

Spring 2011

Foreword: The Impact of Citizens United, 44 J. Marshall L. Rev. xxiii (2011)

Steven D. Schwinn
schwinn@uic.edu

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Constitutional Law Commons](#), [Election Law Commons](#), [First Amendment Commons](#), [Jurisprudence Commons](#), [Law and Politics Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Steven D. Schwinn, Foreword: The Impact of Citizens United, 44 J. Marshall L. Rev. xxiii (2011)

<https://repository.law.uic.edu/lawreview/vol44/iss3/1>

This Symposium is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

BELLE R. AND JOSEPH H. BRAUN
MEMORIAL LECTURE SERIES

FOREWORD: THE IMPACT OF *CITIZENS
UNITED*

STEVEN D. SCHWINN*

I am pleased to introduce the Articles that grew out of the Belle R. and Joseph H. Braun Memorial Lecture Series and the 2011 John Marshall Law Review Symposium, *The Impact of Citizens United: Corporate Speech in the 2010 Elections*. These materials are as exciting and diverse as the Symposium itself and promise to contribute significantly to the ongoing public debates over the appropriate role of money in politics and the nature of corporate speech rights.

The impressive array of Articles was no accident. We knew from the start that we wanted this Symposium to be different and to yield Articles that would inform policymakers, academics, and even the public about the actual effects of *Citizens United*.¹ Thus, we knew that we wanted to include policy analysts, practitioners and activists, and academics from beyond the law school, in addition to more traditional law professors. We knew that we wanted to examine and critique the decision's actual effects in an actual election, in addition to exploring the more traditional theoretical aspects of the First Amendment and campaign finance law. And we knew that we wanted to evaluate real policy options in the context of real politics, in addition to discussing more abstract proposals that are the more usual fare of academic symposiums. We knew that we wanted to do all this with an ideologically diverse and lively group.

Thus, we invited two of the top campaign finance lawyers in

* Associate Professor of Law, The John Marshall Law School. I would like to thank the staff of the John Marshall Law Review for their tireless efforts on the Symposium and these Articles. In particular, I would like to thank Patrick Goodwin, Katie Simpson-Jones, and Kristen Zaharski for their leadership, their outstanding work in helping to organize the Symposium, and their efforts in editing and publishing this volume. I would also like to thank the administration and staff at the John Marshall Law School, whose support made this Symposium a success. Finally, of course, I would like to thank the Braun family for its continued support of this lecture series.

1. *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

the country: Marc E. Elias of Perkins Coie, and Benjamin L. Ginsberg of Patton Boggs. We invited three of the top public policy advocates: Ilya Shapiro of the Cato Institute, David Gans from the Constitutional Accountability Center, and Monica Youn from the Brennan Center for Justice. We invited four academics doing some of the most interesting work on the issues: Geoffrey Stone and M. Todd Henderson of the University of Chicago School of Law, Dr. Peter Francia of East Carolina University, and Atiba Ellis of the West Virginia University College of Law. And we invited one of the most respected public voices on Congress, national politics, and campaign finance to deliver our keynote address: Thomas Mann of the Brookings Institution.

In addition to our panelists, we also invited our own faculty experts to moderate our panels. Thus, we invited Professor Walter Kendall and Professor William Ford to moderate a panel, and we invited Professor Ann Lousin to introduce our keynote speaker, Thomas Mann.

We were thrilled that these impressive invitees all accepted; we thank them all for helping to ensure that our Symposium exceeded even our own very high expectations. And we are thrilled to publish their Articles that grew out of the Symposium in this special volume of the Law Review.

Our issue begins with the keynote address by Thomas Mann, the W. Averell Harriman Chair and Senior Fellow at the Brookings Institution. Mann boldly and honestly sets *Citizens United*² in the broader national political context, where increasing partisanship and a long move toward deregulation set the stage for the ruling.

Mann first explores the impacts of the case on the 2010 elections. He concludes that it did not contribute to significantly increased independent expenditures by major corporations; in fact, increased independent expenditures were a minor factor in the 2010 elections. He also concludes that the case did not contribute to the sharp decline in spending disclosure in 2010; instead, several other factors—the move away from 527 organizations to 501(c) organizations, the rise of super PACs—drove this well-documented phenomenon.

Mann next examines the policy responses to the ruling. He argues that in this hyper-partisan political environment, Congress is unlikely to pass any reforms. He says that any real policy developments will occur in the judiciary, not Congress, and that they will likely lead only to further deregulation. He explains that the latest cases now seek to chip away at disclosure requirements, and some litigation seeks even to take on the time-tested distinction between expenditures and contributions so central to

2. *Citizens United*, 130 S. Ct. 876.

the path-breaking case, *Buckley v. Valeo*.³

Finally, Mann argues that we have reached the limit of campaign finance regulation. He says that the most promising area of campaign finance policy involves public matches for small donations. This would create an incentive for candidates to chase small donations and thus re-engage individual citizens in the political process.

Professor Peter Francia picks up on some of Mann's arguments about the effects of *Citizens United* on the 2010 elections. Francia contributed a piece that critically examines four key predictions about campaign spending and influence in politics in the wake of *Citizens United*. Francia thus looks at the case and its effects on the 2010 mid-term election with a political scientist's eye. He concludes—tentatively, based on data from just one election—that some of the principal predictions about the effects of *Citizens United* came true, others came true only slightly, and one did not materialize at all. Moreover, Francia acknowledges that other factors may have impacted spending and influence in the 2010 elections, further complicating the picture in this first post-*Citizens United* national election.

Francia first looks at whether interest group spending increased in the 2010 election. He concludes that there was a sharp increase in interest group spending over spending in 2006, the last mid-term election, and even over spending in 2008, a presidential year. Moreover, independent expenditures rose relative to electioneering communication, suggesting that interest groups were channeling their expenditures in reaction to Supreme Court rulings.

Francia next examines whether corporate and pro-business messages drowned out the voices of their traditional political opponents. He finds that pro-business spending indeed increased in the 2010 election. But he also finds that organized labor groups spent a competitive amount and thus also played a significant role. He concludes that pro-business interests did not drown out the voices of organized labor, at least not to the extent predicted by critics of *Citizens United*.

Third, Francia examines whether *Citizens United* gave Republicans an advantage over Democrats. He explains that spending by conservative and pro-business groups increased dramatically in 2010, that spending by conservative groups exceeded spending by liberal groups, and that this reversed a trend going back to the 1996 election. But he concludes that some of the conservative gains may be attributable to other features of the 2010 election and not just *Citizens United*.

Finally, Francia looks at the influence of foreign corporations

3. *Buckley v. Valeo*, 424 U.S. 1 (1976).

in the 2010 election. He notes that *Citizens United* did not address the prohibition on contributions by foreign nationals, but that critics worried that corporations—any corporations—would find a way to spend money in U.S. elections. Francia concludes that there is no evidence of increased influence by foreign corporations in the 2010 election.

Monica Youn moves the discussion from effects of the decision to a policy reaction to the decision. Youn, of the Brennan Center for Justice at New York University School of Law, contributed her testimony before the Subcommittee on the Constitution, Civil Rights and Human Rights of the U.S. Senate Judiciary Committee on The Fair Elections Now Act. That Act, which would establish a public financing program for federal congressional candidates that would match funds for small campaign contributors, was one of the many congressional responses to *Citizens United*. Youn argues that the Act would plug some of the gaping holes left in federal campaign finance law by *Citizens United*.

Youn starts by showing how *Citizens United* opened the door for a flood of corporate spending in the 2010 elections. Spending by corporations and wealthy special interests skyrocketed in the mid-term elections, and it is only projected to increase in the 2012 presidential cycle. Youn explains how federal reporting requirements allow corporations to shield their expenditures from public disclosure by funneling contributions through trade associations, nonprofits, and “super PACs”—a new vehicle, spawned by *Citizens United* and its progeny, that facilitates massive and anonymous coordinated corporate campaign spending. As a result, corporations can hide their political involvement from both the public and their own shareholders. This, in turn, increases the potential for actual political corruption and the appearance of corruption, and it curbs the relative political influence and involvement of ordinary citizens. In short, *Citizens United*, by encouraging massive and secretive corporate spending, helps to put the political levers in the hands of anonymous corporations while at the same time disenchanting and disenfranchising exactly those natural people who ought to control our politics.

Youn argues that the Act offers an important fix to some of these problems, which *Citizens United* helped create. Drawing on case studies from public financing programs in the states, she argues that public financing works to reduce actual and perceived political corruption; that it allows public officials to focus on policy, not fundraising; and that it increases political participation by grassroots organizations and ordinary citizens. By matching *small* donations, the Act would only magnify these effects.

Finally, Youn points out that public financing programs are still constitutionally viable, even under *Citizens United*. While

that is true, the Supreme Court suggested just this past Term—after our Symposium and after Youn delivered her testimony—that it would hold Congress and state legislatures on a very tight leash when they deviate from a standard block-grant or matching-funds program. The Court in *Arizona Free Enterprise v. Bennett* ruled that Arizona’s public financing program, which provided for matching funds for participating candidates when their nonparticipating opponents outspent them, violated the First Amendment.⁴ The Court wrote that a basic, block-grant public financing program remained constitutional, but the Court’s reasoning suggests that even the basic program may be hanging on by a string.⁵

David Gans and Douglas Kendall of the Constitutional Accountability Center contributed a piece on the history of corporate personhood, *A Capitalist Joker: The Strange Origins, Disturbing Past, and Uncertain Future of Corporate Personhood in American Law*. Carefully reviewing the constitutional text, history, and jurisprudence, Gans and Kendall argue that the Constitution supports neither corporate personhood nor corporate rights—that, indeed, these ideas arose from an historical irregularity in the late nineteenth century, not anything like the Framers’ understanding or the Court’s dominant jurisprudence. The idea of corporate First Amendment rights, then, flies in the face of our constitutional traditions.

Gans and Kendall start with the Founding and argue that the Framers had no idea that corporations would have personhood or rights under our Constitution. For the Framers, corporations were artificial entities possessing certain privileges and protections only to enable them to succeed as economic actors; they were not people with fundamental or inalienable rights. This understanding is reflected in the text of the original Constitution and the Bill of Rights, both of which speak in terms of the rights of people, not entities. Moreover, the Framers assumed that corporations could be, even must be, comprehensively regulated in the broader interest of the public welfare.

Gans and Kendall next trace the Court’s treatment of corporations, starting in the early Republic, and show how the Court’s early treatment of corporations is consistent with the Framers’ understanding and the text. They explain that the Court consistently rejected corporate citizenship in the early nineteenth century and that it treated corporations as perfectly legitimate objects of government regulation (and not as rights-bearing persons). Later, the Fourteenth Amendment, with its Citizenship

4. *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011).

5. *Id.*

Clause that defines citizenship in terms of birth or naturalization, things that only a live person can do, only served to underscore the Court's earlier rejection of corporate personhood.

Against this history, Justice Field in 1882 planted the seed for corporate personhood and corporate rights. Justice Field was riding circuit that year in the *Railroad Tax Cases*⁶ and wrote a lengthy opinion that a corporation was a person under the Constitution and that the tax violated its right to equal protection. When a companion case came before the Supreme Court, the court reporter slipped in his description of oral argument that the justices all agreed that the Fourteenth Amendment applied to corporations. The Court itself, however, never reached the question in its opinion. Thus, a court reporter's description of oral argument introduced this Capitalist Joker against nearly a century of contrary understanding and jurisprudence.

Gans and Kendall explain that the Court's approach vacillated ever since. During the *Lochner* era, the Court ruled that corporations were persons and enjoyed certain constitutional rights. But from 1937 to 1971, the Court backtracked and rejected nearly all of the corporate protections it recognized in the *Lochner* era.⁷ In 1971, Justice Powell reintroduced the idea of corporate personhood and corporate rights. But in the most recent cases, the Court again rejected corporate rights claims.

Gans and Kendall conclude by situating *Citizens United* within this background and arguing that the case marks a return to the *Lochner* era for corporate personhood.

Ilya Shapiro, Senior Fellow in Constitutional Studies at the Cato Institute, and Caitlyn McCarthy, Legal Associate at the Cato Institute, take issue with Gans and Kendall's critique of corporate personhood and corporate rights. Shapiro and McCarthy, in their piece that distinguishes between individual rights and corporate rights, attack the idea of corporate personhood: of course corporations are not persons, they say, but that does not mean that they do not enjoy certain rights under the Constitution, even if those rights may be different than rights due individuals.

Shapiro and McCarthy first trace the evolution of corporate personhood and corporate rights. They explain that critics of corporate personhood predicted that corporations would enjoy the same rights as individuals, but they argue that this never came true. Instead, the Supreme Court ruled, as recently as 2011 in *FCC v. AT&T*,⁸ that while corporations enjoy some rights, those rights are not equivalent to the rights of live human beings. Thus, "corporate personhood"—the idea that corporations enjoy the same

6. *State Railroad Tax Cases*, 92 U.S. 575 (1875).

7. *See Lochner v. New York*, 198 U.S. 45 (1905).

8. *FCC v. AT&T, Inc.*, 131 S. Ct. 1177 (2011).

rights as human beings—is false. More accurately, corporations are artificial entities that enjoy selected and appropriate rights, but not the same rights due live human beings.

Shapiro and McCarthy next examine why corporations have *any* rights. They offer four principal theories of corporate rights. First, corporations are a useful vehicle for aggregations of individuals to exercise their *individual* rights. As aggregations of persons, corporations must also have the rights of those persons. Next, corporations are merely legal shells for their owners' exercise of activities to promote the corporation. Many of these activities (like corporate advertising, for example) involve fundamental rights (like free speech) and, therefore, corporations must have certain rights. Third, corporations must enjoy certain rights in order for those rights to retain their vitality in our democracy. If government can trammel corporate rights, it can also trammel individual rights. Fourth, government cannot trade corporate rights for a government-issued charter or license; this violates the unconstitutional conditions doctrine. Moreover, corporations arise principally from a web of *private* contracts, not government-issued licenses, and government cannot infringe on the rights of those individual parties to the contracts.

Finally, Shapiro and McCarthy argue that particular kinds of corporations—media corporations, advocacy corporations, and the like—surely must, and quite clearly do, enjoy free speech rights. This bedrock principal would erode if corporations were categorically not entitled to rights.

Professor Atiba Ellis rounds out our Articles with a more theoretical approach to corporate rights. Ellis wrote an Article situating *Citizens United* and the idea of corporate personhood in the larger context of historical and evolving ideas of *political* personhood in our Republic. While so much of the literature on *Citizens United* addresses the question whether the Court was right to grant corporate personhood and corporate rights under the First Amendment, Ellis turns this question on its head and examines what corporate personhood means as only the latest step in a long evolution of the idea of political personhood. Ellis thus takes a sharp turn, running at a crosscurrent with much of the literature, and opens up a fascinating line of inquiry: Compared to the evolution of political personhood for African Americans and women, what does *Citizens United* say about the nature of political personhood, citizenship, and rights?

Ellis begins by examining the process of extending political personhood, with particular reference to African Americans and women. He argues that in extending political personhood, the Supreme Court has used a two-step process. First, the Court has made a specific choice to examine political personhood and to define it for whatever purpose was at issue. Next, the Court has

asked whether the claimant fits the definition. As the Court slowly moved to extend political personhood to African Americans and women—piecemeal, and over time—it created tiers of personhood by selectively extending only components of political personhood to African Americans and women. At the same time, the evolution reinforced the privilege of the dominant form of social construction, white male supremacy. As a result, African Americans and women achieved only a kind of second-tier political personhood.

In contrast to the step-by-step extension of political citizenship to African Americans and women, *Citizens United* extended full political personhood to corporations in one fell swoop. The case suddenly thrust upon corporations a core privilege of political personhood—the First Amendment right to engage in campaign speech—raising a host of questions about the nature and hierarchy of political personhood. Ellis argues that because of mass corporate wealth *Citizens United* privileges corporations over citizens, creating a new kind of tiered political personhood, with corporations on top. Moreover, because corporations themselves are dominated by white male privilege, *Citizens United* replicates and perpetuates patterns of white male privilege in our existing tiers of political personhood.

Thus, the following Articles reflect exactly what we sought to achieve in our Symposium: a diverse, lively, multi-disciplinary examination of *Citizens United* and its effects on the 2010 elections and beyond. We hope you enjoy reading them as much as we enjoyed publishing them.