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PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES RELATING TO CONTRIBUTIONS AND EXPENDITURES INTENDED TO AFFECT ELECTIONS

JULY 30, 2014.—Ordered to be printed

Mr. LEAHY, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany S.J. Res. 19]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to which was referred the joint resolution (S.J. Res. 19), proposing an amendment to the Constitution of the United States relating to contributions and expenditures intended to affect elections, having considered the same, reports favorably thereon, with an amendment, and recommends that the joint resolution, as amended, do pass.

CONTENTS

I. PURPOSE

The purpose of Senate Joint Resolution 19 is to restore to Congress and the States the authority to set reasonable limits on financial contributions and expenditures intended to influence our elections. Over the last decade, a narrow majority of the United States Supreme Court has eviscerated nearly every reasonable campaign finance law that protects hardworking Americans and enables them to participate in our democracy. The Court's radical and novel reinterpretation of the First Amendment contradicts the principles of freedom, equality, and self-government upon which this Nation was founded. As a result of the Court's decisions, a small minority of wealthy individuals and special interests have been able to, and increasingly will be able to, drown out the voices of ordinary Americans and skew both the electoral process and public policy outcomes. This proposed amendment would restore the First Amendment as the Founders intended and preserve the protections that ensure all voices can be heard in the democratic process.

S.J. Res. 19, as amended by Senator Richard Durbin's substitute, provides as follows:

> SECTION 1. To advance democratic self-government and political equality, and to protect the integrity of government and the electoral process, Congress and the States may regulate and set reasonable limits on the raising and spending of money by candidates and others to influence elections.
>
> SECTION 2. Congress and the States shall have power to implement and enforce this article by appropriate legislation, and may distinguish between natural persons and corporations or other artificial entities created by law, including by prohibiting such entities from spending money to influence elections.
>
> SECTION 3. Nothing in this article shall be construed to grant Congress or the States the power to abridge the freedom of the press.

The story of our Constitution is that it has gradually evolved to ensure a more representative and inclusive democracy. The 14th

and 15th Amendments guaranteed equal protection of the law for all Americans, and ensured that all Americans have the right to vote regardless of their race. The 17th Amendment gave Americans the right to directly elect their Senators in the wake of concerns that corporations and wealthy individuals were corrupting State legislatures and leading them to choose Senators beholden to moneyed interests. The 19th Amendment's expansion of the right to vote to women and the 26th Amendment's extension of the vote to younger Americans made ours an even more open and inclusive democracy. Guarding and enhancing the access of citizens to the democratic process is the subject of more amendments to the Constitution than any other single issue. Accordingly, this proposed amendment is consistent with the story of our Nation and of our Constitution. It would restore the First Amendment to ensure that it is interpreted to allow all Americans to participate in our democracy.

II. LEGISLATIVE HISTORY

S.J. Res. 19 derives from previous Congressional proposals to amend the Constitution after the Supreme Court's 1976 decision in *Buckley* v. *Valeo*,[1] which invalidated key spending provisions of the Federal Election Campaign Act of 1971. The Court held unconstitutional the 1971 Act's limits on independent expenditures in campaigns, the limitation on expenditures by candidates from their own personal or family resources, and the limitation on total campaign expenditures.

During the 98th Congress, in response to *Buckley*'s removal of restraints on unlimited spending in Federal election campaigns, and the deteriorating effect he believed those unlimited campaign expenditures were having on Congress, Senator Ted Stevens (R–AK), introduced S.J. Res. 110. This proposed joint resolution would have amended the Constitution of the United States by directing Congress to enact laws limiting the amounts of contributions and expenditures made in Federal elections.[2] S.J. Res. 110 was referred to the Senate Committee on the Judiciary, but the joint resolution did not receive a vote in Committee or on the Senate floor.

During the 99th Congress, Senator Fritz Hollings (D–SC) introduced S.J. Res. 313, a joint resolution proposing an amendment to the Constitution of the United States with respect to limiting expenditures in Congressional elections. S.J. Res. 313 was referred to the Senate Committee on the Judiciary, but the joint resolution did not receive a vote in Committee or on the Senate floor. S.J. Res. 313 was the first of a total of fourteen joint resolutions that Senator Hollings introduced, from the 99th to 108th Congresses, to amend the Constitution to authorize the Congress to enact legislation regulating the amounts of expenditures intended to affect elections.[3]

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[1] 424 U.S. 1 (1976).

[2] 129 Cong. Rec. S.14126 (May 26, 1983) (statement of Sen. Stevens).

[3] After introducing S.J. Res. 313 on March 27, 1986, Senator Hollings introduced thirteen additional proposals in subsequent Congresses: S.J. Res. 21, A joint resolution proposing an amendment to the Constitution of the United States relative to contributions and expenditures intended to affect congressional and Presidential elections (January 20, 1987); S.J. Res. 282, A joint resolution proposing an amendment to the Constitution of the United States relative to contributions and expenditures intended to affect Congressional and Presidential elections (March 29, 1988); S.J. Res. 48, A joint resolution proposing an amendment to the Constitution

Continued

On March 17, 1988, the Senate Judiciary Committee, Subcommittee on the Constitution held a hearing to consider proposed constitutional amendments to respond to the *Buckley* v. *Valeo* decision that restrictions on campaign expenditures are in violation of First Amendment guarantees of freedom of speech. The Subcommittee considered the following proposed constitutional amendments: S.J. Res. 21, to amend the Constitution to permit Congress to limit campaign contributions and expenditures in Federal elections; S.J. Res. 130 to amend the Constitution to permit Congress to limit campaign contributions and expenditures in Federal elections and permit States to limit State and local campaign expenditures; and S.J. Res. 166 to amend the Constitution to permit Congress and the States to limit candidates' expenditure of personal funds in campaigns and the expenditure of funds by individuals or organizations other than political parties to support or oppose candidates. Three witnesses testified at this hearing: Lloyd Cutler, former White House Counsel to President Carter and Chairman of the Committee on the Constitutional System; Walter Dellinger, Professor of Law at Duke University School of Law; and Joel Gora, Professor of Law at Brooklyn Law School and testifying on behalf of the American Civil Liberties Union.

On February 28, 1990, the Senate Committee on the Judiciary, Subcommittee on the Constitution held a hearing to consider S.J. Res. 48, a proposed constitutional amendment to respond to *Buckley* v. *Valeo*, which would authorize Congress and the States to set limitations on political candidate campaign expenditures. Two panels of witnesses testified at this hearing. The first panel consisted of: Morton Halperin of the American Civil Liberties Union; Robert Wood of the Committee on the Constitutional System; and Dave Eppler, staff attorney for Public Citizen's Congress Watch. The second panel consisted of: Marlene Arnold Nicholson, Professor of Law at DePaul University and Gerald Ashdown, Professor of Law at the West Virginia University College of Law.

On February 27, 1992, the Senate Committee on the Judiciary voted on S.J. Res. 35, a joint resolution sponsored by Senator Hollings (D–SC) proposing an amendment to the Constitution of the United States relative to contributions and expenditures intended to affect Congressional and Presidential elections. The Committee voted 9–5 in favor of this joint resolution.

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of the United States relative to contributions and expenditures intended to affect Congressional and Presidential elections (February 2, 1989); S.J. Res. 35, A joint resolution proposing an amendment to the Constitution of the United States relative to contributions and expenditures intended to affect Congressional and Presidential elections (January 14, 1991); S.J. Res. 10, A joint resolution proposing an amendment to the Constitution relative to contributions and expenditures intended to affect Congressional and Presidential elections (January 21, 1993); S.J. Res. 37, A joint resolution proposing an amendment to the Constitution relative to contributions and expenditures intended to affect Congressional and Presidential elections (January 28, 1993); S.J. Res. 18, A joint resolution proposing an amendment to the Constitution relative to contributions and expenditures intended to affect elections for Federal, State, and local office (January 17, 1995); S.J. Res. 2, A joint resolution proposing an amendment to the Constitution of the United States relating to contributions and expenditures intended to affect elections (January 21, 1997); S.J. Res. 18, A joint resolution proposing an amendment to the Constitution of the United States relating to contributions and expenditures intended to affect elections (February 27, 1997); S.J. Res. 6, A joint resolution proposing an amendment to the Constitution of the United States relating to contributions and expenditures intended to affect elections (December 19, 1999); S.J. Res. 4, A joint resolution proposing an amendment to the Constitution of the United States relating to contributions and expenditures intended to affect elections (February 7, 2001); S.J. Res. 33, A joint resolution proposing an amendment to the Constitution of the United States relating to contributions and expenditures intended to affect elections (March 4, 2002); S.J. Res. 5, A joint resolution proposing an amendment to the Constitution of the United States relating to contributions and expenditures intended to affect elections (January 23, 2003).

The vote record is as follows:

Tally: 9 Yeas, 5 Nays

Yeas (9): Biden (D–DE), Kennedy (D–MA), Metzenbaum (D–OH), DeConcini (D–AZ), Leahy (D–VT), Heflin (D–AL), Simon (D–IL), Kohl (D–WI), Specter (R–PA)

Nays (5): Thurmond (R–SC), Hatch (R–UT), Simpson (R–WY), Grassley (R–IA), Brown (R–CO)

The Committee reported S.J. Res. 35 to the Senate floor where it did not receive a vote.

On February 27, 1997, Senator Hollings (D–SC) introduced S.J. Res. 18, a joint resolution proposing an amendment to the Constitution of the United States relating to contributions and expenditures intended to affect elections. This joint resolution was not referred to the Senate Committee on the Judiciary. Instead, S.J. Res. 18 was given a vote on the Senate floor on March 18, 1997. The joint resolution failed by a vote of 38–61.[4]

On February 7, 2001, Senator Hollings (D–SC) introduced S.J. Res. 4, a joint resolution proposing an amendment to the Constitution of the United States relating to contributions and expenditures intended to affect elections, which was referred to the Senate Committee on the Judiciary. The Committee discharged this joint resolution by Unanimous Consent on March 26, 2001. The joint resolution received a vote on the Senate floor on March 26, 2001. The measure failed by a vote of 40–56.[5]

In the 110th Congress, Senators Charles Schumer (D–NY), Thad Cochran (R–MS), Tom Harkin (D–IA), and Arlen Specter (D–PA) introduced a joint resolution, S.J. Res. 21, a joint resolution pro-

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[4] Senators voting in the affirmative on S.J. Res. 18: Akaka (D–HI), Baucus (D–MT), Biden (D–DE), Bingaman (D–NM), Boxer (D–CA), Breaux (D–LA), Bryan (D–NV), Byrd (D–WV), Cleland (D–GA), Cochran (R–MS), Conrad (D–ND), Daschle (D–SD), Dodd (D–CT), Dorgan (D–ND), Feinstein (D–CA), Ford (D–KY), Glenn (D–OH), Graham (D–FL), Harkin (D–IA), Hollings (D–SC), Inouye (D–HI), Jeffords (R–VT), Johnson (D–SD), Kerry (D–MA), Landrieu (D–LA), Lautenberg (D–NJ), Levin (D–MI), Lieberman (D–CT), Mikulski (D–MD), Murray (D–WA), Reed (D–RI), Reid (D–NV), Robb (D–VA), Roth (R–DE), Sarbanes (D–MD), Specter (R–PA), Wellstone (D–MN), Wyden (D–OR). Senators voting in the negative: Abraham (R–MI), Allard (R–CO), Ashcroft (R–MO), Bennett (R–UT), Bond (R–MO), Brownback (R–KS), Bumpers (D–AR), Campbell (R–CO), Chafee (R–RI), Coats (R–IN), Collins (R–ME), Coverdell (R–GA), Craig (R–ID), D'Amato (R–NY), DeWine (R–OH), Domenici (R–NM), Durbin (D–IL), Enzi (R–WY), Faircloth (R–NC), Feingold (D–WI), Frist (R–TN), Gorton (R–WA), Gramm (R–TX). Grams (R–MN), Grassley (R–IA), Gregg (R–NH), Hagel (R–NE), Hatch (R–UT), Helms (R–NC), Hutchinson (R–AR), Hutchison (R–TX), Inhofe (R–OK), Kempthorne (R–ID), Kennedy (D–MA), Kerrey (D–NE), Kohl (D–WI), Kyl (R–AZ), Leahy (D–VT), Lott (R–MS), Lugar (R–IN), Mack (R–FL), McCain (R–AZ), McConnell (R–KY), Moseley–Braun (D–IL), Moynihan (D–NY), Murkowski (R–AK), Nickles (R–OK), Roberts (R–KS), Rockefeller (D–WV), Santorum (R–PA), Sessions (R–AL), Shelby (R–AL), Smith (R–NH), Smith (R–OR), Snowe (R–ME), Stevens (R–AK), Thomas (R–WY), Thompson (R–TN), Thurmond (R–SC), Torricelli (D–NJ), Warner (R–VA).

[5] Senators voting in the affirmative for S.J. Res. 4: Bayh (D–IN), Biden (D–DE), Bingaman (D–NM), Boxer (D–CA), Breaux (D–LA), Byrd (D–WV), Cantwell (D–WA), Carnahan (D–MO), Carper (D–DE), Cleland (D–GA), Clinton (D–NY), Cochran (R–MS), Conrad (D–ND), Daschle (D–SD), Dayton (D–MN), Dodd (D–CT), Dorgan (D–ND), Durbin (D–IL), Feinstein (D–CA), Graham (D–FL), Harkin (D–IA), Hollings (D–SC), Inouye (D–HI), Kerry (D–MA), Levin (D–MI), Lieberman (D–CT), Lincoln (D–AR), McCain (R–AZ), Mikulski (D–MD), Miller (D–GA), Murray (D–WA), Reed (D–RI), Reid (D–NV), Rockefeller (D–WV), Sarbanes (D–MD), Schumer (D–NY), Specter (R–PA), Stabenow (D–MI), Stevens (R–AK), Wyden (D–O). Senators voting in the negative on S.J. Res. 4: Akaka (D–HI), Allen (R–VA), Bennett (R–UT), Bond (R–MO), Brownback (R–KS), Bunning (R–KY), Campbell (R–CO), Chafee (R–RI), Collins (R–ME), Corzine (D–NJ), Craig (R–ID), Crapo (R–ID), DeWine (R–OH), Domenici (R–NM), Edwards (D–NC), Ensign (R–NV), Enzi (R–WY), Feingold (D–WI), Fitzgerald (R–IL), Frist (R–TN), Gramm (R–TX), Grassley (R–IA), Gregg (R–NH), Hagel (R–NE), Hatch (R–UT), Helms (R–NC), Hutchinson (R–AR), Hutchison (R–TX), Inhofe (R–OK), Jeffords (R–VT), Johnson (D–SD), Kennedy (D–MA), Kohl (D–WI), Kyl (R–AZ), Leahy (D–VT), Lott (R–MS), Lugar (R–IN), McConnell (R–KY), Murkowski (R–AK), Nelson (D–FL), Nelson (D–NE), Nickles (R–OK), Roberts (R–KS), Santorum (R–PA), Sessions (R–AL), Shelby (R–AL), Smith (R–NH), Smith (R–OR), Snowe (R–ME), Thomas (R–WY), Thompson (R–TN), Thurmond (R–SC), Torricelli (D–NJ), Voinovich (R–OH), Warner (R–VA), Wellstone (D–MN). Senators not voting on S.J. Res. 4: Allard (R–CO), Baucus (D–MT), Burns (R–MT), Landrieu (D–LA).

posing an amendment to the Constitution of the United States relating to contributions and expenditures intended to affect elections, similar to those introduced in the past by Senator Hollings. This joint resolution did not receive a vote in the Senate Committee on the Judiciary or on the Senate floor.

In the 111th Congress, Senator Chris Dodd (D–CT) and Senator Tom Udall (D–NM) introduced S.J. Res. 28, a joint resolution proposing an amendment to the Constitution of the United States relating to contributions and expenditures intended to affect elections. This joint resolution did not receive a vote in the Senate Committee on the Judiciary or on the Senate floor.

On November 11, 2011, in the 112th Congress, Senator Udall (D–NM) introduced S.J. Res. 29, a joint resolution proposing an amendment to the Constitution of the United States relating to contributions and expenditures intended to affect elections. Upon introduction of the bill, Senator Udall stated on the Senate floor that, "[a]s we head into another election year, we are about to see unprecedented amounts of money spent on efforts to influence the outcome of our elections. With the Supreme Court striking down the sensible regulations Congress has passed, I believe the only way to address the root cause of this problem is by first amending the Constitution. Such an amendment is not a new idea. Constitutional amendments to grant Congress broad authority to regulate the campaign finance system have been introduced many times in the past, and most had bipartisan support. But last year's Supreme Court decision in *Citizens United* v. *FEC* places a new emphasis on the need for Congress to act."[6]

On June 18, 2013, Senator Udall (D–NM) introduced S.J. Res. 19, a joint resolution proposing an amendment to the Constitution of the United States relating to contributions and expenditures intended to affect elections. Senators Michael Bennet, Barbara Boxer, Chris Coons, Al Franken, Tom Harkin, Angus King, Amy Klobuchar, Chris Murphy, Charles Schumer, Jeanne Shaheen, Jon Tester, Debbie Stabenow, Mark Udall, Sheldon Whitehouse, and Ron Wyden were original cosponsors. The bill was referred to the Committee on the Judiciary.

The Committee held a hearing on S.J. Res. 19 on June 3, 2014. Testimony was received from Senator Majority Leader Harry Reid; Senate Minority Leader Mitch McConnell; Floyd McKissick, Jr., State Senator from North Carolina; Floyd Abrams, Partner at Cahill Gordon & Reindel LLP; and Jamie Raskin, Professor of Law and Director of the Law and Government Program at American University, Washington College of Law.

The Committee's Subcommittee on the Constitution, Civil Rights, and Human Rights considered S.J. Res. 19 on June 18, 2014. At that executive business meeting, Senator Dick Durbin offered a substitute amendment to S.J. Res. 19 to provide that any limits set by lawmakers on campaign money should be "reasonable." The amendment also explicitly gives Congress and the states the power to distinguish between people and "corporations or other artificial entities created by law" and to block such entities from spending

[6] 157 Cong. Rec. S7007–S7008 (daily ed. November 1, 2011), available at http://www.gpo.gov/fdsys/pkg/CREC-2011-11-01/pdf/CREC-2011-11-01-pt1-PgS7007.pdf#page=2.

money on elections. It also makes other minor and technical revisions.

The amendment was accepted by a voice vote.

Senator Ted Cruz offered a substitute amendment to replace the entire underlying proposal with the existing language of the First Amendment to the Constitution.

The amendment was rejected by a roll call vote. The vote record is as follows:

Tally: 4 Yeas, 5 Nays

Yeas (4): Hatch (R–UT), Graham (R–SC), Cornyn (R–TX), Cruz (R–TX)

Nays (5): Durbin (D–IL), Franken (D–MN), Coons (D–DE), Blumenthal (D–CT), Hirono (D–HI)

The Subcommittee on the Constitution, Civil Rights, and Human Rights then voted to report S.J. Res. 19, with an amendment in the nature of a substitute, favorably to the full Committee. The Subcommittee proceeded by roll call vote as follows:

Tally: 5 Yeas, 4 Nays

Yeas (5): Durbin (D–IL), Franken (D–MN), Coons (D–DE), Blumenthal (D–CT), Hirono (D–HI)

Nays (4): Hatch (R–UT), Graham (R–SC), Cornyn (R–TX), Cruz (R–TX)

The full Committee considered S.J. Res. 19 on July 10, 2014. Senator Cruz offered a substitute amendment to replace the entire underlying proposal with the existing language of the First Amendment to the Constitution.

The amendment was rejected by a roll call vote. The vote record is as follows:

Tally: 8 Yeas, 10 Nays

Yeas (8): Grassley (R–IA), Hatch (R–UT), Sessions (R–AL), Graham (R–SC), Cornyn (R–TX), Lee (R–UT), Cruz (R–TX), Flake (R–AZ)

Nays (10): Leahy (D–VT), Feinstein (D–CA), Schumer (D–NY), Durbin (D–IL), Whitehouse (D–RI), Franken (D–MN), Klobuchar (D–MN), Coons (D–DE), Blumenthal (D–CT), Hirono (D–HI)

The Committee then voted to report S.J. Res. 19, as amended by the Subcommittee on the Constitution, Civil Rights, and Human Rights, favorably to the Senate. The Committee proceeded by roll call vote as follows:

Tally: 10 Yeas, 8 Nays

Yeas (10): Leahy (D–VT), Feinstein (D–CA), Schumer (D–NY), Durbin (D–IL), Whitehouse (D–RI), Franken (D–MN), Klobuchar (D–MN), Coons (D–DE), Blumenthal (D–CT), Hirono (D–HI)

Nays (8): Grassley (R–IA), Hatch (R–UT), Sessions (R–AL), Graham (R–SC), Cornyn (R–TX), Lee (R–UT), Cruz (R–TX), Flake (R–AZ)

III. DISCUSSION

A. A history of expanding democracy for all Americans and rejecting plutocratic and corporate practices that undermine popular rule

S.J. Res. 19 seeks to restore balance to campaign finance by affirming the power that Congress and State legislatures have always held, and often used, to pass laws governing money in politics. These legislatures passed such laws to help preserve the integrity of the electoral process, to prevent and deter corruption, and

to limit the undue influence of wealthy individuals and special interests in our elections. History shows that the Founders and subsequent representatives were deeply concerned with these issues.

1. The founders of our Nation on undue influence and corruption

A broad view of corruption has guided American policy-making and jurisprudence since the framing of the Constitution. The Founders were equally concerned about the adverse effects of undue influence, dependent relationships, and *quid pro quo* corruption on the republican form of government at the State and Federal levels. At the Constitutional Convention, corruption was a topic of discussion on nearly 25 percent of the days on which members convened.[7] To the Founders, corruption could appear in many forms—not simply as a violation of criminal laws, but also in subtler forms of self-aggrandizement through lawful and structural means.[8] As such, the Founders referred to corruption a majority of the time as that which was "predicated of an entity, not an individual."[9]

Founder Gouverneur Morris noted not only that "[w]ealth tends to corrupt the mind[,] . . . to nourish its love of power, and to stimulate it to oppression," but also that "[t]he check provided in the [second] branch was not meant as a check on Legislative usurpations of power, but on the abuse of lawful powers. . . ."[10] The word "corrupt" could even be used in reference to a law itself, for instance when William Davie discussed the possibility of legislators making "corrupt laws" at the North Carolina convention in 1788.[11] Richard Henry Lee took care to distinguish between general corruption and specific bribery during his remarks at the Virginia convention regarding the British House of Commons, which he deemed "undermined by corruption in every age, and contaminated by bribery even in this enlightened age. . . ."[12]

James Madison's writings in *The Federalist Papers* also evince concern about a broad form of corruption that could take root among legislators—that a lawmaker's duties might be "diverted from him by the intrigues of the ambitious or the bribes of the rich."[13]

The specific issue of undue influence in the election of public officials received its due share of debate. Charles Pinckney argued at the South Carolina convention in 1788 that the size of an electorate was inversely proportional to the probability of corruption: "If a small district sent a member [to the House of Representatives], there would be frequent opportunities for cabal and intrigue: but if the sphere of election is enlarged, then opportunities must necessarily diminish."[14] James Madison, in *Federalist* No. 57, sounded

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[7] Zephyr Teachout, *The Anti-Corruption Principle,* 94 Cornell L. Rev. 341, 352–53 (2009).
[8] *See id.* at 373–74.
[9] Lawrence Lessig, *"Corruption," Originally: About* (2013–14) (accessed July 23, 2014), *available at* ocorruption.tumblr.com/about.html.
[10] Notes of James Madison (July 19, 1787), in 2 The Records of the Federal Convention of 1787, at 52.
[11] William Davie, 4 The Debates in the Convention of the State of North Carolina, at 59 (Jonathan Elliot ed. 1827), *available at* http://memory.loc.gov/ammem/amlaw/lwed.html.
[12] Richard Lee, 3 Debates in the Several State Conventions on the Adoption of the Federal Constitution, at 43 (Jonathan Elliot ed. 1827).
[13] *The Federalist* No. 57 (Madison).
[14] Charles Pinckney, 4 Debates in the Legislature and in Convention of the State of South Carolina, at 302 (Jonathan Elliot ed. 1827).

a similar note, and specifically discussed the influence of big money:

> Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States.[15]

While a good portion of the Framers' discussion of corruption and undue influence concerned foreign governments, the historical evidence above demonstrates a high level of concern over the undue influence of moneyed interests, a foundational concern which continues to this day.

2. The evolution of our Nation's campaign finance legislation

The modern era of campaign finance legislation began at the turn of the 20th century, by which point popular concern regarding the concentration of money in State and national campaigns had grown.[16] President Theodore Roosevelt was a strong proponent of reform, with a particular eye toward limiting the reach of the largest corporations. In his 1902 State of the Union address, President Roosevelt affirmed the importance of corporations in the modern industrial landscape, but was "determined that they shall be so handled as to subserve the public good."[17]

After President Roosevelt's victory in the election of 1904, courtroom testimony revealed that high-powered officers at New York insurance companies had been funneling policy-holders' assets into donations to the Republican National Committee since 1896.[18] President Roosevelt, who was also known for his rigorous enforcement of antitrust law against large corporations, perceived the necessity for reform. He called on Congress to address the issues of corporate malfeasance and undue influence on elections,[19] which this scandal had shown to be intertwined.

Congress's efforts led to the passage of the Tillman Act, ch. 420, 34 Stat. 864 (1907), which "prohibited federally chartered corporations and national banks from contributing money to Federal campaigns."[20]

Two years before his campaign for a third term, Roosevelt gave another speech in which he declared that "our government, National and State, must be freed from the sinister influence or control of special interests . . . [which] too often control and corrupt the men and methods of government for their own profit."[21] He further stated that "[t]here can be no effective control of corporations while their political activity remains" and that "laws should be passed to prohibit the use of corporate funds directly or indirectly for political purposes" because corporate political expendi-

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[15] *The Federalist* No. 57 (Madison).
[16] *See* Melvin I. Urofsky, *Campaign Finance Reform Before 1971,* 1 Alb. Gov't L. Rev. 1, 13–14 (2008).
[17] President Theodore Roosevelt, *State of the Union Address* (Dec. 2, 1902).
[18] *Id.* at 14.
[19] *Id.* at 15–16; *see also* Robert E. Mutch, Campaigns, Congress, and Courts: The Making of Federal Campaign Finance Law 3–6 (1988).
[20] Fed. Election Comm'n, *Appendix 4: The Federal Election Campaign Laws: A Short History* (accessed July 21, 2014), *available at* http://www.fec.gov/info/appfour.htm.
[21] Theodore Roosevelt, Speech on The New Nationalism in Osawatomie, Kansas (Aug. 31, 1910).

tures are "one of the principle sources of corruption in our political affairs." [22]

Around the turn of the 20th century, there were also a series of corruption scandals that shook the U.S. Senate. Senator William A. Clark of Montana, a copper mining baron, resigned after it was discovered that he had made a "personal disbursement" of over $140,000 to Montana State legislators.[23] The Senate expelled Senator William Lorimer of Illinois in 1912 for bribing four State legislators to vote for his election.[24] During the 58th Congress (1903–05), ten percent of U.S. Senators were either the subjects of legislative investigations or were put on trial for corruption.

In 1911, text that would ultimately become the Seventeenth Amendment was proposed by Senator Joseph Bristow of Kansas in response to these and other scandals. Senator Bristow was specifically concerned with the corruption that corporate interests had caused in the U.S. Senate:

> With the development during recent times of the great corporate interests of the country, and the increased importance of legislation relating to their affairs, they have tenaciously sought to control the election of Senators friendly to their interests. . . .
>
> The power of these great financial and industrial institutions can be very effectively used in the election of Senators by legislatures, and they have many times during recent years used that power in a most reprehensible and scandalous manner. They have spent enormous amounts of money in corrupting legislatures to elect to the Senate men of their own choosing.[25]

William Jennings Bryan similarly argued for the Amendment, explaining that "great corporations . . . are able to compass the election for their tools and their agents through the instrumentality of Legislatures, as they could not if Senators were elected directly by the people." [26] In 1913, the 17th Amendment was formally adopted.

The next generation of laws, including the Federal Corrupt Practices Act, 43 Stat. 1070 (1925), and the Hatch Act of 1939, 5 U.S.C. 7321–7326, responded to the public outcry over scandals. There was the Teapot Dome scandal, where Secretary of the Interior Albert Fall accepted a bribe and leased Navy petroleum reserves to private oil companies at low rates without competitive bidding. There was concern that New Deal programs might be used for political activities. In response to these incidents and concerns, Congress passed legislation that created disclosure requirements for candidates and party committees as well as limits on campaign contributions to and expenditures by the parties.[27] The Taft-Hartley Act, Pub.L. 80–101 (1947), fortified prohibitions on expendi-

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[22] *Id.*

[23] *See* Ralph A. Rossum, *The Irony of Constitutional Democracy: Federalism, The Supreme Court, and the Seventeenth Amendment*, 36 San. Diego L. Rev. 671, 707 (1999).

[24] *See id.*

[25] Sen. Joseph Bristow, *The Direct Election of Senators,* in Congressional Serial Set Issue 6177 (U.S. G.P.O. 1912).

[26] 26 Cong. Rec. 7775 (1894); *see also* 28 Cong. Rec. 1520 (1896) (statement of Sen. Turpie); 23 Cong. Rec. 3194 (1892) (statement of Sen. Chandler); *id.* at 6063 (statement of Rep. Tucker); *id.* at 6068 (statement of Rep. Gantz).

[27] *See* Urofsky, *supra* note 16, at 20, 25.

tures and contributions by labor unions' and corporations' relating to Federal elections.

These laws, however, established an ineffective regulatory framework that candidates and committees were able to circumvent through loopholes and lack of enforcement.[28] For example, despite the existence of the Tillman Act, corporate executives would make large contributions for which they would be reimbursed by their companies, or would simply ignore the Act's bans by reaching into the corporate treasury and sending money to campaign committees. The lack of enforcement meant that there was virtually no fear of indictment.[29]

Meanwhile, the cost of campaigns became more and more prohibitive throughout the 1950s and 1960s. As a result, candidates had to constantly engage in fundraising for their next campaigns.[30] Congress attempted to respond to the loopholes, lack of enforcement, and increasing costs of running for office on several occasions, but failed.[31] It was not until the Watergate scandal that conditions finally became ripe for further reform.

In 1971, Congress had enacted disclosure requirements by passing the Federal Election Campaign Act (FECA), Pub.L. 92–225 (1971). It was not, however, until the 1974 post-Watergate amendments to the FECA, Federal Election Campaign Act Amendments, Pub.L. 93–443 (1974), that Congress could really be said to have mounted a systematic campaign against electoral corruption. President Nixon's re-election strategy of bypassing party committees and seeking contributions from wealthy donors—magnified in public salience by the general outrage over the Watergate break-in and other crimes [32]—provided Congress with the case for placing tighter limits on expenditures, including a $1,000 limit on contributions to any candidate for a primary, run-off, or general election, $5,000 to any political organization or committee, and a maximum of $25,000 to all candidates for Federal office in any election cycle.[33] Presidential candidates could not spend more than $10 million in the primaries or $20 million in general elections, House candidates had a $70,000 primary and general limit on spending, and Senate candidates had a $100,000 primary and $150,000 general limit on spending.[34] The 1974 amendments also created the Federal Election Commission (FEC), an independent regulatory agency designed to enforce campaign finance provisions.

3. Buckley v. Valeo

In 1976, the Supreme Court considered a First Amendment challenge to FECA in *Buckley* v. *Valeo*.[35] The Court's *Buckley* decision resulted in a set of compromise doctrines that drew questionable distinctions between the constitutional validity of limitations on campaign contributions on the one hand and limitations on campaign-related expenditures on the other.

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[28] *See id.* at 28–31.
[29] *See id.* at 29.
[30] *See id.* at 31–32.
[31] *See id.* at 46.
[32] Urofsky, *supra* note 16, at 51–53, 55–56; *see also* David Schultz, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws,* 18 Rev. Litig. 85, 91–92 (1999).
[33] FECA Amendments § 101.
[34] *Id.*
[35] 424 U.S. 1 (1976).

Analyzing FECA, the Court acknowledged that the "actuality and appearance of corruption resulting from large individual financial contributions" is a "constitutionally sufficient justification for" limiting the amount of money that individuals can contribute to political campaigns.[36] However, the Court struck down limitations on individual expenditures "relative to a clearly identified candidate" and limitations on campaign spending by candidates for various Federal offices, finding that "the interest in alleviating the corrupting influence of large contributions" is "clearly not sufficient to justify the provision's infringement of fundamental First Amendment rights." [37]

Buckley thus upheld an infrastructure of modest campaign finance regulations. But in so doing, it placed significant limitations on the scope and creativity of any future campaign finance efforts, thereby undercutting legislative efforts to protect against corruption and maintain the "integrity of our system of representative democracy." [38]

4. McCain-Feingold Bipartisan Campaign Reform Act (BCRA)

Until the McCain-Feingold Bipartisan Campaign Reform Act (BCRA), Pub.L. 107–155 (2002), was enacted, the intervening years were marred by large donors' increasing abuse of FECA exceptions, loopholes that allowed for unlimited spending on grass-roots activities (soft money had grown from $86 million in 1992 to $495 million in 2000), and the unlimited broadcasting of so-called issue advertisements that were the functional equivalent of advertisements urging the support or defeat of candidates for election. BCRA, which was the most significant reform of campaign finance since the 1970s, was a reaction to these problems.[39]

The Act, which amended FECA, eliminated soft money donations—those donations that do not go directly to the candidate, but are directed instead to national party committees—and limited fundraising by candidates and incumbents on behalf of committees or other candidates.[40] The Act also banned the use of corporate or union money for electioneering communications (advertisements referring to a Federal candidate in the context of a political issue without explicitly supporting or attacking the candidate) within thirty days of a primary or sixty days of a general election.[41] Another key piece of the BCRA framework was a set of rules governing coordinated and independent expenditures.[42] These rules were flexible and allowed campaigns to grow in sophistication, duration, and magnitude. BCRA made room for corporate and PAC spending in issue advertising and contained exemptions permitting several forms of electioneering materials.[43]

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[36] *Id.* at 27.
[37] *Id.* at 56.
[38] *Id.* at 27.
[39] *See* Gregory Comeau, *Bipartisan Campaign Reform Act,* 40 Harv. J. on Legis. 253, 260–62 (2003).
[40] Bipartisan Campaign Reform Act, Pub.L. 107–155 (2002), § 101.
[41] *Id.* § 201.
[42] *Id.* § 213–214.
[43] *See Citizens United* v. *Federal Election Comm'n*, 558 U.S. 310, 415–17 (2010) (Stevens, J., dissenting).

5. McConnell v. FEC

In 2003, the Supreme Court heard and upheld a challenge to BCRA in *McConnell* v. *Federal Election Commission.*[44] The opinion of the Court, in relevant part, was delivered by Justices Stevens and O'Connor and joined by Justices Souter, Ginsburg, and Breyer. Drawing on a substantial record, the Court observed that large, soft money contributions may give rise to corruption or the appearance of corruption. The Court noted, for example, that "in 1996 and 2000, more than half of the top 50 soft-money donors gave substantial sums to both major national parties, leaving room for no other conclusion but that these donors were seeking influence, or avoiding retaliation, rather than promoting any particular ideology."[45]

Quoting the 1990 case, *Austin* v. *Michigan Chamber of Commerce,* the Court observed that in addition to upholding laws that were justified by a legislative interest in combatting corruption or the appearance of corruption, it had also "repeatedly sustained legislation aimed at 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'"[46] The Court emphasized that "[j]ust as troubling to a functional democracy as classic *quid pro quo* corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder."[47]

Campaign finance laws like FECA and BCRA, the Court recognized, do not undermine free speech rights, but rather, take aim at the inappropriate influence of moneyed interests, influence that in turn destabilizes "the integrity of our electoral process."[48]

B. The Supreme Court's drastic reversal and departure from a century of precedent

1. FEC v. Wisconsin Right to Life

In a 2007 split decision in *Federal Election Commission* v. *Wisconsin Right to Life,*[49] the Court—which now had two new members—struck down an application of the very law it had upheld four years earlier in *McConnell*. Wisconsin Right to Life had used its general treasury funds to pay for political ads that criticized Wisconsin's senators for participating in a filibuster to block confirmation of President Bush's judicial nominees. It hoped to run these ads within thirty days of the Wisconsin primary—a move that would have violated Section 203 of BCRA, which prohibits electioneering communications by corporations and labor unions paid out of treasury funds within 30 days of a primary election. The controlling opinion, which held that the specific application of Section 203 was unconstitutional as applied—as opposed to it being unconstitutional in all circumstances—was signed only by the Court's two newest justices, Chief Justice Roberts and Justice Alito.

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[44] 540 U.S. 93 (2003).
[45] *Id.* at 148.
[46] *Id.* at 205 (quoting Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 660 (1990)).
[47] *Id.* at 153.
[48] *Id.* at 153 (internal citation omitted).
[49] 551 U.S. 449 (2007).

The Court's controlling opinion contorted *McConnell* in an effort to distinguish it and thereby weaken Section 203. It applied strict scrutiny to BCRA and held that the government lacked the requisite compelling state interest in regulating advertisements, like Wisconsin Right to Life's, that, to the Justices, were neither express advocacy nor its functional equivalent. This created a formalist, easy-to-circumvent, "magic words"[50] test for determining which advertisements were or were not prohibited by BCRA. Essentially, unless an advertisement specifically stated that one should vote for or against a candidate, it would not be considered express advocacy or its functional equivalent and could not be regulated.

Wisconsin Right to Life therefore imposed a high barrier to regulating the campaign-related financial activities of corporations and unions. As the dissent noted, "the ban on contributions by corporations and unions and the limitation on their corrosive spending when they enter the political arena are open to easy circumvention, and the possibilities for regulating corporate and union campaign money are unclear."[51] Moreover, the decision "[t]hreaten[ed] the capacity of this democracy to represent its constituents and the confidence of its citizens in their capacity to govern themselves."[52]

The result, as the dissent explained, is that the moneyed few get "special access to the officials they help elect, and with it a disproportionate influence on those in power."[53] Moreover, the American voters know this: The

> [The] consequence of the demand for big money to finance publicity: pervasive public cynicism. A 2002 poll found that 71 percent of Americans think Members of Congress cast votes based on the views of their big contributors, even when those views differ from the Member's own beliefs about what is best for the country. . . . The same percentage believes that the will of contributors tempts Members to vote against the majority view of their constituents. . . . Almost half of Americans believe that Members often decide how to vote based on what big contributors to their party want, while only a quarter think Members often base their votes on perceptions of what is best for the country or their constituents.[54]

Justices Scalia, joined by Justices Kennedy and Thomas, concurred in the judgment. The three Justices disagreed with the controlling opinion's approach and would have simply overturned *McConnell* and struck Section 203(a) in its entirety. In a footnote, Justice Scalia accused his new colleagues of hiding the ball. He wrote:

> [T]he principal opinion's attempt at distinguishing *McConnell* is unpersuasive enough, and the change in the law it works is substantial enough, that seven Justices of this Court, having widely divergent views concerning the

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[50] *See, e.g.*, Federal Election Comm'n v. Wisconsin Right to Life, Inc. 551 U.S. 449, 531 (2007) (Souter, J., dissenting).
[51] *Id.* at 536 (Souter, J., dissenting).
[52] *Id.* at 507 (Souter, J., dissenting).
[53] *Id.* at 506 (Souter, J., dissenting).
[54] *Id.* at 507 (Souter, J., dissenting).

> constitutionality of the restrictions at issue, agree that the opinion effectively overrules *McConnell* without saying so. . . . This faux judicial restraint is judicial obfuscation.[55]

The four dissenting Justices, Justices Souter, Stevens, Ginsburg, and Breyer, emphasized that the facts before the Court were no different than those presented in *McConnell*.[56] In an opinion authored by Justice Souter, the dissenting Justices emphasized that "[t]he principal opinion . . . stands McConnell on its head"[57] and "produces the result of overruling *McConnell*'s holding on § 203, less than four years in the Reports."[58] Observing that "there is no justification for departing from our usual rule of *stare decisis* here," Justice Souter wrote that the "price of *McConnell*'s demise as authority on § 203 seems to me to be a high one. The Court (and, I think, the country) loses when important precedent is overruled without good reason."[59]

2. Citizens United v. FEC

Just a few years later, the Court would explicitly do what it implicitly began to do in *Wisconsin Right to Life*. In the 2010 case, *Citizens United* v. *Federal Election Commission*,[60] the Court departed from principles of judicial restraint and decided to overturn an act of Congress under the broadest grounds possible. In so doing, it overruled a century of practice and decades of doctrine. The Court rejected the longstanding understanding of the First Amendment as democracy-facilitating[61] and replaced it with an interpretation that injects into the First Amendment a poison pill for "our system of representative democracy."[62]

As Justice Stevens detailed in his 90-page dissenting opinion, the questions that the Court resolved in the case were not properly brought before it. In its jurisdictional statement before the Supreme Court, Citizens United wrote that it brought only "an as-applied challenge to the constitutionality of . . . BRCA 203."[63] This was because, in its motion for summary judgment at the District Court, Citizens United had "expressly abandoned"[64] its original facial challenge, and the parties had stipulated to the dismissal of the claim.[65] Moreover, "not one of the questions presented suggested that Citizens United was surreptitiously raising the facial challenge to 203" or that it was "rais[ing] an issue based on Citizen United's corporate status."[66] But, as Justice Stevens explained, "[e]ssentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves

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[55] *Fed. Election Com'n* v. *Wisconsin Right To Life, Inc.,* 551 U.S. 449, 499 n.7 (2007) (Scalia, J., concurring in judgment).
[56] *See id.* at 535 (Souter, J., dissenting).
[57] *Id.* at 526–27 (Souter, J., dissenting).
[58] *Id.* at 533 (Souter, J., dissenting).
[59] *Id.* at 534 (Souter, J., dissenting).
[60] 558 U.S. 310 (2010).
[61] *See generally id.,* 425–446 (2010) (Stevens, J., dissenting) (describing this history).
[62] *Buckley* v. *Valeo*, 424 U.S. 1, 26–27 (1976).
[63] Jurisdictional Statement at 5, *Citizens United* v. *Fed. Election Comm'n,* 558 U.S. 310 (2010) (No. 08–205).
[64] *Citizens United* v. *Fed. Election Comm'n,* 558 U.S. 310, 396–97 (2010) (Stevens, J, dissenting); Citizens United v. Federal Election Comm'n, Case No. 07–cv–2240–RCL–RWR, Docket Entry No. 52, pp. 1–2 (May 16, 2008).
[65] *Citizens United* v. *Federal Election Comm'n,* Case No. No. 07–cv–2240–RCL–RWR, Docket Entry Nos. 53 (May 22, 2008), 54 (May 23, 2008), App. 6a.
[66] *Citizens United* v. *Fed. Election Comm'n*, 558 U.S. 310, 397 (2010) (Stevens, J, dissenting).

an opportunity to change the law,"[67] subverting basic principles of judicial restraint in so doing.[68] Under pressure, those Justices who were intent on effectuating a sea-change in First Amendment jurisprudence acquiesced to holding a second set of arguments on the facial challenge to BCRA.[69] But even with this second set of arguments, the record remained undeveloped; the lower courts had heard the case as an as-applied challenge. In a fit of judicial activism, the Court rendered its momentous decision "on the basis of pure speculation" and with no record to fill the "gaping empirical hole" with which it was confronted.[70]

With its overly broad decision, the Court overturned more than a century of established practice and decades of Court precedent[71] to proscribe reasonable efforts to protect our representative democracy from what the Framers described as the corrupting influences that sever the "chain of communication between the people, and those, to whom they have committed the exercise of the powers of government."[72]

As a matter of doctrine, the Court in *Citizens United* advanced two extreme and highly questionable positions. First, it held—for the first time in its history—that corporations have the same political speech rights to spend money in electoral campaigns as humans and would not allow for any distinction between the two. Second, the Court substantially narrowed the types of corruption that campaign finance legislation may target, leaving large swaths of toxic, financial activities wholly outside of permissible State or Federal regulation.

a. Corporations now have the political speech rights of the people but enjoy extraordinary economic benefits and privileges

In his dissent, Justice Stevens offered a vigorous response to the Court's claim that the First Amendment demands that "the Gov-

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[67] *Id.* (Stevens, J, dissenting).

[68] *See Washington State Grange* v. *Washington State Republican Party,* 552 U.S. 442, 450 (2008) (resorting to a facial inquiry unnecessarily "run[s] contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied"); *Citizens United* v. *Fed. Election Comm'n,* 558 U.S. 310, 398–99 (2010) (Stevens, J., dissenting).

[69] *See* Jeffrey Toobin, *Money Unlimited: How Chief Justice Roberts Orchestrated the Citizens United Decision,* New Yorker, May 21, 2012, *available at* http://www.newyorker.com/magazine/2012/05/21/money-unlimited.

[70] *Citizens United* v. *Fed. Election Comm'n,* 558 U.S. 310, 399, 400 (2010) (Stevens, J, dissenting).

[71] *Id.* (Stevens, J, dissenting) ("The majority's approach to corporate electioneering marks a dramatic break from our past. Congress has placed special limitations on campaign spending by corporations ever since the passage of the Tillman Act in 1907, ch. 420, 34 Stat. 864. We have unanimously concluded that this 'reflects a permissible assessment of the dangers posed by those entities to the electoral process,' *FEC* v. *National Right to Work Comm.,* 459 U.S. 197, 209, 103 S.Ct. 552, 74 L.Ed.2d 364 (1982) (*NRWC*), and have accepted the 'legislative judgement that the special characteristics of the corporate structure require particularly careful regulation,' *id.*, at 209–210, 103 S.Ct. 552. The Court today rejects a century of history when it treats the distinction between corporate and individual campaign spending as an invidious novelty born of *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990). Relying largely on individual dissenting opinions, the majority blazes through our precedents, overruling or disavowing a body of case law including *FEC* v. *Wisconsin Right to Life, Inc.,* 551 U.S. 449, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) (*WRTL*), *McConnell* v. *FEC*, 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003), *FEC* v. *Beaumont*, 539 U.S. 146, 123 S.Ct. 2200, 156 L.Ed.2d 179 (2003), *FEC* v. *Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986) (*MCFL*), *NRWC*, 459 U.S. 197, 103 S.Ct. 552, 74 L.Ed.2d 364, and *California Medical Assn.* v. *FEC,* 453 U.S. 182, 101 S.Ct. 2712, 69 L.Ed.2d 567 (1981).").

[72] J. Wilson, Commentaries on the Constitution of the United States of America 30–31 (1792).

ernment . . . not suppress political speech on the basis of the speaker's corporate identity":

> At the federal level, the express distinction between corporate and individual political spending on elections stretches back to 1907, when Congress passed the Tillman Act, ch. 420, 34 Stat. 864, banning all corporate contributions to candidates. The Senate Report on the legislation observed that "[t]he evils of the use of [corporate] money in connection with political elections are so generally recognized that the committee deems it unnecessary to make any argument in favor of the general purpose of this measure. It is in the interest of good government and calculated to promote purity in the selection of public officials." S.Rep. No. 3056, 59th Cong., 1st Sess., 2 (1906).[73]

As Justice Stevens likewise documented at length, treating corporations and individuals as indistinguishably protected by the First Amendment contravenes the Amendment's original purpose and design.[74]

Beyond historical practice and original understanding, there remain critical, functional reasons why the First Amendment had never before treated corporations and human beings as equivalent. As Justice Stevens wrote:

> In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters. The financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process. Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races.
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> Unlike natural persons, corporations have limited liability for their owners and managers, perpetual life, separation of ownership and control, and favorable treatment of the accumulation and distribution of assets . . . that enhance their ability to attract capital and to deploy their resources in ways that maximize the return of their shareholders' investments. . . . Unlike voters in U.S. elections,

[73] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 433 (2010) (Stevens, J., dissenting).

[74] *Id.* at 425-32 (Stevens, J., dissenting) ("To the extent that the Framers' views are discernible and relevant to the disposition of this case, they would appear to cut strongly against the majority's position. This is not only because the Framers and their contemporaries conceived of speech more narrowly than we now think of it, see Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 22 (1971), but also because they held very different views about the nature of the First Amendment right and the role of corporations in society. . . . The Framers [] took it as a given that corporations could be comprehensively regulated in the service of the public welfare. Unlike our colleagues, they had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind. While individuals might join together to exercise their speech rights, business corporations, at least, were plainly not seen as facilitating such associational or expressive ends.").

> corporations may be foreign controlled. . . . The resources in the treasury of a business corporation are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence even though the power of the corporation may be no reflection of the power of its ideas.[75]

b. Overruling well-settled precedent

In *Citizens United*, the Court also overruled its 1990 decision *Austin* v. *Michigan Chamber of Commerce*,[76] and thus significantly limited the government interests that campaign finance regulation can constitutionally protect. More specifically, the Court held that a governmental interest in preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas" [77] is insufficient to justify the infringements on the First Amendment that are allegedly imposed by campaign finance regulations. This left the government's interest in reducing corruption or the appearance of corruption—terms that would themselves be severely narrowed by the Court's 2012 ruling in *McCutcheon* v. *FEC*, discussed infra—as the sole grounds on which governments may justify campaign finance laws.

In overruling *Austin*, the Court demonstrated an unsophisticated understanding of how money in politics has distorted the activities of legislatures across the country and created structural impediments that make it difficult, if not impossible, for elected representatives to act in the best interests of their actual constituents. The majority's insistence, throughout its opinion, that *Citizens United* expands rights and democracy is belied by reality.

3. McCutcheon v. *FEC*

In 2014 in *McCutcheon* v. *Federal Election Commission*,[78] the Court struck down the FECA's aggregate limit on contributions to candidates and party committees and offered an even narrower and more formalist definition of corruption. Affirming that campaign finance regulations may only be justified by a governmental interest in preventing corruption or the appearance of corruption, the Court explained for the first time that this interest must be "confined to . . . quid pro quo corruption[;] the Government may not seek to limit . . . mere influence or access [or the appearance thereof]." [79]

Writing that governments "may not . . . regulate contributions simply to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative influence of others," the Court betrayed hostility towards basic democratic principles, principles that have long been thought to undergird the First Amendment.[80] As the dissent, authored by Justice

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[75] *Id.* (Stevens, J., dissenting) (internal quotation marks and citations omitted).
[76] 494 U.S. 652 (1990).
[77] *Id.* at 660; *Citizens United* v. *Fed. Election Comm'n*, 558 U.S. 310, 348–363, 365.
[78] 134 S.Ct. 1434 (2014).
[79] *Id.*
[80] *See generally, id.* (Breyer, J., dissenting).

Breyer and joined by Justices Ginsburg, Sotomayor, and Kagan, explained,

> Corruption breaks the constitutionally necessary "chain of communication" between the people and their representatives. It derails the essential speech-to-government-action tie. Where enough money calls the tune, the general public will not be heard. Insofar as corruption cuts the link between political thought and political action, a free marketplace of political ideas loses its point. That is one reason why the Court has stressed the constitutional importance of Congress' concern that a few large donations not drown out the voices of the many.[81]

The Court also characterized the "constituent" at the heart of our political system not as she who votes or she who is governed by an elected representative, but rather as he who funds campaigns. The majority wrote that "'[i]ngratiation and access . . . are not corruption.' . . . They embody a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns."[82] Yet the companies and individuals donating huge sums of money to candidates for statewide office or Congress may not be "constituents" in any normal sense of the word: they may not live or have any corporate presence in the State whose policies and races they are trying to influence.[83]

The majority's opinion and crabbed definition of corruption, however, stands in contradiction to prior Supreme Court precedent and evidence of the Founders' ideas on corruption. In fact, in rejecting this very narrow view of corruption just years earlier in *McConnell* v. *FEC*, the Court stated:

> Our cases have made clear that the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits. We have not limited that interest to the elimination of cash-for-votes exchanges. In *Buckley*, we expressly rejected the argument that antibribery laws provided a less restrictive alternative to FECA's contribution limits, noting that such laws "deal[t] with only the most blatant and specific attempts of those with money to influence governmental action." 424 U.S., at 28, 96 S.Ct. 612. Thus, "[i]n speaking

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[81] *Id.,* 134 S.Ct. 1434, 1467-68 (2014) (Breyer, J., dissenting). The dissent also emphasized that one purpose of the First Amendment is to empower a "public opinion that can and will influence elected representatives." *Id.* at 1467. Some have argued that this suggests the dissent would read the First Amendment as solely a "collective" right. *See, e.g., Hearing on Examining a Constitutional Amendment to Restore Democracy to the American People Before the S. Comm. on the Judiciary,* 113th Cong (2014) (statement of Ranking Member Chuck Grassley). This misreads the opinion. The dissent simply sought to highlight that "political communication seeks to secure government action" and does not "exist in a vacuum." McCutcheon v. Federal Election Com'n, 134 S.Ct. 1434, 1467 (2014) (Breyer, J., dissenting). Thus, "we can and should understand campaign finance laws as resting upon a broader and more significant constitutional rationale than the plurality's limited definition of 'corruption' suggests. We should see these laws as seeking in significant part to strengthen, rather than weaken, the First Amendment. To say this is not to deny the potential for conflict between (1) the need to permit contributions that pay for the diffusion of ideas, and (2) the need to limit payments in order to help maintain the integrity of the electoral process. But that conflict takes place within, not outside, the First Amendment's boundaries." *Id. at 1468.*

[82] *McCutcheon* v. *Federal Election Com'n,* 134 S.Ct. 1434, 1441 (2014) (emphasis added).

[83] *See, e.g.,* Nicholas Confessore, *A National Strategy Funds State Political Monopolies,* N.Y.Times, Jan. 11, 2014, *available at* http://www.nytimes.com/2014/01/12/us/politics/a-national-strategy-funds-state-political-monopolies.html.

> of 'improper influence' and 'opportunities for abuse' in addition to 'quid pro quo arrangements,' we [have] recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors." [84]

The concept that corruption reaches beyond mere quid pro quo corruption is supported by how our Framers viewed and used the term corruption. As Professor Larry Lessig has written,

> [B]y "corruption," the Framers certainly did not mean quid pro quo corruption alone. That exclusive usage is completely modern. And while there were cases where by "corruption" the Framers plainly meant quid pro quo corruption, these cases were the exception. The much more common usage was "corruption" as in improper dependence. Parliament, for example, was "corrupt," according to the Framers, because it had developed an improper dependence on the King. That impropriety had nothing to do with any quid pro quo. It had everything to do with the wrong incentives being allowed into the system because of that improper dependence.[85]

Moreover, in his *Citizens United* dissent, Justice Stevens cites to Professor Zephyr Teachout's article on the issue, and notes that "[i]t is fair to say that the Framers were obsessed with corruption, which they understood to encompass dependency of public officeholders on private interests. They discussed corruption more often in the Constitutional Convention than factions, violence, or instability. When they brought our constitutional order into being, the Framers had their minds trained on a threat to republican self-government that this Court has lost sight of." [86]

Contrary to the claims made by the Minority, the four dissenting justices in *McCutcheon* nowhere advanced the premise that constitutional rights are generally "collective" rights. Rather, they contextualized *McCutcheon* as a decision at odds with over 200 years of constitutional thinking—thinking that has recognized that individual speech rights are closely linked to the preservation of democracy and freedom in our society. "Collective speech matters," the dissent explained, because in a democracy, the collective voices of individual citizens—rather than the single voice of a solitary moneyed interest—should be what persuade representatives to devote time and attention to specific issues.[87] This is a common sense proposition because, as the Court recognized more than 100 years ago, the right to vote is a fundamental political right because in a democracy it is "preservative of all rights." [88] That collective speech matters is an observation as old as our democracy itself. As the dissenting justices wrote in *McCutcheon*, Federalist No. 57 discussed the "'communion of interests and sympathy of sentiments' between

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[84] *McConnell* v. *Federal Election Com'n,* 540 U.S. 93, 143 (2003).

[85] Larry Lessig, *Originalists Making it Up Again: McCutcheon and 'Corruption,'* The Daily Beast, Apr. 2, 2014, *available at* http://www.thedailybeast.com/articles/2014/04/02/originalists-making-it-up-again-mccutcheon-and-corruption.html.

[86] Citizens United, 558 U.S. at 452 (Stevens, J., dissenting) (internal quotation marks omitted) (citing Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 341, 373, 378 (2009)).

[87] *McCutcheon* v. *Fed. Election Comm'n*, 134 S. Ct. 1434, 1467 (2014) (Breyer, J., dissenting).

[88] *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886).

the people and their representatives, so that public opinion [can] be channeled into effective governmental action." [89]

And contrary to the Minority's claims that this Supreme Court has been a staunch guardian of the First Amendment, the evidence shows that the conservative majority is not so protective of the First Amendment when it comes to the rights of everyday hard-working Americans. For instance, in *Arizona Free Enterprise Club's Freedom Club PAC* v. *Bennett*,[90] the Court struck down Arizona's public financing law, which provided matching funds (up to a limit) to publicly funded candidates in order to balance money spent by privately financed opponents and by independent groups. This was decidedly an anti-democratic and anti-First Amendment ruling because Arizona's public financing law actually provided for more voices to be heard in the political process.

In sum, the Court's recent about-face and drastic departure from a century of settled law and precedent has led to the evisceration of nearly every reasonable campaign finance protection that had been in the books. Its tortured and radical interpretation of the First Amendment has led to a predictable and entirely foreseeable fallout.

C. Fallout from the Supreme Court's unprecedented decisions

Over the last several years, outside spending in elections has risen to unprecedented levels. According to the Federal Election Commission, almost $7 billion was spent on Federal elections in 2012.[91] The election in 2012 was the most expensive election in U.S. history, with one dollar spent for almost every person on the planet.[92]

The dramatic increase is directly attributable to a series of recent Supreme Court cases documented above, decided along ideological lines, that ignored decades of precedent, eviscerated campaign finance laws, and opened the floodgates to vast sums of money from wealthy, special interests, and corporate donors.

1. Massive influx of spending by corporations and wealthy donors

Citizens United v. *FEC*, along with the D.C. Circuit case of *SpeechNOW.org* v. *FEC* [93] are primarily responsible for the creation of Super PACs (Super PACs or Super Political Action Committees can accept unlimited financial contributions directly from the bank accounts of wealthy donors and the corporate treasuries of unions and corporations to finance expenditures on elections, as long as they are not coordinated with candidates). During the 2012 election, the first presidential election cycle following *Citizens United*, outside spending from groups not affiliated with a political party

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[89] *McCutcheon* v. *Fed. Election Comm'n*, 134 S. Ct. 1434, 1467 (2014) (Breyer, J., dissenting) (quoting The Federalist No. 57, 386 (J. Cooke ed. 1961) (James Madison)).

[90] 131 S. Ct. 2806 (2011).

[91] Press Release, Federal Election Commission, *FEC Summarizes Campaign Activity of the 2011–2012 Election Cycle*, Apr. 19, 2013, *available at:* http://www.fec.gov/press/press2013/20130419_2012-24m-Summary.shtml.

[92] Tarini Parti, *$7 Billion Spent on 2012 Campaign, FEC Says*, Politico, Jan. 31, 2013, *available at* http://www.politico.com/story/2013/01/7-billion-spent-on-2012-campaign-fec-says-87051.html.

[93] 599 F.3d 686 (D.C. Cir. 2010).

tripled the 2008 total and exceeded $1 billion for the first time.[94] According to the Center for Responsive Politics, $600 million of that came from Super PACs.[95] There were at least 36 U.S. House and U.S. Senate races in 2012 in which candidates were outspent by outside groups.[96]

Freed from the previous prohibition on using profits from corporate treasuries to fund Federal elections, privately held corporations jumped at the opportunity to give millions to Super PACs during the 2012 presidential election. Specialty Group, Inc. gave more than $10 million, while Contran Corp., a holding company, and Oxbow Corp, a Koch Company, each contributed more than $4 million to Super PACs. These are three of the top 15 *publicly disclosed* organizations funding outside spending groups in 2012.[97] While these three gave almost $20 million exclusively to conservative causes, excessive money from wealthy individuals, unions, and special interest PACs too easily finds its way into the campaign coffers of both parties. *Citizens United* and its progeny took this bipartisan problem and made it worse by inviting money from corporate and union treasuries.

A Washington Post-ABC News Poll published shortly after *Citizens United*, found that 80% of Americans opposed the Court's ruling, with 65% "strongly opposed to unfettered corporate spending in elections."[98] Perhaps because of this widespread and bipartisan opposition to unlimited corporate spending on elections, publicly traded corporations have been slow to broadcast their outside spending or donate to Super PACs that disclose their donors. Election watchdogs and transparency groups believe that publicly traded companies prefer to discretely invest in politically active nonprofits and trade associations that do not disclose their donors.[99]

Although the vast majority of money spent on elections by publicly traded companies is most likely being spent through non-disclosing Super PACs, some companies had their contributions publicly disclosed in 2012. According to the Center for Responsive Politics, Chevron donated $2.5 million and Clayton Williams Energy, Inc. donated more than $1 million to Super PACs. Chesapeake Energy, CONSOL Energy, Hallador Energy, Scotts Miracle-Gro, and Pilot Corp each contributed $100,000 or more to Federal Super PACs during that election.[100]

Corporate entities, drawing upon million-dollar and billion-dollar treasuries to advance their corporate interests and enhance their bottom-line, now have the capacity to drown out the voices of hard-working Americans in Federal elections. This unfettered corporate money released by *Citizens United* can perhaps have the greatest impact and disproportionately high return on investment for corporations in State and local elections. One prominent example of this phenomena occurred in Richmond, California last year.

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[94] Andrew Mayersohn, *Four Years After Citizens United: The Fallout*, Open Secrets Blog, Jan. 21, 2014, http://www.opensecrets.org/news/2014/01/four-years-after-citizens-united-the-fallout/.
[95] *Id.*
[96] *Id.*
[97] Ciara Torres-Spelliscy, *What a Waste of Corporate Money*, JURIST—Forum, Dec. 3, 2012, http://jurist.org/forum/2012/12/torres-spelliscy-campaign-finance.php.
[98] Dan Eggen, *Poll: Large Majority Opposes Supreme Court Decision on Campaign Financing,* The Washington Post, Feb. 17, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html.
[99] Torres-Spelliscy, *supra* note 97.
[100] *Id.*

After the mayor and city council sought to limit pollution and demand higher safety standards at a Chevron refinery in the town,[101] Chevron poured $1.6 million into a Super PAC during the 2012 city council race, defeating two council candidates who supported the efforts.[102] In addition to corporate spending in the council races, almost $2.7 million was spent by the American Beverage Association, Cinemark INC, and Regal Entertainment to fund a campaign against a ballot measure that would have taxed sugar-sweetened beverages.[103] As a result, campaigns in Richmond spent at least $40 per resident in the 2012 election.[104] While $1.4 million was a drop in the bucket for a billion-dollar company like Chevron, ordinary Richmond residents were bombarded with the highest election expenditure in the city's history.[105]

Corporations, of course, are not alone in their desire to use their financial largess to influence the elections and public policies impacting their interests. *Citizens United* and its progeny have also given rise to an elite class of wealthy, mega-donors who exercise tremendous influence on elections.

For the millionaires and billionaires hoping to expand their influence on elections, the Supreme Court's decision in *McCutcheon* v. *FEC* is the gift that keeps on giving. *McCutcheon* eliminated the $123,200 aggregate, per cycle cap on individual donations to Federal candidates, PACs, and parties. Now, wealthy donors can give as much as $3.5 million each cycle to all candidates, parties, and PACs.[106] Those separate donations can be transferred between and coordinated by the groups, allowing donors to circumvent limits on donations to a particular candidate or party.

According to the Center for Responsive Politics, "in 2012, the most expensive election ever, the average winner of a House race spent only $1.5 million."[107] Post *McCutcheon*, one wealthy donor contributing the maximum of $3.5 million "could fund, on average, two winning House campaigns—and have change left over."[108] In the aggregate, *McCutcheon* could enable an elite class of 429 people, each donating $3.5 million, to raise $1.5 billion, the total amount raised by Republicans and Democrats from all donors in 2010.[109] That means, in a society that values democracy and political participation, we could have two major parties wholly funded by fewer than 450 people.

It is a troubling concept, far more fitting for a plutocracy than the world's foremost democracy. Nevertheless, it is not a farfetched idea. *Citizens United* and its progeny created a club of millionaire and billionaire mega-donors who have an outsized influence on elections. In 2012, 60% of all Super PAC donations came from an

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[101] Tawanda Kanhema, *Citizens Outspent: Inside Richmond's $4m Election Campaign,* Richmond Confidential, Nov. 5, 2012, *available at* http://richmondconfidential.org/2012/11/05/citizens-outspent-inside-richmonds-4m-election-campaign/.

[102] John Geluardi, Stephen Hobbs, et al., *Election recap: Voters seek familiar faces,* Richmond Confidential, Nov. 8, 2012, *available at* http://richmondconfidential.org/2012/11/08/election-recap-voters-seek-familiar-faces.

[103] *See* Kanhema, *supra* note 101; Geluardi, *supra* note 102.

[104] Kanhema, *supra* note 101.

[105] *Id.*

[106] Russ Choma, *Supreme Court and Campaign Finance: McCutcheon Chapter,* Open Secrets Blog, Oct. 8, 2013, http://www.opensecrets.org/news/2013/10/supreme-court-and-campaign-finance-mccutcheon-chapter.

[107] *Id.*

[108] *Id.*

[109] *Id.*

elite class of 159 people.[110] In North Carolina, that elite group had just one member in 2010: 72% of all outside spending that year came from groups affiliated with Art Pope, the millionaire conservative activist.[111] On the West Coast, Las Vegas casino magnate, Sheldon Adelson, donated nearly $92 million to conservative Super PACs in the 2012 election.[112] Not to be outdone, the *Washington Post* reports that the Koch brothers may spend $290 million on elections in 2014, the equivalent of the average annual income for 5,270 middle class American households.[113] These millionaires and billionaires are breaking one campaign donation record after another in an influence game in which the average American cannot participate. In the 2012 elections, only 0.4% of the U.S. population gave political contributions of more than $200 to candidate campaigns, political parties, and PACs.[114]

2. Increase in undisclosed money

Although the Supreme Court touted the merits of disclosure and transparency in *Citizens United*, the reality is that campaign finance laws and regulations are currently not up to the task. While campaign contributions from corporations, special interest, and wealthy individuals have grown exponentially, disclosure of contributors has gone in the opposite direction.

In 2006, organizations that do not disclose their donors spent $5 million on Federal elections, according to the FEC. By 2010, after Supreme Court decisions in *Citizens United* and *Wisconsin Right to Life*, that number catapulted to $131 million. Two years later, during the 2012 presidential election, organizations that do not disclose their donors spent $311 million dollars.[115]

Unfortunately, this corrosive trend of more money and less disclosure is continuing in 2014. According to the Center for Responsive Politics, "[a]s of April 29 in the current cycle, despite this being a midterm election, spending by nondisclosing groups is nearly three times higher than it was at the same point in 2012." As of the same date, the money "spent by nondisclosing groups in 2014 was more than 75% of all spending by PACs, Super PACS, 527s, and 501(c) organizations at this point in the 2010 midterms."[116]

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[110] Adam Lioz and Blair Bowie, *Billion-Dollar Democracy: The Unprecedented Role of Money in the 2012 Elections,* DEMOS, Jan. 17, 2013, http://www.demos.org/publication/billion-dollar-democracy-unprecedented-role-money-2012-elections.

[111] Robin Parkinson, *Independent Spending in North Carolina, 2006–2010,* National Institute on Money in State Politics, Dec. 20, 2011, http://www.followthemoney.org/press/ReportView.phtml?r=472.

[112] *2012 Top Donors to Outside Spending Groups,* Open Secrets, http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&disp=D&type=V&superonly=S (last visited July 24, 2014).

[113] Philip Bump, *The Koch brothers may spend $290 million on this election. That's how much 5,270 American households make in a year,* The Washington Post, June 17, 2014, http://www.washingtonpost.com/blogs/the-fix/wp/2014/06/17/the-koch-brothers-may-spend-290-million-on-this-election-thats-how-much-5270-american-households-make-in-a-year/.

[114] *Donor Demographics, Campaign Contributions, 2011–2012,* Center For Responsive Politics, http://www.opensecrets.org/bigpicture/donordemographics.php?cycle=2012.

[115] Testimony of Trevor Potter, President and General Counsel of the Campaign Legal Center, before the Senate Committee on Rules and Administration, *Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect 2014 and Beyond,* Center for Responsive Politics, Apr. 30, 2014; Outside *Spending by Disclosure, Excluding Party Committees,* Center for Responsive Politics, http://www.opensecrets.org/outsidespending/disclosure.php.

[116] *Id.*

IV. TEXT OF S.J. RES. 19, AS REPORTED

ARTICLE —

SECTION 1. To advance democratic self-government and political equality, and to protect the integrity of government and the electoral process, Congress and the States may regulate and set reasonable limits on the raising and spending of money by candidates and others to influence elections.

SECTION 2. Congress and the States shall have power to implement and enforce this article by appropriate legislation, and may distinguish between natural persons and corporations or other artificial entities created by law, including by prohibiting such entities from spending money to influence elections.

SECTION 3. Nothing in this article shall be construed to grant Congress or the States the power to abridge the freedom of the press.

V. SECTION-BY-SECTION ANALYSIS OF THE JOINT RESOLUTION

Section 1. To advance democratic self-government and political equality, and to protect the integrity of government and the electoral process, Congress and the States may regulate and set reasonable limits on the raising and spending of money by candidates and others to influence elections

Section 1 affirms the central principles that elections are meant to serve the process of democratic self-government, that political equality among citizens is a precondition for democratic self-government, and that the integrity of representative relationships in democracy must be protected against political and financial corruption. Section 1 further affirms the fundamental principle that elections in our democracy are about voters choosing their elected representatives. Through a series of 5–4 decisions, including *McConnell* v. *FEC*, *Citizens United* v. *FEC*, and *McCutcheon* v. *FEC*, the Supreme Court has eviscerated longstanding campaign finance regulations and invalidated critical provisions of some public financing programs. The cumulative effect of these wrongheaded decisions has been a tidal wave of special interest, corporate, and secret money flooding federal, state, and local elections and drowning out the voices of everyday Americans.

Section 1 restores the power of the people to pass laws and regulations, through their elected representatives, that stop the corrupting influence of money in our elections. Section 1 gives Congress and States the express power to adopt reasonable, content neutral, campaign finance regulations that govern the raising and spending of money by candidates and others in Federal, State and local elections. This section of the amendment also restores the First Amendment right of ordinary Americans to have their voices heard during the electoral process. It expressly overturns *Buckley* v. *Valeo* by establishing that preventing special interests, corporate, and secret money from buying influence and access is a legitimate governmental interest for establishing campaign contribution and spending limits.

Section 2. Congress and the States shall have power to implement and enforce this article by appropriate legislation, and may distinguish between natural persons and corporations or other artificial entities created by law, including by prohibiting such entities from spending money to influence elections

Section 2 empowers Congress and the States to enact campaign finance laws, including public financing programs, and adopt implementing regulations as appropriate. It overturns *Citizens United* v. *FEC* by clarifying that Congress and the states are permitted to

set election spending limits on artificial entities, such as for-profit corporations, unions, and other organizations that are different than the limits applicable to natural born citizens. The status of existing constitutional law with respect to corporations for purposes other than campaign finance reform is unchanged by Section 2.

Section 3. Nothing in this article shall be construed to grant Congress or the States the power to abridge the freedom of the press

Section 3 ensures that limitations on campaign spending and contributions will not restrict legitimate press functions, including reporting on elections and government, publishing opinions and editorials, and endorsing candidates.

The Minority Views below make various assertions and arguments regarding what this proposed constitutional amendment would do. The arguments they make include: that the proposed amendment would threaten and criminalize the fundamental right of free speech; that it would allow for government to impose regulations that would favor certain viewpoints; that the proposed amendment is itself a content-based regulation; that it is the first time in history that we have amended the Bill of Rights and the Constitution to curtail someone's liberty; and that it is an incumbent protectionist measure designed to protect those in office. For the reasons discussed below, the Minority Views are without merit. Even stripping away the hyperbole, the Minority's arguments are simply not supported by the facts.

A. S.J. RES. 19 ALLOWS FOR REGULATION OF ELECTION-RELATED SPENDING AND NOT SPEECH

"Money is property; it is not speech," as Justice John Paul Stevens wrote in *Nixon* v. *Shrink Missouri Government Pac.*[117] Speech, of course, is the distinctive human attribute and is essential to political debate, governance, and voting in democracy. It is protected under the First Amendment. But money is currency, a universal medium of exchange that can be used for multiple purposes, including paying bribes, making gifts to politicians, achieving political influence and favor, ingratiating oneself or one's lobbying clients with officeholders, paying for political speech and advertising, buying votes from voters, paying people not to vote, and so on. Political speech has the highest levels of First Amendment protection, but it is clear—or at least it used to be clear—that money can be regulated or blocked in a host of contexts where its use is considered illegitimate or incompatible with other constitutional interests. This is the principle endangered by the Supreme Court's money-is-speech dogma, which appeared first in *Buckley* v. *Valeo* and has been exponentially magnified by a narrow majority of this current Court.

It is a logical fallacy to treat political money as political speech for all purposes and yet that is the trajectory at work in Supreme Court decisions like *Citizens United* and *McCutcheon*. Floyd Abrams, who is frequently quoted by the Minority Views below, testified not only in defense of those two decisions but for wiping out virtually all of campaign finance law, including all limits on contributions, expenditures, and corporate involvement. He testified only to the validity of some disclosure laws. Thus, if we follow

[117] 528 U.S. 377, 398 (2000) (Stevens, J., concurring).

the dogmas of money being speech and corporations being people to their logical destinations, corporate CEOs will not only be able to spend other people's money freely in politics but they will have a right to give unlimited amounts directly to politicians' campaigns, toppling the Tillman Act. And then a century of campaign finance law will be destroyed. The rationale which supports the extreme notion that government cannot regulate any political money without squelching speech—taken to its extreme conclusion—is in tension with the notion that we can limit foreign money, foreign corporate money, foreign government money, State and local government money, illegal drug money, criminal proceeds, conduit contributions, and money from children.

S.J. Res. 19 halts the rapid destruction of campaign finance law by establishing once and for all that Congress and the States have power to regulate "election-related spending"—not political speech.

B. S.J. RES. 19 PRESERVES THE PRINCIPLES OF VIEWPOINT AND CONTENT NEUTRALITY AS WELL AS OTHER CONSTITUTIONAL PROTECTIONS

The Minority misconstrues the proposed constitutional amendment. They claim that it would allow Congress to make it a crime "for the Sierra Club to run an ad urging the public to defeat a congressman who favors logging in the national forests" among other outlandish hypotheticals.

The Minority ignores that the power to regulate campaign finance has been exercised for more than a century since the passage of the Tillman Act in 1907. Despite that history, somehow we are to believe that the proposed constitutional amendment would be a license for the government to practice viewpoint and content discrimination. This is simply false. The ban on Federal corporate spending struck down in *Citizens United* applied to spending for Democrats, Republicans, Independents and everyone else, and it applied to all corporations, whether conservative, liberal, or anything else, except for one kind of corporation: not-for-profit corporations organized for the explicit purpose of being involved in electoral politics.[118] Similarly, the now-imperiled Tillman Act's ban on corporate contributions to candidates has applied for more than a century to all candidates of all political stripes and to all corporations of all ideological hues.

Any attempted use of the campaign finance regulatory power to discriminate against this or that political group, party, or position would conflict directly with the First Amendment's prohibition against viewpoint and content discrimination and would be deemed immediately "unreasonable." It is a cardinal First Amendment principle that the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[119] The fact that the 28th Amendment will come after the First Amendment does not change this reality in any way. After all, the Fourteenth Amendment came after the First Amendment too, but in *R.A.V.* v. *City of St. Paul*,[120] the Supreme Court struck down a hate crimes ordinance that had made it a crime to use racist fighting words but not, for example, anti-racist fighting words.

[118] *See FEC* v. *Massachusetts Citizens for Life*, 479 U.S. 238 (1986).
[119] *Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972).
[120] 505 U.S. 377 (1992).

In a unanimous 9–0 decision, the Court found that this was content-based discrimination and that the Equal Protection command in the Fourteenth Amendment does not overcome the First Amendment command of content neutrality in speech regulation. As Justice Scalia wrote, government has no authority "to license one side of a debate to fight freestyle, while requiring the other to follow the Marquis of Queensbury Rules."[121] The principle that a new constitutional amendment "must be construed in connection with the . . . clauses of the original Constitution and the effect attributed to them before the amendment was adopted"[122] is not a controversial proposition, and the Minority's rhetoric that this proposed amendment—if adopted—would somehow wipe out all prior constitutional protections under the First Amendment is belied by Supreme Court precedent and longstanding principles of constitutional interpretation. The proposed amendment no more suspends operation of Fourteenth Amendment equal protection principles than it does operation of First Amendment free speech principles. New amendments are not read outside of their legislative history to repeal existing constitutional guarantees but instead are read to complement them.

The Minority further claims that the proposed amendment is itself "content-based" because it would allow Congress and the States to pass laws that regulate spending to "influence elections." First, as explained in the previous section, money is not speech, and thus, allowing Congress and the States to set reasonable limits on campaign contributions and expenditures in the electoral context is not speech regulation. Furthermore, even assuming that campaign finance regulations create changes in the speech market, as arguably the Tillman Act has done since 1907 by keeping corporate money out of candidate campaigns, the proposed amendment is still not content-based. Rather, it allows for reasonable—that is, viewpoint-neutral, content-neutral and proportionate—regulations in the electoral arena. As explained above, the rules have to apply to all parties and candidates equally and they may not target speech about a particular subject like reproductive freedom or immigration.

Simply because the amendment provides for reasonable regulation of spending in the electoral domain does not, of course, make it content-based. After all, there are specific rule regimes that apply to the speech that takes place in many different social domains and contexts: speech relating to corporate securities and insider trading, student speech that takes place in public schools, public employee speech that takes place in the government sector, broadcast speech on the airwaves, speech by Members of Congress and by citizens that takes place in the halls and formal meeting places of Congress, and so on. Far from invalidating distinct rule regimes for speech in different social domains, the Supreme Court has upheld them and helped to articulate and define them. The Mi-

[121] *Id.* at 392.

[122] *Eisner* v. *Macomber*, 252 U.S. 189, 205 (1920) (discussing interpretation of the Sixteenth Amendment); *see Newberry* v. *United States*, 256 U.S. 232, 249–50 (1921) ("Undoubtedly elections within the original intendment of section 4 were those wherein Senators should be chosen by Legislatures and Representatives by voters possessing 'the qualifications requisite for electors of the most numerous branch of the state Legislature.' Article 1, §§ 2 and 3. The Seventeenth Amendment, which directs that Senators be chosen by the people, neither announced nor requires a new meaning of election and the word now has the same general significance as it did when the Constitution came into existence. . . .").

nority is simply confusing *content*-based regulation with *context*-based regulation.

C. S.J. RES. 19 ADVANCES DEMOCRATIC SELF-GOVERNMENT AND IS NOT THE FIRST CONSTITUTIONAL AMENDMENT TO UPSET POWERFUL INTERESTS UNDER THE CONSTITUTION

The Minority states: "In its history, no provision of its Bill of Rights has ever been amended. We consider S.J. Res. 19 to be a dagger at the heart of the Bill of Rights. . . ." [123]

This claim is plainly false. As Professor Raskin testified in his answer to Senator Durbin on this point, "the people have been forced to amend the Constitution multiple times to reverse reactionary decisions of the Supreme Court that freeze into place the constitutional property rights and political privileges of the powerful against the powerless." [124] For example, the Thirteenth and Fourteenth Amendments clearly "upset numerous settled expectations and vested rights of white supremacy in the Constitution." [125] The Thirteenth Amendment abolished slavery, stripping the absolute individual property rights that white slave masters had enjoyed under the Fifth Amendment as found by the Supreme Court in the Dred Scott decision in 1857. Similarly, Section 4 of the Fourteenth Amendment completely blocked and made illegal any future compensation of slave masters for the confiscation of their vested property rights in their slaves. It reads: "But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, *or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.*" [126] Thus, not only did the Constitution strip slave masters of their property, it also made it impossible for them to seek restitution under the Fifth Amendment.

Other amendments have affected settled rights and interests. For example, the Seventeenth Amendment shifted the mode of election of United States Senators from State legislatures to the people, stripping individual legislators of their rights and powers to control the choice of Senators. This was a deeply controversial change pushed by progressives and populists opposing corporate domination of the United States Senate through blatant financial manipulation of State legislatures. It removed the right of State legislators to select the U.S. Senators representing their state. The Seventeenth Amendment remains controversial even today, with certain Senators, including some of those in the Minority, calling for its repeal.

The Nineteenth Amendment, ratified in 1920, gave women the right to vote over strenuous objections that this would dilute and violate the rights of men to govern. The Supreme Court in 1874 had rejected a constitutional challenge to the disenfranchisement of women, upholding the regime of male supremacy.[127] Indeed, in

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[123] *See supra* section IX.

[124] Professor Jamie Raskin's Responses to Senator Richard J. Durbin, Follow Up Questions for the Record, *Examining a Constitutional Amendment to Restore Democracy to the American People,* Hearing before the U.S. Senate Committee on the Judiciary, June 25, 2014, at 6.

[125] *Id.* at 4.

[126] U.S. Const. amend. XIV, § 4 (emphasis added).

[127] *See Minor* v. *Happersett*, 88 U.S. 162 (1874).

Bradwell v. *Illinois*, the Court had stated that "[t]he paramount destiny and mission of woman are to fulfil[l] the noble and benign offices of wife and mother. This is the law of the Creator." [128] As Professor Raskin noted, "It took decades of agitation and civil disobedience by Suffragettes to get the 19th Amendment enacted, and its opponents interpreted its adoption as a dramatic limitation on their exclusive rights to govern and rule in a patriarchal system, which surely it was." [129] The Nineteenth Amendment therefore stripped male citizens from having the sole right to choose their elected representatives to the categorical exclusion of women.

The Minority suggests that the progress of democracy and freedom under our Constitution have been seamless and downplays that no one has been aggrieved by the addition of new rights for the people as a whole. This is false. Nearly every expansion of the rights of the people has encountered ferocious opposition by those invested in the status quo and has, in a sense, taken away or removed a right or settled expectation from some group of individuals.

The Minority also alleges that this proposed amendment is "elitist" and is effectively an incumbent protectionist measure. This statement is simply unsupported by any facts. The proliferation of State campaign finance laws throughout the past half-century shows that they can, and do, foster competitive elections. In 1959, forty-three states had some form of disclosure requirement for parties, committees, or candidates, while thirty-one had expenditure limits and only four had individual contribution limits.[130] State contribution limits have particularly grown more prevalent over the decades; as of 2013, forty-six states had limits on individual contributions.[131] These laws have had a positive impact on the competitiveness of elections. One 2006 study showed that State contribution limits, analyzed from 1980 to 2001, "narrow[ed] the margin[s] of victory of the winning candidate[s]," "[led] to closer elections for future incumbents," and "increase[d] the number of candidates in the race[s]." [132] A comparative study of the 2010 election cycle showed that Texas (operating under lax contribution limits) was much less competitive than Colorado (operating under tight contribution limits).[133]

In sum, rather than restrict or ban speech as the Minority's extreme rhetoric would have one believe, the proposed amendment would enhance speech and provide for greater democratic participation from the American people.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

The Committee sets forth, with respect to the joint resolution, S.J. Res. 19, the following estimate and comparison prepared by

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[128] 83 U.S. 130, 141 (1872).

[129] *Supra* note 124 at 5.

[130] Frank J. Sorauf, Money in American Elections 50 (1988).

[131] Nat'l Conference of State Legislatures, *State Limits on Contributions to Candidates* (updated Oct. 2013) (accessed July 21, 2014), *available at* http://www.ncsl.org/Portals/1/documents/legismgt/Limits_to_Candidates_2012-2014.pdf.

[132] Thomas Stratmann & Francisco J. Aparicio Castillo, *Competition policy for elections: Do campaign contribution limits matter?*, 127 Pub. Choice 177, 191, 199 (2006); *see also* Donald A. Gross & Robert K. Goidel, *The Impact of State Campaign Finance Laws*, 1 St. Pol. & Pol'y Q. 180, 190 (2001) (finding that public financing in combination with spending limits is a viable means of increasing electoral competition as well as voter turnout).

[133] Edwin Bender, E*videncing a Republican Form of Government: The Influence of Campaign Money on State-Level Elections*, 74 Mont. L. Rev. 165, 173–74 (2013).

the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

JULY 18, 2014.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S.J. Res. 19, a joint resolution proposing an amendment to the Constitution of the United States relating to contributions and expenditures intended to affect elections.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

S.J. Res. 19—A joint resolution proposing an amendment to the Constitution of the United States relating to contributions and expenditures intended to affect elections.

S.J. Res. 19 would propose an amendment to the Constitution to allow the Congress and individual states to enact legislation that regulates the raising and spending of money in federal and state elections. By itself, this legislation would have no effect on the federal budget. If the proposed amendment to the Constitution were approved by the states, then any future legislation regulating the financing of elections could impose additional costs on executive branch agencies, including the Federal Election Commission, and on the judicial branch; however, any such costs would be attributed to subsequent legislation. Enacting S.J. Res. 19 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

S.J. Res. 19 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments. In order for the amendment to become part of the Constitution, three-fourths of the state legislatures would have to ratify the resolution within seven years of its submission to the states by the Congress. However, no state would be required to take action on the resolution, either to reject it or approve it.

The CBO staff contacts for this estimate are Matthew Pickford (for federal costs), and Michael Hirsch and Leo Lex (for the state and local impact). The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

VII. REGULATORY IMPACT STATEMENT

In compliance with rule XXVI of the Standing Rules of the Senate, the Committee finds that no significant regulatory impact will result from the enactment of S.J. Res. 19.

VIII. CONCLUSION

The proposal to amend the Constitution of the United States relating to contributions and expenditures intended to affect elections, S.J. Res. 19, would counter the Supreme Court's distorted and extreme rulings expanding the role of money in politics, and

overturn the Court's assertion that Federal restrictions on contributions and independent expenditures violate the First Amendment's guarantee of free speech. The amendment grants lawmakers at both the Federal and State levels the express constitutional authority to regulate money raised and spent on elections, and thereby rein in the influence that wealthy donors and outside groups have on election. The amendment restores the First Amendment as the Founders intended and preserves the protections that ensure all voices can be heard in the democratic process. The amendment reestablishes the power of the people in Congress and the states to protect democratic self-government, political equality, and representative integrity as the framework for free political discourse and public discussion.

MINORITY VIEWS FROM SENATORS GRASSLEY, HATCH, SESSIONS, GRAHAM, CORNYN, LEE, CRUZ AND FLAKE

Our Constitution, as Chief Justice John Marshall wrote, was "intended to endure for ages to come . . ."[1] In its history, no provision of its Bill of Rights has ever been amended. We consider S.J. Res. 19 to be a dagger at the heart of the Bill of Rights, and we oppose it to a degree commensurate with its dangers.

We start with First Principles. The Declaration of Independence states that everyone is endowed by their Creator with unalienable rights that governments are created to protect. Those preexisting rights include the right to liberty.

The Constitution was adopted to secure the blessings of liberty to Americans. Americans rejected the view that the structural limits on government power contained in the original Constitution would adequately protect the liberties they had fought a revolution to preserve. So they insisted on the adoption of a Bill of Rights.

The Bill of Rights protects individual rights regardless of whether the government or a majority approves of their use. The First Amendment in the Bill of Rights protects the freedom of speech. That freedom is basic to self-government. Other parts of the Constitution foster equality or justice or representative government. But the Bill of Rights is only about individual freedom.

Liberals who were once great champions of freedom of speech have retreated from protecting it. Their new thinking mirrors Justice Breyer, who wrote in the *McCutcheon* case that free political speech is about advancing "the public's interest in preserving a democratic order in which collective speech *matters*."[2] That is no misreading of the dissent of four Justices, as the majority report weakly argues, but a direct quotation in context. It is the core conception of the dissent's view of campaign spending. To be sure, individual rights often advance socially desirable goals. But our constitutional rights do not depend on whether unelected judges believe they advance democracy as they conceive it. Our constitutional rights are *individual*, not "collective." It is individual speech, alone or in association with others, that matters. Never in 225 years has any Supreme Court opinion described our rights as "collective." They come from God and not from the government or the public.

Free speech creates a marketplace of ideas in which citizens can learn, debate, and persuade fellow citizens on the issues of the day.

[1] *McCulloch* v. *Maryland*, 4 Wheat. 316, 415 (1819).
[2] *McCutcheon* v. *Federal Election Commission,* 134 S. Ct. 1434, 1467 (2014) (Breyer, J., dissenting).

At its core, it enables the citizenry to be educated to cast votes to elect their leaders.

Today, freedom of speech is threatened as it has not been in many decades. Too many people will not listen and debate and persuade. They want to punish, intimidate, and silence those with whom they disagree. A corporate executive who opposed same sex marriage—the same position that President Obama held at the time—is to be fired. Universities that are supposed to foster academic freedom cancel graduation speeches by speakers that some students find offensive.

S.J. Res. 19, cut from the same cloth, would amend the Constitution for the first time to diminish an important right of Americans that is contained in the Bill of Rights. In fact, it would cut back on the most important of these rights, core free speech about who should be elected to govern ourselves.

The proposed constitutional amendment would enable government to limit funds contributed to candidates and funds spent by or in support of candidates to influence elections. That would give the government the ability to limit speech. Public debate on who should be elected to govern the public would be diminished to whatever level politicians considered to be "reasonable." Incumbents would find that outcome to be acceptable. They would know that few challengers could run an effective campaign against them.

Consider the history of the last 100 years. Freedom has flourished where rights belonged to individuals that governments were bound to respect. Where rights were collective, and existed only at the whim of a government that determines when they serve socially desirable purposes, the results have been literally horrific. We should not move even one inch in the direction the liberal justices and this amendment would take us.

What precedent would this amendment create? Suppose Congress limited the amount of money people could spend on guns? Or limited how much people could spend of their own money on health care?

What is striking about the majority report is its nearly exclusive spinning of a creative narrative of historical and contemporary campaign spending with barely any discussion of the language of the constitutional amendment and its effects.

Under this amendment, Congress could do what the *Citizens United* decision rightfully said it could not: make it a criminal offense for the Sierra Club to run an ad urging the public to defeat a congressman who favors logging in the national forests; for the National Rifle Association to publish a book seeking public support for a challenger to a senator who favors a handgun ban; or for the ACLU to post on its website a plea for voters to support a presidential candidate because of his stance on free speech.[3] It could prefer some speakers over others and ban some classes of speakers from the public debate. It could jail citizens or associations of citizens for speaking at all or in excess of limits Congress set. It could ban books or movies produced by corporations that are designed to influence elections. This is unquestionably the case because it was the government's legal action against a corporate-produced film

[3] *Citizens United* v. *Federal Election Commission*, 558 U.S. 310 (2010).

that was at issue in *Citizens United*. And it was the Obama Justice Department's position in the original oral argument before the Supreme Court in that case that the First Amendment was no obstacle to criminalizing a corporate-published book concerning a candidate. These should be frightening prospects for us all.

S.J. Res. 19 would amend the Constitution to allow Congress and the states to limit campaign contributions and expenditures, some reasonably and some in total, without complying with existing constitutional provisions or doctrine. Congress could pass a law limiting expenditures by Democrats but not by Republicans, by opponents of Obamacare but not by supporters. That fear is enhanced by the majority's criticism of Chevron's independent expenditures, but not those of unions in the same city elections; of the Koch Brothers and Art Pope but not those of liberal environmentalist billionaires on behalf of Democrats.

The majority wrongly contends that the amendment would apply only "content neutral [] campaign finance regulations." The clear text is to the contrary. It allows the restriction, and in some instances banning, of speech that is "to influence elections." Its application is explicitly and exclusively content-based, not content neutral. The amendment would apply only to speech containing statements that sought to influence elections. It would be inapplicable to any other kind of expression. And the discussion of a majority senator at the hearing emphasizes the point. Senator Schumer expressly analogized speech to influence elections, at least by certain speakers, to the kinds of expression that the Supreme Court has held do not enjoy any First Amendment protection due precisely to their content, such as child pornography and the false cry of "fire" in a crowded theater, while one of the majority witnesses compared bans and restrictions on the political speech contained in the amendment to prohibitions on buying sex, another category of speech that can be prohibited by virtue of its content notwithstanding the First Amendment.

And what does the amendment mean when it says that Congress can limit funds spent "to influence elections"? If an elected official says he or she plans to run again, long before any election, Congress under this amendment could criminalize any criticism of that official as spending "to influence elections." A senator on the Senate floor, appearing on C–SPAN free of charge, could with immunity defame a private citizen. The member could say that the citizen was buying elections. If the citizen spent any money to rebut the charge, he could go to jail. We would be back to the days when criticism of elected officials was a criminal offense, as during the Alien and Sedition Acts. And yet its supporters say this amendment is necessary for democracy.

The majority is also incorrect when it argues that the amendment "restores the First Amendment right of ordinary citizens to have their voices heard during the election process." Obtaining support for candidates and their ideas takes money. Under modern communications, it often takes a great deal of money, much more than an ordinary citizen can afford. Only if those citizens can join together with others in some sort of association that is not a natural person will they be able to meaningfully make their voices heard. This amendment would make that far more difficult. Silenc-

ing some voices will not enable ordinary citizens to effectively combine to make their own voices heard.

Section 2 of the amendment's text provides that "Congress and the States shall have power to implement and enforce this article by appropriate legislation . . ." Yet, the majority report states that Section 2 "empowers Congress and the states to enact campaign finance laws, including public financing programs, and adopting implementing *regulations* as appropriate" (emphasis added). The hollowness of the majority's declared commitment to democracy is self-evident. The majority seeks to give unelected bureaucrats, answerable to no one, the ability to ban and restrict core political speech that would no longer enjoy First Amendment protection. The majority would undermine the most fundamental truth of our Constitution: "If there is any fixed star in our constitutional constellation, it is that no official, *high* or *petty*, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . ."[4] S.J. Res. 19 would empower both sorts of officials to do so.

The only existing right that the amendment says it will not harm is freedom of the press. So Congress and the states could limit the speech of anyone except the corporations that control the media. That would produce an Orwellian world in which every speaker is equal but some speakers are more equal than others. Freedom of the press has never been understood to give the media special constitutional rights denied to others.

The stakes could not be higher for all Americans who value their rights and freedom. Speech concerning who the people's elected representatives should be; speech setting the agenda for public discourse; speech designed to open and change the minds of our fellow citizens; speech criticizing politicians; and speech challenging government policy are all vital rights. This amendment puts all of them in jeopardy upon penalty of imprisonment.

It would make America no longer America.

We totally reject the arguments that proponents have raised in support of the amendment.

This amendment will not advance self-government or protect the political process from corruption. Just the opposite. It would harm the rights of ordinary citizens, individually and in free association, to advance their political views and to elect candidates who support their views. And by limiting campaign speech, it would limit the information that voters receive in deciding how to vote. It would limit the amount that people can spend on advancing what they consider to be the best political ideas.

Individuals facing "reasonable" limits on their political activity would risk criminal prosecution in deciding whether to speak, hoping that a court would later find that the limit he or she exceeded was "unreasonable." That would create not a chilling effect on speech, but a freezing effect. This does not further democratic self-government. Instead of the government being the servant to the people, the people would be the servant to the government.

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[4] *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 642 (1943) (emphasis added).

The amendment would apply to some campaign speech that cannot give rise to corruption. For instance, under current law, an individual could spend any amount of his or her own money to run for office. An individual could not corrupt himself by his own money and could not be bought by others if he or she did not rely on outside money. Senator Herb Kohl, a former member of this Committee, made that argument to his constituents. Were this amendment part of the Constitution, a future Senator Kohl would be limited in what he could contribute to his campaign and how much he could spend.

In practice, individuals seeking to elect candidates in the democratic process must exercise their First Amendment freedom of association to work together with others. This amendment could prohibit that altogether. It would permit Congress and the states to prohibit "corporations and artificial entities . . . from spending money to influence elections." That means unions. That means nonprofit corporations like the NAACP Legal and Educational Defense Fund, Inc., which recently testified before the Committee on a different matter. That means political parties. The amendment would allow Congress to prohibit political parties from spending money to influence elections. If they cannot spend money on elections, then they would be rendered as mere social clubs.

The prohibition on political spending by for-profit corporations also does not advance democracy. Were this amendment to take effect, a company that wanted to advertise beer or deodorant would be given more constitutional protection than a corporation of any kind that wanted to influence an election.

The philosophy of the amendment is elitist. It says the ordinary citizen cannot be trusted to listen to political arguments and evaluate which ones are persuasive. Instead, incumbent politicians interested in securing their own reelections are trusted to be high-minded. Surely, they would not use this new power to develop rules that could silence not only their actual opposing candidates, but associations of ordinary citizens who have the nerve to want to vote them out of office. As leading First Amendment luminary Floyd Abrams wrote, "[P]ermitting unlimited expenditures from virtually all parties leads to more speech from more candidates for longer time periods, and ultimately to more competitive elections." Incumbents are unlikely to use this new power to welcome that competition.[5]

Yet the amendment also presumes that these same politicians are unprincipled and cowardly. They supposedly will not defend their principles if anyone can run ads against them. They supposedly lack the capacity to state their views in a way that will enable others to adequately support their candidacy in the light of opposition. Actual limits on free speech are supposedly justified on potential threats that no politician will be able to expose or withstand or use to rally the voters.

The argument that democracy is advanced when some voices should not exercise undue influence because they might "drown out" others also runs counter to free speech. And it is also elitist. It assumes that voters will be manipulated into voting against

[5] *Hearing on Examining a Constitutional Amendment to Restore Democracy to the American People Before the S. Comm. on the Judiciary*, 113th Cong (2014) (statement of Floyd Abrams).

their interests because large sums will produce so much speech as to drown out others and blind them to the voters' true interests. Tell that to the voters in Virginia's Seventh Congressional District. The incumbent Congressman outspent his opponent 26–1. Newspaper reports state that large sums were spent on independent expenditures on the incumbent's behalf, many by corporations. No independent expenditures were made for his opponent. His opponent won. That's some drowning out. That's some undue influence.

The winner of that primary spent just over $200,000 to win 55% of the vote. Since under the amendment, a limit that allowed a challenger to win would presumably be "reasonable," Congress or the states could limit spending on House primaries to as little as $200,000, all by the candidate, with no obviously unnecessary outside spending allowed.

Whatever the Framers of the Constitution meant by "corruption," and whether their concerns were addressed in the structural safeguards the Constitution contains, those same Framers did not believe that the original Constitution needed any explicit protection of freedom of speech. The adoption of the Bill of Rights was necessary because despite their great accomplishments, those same Framers were inadequately protective of various rights such as the free speech rights that S.J. Res. 19 would vastly diminish. Nor would we wish to adopt the crabbed interpretation of free speech that prevailed in the 1910's, the era the majority believes represented a halcyon day of campaign finance proposals, when the Supreme Court upheld against First Amendment objections the convictions of individuals for peaceably distributing leaflets against the draft.

As Mr. Abrams stated in a question for the record, "The proposed amendment would undermine the very goals it purports to further. It is worth recalling that as broadly as the First Amendment has been interpreted, its text focuses on the danger that *Congress* will overreach. S.J. Res. 19 raises the very dangers that the First Amendment aims to curtail by placing those in power—incumbents—in a position to make it still more difficult for their actual or potential challengers to become known and thus more credible as their replacements."[6] Those dangers are explicit, as the majority is ready to ban "excessive money," however self-interested members of Congress make that determination.

The second set of unpersuasive arguments concerns *Citizens United*. That case has been mischaracterized as "activist." Apart from the breathtaking claims of banning books and movies that the Obama Administration contained in that case, Chief Justice Roberts' concurrence sets out the necessity for the Court's decision. Mr. Abrams stated to the Committee that the Supreme Court acted "wisely and prudently" in *Citizens United*, a case that "call[ed] for broader rather than narrower opinions precisely because of the importance of the constitutional issues raised and the need for judicial clarity in preserving constitutionally protected rights."[7] As Mr. Abrams testified, that case continues a view of free speech rights by unions and corporations that was expressed by President Tru-

[6] *Id.*
[7] *Id.*

man and by liberal Justices in the 1950s. What *Citizens United* overruled was the departure from precedent. And *Citizens United* did not give rise to unfettered campaign spending. The Supreme Court in 1976, in *Buckley* v. *Valeo*, ruled that independent expenditures could not be limited. That decision was not the work of supposed conservative judicial activists. Wealthy individuals have been able to spend unlimited amounts since then. And corporations and others have been able to make unlimited donations to 501(c)(4) corporations since then as well.

The majority report incorrectly maintains that *Citizens United* adopted the "extreme and highly questionable position[]" that "for the first time in its history[,] . . . the First Amendment equally protects corporations and humans and would not allow for any distinction between the two." The majority is free to disagree with *Citizens United*, but it will not do to attack a straw man. Both before and after *Citizens United*, individuals may make contributions to campaigns, but corporations and unions may not use general treasury funds to do so. The decision relates exclusively to expenditures, and has no relevance to contributions.

The majority treats all corporations alike, without regard to the many non-profit corporations. These entities share few of the attributes of for-profit corporations on which the majority rests its case for treating corporations differently from individuals both with respect to contributions and expenditures. Those non-profit corporations represent efforts by individual citizens to associate to advance their First Amendment free speech rights and enhance their ability to participate in the democratic process with the goal of persuading their fellow citizens. Contrary to the majority's derisive treatment of the decision, *Citizens United* did "expand[] rights and democracy."

The decision also enhanced disclosure and transparency. As Mr. Abrams wrote in questions for the record, "What *Citizens United* did do, however, is permit corporations to contribute to PACs that are required to disclose all donors *and* engage only in independent expenditures. "If anything, *Citizens United* is a pro-disclosure ruling which brought corporate money further into the light." [8]

And it is the amendment, not *Citizens United*, that "overrul[es] well-settled precedent." It does not simply overturn one case. As Mr. Abrams responded, it overturns 12 cases, some of which date back almost 40 years.[9] As the amendment has been redrafted, it

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[8] *Id.*

[9] Mr. Abrams identified as the cases containing points of law that the amendment would reverse to include (1) *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (striking down limits on spending by candidates and their committees (with the exception of Presidential candidates participating in the public funding program); striking down limits on independent expenditures by all individuals; striking down limits on candidates' spending of their own personal funds); (2) *First National Bank* v. *Bellotti*, 435 US 765 (1978) (protecting a corporation's First Amendment right to contribute to a ballot initiative campaign; finding that the value of particular speech "does not depend upon the identity of its source, whether corporation, association, union, or individual."); (3) *Citizens Against Rent Control/Coalition for Fair Housing* v. *Berkeley,* 454 US 290 (1981) (striking down ordinance placing $250 limit on contributions to groups supporting or opposing referendums); (4) *Federal Election Commission* v. *National Conservative Political Action Committee*, 470 U.S. 480 (1985) (striking down limits on independent expenditures by political committees; finding that contributions to political committees did not pose risk of corruption); (5) *Federal Election Commission* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (protecting nonprofit, nonstock corporation's right to use general treasury funds to engage in express advocacy); (6) *Colorado Republican Federal Campaign Committee* v. *Federal Election Com-*

Continued

may be 11½ now, depending on what "reasonable" means. Justice Stevens, cited in support of the amendment, voted with the majority in three of the cases the amendment would overturn. Members of the Committee may not like the long established broad protections for free speech that the Supreme Court has reaffirmed. But that does not mean there are 5 activists on the Supreme Court. The Court ruled unanimously in more cases this year than it has in 60 or 75 years, depending on whose figures you use. Its unanimity was frequently demonstrated in rejecting arguments of the Obama Administration.

This amendment abridges fundamental freedoms that are the birthright of Americans. The arguments made to support it are unconvincing. The amendment will weaken, not strengthen democracy. It will not reduce corruption, but open the door for elected officials to bend democracy's rules to benefit themselves. The fact that the Committee took up this amendment at all, and regrettably adopted it, is a great testament to the wisdom of our Founding Fathers in insisting on and adopting a Bill of Rights in the first place.

We recoil from the majority's citation of poll results on the popularity of First Amendment protected speech as a basis to scale back the protections of the Bill of Rights. As Justice Jackson famously wrote, "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." [10]

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mission, 518 U.S. 604 (1996) (striking down limits on independent expenditures made by political party committees; rejecting notion that all party expenditures should be treated as "coordinated" as a matter of law); (7) *Randall* v. *Sorrell*, 548 U.S. 230 (2006)(striking down state law limiting contributions on the grounds that such low limits interfere with a candidate's right to raise funds necessary to run a competitive election and disproportionately burden the rights of citizens and political parties to help candidates get elected); (8) *Federal Election Commission* v. *Wisconsin Right to Life, Inc.*, 551US 449 (2007)(striking down restrictions on issue ads (ads that do not engage in "express advocacy") during the 30/60 day primary/general pre-election window); (9) *Davis* v. *Federal Election Commission*, 554 U.S. 724 (2008) (striking down BCRA's "Millionaires' Amendment" on the grounds that leveling electoral opportunities for candidates of different personal wealth is not a legitimate government objective; finding that the strength of the governmental interest in campaign finance disclosure requirements must reflect the seriousness of the actual burden on First Amendment rights; (10) *Citizens United* v. *Federal Election Commission*, 558 U.S. 310 (2010)(striking down BCRA's prohibition on independent expenditures by corporations and labor unions, including electioneering communications; permitting corporate and labor union contributions to groups which engage only in independent expenditures (and do not give directly to candidates); announcing that political speech cannot be suppressed on the basis of the speaker's corporate identity; finding that independent expenditures made in support of candidates by corporations do not give rise to corruption or the appearance of corruption); (11) *Arizona Free Enterprise Club's Freedom Club PAC* v. *Bennett*, 131 S. Ct. 2806 (2011)(finding that public financing provisions cannot be drawn so as to burden the speech of privately-financed candidates and independent expenditure groups absent a compelling state interest; (12) *McCutcheon* v. *Federal Election Commission*, 134 S. Ct. 1434 (2014) (striking down aggregate limits on how much a donor may contribute to federal candidates, political parties and PACs over a two-year election cycle; "Contributing money to a candidate is an exercise of an individual's right to participate in the electoral process through both political expression and political association;" finding that "[t]he First Amendment does not protect the government, even when the government purports to act through legislation reflecting 'collective speech' ").

[10] *West Virginia State Bd. of Education* v. *Barnette*, 319 U.S. at 638.

We must preserve our Bill of Rights including our rights to free speech. We must not allow officials to curtail and ration that right. We must not let this proposal become the supreme law of the land.

CHUCK GRASSLEY.
ORIN G. HATCH.
JEFF SESSIONS.
LINDSEY GRAHAM.
JOHN CORNYN.
MICHAEL S. LEE.
TED CRUZ.
JEFF FLAKE.

X. CHANGES TO EXISTING LAW MADE BY THE JOINT RESOLUTION, AS REPORTED

Pursuant to paragraph 12 of Rule XXVI of the Standing Rules of the Senate, the Committee finds no changes in existing law made by S.J. Res. 19, as ordered reported.

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