speech, our right to march in protest, our right to cast ballots for our preferred policies and candidates. Our property — our beliefs, our opinions, our faculties, our things — is part of who we are. The ability to freely pursue property in all its forms was considered an essential freedom. It was at the heart of the pursuit of happiness.

While we may define “happiness” today in terms of contentment or even entertainment, to 18th century Americans the idea meant much more. Happiness encompassed the ability to take care of oneself and one’s family, to build wealth and enjoy the fruits of one’s labor. It was attained by living in liberty and by practicing virtue. Understanding the term as the Founders did is key to our understanding of the Declaration’s pronouncement that governments are instituted to protect our inalienable rights to “life, liberty, and the pursuit of happiness.”
Debate Over a Bill of Rights

The Constitution was written with several ends in mind. Listed in the Preamble, they had the multi-generational goal of ensuring “the blessings of liberty to ourselves and our posterity.” The now-familiar constitutional principles such as separation of powers, checks and balances, and our federal system served to limit and divide power in order to prevent tyranny and frustrate excessive government control over individual liberties.

With this purpose and structure in place, the Constitution submitted to the states for approval in 1787 did not contain a bill of rights. The Federalists, who supported the Constitution as written, argued that bills of rights were needed only against kings who wielded unlimited power, but they weren’t necessary for a free, popular government of enumerated powers. As Alexander Hamilton wrote in Federalist 84, “[W]hy declare that things shall not be done which there is no power to do?”

Federalists went even further. Hamilton and Madison argued that the addition of a bill of rights was not only unnecessary, but could even be dangerous. Rights were sacred spaces around sovereign individuals into which government could not justly intrude. Carving out certain secured rights might cause people to think that, but for those few exceptions, other rights were not secured. In short, a bill of rights at the end of the Constitution might result in a massive increase in government power that would turn the very idea of limited government on its head.

Madison’s Promise and the Ninth Amendment

Several states sent lists of proposed amendments to Congress. With the Constitution still in doubt, Madison promised that Congress would take up a bill of rights after ratification. In the summer of 1789, he kept his promise and introduced draft amendments in the House. Mindful of his own warning against identifying a limited list of rights, Madison included what would ultimately become the Ninth Amendment: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

The Ninth Amendment would be a signal that while government powers were few and definite, the rights of naturally-free individuals were indefinite and numerous, even innumerable. Though maligned in modern times by the late Supreme Court nominee Robert Bork as an “inkblot,” the amendment served in the Founding era, and was intended to serve for all time, as a reminder that the list of individual rights and due process protections in the Bill of Rights was not exhaustive. Madison wrote later in 1792, “As a man is said to have a right to his property, he may be equally said to have a property in his rights.”

The Supreme Court and Liberty

Congress approved twelve amendments and sent them to the states for ratification. Of those 12, the states ratified ten, which became the Bill of Rights in 1791. Because the limits on government applied only at the federal level and the scope of federal power was relatively small, federal lawmaking faced few constitutional challenges for several decades. The states, however, were not subject to the federal Bill of Rights and condoned numerous violations — slavery being the most egregious.

Not until the 14th Amendment, ratified 77 years later in 1868, were the states prevented from making or enforcing “any law which shall abridge the privileges or immunities of citizens of the United States; ... deprive any person of life, liberty, or property, without due process of law; [or] deny to any person within its jurisdiction the equal protection of the laws.”
Through a series of cases involving rights, the Supreme Court identified the particular rights that would be “incorporated,” i.e., applied to limit state power.

But which rights would be protected from unjust abrogation by state governments? Through a series of cases involving rights ranging from freedom of religion to protection against cruel and unusual punishment, the Supreme Court identified the rights that would be “incorporated,” i.e., applied to limit state power. Generally, the Court asked whether claimed rights were “fundamental,” which depended in turn on whether they were “implicit in the concept of ordered liberty” or “rooted in the traditions and conscience of our people.” Not all rights qualified, and that meant some rights would be less vigorously protected than others.

In cases like *Meyer v. Nebraska* (1923) and *Pierce v. Society of Sisters* (1925) the right to liberty was interpreted broadly. Under the 14th Amendment’s Due Process Clause, the Court protected the right to educate one’s children in a private school (*Pierce*) and the right to teach young children a foreign language (*Meyer*). Further, the Court held in *Meyer*, if government wanted to bring about an outcome in society, no matter how noble, it could not go about reaching that goal via unconstitutional means. “That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected….a desirable end cannot be promoted by prohibited means.”

In *Lochner v. New York* (1905), the Court struck down a state law limiting the number of hours bakers could work. The Court held that a law of this scope was outside of the legislature’s constitutional power, and that citizens’ liberty included the right to earn an honest living, as well as the right for employers and employees to enter into contracts. This case began what is now called the “Lochner Era” during which the Court interpreted the Due Process Clause of the Fourteenth Amendment as protecting economic rights to the same degree as other personal rights. For this reason, and because the Court’s rulings came into direct conflict with Congress’s attempts to intervene in the marketplace and redistribute wealth, many regard *Lochner* Era rulings as examples of judicial activism.

**The New Deal and the Switch in Time that Saved Nine**

After several economic regulations advanced by President Franklin D. Roosevelt’s administration were struck down by the Court’s conservative bloc, Roosevelt proposed the Judicial Procedures Reform Bill of 1937, giving the President the power to appoint a new justice to the high Court for each current justice over the age of 70-1/2. This would have resulted in six new justices at that time. In what is now called “the switch in time that saved nine,” Justice Owen Roberts, who often sided with the conservatives, voted to uphold a Washington state minimum wage law for women. That case, *West Coast Hotel v. Parrish* (1937) marked the end of the *Lochner* Era. The new Court majority held that “deprivation of liberty to contract is forbidden by the Constitution if without due process of law, but restraint or regulation of this liberty, if reasonable in relation to its subject and if adopted for the protection of the community against evils menacing the health, safety, morals and welfare of the people, is due process.”
While the Supreme Court had previously treated individual economic freedom as fundamental to “ordered liberty” under the Due Process Clause, after 1937 these rights were to be subordinated. Moreover, another part of the 14th Amendment, the Privileges or Immunities clause, offered no further protection. Decades earlier in the Slaughterhouse Cases (1873), the Court had limited the scope of “privileges or immunities” to activities such as petitioning government, access to navigable waters, and the writ of habeas corpus. Economic rights were not included.

Footnote 4

In U.S. v. Carolene Products Company (1938), the Court held that Congress could ban “filled milk” as a health hazard (a charge for which there was no evidence, but which protected large corporate milk producers from smaller competitors selling a lower-cost product). “Filled milk” refers to skim milk to which some form of fat other than milk fat has been added. Often vegetable oil was used. The result resembled cream, but was less expensive. Carolene might have been just another case upholding Congress’s power to regulate economic activity, but a single footnote supplied a rationale for elevating some rights over others.

In Footnote 4, the Court established a hierarchy of rights. In the top tier, entitled to the highest level of protection, are “fundamental” rights such as some of those secured by the first ten amendments to the Constitution, access to key political processes such as voting, and equal treatment of “discrete and insular minorities.” Government restrictions on those rights are rigorously scrutinized to determine their necessity and effectiveness. To be upheld, a restriction must be narrowly tailored to serve a compelling government interest. By contrast, in the bottom tier, are “non-fundamental” economic liberties such as the right to own property and earn an honest living. Government regulation of economic liberties is subject only to a “rational basis” test: The regulation is presumed to be constitutional; the burden is on the citizen to prove it is not; and the regulation will be upheld if it is reasonably related to a legitimate government purpose.

The history of the Court’s treatment of various rights suggests that certain types of activities — the ones we think of today as implicating “civil rights” — receive the greatest constitutional protection. The question whether other rights just as fundamental to our nature have been “den[ied] or disparage[d]” should be the subject of searching inquiry.

Critical Thinking Questions

1. How did the Founding generation understand “property”?
2. What was a chief reason that Federalists opposed a listing of specific liberties (a bill of rights)?
3. Which branch of government do you believe is best suited to determine which rights government cannot infringe? Why?
4. Was the Court right in Carolene Products to distinguish between types of rights? Explain.
5. Are civil and economic liberties different? If so, why? If not, why not?
6. Does Footnote 4 of Carolene Products prove the Federalists right about the dangers of listing certain rights at the end of the Constitution, or was the footnote consistent with the Constitution and the goal of protecting liberty?
AGREE OR DISAGREE?

Directions: Mark each statement with an “A” if you agree or a “D” if you disagree.

_____ 1. Government should be able to punish the Sierra Club if it were to run an ad immediately before a general election, trying to convince voters to disapprove of a Congressman who favors logging in national forests.

_____ 2. Government should be able to punish the National Rifle Association if it were to publish a book urging the public to vote for the challenger because the incumbent U. S. Senator supports a handgun ban.

_____ 3. Government should be able to punish the American Civil Liberties Union if it creates a website telling the public to vote for a presidential candidate in light of that candidate’s defense of free speech.

_____ 4. “The First Amendment protects speech and speaker, and the ideas that flow from each.”

_____ 5. “If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.”

_____ 6. “When Government seeks to use its full power, including the criminal law, 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.”
BACKGROUND ESSAY

CITIZENS UNITED V. F.E.C. (2010)

Since the rise of modern “big business” in the Industrial Age, Americans have expressed concerns about the influence of corporations and other “special interests” in our political system. In 1910 President Theodore Roosevelt called for laws to “prohibit the use of corporate funds directly or indirectly for political purposes ... [as they supply] one of the principal sources of corruption in our political affairs.” Although Congress had already made such corporate contributions illegal with the Tillman Act (1907), Roosevelt’s speech nonetheless prompted Congress to amend this law to add enforcement mechanisms with the 1910 Federal Corrupt Practices Act. Future Congresses would enlarge the sphere of “special interests” barred from direct campaign contributions through — among others — the Hatch Act (1939), restricting the political campaign activities of federal employees, and the Taft-Hartley Act (1947), prohibiting labor unions from expenditures that supported or opposed particular federal candidates.

Collectively, these laws formed the backbone of America’s campaign finance laws until they were replaced by the Federal Elections Campaign Acts (FECA) of 1971 and 1974. FECA of 1971 strengthened public reporting requirements of campaign financing for candidates, political parties and political committees (PACs). The FECA of 1974 added specific limits to the amount of money that could be donated to candidates by individuals, political parties, and PACs, and also what could be independently spent by people who want to talk about candidates. It provided for the creation of the Federal Election Commission, an independent agency designed to monitor campaigns and enforce the nation’s political finance laws. Significantly, FECA left members of the media, including corporations, free to comment about candidates without limitation, even though such commentary involved spending money and posed the same risk of quid pro quo corruption as other independent spending.

In Buckley v. Valeo (1976), however, portions of the FECA of 1974 were struck down by the Supreme Court. The Court deemed that restricting independent spending by individuals and groups to support or defeat a candidate interfered with speech protected by the First Amendment, so long as those funds were independent of a candidate or his/her campaign. Such restrictions, the Court held, unconstitutionally interfered with the speakers’ ability to convey their message to as many people as possible. Limits on direct campaign contributions, however, were permissible and remained in place. The Court’s rationale for protecting independent spending was not, as is sometimes stated, that the Court equated spending money with speech. Rather, restrictions on spending money for the purpose of engaging in political speech unconstitutionally interfered with the First Amendment-protected right to free speech. (The Court did mention that direct contributions to candidates could be seen as symbolic expression, but concluded that they were generally restrictable despite that.)

The decades following Buckley would see a great proliferation of campaign spending. By 2002, Congress felt pressure to address this spending and passed the Bipartisan Campaign Finance Reform Act (BCRA). A key provision of the BCRA was a ban on speech that was deemed “electioneering communications” — speech that named a federal candidate within 30 days of a primary election or 60 days of a general election that was paid for out of a “special interest’s” general fund (PACs were left untouched by this prohibition). An immediate First Amendment challenge to this provision — in light of the precedent set in Buckley — was mounted in McConnell v. F.E.C. (2003). But the Supreme Court upheld it as a restriction justified by the need to prevent both “actual corruption...and the appearance of corruption.”
Another constitutional challenge to the BCRA would be mounted by the time of the next general election. Citizens United, a nonprofit organization, was primarily funded by individual donations, with relatively small amounts donated by for-profit corporations as well. In the heat of the 2008 primary season, Citizens United released a full-length film critical of then-Senator Hillary Clinton entitled *Hillary: the Movie*. The film was originally released in a limited number of theaters and on DVD, but Citizens United wanted it broadcast to a wider audience and approached a major cable company to make it available through their “On-Demand” service. The cable company agreed and accepted a $1.2 million payment from Citizens United in addition to purchased advertising time, making it free for cable subscribers to view.

Since the film named candidate Hillary Clinton and its On-Demand showing would fall within the 30-days-before-a-primary window, Citizens United feared it would be deemed an “electioneering communications” under the BCRA. The group mounted a preemptive legal challenge to this aspect of the law in late 2007, arguing that the application of the provision to *Hillary* was unconstitutional and violated the First Amendment in their circumstance. A lower federal court disagreed, and the case went to the Supreme Court in early 2010.

In a 5-4 decision, the Supreme Court ruled in *Citizens United v. F.E.C.* that: 1) the BCRA’s “electioneering communication” provision did indeed apply to *Hillary* and that 2) the law’s ban on corporate and union independent expenditures was unconstitutional under the First Amendment’s speech clause. “Were the Court to uphold these restrictions,” the Court reasoned, “the Government could repress speech by silencing certain voices at any of the various points in the speech process.” *Citizens United v. F.E.C.* extended the principle, set 34 years earlier in *Buckley*, that restrictions on spending money for the purpose of engaging in political speech unconstitutionally burdened the right to free speech protected by the First Amendment.

**Comprehension and Critical Thinking Questions**

1. Summarize the ways in which various campaign finance laws have restricted the political activities of groups, including corporations and unions.
2. What was the main idea of the ruling in *Buckley v. Valeo*?
3. What political activity did the group *Citizens United* engage in during the 2008 primary election? How was this activity potentially illegal under the BCRA?
4. How did the Supreme Court rule in *Citizens United v. F.E.C.*? In what way is it connected to the ruling in *Buckley*?
5. Do you believe that the First Amendment should protect collective speech (i.e. groups, including “special interests”) to the same extent it protects individual speech? Why or why not?
6. What if the government set strict limits on people spending money to get the assistance of counsel, or to educate their children, or to have abortions? Or what if the government banned candidates from traveling in order to give speeches? Would these hypothetical laws be unconstitutional under the reasoning the Court applied in *Buckley* and *Citizens United*? Why or why not?
# Timeline of Campaign Finance Reform Initiatives

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<tr>
<th>DATE</th>
<th>Law/Supreme Court Case</th>
<th>Main Effect</th>
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<td>1907</td>
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<td>1976</td>
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<td>2002</td>
<td>Bipartisan Campaign Finance Reform Act (BCRA)</td>
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Federalist #10 by James Madison (1787)

By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverced to the rights of other citizens, or to the permanent and aggregate interests of the community.

There are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects.

There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.

It could never be more truly said than of the first remedy, that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.

[Because] the causes of faction cannot be removed ... relief is only to be sought in the means of controlling its effects. ...If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote.

( Italics are Madison’s )

1. How does James Madison define a faction?

2. What does Madison argue serves as a “check” on the influence various factions may have on society?

3. Would the Federalist Papers have been legal under the BCRA?
DOCSUMENT B

Thomas Jefferson to Edward Carrington (1787)

I am persuaded myself that the good sense of the people will always be found to be the best army. They may be led astray for a moment, but will soon correct themselves. The people are the only censors of their governors: and even their errors will tend to keep these to the true principles of their institution. To punish these errors too severely would be to suppress the only safeguard of the public liberty. ...The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter. But I should mean that every man should receive those papers and be capable of reading them....

If once they become inattentive to the public affairs, you and I, and Congress, and Assemblies, judges and governors shall all become wolves.

1. What does Jefferson believe is “the basis of our governments”?
2. What does Jefferson believe is “the only safeguard of the public liberty”?
3. What does Jefferson seem to believe is a possible disadvantage of press freedom? Why does he find it acceptable?
4. What does Jefferson predict will happen if the people become inattentive to public affairs?

DOCUMENT C

The First Amendment (1791)

Congress shall make no law ... abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

1. Why did the Founders deem speech and assembly so vital to self-government?
2. List a variety of ways you see Americans “speak” and “assemble” in political life.
Dartmouth College v. Woodward (1819), Majority Opinion

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 its 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. Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs and to hold property... It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities that corporations were invented and are in use...

The opinion of the Court, after mature deliberation, is that this is a contract the obligation of which cannot be impaired without violating the Constitution of the United States. This opinion appears to us to be equally supported by reason and by the former decisions of this Court.

1. According to this unanimous opinion by Chief Justice John Marshall, what properties does a corporation possess?

2. In what actions may a corporation engage?

3. How would you explain the reasoning behind the decision that a corporation has an enforceable right to enter into contracts?
“The Bosses of the Senate,” Joseph Keppler (1889)

1. How does this cartoon express the concern of “quid pro quo” corruption?

2. What is the significance of the closed door with the sign above it in the upper left hand corner of the cartoon?

3. Did Madison’s assertion in *Federalist 10* (Document A) — that the republican principle will serve as a check on the influence of factions — apply in the cartoon’s time period? Does it apply today?
New Nationalism Speech, Theodore Roosevelt (1910)

[O]ur government, National and State, must be freed from the sinister influence or control of special interests. Exactly as the special interests of cotton and slavery threatened our political integrity before the Civil War, so now the great special business interests too often control and corrupt the men and methods of government for their own profit. We must drive the special interests out of politics. ... [E]very special interest is entitled to justice, but not one is entitled to a vote in Congress, to a voice on the bench, or to representation in any public office. The Constitution guarantees protection to property, and we must make that promise good. But it does not give the right of suffrage to any corporation.

1. What does Roosevelt mean by “special interests”?

2. Does this concept relate to Madison’s definition of “faction”? If so, how?

Buckley v. Valeo (1976), Majority Opinion

Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation. ...Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest possible protection to such political expression in order to assure unfettered exchange of ideas for the bringing about of political and social changes desired by the people. ...A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today’s mass society requires the expenditure of money.

1. Restate this excerpt from the Buckley ruling in your own words.

Citizens United is an organization dedicated to restoring our government to citizens’ control. Through a combination of education, advocacy, and grass roots organization, Citizens United seeks to reassert the traditional American values of limited government, freedom of enterprise, strong families, and national sovereignty and security. Citizens United’s goal is to restore the founding fathers’ vision of a free nation, guided by the honesty, common sense, and good will of its citizens. ...Citizens United has a variety of different projects that help it uniquely and successfully fulfill its mission. Citizens United is well known for producing high-impact, sometimes controversial, but always fact-based documentaries filled with interviews of experts and leaders in their fields.

1. Do you believe James Madison would consider Citizens United a faction? Why or why not?

2. Is Citizens United an “assembly” of people seeking to engage in political “speech?” Why or why not?

McConnell v. F.E.C. (2003), Majority Opinion

Because corporations can still fund electioneering communications with PAC money, it is ‘simply wrong’ to view the [BCRA] provision as a ‘complete ban’ on expression...

We have repeatedly sustained legislation aimed at ‘the corrosive effects of immense aggregations of wealth that are accumulated with the help of the corporate form.’ ...[T]he government has a compelling interest in regulating advertisements that expressly advocate the election or defeat of a candidate for federal office ... corporations and unions may finance genuine issue ads during those time frames by simply avoiding any specific reference to federal candidates, or ... by paying for the ad from a segregated fund [PAC].

1. Restate the McConnell opinion in your own words.

2. In your opinion, is the McConnell ruling consistent with the ruling in Buckley (Document G) in its interpretation of the First Amendment?

The F.E.C. has adopted 568 pages of regulations, 1,278 pages of explanations and justifications for those regulations, and 1,771 advisory opinions since 1975. ...[G]iven the complexity of the regulations and the deference courts show to administrative determinations, a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against F.E.C. enforcement must ask a governmental agency for prior permission to speak.

If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech. All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech.

At the founding, speech was open, comprehensive, and vital to society’s definition of itself; there were no limits on the sources of speech and knowledge. ...By suppressing the speech of manifold corporations, both for-profit and nonprofit, 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 will necessarily form in our Republic, but the remedy of ‘destroying the liberty’ of some factions is ‘worse than the disease’ [Federalist 10]. 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, including the criminal law, 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.

The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials.
Rapid changes in technology — and the creative dynamic inherent in the concept of free expression — counsel against upholding a law that restricts political speech in certain media or by certain speakers. Today, 30-second television ads may be the most effective way to convey a political message. Soon, however, it may be that Internet sources ... will provide citizens with significant information about political candidates and issues. Yet, [the BCRA] would seem to ban a blog post expressly advocating the election or defeat of a candidate if that blog were created with corporate funds. The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech.

1. How would you summarize the Court’s interpretation of the First Amendment?

2. How would you evaluate the Court’s analysis of *Federalist 10*?

3. The Court reasoned, “The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy.” Do you agree? What effect, if any, does this ruling have on the republican principle of the United States government?
Citizens United v. F.E.C. (2010), Dissenting Opinion

[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.

Unlike our colleagues, the Framers had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind. ...[M]embers of the founding generation held a cautious view of corporate power and a narrow view of corporate rights ... [and] they conceptualized speech in individualistic terms. If no prominent Framer bothered to articulate that corporate speech would have lesser status than individual speech, that may well be because the contrary proposition — if not also the very notion of “corporate speech” — was inconceivable.

On numerous occasions we have recognized Congress’s 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.’ 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. ...A democracy cannot function effectively when its constituent members believe laws are being bought and sold.

A regulation such as BCRA may affect the way in which individuals disseminate certain messages through the corporate form, but it does not prevent anyone from speaking in his or her own voice.

At bottom, 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.

1. How does the reasoning in the dissenting opinion differ from that of the Majority (Document J)?

2. How would you evaluate the dissenters’ statement, “A democracy cannot function effectively when its constituent members believe laws are being bought and sold.”
**Citizens United v. F.E.C. (2010), Concurring Opinion**

The Framers didn’t like corporations, the dissent concludes, and therefore it follows (as night the day) that corporations had no rights of free speech.

The lack of a textual exception for speech by corporations cannot be explained on the ground that such organizations did not exist or did not speak. To the contrary ... both corporations and voluntary associations actively petitioned the Government and expressed their views in newspapers and pamphlets. For example: An antislavery Quaker corporation petitioned the First Congress, distributed pamphlets, and communicated through the press in 1790. The New York Sons of Liberty sent a circular to colonies farther south in 1766. And the Society for the Relief and Instruction of Poor Germans circulated a biweekly paper from 1755 to 1757.

The dissent says that when the Framers “constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind.” That is no doubt true. All the provisions of the Bill of Rights set forth the rights of individual men and women — not, for example, of trees or polar bears. But the individual person’s right to speak includes the right to speak in association with other individual persons. Surely the dissent does not believe that speech by the Republican Party or the Democratic Party can be censored because it is not the speech of “an individual American.” It is the speech of many individual Americans, who have associated in a common cause, giving the leadership of the party the right to speak on their behalf. The association of individuals in a business corporation is no different — or at least it cannot be denied the right to speak on the simplistic ground that it is not “an individual American.”

1. Why does this Justice argue that the original understanding of the First Amendment does not allow for limitations on the speech of associations such as corporations and unions? Do you agree?
1. What does the cartoonist predict will be the effect of the Citizens United ruling?

2. What assumptions does the cartoonist seem to make about voters? Are they valid assumptions? Explain.

KEY QUESTION