

THE SUPPORT STRUCTURE FOR CAMPAIGN FINANCE LITIGATION IN THE ROBERTS COURT: A RESEARCH AGENDA

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Two recent Supreme Court decisions, *Citizens United v. Federal Election Commission*¹ and *McCutcheon v. Federal Election Commission*,² have sparked enormous public controversy over the Roberts Court's stance toward the regulation of money in politics.³ Supporters of the decisions laud them for striking down dangerous restrictions on freedom of speech,⁴ while critics assert that they have struck a terrible blow against democratic values and electoral integrity.⁵ These

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1. 558 U.S. 310 (2010) (striking down a prohibition on the use of corporate or union treasury funds to pay for electioneering communications or express advocacy not coordinated with a campaign).

2. 134 S. Ct. 1434 (2014) (finding unconstitutional federal aggregate limits on contributions to candidates, political parties, and political action committees).

3. President George W. Bush nominated John Roberts in 2005, initially to succeed retiring Associate Justice Sandra Day O'Connor. When Chief Justice William Rehnquist died before Roberts's confirmation hearings, President Bush nominated Roberts to become the new Chief Justice.

4. See, e.g., FLOYD ABRAMS, FRIEND OF THE COURT: ON THE FRONT LINES WITH THE FIRST AMENDMENT 303–47 (2013) (defending the ruling in *Citizens United*); Bradley A. Smith, *Free Speech at Last: McCutcheon Decision Just Right*, NAT'L REV. ONLINE (Apr. 2, 2014), <http://www.nationalreview.com/article/374894/free-speech-last-mccutcheon-decision-just-right-bradley-smith>, archived at <http://perma.cc/GP6E-AMXV> (describing *McCutcheon* as “another step toward protecting political speech”).

5. See, e.g., Erwin Chemerinsky, *Future of Campaign Finance Laws*, ORANGE COUNTY REG. (Apr. 8, 2014), <http://www.ocregister.com/articles/court-608924-political-campaign.html>, archived at <http://perma.cc/E5HA-FQZP> (“Those who spend huge sums, after *McCutcheon*, in contributions to political parties will be rightly perceived as having undue influence over the government that they helped to elect.”); Richard L. Hasen, *Worse Than Watergate: The New Campaign Finance Order Puts the Corruption of the 1970s to Shame*, SLATE (July 19, 2012), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/07/campaign_finance_after_citizens_united_is_worse_than_watergate_.html, archived at <http://perma.cc/9DZZ-H3UK> (“How does the brave new world of campaign financing

decisions have attracted a great deal of scholarly commentary—analyzing the confused history of campaign finance doctrine, the evolution of the Justices’ views on these issues, and the reasoning, wisdom, and policy implications of the rulings.⁶

My current book project differs from much of the existing scholarship on the Roberts Court’s campaign finance decisions because it investigates processes that precede adjudication and focuses on how actors other than judges have helped to create conditions conducive to constitutional change. The research traces what might be viewed as the supply-side of adjudication, or what another scholar, Charles Epp, has called the “support structure” for legal mobilization.⁷ This support structure includes the organizations that have teed up campaign finance cases for adjudication, the lawyers who have represented the parties and amici, the scholars and interest groups that have cultivated and advanced the ideas adopted in the Court’s decisions, and the financial patrons and advocacy networks that have supported that process.⁸

What are the various organizations and who are the lawyers on both sides of these cases about the expressive rights of corporations and wealthy donors in electoral politics? What interests and constituencies do they claim to represent? Which of these organizations characterize themselves as public interest groups, and what vision of the public good do they

created by the Supreme Court’s *Citizens United* decision stack up against Watergate? The short answer is: Things are even worse now than they were then.”).

6. See, e.g., RONALD COLLINS & DAVID SKOVER, WHEN MONEY SPEAKS: THE MCCUTCHEON DECISION, CAMPAIGN FINANCE LAWS AND THE FIRST AMENDMENT (2014); ROBERT E. MUTCH, BUYING THE VOTE: A HISTORY OF CAMPAIGN FINANCE REFORM (2014); ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 86–88 (2014); ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO CITIZENS UNITED (2014); Richard L. Hasen, *The Nine Lives of Buckley v. Valeo*, in FIRST AMENDMENT STORIES 345–73 (Richard W. Garnett & Andrew Koppelman eds., 2012); Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011); Michael S. Kang, *Party-Based Corruption and McCutcheon v. FEC*, 108 NW. U. L. REV. ONLINE 240 (2014); Alexander Polikoff, *So How Did We Get Into this Mess? Observations on the Legitimacy of Citizens United*, 105 NW. U. L. REV. 203 (2011).

7. CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 17–20 (1998).

8. For a study of one very important element of this support structure, the Federalist Society, see AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES, 61–89 (2015).

2015]

CAMPAIGN FINANCE LITIGATION

1223

purport to advance? What lawyers and other types of resources do the organizations bring to the effort? What are the lines of agreement and disagreement among the advocates, advocacy organizations, and their financial backers, and how united or fragmented are the parties and amici? Are there obvious patterns in the types of arguments made and the language and metaphors, keywords, and turns of phrase used to advance the arguments? What are these advocates' ties to one another and to private law firms, political parties, and bar associations with particular ideological commitments, such as the Federalist Society and American Constitution Society?⁹

Eventually, I plan to study the support structure for a long line of campaign finance cases from *Buckley v. Valeo*¹⁰ through *McCutcheon v. Federal Election Commission*.¹¹ So far, however, the research focuses primarily on two especially significant campaign finance decisions of the Roberts Court: *Citizens United*,¹² which found unconstitutional a provision of the Bipartisan Campaign Reform Act of 2002 (BCRA)¹³ limiting corporate expenditures in federal elections,¹⁴ and *McCutcheon*, which invalidated overall limits on the total contributions an individual can give in an election cycle.¹⁵ In *Citizens United*, the Court found that corporations, like individuals, have a First Amendment right to spend unlimited amounts on elections.¹⁶ The decision overruled *Austin v. Michigan Chamber of Commerce*, which upheld a Michigan statute limiting the amount that corporations could spend to support or oppose candidates in elections for state offices,¹⁷ and *McConnell v. Federal Election Commission*, which upheld the very provision of the BCRA invalidated in *Citizens United*.¹⁸ In *McCutcheon*, the Court rejected the notion that the government may

9. In her analysis of the influence of the Federalist Society's "epistemic community" on campaign finance doctrine, Hollis-Brusky identified many Federalist Society connections among advocates and scholars. However, she did not attempt to identify all such ties among the lawyers who participated in the litigation. *See id.* at 61–89.

10. 424 U.S. 1, 5–43 (1976).

11. 134 S. Ct. 1434 (2014).

12. 558 U.S. 310 (2010).

13. Pub. L. No. 107–155, 116 Stat. 81 (2002).

14. 558 U.S. at 311–16.

15. 134 S. Ct. at 1437–40.

16. 558 U.S. at 314.

17. 494 U.S. 652 (1990).

18. 540 U.S. 93 (2003).

regulate campaign contributions to prevent the kind of broad political influence or access that an individual might acquire by contributing to an unlimited number of candidates and political committees.¹⁹

The research will pursue three broad issues. First, it will explore the resources and alignments of organizations active in these cases. With assistance from an excellent team of research assistants, I have gathered data about the organizations' tax statuses, annual revenues, founding dates, board members, and foundation contributors. I have identified the allies and adversaries among the litigants, and I am examining how the organizations' positions relate to their missions and those of their financial patrons. The cases are complex, and the briefs take a variety of different stances, some quite absolute and others more nuanced. I will analyze the positions of various constituencies—business and trade groups, libertarians, liberals, civil libertarians, religious conservatives, unions, political parties, etc.—and the extent to which they have agreed and disagreed across and within their respective blocks. I will consider, for example, whether business groups were united in opposition to the campaign finance regulations and whether and to what extent the arguments of ideologically motivated nonprofit organizations coincided with those of groups representing the interests of for-profit corporations. I will review why the American Civil Liberties Union (ACLU) took the side of the appellant in *Citizens United* and against the position of many of their usual liberal allies, and why it declined to file a brief in *McCutcheon*. I will also examine whether the primary financial patrons of the groups on opposing sides of these cases overlapped or were themselves divided.

Second, this project will investigate the characteristics of lawyers active in campaign finance litigation and the structure of their advocacy network. Using publicly available information on all lawyers who have filed briefs in these cases, I will research the advocates' backgrounds, educational credentials, employers, political contributions, and ties to bar groups. I will systematically analyze the characteristics of the lawyers for the various constituencies represented in this litigation, not only in the Supreme Court but also in the lower courts. The study will

19. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1460–65 (2014).

explore the lawyers' networks, using social network software and data about the lawyers' organizational affiliations, drawn from the lawyers' biographies and other public sources. I will also interview some of these lawyers to better understand their values, purposes, strategies, efforts to coordinate with one another, and struggles over control of the litigation agenda.

Preliminary analyses of some of the characteristics of the lawyers who filed briefs in the Supreme Court in *Citizens United* and *McCutcheon* suggest that there are substantial differences in the educational backgrounds, work locations, and party allegiances of lawyers for the opposing sides.²⁰ In *Citizens United*, more than four-fifths of the lawyers filing briefs in the Supreme Court on appellee's (Federal Election Commission's) side attended law schools ranked in the top twenty in the *U.S. News and World Report* rankings,²¹ as compared to just half of lawyers filing briefs on the appellant's (*Citizens United*'s) side.²² Just 2 percent of lawyers for appellee's side attended local law schools, defined as schools ranked below fifty, as compared with one-third of lawyers for appellant's side. In *McCutcheon*, those differences in educational background were even more pronounced, perhaps because lawyers for the ACLU and several other civil liberties groups that tend to attract elite lawyers and were on the appellant's side in *Citizens United* did not participate in *McCutcheon*.²³ There were also notable

20. See Ann Southworth, presentation for panel on "Lawyers, Networks, and Institutions: Examining the 'Support Structure' for Legal Development," Law & Society Annual Meeting (May 30, 2015).

21. *Best Law Schools*, U.S. NEWS & WORLD REPORT, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings?int=992008> (last visited Feb. 8, 2015), *archived at* <http://perma.cc/E6A8-8S5L>.

22. The data used for these analyses came from Martindale-Hubbell entries and the websites of the lawyers' employers. See, e.g., MARTINDALE.COM, <http://www.martindale.com> (last visited Apr. 12, 2015), *archived at* <http://perma.cc/4ZK9-QBKL>.

23. The ACLU's opposition to campaign finance limitations has been highly controversial within the organization. See generally Ronald Collins, *The ACLU & the McCutcheon Case*, SCOTUS BLOG (Mar. 14, 2014, 1:07 PM), <http://www.scotusblog.com/2014/03/the-aclu-the-mccutcheon-case>, *archived at* <http://perma.cc/D3H2-GGNF> (commenting on the controversy within the ACLU over campaign finance laws, the filing of briefs by the ACLU and former officials of the ACLU on different sides of the First Amendment issue in six Supreme Court cases on campaign finance, and the ACLU's failure to file a brief in *McCutcheon*). On September 4, 2014, six former leaders of the ACLU submitted to the Senate Judiciary Committee a letter stating that the current leadership of the national ACLU "has endorsed a deeply contested and incorrect reading of the

geographic differences. In both cases, a large proportion of the lawyers on both sides worked in Washington, D.C. However, a much higher percentage of the lawyers on the appellant's side than the appellee's side worked in the South and Midwest and a much lower percentage in the Northeast. In both cases, among those lawyers who made political contributions, the overwhelming majority on appellant's side gave exclusively or primarily to Republicans, while those on appellee's side strongly favored Democrats.

These sharp differences are perhaps unsurprising given that campaign finance has become a highly partisan issue in recent years and that party affiliation is linked to social background and geography. Still, it does not necessarily follow that the lawyers representing the opposing sides should themselves display those differing characteristics. Interviews with the advocates may help explain how the lawyers' backgrounds, values, and political commitments relate to their professional identities.

Third, I will study the role of organizations and advocates in promoting some of the controversial ideas adopted in the Roberts Court's campaign finance decisions but strongly criticized by the dissenters (and some commentators). In *Citizens United*, for example, one of the majority opinion's disputed claims is that the corporate identity of the speaker should be irrelevant in determining the permissibility of the regulation.²⁴ The majority asserted that regulatory distinctions among types of speakers—e.g., individuals, nonprofits, for-profit corporations, etc.—constitute a type of pernicious and impermissible discrimination: “The First Amendment does not

First Amendment as a rigid deregulatory straitjacket that threatens the integrity of American democracy.” Letter from Former Leaders of the ACLU to Members of the U.S. Senate Comm. on the Judiciary, (Sept. 4, 2014), available at http://www.commoncause.org/policy-and-litigation/letters-to-government-officials/National_090414_Civil_Rights_Experts-Letter-Amend.pdf, archived at <http://perma.cc/DVV6-M32A>. The ACLU’s Legislative Director, Laura Murphy, issued a strong response, reaffirming the ACLU’s opposition to the regulation of campaign expenditures but its support of public financing for election campaigns. See Ronald K.L. Collins, *Six Former ACLU Leaders Contest Group’s 1st Amendment Position on Campaign Finance – ACLU’s Legislative Director Responds*, CONCURRING OPINIONS (Sept. 6, 2014), available at <http://www.concurringopinions.com/archives/2014/09/fan-30-1-first-amendment-news-six-former-aclu-leaders-contest-groups-1st-amendment-position-on-campaign-finance-aclus-legislative-director-responds.html>, archived at <http://perma.cc/KY3V-XHYJ>.

24. 558 U.S. 310, 364 (2010).

2015]

CAMPAIGN FINANCE LITIGATION

1227

permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of political speech.”²⁵ The dissent took strong issue with the Court’s critique of identity-based distinctions:

The basic premise underlying the Court’s ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker’s identity, including its “identity” as a corporation.... The conceit that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court’s disposition of this case.²⁶

Another feature of the majority’s opinion that drew criticism is its characterization of the challenged limitations on corporate expenditures as “an outright ban on speech.”²⁷ The dissent again disapproved of the majority’s rhetoric: “Pervading the Court’s analysis is the ominous image of a ‘categorical ba[n]’ on corporate speech. Indeed, the majority invokes the specter of a ‘ban’ on nearly every page of its opinion. This characterization is highly misleading....”²⁸ The dissent also faulted the majority opinions in *Citizens United* and *McCutcheon* for asserting that the only justification for regulating campaign expenditures is to avoid *quid pro quo* corruption²⁹—something close to outright bribery. The dissent in *Citizens United* rejected the “majority’s apparent belief that *quid pro quo* arrangements can be neatly demarcated from other improper influences” and that only the former constitute a sufficient threat to justify limits on expenditures.³⁰

I will assess what role the advocates have played in serving up competing frames for the Court and advancing ideas eventually adopted by the majority.³¹ One of the qualitative data management software packages used in this research,

25. *Id.*

26. *Id.* at 394.

27. *Id.* at 312.

28. *Id.* at 415 (citation omitted).

29. *Id.* at 313.

30. *Id.* at 448.

31. In subsequent publications, I may explore the litigants’ influence on dissenters, but I am primarily interested in how litigants contributed to the arguments that prevailed.

ATLASI, offers “word crunching” formulas, which count appearances of a particular word or phrase in a document or set of documents, while allowing the user to check the context in which the word or phrase appears. Applying these tools to the briefs in *Citizens United* demonstrates that the appellant and supporters took great pains to advance the argument against the permissibility of any type of distinction based on the identity of the speaker; they characterized limits on corporate expenditures as a form of invidious discrimination. They also repeatedly described the regulation as a “ban” on speech or expression. The briefs of appellants and some of their supporters in *Citizens United* and *McCutcheon* portrayed political influence and access gained through political expenditures and contributions as inevitable and unproblematic features of representative democracy. Systematic parsing of the briefs and sources cited in them—with help from language-analysis software—may shed light on how advocates employed key words, concepts, and turns of phrase (as well as precedents) in their efforts to influence the Court. Interviews with the advocates may also reveal how and to what extent the litigants and amici coordinated their efforts to persuade the Court to adopt these frames.

Overall, this research focuses on how political actors other than judges have contributed to the processes that have generated constitutional change in campaign finance doctrine. The project’s goal is to use both quantitative and qualitative social science methods to explore the role that advocates, advocacy organizations, and their patrons and networks have played in litigating constitutional change in this area, complementing approaches that focus primarily on judicial behavior and the policy implications of what judges decide.