

# CONCURRING OPINIONS

## FAN 37 (First Amendment News) McCutcheon case produces flood of scholarly commentary — 40 works!

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Before proceeding to the scholarly output on *McCutcheon*, here is where we stand this Term on First Amendment free expression cases:

### Review Granted

1. [Elonis v. United States](#) (to be argued on 12-1-14)
2. [Williams-Yulee v. The Florida Bar](#)
3. [Reed v. Town of Gilbert](#)

### Review Pending

1. [Pregnancy Care Center of New York v. City of New York](#)
2. [Vermont Right to Life Committee, et al v. Sorrell](#)
3. [Stop This Insanity Inc Employee Leadership Fund et al v. Federal Election Commission](#)

### Review Denied

1. [City of Indianapolis, Indiana v. Annex Books, Inc.](#)
2. [Ashley Furniture Industries, Inc. v. United States](#)
3. [Mehanna v. United States](#)

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The decision in [McCutcheon v. Federal Election Commission](#) (2014) is barely six months old and it has already produced an abundance of scholarly commentary, including books, symposia, and articles — no fewer than 40 such works. And all of this *before* the revered *Harvard Law Review* issue dedicated to the last Supreme Court term finds its way to print. Ditto for the equally acclaimed *Supreme Court Review*. How times have changed. The days of waiting are over; we live in a wired era. That's the good news. The bad news, of course, is: who can possibly begin to read all of this?

That said, and for better or worse, below is a list of books (e-books and print ones) and articles and essays (in online companions and print journals) that either discuss *McCutcheon* in full or in part (e.g. Zephyr Teachout's book) or issues very much related to the decision (e.g, Robert Post's book). All were published *after* the decision came down on April 2, 2014. Browse them and see how many catch your eye.

## 5 Books

- Ronald Collins & David Skover, [\*When Money Speaks: The McCutcheon Decision, Campaign Finance Law & the First Amendment\*](#) (2014)
- R. Sam Garrett, [\*Campaign Contribution Limits: Selected Questions About McCutcheon and Policy Issues for Congress\*](#) (2014)
- Shaun McCutcheon, [\*Outsider Inside the Supreme Court: A Decisive First Amendment Battle\*](#) (2014)
- Robert Post, [\*Citizens Divided: Campaign Finance Reform and the Constitution\*](#) (2014)
- Zephyr Teachout, [\*Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United\*](#) (2014)

## 35 Scholarly Articles or Blog Posts

- Albert W. Alschuler, "[Limiting Political Contributions after \*McCutcheon\*, \*Citizens United\*, and \*SpeechNow\*](#)," U. of Chicago, Public Law Working Paper (2014)
- Allen Dickerson, "[McCutcheon v. FEC and the Supreme Court's Return to Buckley](#)," *Cato Supreme Court Review* (2014)
- Garrett Epps, "Balls & Strikes: Chief Justice John Roberts — *McCutcheon v. Federal Election Commission*" in Garrett Epps, [\*American Justice 2014: Nine Clashing Visions on the Supreme Court\*](#) (2014)
- Michael Grant, "[Buttering Bread: The Sordid Tale of Campaign Finance and Shaun McCutcheon](#)," *National Law Review* (2014)
- Stephen Kruger, "[McCutcheon and Revision of Voting by Supreme Court Justices](#)," SSRN (2014)
- Adam Lamparello, "[Citizens Disunited: \*McCutcheon v. Federal Election Commission\*](#)," SSRN (2014)
- Alan B. Morrison, "[McCutcheon v. FEC and Roberts v. Breyer: They're Both Right and They're Both Wrong](#)," *American Constitution Society* (2014)
- Tom Pettys, "[Campaign Finance, Federalism, and the Case of the Long-Armed Donor](#)," *Dialogue* (2014) (*U. Chi. L. Rev*)
- Renata Strause & Daniel P. Tokaji, "[Building a Record for the Next Court](#)," Ohio State Public Law Working Paper (2014)
- Andrew Tutt, "[McCutcheon Calls for NatCampaign Finance \(Literally\)](#)," *Columbia Law Review Sidebar* (2014)

## [NYU Law Review: Online Symposium](#) (2014)

- Johanna Kalb & Burt Neuborne, "[Introduction: Building a First Amendment-Friendly Democracy or a Democracy-Friendly First Amendment](#)"

- Yasmin Dawood, "[Democracy Divided: Campaign Finance Regulation and the Right to Vote](#)"
- Deborah Hellman, "[Response: Political Participation: A Hybrid Sphere](#)"
- Joseph Fishkin & Heather K. Gerken, "[The Two Trends That Matter for Party Politics](#)"
- Kate Andrias, "[Response: Hollowed-Out Democracy](#)"
- Edward B. Foley, "[The Speaking Ballot: A New Way to Foster Equality of Campaign Discourse](#)"
- Lisa Marshall Manheim, "[Response: The Nudging Ballot? A Response to Professor Foley](#)"
- Justin Levitt, "[Electoral Integrity: The Confidence Game](#)"
- Rick Hasen, "[‘Electoral Integrity,’ ‘Dependence Corruption,’ and What’s New Under the Sun](#)"
- Michael Malbin, "[McCutcheon Could Lead to No Limits for Political Parties—With What Implications for Parties and Interest Groups?](#)"
- Samuel Issacharoff, "[Response: Market Intermediaries in the Post-Buckley World](#)"
- Ciara Torres-Spelliscy, "[The Democracy We Left Behind in Greece and McCutcheon](#)"

#### [Valparaiso Law Review Symposium](#) (2014)

- Liz Kennedy & Seth Katsuya Endo, "[The World According to, and after, McCutcheon V. FEC, and Why It Matters](#)"
- James Bopp, Jr., "The Rise of SuperPACs: The Constitutionality of Contribution Limits on Independent Spending for Political Speech" (forthcoming)
- Paul S. Ryan, "[McCutcheon: The Return of Soft Money?](#)" (forthcoming)

#### *Harvard Law Review Forum* (2014)

- Robert K. Kelner, "[The Practical Consequences of McCutcheon](#)"
- Jonathan S. Berkon & Marc E. Elias, "[After McCutcheon](#)"

#### *SCOTUSblog Symposium* (2014)

- Ronald Collins & David Skover: "[Foreword: It’s All Forward Now](#)"
- Floyd Abrams, "[Opposing More Speech — a Disturbing & Recurring Reality](#)"
- Jan Baran, "[McCutcheon and the Future of Campaign Finance Regulation](#)"
- Richard Hasen, "[Does the Chief Justice not Understand Politics, or Does He Understand it all too Well?](#)"
- Burt Neuborne, "[Welcome to Oligarchs United](#)"
- Ilya Shapiro, "[The First Amendment’s Protection of Political Speech Extends to Both Donations & Spending](#)"
- Paul M. Smith, "[McCutcheon opens the Door to Massive Party Contributions, but four Justices Continue to Push Back Forcefully](#)"
- Fred Wertheimer, "[The Supreme Court and the McCutcheon Decision](#)"

### **Related Topics**

→ This from [Fred Wertheimer](#) of [Democracy 21](#):

WASHINGTON—”Explaining that the measure is intended to protect politicians’ right to free expression against undue scrutiny from the general population, a new [ruling](#) [see [here](#)] implemented this week by the Federal Election Commission allows candidates running for public office to remain completely anonymous throughout the campaign process. ‘Candidates should be able to make themselves heard without having their identities, personal associations, and records on the issues exposed in the public eye,’ said agency spokesperson Wayne Branson, adding that the new policy means congressional hopefuls can avoid being personally challenged on their agendas by opting to withhold their names and likenesses from all campaign material, television commercials, FEC filings, and public appearances. ‘The fact that political candidates are no longer under any obligation to disclose who they are will ensure a freer, more open electoral process. It is our belief that elections should be about ideas and plans for the country, not about who is saying them, what that person looks like, what their background might be, if they’re qualified, or what motives they might have.’ Branson confirmed that elected candidates would then have the option to remain anonymous for the duration of their term.”

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*Related News items:*

- Jonathan S. Tobin, “[Tom Steyer and the Right to Free Speech](#),” *Commentary*, Oct. 21, 2014
- Russ Choma, “[Super JFC Donors Emerge in Third Quarter](#),” *Open Secrets.org*, Oct. 15, 2014
- Editorial, “[The Latest Speech Assault Liberals want to regulate ‘coordination,’ but a judge blows the whistle in Wisconsin](#),” *Wall Street Journal*, Oct. 21, 2014

→ *Re another voting-1-A issue*, see Joey Garrison, “[Nashville voting site restrictions raise First Amendment concerns](#),” *The Tennessean*, Oct. 20, 2014

### **Tim Wu to head Poliak Center for the Study of First Amendment Issues**

*He is prepared to think about things in an entirely new way.* — Lee Bollinger

According to the [Columbia Daily Spectator](#), Columbia University “law professor and former lieutenant governor candidate [Tim Wu](#) celebrated his appointment as the head of the Journalism School’s [Poliak Center for the Study of First Amendment Issues](#) Tuesday night with a discussion about political corruption and the First Amendment. . . . Wu — who is known for his work on ‘net neutrality’ — was named the Center’s director last week.”

“I think the hope is to inspire a new generation of First Amendment thinking,” Wu said in an interview about his goals for the center. “In particular, [I will] focus less on the old, yet still important, aspects of civil rights and more on the practical questions of, for example, what it means to have an actual liberty of conscience. . . .”

Professor Wu's remarks centered on the First Amendment and its role in fostering civic republicanism, which he views as being undermined by money in politics "that makes elected officials so reliant on donors that no one wants to do the job. 'I just boil it down to . . . whether the best and brightest are going into electoral government and asking whether the First Amendment is to blame,'" Wu added.

### **Headline: "Commencement Speech by Convicted Cop Killer Prompts New Law"**

PHILADELPHIA— "Spurred by outcry over a recent commencement speech by a man convicted of killing a police officer, Pennsylvania Gov. Tom Corbett is scheduled to sign a bill Tuesday designed to prevent people convicted of crimes from causing their victims additional "mental anguish."

"The measure won approval in the state legislature last week after Mumia Abu-Jamal, convicted in the 1981 shooting death of a Philadelphia police officer, [delivered a pre-recorded commencement address to graduates of Goddard College in Vermont earlier this month](#). . . ." (Source: [WFMYNews2.com](#))

### **First Circuit Billboard Case**

[This](#) from Professor [Ruthann Robson](#) over at *Constitutional Law Prof Blog*:

"Reversing the district judge, a unanimous panel of the First Circuit held that a billboard company had standing to challenge the Massachusetts regulatory scheme in [Van Wagner Boston LLC v. Davey](#). The opinion, authored by Judge [Bruce Selya](#) who is known for his ambitious language, concludes that the complaint plausibly alleges that the plaintiffs are subject to a regulatory permitting scheme that grants an official unbridled discretion over the licensing of their expressive conduct and poses a real and substantial threat of censorship. No more is exigible to give the plaintiffs standing to proceed with their challenge." (Continued [here](#)).

### **Floyd Abrams' Op-Ed**

["Klinghoffer and the 'Two Sides' of Terrorism,"](#) *Wall Street Journal*, Oct. 15, 2014.

*So, in Joan Rivers' s much repeated phrase, can we talk? Some things are easy. Mr. Adams's opera is protected by the First Amendment and so is the Metropolitan Opera in its decision to offer it. It would be a gross and obvious constitutional violation if government sought to bar the opera from being publicly produced or imposed any punishment for doing so. Beyond that, canceling any public artistic performance because it expresses unpopular or even outrageous views is dangerous. I represented the Brooklyn Museum when then-New York City Mayor Rudolph Giuliani in 1999 sought to shut it down because he viewed some of its art—I use his language now—as "sick," "disgusting" and sacrilegious. I argued then, successfully, that the mayor's conduct violated the First Amendment. But the controversy over the Adams opera cannot be dealt with by simple reference to the First Amendment or artistic freedom. Those who direct the Metropolitan Opera made a choice when they decided to offer Mr. Adams's opera, and it is altogether fitting that they be publicly judged by that choice.*

. . . . One can argue passionately about the Middle East, Israel or Palestinians, but nothing makes the Klinghoffer murder morally tolerable. . . . Leon Klinghoffer's murder was an unspeakable act. Period. His demise is not a proper subject of debate, only of mourning. And of how best to prevent future murderous attacks.

→ See also: Letters-to-the Editor, "[‘Klinghoffer’ Goes On, and So Does the Discord](#)," *New York Times*, Oct. 21, 2014

### ***Nota Bene***

Wendy Kaminer, "[John Grisham Is Right: Looking Isn't The Same As Touching](#)," *Cognoscenti*, Oct. 20, 2014:

*In protesting lengthy prison sentences for downloading images of child porn, John Grisham was [pointing out](#) an obvious injustice: the equation of people who view child porn with people who molest children. In fact, you may even be sentenced more harshly for viewing child pornography than for molesting a child.*

### **Volokh Watch**

- "[Punishing high school students for condemning school's firing of allegedly abusive teacher](#)," *Volokh Conspiracy*, Oct. 21, 2014
- "[Court reverses union official John Leidecker's conviction for "cyberstalking" R.I. state representative Douglas Gablinske via absurd e-mails](#)," *Volokh Conspiracy*, Oct. 21, 2014
- "[Court allows First Amendment claim based on alleged professor retaliation for paper 'harshly critical of ... lesbianism'](#)," *Volokh Conspiracy*, Oct. 17, 2014