2014 Election Law Update -
New Laws and Court Decisions Impacting the Elections

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I. Pre-Roberts' Court Background

Broad Overview: The Court has frequently considered restrictions on campaign financing and related politically speech. The Court has focused on the nexus between the restriction and the interest the governmental intends to promote. Although there was some variation depending on the facts presented and the make-up of the Court, in years past, the Court was generally willing to allow restrictions on levels of spending, but not complete bans on participation.

- **Buckley v. Valeo (1976)**

The Supreme Court had upheld contribution limits on the basis of the government's "compelling interest" in preventing political corruption or its appearance, but had left open the possibility that if limits were set so low as to prevent speakers from effectively presenting their message to the public, such limits might be unconstitutional.

- **First National Bank of Boston v. Bellotti (1978)**

The Supreme Court held that corporations have a First Amendment right to make contributions to ballot initiative campaigns. The ruling came in response to a Massachusetts law that prohibited corporate donations in ballot initiatives unless the corporation's interests were directly involved.

- **California Medical Association v. FEC (1981)**

The Supreme Court upheld limits that prevented individuals and unincorporated associations from contributing more than $5,000 per calendar year to any multicandidate political committee. A related provision of the Act made it unlawful for political committees to knowingly accept contributions exceeding this limit. The Court found that if the First Amendment rights of a contributor are not infringed by limitations on the amount he may contribute to a campaign organization which advocates the views and candidacy of a particular candidate, the rights of a contributor are similarly not impaired by limits on the amount he may give to a multicandidate political committee, which advocates the views and candidacies of a number of candidates.

- **FEC v. Massachusetts Citizens for Life (1986)**

The Supreme Court decided, in a 5-4 ruling, that the Federal Election Campaign Act's ban on corporate spending in connection with federal elections, was unconstitutional as applied to independent expenditures made by a narrowly defined type of nonprofit

corporation. Acknowledging that "the class of organizations affected by our holding today will be small," the Court delineated the type of corporation which would be permitted to make independent expenditures under this ruling. "MCFL has three features essential to our holding that it may not constitutionally be bound by §441b's restriction on independent spending." These three criteria are as follows: The organization must be formed "for the express purpose of promoting political ideas, and cannot engage in business activities. If political fundraising events are expressly denominated as requests for contributions that will be used for political purposes, including direct expenditures, these events cannot be considered business activities." The organization must have "no shareholders or other persons affiliated so as to have a claim on its assets or earnings." The organization must not have been established by a business corporation or a labor union, and must adopt a policy "not to accept contributions from such entities."

- **Austin v. Michigan Chamber of Commerce (1990)**

The Supreme Court held that the Michigan Campaign Finance Act, which prohibited corporations from using treasury money to make independent expenditures to support or oppose candidates in elections, did not violate the First and Fourteenth Amendments. The Court upheld the restriction on corporate speech "Corporate wealth can unfairly influence elections," and the Michigan law still allowed the corporation to make such expenditures from a segregated fund.

- **Nixon v. Shrink Missouri Government PAC (2000)**

The Supreme Court held that their earlier decision in Buckley v. Valeo, upholding federal limits on campaign contributions also applied to state limits on campaign contributions to state offices.

- **FEC v. Colorado Republican Federal Campaign Committee (2001)**

The Supreme Court upheld the constitutionality of coordinated expenditure limitations imposed on political parties by the Federal Election Campaign Act of 1971. The Court drew a distinction between independent expenditures, which receive strict scrutiny, and coordinated expenditures which are subject to enhanced regulation and are therefore more likely to be upheld.

- **Republican Party of Minnesota v. White, 536 U.S. 765 (2002)**

The Supreme Court held in a 5-4 decision that Minnesota's announce clause, which was a part of their judicial conduct code and forbade candidates for judicial office from announcing their views on disputed legal and political issues was an unconstitutional infringement on the candidates' First Amendment rights.

- **Federal Election Commission v. Christine Beaumont, et al. (2003)**

The Supreme Court agreed that the ban on corporate contributions to federal candidates is constitutional, even when applied to nonprofit advocacy corporations. The Court was

reviewing the Federal Election Campaign Act sections that provided corporations are prohibited from making "a contribution or expenditure in connection with" certain federal elections, but not from establishing, administering, and soliciting contributions to a separate fund to be used for political purposes. Such a PAC is free to make contributions and other expenditures in connection with federal elections.

- **McConnell v. Federal Election Commission (2003)**

The Supreme Court upheld the constitutionality of the Bipartisan Campaign Reform Act of 2002. With a 5-4 majority, the Court upheld the key provisions including (1) the "electioneering communication" provisions (which required disclosure of and prohibited the use of corporate and union treasury funds to pay for or broadcast cable and satellite ads clearly identifying a federal candidate targeted to the candidate's electorate within 30 days of a primary or 60 days of a general election); and (2) the soft money ban, which prohibited federal parties, candidates, and officeholders from raising or spending funds not in compliance with contribution restrictions, and prohibited state parties from using such soft money in connection with federal elections.

II. Roberts Court Era Decisions

Broad Overview: The Roberts' Court has taken a narrow view on the constitutionality of campaign financing laws, ruling that the only acceptable purpose of campaign money regulation is to limit corruption and the appearance of corruption. The Court has then gone on to narrow the definition of corruption to the quid pro quo trading of favors for money. Justice Roberts has noted "[s]pending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to such quid pro quo corruption. Nor does the possibility that an individual who spends large sums may garner 'influence over or access to' elected officials or political parties." *McCutcheon v. Federal Election Commission*, 572 U.S. ____ (2014). Although, the Court has not adopted Justice Thomas' preferred approach of simply striking down in broad strokes all restraint on campaign financing, the Court has struck down most restrictions that are squarely before the Court. Chief Justice Roberts has indicated that his Court has little deference to stare decisis in this area. "Stare decisis...counsels deference to past mistakes, but provides no justification for making new ones." *Citizens United v. Federal Election Commission* 130 S. Ct. 876 (2010) (Roberts, C.J., concurring)

- **Randall v. Sorrell (2006)**

The Court reviewed the constitutionality of Vermont's Act 64. Act 64 set mandatory campaign expenditure limits and limited out-of-state funding. In response to a First Amendment challenge, Vermont argued that circumstances had changed since Buckley v. Valeo. In a 6-3 decision, the Court ruled against Vermont on the three issues:

  - Did Vermont's law violate the First Amendment, Fourteenth Amendment, following the Supreme Court ruling in Buckley v. Valeo?

- Did Vermont violate the right of political parties to make independent expenditures, following the Supreme Court ruling in Colorado Republican Federal Campaign Committee v. FEC?
- Did Vermont's contribution limits fall below an acceptable constitutional threshold and should be struck down?

The Court found that Vermont's contribution limits failed to satisfy the "careful tailoring" requirement of the First Amendment. While striking down Vermont's Act, the Court noted that contribution limits were permissible if they were "closely drawn" to match a "sufficiently important interest." Although, the Vermont legislature's intent was preventing corruption and the appearance of corruption—interests that have been previously found to be sufficiently important—Vermont's limitations on contributions were the lowest in the nation and well below the lowest limit that the Supreme Court has previously upheld, therefore the Court found that they were not sufficiently tailored to withstand scrutiny.

- **Federal Election Commission v. Wisconsin Right to Life (2007)**

The Court held that issue ads may not be banned from the months preceding a primary or general election. The Bipartisan Campaign Reform Act, commonly known as McCain-Feingold, amended the Federal Election Campaign Act in part to regulate "issue ads." "Issue ads" typically discussed a candidate name with regards to a particular issue, but because they did not expressly advocate the election or defeat of a candidate, they fell outside the prohibitions and limitations of the Federal Election Campaign Act. McCain-Feingold prohibited corporations and unions from directly or indirectly funding "electioneering communications," defined as broadcast ads costing in excess of an aggregated $10,000 that mentioned a candidate for federal political office within 30 days of a primary election or 60 days of a general election. In McConnell v. Federal Election Commission, the Court previously upheld the Bipartisan Campaign Reform Act against a facial challenge that the law was unconstitutional.

Wisconsin Right to Life Inc., a nonprofit advocacy group, sought to run ads within the 30 and 60 day blackout provisions, asking voters to contact their Senators and urge them to oppose filibusters of judicial nominees. They argued that the proposed ads addressed a current issue pending in Congress and did not advocate the election or defeat of a candidate and therefore there was no governmental interest in prohibiting the ads. The case went to the Supreme Court twice. Initially, the Court reversed a lower court finding that McConnell v. FEC precluded not only a facial challenge, but also an "as applied" challenge. After the lower court addressed the merits of the claim and found that they were not "sham" issue ads and did not expressly advocate for or against a candidate, therefore finding that the government lacked a compelling interest to abridge rights of free speech. The FEC appealed. Chief Justice Roberts, on behalf of a 5-4 Court, crafted an exception to the limitations on broadcast ads within 30 days of a primary or 60 days of a general election. The court ruled that unless an ad could not reasonably be interpreted as anything other than an ad urging the support or defeat of a

candidate, it was eligible for an "as applied" exception to the McCain-Feingold limits on issue ads close to an election. The opinion was strongly worded, calling the prohibition a "blackout" period; declaring "Enough is enough" when it comes to the regulation of political speech; and concluding "we give the benefit of the doubt to speech, not censorship."

- **Davenport v. Washington Education Association (2007)**

The Supreme Court held that it does not violate the First Amendment for a state to require its public-sector unions to receive affirmative authorization from a non-member before spending that nonmember's agency fees for election-related purposes. The National Labor Relations Act allows unions to require that non-union members pay agency fees to cover collective bargaining costs and prevent so-called free rider problems. The Supreme Court had previously found that requiring non-members to pay agency fees is constitutional and legal, provided a number of conditions are met including that safeguards are in place to ensure that unions don't spend a worker's money for political causes that he/she opposes without permission.

In 1992, Washington state voters approved a ballot initiative that requires unions to receive permission from non-union members to use their fees to support political campaigns, including soft money expenditures. The Washington Education Association was sued for intentionally violating the initiative. The Washington Supreme Court found that the law was unconstitutional because it places too large of an administrative burden on the union. Therefore, non-union members could not prevent the union from using their money for political campaign purposes. The US Supreme Court granted cert. and in a unanimous decision overturned the Washington Supreme Court's ruling.

Justice Scalia, writing for the Court, found that the Washington Supreme Court misinterpreted the Supreme Court's precedent when it found that the law's provision that "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee." demonstrated a First Amendment partiality to one group and marginalizes the unions understood freedom of expression. The Court held that voters can limit the entitlement that unions have to collect and use non-members funds. The Court further found that the Washington statute was not unconstitutional because it distinguished between public and private sector unions. The Court found unions violated the extent of the non-members free speech because they were using tax-payers dollars to fund political election campaigns, because the limitation of the union's free speech protection is not content based. The voters of Washington passed a law that prevents the government from "acting in a capacity other than as regulator." Therefore, it does not threaten the "marketplace of ideas" that the First Amendment seeks to protect.

- **Davis v. Federal Election Commission (2008)**

The Supreme Court held that Sections 319 of the McCain-Feingold Act unconstitutionally infringed on a candidate's First Amendment rights. Section 319 of the Bipartisan Campaign Reform Act (BCRA) of 2002 contained the so-called "Millionaire's

Amendment," which required a candidate for federal office in the United States to file a "declaration of intent" regarding how much of the candidate's personal funds he or she intended to spend in the upcoming election. This provision was triggered only if the amount of personal funds available to the candidate for expenditure in the race exceeded $350,000. Once the reporting obligation was triggered, the candidate would still be subject to the contribution limitations imposed by the BCRA and other federal and state laws. However, Section 319 provided that the contribution caps for the non-self-financing opposition candidate were now tripled, and the non-self-financing candidate could receive coordinated contributions and expenditures from his or her national political party without any limitation.

Plaintiff Jack Davis brought suit, alleging that the BCRA disclosure and limitation restrictions on wealthy candidates violated his First Amendment rights. Justice Alito wrote the 5-4 decision, holding that Section 319 of the BCRA failed to pass constitutional muster. The Court found that, to be constitutional, campaign finance limitations not only must equally apply to all candidates, but they must be narrowly drawn to advance important governmental interests (such as avoiding corruption in the political process). Not only did the provision fail to provide a level playing field, it fundamentally restricted the right of a self-financing candidate to spend his or her own money in a preferred way. The Court found that no important governmental interest was advanced, because a reliance on personal expenditures fundamentally reduces the likelihood of corruption. The FEC had argued that a level playing field was an important governmental interest, but the Court disagreed.

- **Caperton v. A.T. Massey Coal Co., Inc. (2009)**

The Supreme Court held that the Due Process clause of the Fourteenth Amendment requires a judge to recuse himself not only when actual bias has been demonstrated or when the judge has an economic interest in the outcome of the case, but also when "extreme facts" create a "probability of bias."

In 1998, Harman Mining Company filed a lawsuit against A.T. Massey Coal Company alleging that Massey fraudulently canceled a contract with Harman Mining, resulting in its going out of business. In August 2002, a jury found in favor of Caperton and awarded $50 million in damages. While the case was pending in the West Virginia Supreme Court of Appeals, A.T. Massey's CEO became involved in the election campaign pitting incumbent Supreme Court Justice Warren McGraw against Charleston lawyer Brent Benjamin. Blankenship created a non-profit corporation called "And for the Sake of the Kids" through which he contributed over $3 million in Benjamin's behalf. Much of the money went to an advertising campaign aimed at questioning McGraw's impartiality. Justice McGraw was defeated. In 2007, when the case came before the West Virginia Supreme Court, Caperton petitioned for Justice Benjamin to recuse himself because of Blankenship's contributions during the campaign. Benjamin declined and was ultimately part of the 3 to 2 majority that overturned the $50 million verdict. Caperton filed a petition with the United States

Supreme Court arguing that Blankenship's 2004 campaign expenditures on behalf of Benjamin's election raised an appearance of partiality on Benjamin's part, and due process required his recusal. Justice Benjamin countered that he was not biased and that because there was no direct financial or other connection between him and Blankenship, there was no obligation for him to recuse himself.

In June 2009, the Court found for Harman Mining, remanding the case back to the West Virginia Supreme Court. Justice Kennedy wrote for the 5-4 majority, calling the appearance of a conflict of interest so "extreme" that Benjamin's failure to recuse himself constituted a violation of the plaintiff's Constitutional right to due process under the Fourteenth Amendment. The Court noted that not every campaign contribution by a litigant creates a probability of bias that requires a judge's recusal. Justice Kennedy wrote, "We conclude that there is a serious risk of actual bias — based on objective and reasonable perceptions — when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." "The inquiry," Justice Kennedy wrote, "centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election."

Applying that test, Justice Kennedy ruled for the Court that "Blankenship's significant and disproportionate influence—coupled with the temporal relationship between the election and the pending case—"' "offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true."' "On these extreme facts the probability of actual bias rises to an unconstitutional level." Chief Justice Roberts dissented, arguing that the majority decision would have dire consequences for "public confidence in judicial impartiality." The dissent emphasized that the "probability of bias" standard formulated by the Court was excessively vague and "inherently boundless." Chief Justice Roberts noted that previously the Supreme Court had recognized only two situations in which the Fourteenth Amendment's Due Process Clause disqualified a judge: when the judge has a financial interest in the outcome of the case, and when the judge is trying a defendant for criminal contempt in his own court. Chief Justice Roberts contrasted the objective nature of these situations to the completely subjective inquiry required by the "probability of bias" standard.

- **Citizens United v. Federal Election Commission (2010)**

The Supreme Court held that the First Amendment prohibits the government from restricting political independent expenditures by corporations, associations, or labor unions. In the case, the conservative lobbying group Citizens United wanted to air a film critical of Hillary Clinton and to advertise the film during television broadcasts in apparent violation of the 2002 Bipartisan Campaign Reform Act ("BCRA"). Section 203 of BCRA defined an "electioneering communication" as a broadcast, cable, or satellite communication that mentioned a candidate within 60 days of a general election or 30 days of a primary, and prohibited such expenditures by corporations and unions.

The United States District Court for the District of Columbia held that §203 of BCRA applied and prohibited Citizens United from advertising the film Hillary: The Movie in broadcasts or paying to have it shown on television within 30 days of the 2008 Democratic primaries. The Supreme Court reversed this decision, striking down as unconstitutional those provisions of BCRA that prohibited corporations and unions from making independent expenditures and "electioneering communications".

The majority decision overruled *Austin v. Michigan Chamber of Commerce* and partially overruled *McConnell v. Federal Election Commission*. The Court, however, upheld requirements for public disclosure by sponsors of advertisements. The ruling removed the previous ban on corporations and organizations using their treasury funds for direct advocacy. These groups were freed to expressly endorse or call to vote for or against specific candidates, actions that were previously prohibited. Justice Kennedy, writing for the majority wrote, "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech." and found the First Amendment does not allow prohibitions of speech based on the identity of the speaker.

In his concurrence, Chief Justice Roberts, wrote "to address the important principles of judicial restraint and stare decisis implicated in this case." Justice Roberts took a statement from the main opinion that "there is a difference between judicial restraint and judicial abdication" and explained why the Court must sometimes overrule prior decisions. He noted that had prior Courts never gone against stare decisis, "segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants". Roberts argued that "stare decisis...counsels deference to past mistakes, but provides no justification for making new ones".

- **Arizona Free Enterprise Club Freedom Club PAC v. Bennett (2011)**

Arizona's matching funds scheme, which provides additional funds to a publicly funded candidate when expenditures by a privately financed candidate and independent groups exceed the funding initially allotted to the publicly financed candidate, substantially burdens political speech and is not sufficiently justified by a compelling interest to survive First Amendment scrutiny. The Arizona voters approved a system which provides subsidies to candidates in state races who are willing to forgo private donations, and if a subsidized candidate started to be out-spent by a candidate relying on his or her own money, that triggered some added subsidy money for the subsidized politician. The more the self-financed candidate spent, the more subsidy would be provided to the candidate relying solely on those funds.

The Supreme Court struck down the triggering component, but not the concept of public funding, explicitly stating "we do not today call into question the wisdom of public financing as a means of funding political candidacy. That is not our business." The Court found that the matching program may cause self-financed candidates to curb their own spending and therefore campaigning, because if they went above the public

subsidy they would in essence be providing free money to their opponent. The Court found that the end result would be less speech and that was an unconstitutional burden on the self-financed candidates, and on the independent groups that favored their candidacy. Justice Roberts found that for this burden to withstand the First Amendment, it would have to be justified by a strong interest for the state. The Court found that the law's intended purposes to reduce the corrupting influence of private funds in election campaigns and to "level the playing field" were insufficient to justify the burden.

- **American Tradition Partnership v. Bullock (2012)**

The Supreme Court reversed without argument a Montana Supreme Court ruling which upheld the state's prohibition on corporate financing in elections despite the Citizens United decision. The Montana Supreme Court relied heavily on the particularized history of corruption in Montana's elections in its finding that the prohibition did not conflict with Citizens United. The Supreme Court wrote only that "[t]here can be no serious doubt" that the holding of Citizens United applies to the Montana state law, as per U.S. Const., Art. VI, cl. 2, and that "Montana's arguments in support of the judgment below either were already rejected in Citizens United, or fail to meaningfully distinguish that case." Four justices dissented.

- **McCutcheon v. FEC (2014)**

The Supreme Court struck down Section 441 of the Federal Election Campaign Act, which imposed a biennial aggregate limit on individual contributions to national party and federal candidate committees as violating the First Amendment.

The Federal Election Campaign Act was amended in 1974, after Watergate, imposing aggregate limits on the direct contributions that individuals can make to national political parties and federal candidates in a calendar year. The constitutionality of the amendments was challenged in 1976, which resulted in the court upholding the aggregate limits in Buckley v. Valeo. In 2002, the Bipartisan Campaign Reform Act (BCRA) was passed. The BCRA revised the aggregate limits, adjusted them to inflation, and changed the individual limitations from annual to biennial. McCutcheon filed suit against the Federal Election Commission challenging the limits. In a 5-4 decision, the Court overturned limits on aggregate federal campaign contributions, it did not, however, affect limits on how much individuals can give to an individual politician's campaign, which remain at $2,600 per election. Chief Justice John Roberts writing for the majority found that "The government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse."

Justice Thomas concurred in the judgment but argued for abolishing all campaign contribution limits. He wrote: "limiting the amount of money a person may give to a candidate does impose a direct restraint on his political communication." Justice Thomas advocated overturning Buckley v. Valeo's holding that "[a] contribution serves as a general expression of support for the candidate and his views, but does not

communicate the underlying basis for the support", since "this Court has never required a speaker to explain the reasons for his position in order to obtain full First Amendment protection".

III. Other Notable Cases

- **New York Progress & Prot. PAC v. Walsh, 2014 U.S. Dist LEXIS 57477 (S.D.N.Y. Apr. 24, 2014)**

In reviewing restrictions on campaign financing by independent expenditure-only organizations under New York Law, the United States District Court for the Southern District of New York, in the wake of *Citizens United*, found that since contributing money is a form of speech, preventing *quid pro quo* corruption or its appearance is the only governmental interest strong enough to justify restrictions on political speech. The Court noted that "it is only direct bribery—not influence—that the Court views as crossing the line into *quid pro quo* corruption." Accordingly, the Court held that the limitations contained in New York Election Laws §§ 14-114(8) and 14-126, as applied to independent expenditure-only organizations, cannot prevent quid pro quo corruption or its appearance, and thus violate the First Amendment.

- **Wis. Right to Life, Inc. v. Barland, 2014 U.S. App. LEXIS 9015 (7th Cir. May 14, 2014)**

Wisconsin Right to Life, Inc., and its State Political Action Committee, sued to block the enforcement of many state statutes and rules against groups that spend money for political speech independently of candidates and parties. Applying *Citizens United*, the Seventh Circuit held that the Wisconsin aggregate contribution limit is unconstitutional as applied to organizations that independently spend money on election-related speech and permanently enjoined its enforcement against independent-expenditure groups and their donors. The Court further held that Wisconsin's prohibition on corporate political fundraising, and the cap on corporate fundraising were unconstitutional restraints of political speech; The definitions of political purposes and political committee were unconstitutionally vague and overbroad; the court required that, as applied to political speakers other than candidates, their campaign committees, and political parties, the definitions be limited to express advocacy and its functional equivalent; and PAC-like registration, reporting, and other requirements on all organizations that made independent disbursements, was unconstitutional as applied to organizations not engaged in express advocacy as their major purpose.

- **Seaton v. Wiener, 0:14-cv-01016-DWF-JSM (D. Minn. May 19, 2014)**

The United States District Court for the District of Minnesota, addressed a constitutional challenge to Minn. Stat. § 10A.27, subd. 11—insofar as it restricts donations from "large contributors"—in light of the recent United States Supreme Court decision, McCutcheon v. FEC. The legislative history indicates that the law was enacted for the purpose of combatting concerns separate from quid pro quo

corruption—namely efforts to lessen the "disproportionate influence" of large donors, to "level the playing field," and to "reduce the role of big money in politics." The Court found that these purposes did not meet constitutional muster in light of McCutcheon and granted a preliminary injunction.

Further Reading:

Garrett, R. Sam, "The State of Campaign Finance Policy: Recent Developments and Issues for Congress," Congressional Research Service (June 5, 2014) (available at: http://fas.org/sgp/crs/misc/R41542.pdf)

Collins, Ron; Skover, David, When Money Speaks: The McCutcheon Decision, Campaign Finance Laws, and the First Amendment, Trade Paper (2014)

Sherman, Paul, "Citizens United Decision Means More Free Speech," National Review Online (Jan. 21, 2010) (available at http://www.nationalreview.com/bench-memos/49332/citizens-united-decision-means-more-free-speech/paul-sherman)

Kroll, Andy, "The Supreme Court Just Gutted Another Campaign Finance Law. Here's What Happened. Everything you need to know about the McCutcheon v. FEC ruling." MotherJones (Apr. 2, 2014) (available at http://www.motherjones.com/politics/2014/03/supreme-court-mccutcheon-citizens-united)