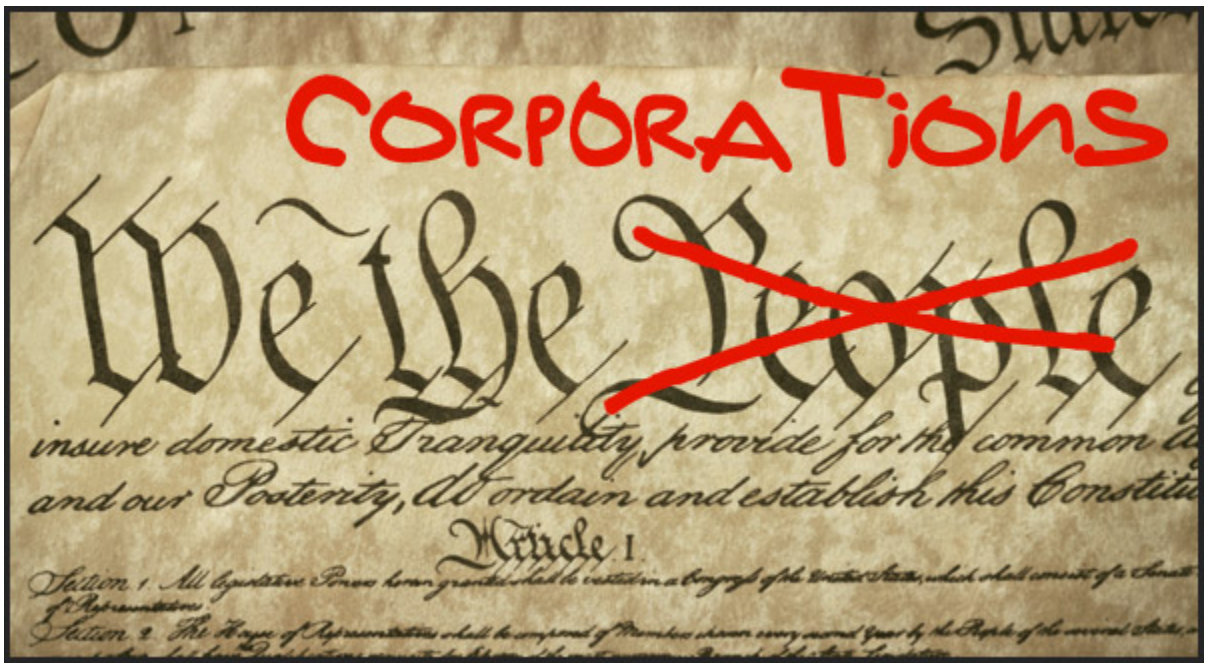
Citizens United Packet



This will be a MAJOR grade.

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?

A 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."

B BACKGROUND ESSAY
Citizens United v. F.E.C., 2010

During his 2010 State of the Union address, President Barack Obama did something very few presidents have done: he openly challenged a Supreme Court ruling in front of both chambers of Congress and members of the Supreme Court of the United States. That ruling, *Citizens United v. F.E.C.* (2010), and the President's commentary on it, reignited passions on both sides of a century-long debate: to what extent does the First Amendment protect the variety of ways Americans associate with one another and the diverse ways we "speak," "assemble," and participate in American political life? It is this speech – political speech – that the Founders knew was inseparable from the very concept of self government.

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 Teddy 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." Already having made such corporate contributions illegal with the Tillman Act of 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 restrict-able 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 BRCA 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 communications" 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?

Document I

1. Why does the Court say that current F.E.C. regulations results in citizens needing "permission to speak"?

2. Why does the Court say that "The First Amendment confirms the freedom to think for ourselves"?

3. The Court reasoned, "The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy." a) Do you agree? b) What effect, if any, does this ruling have on the republican principle of the United States government?(make sure you include the republican principle in your response)
a)

b)

Document J

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

2. How would you evaluate the dissenters statement, “A democracy cannot function effectively when its constituent members believe laws are being bought and sold.”

Document K

1. Why does this Justice (Document K) 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 or disagree and WHY?

Document L: “Another Dam Breaks”

1. What does the cartoonist predict will be the effect of the Citizens United ruling?

2. a) What assumptions does the cartoonist seem to make about voters? b) Are they valid assumptions? c) EXPLAIN

a)

b)_____

c)

Justices, 5-4, Reject Corporate Spending Limit

1. annotate the article

2. What did the 2002 McCain-Feingold Act do?

3. What was still banned?

4. List the Supreme Court justices in the article.

5. fill in the chart by summarizing ideas presented by each justice in the article

Justice Stevens	Justice Kennedy

6. What is YOUR impression of the article? a) Summarize the article in 4 sentences b) Do you agree/disagree with the decision? c) WHY? EXPLAIN

a) *

*

*

*

b)

c)

DOCUMENT I: *CITIZENS UNITED V. F.E.C.*, 2010

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. … given 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. **Why does the Court say that current F.E.C. regulations results in citizens needing "permission to speak"?**
2. **Why does the Court say that "The First Amendment confirms the freedom to think for ourselves"?**
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?**

Document J: Dissenting Opinion, *Citizens United v. F.E.C.*, 2010

[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 I)?**
2. **How would you evaluate the dissenters statement, "A democracy cannot function effectively when its constituent members believe laws are being bought and sold."**

Document K: Concurring Opinion, Citizens United v. F.E.C., 2010

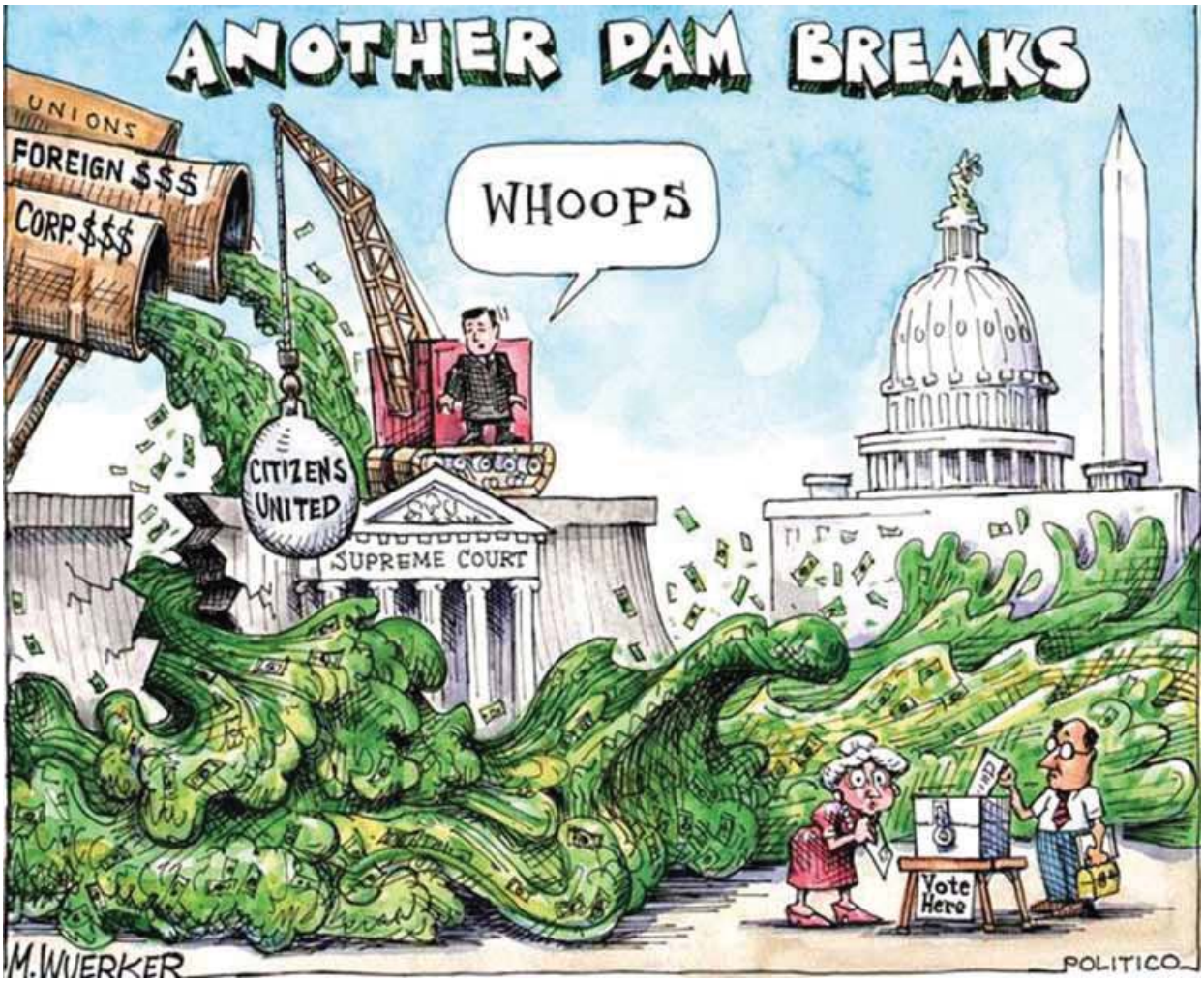
The Framers didn't like corporations, the dissent concludes, and therefore it follows (as night the day) that corporations had no rights of free speech.

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?**

Document L: "Another Dam Breaks," Matt Wuerker, 2010



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.**

January 21, 2010

Justices, 5-4, Reject Corporate Spending Limit

By ADAM LIPTAK

WASHINGTON — Overruling two important precedents about the First Amendment rights of corporations, a bitterly divided Supreme Court on Thursday ruled that the government may not ban political spending by corporations in candidate elections.

The 5-to-4 decision was a vindication, the majority said, of the First Amendment's most basic free speech principle — that the government has no business regulating political speech. The dissenters said that allowing corporate money to flood the political marketplace would corrupt democracy.

The ruling represented a sharp doctrinal shift, and it will have major political and practical consequences. Specialists in campaign finance law said they expected the decision to reshape the way elections were conducted. Though the decision does not directly address them, its logic also applies to the labor unions that are often at political odds with big business.

The decision will be felt most immediately in the coming midterm elections, given that it comes just two days after Democrats lost a filibuster-proof majority in the Senate and as popular discontent over government bailouts and corporate bonuses continues to boil.

President Obama called it "a major victory for big oil, Wall Street banks, health insurance companies and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans."

The justices in the majority brushed aside warnings about what might follow from their ruling in favor of a formal but fervent embrace of a broad interpretation of free speech rights.

"If the First Amendment has any force," Justice Anthony M. Kennedy wrote for the majority, which included the four members of the court's conservative wing, "it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech."

The ruling, Citizens United v. Federal Election Commission, No. 08-205, overruled two precedents: Austin v. Michigan Chamber of Commerce, a 1990 decision that upheld restrictions on corporate spending to support or oppose political candidates, and McConnell v. Federal Election Commission, a 2003 decision that upheld the part of the Bipartisan Campaign Reform Act of 2002 that restricted campaign spending by corporations and unions.

The 2002 law, usually called McCain-Feingold, banned the broadcast, cable or satellite transmission of "electioneering communications" paid for by corporations or labor unions from their general funds in the 30 days before a presidential primary and in the 60 days before the general elections.
The law, as narrowed by a 2007 Supreme Court decision, applied to communications "susceptible to no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

The five opinions in Thursday's decision ran to more than 180 pages, with Justice John Paul Stevens contributing a passionate 90-page dissent. In sometimes halting fashion, he summarized it for some 20 minutes from the bench on Thursday morning.

Joined by the other three members of the court's liberal wing, Justice Stevens said the majority had committed a grave error in treating corporate speech the same as that of human beings.
Eight of the justices did agree that Congress can require corporations to disclose their spending and to run disclaimers with their advertisements, at least in the absence of proof of threats or reprisals. "Disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way," Justice Kennedy wrote.
Justice Clarence Thomas dissented on this point.

The majority opinion did not disturb bans on direct contributions to candidates, but the two sides disagreed about whether independent expenditures came close to amounting to the same thing.

"The difference between selling a vote and selling access is a matter of degree, not kind," Justice Stevens wrote. "And selling access is not qualitatively different from giving special preference to those who spent money on one's behalf."

Justice Kennedy responded that "by definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate."

The case had unlikely origins. It involved a documentary called "Hillary: The Movie," a 90-minute stew of caustic political commentary and advocacy journalism. It was produced by Citizens United, a conservative nonprofit corporation, and was released during the Democratic presidential primaries in 2008.

Citizens United lost a suit that year against the Federal Election Commission, and scuttled plans to show the film on a cable video-on-demand service and to broadcast television advertisements for it. But the film was shown in theaters in six cities, and it remains available on DVD and the Internet.

The majority cited a score of decisions recognizing the First Amendment rights of corporations, and Justice Stevens acknowledged that "we have long since held that corporations are covered by the First Amendment."

But Justice Stevens defended the restrictions struck down on Thursday as modest and sensible. Even before the decision, he said, corporations could act through their political action committees or outside the specified time windows.

The McCain-Feingold law contains an exception for broadcast news reports, commentaries and editorials. But that is, Chief Justice John G. Roberts Jr. wrote in a concurrence joined by Justice Samuel A. Alito Jr., "simply a matter of legislative grace."

Justice Kennedy's majority opinion said that there was no principled way to distinguish between media corporations and other corporations and that the dissent's theory would allow Congress to suppress political speech in newspapers, on television news programs, in books and on blogs.

Justice Stevens responded that people who invest in media corporations know "that media outlets may seek to influence elections." He added in a footnote that lawmakers might now want to consider requiring corporations to disclose how they intended to

spend shareholders' money or to put such spending to a shareholder vote.

On its central point, Justice Kennedy's majority opinion was joined by Chief Justice Roberts and Justices Alito, Thomas and Antonin Scalia. Justice Stevens's dissent was joined by Justices Stephen G. Breyer, Ruth Bader Ginsburg and Sonia Sotomayor.

When the case was first argued last March, it seemed a curiosity likely to be decided on narrow grounds. The court could have ruled that Citizens United was not the sort of group to which the McCain-Feingold law was meant to apply, or that the law did not mean to address 90-minute documentaries, or that video-on-demand technologies were not regulated by the law. Thursday's decision rejected those alternatives.

Instead, it addressed the questions it proposed to the parties in June when it set down the case for an unusual second argument in September, those of whether Austin and McConnell should be overruled. The answer, the court ruled Thursday, was yes.

"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," Justice Kennedy wrote. "This is unlawful. The First Amendment confirms the freedom to think for ourselves."