



# The Practical Reality of a *Citizens United* Constitutional Amendment

**Trevor Potter**  
President, Campaign Legal Center  
Senior Advisor, Issue One

## Prepared for Issue One

For more information on achievable reforms, please visit [BlueprintsForDemocracy.org](http://BlueprintsForDemocracy.org), which describes actions states and localities are taking to provide citizen funding for elections, political spending disclosure, and other reforms.

The public outrage over the Supreme Court's decision in *Citizens United v. FEC* is palpable. Eighty percent of Americans—an overwhelming majority of both parties, something rarely seen in American political life today—believe that the decision should be overturned. Much of the energy around undoing the damage done by the Court's campaign finance jurisprudence has focused on amending the Constitution. Although the public targets the *Citizens United* decision, the court rulings overturning campaign finance regulation are more numerous and far reaching than just that one case.

### The Supreme Court's First Amendment Theory

In *Citizen United v. Federal Election Commission (FEC)*, 558 U.S. 310 (2010), the Supreme Court opened the door for corporations and labor unions to make unlimited independent expenditures to influence our elections. The decision is based on the Court's theory that independent expenditures do not present a danger of corrupting candidates or officeholders. The legal foundation for this was laid with the Court's seminal campaign finance decision *Buckley v. Valeo*, 424 U.S. 1 (1976). The *Buckley* case

was a sweeping challenge to the newly enacted Federal Election Campaign Act (FECA)—the post-Watergate reforms that form the basis of our current campaign finance system. FECA established both contribution and expenditure limits. Contribution limits place a ceiling on how much money an individual can give to a candidate, party or political committee. Expenditure limits, on the other hand, cap the amount of money an individual, candidate, party or political committee can spend on their own communications.

In *Buckley*, the Court found that both contribution and expenditure limits implicate First Amendment interests. In *Buckley*, however, the Court distinguished between expenditures and contributions, stating that expenditure limits “represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech,” while contribution limits “permit[] the symbolic expression of support evidenced by a contribution but do[] not in any way infringe the contributor's freedom to discuss candidates and issues.” *Buckley*, at 19-21.

Thus, since *Buckley*, the Supreme Court has been mostly receptive to campaign finance regulations imposing

contribution limits while rejecting almost all restrictions on expenditures. In *Citizens United*, the First Amendment right found by the Buckley Court for individuals to make unlimited independent expenditures was extended by the Court's 5-4 majority to include independent spending by corporations.

The proposed constitutional amendments to undo *Citizen United* seek to make clear in the text of the Constitution that Congress and the states may enact campaign finance regulations that limit the ability for corporations to spend money to influence our elections and, more broadly, that Congress may enact other "reasonable" restrictions on money in politics.



### Requirements for Amending the Constitution

Practically and politically, amending the Constitution is not easily done. The Constitution requires a two-thirds vote by the House and Senate. U.S. Const. art. V. After achieving consensus from two-thirds of Congress, three-fourths of the state legislatures (37) must ratify the proposed amendment. Historically, efforts to amend the Constitution have been successful when there has been a nationwide movement representing wide bipartisan consensus among citizens. Although poll numbers indicate there is broad public support for campaign finance reform, efforts have so far not achieved the critical bipartisan sponsorship of Republican lawmakers and party leaders that would be required for a successful constitutional amendment. Since 38 states have at least one legislative house

controlled by Republicans, bipartisan support for any amendment is essential.

### What the Proposed Amendments Say

Several proposed amendments have been introduced in Congress. The Democracy for All Amendment was supported by the Democratic leadership in the Senate and brought to the floor for a vote in 2014. It reads:

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

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

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

The amendment failed to receive the 60 votes necessary to proceed. The Democracy for All Amendment was introduced in the 113th Congress, S.J. Res. 19, 113th Cong. (2013), and in the 114th Congress, S.J. Res. 5, 114th Cong. (2015).

Drafting a constitutional amendment that alters the First Amendment just enough to negate the damage of *Citizens United*, and other Supreme Court campaign finance opinions, but not so much as to undo the crucial protections the Constitution

affords free speech, is not easily done. If adopted, this amendment would still face difficult questions of interpretation—questions that would ultimately be decided by the same Supreme Court that decided *Citizens United* (or perhaps a differently constituted one—we do not know).

For example, the amendment allows Congress and the states to “set reasonable limits” on the raising and spending of campaign funds. What one state determines to be “reasonable” may not be deemed so by the Supreme Court. In fact, the Court has recently invalidated contribution limits it found to be too low. In *Randall v. Sorrell*, 548 U.S. 230 (2006), the Court found that Vermont’s \$200 contribution limits were “disproportionate to the public purposes they were enacted to advance.” These were contribution limits that the state of Vermont had thought to be “reasonable.”

The proposed amendment also states that “[n]othing in this article shall be construed to grant Congress or the States the power to abridge the freedom of the press.” This is certainly an important proviso, likely necessary for passage, but it is difficult to know exactly what it means. In a world of increasingly fluid media organizations and forms—many web based—determining who may be considered “press” would be a critical task with important consequences. But there is a high probability that those seeking to evade regulation would claim such an exemption

under this provision, requiring regulatory and court interpretation.

Finally, even with a new constitutional amendment in place, it would not necessarily remedy all of the ills plaguing our campaign finance system. For instance, we would still be facing an ineffective, gridlocked FEC unable to enforce the law, unless it is reformed in separate legislation. Further, an amendment would only empower Congress to pass new laws regulating money in politics; whether Congress would actually do so, and how, is a different question.

*Further, an amendment would only empower Congress to pass new laws regulating money in politics; whether Congress would actually do so, and how, is a different question.*

Meanwhile, Congress already has the power under existing Supreme Court precedent to enact legislative changes that would have a most profound impact, including: changing the way campaigns are funded by providing for matching funds for small contributions to candidates and parties, vouchers, rebates for contributions, etc.; ensuring the activity of independent groups is actually independent of candidates and parties; disclosing the underlying sources of dark money flowing into elections; and restructuring the broken FEC. These are all important changes that could be made without first achieving the very high political hurdle of passing a constitutional amendment.

The language of several other proposed amendments is appended to this document.





## Appendix: Other Proposed Constitutional Amendments

### Senate Joint Resolution 4, January 21, 2015:

Section 1. Whereas the right to vote in public elections belongs only to natural persons as citizens of the United States, so shall the ability to make contributions and expenditures to influence the outcome of public elections belong only to natural persons in accordance with this Article.

Section 2. Nothing in this Constitution shall be construed to restrict the power of Congress and the States to protect the integrity and fairness of the electoral process, limit the corrupting influence of private wealth in public elections, and guarantee the dependence of elected officials on the people alone by taking actions which may include the establishment of systems of public financing for elections, the imposition of requirements to ensure the disclosure of contributions and expenditures made to influence the outcome of a public election by candidates, individuals, and associates of individuals, and the imposition of content neutral limitations on all such contributions and expenditures.

Section 3. Nothing in this Article shall be construed to alter the freedom of the press.

Section 4. Congress and the states shall have the power to enforce this Article through appropriate legislation.

### Senate Joint Resolution 7, introduced February 4, 2015:

Section 1. The rights enumerated in this Constitution and other rights retained by the people shall be the rights of natural persons.

Section 2. As used in this Constitution, the terms 'people', 'person', and 'citizen' shall not include a corporation, a limited liability company, or any other corporate entity established by the laws of any State, the United States, or any foreign State.

Section 3. A corporate entity described in section 2 shall be subject to such regulation as the people, through representatives in Congress and State representatives, may determine reasonable, consistent with the powers of Congress and the States under this Constitution.

Section 4. Nothing in this Constitution shall be construed to limit the rights enumerated in this Constitution and other rights retained by the people, which are not unalienable.

### House Joint Resolution 48, introduced April 28, 2015:

Section 1. The rights protected by the Constitution of the United States are the rights of natural persons only. Artificial entities, such as corporations, limited liability companies, and other entities, established by the laws of any State, the United States, or any foreign state shall have no rights under this Constitution and are subject to regulation by the People, through Federal, State, or local law. The privileges of artificial entities shall be determined by the People, through Federal, State or local law, and shall not be construed to be inherent or inalienable.

Section 2. Federal State and local government shall regulate, limit, or prohibit contributions and expenditures, including a candidate's own contributions and expenditures, to ensure that all citizens, regardless of their economic status, have access to the political process, and that no person gains, as a result of that person's money, substantially more access or ability to influence in any way the election of any candidate for public office or any ballot measure. Federal, State, and local governments shall require that any permissible contributions and expenditures be publicly disclosed. The judiciary shall not construe the spending of money to influence elections to be speech under the First Amendment.