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Symposium Foreword

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SYMPOSIUM FOREWORD

*Ronald A. Fein**

It's been just over five years since the Supreme Court's widely-criticized decision in *Citizens United v. FEC*, which swept away a federal ban on corporate expenditures in federal election campaigns.¹ The decision provoked widespread criticism for the Court's rejection of a constitutional distinction between corporations and natural persons, and its pronouncement that independent political expenditures, even from corporations, cannot "corrupt" the political process.²

The public is remarkably united in its disagreement with both premises. Multiple polls show that an overwhelming majority of Americans—about 80% of both Democrats and Republicans—oppose the *Citizens United* ruling and support limits on corporate and union political spending, as well as campaign fundraising and spending in general.³ And as of this writing, sixteen states—as well

* Legal Director, Free Speech For People; J.D., Stanford Law School, 2003. The author thanks the other participants at the November 7, 2014 symposium on "Advancing a New Jurisprudence for American Self-Government and Democracy," co-sponsored by Harvard Law School (through academic host Professor John Coates) and Free Speech For People: Mark Alexander, John Bonifaz, Ben Clements, John Coates, Caroline Mala Corbin, Kent Greenfield, Deborah Hellman, Rob Jackson, Tom Joo, Lawrence Lessig, Tamara Piety, Jed Purdy, U.S. Senator Jon Tester, Jennifer Taub, Ciara Torres-Spelliscy, Larry Tribe, and Federal Election Commissioner Ellen Weintraub. For more information on Free Speech For People, a public interest advocacy organization formed on the day of the *Citizens United* decision, see <http://www.freespeechforpeople.org>. Four of the symposium participants who contributed to this issue serve on Free Speech For People's unpaid Legal Advisory Committee: John Coates, Tom Joo, Tamara Piety, and Jennifer Taub.

1. 558 U.S. 310, 365 (2010).

2. *See id.* at 357, 364.

3. *See* Nicholas Confessore & Megan Thee-Brenan, *Poll Shows Americans Favor an Overhaul of Campaign Financing*, N.Y. TIMES, June 3, 2015, at A18; Lydia Saad, *Half in U.S. Support Publicly Financed Federal Campaigns*, GALLUP (June 24, 2013), <http://www.gallup.com/poll/163208/half-support-publicly-financed-federal-campaigns.aspx>; Mark Sherman, *AP-NCC Poll: Public Wants to Limit Influence on Elections by Cash-Rich Outside Interest Groups*, ASSOCIATED PRESS (Sept. 15, 2012), <http://ap-gfkpoll.com/uncategorized/our-latest-poll-findings-10>; Dan Eggen, *Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing*, WASH. POST (Feb. 17, 2010 4:38 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html>.

as 665 cities and towns across thirty-eight states—have passed resolutions calling for an amendment to overturn *Citizens United*.⁴ In the words of Judge Calabresi, the democratic value of political equality “is so fundamental that sooner or later it is going to be recognized. Whether this will happen through a constitutional amendment or through changes in Supreme Court doctrine, I do not know. But it will happen.”⁵ Since *Citizens United*, decisions in areas ranging from campaign finance⁶ to corporate religious exemptions⁷ have enhanced the urgency of developing new ways of thinking about the role of money in politics, the role of corporations under the First Amendment, how corporate law should respond to *Citizens United* and its progeny, and, most importantly, strategies for moving forward.

This symposium issue features nine articles developed from discussions among an extraordinary assembly of scholars, public interest lawyers, and public officials at a one-day symposium on November 7, 2014 at Harvard Law School. The articles in this issue reflect fresh insights, from both constitutional and corporate law, on how best to understand the intersection of money, politics, corporations, and the Constitution. But first, some background.

I. *CITIZENS UNITED* AND ITS AFTERMATH

Citizens United, a nonprofit corporation, sought to distribute a video-on-demand documentary criticizing Hillary Clinton shortly before a 2008 Democratic primary election.⁸ This plan appeared to run afoul of a provision of the Bipartisan Campaign Reform Act of 2002 prohibiting corporations (and unions) from using general treasury funds to make independent expenditures for “electioneering communication[s].”⁹

Citizens United sued the Federal Election Commission, basing its primary argument on statutory interpretation. It argued that a video-on-demand program, which customers would have to affirmatively select and pay for, did not meet the statutory

4. See *State and Local Support*, UNITED FOR THE PEOPLE, <http://united4thepeople.org/state-and-local-support/> (last visited June 11, 2015).

5. *Ognibene v. Parkes*, 671 F.3d 174, 201 (2d Cir. 2011) (Calabresi, J., concurring).

6. See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441–42 (2014) (limiting allowable government interest in regulating political contributions to “*quid pro quo* corruption” and invalidating aggregate contribution limits).

7. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2774–75 (2014) (interpreting Religious Freedom Restoration Act to cover business corporations).

8. *Citizens United v. FEC*, 558 U.S. 310, 319–20 (2010).

9. See *id.* at 318–19, 321; 52 U.S.C. § 30118 (2014) (transferred from 2 U.S.C. § 441b).

definition of “electioneering communication.”¹⁰ But *Citizens United* also raised a First Amendment challenge. By the time *Citizens United* got to the Supreme Court, its argument was constitutional but narrow. The appeal presented the key question as “[w]hether the prohibition on corporate electioneering communications in the Bipartisan Campaign Reform Act of 2002 (‘BCRA’) can constitutionally be applied to a feature-length documentary film about a political candidate funded almost exclusively through noncorporate donations and made available to digital cable subscribers through Video On Demand.”¹¹ But the Court’s ultimate decision swept far more broadly, with a number of remarkable conclusions.

The Court, in a 5-4 opinion by Justice Kennedy, declared that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption,” and that “[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy.”¹² It rejected any constitutional basis for regulating corporations’ political expenditures differently from those of natural persons, describing corporations as Tocquevillian “associations of citizens” and implying that a law that “exempts some corporations but covers others” invidiously discriminates against “certain disfavored associations of citizens—those that have taken on the corporate form.”¹³ And as to whether the “citizens” constituting these “associations” actually support management’s decisions on political spending, the Court declared that there was “little evidence of abuse that cannot be corrected by shareholders ‘through the procedures of corporate democracy.’”¹⁴

Citizens United thus brought together two areas of law: campaign finance and the extension of constitutional rights to corporations. In campaign finance, *Citizens United* reversed decades of precedent allowing limits on corporate (and union) political spending.¹⁵ But its seeds had been planted in *Buckley v. Valeo*, which treated campaign money as protected “speech” in

10. *Id.* at 322.

11. Brief for Appellant at i, *Citizens United v. FEC*, 558 U.S. 310 (2010) (No. 08-205), available at <http://goo.gl/zOzLqu>.

12. *Citizens United*, 558 U.S. at 357, 360.

13. *Id.* at 349, 352, 356.

14. *Id.* at 361–62 (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 794 (1978)).

15. See *id.* at 365 (overruling *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990) and *McConnell v. FEC*, 540 U.S. 93 (2003)).

the first place.¹⁶ As for corporate constitutional rights, *Citizens United* represents the culmination of a trend, which began in the 1880s¹⁷ but was mostly dormant until the 1970s,¹⁸ of extending to corporate entities many of the rights guaranteed to individuals in the Constitution.¹⁹

These trends have continued. Just two months after *Citizens United*, the D.C. Circuit extended the logic of the Court's theory that independent expenditures cannot corrupt to invalidate limits on contributions to so-called independent expenditure political committees.²⁰ That gave birth to "Super PACs," which can receive unlimited contributions and make unlimited independent expenditures. Within the next two years, the Court extended *Citizens United* to the states²¹ and invalidated a key feature of voluntary state public financing systems that gave extra funds to candidates facing better-financed opponents operating outside the system.²²

As for corporate rights claims, the Court has wielded the First Amendment to strike down a state law restricting commercial sale of physician prescription information,²³ and in the state and lower federal courts, emboldened corporate plaintiffs cite the First Amendment and the Equal Protection Clause to challenge laws regarding securities disclosures,²⁴ the

16. 424 U.S. 1, 15–20 (1976) (per curiam) (holding that limits on political contributions and expenditures are restrictions on speech, not conduct).

17. See *Santa Clara Cnty. v. S. Pac. R. Co.*, 118 U.S. 394 (1886) (asserting that Fourteenth Amendment's Equal Protection Clause applies to corporations).

18. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980) (articulating First Amendment doctrine for protecting "commercial speech"); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (invalidating restriction on corporate expenditures in ballot initiative campaigns).

19. See JEFFREY D. CLEMENTS, *CORPORATIONS ARE NOT PEOPLE: RECLAIMING DEMOCRACY FROM BIG MONEY AND GLOBAL CORPORATIONS* 72–79 (2d ed. 2014) (summarizing history of development of corporate constitutional rights).

20. See *SpeechNow.org v. FEC*, 599 F.3d 686, 692–95 (D.C. Cir. 2010) (en banc).

21. See *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490, 2491 (2012) (per curiam) (extending *Citizens United* to invalidate state campaign finance law prohibiting corporate political expenditures).

22. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2829 (2011) (invalidating state public campaign financing system that provided extra public funds to publicly-financed candidates running against privately-financed candidates).

23. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2663 (2011) (invalidating state law regulating sale, disclosure, and use of physician prescription information).

24. See *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 370–73 (D.C. Cir. 2014), *reh'g granted* No. 13-5252 (D.C. Cir. Nov. 18, 2014) (considering First Amendment challenge to regulation requiring disclosure of whether publicly-traded company's products contain minerals traceable to African conflict).

minimum wage,²⁵ food labeling,²⁶ and even a municipal ballot measure limiting public financial incentives for nonrenewable energy corporations.²⁷

Even as the November 2014 symposium was being planned, the Court issued two more decisions, one each on campaign finance and corporate rights, raising many of the same themes. In April 2014, the Court decided *McCutcheon v. FEC*, invalidating long-standing restrictions on the total (aggregate) amount that an individual could contribute to federal political campaigns.²⁸ Just two months later, the Court issued a controversial corporate rights decision in *Burwell v. Hobby Lobby Stores, Inc.*, allowing a religious exercise claim by a corporation whose shareholders objected to federal employee health insurance regulations regarding coverage for contraceptives.²⁹ It's safe to say that the issues of money in politics, and the intersection of corporations and the Constitution, are not going away anytime soon.

II. THE SYMPOSIUM CONTRIBUTIONS

The conference that gave rise to this symposium issue consisted of four panels: Corporations and the First Amendment; Constitutional Dimensions of Corporate Law; Money in Politics and Democracy; and Beyond *Citizens United* and *Hobby Lobby*. These panels brought together scholars from two quite different fields of law. As John Coates noted at the outset, for too long corporate scholars have ignored constitutional law, and vice versa,

25. *See Int'l Franchise Ass'n v. City of Seattle*, No. 2:14-cv-00848 (W.D. Wash. March 17, 2015) (order denying preliminary injunction) (rejecting First Amendment and Equal Protection Clause challenges to minimum wage ordinance), *appeal docketed*, No. 15-35209 (9th Cir. Mar. 20, 2015); *Am. Hotel & Lodging Ass'n v. City of Los Angeles*, No. 2:14-cv-09603 (C.D. Cal. filed Dec. 16, 2014) (considering Equal Protection Clause challenge to minimum wage ordinance).

26. *Grocery Mfrs. Ass'n v. Sorrell*, No. 5:14-cv-00117, 2015 WL 1931142 (D. Vt. Apr. 27, 2015) (granting in part and denying in part motion to dismiss First Amendment challenge to law regulating marketing and labeling of food produced with genetically-engineered ingredients), *appeal docketed*, No. 15-1504 (2d Cir. May 6, 2015).

27. *Noel v. Bd. of Elections*, No. 1422-CC00249 (Mo. Circuit Ct. May 27, 2014) (finding that ballot measure denying public financial incentives to nonrenewable energy corporations and their major business partners violates Equal Protection Clause), *appeal pending sub nom. Jones v. Noel*, No. 101630 (Mo. Ct. App. argued May 12, 2015).

28. 134 S. Ct. 1434, 1442 (2014).

29. 134 S. Ct. 2751, 2762–66 (2014). The challenge was raised under both the First Amendment's Free Exercise Clause and the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb-1, and was ultimately decided under RFRA. Of course, RFRA is "only" a statute. But as a statute, RFRA is unusual—perhaps unique—in its relationship to the First Amendment. *See Hobby Lobby*, 134 S. Ct. at 2760–61 (explaining Congressional intent in RFRA as restoring religious liberty protections after change in Supreme Court's First Amendment doctrine).

but after *Citizens United* and *Hobby Lobby*, these disciplines must communicate. That said, the symposium’s goals—and those of this issue—have been practical as well as scholarly. As Senator Tester noted in his keynote address, it is not sufficient to have the conversation: “it must make a difference.”³⁰

John Coates brings empirical perspective to the rise of corporate First Amendment cases. He sets forth parallel histories of the corporation and of the First Amendment, noting that the Amendment played no role in the country’s dramatic economic expansion from the 19th century through the postwar era. Before the 1970s, the First Amendment’s role was limited, but mainly protected individual expression. But after the Court’s decisions protecting “commercial speech” in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*³¹ and *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*,³² corporate First Amendment litigation exploded. In fact, Coates’s empirical analysis of Supreme Court and Courts of Appeals decisions indicates that corporations are increasingly displacing individuals as the beneficiaries of the First Amendment. This recent (but accelerating) trend, he posits, presents the “risk of Russia,” as the business sector relies less on innovation and efficient addition of value, and more on rent-seeking through the judicial system. In the end, he warns, this “corporate takeover of the First Amendment” is not just bad for democracy—it’s also bad for business.³³

Caroline Mala Corbin and Tamara Piety argue that the metaphor of corporation as person has led the Court astray. Corbin dives into *Hobby Lobby*’s extension of religious liberty to commercial corporations. Surveying the underlying religious and secular justifications for protecting religious liberty in the first place, she argues that none of them apply to business corporations. The nature of the corporate “person,” she argues, simply does not make it a suitable vehicle for religious liberty.³⁴ Piety argues that the personhood framework, and the Court’s anti-discrimination rhetoric, is misleading and dangerous because

30. See Jon Tester, U.S. Sen., Speech at Harvard Law School: *Citizens United*, Democracy, and Ensuring the Rights of Individuals in the Political Process (Nov. 7, 2014) (transcript available at <http://goo.gl/26gha1>).

31. 425 U.S. 748 (1976).

32. 447 U.S. 557 (1980).

33. John C. Coates IV, *Corporate Speech and the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 269 (2015).

34. Caroline Mala Corbin, *Corporate Religious Liberty*, 30 CONST. COMMENT. 277 (2015).

it presents business corporations as an embattled minority in need of the courts' counter-majoritarian power. She enumerates and rebuts common arguments minimizing the relevance of corporate personhood in constitutional analysis, and argues that avoiding this issue obscures important value judgments.³⁵

Kent Greenfield and Tom Joo counter that the problem with *Citizens United* and *Hobby Lobby* does not lie in corporate personhood. In Joo's view, personhood is a red herring; the root of the problem is not attribution of First Amendment rights to corporations, but rather the Court's analysis of corporate political spending. He argues that the Court's naïve trust in "corporate democracy"³⁶ belies corporate law realities, including board-centric governance, limited shareholder powers, and the undemocratic nature of shareholder voting. He posits that constitutional analysis should consider the structure of corporate governance, and the fundamental incompatibility of corporate governance with democratic governance justifies limiting corporate involvement in politics.³⁷ Greenfield, in contrast, maintains that the ultimate solution lies in fundamentally restructuring corporate law. He proposes reforming corporate governance, by extending management's fiduciary obligations to include employees and other corporate stakeholders and by mandating employee representation on boards, to make the corporate "person" behave more like a real person.³⁸

Jed Purdy and Larry Tribe argue that, to think clearly about moving past *Citizens United* on the role of money in politics, we need a better conception of democratic values and civic engagement. In Purdy's view, our notion of citizenship is mired in an economistic, anti-civic culture, and campaign finance reform must be part of a larger program of revitalizing democratic culture. Unless we can rejuvenate an egalitarian democratic conception, distinct from the self-interested marketplace, he fears, we will lose a democracy worthy of the name.³⁹ Tribe takes a different path to a compatible conclusion. He emphasizes that we must speak precisely about the nature of the Court's error in *Citizens United*: not the narrow judgment in that particular case

35. Tamara R. Piety, *Why Personhood Matters*, 30 CONST. COMMENT. 361 (2015).

36. See *Citizens United v. FEC*, 558 U.S. 310, 362, 370 (2010).

37. Thomas W. Joo, *Corporate Speech and the Rights of Others*, 30 CONST. COMMENT. 335 (2015).

38. Kent Greenfield, *In Defense of Corporate Persons*, 30 CONST. COMMENT. 309 (2015).

39. Jedediah Purdy, *That We Are Underlings: The Real Problems in Disciplining Political Spending and the First Amendment*, 30 CONST. COMMENT. 391 (2015).

(involving a nonprofit that sought to distribute a movie), but rather the Court's fundamental conception of First Amendment values. He argues that, while the First Amendment embraces the libertarian values proclaimed by the Court, it *also* embraces egalitarian and democratic values that the Court ignored. In his view, campaign finance should be reconstructed with some judicial humility: recognizing empirical realities and competing constitutional values, granting the political branches some space to limit the conversion of economic inequality to political inequality, and taking a modest approach rather than going "all in" on a particular ideological conception of democracy.⁴⁰

Jennifer Taub and Ciara Torres-Spelliscy discuss practical solutions to problems created by *Citizens United* and *Hobby Lobby* that are motivated by the language of the decisions themselves. Torres-Spelliscy examines *Citizens United*'s concept of "corporate democracy" from the perspective of "say on pay" and "say on politics" proposals. She traces the evolution of shareholder voting on executive compensation, and observes that management resisted "say on pay" with a laundry list of legal and policy objections that ultimately suggest a discomfort with corporate democracy within the executive suite and boardroom. She observes a similar trajectory at the early stages of proposals to require shareholder approval of corporate political spending, and argues that, despite management objections, the law supports giving shareholders a "say on politics."⁴¹ Taub examines *Hobby Lobby*'s focus on "closely-held" corporations as the purest embodiment of its model of corporation-as-association. She suggests that the post-*Hobby Lobby* effort to define the subset of corporations that meet the Court's vision—to develop a "*Hobby Lobby* Tool"—could be broadly productive. If corporate exercise of *religion* can be limited to a tight subset of corporations, based on structural features of the corporation, then perhaps those same principles could limit the Court's expansion of corporate constitutional rights in other domains, such as political spending.⁴²

III. CONCLUSION

Citizens United has led to great concern about the direction

40. Laurence H. Tribe, *Dividing Citizens United: The Case v. the Controversy*, 30 CONST. COMMENT. 463 (2015).

41. Ciara Torres-Spelliscy, *Corporate Democracy from Say on Pay to Say on Politics*, 30 CONST. COMMENT. 431 (2015).

42. Jennifer S. Taub, *Is Hobby Lobby a Tool for Limiting Corporate Constitutional Rights?*, 30 CONST. COMMENT. 403 (2015).

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of our democracy. But as the symposium itself and the thoughtful contributions to this issue show, there is reason for hope. Thirty-five years ago, Justice Rehnquist wrote in dissent that “in a democracy, the economic is subordinate to the political, a lesson that our ancestors learned long ago, and that our descendants will undoubtedly have to relearn many years hence.”⁴³ We are now relearning that lesson, and there is light ahead.

43. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 599 (1980) (Rehnquist, J., dissenting).