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Margaret E. Wade

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Foreword

Citizens United: Democracy Realized—or Defeated?

Margaret E. Wade*

In the landmark campaign finance decision, *Citizens United v. Federal Election Commission*, the United States Supreme Court held that political spending is a form of protected speech under the First Amendment, and corporations and unions are free to spend money to support individual candidates during elections. The 5-4 decision has had enormous ramifications for American politics. In a single opinion, the Court struck down important parts of the 2002 Bipartisan Campaign Reform Act, overruling *Austin v. Michigan Chamber of Commerce* and parts of *McConnell v. Federal Election Commission*, and called into question laws in 24 states. Consequently, since it was decided on January 21, 2010, *Citizens United* has been the subject of an intense debate among professors, politicians, pundits, and even the President. Supporters of the decision view it as a triumph for free speech and the First Amendment, while critics see it as a devastating nod to corporate interests.

On October 21, 2011, the Minnesota Law Review hosted leading academics, political scientists, and practicing attorneys from across the country for its annual symposium. The 2011 Symposium, "*Citizens United: Democracy Realized—or Defeated?*", was well-positioned to reflect on the *Citizens United* decision and its effects on upcoming elections. It featured three

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panels, each composed of a diverse collection of panelists, and organized with the aim of fostering a point/counterpoint discussion of the case and its significance.

The first panel, "*Citizens United*: Right or Wrong," analyzed the merits of the decision, with a focus on substantive legal questions in the sea of public policy arguments presented in the media. Professor Richard Briffault, of Columbia Law School, analyzed the caselaw framing the *Citizens United* decision. He argued that the Roberts Court has ushered in a new jurisprudence of campaign finance law, built around six themes: (1) a narrow definition of what constitutes corruption that justifies regulation, (2) a narrow definition of what constitutes election-related speech that is subject to regulation, (3) skepticism about the prevention of circumvention as a justification for regulation, (4) much greater sensitivity to the arguable burdens on rights that can result in regulation, (5) rejection of equality as a legitimate regulatory goal, and (6) rejection of deference to Congress or any other political decision maker, including the voters themselves. Professor Briffault contrasted these themes with the values and aspirations that underlie campaign finance legislation, literature, and caselaw, including notions of political participation, political equality, voter information, fair and effective political competition among candidates, promotion of government integrity in the prevention of corruption, and effective administration and enforcement of the laws. In considering the relative roles of the court and democratic institutions, he posed the question: who should decide on the balance of these competing goals?

Cleta Mitchell, campaign finance attorney at Foley & Lardner L.L.P. and author of an amicus curiae brief in support of the petitioner in *Citizens United*, spoke on the future of disclosure. She challenged Professor Briffault's criticism of the Court's decision, asking how we can reconcile aggressive regulation of campaign finance and political activity with the First Amendment's guarantee that "Congress shall make no law . . . abridging the freedom of speech." Mitchell argued that when campaign finance regulations—like mandatory disclosure rules—becomes tools to harass and intimidate political opponents—as such rules did in the campaign against California's Proposition 8—there is a constitutional problem. Mitchell criticized Minnesota's donor disclosure requirements, passed in the aftermath of *Citizens United*, as the wrong response to the Court's decision, urging that states should repeal campaign fi-

nance laws, rather than simply modifying them. Calling disclosure the next frontier of campaign finance regulatory litigation, she warned against regulation just for the sake of regulation.

Rather than taking a side in the debate over the decision, Professor Guy-Uriel Charles, of Duke University School of Law, sought to emphasize the clash of values underlying the *Citizens United* debate. He argued that the supporters and the critics of the decision are speaking past each other because they are operating under incompatible visions of the First Amendment. He described the worldview of the supporters as an individualist perspective concerned with voter autonomy and skeptical of government regulation. In contrast, he depicted the worldview of the critics as a structuralist one that believes there are proper democratic outcomes and that government regulation is generally acceptable. Professor Charles predicted that although the individualist view is prevailing in the vision war, campaign finance regulation will continue to lurch back and forth between the individualist and structuralist views.

The second panel, "Don't Look Now! *Citizens United*: An Empirical Analysis," examined the decision's political impact, with a focus on the numbers: money raised, television time bought, and electoral results. Co-authors Mike Wittenwyler and Professor Kenneth Goldstein collaborated in a presentation on political television advertising. Professor Goldstein contributed his political perspective as President of Kantar Media's Campaign Media Analysis Group and as a political science professor at the University of Wisconsin-Madison, while Wittenwyler, as an administrative and regulatory attorney at Godfrey & Kahn, S.C. and an adjunct professor at the University of Wisconsin Law School, provided a valuable viewpoint regarding the relationship between the numbers and the law. Goldstein and Wittenwyler analyzed how the composition, targeting, and tone of political advertising has changed over the last three midterm contests, with the aim of better understanding the current state of political speech, political competition, and political parties. Wittenwyler began from the premise that money is an unavoidable part of politics—like water in a balloon, pressure from regulation just causes it to shift forms and flow through different channels. Given that reality, Wittenwyler declared that the Court's decision in *Citizens United* was a step forward for American campaign finance law because it helped to clarify a field that had become muddled in a sea of well-intentioned, but ineffective regulations. Professor

Goldstein presented data on how the volume, timing, placement, and geography of political television advertising has changed in response to the new regulations, but that the role of money in the process has remained fairly constant. Professor Goldstein stressed that the primary effect of campaign finance laws was in terms of how people made contributions; the *Citizens United* decision made it easier for private donors to give huge amounts of money directly to candidates, thereby making political parties a less important source of funding. Co-author David A. Schweidel, professor of marketing at the University of Wisconsin-Madison, did not attend the Symposium, but contributed to the Article that follows.

The final panel, "After *Citizens United* is Campaign Finance Reform a Phoenix—or the Titanic?," addressed the decision's effects and the future of campaign financing. Professor Spencer Overton, of George Washington University Law School, proposed a philosophical shift, arguing that campaign finance regulation should no longer aim to purge money from politics, but should encourage as many private citizens as possible to participate in financing politics. He argued that conventional reformers who suggest that there is too much money in politics are wrong because the real problem is that money in politics comes from too few people. Professor Overton proposed a new approach to public financing where federal, state, and local lawmakers would adopt multiple-matching fund programs that match the first \$200 of a political contribution at a six-to-one ratio, so that a \$100 contribution would be worth \$700. He explained that this widespread participation approach is consistent with the *Citizens United* majority's maxim that money is an important tool to hold government accountable to the people.

The afternoon's final panelist was James Bopp, Jr., a campaign finance attorney who served as counsel for Citizens United in the district court and prepared the jurisdictional statement in Citizens United's cert petition. Bopp first addressed the title of the panel, asserting that campaign finance reform is the Titanic, since developments over the last ten years have blown huge holes in the traditional campaign finance regulatory system, resulting in an even more complex, Super-PAC-driven system. Bopp framed *Citizens United* as an important step toward restoring the full meaning of the First Amendment and guaranteeing that people of average means have vehicles through which to participate in the political system. In the spir-

it of increased electoral participation, Bopp argued in favor of judicial elections, asserting that they preserve judicial independence, enhance judicial accountability, and ultimately serve as an important tool for limiting judicial activism.

The Articles in this issue reflect the panelists' efforts to address issues at the intersection of law and politics in the wake of *Citizens United*. The Minnesota Law Review hopes that, like the Symposium itself, these articles will advance the debate on, and fuel the development of, campaign finance law for years to come.