

# LEGAL MEMORANDUM

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## Amending the First Amendment: How the Campaign Finance Amendment Will Silence Free Speech

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### Abstract

*Frustrated with the Supreme Court's consistent defense of political speech protected by the First Amendment, the Left is driving a movement to amend the Constitution to allow Congress to limit fundraising and spending on political speech. Supporters of this amendment claim that restricting the amount of money that may be spent on political speech and activity is not the same as limiting speech, but as the Supreme Court has recognized, bans on spending are indeed bans on speech. Limiting spending on political communication necessarily affects the quantity and quality of that speech. Rather than "level the playing field," this constitutional amendment would protect incumbents and violate a fundamental right of Americans.*

An effort is underway in the Senate to amend the Constitution to restrict free speech by allowing Congress to limit fundraising and spending on political speech. A constitutional amendment proposed by Senator Tom Udall (D-NM) would grant Congress the power to regulate the raising and spending of money in elections. Supporters of this amendment claim that restricting the amount of money that may be spent on political speech and activity is *not* the same as limiting speech, even though "virtually every means of communicating ideas in today's mass society requires the expenditure of money."<sup>1</sup>

Wisely, the Framers of the Constitution ensured that amending the Constitution would not be an easy task. Thus, advocates of this constitutional amendment that would severely cut back the protections of a fundamental part of the Bill of Rights will face an uphill battle.

### KEY POINTS

- An effort is underway in the Senate to amend the Constitution to allow Congress to limit fundraising and spending on political speech.
- This amendment is an attempt to circumvent Supreme Court precedent in key campaign finance cases that protect the First Amendment rights of Americans.
- Restricting the amount of money that may be spent on political speech is the same as restricting the speech itself.
- Rather than "level the playing field," this constitutional amendment would protect incumbents and violate a fundamental right of Americans.
- The process of amending the Constitution is an exceedingly difficult one, and advocates of this amendment will (as they should) face an uphill battle in attempting to restrict free speech.

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## Congress and Campaign Finance Laws

The Constitution authorizes Congress to regulate federal elections,<sup>2</sup> but any regulation must comply with the First Amendment guarantee that “Congress shall make no law...abridging the freedom of speech.” The Supreme Court of the United States has consistently determined that campaign contributions and expenditures are protected speech within the meaning of the First Amendment. Limiting the amount of money that may be spent on political communication necessarily affects the quantity and quality of that speech. As the Court has so aptly noted, expenditure limits “restrict the number of issues discussed, the depth of their exploration, and the size of the audience reached.”<sup>3</sup>

Nearly all means of communication require spending money—from the “humblest handbill or leaflet” to political advertisements run during prime time on “television, radio, and other mass media,” which are “indispensable instruments of effective political speech.”<sup>4</sup> Congress has enacted many laws over the years regulating campaign finance, such as setting caps on the amount of contributions that can be donated to candidates; requiring disclosure of funding sources for candidate, party, and political action committees; and banning direct contributions to candidates by corporations, labor unions, and foreign nationals.<sup>5</sup> These laws are intended to act as safeguards to prevent corruption. Ultimately, however, when these regulations have been challenged, the Supreme Court has upheld only those that achieve a “compelling governmental interest” by using the “least restrictive means” available.

## Supreme Court Response to Campaign Finance Laws

In 1976, in one of its seminal campaign finance decisions, the Supreme Court struck down federal limits on campaign expenditures in *Buckley v. Valeo* because such limits restrain “the quantity and diversity of political speech.”<sup>6</sup> Yet it upheld limits on individual contributions to a candidate, finding that Congress had determined that contributions above a certain amount raised the specter (or appearance) of *quid pro quo* corruption. The Court pointed out that contribution and expenditure limitations “both implicate fundamental First Amendment interests”<sup>7</sup> and that “[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.”<sup>8</sup> Indeed, the First Amendment affords the broadest protection to such political expression to guarantee an “unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”<sup>9</sup>

More recently, in 2010, the Supreme Court threw out a federal ban on independent political speech by corporations, unions, and associations in *Citizens United v. Federal Election Commission*.<sup>10</sup> In holding that this law was “a ban on speech,” the Court noted that the First Amendment “has its fullest and most urgent application to speech uttered during a campaign for political office.... [Thus], political speech must prevail against laws that would suppress it, whether by design or inadvertence.”<sup>11</sup> Free speech is “an essential mechanism of democracy” because it is “the means to hold officials accountable to the peo-

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1. *Buckley v. Valeo*, 424 U.S. 1, 19 (1976).

2. U.S. CONST. art. I, §4; art. II, §1. However, Congress cannot regulate the qualifications of voters for federal elections; that power is specifically given to the states. U.S. CONST. art. I, §2; amend. XVII.

3. *Buckley*, 424 U.S. at 19.

4. *Id.*

5. See The FEC and the Federal Campaign Finance Law, <http://www.fec.gov/pages/brochures/fecfeca.shtml> (an overview of campaign finance regulations).

6. *Buckley*, 424 U.S. at 20.

7. *Id.* at 23.

8. *Id.* at 14.

9. *Id.* (internal citations omitted).

10. *Citizens United v. Federal Election Com'n*, 558 U.S. 310 (2010).

11. *Id.* at 339–40 (internal citation omitted).

ple.”<sup>12</sup> Therefore, “it is our law and our tradition that *more* speech, not less, is the governing rule.”<sup>13</sup>

The Left has demonized the *Citizens United* decision<sup>14</sup>—even rising to the level of President Barack Obama’s condemnation of the decision in his 2010 State of the Union Address—and is driving the current movement to amend the Constitution.

The Supreme Court again drew the ire of many on the Left when it struck down a federal law limiting the total amount a donor can contribute to all candidates and committees (“aggregate limits”) in *McCutcheon v. FEC*.<sup>15</sup> The maximum individual donation to a federal candidate (currently \$2,600 per election) was not at issue in the case; rather, the Court addressed the constitutionality of the aggregate limit on the total amount one person may contribute to all candidates in the two-year federal election cycle (currently set at \$48,600). The Court recognized that an individual’s choosing to contribute money to a candidate constitutes an exercise of that individual’s right to participate in the electoral process through both political expression and political association. Restricting the number of candidates and committees that an individual may help through his contributions therefore limits that individual’s First Amendment rights.

In striking down the aggregate limits, the Supreme Court noted that “the government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse.”<sup>16</sup> The Court held that to require one person to contribute at lower levels because he wants to support more candidates or causes is to penalize him for robustly exercising his First Amendment rights. Further, the Court con-

cluded that the government’s claim that eliminating aggregate limits would lead to the circumvention of other limits was “far too speculative” and that the scenarios offered by the government were either implausible or already illegal under current campaign finance laws.<sup>17</sup>

### **An Effort to Amend the First Amendment**

In light of the Supreme Court’s increasing skepticism about whether campaign finance restrictions comport with the First Amendment, prominent figures from the so-called campaign finance reform movement have argued for a constitutional amendment to overturn *Citizens United* and allow Congress to further regulate money in elections. In an August 2012 interview, President Obama—who, despite his expressed support for campaign finance reform, was the first presidential candidate to forgo public funding for the general election in 2008 in order to continue private fundraising—stated, “[W]e need to seriously consider mobilizing a constitutional amendment process to overturn *Citizens United*...and shine a spotlight on the super-PAC phenomenon.”<sup>18</sup>

Likewise, Senate Majority Leader Harry Reid (D-NV) recently advised that the Senate should pass this amendment because “the flood of special interest money...is one of the greatest threats our system of government has ever faced.”<sup>19</sup> Senator Charles Schumer (D-NY) argued, “It’s time for Congress to act—to reassert its role and protect the right of all Americans...without the risk of [laws] being eviscerated by a conservative Supreme Court.”<sup>20</sup> Senator Schumer made it very clear in 2010 when he introduced the unsuccessful DISCLOSE Act, which was

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12. *Id.*

13. *Id.* at 361 (emphasis added).

14. Michael McGough, *A Mythical Citizens United Is the Liberals’ Obamacare*, L.A. TIMES (Oct. 14, 2013), <http://articles.latimes.com/2013/oct/14/news/la-ol-citizens-united-obamacare-20131014>.

15. *McCutcheon v. Federal Election Com’n*, 134 S.Ct. 1434 (2014).

16. *Id.* at 1448.

17. *Id.* at 1452.

18. Byron Tau, *Obama Calls for Constitutional Amendment to Overturn Citizens United*, POLITICO (Aug. 29, 2012), <http://www.politico.com/politico44/2012/08/obama-calls-for-constitutional-amendment-to-overturn-133724.html>.

19. Greg Sargent, *Morning Plum: Reid Calls for Constitutional Amendment on Campaign Cash*, WASH. POST (May 15, 2014), <http://www.washingtonpost.com/blogs/plum-line/wp/2014/05/15/morning-plum-harry-reid-calls-for-constitutional-amendment-on-campaign-cash/>.

20. *Rewriting the First Amendment*, WALL ST. J. (May 6, 2014), <http://online.wsj.com/news/articles/SB1000142405270230375490457753072229309932>.

intended to overturn the *Citizens United* decision, that his intent was in fact to deter political speech and involvement in the political process by disfavored actors: “The deterrent effect should not be underestimated.”<sup>21</sup>

Senator Udall introduced a joint resolution to amend the Constitution and grant Congress and the states the power to “regulate the raising and spending of money and in-kind equivalents” including limits on:

- (1) the amount of contributions to candidates for nomination for election to, or for election to, Federal [and State] office; and
- (2) the amount of funds that may be spent by, in support of, or in opposition to such candidates.<sup>22</sup>

Thus, this amendment would give Congress the power not only to limit contributions to candidates, but also to limit the amount that the candidates could spend on an election campaign. Further, it would give Congress the authority to limit the amount that any individual, association, union, or corporation (both for-profit and nonprofit) could spend independently in support of or in opposition to a particular candidate.

The Supreme Court ruled in *Buckley* that such a \$1,000 limit on independent expenditures that Congress tried to impose was unconstitutional because it would prohibit individuals and all other groups (with certain exceptions including the owners of “institutional press facilities”) “from fully voicing their views relative to a clearly identified candidate.”<sup>23</sup> Such a limit heavily burdened “core First Amendment expression,” which includes the right to “speak one’s mind” and engage in “vigorous advocacy.”<sup>24</sup>

In a Senate hearing on the influence of so-called dark money in elections, retired Justice John Paul

Stevens testified that campaign finance laws “should create a level playing field.”<sup>25</sup> He also claimed that “while money is used to finance speech, money is not speech.” But allowing Congress the power to limit spending by candidates on political campaigns or by anyone else in support of or opposition to candidates would protect incumbents and make challenging and defeating a sitting Member of Congress even more difficult than it already is.

Supporters of this amendment claim that restricting the amount of money that may be spent on political speech and activity is *not* the same as limiting speech, but that is the equivalent of saying that limiting the amount of newsprint a newspaper may buy does not limit the newspaper’s speech. Coincidentally, the proposed constitutional amendment has one glaring exception: It would *not* apply to the press. Thus, *The New York Times* and MSNBC could continue to spend as much money, newsprint, and airtime as they want supporting their preferred candidates (or attacking those they oppose), but individuals, associations, and non-media corporations would be strictly limited in their political speech. This is certainly no way to “level the playing field.” Instead, this would allow Members of Congress to tie the hands of candidates and ordinary Americans who are trying to unseat them.

Senator Reid promises that the Senate will take up the proposed amendment this year.<sup>26</sup>

### **An Uphill Battle: Amending the Constitution**

Article V of the Constitution provides two ways to amend the Constitution. Amendments may be proposed by two-thirds of both the House and the Senate or by a national convention that is called by Congress at the request of two-thirds (34) of the state legislatures. In either instance, proposed amendments must then be ratified by three-quarters (38) of the states. Congress may choose the manner

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21. T.W. Farnam, *The Influence Industry: Disclose Act Could Deter Involvement in Elections*, WASH. POST (May 13, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/12/AR2010051205094.html>.

22. S.J.Res. 19, 113th Cong. (June 18, 2013), <http://www.scribd.com/doc/148408191/Udall-Constitutional-Amendment-on-Campaign-Finance>.

23. *Buckley*, 424 U.S. at 40 (internal citation omitted).

24. *Id.* at 48.

25. *Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect 2014 and Beyond*, Hearing Before the S. Comm. on Rules & Admin., 113th Cong. (Apr. 30, 2014) (statement of Justice Stevens), [http://www.rules.senate.gov/public/?a=Files.Serve&File\\_id=a6a66f45-3893-41c3-bb83-912c131e039b](http://www.rules.senate.gov/public/?a=Files.Serve&File_id=a6a66f45-3893-41c3-bb83-912c131e039b).

26. Sargent, *supra* note 19.

in which the states will ratify a proposed amendment: either by state legislatures or state ratifying conventions.

Since the First Congress, more than 11,500 amendments have been proposed, 33 have been submitted to the states for ratification, and 27 have actually been ratified.<sup>27</sup> Thus, passing a constitutional amendment is an exceedingly difficult task—intentionally so. While the Framers recognized that future generations might wish to alter the Constitution, the amendment process helps to ensure that it does not become “an assemblage of legislative enactments.”<sup>28</sup> The difficulty of this process guards the Constitution against the fleeting passions of the people and “extreme facility which would render [it] too mutable.”<sup>29</sup>

## Conclusion

The current effort to amend the Constitution to allow Congress to limit fundraising and spending on political speech is an unprecedented attempt to curtail the First Amendment that would, if ultimately ratified and implemented, restrict core free speech protections for all Americans—something that Senator Mitch McConnell (R-KY) has labeled as “scandalous.”<sup>30</sup>

Supporters of this amendment claim that restricting the amount of money that may be spent on politi-

cal speech and activity is *not* the same as limiting speech, but as the Supreme Court has recognized, bans on spending are indeed bans on speech. No one with any experience in public advocacy or the practical problems of running for office or managing a campaign could possibly claim that one can engage in political speech or political activity effectively without the funding required to support such efforts and distribute such communications.

Rather than “level the playing field,” this constitutional amendment would protect incumbents and violate a fundamental right of Americans. As Senator McConnell has said, why are the advocates of this amendment “so afraid of a free and open exchange of ideas?”<sup>31</sup> Thanks to the sound judgment of the Founders, they will (and should) face an uphill battle in attempting to restrict free speech.

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27. Measures Proposed to Amend the Constitution, [http://www.senate.gov/pagelayout/reference/three\\_column\\_table/measures\\_proposed\\_to\\_amend\\_constitution.htm](http://www.senate.gov/pagelayout/reference/three_column_table/measures_proposed_to_amend_constitution.htm); Proposed Amendments Not Ratified by the States, <http://www.gpo.gov/fdsys/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-8.pdf>. The 27 successful amendments were all proposed by Congress.

28. MATTHEW SPALDING & TRENT ENGLAND, *Article V Amendments* in HERITAGE GUIDE TO THE CONSTITUTION 285 (2005).

29. THE FEDERALIST NO. 43 (Madison).

30. Noah Rothman, *McConnell Unloads on Democrats' "Scandalous" Plan to Change Bill of Rights*, MEDIAITE (May 15, 2014), <http://www.mediaite.com/tv/mcconnell-unloads-on-democrats-scandalous-plan-to-change-bill-of-rights/>.

31. *Id.*

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