

# MONEY, POLITICS, AND THE CONSTITUTION



**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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## ABOUT THE BRENNAN CENTER FOR JUSTICE

THE BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW is a non-partisan 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

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## 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 lock-step. 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*  
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