

REVIEW OF CONSTITUTIONAL AMENDMENTS PROPOSED IN RESPONSE TO CITIZENS' UNITED



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Prepared by the LWVUS Campaign Finance Task Force

The following discussion is about federal Court decisions interpreting laws and the Constitution regulating free speech, money, corporations, politics, and elections. Proposals to amend the Constitution arise out of fears that the First Amendment to the Constitution is being interpreted in such a way that our freedom, indeed our democracy, can be purchased. Here's what the First Amendment says:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Background of **Citizens United v. Federal Election Commission (FEC)** [1]

Supreme Court Decision. In *Citizens United v. FEC*, the Supreme Court struck down long-standing provisions of federal campaign finance law prohibiting the use of corporate general treasury funds for independent expenditures[2]and electioneering communications[3]. The Court found that these provisions constituted a “ban on speech” and were unconstitutional under the First Amendment. The Court held that government could not restrict political speech based on the speaker being a corporation and not a natural person.

In its ruling, the Court invoked its landmark 1976 decision, *Buckley v. Valeo*, which held that the use of money, for both contributions and expenditures, is a form of speech protected by the First Amendment. In *Buckley*, the Court found that contributions to candidate campaigns could be regulated because they create a risk of *quid pro quo* corruption. However, the court found no danger of corruption in independent expenditures or in expenditures by candidate campaigns, which therefore could not be limited. The Court defines corruption narrowly to include votes-for-money *quid pro quo* or the appearance thereof but generally to exclude the other distorting effects that big money has on politics or government.

Following the Supreme Court's reasoning in *Citizens United*, the US Court of Appeals for the District of Columbia ruled in *Speechnow.org v. FEC* that since independent expenditures do not create actual or apparent *quid pro quo* corruption, individual and corporate contribution limits to PACs are impermissible if the PACs do not contribute to candidate campaigns but make only independent

expenditures.

Impact on Federal Campaign Finance Law. Prior to the *Citizens United* ruling, corporations and labor unions were prohibited from using general treasury funds to make independent expenditures and electioneering communications. In the new, post-*Citizens United* world, corporate and labor union general treasuries are permitted to fund independent expenditures and electioneering communications. Subsequent to *Speechnow.org*, they may also give unlimited amounts to PACs or other entities that make independent expenditures. Corporations and labor unions are still prohibited from making direct contributions to candidate campaigns or political parties.

Prior to *Speechnow.org*, individuals were allowed to spend unlimited amounts directly on independent expenditures, but they were bound by contribution limits to PACs. After *Speechnow.org*, individuals are also allowed to make unlimited contributions to PACs that make only independent expenditures.

Amending the Constitution. Since the Court's decision is one of constitutional (not statutory) interpretation, amending the Constitution is an option for reversing the effects of these rulings. To date, 14 resolutions have been introduced in Congress to respond to *Citizens United*. Such resolutions require approval by two-thirds of both the House and the Senate, and they require ratification by the legislatures of three-fourths of the states.

Analysis of Proposed Constitutional Amendments

The 14 proposed resolutions vary considerably. For example, some of the resolutions give Congress very broad power to regulate both contributions and expenditures by candidates, political parties, political action committees (PACs), and individuals. Some limit the application of such regulation to corporations and other business-related entities. Because *Citizens United* invalidated state as well as federal laws, most proposals give both Congress and the states some power to regulate in this area. Instead of permitting Congress to regulate, two of the proposals directly prohibit corporate and labor union expenditures.

Although *Citizens United* was the flash point for introducing these resolutions, some of them suggest remedies that go beyond merely restoring the prior status quo. Some would affect corporate rights well beyond the sphere of political campaigns. Others would affect the contributions and expenditures of entities beyond those of corporations and labor unions.

Some of the resolutions use terms such as "contributions" and "expenditures" without definition, and it is unclear how the courts will interpret them. Courts may rely on the plain meaning of such terms, but they may also refer to other material including current campaign finance law. How these terms are ultimately understood by the courts will make a critical difference in what type of campaign finance law is permitted. Those resolutions that define key terms and contain the greatest specificity are best positioned to avoid uncertainty.

Furthermore, many of these proposals raise the question of what Congress and state legislatures can or should regulate and what checks would remain on the improper or overreaching use of that legislative power.

The following discussion highlights selected issues raised by the 14 joint resolutions.

Rights of “Natural Persons.” Three resolutions propose to limit the rights protected by the Constitution to “natural persons.” One (H.J. Res. 88) would provide that such protected rights are the rights of “natural persons,” and that the terms “people, person, or citizen” as they are used in the Constitution do not include corporations, limited liability companies, or “other corporate entities.” This means that both for-profit and non-profit corporations could be excluded. Two other resolutions (H.J. Res 90 and S.J. Res. 33) are similar but their effect on non-profits is unclear.

Specifying that rights protected by the Constitution are only those of natural persons, and not of corporations, might not have the effect amendment sponsors intend. According to the Supreme Court, “the First Amendment does not allow political speech restrictions based on a speaker’s corporate identity.” In other words, it is the speech that will be protected, regardless of the identity of the speaker.

In addition, excluding corporations and other entities from all the rights protected by the Constitution might create unintended consequences for property rights under the Fifth and Fourteenth Amendments, Fourth Amendment rights against unreasonable search and seizure, and Fifth Amendment protection against double jeopardy.

“Political Speech” of Corporations in Elections. Two resolutions contain provisions that exclude application of the First Amendment to the political contributions and expenditures of corporations and other business entities. This could reverse elements of *Buckley* and permit limits on independent expenditures made directly with corporate general treasury funds. It might also strengthen the argument that it is permissible to prohibit the use of such funds for contributions to PACs.

The proposed new language does not restrict regulation to the brief periods before a primary or a general election. However, there are ambiguities in the language of the resolutions. Precisely what is covered by the terms “contributions,” “expenditures,” and “disbursements . . . in connection with public elections” would be open to interpretation by the courts.

Regulate Expenditures or Disbursements by Corporations. Two resolutions permit regulation of expenditures and disbursements by corporations. Determining what type of corporate activity would be affected by these resolutions depends on interpretation of the language. Under a legalistic interpretation, one of these resolutions (H.J. Res. 82) could permit regulation only of coordinated expenditures, as well as independent expenditures. Under a plain meaning interpretation, the language may be broad enough to allow for the regulation of all contributions, not just coordinated expenditures, and it might permit regulation of both independent expenditures and electioneering communications, as well.

The other resolution (H. J. Res. 92) allows regulation of “the disbursement of funds for political activity.” This broad terminology might permit the regulation of funds spent not only for independent expenditures, but also for electioneering communications and contributions. The term “political activity” is very broad and might allow for regulation of activity not usually associated with elections

or campaign finance, such as true issue ads. This proposal specifies the types of entities that could be regulated, specifically, “for-profit corporations, other for-profit business entities, or other business organizations,” thereby exempting those non-profit corporations that are not business organizations.

Both of these resolutions also might permit regulation beyond the scope of the law prior to *Citizens United*, including restrictions on spending at all times, not just during the periods immediately prior to an election.

Ban Corporate Contributions and Expenditures. In contrast to resolutions that provide Congress and the states with the *power* to regulate, two proposals directly ban corporations and other business-related entities from making “contributions” or “expenditures” in any candidate election or ballot measure. While the terms “contributions” and “expenditures” are subject to interpretation by the courts, these provisions leave little room for Congressional regulation.

Regulate Expenditures and Contributions. Going beyond *Citizens United*, nine of the resolutions contain provisions that authorize Congress and the states to regulate both expenditures and contributions. Of these, only two (H. J. Res. 78 and S. J. Res. 35) attempt to limit the entities that could be regulated. The other seven seem to permit restrictions on expenditures by candidates, parties, political action committees (PACs), and individuals, as well as corporations and labor unions.

With all nine of these resolutions, determining how they would work will depend largely on how a court defines “expenditure” and “contribution.”

Expenditures Not Protected Speech. One resolution contains very broad language that would exempt expenditures in almost all political contexts from First Amendment protection and thereby permit spending limits. Excluding all political expenditures from the protections of free speech, without limitation as to the source of expenditures, could mean that spending limits would apply not only to corporations, but also to candidates, political parties, political action committees (PACs) and individuals. Additionally, the expansive language of this resolution could permit legislation to restrict currently protected independent expenditures and electioneering communications, which refer only to candidates without expressly advocating for or against the candidate, and it could allow such legislation to restrict electioneering communication at any time during the election season, not just in the 30-day period before a primary or the 60-day period before a general election. The very broad language of this resolution gives unlimited regulatory power to state and federal legislatures, which could no longer be checked by the judiciary.

Freedom of the Press. Five resolutions seek to explicitly protect the free speech rights of the press while permitting regulation of other political speech. “Freedom of the press” is currently a protected right under the First Amendment separately from “freedom of speech” – “Congress shall make no law . . . abridging the freedom of speech, or of the press.” Until now, courts have not treated them separately.

However, with the proposals to restrict corporate “speech,” the exemption for “freedom of the press” brings challenges. One issue is how a media corporation is differentiated from other types of corporations, particularly with the proliferation of the Internet, Twitter, and other modern media and

the decline of print and broadcast media. Another press exemption conundrum is how to carve out the press exemption for a “media” corporation that is part of a conglomerate owning other unrelated businesses, using its media outlet to promote its agenda, when other corporations do not have the same opportunity to speak.

Conclusion. These proposals illustrate the complexity of this issue, the risk of unintended consequences, and the difficulty of crafting precise language in the form of a constitutional amendment.

[1] As of 3/12/2012. Source: Congressional Research Service Memo.

[2] Independent expenditures are communications that expressly advocate the election or defeat of a clearly identified candidate and are not coordinated with any candidate or party.

[3] Electioneering communications are broadcast, cable or satellite transmissions that refer to a clearly identified federal candidate and made within 60 days of a general election or 30 days of a primary.

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