MONEY, POLITICS, AND THE CONSTITUTION

Beyond *Citizens United*

Monica Youn, editor

Sponsored by The Century Foundation and the Brennan Center for Justice at NYU School of Law

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Money, Politics, and the Constitution

About the Brennan Center for Justice

The Brennan Center for Justice at New York University School of Law is a nonpartisan public policy and law institute that focuses on the fundamental issues of democracy and justice. Our work ranges from voting rights to campaign finance reform, from racial justice in criminal law to presidential power in the fight against terrorism. A singular institution—part think tank, part public interest law firm, part advocacy group—the Brennan Center combines scholarship, legislative and legal advocacy, and communications to win meaningful, measurable change in the public sector. Founded in 1995 by the family and clerks of Justice William J. Brennan, Jr., the Center is dedicated to his vision of "common human dignity."

From its beginning, the Brennan Center has played a central legal and intellectual role on the subject of money and politics. It helped draft the Bipartisan Campaign Reform Act of 2002 (BCRA), and successfully defended the law before the U.S. Supreme Court as co-lead counsel in *McConnell v. FEC*. In the wake of *Citizens United*, the Center leads the legal defense of campaign finance laws in federal court. Most recently, it defended Arizona's Clean Elections system in the U.S. Supreme Court in *McComish v. Bennett*. Over the years, its attorneys and experts have testified frequently before Congress and state legislatures, have counseled policy makers nationwide, and have participated in campaign finance litigation in dozens of federal courts. The Brennan Center also serves as constitutional counsel to the Fair Elections Now Act coalition, advocating for public financing laws at the federal level. Recent publications include *A Return to Common Sense* by executive director Michael Waldman and *Small Donor Matching Funds: The NYC Election Experience*.

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Foreword

In the late 1990s, The Century Foundation and the Brennan Center for Justice at New York University School of Law collaborated to develop two publications focusing on the landmark *Buckley v. Valeo* campaign finance case. At the time, that 1976 decision, which prohibited caps on electoral spending, was viewed as the central obstacle to legislative reforms that could help to reduce the deleterious effects of money on democracy. One of those reports, titled *Buckley Stops Here*, conveyed the recommendations of a group of legal scholars for a strategic campaign to overrule or limit that decision. The follow-up edited volume, titled *If Buckley Fell*, was a collection of essays describing an alternative vision of a First Amendment that tolerates greater regulation of the flow of money into elections, without sacrificing any of the critical First Amendment moorings that are so critical to a free society.

Last year, the Supreme Court reached an even more monumental decision in *Citizens United v. Federal Election Commission*, further inhibiting what Congress can do to regulate campaigns. That unwelcome development prompted the Brennan Center to join forces once again with The Century Foundation to publish a new collection of essays, this time focused on *Citizens United*. Although we are clearly fighting an uphill battle, to say the least, we remain convinced that the influence of money on American democracy denigrates the integrity of the republic. Rather than acquiesce to the ongoing judicial assault against campaign finance laws enacted by elected officials, both the Brennan Center and The Century Foundation remain deeply committed to finding ways to diminish the outsized clout of money in elections and governing.

We thank Michael Waldman, executive director of the Brennan Center, and his colleagues for working with us on this project. Perhaps one day down the road our efforts will lead to a campaign finance decision that we can celebrate together.

RICHARD C. LEONE, *President*
THE CENTURY FOUNDATION

Preface

The struggle for democracy is at the heart of our history. American politics has long been convulsed by scandal and reform. Results rarely are pretty. The line dividing private economic power and the public realm shifts and slides with the felt necessity of the times.

Then, in *Citizens United v. Federal Election Commission*, the U.S. Supreme Court abruptly erased and redrew that line again. Overturning decades of precedent and dozens of laws, five justices ruled that corporations and unions had a constitutional right to spend unlimited sums in elections. The ruling earned banner headlines, a sharp State of the Union rebuke, and public disapproval hovering near 80 percent in the polls. In the 2010 election, independent spending spiked, much of it secret, with more to come. The decision ranks among the Court's most controversial and consequential.

Yet *Citizens United* was no bolt out of the blue. It was the product of a decades-long legal drive to rethink doctrine and, ultimately, strike down the edifice of campaign law. This jurisprudential movement drew inspiration from the 1971 memo drafted by soon-to-be Justice Lewis Powell that urged corporate leaders to fund scholars and public interest legal groups to promote a "free market" approach in the courts. Former Federal Election Commission chair Bradley Smith bragged to the *New York Times* that *Citizens United* was the fruit of "long-term ideological warfare." This effort was bold, strategic, and willing to rethink basic premises. It has been markedly effective.

Above all, it sought to advance a powerful but narrow notion of the First Amendment, focused on the rights of the speaker, especially corporate speakers. Until 1976, courts rarely if ever applied the

First Amendment to campaign finance laws. By 2010, claims of "free speech" were wielded to overturn campaign laws dating back decades at least. Nearly forgotten in the emerging jurisprudence were the interests of voters, of a workable government, or of democracy itself.

Even as the Court's conception of democracy has continued to narrow, new strategies and technologies are shaking and remaking the world of politics. New media create the possibility for positive change, from the role of low-cost social media, to the small donor phenomenon, to the possibility of real-time transparency in campaign spending. These trends can be magnified by reforms such as multiple matching funds for small contributions. But these shoots of reform could be washed away by the tide of big money in the wake of *Citizens United*.

We cannot ask courts to craft the institutional mechanisms for an effective democracy, but we can insist that courts allow those mechanisms to be created. In short, we must build a new jurisprudential movement, one that advances a vision of the Constitution as a charter for a vibrant democracy. This effort will call on the talents of the most powerful minds in law and the academy. The fight for democracy cannot be waged from an ivory tower: instead, such a movement can draw strength from a true dialogue between scholars and an active citizenry.

The Brennan Center for Justice at NYU School of Law is proud to play a leading role in launching such a movement. This volume and the symposium that produced it are among the first steps. We expect this thinking to play out in law reviews, briefs, and ultimately court decisions. For example, already many of these scholars have put their ideas into effect in amicus briefs in ongoing litigation, including the defense of public financing. These ideas do not advance in lockstep. Participants here disagree on many things (indeed, including the basic question of whether *Citizens United* was rightly decided). But all agree that constitutional interests are not hostile to our democratic values—instead, strengthening democracy is the very core of our constitutional enterprise.

As Justice Robert Jackson once wrote, the Constitution is not "a suicide pact." Similarly, the First Amendment is not a hostage

note. Fealty to a narrow ideology of free speech ought not threaten democracy or workable governance. It is time to craft a constitutional vision that allows "we the people," directly and through elected representatives, to create our own democracy.

We are thrilled to publish this important volume with The Century Foundation. The newly created Brennan Center forged an important partnership with the Foundation nearly fifteen years ago, and we are glad to renew this collaboration now. We want to thank all of the contributors for pushing forward an ambitious jurisprudential movement, and all at The Century Foundation who helped make this volume happen, including Richard Leone for his leadership, and Greg Anrig, Jason Renker, Carol Starmack, Christy Hicks, and Laurie Ahlrich for their excellent work on this project.

MICHAEL WALDMAN, *Executive Director*
THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW

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INTRODUCTION

*Monica Youn**

The modern jurisprudence of money and politics has long resembled a labyrinth. The U.S. Supreme Court's constitutional decisions in this area have erected seemingly unbreachable walls that block any straightforward path between acknowledged problems and proposed reforms. From the elevated vantage point of courts and scholars, these doctrinal walls might present some discernible pattern, but from the perspective of those who find themselves traversing this maze—lawmakers, reformers, candidates, fund-raisers, interest groups, and voters—these constitutional obstacles must seem at best arbitrary and at worst self-defeating. Well-intentioned policymakers who attempt to thread a constitutionally permissible route through this labyrinth may find themselves tracing a tortuous path and encountering unanticipated complications. The labyrinth's sheer complexity can exact a heavy toll: campaign finance policymaking

* I would like to recognize the work of my colleagues at the Brennan Center—this volume, as well as the symposium that generated it, can truly be considered a team effort. Burt Neuborne, Michael Waldman, and Susan Liss were instrumental in conceptualizing this symposium, recruiting participants, and ensuring that jurisprudential development is at the forefront of the Brennan Center's mission. Mimi Marziani and Mark Ladov played an invaluable role in editing this volume, while Ciara Torres-Spelliscy and Angela Migally contributed their deep expertise on campaign finance issues. Jeanine Plant-Chirlin arranged for the publication of this volume and shepherded us through the production process. Ali Hassan and Jafreen Uddin organized the symposium and ensured its success. NYU's *Review of Law and Social Change* co-sponsored the symposium with us and published many of the essays included in this volume.

may result in rules that are difficult to understand and implement, vulnerable to loopholes, and subject to perverse consequences.

Most notorious, perhaps, is the Supreme Court's 1976 decision in *Buckley v. Valeo*.[1] There, the Court drew a First Amendment bright line between contributions given directly to a campaign and expenditures made independently from the campaign: limits on the former were deemed constitutionally permissible, while limits on the latter were assumed to be unconstitutional. In the real world, this distinction has encouraged campaign money to flow to relatively unregulated outside groups, while candidates and political parties face restrictions on the contributions they can raise. The groups wielding monetary power cannot be voted in or out, and candidates can deny any responsibility for such outside spending. Thus, *Buckley's* legacy is a system in which money—and, consequently, power—is pushed to the political fringes, special interests wield disproportionate power over candidates and elected officials, and voters can hold no one accountable. For generations, legal thinkers have asked: is this really the result the First Amendment dictates? Despite these constant doubts, however, the contributions/expenditures distinction has become ever more deeply entrenched in the law.

In this convoluted doctrinal landscape, last year's decision in *Citizens United v. Federal Election Commission* arrived like a long-anticipated earthquake, leveling precedents and generating ongoing aftershocks. Even before the decision, the conservative majority of the Roberts Court had signaled its dissatisfaction with current campaign finance laws—"Enough is enough," pronounced Chief Justice John Roberts in the 2007 decision, *Federal Election Commission v. Wisconsin Right to Life,* rejecting an argument that federal restrictions should apply to campaign advertisements that did not advocate for the election or defeat of a candidate.[2] Three times prior to *Citizens United,* the Roberts Court considered campaign finance laws, and on all three occasions, the majority struck the regulation down. Thus, even before *Citizens United,* campaign finance law was suffering what election law expert Richard Hasen called "the death of a thousand cuts."[3]

Citizens United started as a little-noticed lawsuit regarding a ninety-minute video, *Hillary: The Movie.* The so-called documentary

was harshly critical of Hillary Clinton, who was then a presidential primary candidate, arguing that she was unfit to be the commander-in-chief, unqualified for the presidency, and that "a vote for Hillary is a vote to continue 20 years of a Bush or a Clinton in the White House."[4] Citizens United—a nonprofit corporation that received some part of its funding from business corporations—wished to distribute the documentary on cable television as a "video-on-demand" in the period before the 2008 primary elections.

While *Hillary: The Movie* appeared to be simply just another salvo in the presidential campaign season, its production, timing, and planned release, in fact, were part of a coordinated and long-standing legal strategy to test the constitutional boundaries of federal campaign finance law, in particular the Bipartisan Campaign Reform Act (BCRA), popularly known as "McCain-Feingold."[5] Federal law barred corporations and unions from using general treasury funds to pay for "electioneering communications"—that is, broadcast campaign advertisements—or for federal communications that expressly advocated the election or defeat of a candidate.[6] Instead, corporations could engage in such election-related expenditures only by establishing and administering a "separate segregated fund" or political action committee (PAC).[7] Such a PAC could be funded only through contributions of the corporation's stockholders, employees, and their families, and were subject to generally applicable federal contribution limits. But, under the so-called *MCFL* exemption (named after the Supreme Court's decision in *Federal Election Commission v. Massachusetts Citizens for Life*),[8] federal electioneering communications restrictions did not apply to nonprofit ideological advocacy corporations that had no shareholders and that did not accept contributions from for-profit corporations or unions.

The corporate electioneering restriction had been an explicit feature of federal campaign finance law since at least 1947, and had been upheld against a facial constitutional challenge by the Supreme Court in its 2003 decision *McConnell v. Federal Election Commission.*[9] In that case, the Court reasoned that the existence of the PAC alternative gave corporations and unions a "constitutionally sufficient" alternative to participate in federal electoral politics.[10] The Court

had also upheld a state law analogous to the federal electioneering communications restriction in its 1990 decision *Austin v. Michigan Chamber of Commerce.*[11]

In multiple ways, *Hillary: The Movie* was at the very margins of the coverage of the corporate electioneering communications restrictions. Whether or not the proposed video-on-demand release was, indeed, a "broadcast" advertisement, whether the *de minimis* amount of business corporation contributions disqualified Citizens United from being covered by the *MCFL* exemption, and whether a ninety-minute documentary could be considered an advertisement were all questions that could have been resolved narrowly, avoiding the constitutional issue.[12] Rather than resolving the case on narrow grounds, on the last day of the 2009 term, the Supreme Court vastly expanded the scope and consequences of the case by requesting expedited reargument on whether the Court's precedents in *Austin* and *McConnell* should be overturned, and whether the restrictions on corporate electioneering should be held facially unconstitutional.

Suddenly, this sleepy little case had the potential to transform federal politics as we know it. The political community sat up and took notice: forty-one *amicus* briefs were filed in the few short weeks of the Court's rushed briefing schedule. The end result was, of course, a sweeping decision, clearing the way for unlimited corporate spending in federal elections for the first time in the modern era.

This volume of essays is an attempt to map out the complex labyrinth that led to *Citizens United* and to explore where this decision may lead. The chapters in it arose from a symposium sponsored by the Brennan Center just nine weeks after the *Citizens United* decision was announced. The timing was somewhat fortuitous—although we knew the *Citizens United* decision was pending when we organized the convening, we had no way of knowing that the Supreme Court was on the verge of upending decades of settled constitutional doctrine. We were painfully aware, however, that the increasingly byzantine contours of campaign finance law had driven many of our greatest constitutional scholars out of the field, leaving the topic of money and politics to be largely the province of specialists. A fundamental reassessment was long overdue. Our goal, then, was to bring together the most incisive, innovative, and

profound constitutional scholars of our time to take a fresh look at the age-old conundrum of money and politics.

Now, *Citizens United* has created an inflection point in constitutional law. Fundamental questions of money and politics have been brought to the forefront of constitutional debate: Should the First Amendment favor individual speech rights at the expense of other democratic values, or is the First Amendment itself premised on an ideal of deliberative democracy? Are elections a marketplace that the economically powerful can rightfully dominate, or should they instead be viewed as an institution designed to facilitate informed decision-making by voters? Should money be treated as speech, and, if so, when and to what extent? How do the First Amendment rights of corporations and other organizations compare to the rights of individuals? Does the insulation of judges from politics make them the ideal arbiters of the competing claims of campaigners, or does their inexperience lead them to constitutionalize a misguided view of the political process?

In responding to these and other basic questions, the contributors to this volume have outlined unexpected and productive avenues to pursue in examining the constitutional law of money and politics. The volume is divided into four parts. The first part explores the concept of "electoral exceptionalism," in which elections may be deemed to be exceptional realms of First Amendment activity—comparable to town hall meetings or public debates—in which ordinary rules regarding government regulation of speech may apply differently than in other spheres of public discourse. In Chapter 2, Robert Post points out that First Amendment coverage is not omnipresent—whether particular circumstances trigger First Amendment analysis at all depends, crucially, on an underlying account of the purposes and values advanced by the First Amendment. He argues that First Amendment coverage should be triggered whenever state regulations threaten communication that is essential to public discourse, but also that First Amendment doctrine should be formulated to safeguard essential processes of democratic legitimation. The question of First Amendment protection should turn on the assessing the justification for campaign finance regulation in light of its impact on public discourse. He suggests that reconciling campaign finance regulation with existing

First Amendment doctrine will require a reorientation, so that such regulations are conceptualized as efforts to preserve the institutional purposes of elections.

In Chapter 3, Richard H. Pildes introduces more fully the concept of "electoral exceptionalism," arguing that elections should be constitutionally viewed as specially bounded domains warranting distinct First Amendment rules. Pildes explains that particularized treatment of election-related speech would be consistent with existing First Amendment doctrine, which recognizes a variety of context-dependent principles. Pildes outlines a jurisprudential theory that treats elections as a bounded sphere of First Amendment concern.

In Chapter 4, Geoffrey R. Stone responds with fundamental questions raised by the electoral exceptionalism approach. He sets forth the parameters that govern the recognition of First Amendment exceptionalism in other areas, such as in schools or town hall meetings. He explores the difficulty of finding an appropriate analogy between such recognized First Amendment exceptions and elections, and lists an array of questions that must be answered before suspending our general skepticism of government efforts to regulate electoral speech.

The second part of the volume offers new perspectives on a fundamental issue: whether and to what extent money spent on speech equals speech itself. In Chapter 5, Deborah Hellman posits a fresh approach to determining when the spending of money should be equated with an underlying constitutional right. She explores case law in other arenas in which such spending is, and is not, deemed to be encompassed within the penumbra of a particular right. She ultimately concludes that spending can be constitutionally regulated when the state provides an adequate, alternative means of accessing the right in question.

In Chapter 6, highlighting the constitutional primacy of consent in legitimate democratic government, Frances R. Hill faults the *Citizens United* Court for ignoring the underlying First Amendment rights of corporate shareholders and members. She explores the textual and doctrinal foundations of considering consent a constitutional principle. She then considers methods to ensure consent and accountability for corporate political spending in the post–*Citizens United* world.

In Chapter 7, I explain that the Court's campaign finance decisions have embodied two competing conceptions of the source