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A Constitutional Amendment Allowing Broader Campaign-Finance Reform Would Not Criminalize Political Satire.

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COMMENT

A CONSTITUTIONAL AMENDMENT ALLOWING BROADER CAMPAIGN-FINANCE REFORM WOULD NOT CRIMINALIZE POLITICAL SATIRE

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I. INTRODUCTION

While a majority of the American public supports limiting campaign spending,[1] campaign finance reform continues to rank near the bottom of most voters' priorities.[2] Reformers have called the lack of the public's

1. According to a June 2013 Gallup poll, nearly eighty percent of respondents voiced support for "limiting the amount of money that U.S. House and Senate candidates can raise and spend for their campaigns." Lydia Saad, *Half in U.S. Support Publicly Financed Federal Campaigns*, GALLUP (June 24, 2013), http://www.gallup.com/poll/163208/half-support-publicly-financed-federal-campaigns.aspx; *see also* Brian Montopoli, *Poll: Most Want Limits on Campaign Spending*, CBS NEWS (Jan. 18, 2012, 7:07 PM), http://www.cbsnews.com/news/poll-most-want-limits-on-campaign-spending (reporting a CBS News poll found sixty-four percent of respondents, including a majority of Republicans, Democrats, and independents, support limits on individual campaign contributions, compared to thirty-one percent of respondents who favor no caps on individual campaign contributions); Dalia Sussman, *Where Voters Stand on Campaign Finance*, N.Y. TIMES: THE CAUCUS (July 27, 2010, 4:03 PM), http://thecaucus.blogs.nytimes.com/2010/07/27/where-voters-stand-on-campaign-finance (reporting an ABC and Post poll found more than seventy percent of respondents supported congressional efforts to reinstate campaign spending limits on corporations and unions).

2. Juliet Eilperin & Scott Clement, *Why Don't Americans Care More about Campaign Finance Reform?*, WASH. POST: THE FIX (Apr. 30, 2013), http://www.washingtonpost.com/blogs/the-fix/wp/2013/04/30/why-dont-americans-care-more-about-campaign-finance-reform (noting a

relative interest "[o]ne of the persistent mysteries of campaign finance reform."[3] Campaign finance remains a perennial issue because it reaches the depths of our democracy. If one were to "[s]tudy a particular election in sufficient depth[,] . . . there will emerge universal truths about campaigns in a democracy, and about the nature of the power that shapes our lives."[4] Because contributions and expenditures define political campaigns[5] and political campaigns shape lives in a democracy, the way we interpret the role of campaign finance defines and shapes our democratic society. The Supreme Court again focused our national attention on the critical role of money in politics in *Citizens United v. FEC*.[6]

Citizens United is one of the most controversial rulings of the Roberts Court, earning criticism from the President of the United States,[7] members of the U.S. Congress,[8] Supreme Court justices,[9] and the

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January 2012 poll conducted by the Pew Research Center found the issue of campaign finance reform ranked twenty-first when pollsters asked voters to list their top priorities for the nation's government); Sussman, *supra* note 1 (reporting a September 2000 poll by ABC News and Washington Post found campaign finance ranked last in importance in influencing a respondent's decision for whom to vote).

3. Kenneth R. Mayer, *Hey, Wait a Minute: The Assumptions Behind the Case for Campaign Finance Reform*, *in* A USER'S GUIDE TO CAMPAIGN FINANCE REFORM 71, 71 (Gerald C. Lubenow ed. 2001).

4. ROBERT A. CARO, MEANS OF ASCENT, at xxxi (1990).

5. *See* Mike Huckabee, *It's Really About the Dogs*, CAMPAIGNS & ELECTIONS, Apr. 25, 2010, http://www.campaignsandelections.com/magazine/2140/it-s-really-about-the-dogs (lamenting the primacy of money in political campaigns); Ed Rendell, *On Money and Politics*, CAMPAIGNS & ELECTIONS, Apr. 25, 2010, http://www.campaignsandelections.com/magazine/2002/on-money-and-politics ("Having money does not guarantee a candidate will win the election, but not having enough money to effectively convey your message will guarantee that a candidate will not win.").

6. Citizens United v. FEC, 558 U.S. 310, 365 (2010) (holding Congress may not limit political contributions by nonprofits and for-profit corporations).

7. *See* President Barack Obama, State of the Union Address (Jan. 27, 2010), http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address ("[T]he Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections."); *see also* President Barack Obama, Weekly Address (May 1, 2010), http://www.whitehouse.gov/the-press-office/weekly-address-president-obama-calls-congress-enact-reforms-stop-a-potential-corpor ("[T]he Supreme Court issued a decision that overturned decades of law and precedent, dealing a huge blow to our efforts to rein in this undue influence.").

8. *See* S. REP. NO. 113-223, at 21 (2014) ("[T]he 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."); Nancy Pelosi & John Sarbanes, *Nancy Pelosi and John Sarbanes: Reversing the Grievous Error of Citizens United*, WASH. POST (Feb. 4, 2014), http://www.washingtonpost.com/opinions/nancy-pelosi-and-john-sarbanes-reversing-the-grievous-error-of-citizens-united/2014/02/04/0f197d0a-8dba-11e3-98ab-fe5228217bd1_story.html (labeling the *Citizens United* holding a "grievous error"); Press Release, Tom Udall, Senator for N.M., Udall Introduces Constitutional Amendment on Campaign Finance Reform (June 18, 2013), http://www.tomudall.senate.gov/?p=press_release&id=1329 (calling the case a "flawed precedent").

9. *See* JOHN PAUL STEVENS, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE

public.[10] The *Citizens United* ruling evoked such strong reactions because it represents the contrast between two competing visions of the First Amendment concept of "freedom of speech:"[11] "free speech as serving liberty" and "free speech as serving equality."[12] The contrast is at its starkest in what Justice Stevens characterized as "the claim that the only 'sufficiently important governmental interest in preventing corruption or the appearance of corruption' is one that is 'limited to *quid pro quo* corruption.'"[13] However, the legal fight over the proper role of free speech in a democratic society and its role in how American politicians finance their campaigns began in earnest in the Supreme Court's decision in *Buckley v. Valeo*.[14]

The first section of this Comment examines how the Court narrowed the scope of the government's permissible compelling interest while regulating the way candidates finance their political campaigns. *Citizens United* created a tension between legal thinkers who accept the Court's narrow framing of the government's compelling interest and those who believe the Court should recognize the government has other compelling interests that support the regulation of speech. This latter group has led a

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CONSTITUTION 80 (2014) ("[I]t is unwise to allow persons who are not qualified to vote . . . to have a potentially greater power to affect the outcome of elections than eligible voters have."); Jeffrey Rosen, *Ruth Bader Ginsburg Is an American Hero*, NEW REPUBLIC, Oct. 13, 2014, at 18, 22 (responding "*Citizens United*" to a question asking for the worst ruling the current Court has produced).

10. *See* Ashby Jones, *Legal Experts React to Supreme Court's Campaign-Finance Ruling*, WALL ST. J.: L. BLOG (Apr. 2, 2014, 12:42 PM), http://blogs.wsj.com/law/2014/04/02/legal-experts-react-to-supreme-courts-campaign-finance-ruling (reporting the reaction of legal experts).

11. U.S. CONST. amend. I.

12. *See* Stephen J. Andre, *The Transformation of Freedom of Speech: Unsnarling the Twisted Roots of* Citizens United v. FEC, 44 J. MARSHALL L. REV. 69, 69–70 (2010) (discussing the "irreconcilable differences" in the "two philosophical outlooks bearing on the treatment of speech" that are "illustrated in the *Citizens United* case). "As is so often the case in democratic systems, the conflict, distilled down to its essence, balances concerns of social equality versus claims of individual autonomy." *Id.* at 70; *see also* Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 145 (2010) ("The outcome of *Citizens United* is best explained as representing a triumph of the libertarian over the egalitarian vision of free speech.").

13. Citizens United v. FEC, 558 U.S. 310, 447 (2010) (Stevens, J., concurring in part, dissenting in part).

14. Buckley v. Valeo, 424 U.S. 1, 23 (1976) (per curiam) (upholding federal limits on campaign contributions while ruling that spending money to influence elections is a form of constitutionally protected free speech); *see* Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 631–32 (1982) ("Paradoxically, by equating political spending with political speech and according both the same constitutional protection, the Court placed the [F]irst [A]mendment squarely in opposition to the democratic ideal of political equality."); *see generally* Andre, *supra* note 12, at 70 ("The conflict posed by objectives protecting the interests of individuals versus egalitarian goals is an age-old source of concern for political philosophers contemplating the nature of justice.").

grassroots effort to amend the U.S. Constitution to effectively overturn *Buckley* and *Citizens United* and provide Congress with constitutional support for regulating campaign finance to pursue egalitarian ends.

Because a constitutional amendment is the only way for Congress to overturn the Supreme Court's decision to narrow the scope of the government's compelling interest when regulating campaign finance, the second section of this Comment makes the case for amending the Constitution. This Comment uses retired Justice John Paul Stevens's testimony before the Senate Judiciary Committee as a map for this part of the discussion.[15] Shifting the focus from a theoretical constitutional amendment to legislation actually considered by Congress, this Comment explores the litany of constitutional amendments that members of 113th Congress proposed as a reaction to *Citizens United* and *McCutcheon v. FEC*.[16]

Section III of this Comment examines the lone proposed constitutional amendment that made it to a floor vote, Senator Tom Udall's Senate Joint Resolution 19.[17] While Senate Joint Resolution 19 failed to pass a cloture vote, the reason to explore the Udall amendment is to address its chief critics and refute the strongest argument against the proposed amendment, so when Congress again discusses amending the Constitution to allow broader campaign finance reform, reformers can be ready to counter illegitimate criticism. To this end, this Comment concludes by addressing criticism from Senator Ted Cruz that the proposed constitutional amendment would have criminalized political satire, as featured on *Saturday Night Live*.[18] While Senator Cruz's accusation is important to

15. *Dollars and Sense: How Undisclosed Money and Post-*McCutcheon *Campaign Finance Will Affect 2014 and Beyond: Hearing Before the S. Rules & Admin. Comm.*, 113th Cong. 1 (2014) (statement of John Paul Stevens, retired J., U.S. Supreme Court), http://www.supremecourt.gov/publicinfo/speeches/JPSSpeech(DC)04-30-2014.pdf [hereinafter *Dollars and Sense*].

16. McCutcheon v. FEC, 134 S. Ct. 1434, 1462 (2014) (holding aggregate contribution limits are unconstitutional). The 112th and 113th Congress proposed a combined thirty-four constitutional amendments in response to *Citizens United* and *McCutcheon*. *Constitutional Amendments*, UNITED FOR THE PEOPLE, http://www.united4thepeople.org/amendments.html (last visited Oct. 8, 2015).

17. S.J. Res. 19, 113th Cong. (2013).

18. 160 CONG. REC. S5418 (daily ed. Sept. 9, 2014) (statement of Sen. Ted Cruz); *see also* Bill Carter, *Pratt to Host Premiere of* SNL*'; Cruz Raises Opposition to Show*, HOUS. CHRON. (Sept. 11, 2014), http://www.chron.com/entertainment/tv/article/Pratt-to-host-premiere-of-SNL-Cruz-raises-5748221.php ("Looking to mount a defense for corporate interests, Senator Ted Cruz, R-Texas, said the amendment might make it a 'criminal offense' for 'SNL' to engage in political satire because it is a show owned by NBC and NBC is a corporation."); Josh Feldman, *Ted Cruz: Democrats' Amendment Would Criminalize SNL*, MEDIAITE (Sept. 9, 2014, 10:48 PM), http://www.mediaite.com/tv/ted-cruz-dem-amendment-would-criminalize-snl ("Cruz cried foul and said that no matter what Democrats' intentions might be, their efforts would have the side effect of silencing a television

consider because of the number of Americans who now get their news from non-traditional, comedy-driven sources,[19] the accusation fails to survive careful analysis.

II. THE MARCH FROM *BUCKLEY* TO *CITIZENS UNITED*: TWO COMPETING VIEWS ON THE SCOPE OF THE GOVERNMENT'S COMPELLING INTEREST IN REGULATING THE WAY POLITICIANS FINANCE THEIR CAMPAIGNS

The First Amendment applies with special force to the political arena.[20] The key question in recent times has been how to reconcile Congress's efforts to regulate the money flowing into and out of political campaigns with the free speech guarantee of the First Amendment. While modern congressional efforts to regulate the way politicians finance their campaigns began with the Federal Election Campaign Act of 1971 (FECA), Congress began "prohibit[ing] corporations and national banks from contributing money to Federal campaigns" with the Tillman Act (1907).[21] In 1974, responding to the Watergate scandal, Congress "mounted a systematic campaign against electoral corruption" by amending FECA to place legal limits on campaign contributions.[22] In *Buckley*, the Court began to narrow the scope of the government's compelling interest that allows Congress to regulate campaign finance by distinguishing between contribution limits and campaign expenditures.[23]

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program.").

19. *See* Bootie Cosgrove-Mather, *Young Get News from Comedy Central*, CBS NEWS (Mar. 1, 2004, 4:11 PM), http://www.cbsnews.com/news/young-get-news-from-comedy-central ("For many under 30, the host of Comedy Central's 'The Daily Show' is, improbably, a source for news."); Gail Shister, *Young Adults Eschew Traditional Nightly News for "The Daily Show"*, PHILLY.COM (May 13, 2007), http://articles.philly.com/2007-05-13/entertainment/24994047_1_young-adults-newscast-information-source (citing Nielsen Media Research polls that show more young people watch *The Daily Show* than network evening news).

20. *See* Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971) ("[I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."); Mills v. Alabama, 384 U.S. 214, 218–19 (1966) ("[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs . . . [which] includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes."); Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.").

21. FEC, *Appendix 4: The Federal Election Campaign Laws: A Short History*, http://www.fec.gov/info/appfour.htm (last visited Oct. 8, 2015). The Tillman Act of 1907 was later invalidated by *Citizens United*. Citizens United v. FEC, 558 U.S. 310, 365 (2010). For an in-depth discussion of pre-FECA campaign finance legislation, see generally S. REP. NO. 113-223, at 9–11 (2014) and FEC, *supra*.

22. S. REP. NO. 113-223, at 11.

23. The Court found "actuality and appearance of corruption resulting from large individual

While the *Citizens United* majority implicitly accepted the only "sufficiently important governmental interest in preventing corruption or the appearance of corruption" is one that is "limited to *quid pro quo* corruption,"[24] this has not always been the Court's interpretation of its holding in *Buckley*. In 1990, the Court acknowledged "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" was a legitimate reason to sustain governmental regulation of speech.[25] Upholding its anti-distortion rationale thirteen years later, the Court declared "the danger that officeholders will decide issues . . . according to the wishes of those who have made large financial contributions" instead of "on the merits or desires of their constituencies" is "[j]ust as troubling to a functioning democracy as classic *quid pro quo* corruption."[26]

When the Court rejected the anti-distortion rationale as a proper justification to "suppress political speech on the basis of the speaker's corporate identity," and thus the rationale to support the "prohibition on the use of corporate treasury funds for express advocacy," it very narrowly construed the government's compelling interest when regulating campaign finance.[27] *Citizens United* illuminated a philosophical dichotomy. One side posits the government's compelling interest in regulating campaign finance should be limited to preventing quid pro quo corruption or the appearance thereof, while the other side interprets the government as having other interests, including the creation of a level playing field in political campaigns that should permit Congress to suppress political speech.[28]

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financial contributions" to be "constitutionally sufficient justification for" placing limits on individual campaign contributions. Buckley v. Valeo, 424 U.S. 1, 26 (1976) (per curiam). However, the Court did not find "[t]he interest in alleviating the corrupting influence of large contributions" to be "clearly . . . sufficient to justify the provision's infringement of fundamental First Amendment rights." *Id.* at 54–56. The Senate Judiciary Committee characterized *Buckley* as upholding "an infrastructure of modest campaign finance regulations[,] [b]ut 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." S. REP. NO. 113-223, at 12 (quoting *Buckley*, 424 U.S. at 27).

24. *Citizens United*, 558 U.S. at 359 (Stevens, J., concurring in part, dissenting in part).

25. Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 660 (1990).

26. McConnell v. FEC, 540 U.S. 93, 153 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010).

27. *Citizens United*, 558 U.S. at 365.

28. *See* Andre, *supra* note 12, at 69–70 (discussing the "irreconcilable differences" in the "two philosophical outlooks bearing on the treatment of speech" as "illustrated in the *Citizens United* case"). "As is so often the case in democratic systems, the conflict, distilled down to its essence, balances concerns of social equality versus claims of individual autonomy." *Id.* at 70. Describing

The "triumph of the libertarian over the egalitarian vision of free speech" set off a public debate about the role of free speech in how politicians finance their political campaigns.[29]

III. ONLY ONE WAY TO BREAK THIS TENSION: AMEND THE CONSTITUTION

If the campaign finance system is ever to effectively promote egalitarian ends, Congress must limit campaign expenditures.[30] Unfortunately, the *Buckley* Court removed Congress's authority to limit campaign expenditures by equating money with speech[31] and foreclosed on the promotion of egalitarian ends.[32] *Buckley* and *Citizens United* are "the law of the land and cannot be overturned by simple legislation."[33] Therefore, to regain its constitutional authority to limit campaign expenditures, Congress must amend the Constitution to recognize the promotion of egalitarian ends as a compelling governmental interest and grant itself the authority to pass and enforce reasonable campaign finance reform.[34]

IV. CAMPAIGN FINANCE IS NOT A PARTISAN ISSUE

When reformers say "campaign finance is a not a *partisan* issue," they speak of two separate, but related concepts.[35] The first concept is the *non-partisanship* of campaign finance reform inherent in the egalitarian view of free speech. The second concept illustrates why it may be possible for a *bipartisan* constitutional supermajority to coalesce around an amendment that would restore Congress's authority to place reasonable limits on

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how *Buckley* ended the debate over political values, Robert Much argues "[t]he equality rationale is now of merely historical interest." ROBERT E. MUTCH, BUYING THE VOTE: A HISTORY OF CAMPAIGN FINANCE REFORM 191 (2014).

29. Sullivan, *supra* note 12, at 145.

30. *See generally Dollars and Sense*, *supra* note 15, at 1–7 (addressing several reasons to justify limits on campaign expenditures). A constitutional amendment is now the only way for Congress to limit campaign contributions. *Id.* at 6; *see also* David Firestone, *John Paul Stevens Gets That 'Money Is Not Speech,'* N.Y. TIMES: TAKING NOTE (Apr. 30, 2014, 2:22 PM), http://takingnote.blogs.nytimes.com/2014/04/30/john-paul-stevens-gets-that-money-is-not-speech (acknowledging "[c]onstitutional amendments are designed to fix great national problems that the founders could not anticipate").

31. Buckley v. Valeo, 424 U.S. 1, 52–53 (1976) (per curiam).

32. *Id.* at 48–49 ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.").

33. Andrew Rosenthal et al., Editorial, *An Amendment to Cut Political Cash*, N.Y. TIMES, Sept. 10, 2014, http://www.nytimes.com/2014/09/11/opinion/an-amendment-to-cut-political-cash.html.

34. *See Dollars and Sense*, *supra* note 15, at 7 (declaring "an amendment to the constitution" is required "to correct [the] fundamental error" created by the Court's holding in *Citizens United*).

35. *Id.* at 1 (emphasis added).

corporations' ability to engage in campaign speech.

First, reformers embrace a mode of constitutional interpretation that allows the government to promote egalitarian objectives. The reformers' argument begins with the presumption "[i]t is fundamentally wrong to assume that preventing corruption is the only justification for laws limiting the First Amendment rights of candidates and their supporters."[36] Next, by analogizing political campaigns to other adversarial-based competitions, e.g. "athletic contests or adversary litigation,"[37] reformers rely on a natural sense of equity to argue "[t]he interest in creating a level playing field justifies the regulation of campaign speech that does not apply to speech about general issues that is not designed to affect the outcome of elections."[38] Under the egalitarian interpretation of free speech, "rules should give rival candidates *irrespective of their party* . . . an equal opportunity to persuade citizens to vote for them."[39] In essence, the reformers argue campaign finance reform is not a partisan issue because it would benefit all candidates.

The second way of thinking about campaign finance as "not a partisan issue" derives from the fact that throughout modern history, candidates from both major parties have sponsored and supported efforts to limit campaign speech.[40] The results of the recent cloture vote on Senate Joint Resolution 19 suggest *Citizens United* may have calcified campaign finance around the traditional liberal/conservative polarity.[41] Nevertheless,

36. *Id.* at 2.

37. *See id.* at 2–3 (analogizing procedural rules that regulate speech in contested litigation "to give adversary parties a fair and equal opportunity to persuade the decision-maker to rule in their favor" to "rules regulating political campaigns" and arguing rules on campaign speech "should have the same objective"). The fact that judges are not the decision-makers in a political campaign "does not change the imperative for equality of opportunity." *Id.* at 3.

38. *Id.* at 2.

39. *Id.* (emphasis added). This distinction between campaign speech and general issue speech is not without precedent. In *Buckley*, the Court held FECA could regulate express advocacy—which is synonymous with Justice Stevens's description of campaign speech—but could not limit expenditures on issue advocacy, which can be viewed as general issue speech. *See* Buckley v. Valeo, 424 U.S. 1, 44 (1976) (per curiam) (construing the provisions of FECA that limit expenditures to "apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office").

40. The last time the Senate made a fundamental change to the way federal candidates finance their campaigns, both the sponsorship of the legislation and the vote for it was bipartisan. *See* 148 CONG. REC. 1326 (2002) (showing the Bipartisan Campaign Reform Act of 2002 (McCain–Feingold) passed the Senate with a bipartisan vote of 60–40).

41. No Senators who caucused with the Republicans voted for cloture for Senate Joint Resolution 19. 160 CONG. REC. S5544 (daily ed. Sept. 11, 2014) (roll call vote no. 261). It is not idle speculation that this recent shift toward partisanship reflects the attitudes of party leadership. In 1988, Senator McConnell said, "We Republicans have put together a responsible and constitutional

polling data from the 2014 elections supports the proposition that politicians on both sides of the partisan divide support legislation aimed at "getting the money out of politics."[42]

V. WITHOUT CONSTANT PRESSURE TO RAISE MONEY, "ALL ELECTED OFFICIALS WOULD LEAD HAPPIER LIVES AND BE BETTER ABLE TO PERFORM THEIR PUBLIC RESPONSIBILITIES"[43]

From the moment a freshman member of Congress wins election, his or her party wants the member to focus on raising money.[44] Party leaders urge freshmen "to devote at least four hours each day to the tedious task of raising money," and leaders heavily incentivize members of Congress to meet fundraising goals.[45] While bipartisanship may be in short supply in the nation's capital, there is at least one issue upon which Republicans and Democrats agree: "dialing for dollars" is not an enjoyable experience.[46]

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campaign reform agenda. It would restrict the power of special interest PACs, stop the flow of all soft money, [and] keep wealthy individuals from buying public office." 160 CONG. REC. S5383 (daily ed. Sept. 9, 2014) (statement of Sen. Harry Reid). These quotations are misleading because Senator McConnell has sought to undermine meaningful campaign finance regulations for over three decades. *See* Paul Blumenthal, *Mitch McConnell's Triumph Strikes Worry in the Hearts of Campaign Finance Reformers*, HUFFINGTON POST (Nov. 8, 2014, 7:59 AM), http://www.huffingtonpost.com/2014/11/08/campaign-finance-mitch-mcconnell_n_6122180.html (calling Senator McConnell "the primary antagonist to campaign finance reformers"). While House Republicans have sought to limit the ability of the Federal Communications Commission and the Securities and Exchange Commission "to write rules on campaign funding and spending," with Senator McConnell's ascension into the majority in 2015, "the House GOP will have a much more powerful ally against campaign finance reform in the Senate." *Id.*

42. *Do You Care About Getting Money Out of Politics?*, ON THE ISSUES, http://www.ontheissues.org/HuffPo_CU.htm (last visited Oct. 8, 2015).

43. *Dollars and Sense*, *supra* note 15, at 3.

44. *See* Tracy Jan, *For Freshman in Congress, Focus Is on Raising Money*, BOS. GLOBE (May 12, 2013), http://www.bostonglobe.com/news/politics/2013/05/11/freshman-lawmakers-are-introduced-permanent-hunt-for-campaign-money/YQMMMoqCNxGKh2h0tOIF9H/story.html (writing the motto for freshman congressmen is "Raise Money. Raise More. Win.").

45. *Id.* Members of both parties "are compelled to sign confidential agreements with their parties' campaign committees, pledging to meet specific-fund-raising goals each quarter in exchange for a commitment of heavy financial support" during the next election. *Id.*

46. Ryan Grim & Sabrina Siddiqui, *Call Time for Congress Shows How Fundraising Dominates Bleak Work Life*, HUFFINGTON POST (Jan. 8, 2013, 7:30 AM), http://www.huffingtonpost.com/2013/01/08/call-time-congressional-fundraising_n_2427291.html (opining a bipartisan distaste for "call time"); Jan, *supra* note 44 (repeating one Congress member's comparison of call time to "the Bataan Death March"). Members of Congress describe the depressing experience of having to telephone relentlessly potential donors and how this leads to the feeling "the campaign seemingly never ends." *Id.* This last point can lead to significant problems. Fundraising requires politicians to remind potential donors of the differences between the politician and his or her opponents. Governing requires compromise and finding the common ground among adversaries. Therefore, placing members of Congress in a never-ending campaign cycle may be partially to blame for the hyper-

"[O]ur current campaign finance system has locked members of Congress into an endless campaign cycle" by forcing members to continually engage in fundraising.[47] The problem is that this unquenchable need to raise money takes away from the time a Congressman can dedicate to his official duties. Even though members of Congress may seek elective office to serve the needs of their constituents, "[c]ongressional hearings and fundraising duties often conflict, and members of Congress have little difficulty deciding between the two."[48]

Power in the House of Representatives has long derived from a Congressman's knowledge of the contents of legislation, so there is a premium to attending committee meetings.[49] However, there is little expectation a member of Congress will even attend committee hearings.[50] The public sees this change in prioritization most clearly when members of Congress skip committee hearings and other official duties to attend fundraisers.[51]

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partisanship currently gripping Washington. *See* Fritz Hollings, *Money: It's the Problem with Politics*, HUFFINGTON POST (June 21, 2010, 4:13 PM), http://www.huffingtonpost.com/sen-ernest-frederick-hollings/money-its-the-problem-wit_b_619972.html ("Money has . . . destroyed bi-partisanship.").

47. Tom Udall, *Amend the Constitution to Restore Public Trust in the Political System: A Practitioner's Perspective on Campaign Finance Reform*, 29 YALE L. & POL'Y REV. 235, 245.

48. Grim & Siddiqui, *supra* note 46; *see also* Ryan Grim & Arthur Delaney, *The Cash Committee: How Wall Street Wins on the Hill*, HUFFINGTON POST (Mar. 18, 2010 5:12 AM), http://www.huffingtonpost.com/2009/12/29/the-cash-committee-how-wa_n_402373.html (describing how the Democratic Congressional Campaign Committee's expectation that members of Congress "do as much 'call time' with potential donors as is physically possible from the moment they win election . . . doesn't leave much time for legislating"); Jan, *supra* note 44 (reporting party leaders' expect freshmen members of Congress to dedicate "at least four hours each day to . . . dialing for dollars[,]" double the amount of time the party leaders expect the members "to dedicate to committee hearings and floor votes, or meetings with constituents"). While party leaders may officially deny it, they even consider fundraising when assigning members of Congress to specific committees. Grim & Delaney, *supra.*

49. Members of Congress who attend every committee meeting and, therefore, understand the contents of related legislation are heavily relied upon. ROBERT A. CARO, THE PATH TO POWER 320 (1982) (quoting Representative Marvin Jones, "[T]here are only a few men who sit there and watch every sentence that goes into the bill and know why it went in. . . . The House soon finds out who does that on each committee.").

50. During her freshman year in Congress, Representative Jackie Speier remarked, "I don't know if it's just an unspoken rule around here . . . but it appears you don't have to show up for the hearing. You just show up to vote." Grim & Delaney, *supra* note 48.

51. The public, or at least the media, seems to pay more attention to a congressional representative's attendance during times when the committee to which the representative is a member is working on a national, hot button issue. Therefore, Representative Suzanne Kosmas's absence from a 2009 meeting of the House Financial Services Committee to attend a fundraiser hosted by the kinds of entities the Consumer Financial Protection Agency would regulate was conspicuous, since the committee was discussing the administration's proposal for the agency.

VI. RULES LIMITING CAMPAIGN CONTRIBUTIONS AND EXPENDITURES SHOULD RECOGNIZE THE DISTINCTION BETWEEN MONEY PROVIDED BY CONSTITUENTS AND MONEY PROVIDED BY NON-VOTERS

While many reformers are quick to dismiss the idea of "corporate personhood," there are other analytical avenues available to distinguish corporate and individual participation in political campaigns.[52] Instead of making the dichotomy between corporations and natural persons, Congress could frame the debate as a demarcation between voters and non-voters.[53] The Court upheld the constitutionality of the federal prohibition on foreign citizens from spending money to support or oppose candidates for federal office in *Bluman v. Federal Election Commission*.[54] This holding seems inconsistent with the holding in *Citizens United*, which determined a speaker's identity was an impermissible basis for regulating campaign speech.[55] *Bluman* suggests governmental

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Arthur Delaney, *Rep. Suzanne Kosmas Skips Hearing for Fundraiser*, HUFFINGTON POST (May 25, 2011, 1:35 PM), http://www.huffingtonpost.com/2009/07/15/rep-suzanne-kosmas-skips_n_233678.html. Representative Komas's absence drew the ire of Representative Maxine Waters who exclaimed during a hearing, "Even yesterday when we were engaged with consumer advocates, one member got up and left and went to a fundraiser with the banking community, in the middle of all that." *Id.* More recently, Senator Kay Hagan's campaign admitted the Senator "missed a classified hearing . . . on the threat of ISIS to go to New York to raise money for her re-election." Ted Barrett, *Hagan Admits Skipping Armed Services Hearing for Campaign Fundraiser*, CNN (Oct. 10, 2014, 2:20 PM), http://www.cnn.com/2014/10/08/politics/hagan-armed-services-hearing. While it may be impossible to isolate results to one variable, it is worth noting both Representative Komas and Senator Hagan lost elections following their respective absences.

52. Citing Justice John Marshall's explanation that "[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law," Senator Udall argues "[t]o bestow corporations with the same constitutional rights as U.S. citizens is a sharp departure from the Court's own precedent, and a serious mistake." Udall, *supra* note 47, at 243–44 (citing Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819)). Senator Udall further contends, "Congress's authority to adopt regulations that differentiate the acceptable political involvement of individual citizens in comparison to organizations such as corporations . . . is well established." *Id.* at 244 n.39.

53. The category of "non-voters" would include corporations and natural "persons living in other jurisdictions." *Dollars and Sense*, *supra* note 15, at 3. In *Citizens United*, Justice Stevens laid out the "critical, functional reasons why the First Amendment had never before treated corporations and human beings as equivalent." S. REP. NO. 113–223, at 17 (2014). In the context of public office election, 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. *Id.* (citing Citizens United v. FEC, 558 U.S. 310, 394 (2010) (Stevens, J., concurring in part, dissenting in part)).

54. Bluman v. FEC, 132 S. Ct. 1087 (2012) (mem.) (holding as constitutional the federal prohibition on foreign citizens from spending money to support or oppose candidates for federal office).

55. Citizens United v. FEC, 558 U.S. 310, 315 (2010) ("Government may not suppress political speech based on the speaker's . . . identity.").

restrictions based on a speaker's identity as a non-voter may withstand a certain level of scrutiny.[56] Because "[v]oters' fundamental right to participate in electing their own political leaders is far more compelling than the right of non-voters . . . to support or oppose candidates for public office," balancing the rights should result in the Court's recognition that Congress may limit a corporation's rights with respect to campaign speech.[57]

VII. MONEY IS NOT SPEECH AND SHOULD NOT RECEIVE THE SAME CONSTITUTIONAL PROTECTION AS SPEECH ITSELF

Scholars and educated professionals describe the key mistake in *Buckley* was "holding that every dollar spent on speech is as protected as the spoken word itself."[58] Justice Stevens advocates the clear position that "while money is used to finance speech, money is not speech."[59] A decade before *Citizens United*, Justice Stevens offered the philosophical underpinning for the distinction that can launch "a new beginning" in the campaign finance debate:

> Speech has the power to inspire volunteers to perform a multitude of tasks on a campaign trail, on a battleground, or even a football field. Money,

56. Given the inconsistency was a mere two years removed from the Court expressly overturning precedent for regulating speech based on the speaker's identity, it is rather odd the Court would summarily decide *Bluman*. *See* STEVENS, *supra* note 9, at 96–97 (suggesting the "summary affirmance demonstrates the First Amendment will tolerate *some* regulation of campaign speech that is more restrictive than regulations of speech in other contexts"); *see also Dollars and Sense*, *supra* note 15, at 4–5 ("The *Bluman* case illustrates that the interest in protecting campaign speech by non-voters is less worthy of protection than the interest in protecting speech about general issues.").

57. *Dollars and Sense*, *supra* note 15, at 4.

58. E. Joshua Rosenkranz, *Judges in the Political Thicket*, *in* A USER'S GUIDE TO CAMPAIGN FINANCE REFORM 127, 132 (Gerald C. Lubenow ed., 2001); *see also* Rosenthal et al., *supra* note 33 ("As long as money is officially categorized as protected speech, there will be no brake on the ability of the rich and special interests to drown out other voices."). The New York Times Editorial Board explained the concept of speech in a pre-*Citizens United* world as including "actual words uttered or written by natural persons, not money spent, and certainly not from corporate treasuries." *Id.*

59. *Dollars and Sense*, *supra* note 15, at 5. Not all of the money a campaign collects and expends relates to speech. Non-speech activity funded by campaign contributions and expenditures should not "receive the same constitutional protection as speech itself." *Id.* To support the proposition that the Court should distinguish the constitutional protection for campaign speech from conduct funded by campaign contributions, reformers often cite the Watergate burglaries, the impetus for several key amendments to FECA in 1974. *See id.* ("After all, campaign funds were used to finance the Watergate burglaries — actions that clearly were not protected by the First Amendment."). *But see* Geoffrey R. Stone, *Is Money Speech?*, HUFFPOST POL.: THE BLOG (Feb. 5, 2012, 12:29 PM), http://www.huffingtonpost.com/geoffrey-r-stone/is-money-speech_b_1255787.html ("Even though an object may not itself be speech, if the government regulates it because it is being used to enable free speech it necessarily raises a First Amendment issue.").

> meanwhile, has the power to pay hired laborers to perform the same tasks. It does not follow, however, that the First Amendment provides the same measure of protection to the use of money to accomplish such goals as it provides to the use of ideas to achieve the same results.[60]

In essence, "[t]he key is to differentiate between speaking and spending."[61] Recognizing money is not speech itself, but the megaphone through which the speech is amplified, is key to promoting egalitarian goals.[62]

VIII. IMPOSE LIMITATIONS ON CAMPAIGN EXPENDITURES TO LEVEL THE PLAYING FIELD

Linking "[t]he concepts of political equality and self-government," Judge Skelly Wright argued "[i]f persons are equal, then none has an inherent right to dominate or impose his will on others."[63] Our Founding Fathers also trumpeted political equality as the heart of the American system of government.[64] By *Citizens United*, the Court took a firm position against the centrality of political equality to American democracy. According to Kathleen Sullivan, "The outcome of *Citizens United* is best explained as representing a triumph of the libertarian over the egalitarian vision of free speech."[65] Outlining a "strand of free speech jurisprudence that might be called free speech as equality," Sullivan explains the egalitarian view of free speech has two components: "an anti[-

60. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 398 (2000) (Stevens, J., concurring); *see also* J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1007 (1976) (explaining campaign money is merely a vehicle for speech and not the speech itself).

61. TIMOTHY K. KUHNER, CAPITALISM V. DEMOCRACY: MONEY IN POLITICS AND THE FREE MARKET CONSTITUTION 269 (2014).

62. *See* E. JOSHUA ROSENKRANZ, REPORT OF THE TWENTIETH CENTURY FUND WORKING GRP. ON CAMPAIGN FIN. LITIG., *BUCKLEY* STOPS HERE: LOOSENING THE JUDICIAL STRANGLEHOLD ON CAMPAIGN FINANCE REFORM 37 (1998) ("A candidate has an absolute right to . . . shout out her message at the top of her lungs. But she does not have the right to spend $100,000 on one thousand megaphones, mount them on a sound truck, and blare out her message so loudly that no one else can be heard.").

63. Wright, *supra* note 14, at 626. Quoting former Columbia Law School Dean Albert J. Rosenthal, Judge Wright argues, "The goal of enriching the electoral system[] through . . . reducing inequities in the opportunities of candidates . . . to persuade the electorate . . . [is] indispensable to the attainment of the most fundamental purposes of the Constitution." *Id.* at 629 (citing Albert J. Rosenthal, *Campaign Financing and the Constitution*, 9 HARV. J. ON LEGIS. 359, 360 (1972)).

64. James Madison explained "the objects of popular choice" were to be "[e]very citizen whose merit may recommend him to the esteem and confidence of his county." THE FEDERALIST NO. 57, at 328 (James Madison) (ABA ed., 2009). Promoting the inherent political equality in the U.S. Constitution, Madison wrote, "No qualification of wealth, or birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people." *Id.*

65. Sullivan, *supra* note 12, at 145.

]discrimination component and an affirmative action component."[66] While the anti-discrimination component "bars government from discriminating against marginal, dissident, or unpopular viewpoints that are likely to suffer political subordination or hostility," the affirmative action component "enforces a kind of preference or forced subsidy for marginal, dissident, or unpopular viewpoints by barring the attachment of speech-restrictive conditions to the receipt of public benefits."[67] Describing how the egalitarian balances concerns for "political equality" and "freedom of speech," Sullivan expounds, "Political equality is prior to speech: when freedom of speech enhances political equality, speech prevails; when speech is regulated to enhance political equality, however, regulation prevails. Government may redistribute speaking power so long as it does so along viewpoint-neutral dimensions such as speakers' structural or institutional features."[68]

Justice Stevens acknowledges there are situations in which "the interest in giving adversaries an equal opportunity to persuade a decision maker to reach one conclusion rather than another" justifies "rules limiting the quantity of speech."[69] Proposing his own constitutional amendment "authorizing Congress . . . to place 'reasonable' limitations on campaign expenditures," Justice Stevens advocates for an amendment that "would allow corporations to make public announcements of their views but would prohibit them from engaging in the kind of repetitive and excessive advocacy that the candidates typically employ."[70]

Attempting to undermine the egalitarian rationale for campaign finance reform, Robert Post argues, "In a democracy in which all citizens are equal before the law, each citizen is equally entitled to the *opportunity* to participate in public discourse. But First Amendment rights do not ensure

66. *Id.* at 148.

67. *Id.*

68. *Id.*

69. STEVENS, *supra* note 9, at 97. Relying on an inherent view of fairness and analogizing to a televised political debate, Justice Stevens argues the interest in the egalitarian view of free speech is what makes it "manifestly unfair for the moderator to allow [one candidate] more time than any other candidate because he had more money than any of his rivals. *Id.* at 98. Drawing other analogies before the Senate Rules and Administration Committee, Justice Stevens testified, "Like rules that govern athletic contests or adversary litigation, those rules should create a level playing field." *Dollars and Sense*, *supra* note 15, at 2. Going further, Justice Stevens argued, "Just as procedures in contested litigation regulate speech in order to give adversary parties a fair and equal opportunity to persuade the decision-maker to rule in their favor, rules regulating political campaigns should have the same objective." *Id.* at 2–3.

70. STEVENS, *supra* note 9, at 107–08. The amendment "would also repudiate both the holding and the reasoning" in *Citizens United*. *Id.* at 108.

that each citizen can exercise equal *influence* on government action."[71] Post's formalistic distinction between the "opportunity to participate" and the exercise of influence ignores the realities of political campaigns, where the ability to be heard gives a candidate the opportunity to influence potential voters and therefore affect the outcome of the campaign.[72] If a candidate is completely drowned out before he or she has the chance to attempt to influence potential voters, the candidate has effectively been denied the opportunity to participate in the political process in his or her chosen method.[73] Mark Halperin and John F. Harris introduced the concept of the "money primary" into the popular political lexicon by explaining one way a candidate can introduce himself or herself to the voting public is by rapidly raising vast amounts of money, thus demonstrating his or her prowess as a fundraiser.[74] When candidates can raise unlimited amounts of money, the "money primary" can be a psychological and economic barrier to entry for a candidate who may not be able to raise more money than his opponents.[75] If a candidate does not demonstrate his or her ability to win the "money primary," the press is likely to dismiss the campaign in a horserace story and is much less likely to cover the candidate's message.[76] The solution, according to Thomas I. Emerson, is, "[i]n general, the government must affirmatively make available the opportunity for expression as well as protect it from encroachment."[77] Emerson states, "This means that positive measures must be taken to assure the ability to speak despite economic or other barriers."[78]

The political system's obsession with fundraising not only undermines

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71. ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 49 (2014).

72. *See Dollars and Sense*, *supra* note 15, at 2 (acknowledging a political campaign allows candidates the opportunity to persuade voters to decide in their favor).

73. *See* ROSENKRANZ, *supra* note 62, at 37 (finding it permissible for the government to regulate a speaker's volume when used to "blare out [a] message so loudly that no one else gets heard").

74. *See* MARK HALPERIN & JOHN F. HARRIS, THE WAY TO WIN: TAKING THE WHITE HOUSE IN 2008, at 242 (2008) (explaining the money primary, one of four conceptual contests created by Karl Rove).

75. *See id.* (requiring a serious candidate to raise between $20–$25 million to compete for a presidential nomination).

76. Former presidential candidate Mike Huckabee reported that because his campaign was "short on money," the press corps only wanted to cover his fundraising efforts. Huckabee, *supra* note 5.

77. THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 629 (Vintage Books ed. 1971) (1970).

78. *Id.*

the candidate's opportunity to participate in the political system by running for office but also puts the rights of other participants in the political process in jeopardy.[79] Both political parties appealing to the same moneyed elite in their quest for fundraising dominance tend to produce a political system where neither party is willing to voice opposition to the financial elite and bite the proverbial hand. Emerson further argues "attention must be given to the right of the citizen to hear varying points of view and the right to have access to information upon which such points of view can be intelligently based."[80] Accordingly, the government's system of free expression must "stress the right to hear and the right to know."[81]

Unfortunately, regulating campaign expenditure and donor contributions to promote egalitarian values is a tricky proposition. Limiting expenditures by the campaigns themselves naturally favors the candidate with the highest name identification within the voting community.[82] There is a long history in American politics of wealthy candidates self-funding campaigns.[83] If prohibiting a candidate from self-funding his or her campaign is per se unconstitutional, across-the-board contribution limits favor the candidate with the greatest net worth.[84] As such, in an effort to combat the asymmetric starting points of wealthy and

79. *See* Udall, *supra* note 47, at 246 ("The pressure to raise money also discourages many qualified Americans from running for office.").

80. EMERSON, *supra* note 77, at 629.

81. *Id.*

82. Because incumbent candidates begin a race with name recognition, challengers must spend money to equalize this recognition. *See* Bradley A. Smith, *Why Campaign Finance Reform Never Works*, CATO INST., http://www.cato.org/publications/commentary/why-campaign-finance-reform-never-works (last visited Oct. 8, 2015) (reporting "[t]he key spending variable is . . . the absolute level of challenger spending"). Opponents of reform muddy the water with allegations that reforms are merely an incumbent's means of self-preservation. *See* Peter J. Wallison & Joel M. Gora, *Burying the Incumbent Protection Racket*, AM. ENTERPRISE INST. (June 16, 2010, 3:00 AM), https://www.aei.org/publication/burying-the-incumbent-protection-racket (labeling campaign finance reform efforts as efforts to make it "more difficult for challengers to raise or spend campaign funds").

83. In the eighteenth century, "it was impossible to separate election money from election candidates." Robert E. Mutch, *Three Centuries of Campaign Finance Law*, *in* A USER'S GUIDE TO CAMPAIGN FINANCE REFORM 1, 1 (Gerald C. Lubenow ed., 2001). Certainly, there are numerous wealthy candidates who self-fund in the twenty-first century. *See, e.g.*, Michael Barbaro & David W. Chen, *Bloomberg Sets Record for His Own Spending on Elections*, N.Y. TIMES (Oct. 23, 2009), http://www.nytimes.com/2009/10/24/nyregion/24mayor.html (reporting Michael Bloomberg was "on pace to spend between $110 million and $140 million before the election").

84. *See* Buckley v. Valeo, 424 U.S. 1, 52–53 (1976) (per curiam) (holding a "candidate . . . has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly . . . advocate his own election," and a cap on personal expenditures imposes "a substantial," "clear[]," and "direct[]" restraint on that right).

non-wealthy candidates, the Bipartisan Campaign Reform Act of 2002 (BCRA) included a "millionaire's amendment" that "lifted the contribution limit for candidates facing rich opponents who financed their own campaigns with personal funds."[85] In *Davis v. FEC*,[86] while adhering to its narrow determination that the prevention of "corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances,"[87] the Court held Section 319(a) of BCRA was an impermissible burden of the "First Amendment right to spend [a candidate's] own money for campaign speech."[88] Presumably, after a constitutional amendment that includes language making the promotion of egalitarian goals an explicit governmental compelling interest, Congress could revisit the concept of the "millionaire's amendment" in comprehensive campaign finance reform legislation.[89]

IX. PROPOSED CONSTITUTIONAL AMENDMENTS THAT WOULD OVERTURN *CITIZENS UNITED*

When drafting a constitutional amendment to overturn key holdings in *Buckley* and *Citizens United*, reformers have focused on three key concepts: (1) limiting campaign expenditures, (2) restricting personhood to natural persons,[90] and (3) making the promotion of egalitarian goals a

85. MUTCH, *supra* note 28, at 176.

86. Davis v. FEC, 554 U.S. 724, 744 (2008) (holding the government does not have a compelling interest to burden the First Amendment right of a candidate to spend his or her own money to advocate for the candidate's election).

87. *Id.* at 741 (quoting FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 496–97 (1985)).

88. *Id.* at 738. Melvin Urofsky points out "most studies indicate that personal wealth by itself is not a decisive factor" and, in most of the recent election cycles, the wealthy self-financed candidate has lost. MELVIN I. UROFSKY, MONEY AND FREE SPEECH: CAMPAIGN FINANCE REFORM AND THE COURTS 286–87 (2005). Urofsky deduces the "millionaire provision in the McCain–Feingold Act aimed not at reducing an individual's use of private wealth so much as allowing [his] opponents . . . to exceed certain guidelines in an effort to level the playing field." *Id.* at 287; *see also* MUTCH, *supra* note 28, at 176 (arguing *Davis* represents the victory of the conservative justices' "hostility to equality" over "their frequent professions that they want more speech").

89. While specific reforms are beyond the scope of this Comment, if Congress enshrines the promotion of egalitarian goals into the U.S. Constitution, it may look to the reforms Norman J. Ornstein proposed when it crafts comprehensive campaign finance reform legislation. For a description of Ornstein's suggestions, see Norman J. Ornstein, *Eight Modest Ideas for Meaningful Campaign Finance Reform*, *in* A USER'S GUIDE TO CAMPAIGN FINANCE REFORM 149 (Gerald C. Lubenow ed., 2001).

90. *But see* Garrett Epps, *Don't Blame "Corporate Personhood"*, AM. PROSPECT, Apr. 16, 2012, http://prospect.org/article/dont-blame-corporate-personhood (criticizing *Citizens United* but asserting "[t]he threat to American self-government" cannot be resolved with a "corporate

constitutionally explicit, compelling governmental interest. Members of the 113th Congress proposed sixteen distinct bills (adjusted for duplication of proposed legislation) to overturn *Citizens United*.[91] Of these legislative proposals, nine (56%) would grant Congress the express authority to limit campaign expenditures,[92] seven (44%) would restrict the definition of personhood to natural persons,[93] and three (19%) would amend the Constitution to make the promotion of egalitarian goals a compelling governmental interest.[94] From these bills, only Senate Joint Resolution 19 survived the procedural hurdles to reach a floor vote.[95] While the bill, as originally introduced, only addressed two of the three major reform provisions, the amended version that emerged from the Senate Judiciary Committee addressed all three.[96]

X. THE UDALL AMENDMENT AND ITS CRITICS

A. *Senate Joint Resolution 19*

On June 18, 2013, Senator Tom Udall introduced Senate Joint Resolution 19.[97] On July 17, 2014, the amended bill made it out of the Senate Judiciary Committee.[98] The substantive portions of the amended bill read:

> SECTION 1. To advance . . . political equality, . . . Congress and the States may regulate and set reasonable limits on the raising and spending of money

personhood" amendment).

91. While the 113th Congress introduced eighteen total bills, Senate Bill 525 (2013) is identical to both Senate Joint Resolution 11 (2013) and House Joint Resolution 34 (2013). For analytical purposes, this Comment uses the sixteen bill figure.

92. H.R.J. Res. 12, 113th Cong. (2013); H.R.J. Res. 14, 113th Cong. (2013); H.R.J. Res. 20, 113th Cong. (2013); H.R.J. Res. 29, 113th Cong. (2013); H.R.J. Res. 31, 113th Cong. (2013); H.R.J. Res. 119, 113th Cong. (2013); H.R.J. Res. 121, 113th Cong. (2013); S. 525, 113th Cong. (2013); S.J. Res. 19, 113th Cong. (2013) (as reported by S. Comm. on the Judiciary, July 17, 2014).

93. H.R.J. Res. 13, 113th Cong. (2013); H.R.J. Res. 14; H.R.J. Res. 21, 113th Cong. (2013); H.R.J. Res. 29; S. 525; S.J. Res. 18, 113th Cong. (2013); S.J. Res. 19 (as reported by S. Comm. on the Judiciary, July 17, 2014).

94. H.R.J. Res. 119; S. 525; S.J. Res. 19 (as reported by S. Comm. on the Judiciary, July 17, 2014).

95. *S.J.Res.19 — 113th Congress (2013-2014)*, CONGRESS.GOV, https://www.congress.gov/bill/113th-congress/senate-joint-resolution/19/actions (last visited Oct. 8, 2015).

96. *Compare* S.J. Res. 19 (granting Congress the express authority "[t]o advance the fundamental principle of political equality for all" and to "regulate the raising and spending of money . . . with respect to Federal elections"), *with* S.J. Res. 19 (as reported by S. Comm. on the Judiciary, July 17, 2014) (adding a "corporate personhood" provision).

97. *S.J.Res.19 — 113th Congress (2013-2014)*, *supra* note 95.

98. *Id.*

> by candidates and others to influence elections.
> SECTION 2. Congress and the States . . . 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.[99]

Describing his rationale for introducing the legislative precursor to Senate Joint Resolution 19,[100] Senator Udall argued, "Comprehensive reform can be passed only if there is a constitutional amendment that provides Congress with the authority to regulate all aspects of the campaign finance system."[101] While passage of Senate Joint Resolution 19 would have triggered the first alteration of the original Bill of Rights, Congress has amended the Constitution in pursuit of egalitarian ends several times.[102] Opponents of a constitutional amendment argue the Constitution "should only be considered in rare circumstances and for issues that cannot be resolved through legislation."[103] A challenge to the proposed constitutional amendment was a forgone conclusion, and the Supreme Court already supplied the bill's most vocal challenger with a scary, yet specious argument.

B. *Senator Cruz's Accusation*

During a lengthy floor speech denouncing Democratic efforts to pass

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99. S.J. Res. 19 (as reported by S. Comm. on the Judiciary, July 17, 2014). In essence, Senate Joint Resolution 19 would restore to Congress and the states the power *Citizens United* and other *Buckley* progeny stripped away. *See* Am. Tradition P'ship v. Bullock, 132 S. Ct. 2490, 2491 (2012) (per curiam) (explaining the Court's holding in *Citizens United* applies to campaign finance regulation by a state); *see also* Ian Urbina, *24 States' Laws Open to Attack After Campaign Finance Ruling*, N.Y. TIMES (Jan. 23, 2010), http://www.nytimes.com/2010/01/23/us/politics/23states.html (quoting a law professor who argued *Citizens United* turned the Colorado Constitution into "wastepaper").

100. S.J. Res. 28, 111th Cong. (2010).

101. Udall, *supra* note 47, at 249 ("Because the Court views money as speech, and believes corporations and unions should enjoy the same free speech rights as individuals, any regulations that would pass judicial scrutiny are unlikely to have a significant impact on reforming the broken campaign finance system.").

102. *See* U.S. CONST. amend. XIV § 2 (changing the method of counting citizens for the purpose of apportioning congressional representation); *Id.* amend. XV (granting African-Americans the right to vote); *Id.* amend. XVII (changing the method of electing U.S. Senators); *Id.* amend. XIX (granting women the right to vote); *Id.* amend. XXIV (eliminating the poll tax); *Id.* amend. XXVI (lowering the voting age); *see also* S. REP. NO. 113-223, at 2 (2014) ("The story of our Constitution is that it has gradually evolved to ensure a more representative and inclusive democracy."); S. REP. NO. 113-223, at 29 (answering the Minority's characterization of Senate Joint Resolution 19 as a "dagger at the heart of the Bill of Rights" by quoting Professor Jamie Raskin's statement that "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").

103. Udall, *supra* note 47, at 250.

Senate Joint Resolution 19, Senator Ted Cruz recognized the "profoundly powerful effect" of *Saturday Night Live*.[104] Senator Cruz described an exchange with Senator Al Franken, a former writer for *Saturday Night Live* and member of the Senate Judiciary committee.[105] Senator Cruz relayed when he asked Senator Franken if "Congress should have the constitutional authority to prohibit *Saturday Night Live* from making fun of politicians," Senator Franken "promptly reassured [Senator Cruz] he had no intention of doing any such thing."[106] Arguing legislative language trumps congressional intent, Senator Cruz declared the debate is not about "the intentions of 100 Senators," instead revolves around "a constitutional amendment that [forty-nine] Democrats are proposing to be inserted into the Bill of Rights."[107] Asserting the language of the proposed constitutional amendment gives Congress "the constitutional authority to prohibit [any corporation] from engaging in political speech," Senator Cruz delivered the following sound bite:

> Well, NBC, which airs "Saturday Night Live," is a corporation. Under this amendment . . ., Congress would have the power to make [satirizing a politician close to a federal election] a criminal offense. Lorne Michaels could be put in jail under this amendment for making fun of any politician. That is extraordinary, it is breathtaking, and it is dangerous.[108]

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104. 160 CONG. REC. S5417 (daily ed. Sept. 9, 2014) (statement of Sen. Ted Cruz) ("[The] wickedly funny characterization of the Republican Vice Presidential nominee Sarah Palin . . . had a profoundly powerful effect on people's assessment of Governor Palin.").

105. *Id.* Senator Al Franken was a former writer for *Saturday Night Live* from 1975 to 1980. *Al Franken Biography*, http://www.biography.com/people/al-franken-9542255 (last visited Oct. 8, 2015).

106. 160 CONG. REC. S5417 (daily ed. Sept. 9, 2014) (statement of Sen. Ted Cruz). Some critics question the long-term effects of Senate Joint Resolution 19, while others accuse Democrats of proposing the amendment as a political stunt. *See* Scott Blackburn, *The Real Effect of the Udall Amendment on Campaign Finance*, WASH. TIMES (Sept. 11, 2014), http://www.washingtontimes.com/news/2014/sep/11/blackburn-the-real-effect-of-the-udall-amendment (arguing the intentions of the current members of Congress should be ignored because shifting political winds will bring in a Congress that would use the proposed constitutional language to act in ways current members of Congress would have not contemplated and opining Democrats are voting on the issue "because they think it is a winning political issue this election season"); Luke Wachob, *Udall's Futile Fight Against Free Speech*, NAT'L REV. ONLINE (Sept. 8, 2014, 1:43 PM), http://www.nationalreview.com/article/387387/udalls-futile-fight-against-free-speech-luke-wachob (suggesting Senate Joint Resolution 19 "was never designed to succeed").

107. 160 CONG. REC. S5417 (daily ed. Sept. 9, 2014) (statement of Sen. Ted Cruz).

108. *Id.* at S5418. The National Broadcasting Company (NBC) broadcasts *Saturday Night Live*. *Saturday Night Live*, NBC, http://www.nbc.com/saturday-night-live (last visited Oct. 8, 2015). The network is currently part of the media company NBC Universal, a subsidiary of Comcast. COMCAST, http://corporate.comcast.com/our-company/businesses/nbcuniversal (last visited Oct. 8, 2015). Senator Udall and others immediately rejected the premise of Senator Cruz's argument. *See* Matea Gold, *Ted Cruz Accuses Harry Reid of 'Slander Campaign' Against Koch Brothers*, WASH. POST: POST POL. (Sept. 9, 2014), http://www.washingtonpost.com/blogs/post-politics/wp/2014/09/09/ted-cruz-

C. *Why It Matters: The Importance of Political Satire in Our Culture*

While it is relatively easy to dismiss Senator Cruz's accusation with a derisive laugh at the political theater of it all,[109] the criminalization of political satire would profoundly affect how members of the "Millennial Generation" get their news. According to a 2004 poll by Pew Research Center for the People & the Press, twenty-one percent of respondents between the ages of eighteen and twenty-nine "cited [*The Daily Show with Jon Stewart* (*The Daily Show*)] and [*Saturday Night Live*] as a place where they regularly learned presidential campaign news" compared with twenty-three percent who "mentioned ABC, CBS, or NBC's nightly news broadcasts."[110] Various theories seek to explain the generational shift in television news viewing habits. While some commentators point to the increasing number of satirical television programs to which members of the Millennial Generation are exposed,[111] others credit technological innovation as the primary catalyst.[112] There is disagreement over whether

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accuses-harry-reid-of-slander-campaign-against-koch-brothers (quoting Senator Udall, "Nothing in the amendment would permit the arrest of anyone for engaging in political speech"); Jake Tapper, *Fact Checking Sen. Cruz's Claim of Potential Ban on SNL Sketches*, CNN (Sept. 10, 2014, 6:05 PM), http://thelead.blogs.cnn.com/2014/09/10/fact-checking-sen-cruzs-claim-of-potential-ban-on-snl-sketches (interviewing CNN Senior Legal Analyst Jeffrey Toobin, who disagrees with Senator Cruz). Looking for the best possible argument for the validity of the Cruz accusation, PolitiFact rated the accusation as only "Half True." *See* Louis Jacobson, *Ted Cruz Says SNL's Lorne Michaels Could Be Jailed under Democratic-backed Amendment,* POLITIFACT (Sept. 11, 2014, 4:54 PM), http://www.politifact.com/truth-o-meter/statements/2014/sep/11/ted-cruz/ted-cruz-says-snls-lorne-michaels-could-be-jailed- ("Even after the amendment was in force, a lot would need to happen before any satirist felt the heat from prosecutors."). This Comment analyzes the Cruz accusation under existing campaign finance law.

109. *See* Kelefa Sanneh, *Live from D.C., It's Ted Cruz with a Good Point*, THE NEW YORKER (Sept. 12, 2014) http://www.newyorker.com/news/daily-comment/live-d-c-ted-cruz-good-point ("[Senator] Cruz is one of the Senate's best and canniest speechmakers, and he surely knew that his not-awful imitation of [Dana] Carvey imitating [President George H. W.] Bush would insure plenty of coverage.").

110. Cosgrove-Mather, *supra* note 19. In the same poll, thirteen percent of the "18-to-25-year-old" demographic reported watching "*The Daily Show* regularly as an information source." Shister, *supra* note 19 (including results from a 2004 poll by the Pew Research Center for the People & the Press). During the same time as the Pew poll, Nielsen Media Research found "[o]nly [ten] percent of 18-to-24-year-olds" tuned "in to the evening news on ABC, NBC[,] and CBS combined." *Id.* (reporting figures from Nielsen Media Group).

111. *See, e.g.*, Shister, *supra* note 19 ("This is a generation . . . raised on the savagely barbed topical lampoonery of *The Simpsons* and *South Park*. Irony is mother's milk to them.").

112. According to Dana Young, an assistant professor in Communications at the University of Delaware, "the ability to download whatever they want, whenever they want" from the Internet and "reprocess it [and] mash it up" has given young adults "control and a feedback loop." *Id.* Young argues because of this broad access to easily manipulated information, young adults cannot "relate to

the viewing habits of younger people will change as they age.[113] While a news diet of only satirical programming may leave a viewer ill-informed,[114] there is no doubt programs like *Saturday Night Live* and *The Daily Show* have established themselves as cultural touchstones and part of the political narrative of the United States.[115]

D. *Rejection of Senator Cruz's Accusation*

The roots of Senator Cruz's questionable argument began in *Buckley*.[116] To uphold certain provisions of the FECA, the *Buckley* Court "distinguished between communications that expressly advocate the election or defeat of a clearly identified candidate and those communications that advocate a position on an issue."[117] The Court held

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anchors." *Id.*

113. Executive Producer of *ABC World News*, Jon Banner, predicts a larger number of younger viewers will watch network news as they age. *Id*; *see also* Cosgrove-Mather, *supra* note 19 ("[T]he common theory is that when people get jobs, mortgages[,] and children, they'll take a greater interest in [network news] programs."). Members of the Millennial Generation themselves make the starkly different prediction that "TV news will eventually die out" as members of their generation abandon the traditional news sources. Shister, *supra* note 19.

114. Ben Karlin, Executive Producer of *The Daily Show*, explains a "viewer who [does not] supplement [*The Daily Show*] with real news [is not] very well-informed." *See* Cosgrove-Mather, *supra* note 19 (indicating the 2004 poll by the Pew Research Center for the People & the Press suggested "people who regularly learned news from the comedy shows were less likely to know basic facts of the campaign"). Younger viewers may be aware of the dangers of viewing only the satirical programs. *See* Shister, *supra* note 19 (reporting many college students use *The Daily Show* "as a springboard to pursue real stories on the Internet and on National Public Radio").

115. Satirical programs have had a direct impact on the political debate in the United States. *See* Howard Kurtz, *The SNL Effect*, WASH. POST: MEDIA NOTES (Mar. 14, 2008, 9:13 AM), http://www.washingtonpost.com/wp-dyn/content/blog/2008/03/14/BL2008031401607.html (noting two parodies *Saturday Night Live* did of the 2008 debates between Barack Obama and Hillary Clinton caused the media to "[get] a lot tougher with Obama"); Shister, *supra* note 19 (mentioning Senator John McCain announced his 2004 presidential candidacy on *The Daily Show*, and Senator John Kerry chose the same program to begin addressing the Swift Boat controversy). Jon Stewart and Steven Colbert, hosts of *The Daily Show* and *The Colbert Report,* respectively, have received numerous Emmy Awards and the Peabody Award in recognition of their respective contributions to the national culture. *See News Team*, THE DAILY SHOW WITH JON STEWART, http://thedailyshow.cc.com/news-team/jon-stewart (last visited Oct. 8, 2015) (providing the accolades of Jon Stewart); *Alumni*, THE DAILY SHOW WITH JON STEWART, http://thedailyshow.cc.com/news-team/stephen-colbert (last visited Oct. 8, 2015) (stating the recognition garnered by Stephen Colbert).

116. To preserve FECA's expenditure cap, found in 18 U.S.C. § 608(e)(1), "against invalidation on vagueness grounds," the Court construed the provision to "apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." Buckley v. Valeo, 424 U.S. 1, 41–44 (1976) (per curiam).

117. H.R. REP. NO. 106–297, pt. 1, at 3 (1999). The Court has continuously affirmed the distinction between express and issue advocacy. *See, e.g.*, FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 245–49 (1986) (holding an expenditure must constitute express advocacy to be subject to

Congress could regulate "express advocacy" speech but not "issue advocacy" speech.[118] Campaign managers reacted to *Buckley* by disguising political advertisements that advocated for a specific candidate as "issue ads" by not using any of the "magic words."[119] Reacting to the enormous amounts of money corporations poured into "issue ads" after *Buckley*, Congress enacted BCRA[120] to allow it to regulate corporate expenditures for issue advocacy.[121] BCRA created the term "electioneering communication" to describe a "broadcast, cable, or satellite communication"[122] that "refers to a clearly identified candidate for Federal office"[123] within a certain timeframe before a federal election.[124]

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the Federal Election Campaign Act prohibition against corporations using treasury funds to make an expenditure "in connection with" any federal election).

118. *Buckley*, 424 U.S. at 44.

119. *See* 160 CONG. REC. S5414 (daily ed. Sept. 9, 2014) (statement of the American Civil Liberties Union) ("Historically, campaign finance reform efforts, including constitutional amendments such as this one, have sought to restrict 'sham' issue advocacy—that is, communications that some claim are express advocacy disguised as issue advocacy.").

120. Issue ads "typically discussed candidates in the context of certain issues without specifically advocating a candidate's election or defeat." *Campaign Finance Law Quick Reference for Reporters*, FEC, http://www.fec.gov/press/bkgnd/bcra_overview.shtml#Soft%20Money (last visited Oct. 8, 2015). In a footnote in *Buckley*, the Court clarified the term "express advocacy" applies to "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Buckley*, 424 U.S. at 44 n.52. These terms are often referred to as the "magic words." Frederick G. Slabach, *Introduction to* THE CONSTITUTION AND CAMPAIGN FINANCE REFORM 3, 11 n.41 (Frederick G. Slabach ed., 2d ed. 2006) (1998).

121. *See* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107–155, 116 Stat. 81 (current version at 52 U.S.C.A. §§ 30101–46 Westlaw through Pub. L. No. 114-49) (providing bipartisan campaign reform). In floor debate, Representative Davis of Florida described BCRA as an imperfect attempt to "close the two most gaping loopholes that exist in our campaign finance system today, the uncontrolled issue ads that are influencing the outcome of elections today and soft money." 148 CONG. REC. 1290, 1298 (2002) (statement of Rep. Davis). The act has three major components: a ban on soft money, increased contribution limits, and restrictions on issue advocacy advertising. *See generally* 116 Stat. 81 (identifying the three sections of the Act). For a more detailed review of BCRA, see ANTHONY CORRADO ET AL., THE NEW CAMPAIGN FINANCE SOURCEBOOK (2005).

122. 52 U.S.C.A. § 30104 (f)(3)(A) (Westlaw through Pub. L. No. 114-49).

123. *Id.*

124. *See id.* (noting the timeframe is sixty days before the general election or thirty days before the primary election); *see also Campaign Finance Law Quick Reference for Reporters*, FEC, http://www.fec.gov/press/bkgnd/bcra_overview.shtml#Soft%20Money (last visited Oct. 8, 2015) (acknowledging electioneering communications are communications which are distributed during a specific period of time before an election); Trevor Potter, *The Current State of Campaign Finance Law*, *in* CORRADO ET AL., *supra* note 121, at 48, 56 ("Electioneering communications are defined as broadcast, cable, or satellite communications referring to a clearly identified candidate for federal office, airing within sixty days of the candidate's general election or thirty days of the candidate's primary election, and targeting the candidate's electorate."). During a facial challenge to the regulations, the Supreme Court upheld the constitutionality of the limits Congress placed on electioneering communications, relying on its holding in *Austin v. Michigan State Chamber of Commerce*,

While Congress prohibited corporations from funding electioneering communications,[125] it expressly exempted an apolitical broadcast station's "news stor[ies], commentar[ies], or editorial[s]"[126] from the scope of "electioneering communication."[127] Senator Cruz's argument is essentially Congress can remove the exception for media corporations,[128] placing *Saturday Night Live* within the scope of electioneering communication and thus triggering an FEC violation when the show satirizes a political candidate within the blackout period.[129]

Senator Cruz's argument is farfetched for two reasons. First, Senate Joint Resolution 19 prevents Congress from removing the media corporation exemption in the context of the current campaign finance laws because such removal would breach the proposed amendment's prohibition on abridging "the freedom of the press."[130] Second, assuming arguendo that a court interpreted Senate Joint Resolution 19 to allow Congress to remove the media corporation exemption, the Supreme Court would likely strike such congressional action.[131] In the event media

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which allowed Congress to ban political speech by a corporation based on an anti-distortion rationale. McConnell v. FEC, 540 U.S. 93, 203–09 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010).

125. 52 U.S.C.A. § 30118 (b)(2).

126. *Id.* § 30104 (f)(3)(B)(i).

127. *Id.* § 30104 (f)(3)(B). If a broadcasting station is "owned or controlled by any political party, political committee, or candidate," it is excluded from the "media corporation" exemption. *Id.* § 30104 (f)(3)(B)(i). A media corporation is any corporation that owns a media broadcast company. *See* Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 667 (1990) (finding "media corporations differ significantly from other corporations in that their resources are devoted to the collection of information and its dissemination to the public").

128. The Supreme Court opened the door for Senator Cruz's argument when it decried the anti-distortion rationale in *Austin*. *See* Citizens United v. FEC, 558 U.S. 310, 348 (2010) (discussing *Austin's* holding, which allowed the Government to suppress political speech on the basis of the speaker's identity as a nonprofit or for-profit corporation to prevent "the corrosive and distorting effects of immense aggregations of [corporate] wealth . . . that have little or no correlation to the public's support for the corporation's political ideas"); *see also id.* at 382 (Roberts, C.J., concurring) ("*Austin*'s logic would apply most directly to . . . media corporations[,] [which] . . . are, *for the time being*, not subject to [the] . . . prohibitions on corporate political speech." (emphasis added)). During the debate on BCRA, various congressional representatives fiercely argued Congress should not exempt media corporations from electioneering communication regulation because all corporations deserve equal treatment. *See* 148 CONG. REC. 1298 (2002) (arguing two corporations should be treated the same under the law). *Contra Austin*, 494 U.S. at 667 (distinguishing media corporations from other corporations).

129. *See* 52 U.S.C.A. § 30118 (f)(3)(B)(i) (identifying an exception for media corporations).

130. S.J. Res. 19, 113th Cong. § 3 (2013) (prohibiting courts from construing the article "to grant Congress the power to abridge the freedom of the press").

131. *See Citizens United*, 558 U.S. at 323 (Roberts, C.J., concurring) (arguing "[t]he fact that the law currently grants a favored position to media corporations is no reason to overlook the danger inherent in accepting a theory that would allow government restrictions on their political speech").

corporations were not exempt from the definition of electioneering communication, the law would bar any corporately-owned television news network from airing any story containing the name of a political candidate in the blackout period.[132] The Supreme Court would never tolerate such a result.[133] Therefore, the Court would likely prohibit Congress from removing the media corporation exemption, absent Congress making further changes to the law.[134]

Alternatively, should Congress repeal the media corporation exemption, the Court could decide that the current definition of electioneering communication does not withstand judicial scrutiny.[135] Should the Court so decide, the latent definition of electioneering communication would become effective.[136] According to this latent definition, an electioneering

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See generally McConnell v. FEC, 540 U.S. 93, 283–86 (Thomas, J., concurring in part, concurring in judgment in part, and dissenting in part) (noting media corporations and non-media corporations cannot be distinguished), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010).

132. *See* 52 U.S.C.A. § 30118 (f)(3)(B)(i) (acknowledging media corporations are excepted from the definition of electioneering communication under the law).

133. *See Citizens United,* 558 U.S. at 353 ("The First Amendment was certainly not understood to condone the suppression of political speech in society's most salient media.").

134. Conversely, the Court could itself create a distinction between broadcast communications that Congress could regulate and those it could not with respect to elections, using the familiar language of express advocacy and issue advocacy. Buckley v. Valeo, 424 U.S. 1, 41–44 (1976) (per curiam). The Court has continuously affirmed the distinction between express and issue advocacy. *See, e.g.*, FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 249 (1986) (highlighting the differences between express and issue advocacy).

135. Predicting a constitutional challenge to its definition of "electioneering communication," BCRA provides a latent definition of electioneering communication, which would become effective if the primary definition were "held to be constitutionally insufficient by final judicial decision to support the regulation." 52 U.S.C.A. § 30118 (f)(3)(B)(ii). Senate Amendment 40, sponsored and modified by Senator Arlen Specter, provided the backup definition of "electioneering communication" in BCRA. S. Amend. 140 to S. 27, 107th Cong. (as passed by Senate, Mar. 29, 2001). During the floor debate, Senator Specter explained that one of the goals of the amendment was "to insert a definition so that the bill will survive a constitutional challenge under" precedent that required specific language be used to indicate that an issue advertisement was the functional equivalent of express advocacy. 147 CONG. REC. 5051 (2001). Otherwise, regardless of "the clear purpose of these ads," they would be ruled "issue ads and, therefore, could be paid for with soft money." *See id.* at 5052 ("The expanded test of having 'no plausible meaning other than an exhortation to vote for or against a specific candidate' would make it plain that the kinds of ads which have been viewed as being issue ads are really advocacy ads.").

136. Of course, the substituted definition of "electioneering communication" would still need to survive challenges to its constitutionality, yet the Court sidestepped the question of the backup definition's constitutionality in *McConnell v. FEC. See McConnell,* 540 U.S. at 190 n.73 (upholding the primary definition of electioneering communication). However, precedent suggests the substituted definition would survive judicial scrutiny. *See* FEC v. Wis. Right to Life, Inc. (WRTL), 551 U.S. 449, 476 (2007) ("This Court has never recognized a compelling interest in regulating ads, like WRTL's, that are neither express advocacy nor its functional equivalent."). Justice Souter notes in *FEC v. Wisconsin Right to Life, Inc.*, the backup definition of electioneering communication is "essentially

communication is "any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office . . . and which also is *suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.*"[137] The latent definition does not aid Senator Cruz's argument. Because the goal of *Saturday Night Live* can reasonably be understood to be something different than increasing or decreasing the public support of a specific candidate, the latent definition of "electioneering communication" would not prohibit the program.[138] While *Saturday Night Live* would escape prosecution in the legal universe Senator Cruz is imagining, a television program that expressly advocates for or against a federal candidate or leads to an unmistaken impression that it seeks to generate support for or against a federal candidate, would not be immune from prosecution under the backup definition of "electioneering communication."[139]

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identical to the Chief Justice's test for evaluating an as-applied challenge to the original definition of electioneering communication regulation[,] [which] is permissible only if the communication is 'susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL*, 551 U.S. at 534 (Souter, J. dissenting).

137. 52 U.S.C.A. § 30118 (f)(3)(A)(ii) (emphasis added).

138. The scope of the backup definition is much narrower and prohibits a corporate-funded broadcast only if it engages in express advocacy or the functional equivalent of express advocacy. 52 U.S.C.A. § 30118 (f)(3)(B)(ii); *see also WRTL*, 551 U.S. at 476, 492 (defining "functional equivalent of express advocacy" as advertisements that can only be interpreted "as an appeal to vote for or against a specific candidate"). *Saturday Night Live* creator Lorne Michaels insists the goal of the show's political plotlines is to generate laughs and not to impart a political message. Leslie Larson, *'SNL' Creator Lorne Michaels Says Republicans Take a Joke Better Than Democrats*, N.Y. DAILY NEWS (Feb. 3, 2014, 10:15 AM), http://www.nydailynews.com/news/politics/lorne-michaels-gop-takes-joke-better-article-1.1600335. Discussing any partisan disparity between the targets of his show's political satire, Michaels says, "The NBC show picks on the Democrats less because they 'tend to take it personally.'" *Id.* For an in-depth discussion of the influence of *Saturday Night Live* on American politics, consult TOM SHALES & JAMES ANDREW MILLER, LIVE FROM NEW YORK: AN UNCENSORED HISTORY OF SATURDAY NIGHT LIVE (2002). Therefore, *Saturday Night Live*'s political satire is beyond the scope of the prohibition of corporate funded electioneering communication under the backup definition.

139. *Compare* Bill Carter, *Maher Wants His Show to Decide a House Race*, N.Y. TIMES (Jan. 30, 2014), http://www.nytimes.com/2014/01/31/arts/television/maher-wants-his-show-to-decide-a-house-race.html (reporting the host of *Real Time with Bill Maher* launched a segment on his HBO program with the goal of "outright meddling with the political process"), *and* Bill Carter, *Punch Line with Real Political Punch*, N.Y. TIMES (Nov. 2, 2014), http://www.nytimes.com/2014/11/03/business/media/bill-maher-flip-a-district-campaign-to-end-on-election-day.html (commentating Bill Maher is using his television program as a platform to defeat an incumbent legislator), *with* Larson, *supra* note 138 (affirming *Saturday Night Live* does not have a political agenda). Maher's "Flip a District" campaign targeted Representative John Kline of Minnesota's second congressional district. Corey Mitchell, *Comedian Maher Targets Kline for 'Flip a District' Campaign*, STAR TRIB. (Sept. 15, 2014, 4:15 AM), http://www.startribune.com/politics/statelocal/275093621.html. To leave no doubt regarding his intention to solicit votes against Representative Kline, Maher launched a social media campaign that expressly urged his fans to vote against the Congressman. *See, e.g.*, Bill Maher

E. *The Death of Senate Joint Resolution 19 but Not the Movement*

On September 11, 2014, in a roll call vote for cloture, Senate Joint Resolution 19 received fifty-four votes.[140] While a majority of the Senate voted for the bill, it takes sixty votes to avoid a filibuster, "end debate[,] and force a vote."[141] Even if Republicans had not filibustered the bill, a constitutional amendment requires a two-thirds vote.[142] Essentially, the failure to survive a cloture vote killed Senate Joint Resolution 19.

Nevertheless, as with many things in politics, the end of debate in the Capitol building does not settle the issue—it simply sends it back to the grassroots until Congress is again ready to address it.[143] With the amount of public support in favor of a constitutional amendment to overturn the Court's holding in *Citizens United*, the key question is not whether there will be further efforts to amend the Constitution, but rather when those efforts will again reach the floor of Congress and what they will look like when they do.[144]

(@billmaher), TWITTER (Nov. 4, 2014, 11:37 AM), https://twitter.com/billmaher ("Wouldn't it be cool if a flash mob could change history? One that shows up at the voting booth? Come on MN#2, now's the moment - #FLIPKLINE"). While many Republican representatives dismissed Maher's attacks, Representative Kline attempted to turn the attacks to his political advantage. *Compare* Matt Fuller, *Republicans Mostly Shrug Off Bill Maher Threat*, ROLL CALL (Feb. 5, 2014, 6:08 PM), http://blogs.rollcall.com/218/many-in-gop-shrug-off-maher-threat (reporting Maher's campaign inspired little trepidation in republican members of Congress), *with* Jordan Ray, *John Kline Tries to Turn Tables on Bill Maher*, POLITICO (Sept. 16, 2014, 6:55 AM), http://www.politico.com/story/2014/09/john-kline-bill-maher-110998.html (repeating Representative Kline's accusation that his general election opponent is coordinating with Maher), *and* Mitchell, *supra* ("Kline hopes to seize on the announcement as a rallying point."). If Congress were to lift the media corporation exemption to electioneering communication, thereby triggering its latent definition, Representative Kline might have had legal options available to address Maher's attacks because Maher is expressly advocating against Representative Kline's campaign. Maher's campaign ultimately failed to unseat Representative Kline. Nikki Schwab, *Bill Maher Fails to Flip a District*, U.S. NEWS & WORLD REP. (Nov. 5, 2014, 1:33 PM), http://www.usnews.com/news/articles/2014/11/05/bill-maher-fails-to-flip-a-district.

140. 160 CONG. REC. S5544 (daily ed. Sept. 11, 2014) (roll call vote no. 261).

141. John Nichols, *The Senate Tried to Overturn 'Citizens United' Today. Guess What Stopped Them?*, THE NATION (Sept. 11, 2014, 4:30 PM), http://www.thenation.com/blog/181590/senate-tried-overturn-citizens-united-today-guess-what-stopped-them. To survive a cloture motion in the Senate, a piece of legislation must receive at least sixty affirmative votes. Senate Rule XXII, S. Res. 285, 113th Cong. (2013).

142. *See* U.S. CONST. art. V (requiring two-thirds of both houses of Congress to propose a constitutional amendment); *see also* Nichols, *supra* note 141 (reiterating a simple majority in the Senate is not enough to amend the Constitution).

143. Public support for a constitutional amendment is growing as even more states are contemplating resolutions to request Congress pass an amendment. *See* Nichols, *supra* note 141 (describing the coalition pushing for a constitutional amendment as a group that refuses to "tinker around the edges of the crisis").

144. While the New York Times Editorial Board predicted an unsuccessful outcome for Senate

XI. CONCLUSION

Congress must amend the Constitution to restore its ability to steer the ship of state. The goal of American democracy must remain forming the "more perfect union,"[145] forever pushing the American people and their representatives to integrate the governing document of the United States with the original vision for the nation.[146] The Founding Fathers sold the Constitution on the promise that every qualified American may seek to govern in their democracy.[147] However, the massive influx of money into the political system, thanks to *Citizens United*, has made it nearly impossible for the average American to seek federal office.[148] Once again, Congress must correct the course to bring laws back into alignment with the vision.

The ideal of the United States rests firmly in egalitarianism. From the enunciation of the first self-evident truth, the Founders of this country pledged themselves to the realization of the ideal "that all men are created equal" and that "whenever any [f]orm of [g]overnment becomes destructive of these ends, it is the [r]ight of the People to alter or to abolish it."[149] *Buckley* and *Citizens United* represent a judicial assault on egalitarian values.[150] For too long, the Supreme Court's judicial civil war over the correct interpretation of free speech has pitted liberty against union.[151] In the way Jefferson advocated the colonists shake off the yoke

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Joint Resolution 19, it attributed the bill's sponsors "willingness to undertake a long and difficult effort" to "the importance they attach to restoring fairness to American politics by reducing the influence of big money." Rosenthal et al., *supra* note 33. Describing how the momentum for a constitutional amendment has built in Congress over the years, Senator Udall explained the amendment he co-sponsored in the 111th Congress had four co-sponsors, while Senate Joint Resolution 19 had forty-nine. *See* Press Release, Tom Udall, Senator for N.M., Udall Encouraged by Growing Support for Constitutional Amendment (Sept. 11, 2014), http://www.tomudall.senate.gov/?p=press_release&id=1756. While Senator Udall pledged to introduce a bill similar to Senate Joint Resolution 19 in the 114th Congress, reformers do not expect much progress with the Republicans taking control of the Senate in 2015. *Id.* The issue will continue to percolate at the grassroots level until it can emerge in a more favorable legislative climate.

145. U.S. CONST. pmbl.

146. H.R. DOC. NO. 106-215 (1986) ("The Declaration of Independence was the promise; the Constitution was the fulfillment.").

147. THE FEDERALIST NO. 57, at 328 (James Madison) (ABA ed. 2009) ("No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people.").

148. Udall, *supra* note 47, at 246 (discussing how the fundraising demands of the modern campaign "discourages many qualified Americans from running for office").

149. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

150. *See* Andre, *supra* note 12, at 70 (discussing the two opposing philosophical interpretations of the freedom of speech in *Citizens United*).

151. 6 REG. DEB. 80 (1830) ("'Liberty first and Union afterwards'; but everywhere, spread all over in characters of living light, blazing on all its ample folds . . . that other sentiment, dear to every

of British imperialism to safeguard egalitarian values, the People's elected representatives may protect those values by amending the Constitution to ensure the courts correctly interpret the will of the People.

The Supreme Court's acceptance of the premise that money is synonymous with pure speech and the way it has so narrowly defined the government's compelling interest in regulating how campaigns are financed has diminished the scope of congressional authority to the point Congress cannot legislate.[152] Regulating politicians' means to finance campaigns has many positive effects. If Congress was able to place reasonable restrictions on campaign contributions and expenditures, the republic would be stronger, as public servants—liberated from the fundraising straightjacket—could devote themselves more fully to their official duties.[153] Indeed, if more citizens can seek public office, without the trepidation of raising an inordinate amount of money, competition in the political arena may raise the quality of the people's representation.[154]

In 2014, the long fight to overturn *Buckley* and *Citizens United* reached a major milestone—a constitutional amendment reached the Senate floor. Senate Joint Resolution 19 drew predictable and refutable criticism.[155] Senator Ted Cruz's accusation that the proposed constitutional amendment would have led to the imprisonment of political satirists is both important and illegitimate.[156] Since the current law does not allow Lorne Michaels to be led away in handcuffs for lampooning a public figure,[157] Congress would have to change the laws to fulfill Senator

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true American heart[—]Liberty and Union, now and forever, one and inseparable!").

152. While state legislatures have the constitutional duty to prescribe "times, places and manner of holding elections for Senators and Representatives" in their respective states, Congress reserves the right to "alter such regulations." U.S. CONST. art. 1, § 4, cl. 1.

153. *See* Udall, *supra* note 47, at 245 (discussing the practical effects of the "endless campaign cycle").

154. *See* Nadia Urbinati, *Free Speech As the Citizen's Right*, *in* POST, *supra* note 71, at 125, 133–34 ("Contemporary societies are democratic not only because they have free elections and multiple political parties, but also because they allow effective political competition and debate among diverse and competing views."). *But see* Julie Scharper, *Crowded Fields, Strong Incumbents in City Council Races*, BALT. SUN (Sept. 9, 2011), http://articles.baltimoresun.com/2011-09-09/news/bs-md-ci-city-council-races-20110908_1_william-pete-welch-city-council-races-12th-district-seat/3 (suggesting a crowded electoral field benefits the incumbent).

155. The argument Congress could remove the media corporation exemption for electioneering communication emanates from *Citizens United*. *See* Citizens United v. FEC, 558 U.S. 310, 382 (2010) (Roberts, C.J., concurring) (calling the media corporation exemption "a matter of legislative grace").

156. With the popularity of satirical television programming, Senator Cruz's accusation would have a profound effect on American culture.

157. "Lorne Michaels is an Emmy Award-winning producer and writer, best known as the creator and executive producer of 'Saturday Night Live.'" *Lorne Michaels*, NBC,

Cruz's Orwellian vision.[158] While Senate Joint Resolution 19 would have restored Congress's ability to enact meaningful campaign finance reform, there is no support for the argument that Congress would be able to use their restored authority in an unchecked fashion.[159] Senate Joint Resolution 19 ultimately failed to become law, but the tension between the two competing visions of the freedom of speech remains. While the Court currently gives "maximum deference to money," reformers will continue to work toward a constitutional amendment that will restore the Court's deference to the republic and its citizens.[160]

http://www.nbc.com/saturday-night-live/about/bio/lorne-michaels (last visited Oct. 8, 2015).

158. Jacobson, *supra* note 108 (describing the improbable chain of events that would be need to happen for Senator Cruz's accusation to come to fruition).

159. Congress's actions would be tempered by both the Court and the electorate.

160. Firestone, *supra* note 30.