The Udall Amendment: A Briefing Book

Senator Tom Udall's (NM) S.J. Res. 19 would revoke nearly four decades of campaign finance jurisprudence from the Supreme Court and greatly reduce the quantity (and likely quality) of debate in this country. As written, the amendment could be read in myriad ways and fundamentally miscomprehends the free press clause. It is a rhetorical document that highlights the difficulty in tampering with the First Amendment. More than anything, it bears stating that the Udall amendment would essentially overturn the First Amendment to the United States Constitution as it applies to political speech rights, providing incumbent politicians with virtually unfettered power to regulate free speech.

This Briefing Book provides analyses, reports, columns, and blog posts from the Center examining the many issues with this amendment proposal and includes select newspaper columns from independent voices highlighting a variety of serious concerns with the Udall amendment.

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Amending the First Amendment:

The Udall Proposal is Poorly Drafted, Intellectually Unserious, and Extremely Dangerous to Free Speech

The Senate Judiciary Committee will soon hold a hearing on S.J. Res. 19, a constitutional amendment to restrict First Amendment rights proposed by Senator Tom Udall (D-NM) and sponsored by 41 other senators. Senate Democratic leaders have indicated they plan to bring the measure to a vote on the Senate floor.

What does the amendment do?

The Udall Amendment is not the same amendment supported by Justice John Paul Stevens, although the basic thrust of the two texts is the same.[1] The Udall proposal is designed to overturn essentially all of the Supreme Court's constitutional jurisprudence going back to the 1976 (and near-unanimous) decision in *Buckley v. Valeo*.[2] Even given this ambitious intention, however, many of the practical effects of the amendment cannot be reliably predicted.

Section 1

The first provision states that "[t]o advance the fundamental principle of political equality for all, and to protect the integrity of the legislative and electoral processes, Congress shall have power to regulate the raising and spending of money and in-kind equivalents with respect to Federal elections, including through setting limits on—(1) the amount of contributions to candidates for nomination to, or for election to, Federal office; and (2) the amount of funds that may be spent by, in support of, or in opposition to such candidates."[3]

This section begins with a constitutional rarity: a preamble.[4] Consequently, while it grants Congress the power to limit contributions and expenditures concerning candidates, it also justifies

[1] Adam Liptak, "Justice Stevens Suggests Solution for 'Giant Step in the Wrong Direction,'" *The New York Times*. Retrieved on May 28, 2014. Available at: http://www.nytimes.com/2014/04/22/us/politics/justice-stevenss-prescription-for-giant-step-in-wrong-direction.html?_r=0 (May 26, 2014).

[2] "Udall Constitutional Amendment on Campaign Finance to get Senate Floor Vote," Office of U.S. Senator Tom Udall. Retrieved on May 28, 2014. Available at: http://www.tomudall.senate.gov/?p=press_release&id=1637 (April 30, 2014) ("Udall introduced his constitutional amendment…last June to reverse the Court's 1976 *Buckley v. Valeo* decision, which held that restricting independent campaign expenditures violates the First Amendment right to free speech.")

[3] "S. J. Res. 19 (113th Congress, 1st Session)," United States Government Printing Office. Retrieved on May 28, 2014. Available at: http://www.gpo.gov/fdsys/pkg/BILLS-113sjres19is/pdf/BILLS-113sjres19is.pdf (June 18, 2013).

[4] While the Constitution itself famously begins with a preamble written in the voice of "we the people," only one other portion includes a preamble describing the purpose of governmental authority: the Second Amendment. U.S. CONST., amend. II. Of course, in that case, a great deal of disagreement and difficulty stems from the interaction between the preamble's invocation of "a well regulated militia" and the final language stating that "the right to keep and bear arms shall not be infringed." *See District of Columbia v. Heller*, 554 U.S. 570 at 577 (2000) ("The Second Amendment is naturally divided into two parts: its prefatory clause and its

Congress having this power in order to "advance the fundamental principle of political equality for all, and to protect the integrity of the legislative and electoral processes." This may suggest that Congress may legislate in this area only for this purpose and not others, and that Congress must somehow evidence this subjective intention when passing laws. How two deliberative bodies containing hundreds of voting members can meet such a subjective-intent test is unclear and was probably not considered by the drafters.

The larger issue is that, under our present system, it is unconstitutional to strengthen the voices of some individuals at the expense of others. The Court has explained that "equalizing campaign resources 'might serve not to equalize the opportunities of all candidates, but to handicap a candidate who lack[s] substantial name recognition or exposure of his views before the start of the campaign."[5]

Because of this, efforts to 'level the playing field' do "not serve 'a legitimate government objective,' let alone a compelling one."[6] Under the Udall regime, this would be flipped on its head – government efforts to equalize campaign resources might have to be defended on the grounds of "advanc[ing]…political equality for all," or "to protect the integrity of the legislative and electoral processes."

Second, it grants broad power to Congress to regulate spending in order to "protect the integrity of the legislative and electoral processes." Notably, the amendment does not use the familiar phrase "corruption or the appearance of corruption" – the present permissible rationale for the government's restriction of campaign contributions.[7]

This could represent a sea change, because under *Buckley* and its progeny, "the Government's interest in preventing the appearance of corruption is equally confined to the appearance of *quid pro quo* corruption…[thus], the Government may not seek to limit the appearance of mere influence or access."[8] "The fact that speakers may have influence over or access to elected officials does not mean that those officials are corrupt."[9] Under the Udall amendment, it may be possible to regulate speech on a generic favoritism or influence theory. No one can say with certainty what such a theory would look like, except that it would be broader and less defined than the law at present.

In particular, it invites Congress to discriminate amongst entities that have differing levels of "influence," based upon public perception, instead of any kind of hard data. Judges are routinely asked to defer to Congress in this area. Under this amendment, they may be asked to defer to

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operative clause. The former does not limit the latter grammatically, but rather announces a purpose."), *compare with* 554 U.S. at 643 (Stevens, J., dissenting) ("The Court today tries to denigrate the importance of this [preambulatory] clause…That is not how this Court ordinarily reads such texts, and it is not how the preamble would have been viewed at the time the Amendment was adopted."); *see also* Akhil Reed Amar, "Second Thought," *The New Republic*. Retrieved on May 28, 2014. Available at: http://www.newrepublic.com/article/politics/second-thoughts (July 12, 1999). ("This curious syntax has perplexed most modern readers: How do the two main clauses with different subject-nouns fit together? Do these words guarantee a right of militias, as the first clause seems to suggest, or a right of people, as the second clause seems to say?"). This experience ought to be sufficient to discourage Sen. Udall's style of constitutional draftsmanship.

[5] *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2826 (2011) (quoting *Buckley v. Valeo*, 424 U.S. 1, 56 (1976)).

[6] *Id.* at 2825 (quoting *Davis v. FEC*, 554 U.S. 724, 741 (2008) (internal quotation marks omitted)).

[7] *See, e.g. McCutcheon v. FEC*, 134 S. Ct. 1434, 1450-1451 (2014).

[8] *Id.* at 1451.

[9] *Citizens United v. FEC*, 558 U.S. 310, 359 (2010).

Congress's determination that corporations, but not unions, may contribute to candidates,[10] or that nonprofit corporations like the Sierra Club may be banned from mentioning candidates for office when discussing environmental issues, or that family members of prominent media personalities may be regulated differently from less-connected Americans. A corruption standard helps prevent such gamesmanship; an "integrity" or "political equality" standard would not.

Next, the amendment permits "Congress…to regulate the raising and spending of money and *in-kind equivalents* with respect to Federal elections." What qualifies as an "in-kind equivalent" is unclear, but this would likely be read to permissibly restrict, for instance, a person from volunteering for a campaign.[11]

The text then includes two examples of how Congress may advance equality and integrity. A close reading of the preamble shows that these are just that: examples. Congress's power to regulate in the area of speech is clearly broader under this text, as the preamble uses the phrase "*including* through setting limits on ["contributions" and funds "spent" on candidates]. Consequently, it is impossible to fairly read this amendment as narrowly targeted to spending in elections. While perhaps intended for rhetorical flourish and popular consumption, the broad grant of power in the beginning of the amendment is precisely that: a broad grant. It is not apparent that anyone has seriously considered the dangers posed by allowing Congress, under the rhetorical cover of opposing *Citizens United*, to broadly regulate speech.

Nevertheless, the examples given are likely intended to be central to the operation of the amendment, although that is not the ultimate effect of the chosen language.

First, Congress may limit contribution amounts directly to candidates. Under the present law, which has been developed in the absence of any explicit enabling constitutional provision to enact such limits, most limits on contributions given directly to candidates have been upheld. However, this section could plausibly be read to re-establish the aggregate limits regime overturned by *McCutcheon v. FEC*,[12] or any contribution limit at all, including the limits found unconstitutionally low in *Randall v. Sorrell*. As Justice Breyer's opinion noted, "contribution limits that are too low can also harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability."[13] Breyer also noted that the limits at issue were so low that "a gubernatorial campaign volunteer who makes four or five round trips driving across the State performing volunteer activities coordinated with the campaign can find that he or she is near, or has surpassed, the contribution limit. So too will a volunteer who offers a campaign the use of her house along

[10] This is presently the law in New Hampshire, and the inverse is true in Iowa. The Supreme Court has reviewed neither regime.

[11] In 2013, a gentleman named Mr. T. Augurson ran afoul of federal laws mandating disclaimers on independent expenditures during the 2012 Presidential election. Mr. Augurson's expenditure was transforming his Cadillac into an "Obamamobile"—with a "vinyl wrap with the 'Forward' Obama campaign slogan, complete with the 'O' campaign logo and likeness of the [P]resident." Eric Wang, "Campaign Finance Speed Trap," Center for Competitive Politics. Retrieved on May 28, 2014. Available at: http://www.campaignfreedom.org/2013/05/29/campaign-finance-speed-trap/ (May 29, 2013). Under the Udall amendment, it may be possible to regulate whether Mr. Augurson could drive a similar vehicle in support of a candidate in 2016.

The *Buckley* Court upheld limits on volunteer expenses for those volunteering directly for a campaign, but noted that "[t]reating these expenses as contributions when made to the candidate's campaign or at the direction of the candidate or his staff forecloses an avenue of abuse without limiting actions voluntarily undertaken by citizens independently of a candidate's campaign." *Buckley*, 424 U.S. at 37.

[12] 134 S. Ct. 1424 (2014).

[13] *Randall v. Sorrell*, 548 U.S. 230, 248-249 (2006).

with coffee and doughnuts for a few dozen neighbors to meet the candidate, say, two or three times during a campaign."[14]

Finally, section 1 permits limits on the "amount of funds that may be spent by, in support of, or in opposition to" candidate campaigns. This would permit Congress to cap spending by candidates at a specific amount. This power is explicitly extended to speech "in support of, or in opposition to" candidates – essentially allowing Congress to limit all speech about candidates.

This raises a host of unanswered questions. Would spending by independent groups lower the amount that could be spent by a candidate? What would be included in "support of" or "opposition to" a candidate? Who would decide what is support and what is phony support that highlights an unpopular stand by a candidate? Given the broad grant of authority over political speech, "support of" or "opposition to" a candidate could constitute virtually all speech about politics.

For example, in June of 2004, the American Civil Liberties Union (ACLU) ran an advertisement featuring former Navy Judge Advocate General Real Admiral John D. Hutson (ret.) asking "How can we fight to uphold the rule of law if we break the rules ourselves?" and asserted that "we are conducting the war against terrorism in a manner that is inimical to those values of freedom of justice."[15] The ad did not mention President Bush, then a candidate for re-election, whose campaign largely focused on the President's conduct of the War on Terror. *The New York Times* nonetheless characterized the ad as a negative ad urging Americans to vote Bush out of office.[16] The *Buckley* Court explicitly rejected a reading of the Federal Election Campaign Act that allowed limits on independent speech precisely because it "would provide no security for free discussion."[17]

Under the Udall regime, voter guides, issue advertisements, church bulletins (a sermon on marriage or abortion could be deemed inherently "political," and local candidates may well be identified with one or another position), and the like could all be limited – or even banned – if their funders might violate the "fundamental principle of political equality" merely by being organized as a corporation or labor union. This amendment would provide a breathtaking amount of power to congressional incumbents to set limits on speech about policy or campaigns, effectively making the First Amendment a dead letter for speech.

Section 2

Section 2 merely applies the language of section 1 to the states, with all of the concerns that apply there. Specifically, section 2 could resuscitate Arizona's Rube Goldberg equalization scheme, which was struck down by the Supreme Court in 2011. That system, where monies spent by privately funded candidates and outside groups could provide additional funding to a publicly

[14] *Randall*, 548 U.S. at 260.
[15] Laura W. Murphy and Gabriel Rottman, "Comments on Draft Guidance for Tax-Exempt Social Welfare Organizations on Candidates-Related Political Activities," American Civil Liberties Union. Retrieved on May 28, 2014. Available at: http://www.campaignfreedom.org/wp-content/uploads/2014/02/2-4-14-ACLU-Comments-to-IRS.pdf (February 4, 2014), p. 15, 29.
[16] *Id.* at 15.
[17] *Buckley v. Valeo*, 424 U.S. 1, 42 (1976).

funded candidate, was eliminated on the grounds that it served to "level the playing field."[18] Under the Udall amendment, such a system could survive constitutional scrutiny.

Section 3

The third section of the amendment provides that "[n]othing in this article shall be construed to grant Congress the power to abridge the freedom of the press." Presumably, this is intended to serve as a "media exemption" – a provision often included in campaign finance statutes to preserve the rights of *The New York Times* editorial board and Fox News's Sean Hannity to endorse and campaign for candidates.

But the scope of such an exemption is unclear. The right to a free press does not extend a specific speech right to media corporations that other Americans do not have. The free press clause is merely a natural corollary to the free speech clause, it protects the right to publish and distribute the written word.

The Supreme Court has "consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers."[19] And even in the event that "the press" did confer a separate sanction for certain speech, the Supreme Court in 2010 noted that "[w]ith the advent of the Internet and the decline of print and broadcast media, moreover, the line between the media and others who wish to comment on political and social issues becomes far more blurred."[20]

When Justice Stevens was asked to explain what was and was not press under his proposed amendment, not even he could answer.[21]

This uncertainty over who qualifies for the media exemption may not faze the regulators, however, who tend to favor established players at the expense of newcomers. The Federal Election Commission, for example, has traditionally applied the media exemption by asking, "First . . . whether the entity engaging in the activity is a press or media entity."[22] In other words, in order to qualify as a media entity, a speaker must first be a media entity. The Udall amendment's special exemption for the press would further entrench this model of circular reasoning and preferential treatment for certain speakers over others.

Conclusion

The Udall amendment would rebuke four decades of campaign finance jurisprudence from the Supreme Court and greatly reduce the quantity of debate in this country. The amendment could be read as a broad grant to Congress to regulate virtually all political speech and association, and fundamentally miscomprehends the free press clause. It is a rhetorical document, introduced during an election year, which highlights the difficulty in tampering with the First Amendment.

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[18] *Freedom Club PAC*, 131 S. Ct. at 2812.
[19] *Citizens United v. FEC*, 558 U.S. 310, 352 (2010) (internal citations and quotations omitted).
[20] *Id.*
[21] Adam Liptak, "Justice Stevens Suggests…" ("I asked whether the amendment would allow the government to prohibit newspapers from spending money to publish editorials endorsing candidates. He stared at the text of his proposed amendment for a little while. 'The 'reasonable' would apply there,' he said, 'or might well be construed to apply there.'")
[22] Federal Election Commission Adv. Op. 2010-08 (Citizens United) at 4.

Key Flaws of S.J. Res. 19

Center for Competitive Politics
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Senator Tom Udall's (NM) S.J. Res. 19 would revoke nearly four decades of campaign finance jurisprudence from the Supreme Court and greatly reduce the quantity (and likely quality) of debate in this country. As written, the amendment could be read in myriad ways and fundamentally miscomprehends the free press clause. It is a rhetorical document that highlights the difficulty in tampering with the First Amendment. More than anything, it bears stating that the amendment would essentially overturn the First Amendment to the United States Constitution as it applies to political speech rights. Here are four of the key flaws with this misguided attempt to amend the First Amendment:

1) The Udall Amendment, formally known as S.J. Res. 19, is unclear about who regulates what.

> The original version of S.J. Res 19 clearly gave states power over state elections, and Congress power over federal elections. This restriction was removed by the Senate Judiciary Committee, and the amendment now reads: "Congress and the States may regulate and set reasonable limits on the raising and spending of money by candidates and others to influence elections."
>
> Not only does the language on its face not restrict states to regulating state elections and Congress to regulating federal elections, but the fact that such a restriction was stripped from the bill would, as a general matter of statutory interpretation, mean the original restriction is not there. Potentially, states could raise Tenth Amendment arguments to void any federal regulation of state candidates, and the federal government could claim supremacy to void any state regulation of federal candidates.
>
> However, since this is a constitutional amendment, such arguments, based on other, prior provisions of the Constitution, could be swept aside. At a minimum, this potential legal battle is a distinct possibility that would require some fancy footwork by the courts to avoid.

2) The Udall amendment's inclusion of language granting Congress and the states the power to regulate the spending of money to influence elections by "artificial entities created by law" could permit government regulation of speech in churches.

Many, if not most, churches are incorporated, so leaving aside the question of what "artificial entities created by law" means, as mentioned in the Udall amendment, there could be a serious issue caused by this language. Any church body that can sue or be sued in its own name, however, could easily qualify as an "artificial entity created by law."

Whether this would override the free exercise clause is a question for the courts.

3) The Amendment is unclear about what the word "reasonable" means.

The insertion of "reasonable" into the text of S.J. Res 19 by the Senate Judiciary Committee does nothing to limit the scope of the proposed amendment. It is entirely precatory.

Although it seems contrary to the drafter's intent, it remains true that absent the express authorization to ban corporate and certain other contributions included in Section 2, a court could in theory hold that, for example, an independent expenditure ban on corporations was "unreasonable" (i.e. it could still reach the result of *Citizens United*). Presumably, a Court could declare that the only "reasonable" limits are those approved by the *Buckley* line of cases.

The second clause, however, which lacks "reasonable" language, suggests that a complete ban on spending by some entities is per se reasonable. Who really knows what will happen?

The amendment gives an interpreting court that wants to defend free speech an out against some regulations passed by Congress or the states. But, like the first two provisions, it demonstrates the utter lack of seriousness of the drafters that the amendment's effects are so unclear.

4) The Udall amendment appears to authorize content-based restrictions on speech.

Under the proposed amendment, Congress may enact legislation "To advance … political equality." Almost by definition, this suggests that content-based restrictions would be acceptable. It is true that a Court might determine that a content-based restriction based on non-content neutral law would be "unreasonable," or even hold that the amendment was enacted against a well-established background rule, and there is no evidence of attempting to change that rule. But that is all speculative.

The extensive uncertainty surrounding the effects of S.J. Res 19 is one of the biggest causes for concern with the proposal. Once passed, Congress will not be able to control how these questions are resolved. These are the dangers of messing with the First Amendment, especially in such an irresponsible way.

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Statement of David Keating
President, Center for Competitive Politics

Submitted to the Committee on the Judiciary
United States Senate
June 3, 2014

Mr. Chairman and members of the Committee, thank you for the opportunity to present our views on the hearing titled, "Examining a Constitutional Amendment to Restore Democracy to the American People." We respectfully request that our statement be entered into the public record.

The constitutional amendment being considered by the Committee today is over four times longer than the First Amendment it seeks to amend.[1] It appears to grant unlimited and frightening powers to Congress to regulate speech if lawmakers can assert any connection to an election.

Congress should not tamper with the First Amendment. Along with the rest of the Bill of Rights, the First Amendment has stood the test of time.

The First Amendment to the United States Constitution eloquently begins with five words commanding that "Congress shall make no law…" Unfortunately, Congress has too often ignored these words and passed many misguided campaign finance laws that have stifled political speech and done nothing to improve public confidence in government.

Senator Tom Udall's (NM) S.J. Res. 19 would revoke nearly four decades of campaign finance jurisprudence from the Supreme Court and greatly reduce the quantity (and likely quality) of debate in this country. As written, the amendment could be read in myriad ways and fundamentally miscomprehends the free press clause. It is a rhetorical document that highlights the difficulty in tampering with the First Amendment. More than anything, it bears stating that the amendment would essentially overturn the First Amendment to the United States Constitution. What's equally remarkable is that 42 members of the Senate support such an idea.

Unsurprisingly, observers of Congress haven't been as warm to this legislative meddling with Americans' First Amendment speech rights. *Bloomberg View's* Jonathan Bernstein characterized this constitutional amendment proposal as "bad policy and bad for democracy."[2] In analyzing the motivations behind the amendment, The Cato Institute's Trevor Burrus warned

[1] The text of the First Amendment is 45 words. The current version of S.J. Res. 19 is 200 words.
[2] Jonathan Bernstein, "Watch the Democrats Engage in Constitutional Mischief," *Bloomberg View*. Retrieved on June 2, 2014. Available at: http://www.bloombergview.com/articles/2014-05-16/watch-the-democrats-engage-in-constitutional-mischief (May 16, 2014).

that "[g]iving elected representatives the power to regulate the process by which they get elected is a terrifying proposition."[3] *The Las Vegas Review-Journal* wrote that "the electorate should be repulsed by the proposal because it's an incumbent-protection scheme. Giving elected officials control over the speech of their adversaries is a dangerous idea. Americans should remain free to ruthlessly criticize their government — and blow a fortune doing so, if they wish."[4] *The Wall Street Journal* cautioned that "[o]nce you've opened the First Amendment for revision by politicians, and reinterpretation by judges, anything can happen."[5] *The Weekly Standard*'s Terry Eastland remarked that "[t]he Udall amendment would effectively remove political speech from the speech protected by the First Amendment and relocate it in a new amendment, where it would assume the guise of a political activity to be strenuously regulated."[6]

Opposition to this proposal can be fairly characterized as bipartisan. Former White House Counsel to President Barack Obama, Bob Bauer, noted that "[t]he case for a constitutional change must rest on the claim that the problem an amendment would address is so fundamental that, in the words of James Madison, it qualifies as one of the 'great and extraordinary occasions' for revising the founding document," and challenged supporters of Senator Udall's amendment proposal to furnish evidence that would substantiate their claims.[7] The Campaign Legal Center's Senior Counsel Paul S. Ryan, an advocate of more campaign finance regulation, critiqued the amendment's vagueness and unpredictable enforcement, noting that "it's entirely impossible to predict the impact of this amendment, even if ratified."[8]

If adopted, Senator Udall's constitutional amendment would help entrench those in Congress by insulating incumbent politicians from criticism and granting members of Congress unprecedented power to regulate the speech of those they serve.

Senator Udall's Constitutional Amendment to Amend the First Amendment

In announcing his support for Senator Udall's amendment and intent to bring it to a vote on the Senate floor, Senator Majority Leader Harry Reid has argued that the amendment is necessary to "keep our elections from becoming speculative ventures for the wealthy,"[9] and has explicitly identified brothers Charles and David Koch, two billionaires associated with libertarian

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[3] Trevor Burrus, "Burrus: Should it be against law to criticize Harry Reid?," *The Boston Herald*. Retrieved on June 2, 2014. Available at: http://bostonherald.com/news_opinion/opinion/op_ed/2014/05/burrus_should_it_be_against_law_to_criticize_harry_reid (May 27, 2014).

[4] Editorial, "Money talks," *Las Vegas Review-Journal*. Retrieved on June 2, 2014. Available at: http://www.reviewjournal.com/opinion/editorial-money-talks (June 1, 2014).

[5] Editorial, "Rewriting the First Amendment," *The Wall Street Journal*. Retrieved on June 2, 2014. Available at: http://online.wsj.com/news/articles/SB10001424052702303754904577530722229309932?mg=reno64-wsj (May 6, 2014).

[6] Terry Eastland, "Democrats vs. Free Speech," *The Weekly Standard*. Retrieved on June 2, 2014. Available at: http://www.weeklystandard.com/articles/democrats-vs-free-speech_793490.html (June 2, 2014), p. 1.

[7] Bob Bauer, "'Great and Extraordinary Occasions' for Constitutional Reform—and The Question of Evidence," More Soft Money Hard Law. Retrieved on June 2, 2014. Available at: http://www.moresoftmoneyhardlaw.com/2014/05/great-extraordinary-occasions-constitutional-reform-question-evidence/ (May 19, 2014).

[8] Jim Newell, "Supreme Court's money debacle: The truth behind Dems' campaign finance amendment," *Salon*. Retrieved on June 2, 2014. Available at: http://www.salon.com/2014/05/16/supreme_courts_money_debacle_the_truth_behind_dems_campaign_finance_amendment/ (May 16, 2014).

[9] Igor Bobic and Michael McAuliff, "Harry Reid Proposes Changing Constitution to Block the Koch Brothers," *The Huffington Post*, Retrieved on June 2, 2014. Available at: http://www.huffingtonpost.com/2014/05/15/harry-reid-campaign-finance_n_5329917.html (May 15, 2014).

causes, as individuals whose influence he wishes to curb.[10] Furthermore, he has cited Justice John Paul Stevens' support of a constitutional amendment as "the nudge that [he] needed."[11]

The Udall amendment is not the same amendment supported by Justice John Paul Stevens, although the basic thrust of the two texts is the same.[12] The Udall proposal is designed to overturn essentially all of the Supreme Court's constitutional jurisprudence going back to the 1976 (and near-unanimous) decision in *Buckley v. Valeo*.[13] Even given this ambitious intention, however, as the following analysis will demonstrate, many of the practical effects of the amendment cannot be reliably predicted.

I. Section 1 of S.J. Res. 19 is written so broadly as to permit members of Congress indeterminate power to regulate political speech.

The first provision states that "[t]o advance the fundamental principle of political equality for all, and to protect the integrity of the legislative and electoral processes, Congress shall have power to regulate the raising and spending of money and in-kind equivalents with respect to Federal elections, including through setting limits on—(1) the amount of contributions to candidates for nomination to, or for election to, Federal office; and (2) the amount of funds that may be spent by, in support of, or in opposition to such candidates."[14]

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[10] *Ibid.*

[11] John Stanton and Kate Nocera, "Harry Reid Backs Constitutional Amendment to Limit Koch Brothers' Influence," *Buzzfeed*. Retrieved on June 2, 2014. Available at: http://www.buzzfeed.com/johnstanton/harry-reid-backs-constitutional-amendment-to-limit-koch-brot (May 14, 2014).

[12] Adam Liptak, "Justice Stevens Suggests Solution for 'Giant Step in the Wrong Direction,'" *The New York Times*. Retrieved on June 2, 2014. Available at: http://www.nytimes.com/2014/04/22/us/politics/justice-stevenss-prescription-for-giant-step-in-wrong-direction.html?_r=0 (May 26, 2014).

[13] "Udall Constitutional Amendment on Campaign Finance to get Senate Floor Vote," Office of U.S. Senator Tom Udall. Retrieved on June 2, 2014. Available at: http://www.tomudall.senate.gov/?p=press_release&id=1637 (April 30, 2014) ("Udall introduced his constitutional amendment…last June to reverse the Court's 1976 *Buckley v. Valeo* decision, which held that restricting independent campaign expenditures violates the First Amendment right to free speech.")

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[15] While the Constitution itself famously begins with a preamble written in the voice of "we the people," only one other portion includes a preamble describing the purpose of governmental authority: the Second Amendment. U.S. CONST., amend. II. Of course, in that case, a great deal of disagreement and difficulty stems from the interaction between the preamble's invocation of "a well regulated militia" and the final language stating that "the right to keep and bear arms shall not be infringed." *See District of Columbia v. Heller*, 554 U.S. 570 at 577 (2000) ("The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose."), *compare with* 554 U.S. at 643 (Stevens, J., dissenting) ("The Court today tries to denigrate the importance of this [preambulatory] clause…That is not how this Court ordinarily reads such texts, and it is not how the preamble would have been viewed at the time the Amendment was adopted."); *see also* Akhil Reed Amar, "Second Thought," *The New Republic*. Retrieved on June 2, 2014. Available at: http://www.newrepublic.com/article/politics/second-thoughts (July 12, 1999). ("This curious syntax has perplexed most modern readers: How do the two main clauses with different subject-nouns fit together? Do these words guarantee a right of militias, as the first clause seems to suggest, or a right of people, as the second clause seems to say?"). This experience ought to be sufficient to discourage Sen. Udall's style of constitutional draftsmanship.

deliberative bodies containing hundreds of voting members can meet such a subjective-intent test is unclear and was probably not considered by the drafters.

The larger issue is that, under our present system, it is unconstitutional to strengthen the voices of some individuals at the expense of others. The Court has explained that "equalizing campaign resources 'might serve not to equalize the opportunities of all candidates, but to handicap a candidate who lack[s] substantial name recognition or exposure of his views before the start of the campaign.'"[16]

Because of this, efforts to 'level the playing field' do "not serve 'a legitimate government objective,' let alone a compelling one."[17] Under the Udall regime, this would be flipped on its head – government efforts to equalize campaign resources might have to be defended on the grounds of "advanc[ing]…political equality for all," or "to protect the integrity of the legislative and electoral processes."

Second, the amendment grants broad power to Congress to regulate spending in order to "protect the integrity of the legislative and electoral processes." Notably, the amendment does not use the familiar phrase "corruption or the appearance of corruption" – the present permissible rationale for the government's restriction of campaign contributions.[18]

This could represent a sea change, because under *Buckley* and its progeny, "the Government's interest in preventing the appearance of corruption is equally confined to the appearance of *quid pro quo* corruption…[thus], the Government may not seek to limit the appearance of mere influence or access."[19] "The fact that speakers may have influence over or access to elected officials does not mean that those officials are corrupt."[20] Under the Udall amendment, it may be possible to regulate speech on a generic favoritism or influence theory. No one can say with certainty what such a theory would look like, except that it would be broader and less defined than the law at present.

In particular, it invites Congress to discriminate amongst entities that have differing levels of "influence," based upon public perception, instead of any kind of hard data. Judges are routinely asked to defer to Congress in this area. Under this amendment, they may be asked to defer to Congress's determination that corporations, but not unions, may contribute to candidates,[21] or that nonprofit corporations like the Sierra Club may be banned from mentioning candidates for office when discussing environmental issues, or that family members of prominent media personalities may be regulated differently from less-connected Americans. A corruption standard helps prevent such gamesmanship; an "integrity" or "political equality" standard would not.

[16] *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2826 (2011) (quoting *Buckley v. Valeo*, 424 U.S. 1, 56 (1976)).
[17] *Id.* at 2825 (quoting *Davis v. FEC*, 554 U.S. 724, 741 (2008) (internal quotation marks omitted)).
[18] *See, e.g. McCutcheon v. FEC*, 134 S. Ct. 1434, 1450-1451 (2014).
[19] *Id.* at 1451.
[20] *Citizens United v. FEC*, 558 U.S. 310, 359 (2010).
[21] This is presently the law in New Hampshire, and the inverse is true in Iowa. The Supreme Court has reviewed neither regime.

Next, the amendment permits "Congress…to regulate the raising and spending of money and *in-kind equivalents* with respect to Federal elections." What qualifies as an "in-kind equivalent" is unclear, but this would likely be read to permissibly restrict, for instance, a person from volunteering for a campaign.[22]

The text then includes two examples of how Congress may advance equality and integrity. A close reading of the preamble shows that these are just that: examples. Congress's power to regulate in the area of speech is clearly broader under this text, as the preamble uses the phrase "*including* through setting limits on ["contributions" and funds "spent" on candidates]. Consequently, it is impossible to fairly read this amendment as narrowly targeted to spending in elections. While perhaps intended for rhetorical flourish and popular consumption, the broad grant of power in the beginning of the amendment is precisely that: a broad grant. It is not apparent that anyone has seriously considered the dangers posed by allowing Congress, under the rhetorical cover of opposing *Citizens United,* to broadly regulate speech. Nevertheless, the examples given are likely intended to be central to the operation of the amendment, although that is not the ultimate effect of the chosen language.

To illustrate these issues, let's examine how this amendment might work, if ratified. In 2023, members of Congress vote to set a spending limit of $500 million on candidates for President. The new law, as provided for in the amendment, regulates in-kind equivalents, including the value of celebrity endorsements for candidates. In doing so, Congress leaves existing campaign contribution limits untouched. The spending limit applies to 2024 races, and is justified in order to advance "political equality for all," as guaranteed by Senator Udall's amendment.

In the middle of a heated Democratic primary campaign in advance of the 2024 presidential election, Candidate A and Candidate B are locked in a dead heat in the polls. After much consideration, Oprah announces that she supports Candidate B's campaign.

To remedy the non-monetary value of Oprah's verbal endorsement, Candidate B must now account for the fair market value of the endorsement as provided by the Federal Election Commission regulations and ensure other spending is reduced by that amount.

As examined in the scenario above, the Udall amendment permits Congress to regulate campaign spending in this or seemingly any fashion.

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[22] In 2013, a gentleman named Mr. T. Augurson ran afoul of federal laws mandating disclaimers on independent expenditures during the 2012 Presidential election. Mr. Augurson's expenditure was transforming his Cadillac into an "Obamamobile" – with a "vinyl wrap with the 'Forward' Obama campaign slogan, complete with the 'O' campaign logo and likeness of the [P]resident." Eric Wang, "Campaign Finance Speed Trap," Center for Competitive Politics. Retrieved on June 2, 2014. Available at: http://www.campaignfreedom.org/2013/05/29/campaign-finance-speed-trap/ (May 29, 2013). Under the Udall amendment, it may be possible to regulate whether Mr. Augurson could drive a similar vehicle in support of a candidate in 2016.

The *Buckley* Court upheld limits on volunteer expenses for those volunteering directly for a campaign, but noted that "[t]reating these expenses as contributions when made to the candidate's campaign or at the direction of the candidate or his staff forecloses an avenue of abuse without limiting actions voluntarily undertaken by citizens independently of a candidate's campaign." *Buckley*, 424 U.S. at 37.

Section 1 also permits limits on "the amount of funds that may be spent by, in support of, or in opposition to" candidate campaigns. This would permit Congress to cap spending by candidates at a specific amount. This power is explicitly extended to speech "in support of, or in opposition to" candidates – essentially allowing Congress to limit all speech about candidates.

This raises a host of unanswered questions. Would spending by independent groups require lowering the amount that could be spent by a candidate? What would be included in "support of" or "opposition to" a candidate? Who would decide what is support and what is phony support that highlights an unpopular stand by a candidate? Given the amendment's broad grant of authority over political speech, "support of," or "opposition to" a candidate could constitute virtually all speech about politics.

For example, in June of 2004, the American Civil Liberties Union (ACLU) ran an advertisement featuring former Navy Judge Advocate General Real Admiral John D. Hutson (ret.) asking "How can we fight to uphold the rule of law if we break the rules ourselves?" and asserted that "we are conducting the war against terrorism in a manner that is inimical to those values of freedom of justice."[23] The ad did not mention President Bush, then a candidate for re-election, whose campaign largely focused on the President's conduct of the War on Terror. *The New York Times* nonetheless characterized the ad as a negative ad urging Americans to vote Bush out of office.[24] The *Buckley* Court explicitly rejected a reading of the Federal Election Campaign Act that allowed limits on independent speech precisely because it "would provide no security for free discussion."[25]

Under the Udall regime, voter guides, issue advertisements, church bulletins (a sermon on marriage or abortion could be deemed inherently "political," and local candidates may well be identified with one or another position), and the like could all be limited – or even banned – if their funders might violate the "fundamental principle of political equality" merely by being organized as a corporation or labor union. This amendment would provide a breathtaking amount of power to congressional incumbents to set limits on speech about policy or campaigns, effectively making the First Amendment a dead letter for speech.

II. As Section 2 simply enumerates the powers bestowed in Section 1 to the states, the same concerns apply with equal weight.

Section 2 merely applies the language of section 1 to the states, with all of the concerns that apply there. Specifically, section 2 could resuscitate Arizona's Rube Goldberg equalization scheme, which was struck down by the Supreme Court in 2011. That system, where monies spent by privately funded candidates and outside groups could provide additional funding to a publicly funded candidate, was eliminated on the grounds that it served to "level the playing

[23] Laura W. Murphy and Gabriel Rottman, "Comments on Draft Guidance for Tax-Exempt Social Welfare Organizations on Candidates-Related Political Activities," American Civil Liberties Union. Retrieved on June 2, 2014. Available at: http://www.campaignfreedom.org/wp-content/uploads/2014/02/2-4-14-ACLU-Comments-to-IRS.pdf (February 4, 2014), p. 15, 29.
[24] *Id.* at 15.
[25] *Buckley v. Valeo*, 424 U.S. 1, 42 (1976).

field."[26] Under the Udall proposal, such a system could potentially survive constitutional scrutiny.

III. Section 3's "media exemption" is unclear and inserts further uncertainty into the constitutional amendment's text by failing to define what qualifies as "the press" and leaving Congress and regulators to decide who qualifies as "media" at their whim.

The third section of the amendment provides that "[n]othing in this article shall be construed to grant Congress the power to abridge the freedom of the press." Presumably, this is intended to serve as a "media exemption" – a provision often included in campaign finance statutes to preserve the rights of *The New York Times* editorial board and Fox News's Sean Hannity to endorse and campaign for candidates.

But the scope of such an exemption is unclear. The right to a free press does not extend a specific speech right to media corporations that other Americans do not have. The free press clause is merely a natural corollary to the free speech clause; it protects the right to publish and distribute the written word.

The Supreme Court has "consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers."[27] And even in the event that "the press" did confer a separate sanction for certain speech, the Supreme Court in 2010 noted that "[w]ith the advent of the Internet and the decline of print and broadcast media, moreover, the line between the media and others who wish to comment on political and social issues becomes far more blurred."[28]

When Justice Stevens was asked to explain what was and was not press under his proposed amendment, not even he could answer.[29]

This uncertainty over who qualifies for the media exemption may not faze the regulators, however, who tend to favor established players at the expense of newcomers. The Federal Election Commission, for example, has traditionally applied the media exemption by asking, "[f]irst . . . whether the entity engaging in the activity is a press or media entity."[30] In other words, in order to qualify as a media entity, a speaker must first be a media entity. The Udall amendment's special exemption for the press would further entrench this model of circular reasoning and preferential treatment for certain speakers over others.

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[26] *Freedom Club PAC*, 131 S. Ct. at 2812.
[27] *Citizens United v. FEC*, 558 U.S. 310, 352 (2010) (internal citations and quotations omitted).
[28] *Id.*
[29] Adam Liptak, "Justice Stevens Suggests…" ("I asked whether the amendment would allow the government to prohibit newspapers from spending money to publish editorials endorsing candidates. He stared at the text of his proposed amendment for a little while. 'The 'reasonable' would apply there,' he said, 'or might well be construed to apply there.'")
[30] Federal Election Commission Adv. Op. 2010-08 (Citizens United) at 4.

A Historical Perspective on Campaign Finance Laws

Less than forty years ago, there were no limits at all on individual contributions to federal candidates, except for limited restrictions on government employees and contractors. The Committee should keep in mind that without such limits, voters elected FDR, Truman, Eisenhower, Kennedy, and Johnson as president. Was major legislation such as the Voting Rights Act, Medicare, and the Civil Rights Act the product of a corrupt system, given that individual contributions were unlimited to any one candidate? Of course not.

Consider the role of this system that allowed unlimited contributions to candidates and its impact on the 1968 Democratic primary and the debate on the Vietnam War. In late November 1967, Minnesota Senator Eugene McCarthy decided to challenge President Lyndon Johnson for the Democratic nomination. At first, people thought McCarthy's campaign would be quixotic. But with no contribution limits, Senator McCarthy assembled a well-funded campaign from a small number of wealthy donors who shared his opposition to the Vietnam War. McCarthy concentrated on New Hampshire's primary, and the number one issue in his campaign was to end the war.

His wealthy backers gave the equivalent of almost $10 million in today's dollars to fund the campaign, an enormous amount at the time. As a result of his showing in New Hampshire, McCarthy forced President Johnson out of the race, a feat not duplicated since the enactment of contribution limits.

Attached is a copy of an article by *Washington Post* columnist Richard Cohen that describes what happened in the McCarthy campaign in more detail.

Today, at least a dozen states, including many of the least corrupt[31] and best managed[32] states in the nation, have no limits on individual contributions to candidates or parties. This Committee would be wise to consider ways to unburden citizens' right to speak, rather than consider ways to further limit citizens' voices.

* * *

[31] Adriana Cordis and Jeff Milyo, "Working Paper No. 13-09: Do State Campaign Finance Reforms Reduce Public Corruption?" Mercatus Center at George Mason University. Retrieved on June 2, 2014. Available at: mercatus.org/sites/default/files/Milyo_CampaignFinanceReforms_v2.pdf (April 2013); Matt Nese and Luke Wachob, "Do Lower Contribution Limits Decrease Public Corruption?," Center for Competitive Politics' Issue Analysis No. 5. Retrieved on June 2, 2014. Available at: http://www.campaignfreedom.org/wp-content/uploads/2013/08/2013-08-01_Issue-Analysis-5_Do-Lower-Contribution-Limits-Decrease-Public-Corruption1.pdf (August 2013).

[32] Matt Nese and Luke Wachob, "Do Lower Contribution Limits Produce 'Good' Government?," Center for Competitive Politics' Issue Analysis No. 6. Retrieved on June 2, 2014. Available at: http://www.campaignfreedom.org/wp-content/uploads/2013/10/2013-10-08_Issue-Analysis-6_Do-Lower-Contribution-Limits-Produce-Good-Government1.pdf (October 2013); Matt Nese, "Do Limits on Corporate and Union Giving to Candidates Lead to 'Good' Government?," Center for Competitive Politics' Issue Analysis 7. Retrieved on June 2, 2014. Available at: http://www.campaignfreedom.org/wp-content/uploads/2013/11/2013-11-20_Issue-Analysis-7_Do-Limits-On-Corporate-And-Union-Giving-To-Candidates-Lead-To-Good-Government.pdf (November 2013).

Proponents of S.J. Res. 19 argue that this amendment is needed to promote equality and to "keep our elections from becoming speculative ventures for the wealthy."[33] Yet, what they are supporting is a vague and poorly drafted amendment that would amend our Constitution, shred the protections of the First Amendment, stifle political dissent, and grant members of Congress the power to control political speech.

Contrary to the justification contained within Senator Udall's amendment, the First Amendment is not – and never has been – conditioned upon a level playing field. In fact, there has never been a time in American history where everyone spoke equally and was heard equally, and there never will be. Few will ever be as famous as Oprah, run a newspaper, or host a television program. The purpose of the First Amendment is to protect us from being censored or punished for our views by government, so that we may always speak without limit to other citizens. This amendment proposal threatens that vital right.

We hope that this Committee recognizes the importance of the First Amendment and rejects any measure to amend it. Thank you for considering our comments.

[33] Igor Bobic and Michael McAuliff, "Harry Reid Proposes Changing Constitution to Block the Koch Brothers," *The Huffington Post*, Retrieved on June 2, 2014. Available at: http://www.huffingtonpost.com/2014/05/15/harry-reid-campaign-finance_n_5329917.html (May 15, 2014).

The Washington Post

A defense of big money in politics

By Richard Cohen, Published: January 16, 2012

Sheldon Adelson is supposedly a bad man. The gambling mogul gave $5 million to a Newt Gingrich-loving super PAC and this enabled Gingrich to maul Mitt Romney — a touch of opinion here — who had it coming anyway. Adelson is a good friend of Gingrich and a major player in Israeli politics. He owns a newspaper in Israel and supports politicians so far to the right I have to wonder if they are even Jewish. This is Sheldon Adelson, supposedly a bad man. But what about Howard Stein?

The late chairman of the Dreyfus Corp. was a wealthy man but, unlike Adelson, a liberal Democrat. Stein joined with some other rich men — including Martin Peretz, the one-time publisher of the New Republic; Stewart Mott, a GM heir; and Arnold Hiatt of Stride Rite Shoes — to provide about $1.5 million for Eugene McCarthy's 1968 challenge to Lyndon Johnson. Stein and his colleagues did not raise this money in itsy-bitsy donations but by chipping in large amounts themselves. Peretz told me he kicked in $30,000. That was a huge amount of money at the time.

That sort of donation would now be illegal — unless it was given to a super PAC that swore not to coordinate with the candidate. And until quite recently, even that would have been illegal — the limit being something like $2,400. Many people bemoan that the limit is no more, asserting that elections are now up for sale, as if this was something new. They point to the Adelson contribution and unload invective on the poor right-wing gambling tycoon. I understand, but I do not agree.

Back in 1967, a small group of men gave McCarthy the wherewithal to challenge a sitting president of the United States. The money enabled McCarthy to swiftly set up a New Hampshire operation and — lo and behold — he got 42 percent of the popular vote, an astounding figure. Johnson was rocked. Four days later, Robert F. Kennedy, who at first had declined to do what McCarthy did, jumped in himself. By the end of March 1968, Johnson was on TV, announcing he would not seek a second term.

My guess is that a lot of the people who decry what Adelson has done loved what Stein, Peretz and the others did. My guess is that they cheered Johnson's defeat because they loathed the Vietnam War and wanted it ended. My guess is that while they pooh-pooh the argument that money is speech, they cannot deny that when McCarthy talked — when he had the cash for TV time or to set up storefront headquarters — that was political speech at the highest decibel.

In the end, the 1968 campaign was won by Richard Nixon — and so was the next. Nixon was always awash in cash, huge donations from the scrupulous, the unscrupulous and the just plain weird. (Google W. Clement Stone to see what I mean.) Some of this money came from abroad and some of it funded the Watergate burglary and the cover-up. Too much money chased too

little morality. Reform was demanded and reform is what we got. It limited money and it limited speech.

History was changed by the sort of political donations that are now derided. Lyndon Johnson stepped down. The Democratic Party was ripped right up the middle. Bobby Kennedy joined the race (and was assassinated in June), and nothing — but nothing — was the same afterward. McCarthy's quixotic campaign became so real that Paul Newman came up to New Hampshire, and so did throngs of kids with long hair and incredible energy. I was there, a graduate student-cum-cub reporter, eating off the expense accounts of soon-to-be Washington Post colleagues (My God, what a life!). So when the Supreme Court says that money is speech and ought to be protected, I nod because I was in New Hampshire in 1968 and I know.

Sheldon Adelson is not my type of guy. I don't like his politics. But he has no less right to try his own hand at history than did that band of rich men who were convinced the war was a travesty-tragedy — and they were right. Since 1968, my views have changed on many matters. But my bottom line remains a fervent belief in the beauty and utility of free speech and of the widest exchange of ideas. I am comfortable with dirty politics. I fear living with less free speech.

The above article, "A defense of big money in politics," can be accessed at: http://www.washingtonpost.com/opinions/how-political-donations-changed-history/2012/01/16/gIQA6oH63P_story.html.

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Congress shall make no law...

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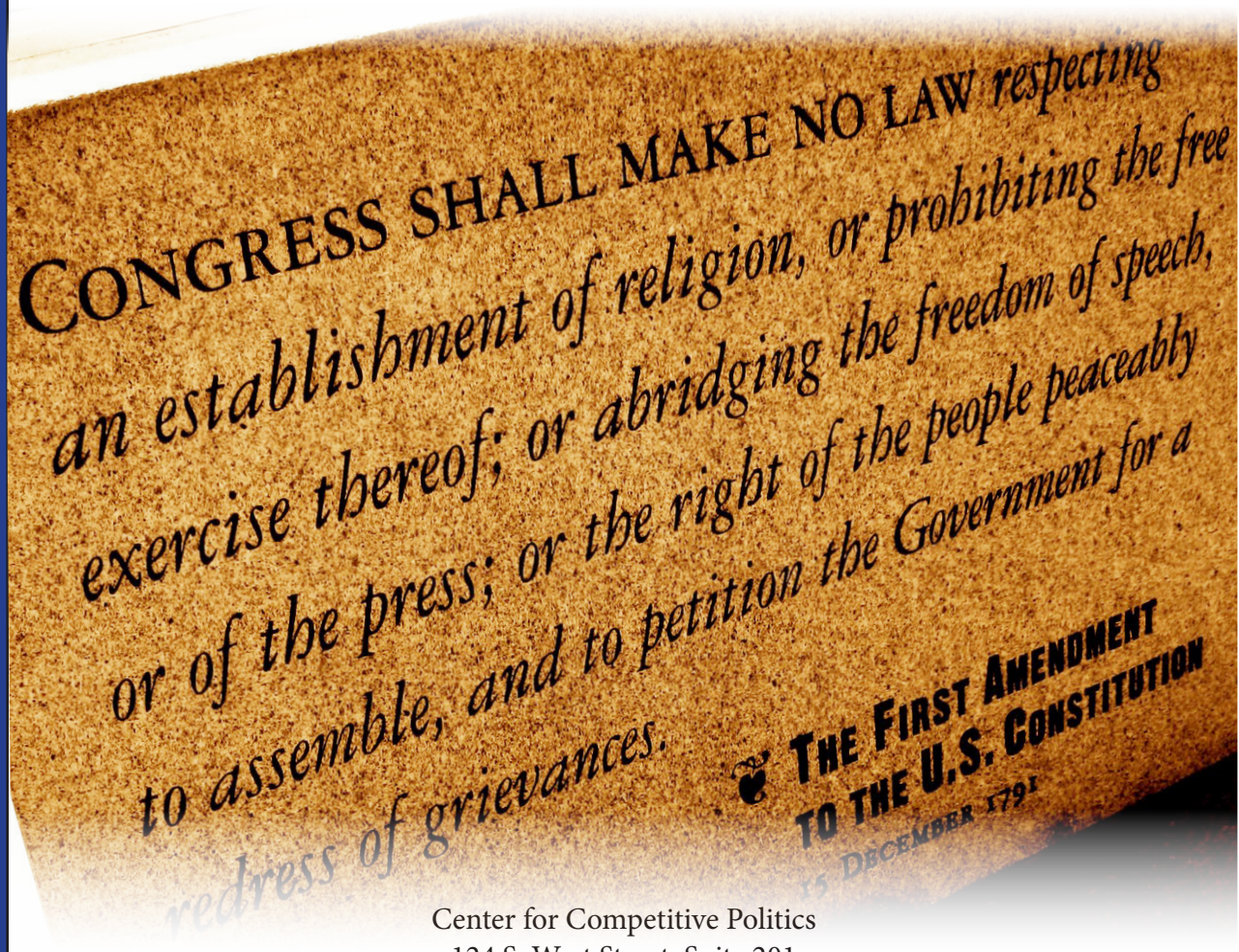
Changing Perspectives: *Senators' Newfound Support for Amending the First Amendment*

By Luke Wachob



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Introduction

A group of forty-two Senators[1] have sponsored an amendment to the Bill of Rights to the United States Constitution that could, for the first time in history,[2] reduce Americans' First Amendment rights. According to Senate Majority Leader Harry Reid (NV), the amendment, which is sponsored by Sen. Tom Udall (NM), will receive a floor vote this summer.[3]

Many current co-sponsors of the proposal have voted on a constitutional amendment limiting political speech before. At various times throughout the 1990s and 2000s, Congress considered amending the Constitution to ban desecration of the U.S. flag. This report examines the shifting views of current Udall amendment co-sponsors who previously voted against a flag protection amendment on free speech grounds. Many of the arguments these politicians made against a flag protection amendment apply equally, or more so, to the Udall amendment currently under consideration.

A little more than a decade later, these Senators appear to have changed their minds about free speech...

During debates on the flag desecration amendment on the Senate and House floor, current Udall amendment co-sponsors made five primary arguments: (1) the Bill of Rights should never be restricted; (2) amending the Constitution could invite further infringements on the First Amendment in the future; (3) dissenting or offensive speech should not be feared; (4) the proposed amendments were too vague; and (5) the majority party was pushing the amendment out of political self-interest in advance of an upcoming election.

A little more than a decade later, these Senators appear to have changed their minds about free speech, supporting an amendment that can be fairly criticized on all of these grounds.

1 S.J. Res. 19, "List of Co-sponsors," Congress.gov. Retrieved on May 28, 2014. Available at: http://beta.congress.gov/bill/113th-congress/senate-joint-resolution/19/cosponsors (2014).

2 This was a central talking point in Democratic opposition during debate on proposed constitutional amendments to ban flag desecration in the 1990s and 2000s. *See* references 19, 21, and 22.

3 Tom Hamburger, "Dems threaten Kochs with a constitutional amendment," *The Washington Post*. Retrieved on May 28, 2014. Available at: http://www.washingtonpost.com/blogs/the-fix/wp/2014/05/15/dems-threaten-kochs-with-a-constitutional-amendment/ (May 15, 2014).

Amendment Text

The amendment, formally known as Senate Joint Resolution 19, is more than quadruple the length of the First Amendment,[4] and reads as follows:

> Section 1. To advance the fundamental principle of political equality for all, and to protect the integrity of the legislative and electoral processes, Congress shall have power to regulate the raising and spending of money and in-kind equivalents with respect to Federal elections, including through setting limits on –
>
> (1) the amount of contributions to candidates for nomination for election to, or for election to, Federal office; and
>
> (2) the amount of funds that may be spent by, in support of, or in opposition to such candidates.
>
> Section 2. To advance the fundamental principle of political equality for all, and to protect the integrity of the legislative and electoral processes, each State shall have power to regulate the raising and spending of money and in-kind equivalents with respect to State elections, including through setting limits on –
>
> (1) the amount of contributions to candidates for nomination for election to, or for election to, State office; and
>
> (2) the amount of funds that may be spent by, in support of, or in opposition to such candidates.
>
> Section 3. Nothing in this article shall be construed to grant Congress the power to abridge the freedom of the press.
>
> Section 4. Congress and the States shall have power to implement and enforce this article by appropriate legislation.[5]

4 The text of the First Amendment is 45 words. The current version of S.J. Res. 19 is 200 words.

5 S.J. Res. 19, "Text of the amendment," Congress.gov. Retrieved on May 28, 2014. Available at: http://beta.congress.gov/bill/113th-congress/senate-joint-resolution/19/text (2014).

Overview of the Amendment

In a June 2013 press release announcing the introduction of his constitutional amendment proposal, Sen. Udall explained that his motivation is born of a concern that elections are not being decided the right way. According to Udall, "[o]ur elections no longer focus on the best ideas, but the biggest bank accounts, and Americans' right to free speech should not be determined by their net worth."[6]

Majority Leader Reid expanded on Sen. Udall's frustration with recent elections when he formally announced his support for the amendment in a speech on the Senate floor in mid-May. Reid remarked: "More and more we see Koch Industries, Americans for Prosperity, one of their shadowy front groups, dictating the results of primaries and elections across the country. Behind these nonvoting organizations are massively wealthy men hoping for a big monetary return on their political donations."[7]

Politicians, campaign finance law experts, and members of the media have all identified major problems with this proposed amendment to the Constitution.

The significance of amending the First Amendment was downplayed by Sen. Charles Schumer (NY) when he announced at an April 30 Senate hearing that leadership had decided to hold a vote on the Udall amendment this summer. Schumer compared a constitutional amendment to give Congress greater power to regulate political speech to a noise ordinance, saying "[w]e have many, many, many different laws that pose limits on the amendments because through two hundred and some odd years of jurisprudence the Founding Fathers and the Supreme Court have realized that no amendment is absolute… We have noise ordinances. Everyone accepts them. That's a limitation on the First Amendment."[8]

Despite these assertions from the amendment's advocates, the flaws in the proposed amendment, and the risks in amending the Constitution, are clear to outside observers. Politicians, campaign finance law experts, and members of the media have all identified major problems with this proposed amendment to the Constitution. It shrinks First Amendment rights rather than expands them.[9] It is an extreme response to an issue that is complex and contested.[10] It amends a Constitution that has stood the test of time, surviving over two centuries with just 27 total amendments, including the 10

6 U.S. Senator Tom Udall, "Udall introduces constitutional amendment on campaign finance reform," Office of U.S. Senator Tom Udall. Retrieved on May 28, 2014. Available at: http://www.tomudall.senate.gov/?p=press_release&id=1329 (June 18, 2013).

7 Siobhan Hughes, "Reid calls for amending the constitution to limit campaign money," *The Wall Street Journal*. Retrieved on May 29, 2014. Available at: http://blogs.wsj.com/washwire/2014/05/15/reid-calls-for-amending-constitution-to-limit-campaign-money/ (May 15, 2014).

8 Byron Tau, "Kochs are center stage (in absentia) at Senate hearing," *Politico*. Retrieved on May 29, 2014. Available at: http://www.politico.com/story/2014/04/kochs-are-center-stage-in-absentia-at-senate-hearing-106199.html

9 Terry Eastland, "Democrats vs. Free Speech," *The Weekly Standard* Vol. 19:36. Retrieved on May 30, 2014. Available at: http://www.weeklystandard.com/articles/democrats-vs-free-speech_793490.html (June 2, 2014).

10 Bob Bauer, "'Great and extraordinary occasions' for constitutional reform – and the question of evidence," *More Soft Money Hard Law*. Retrieved on May 28, 2014. Available at: http://www.moresoftmoneyhardlaw.com/2014/05/great-extraordinary-occasions-constitutional-reform-question-evidence/ (May 19, 2014).

that make up the Bill of Rights.[11] It limits dissent, which is essential to a democratic republic.[12] It is vague and virtually guaranteed to lead to further Supreme Court involvement in campaign finance,[13] the same Supreme Court that the amendment's supporters claim is the problem in the first place.[14] On top of those weighty concerns, its timing in the summer before midterm elections also suggests a partisan political motive.[15]

Interestingly, many co-sponsors of the Udall amendment prominently voiced these same criticisms when a Republican majority attempted to amend the Constitution to ban desecration of the United States Flag, most notably in the 104th (1995-1997), 106th (1999-2001), and 109th (2005-2007) Congresses. In fact, 15 current co-sponsors of the Udall amendment, including the amendment's author Sen. Tom Udall, voted against a flag desecration amendment on multiple occasions.[16] Only seven current co-sponsors of the Udall amendment ever voted in favor of a flag burning amendment during Congress's multiple floor votes on the issue.[17] (Twenty current co-sponsors never had a chance to vote on any flag desecration amendments).[18] Of those 15, eight took to the floor of the House or Senate to argue against the flag burning amendments, and others did so through press releases or in interviews. Their arguments against the flag desecration amendment display a commitment to First Amendment principles that has apparently waned in recent years.

11 Jonathan Bernstein, "Watch the Democrats engage in constitutional mischief," *Bloomberg View*. Retrieved on May 28, 2014. Available at: http://www.bloombergview.com/articles/2014-05-16/watch-the-democrats-engage-in-constitutional-mischief (May 16, 2014).

12 Trevor Burrus, "Should it be against the law to criticize Harry Reid?" *Boston Herald*. Retrieved on May 28, 2014. Available at: http://bostonherald.com/news_opinion/opinion/op_ed/2014/05/burrus_should_it_be_against_law_to_criticize_harry_reid (May 27, 2014).

13 Jim Newell, "Supreme Court's money debacle: the truth behind Dems' campaign finance amendment," *Salon.com*. Retrieved on May 28, 2014. Available at: http://www.salon.com/2014/05/16/supreme_courts_money_debacle_the_truth_behind_dems_campaign_finance_amendment/ (May 16, 2014).

14 *Ibid*. 6.

15 Greg Sargent, "Reid calls for constitutional amendment on campaign cash," *The Washington Post*. Retrieved on May 28, 2014. Available at: http://www.washingtonpost.com/blogs/plum-line/wp/2014/05/15/morning-plum-harry-reid-calls-for-constitutional-amendment-on-campaign-cash/ (May 15, 2014).

16 To calculate this number, we examined House and Senate roll call votes on flag desecration amendments in the 104th Congress (H.J. Res 79; S.J. Res. 31), 105th Congress (H.J. Res. 54), 106th Congress (H.J. Res. 33; S.J. Res. 14), 107th Congress (H.J. Res. 36), 108th Congress (H.J. Res. 4), and 109th Congress (H.J. Res. 10; S.J. Res. 12). Those fifteen Senators are Tammy Baldwin (WI), Barbara Boxer (CA), Benjamin Cardin (MD), Thomas Carper (DE), Richard Durbin (IL), Tom Harkin (IA), Edward Markey (MA), Barbara Mikulski (MD), Patty Murray (WA), Jack Reed (RI), Bernard Sanders (VT), Charles Schumer (NY), Mark Udall (CO), Tom Udall (NM), and Ron Wyden (OR).

17 *Ibid*. Those seven Senators are Sherrod Brown (OH), Dianne Feinstein (CA), Tim Johnson (SD), Robert Menendez (NJ), Harry Reid (NV), Jay Rockefeller (WV), and Debbie Stabenow (MI).

18 *Ibid*. Those twenty Senators are Mark Begich (AK), Michael Bennet (CO), Richard Blumenthal (CT), Cory Booker (NJ), Christopher Coons (DE), Al Franken (MN), Kirsten Gillibrand (NY), Kay Hagan (NC), Martin Heinrich (NM), Mazie Hirono (HI), Angus King (ME), Amy Klobuchar (MN), Jeff Merkley (OR), Christopher Murphy (CT), Brian Schatz (HI), Jeanne Shaheen (NH), Jon Tester (MT), John Walsh (MT), Elizabeth Warren (MA), and Sheldon Whitehouse (RI).

Co-Sponsors of S.J. Res. 19					
Senator	*State*	*Senator*	*State*	*Senator*	*State*
Tom Udall*	NM	Mark Udall	CO	Edward Markey	MA
Michael Bennet	CO	Tim Johnson	SD	Elizabeth Warren	MA
Tom Harkin	IA	Robert Menendez	NJ	Sherrod Brown	OH
Charles Schumer	NY	Jack Reed	RI	John Walsh	MT
Jeanne Shaheen	NH	Richard Blumenthal	CT	Richard Durbin	IL
Sheldon Whitehouse	RI	Martin Heinrich	NM	Harry Reid	NV
Jon Tester	MT	Jeff Merkley	OR	Mazie Hirono	HI
Barbara Boxer	CA	Dianne Feinstein	CA	Thomas Carper	DE
Christopher Coons	DE	Mark Begich	AK	Patty Murray	WA
Angus King	ME	Benjamin Cardin	MD	Brian Schatz	HI
Christopher Murphy	CT	Kirsten Gillibrand	NY	Bernard Sanders	VT
Ron Wyden	OR	Kay Hagan	NC	John Rockefeller	WV
Al Franken	MN	Barbara Mikulski	MD	Debbie Stabenow	MI
Amy Klobuchar	MN	Tammy Baldwin	WI	Cory Booker	NJ
* Original Sponsor					

Quotes from Udall Amendment Co-Sponsors Criticizing Flag Desecration Amendments

"Yet I cannot support an Amendment to the United States Constitution which would, for the first time in our nation's history, narrow the reach of the First Amendment guarantee of freedom of speech."

– Sen. Barbara Mikulski

The following quotes illustrate the intellectual common ground between opponents of a flag desecration amendment and opponents of the Udall amendment. They show how some Senators have changed course in their views on amending the Bill of Rights. The quotes are grouped into five general arguments made by opponents of the flag desecration amendment that apply to the Udall amendment just as well. In opposition to the flag burning amendments, current sponsors of this amendment argued that: (1) the amendments would reduce First Amendment rights; (2) amending the Constitution could permit additional Congressional infringements on the First Amendment in the future; (3) the amendments would limit dissent; (4) the amendments were too vague; and (5) the amendments were politically motivated.

First and foremost, many current co-sponsors of the Udall amendment, which would shrink First Amendment rights, opposed the flag burning amendments because they did exactly that:

> Sen. Barbara Boxer (1995): "The Constitution's principles transcend the few words which are actually written. Hundreds of thousands of American men and women

have made the ultimate sacrifice in defense of these principles. And this remarkable, living document continues to inspire countless others struggling in distant lands for the promise of freedom. In the 204 years since the ratification of the Bill of Rights, we have never passed a constitutional amendment to restrict the liberties contained therein."[19]

"...the amendment offered today by the majority would diminish the First Amendment's guarantee of freedom of expression, one of our most fundamental guarantees of the Bill of Rights."

– Then-Rep. Tom Udall (NM-3)

Sen. Barbara Mikulski (1995): "Now is not the time to change the course. Now is not the time to tamper with laws, precedents and principles that have kept us in good stead for two centuries."[20]

Sen. Richard Durbin (2000): "But the issue before us is not whether we support flag burning but whether we should amend the Constitution, whether we should amend the Bill of Rights for the first time in the history of the United States of America, whether we should narrow the precious freedoms ensured by the first amendment for the very first time in our Nation's history."[21]

Sen. Barbara Mikulski (2000): "Yet I cannot support an Amendment to the United States Constitution which would, for the first time in our nation's history, narrow the reach of the First Amendment guarantee of freedom of speech."[22]

Sen. Jack Reed (2000): "I would argue the way to encourage patriotism is through encouraging civic involvement, not constitutional amendments."[23]

Then-Rep. Mark Udall (CO-2) (2003): "I am not in support of burning the flag. But I am even more opposed to weakening the First Amendment, one of

"...A Bill of Rights that has stood unchanged for more than two centuries--despite Civil War, Depression, two world wars, and powerful internal movements of dissent. Even at those times of profound turmoil, we resisted any temptation to amend the Bill of Rights."

– Sen. Tom Harkin

19 Senator Boxer (CA). *Congressional Record* 141:197 (December 12, 1995) p. 18381. Retrieved on May 28, 2014. Available at: http://beta.congress.gov/crec/1995/12/12/CREC-1995-12-12-pt1-PgS18373-6.pdf.

20 Senator Mikulski (MD). *Congressional Record* 141:197 (December 12, 1995) p. 183830. Retrieved on May 28, 2014. Available at: http://beta.congress.gov/crec/1995/12/12/CREC-1995-12-12-pt1-PgS18373-6.pdf.

21 Senator Durbin (IL). *Congressional Record* 146:36 (March 28, 2000) p. 1791. Retrieved on May 28, 2014. Available at: http://beta.congress.gov/crec/2000/03/28/CREC-2000-03-28-pt1-PgS1765-8.pdf.

22 Senator Mikulski (MD). Congressional Record 146:37 (March 29, 2000) p. 1871. Retrieved on May 28, 2014. Available at: http://beta.congress.gov/crec/2000/03/29/CREC-2000-03-29-pt1-PgS1863.pdf.

23 Senator Reed (RI). *Congressional Record* 146:48 (April 25, 2000) p. 2857. Retrieved on May 28, 2014. Available at: http://beta.congress.gov/crec/2000/04/25/CREC-2000-04-25-pt1-PgS2856-3.pdf.

the most important things for which the flag itself stands."[24]

Then-Rep. Tom Udall (NM-3) (2003): "the amendment offered today by the majority would diminish the First Amendment's guarantee of freedom of expression, one of our most fundamental guarantees of the Bill of Rights."[25]

Sen. Barbara Boxer (2006): "I agree with the approach of Senator Durbin to the protests--proposing a statutory solution to address a problem rather than unnecessarily amending our Constitution. There are many things in life that we find offensive, repugnant to beliefs that we hold dear, but we cannot amend the Constitution every time there is something we consider outrageous, offensive, or repugnant."[26]

Sen. Richard Durbin (2006): "The Bill of Rights has served this Nation since 1791, and with one swift blow of this ax, we are going to chop into the first amendment."[27]

Sen. Tom Harkin (2006): "And once the Communist regimes began to fall, what came next? Calls for Western-style guarantees of rights to freedom of the press, freedom of association, and freedom of speech. Many called for a constitution. They knew what some of us seem to forget: That the only way those freedoms can be protected is with an inviolable Bill of Rights such as our own. A Bill of Rights that has stood unchanged for more than two centuries--despite Civil War, Depression, two world wars, and powerful internal movements of dissent. Even at those times of profound turmoil, we resisted any temptation to amend the Bill of Rights."[28]

"It takes a great deal of audacity for anyone to step up and suggest to change the Constitution… I think we should show a little humility around here when it comes to changing the Constitution. So many of my colleagues are anxious to take a roller to a Rembrandt."

– Sen. Richard Durbin

Further agreement between critics of the Udall and flag desecration amendments can be found in the shared concern that the amendments would be an unnecessary and dangerous invitation for future Congresses to pass stronger restrictions on First Amendment rights. The risk of degrading the Bill of Rights was too severe for many members to favor a flag desecration amendment. Some current co-sponsors of the Udall amendment had this to say back then:

24 Congressman Udall (CO-2). *Congressional Record* 149:80 (June 3, 2003) p. 4831. Retrieved on May 28, 2014. Available at: http://beta.congress.gov/crec/2003/06/03/CREC-2003-06-03-pt1-PgH4811-4.pdf.

25 Congressman Udall (NM-3). *Congressional Record* 149:81 (June 4, 2003) p. E1133. Retrieved on May 28, 2014. Available at: http://beta.congress.gov/crec/2003/06/04/CREC-2003-06-04-pt1-PgE1133.pdf.

26 Senator Boxer (CA). *Congressional Record* 152:85 (June 27, 2006) p. 6547. Retrieved on May 28, 2014. Available at: http://beta.congress.gov/crec/2006/06/27/CREC-2006-06-27-pt1-PgS6516-2.pdf.

27 Senator Durbin (IL). *Congressional Record* 152:84 (June 26, 2006) p. 6484. Retrieved on May 28, 2014. Available at: http://beta.congress.gov/crec/2006/06/26/CREC-2006-06-26-pt1-PgS6471-2.pdf.

28 Senator Harkin (IA). *Congressional Record* 152:85 (June 27, 2006) p. s6527. Retrieved on May 28, 2014. Available at: http://beta.congress.gov/crec/2006/06/27/CREC-2006-06-27-pt1-PgS6516-2.pdf.

Sen. Patty Murray (1995): "Our Constitution guarantees all of us this freedom, including the right to free speech. I believe we should be very cautious about altering this document, because to do so alters the fundamental ideals on which our country was built."[29]

Sen. Barbara Boxer (2006): "This Constitution is more than just an outlet for our justifiable frustrations. It is concise. It has worked. It is the enduring ideal of our Nation, and we should not unnecessarily amend it."[30]

Sen. Richard Durbin (2006): "It is a matter which we will likely debate the rest of this week. The reason we are going to spend this much time on it is because this one-page document represents a historic change in America. If this amendment were to be ratified, it would mark the first time in our nation's history that we would amend the Bill of Rights of the United States of America."[31]

Sen. Richard Durbin (2006): "It takes a great deal of audacity for anyone to step up and suggest to change the Constitution… I think we should show a little humility around here when it comes to changing the Constitution. So many of my colleagues are anxious to take a roller to a Rembrandt."[32]

Sen. Barbara Mikulski (2006): "The Constitution protects our liberty and it is the symbol of the strength of our Nation. I believe that it is my obligation as a Member of this body to protect its integrity and strength."[33]

"In a great country like the United States of America, you don't fear dissent. In a great country you allow dissent, even if it is ugly, even if it makes you sick to your stomach, even if it disgusts you."

– Sen. Barbara Boxer

Critics of the Udall amendment and critics of an amendment to punish desecration of the flag also share the view that dissent should not be punished or restricted. Many co-sponsors of the Udall amendment eloquently defended the right to criticize government and adulated the importance of dissent in a free republic when it was a Republican majority seeking to crack down on flag desecration:

29 Senator Murray (WA). Congressional Record 141:197 (December 12, 1995) p. 18379-80. Retrieved on May 28, 2014. Available at: http://beta.congress.gov/crec/1995/12/12/CREC-1995-12-12-pt1-PgS18373-6.pdf.

30 Senator Boxer (CA). *Congressional Record* 152:85 (June 27, 2006) p. 6547. Retrieved on May 28, 2014. Available at: http://beta.congress.gov/crec/2006/06/27/CREC-2006-06-27-pt1-PgS6516-2.pdf.

31 Senator Durbin (IL). *Congressional Record* 152:84 (June 26, 2006) p. 6483. Retrieved on May 28, 2014. Available at: http://beta.congress.gov/crec/2006/06/26/CREC-2006-06-26-pt1-PgS6471-2.pdf.

32 *Ibid*.

33 Senator Mikulski (MD). *Congressional Record* 152:85 (June 27, 2006) p. s6526. Retrieved on May 28, 2014. Available at: http://beta.congress.gov/crec/2000/03/29/CREC-2000-03-29-pt1-PgS1863.pdf.

"The language of the amendment is vague and fails to offer a clear statement of just what conduct the supporters of the amendment propose to prohibit..."

– Sen. Jack Reed

Sen. Barbara Mikulski (1995): "But we cannot change the culture by changing the Constitution. We change the culture by living the Constitution--by speaking out responsibly and by organizing. I support amendments to expand the Constitution, not constrict it."[34]

Then-Rep. Jack Reed (1995): "I do not think we should be afraid of freedom. I think we should in fact support freedom."[35]

Sen. Barbara Boxer (2006): "In a great country like the United States of America, you don't fear dissent. In a great country you allow dissent, even if it is ugly, even if it makes you sick to your stomach, even if it disgusts you."[36]

Sen. Richard Durbin (2006): "The real test of our belief in the Bill of Rights--the real test of our patriotism--is when we rise in defense of the rights of those whose views we disagree with or even despise. The right to free speech is a bedrock of our democracy."[37]

Critics of both amendments also share technical concerns about vagueness in the amendment language. In both cases, vagueness would lead to further clarification from the Supreme Court, whose decisions sparked calls for an amendment. While banning desecration of the flag seems much simpler than the Udall amendment's broad grant of authority to regulate spending on political speech, even the flag desecration amendment had too much potential to go awry for many current supporters of the Udall amendment to sign on:

Sen. Jack Reed (2000): "The language of the amendment is vague and fails to offer a clear statement of just what conduct the supporters of the amendment propose to prohibit, or to advise the American people of the actions for which they may be imprisoned… This leaves the Supreme Court to clarify these meanings, the same court that supporters believe erred in protecting flag burning as freedom of speech in the first place."[38]

Sen. Richard Durbin (2006): "S.J. Res. 12 is overly vague and filled with potential loopholes. What do the words ``flag desecration" mean? ... But this amendment is

34 Senator Mikulski (MD). *Congressional Record* 141:197 (December 12, 1995) p. 18380. Retrieved on May 28, 2014. Available at: http://beta.congress.gov/crec/1995/12/12/CREC-1995-12-12-pt1-PgS18373-6.pdf.

35 Congressman Reed (D, RI-2). *Congressional Record* 141:107 (June 28, 1995) p. 6420. Retrieved on May 28, 2014. Available at: http://beta.congress.gov/crec/1995/06/28/CREC-1995-06-28-pt1-PgH6415-4.pdf.

36 *Ibid.* 30.

37 Senator Durbin (IL). *Congressional Record* 152:84 (June 26, 2006) p. 6487. Retrieved on May 28, 2014. Available at: http://beta.congress.gov/crec/2006/06/26/CREC-2006-06-26-pt1-PgS6471-2.pdf.

38 *Ibid.* 23

not clear as to where you would draw a line. As gifted as my colleagues may be who have brought this amendment to the floor, I am afraid the language they brought is not going to stand the test of time."[39]

Lastly, the Udall amendment has been accused of being a political ploy. Upon Senate Majority Leader Reid's announcement of his support for the Udall amendment on the Senate floor, Senate Minority Leader Mitch McConnell (KY) characterized the proposal as "an all-out assault on the right to free speech, a right which undergirds all others in our democracy… It's also a clear sign of just how desperate elected Washington Democrats have become in their quest to hold onto power."[40] Others, such as *National Review*, have similarly criticized the proposal as politically motivated.[41]

The last time the flag desecration amendment was seriously considered was the summer of 2006, when Republicans held a slight majority in the Senate that was threatened by upcoming midterm elections. Senate Democrats repeatedly accused Republicans of pushing the flag desecration amendment to excite their base during a heated campaign season:

"That we would so quickly consider amending this Constitution, which has served our Nation so well and for so many years, so frequently suggests to me that there may be something at work here that goes beyond constitutional law and constitutional study..."

– Sen. Richard Durbin

Sen. Richard Durbin (2006): "That we would so quickly consider amending this Constitution, which has served our Nation so well and for so many years, so frequently suggests to me that there may be something at work here that goes beyond constitutional law and constitutional study… This amendment is truly a solution in search of a problem. Why are we debating it again? We know the answer. We are here because the White House and the congressional Republican leadership are nervous about the upcoming elections… The real issue here isn't the protection of the flag, it is the protection of the Republican majority. We are not setting out to protect Old Glory; we are setting out to protect old politicians. That is what this is about."[42]

Sen. Richard Durbin (2006): "I am also considering an amendment which I think is long overdue. It would ban the consideration of constitutional amendments in election years. We have seen too darned much politicking with the Constitution in this Chamber this month."[43]

39 Senator Durbin (IL). *Congressional Record* 152:84 (June 26, 2006) p. 6485. Retrieved on May 28, 2014. Available at: http://beta.congress.gov/crec/2006/06/26/CREC-2006-06-26-pt1-PgS6471-2.pdf.

40 Siobhan Hughes, "Reid Calls for Amending Constitution to Limit Campaign Money," *The Wall Street Journal*. Retrieved on May 30, 2014. Available at: http://blogs.wsj.com/washwire/2014/05/15/reid-calls-for-amending-constitution-to-limit-campaign-money/ (May 15, 2014).

41 Charles C. W. Cooke, "Harry's Dirty Amendment," *National Review*. Retrieved on May 30, 2014. Available at: http://www.nationalreview.com/article/378172/harrys-dirty-amendment-charles-c-w-cooke (May 16, 2014), p. 1.

42 *Ibid*. 27.

43 *Ibid*.

Sen. Richard Durbin (2006): "James Madison wrote in Federalist 49 in 1788 that the U.S. Constitution should be amended only on "great and extraordinary occasions." It appears now that biennial elections are great and extraordinary occasions in the minds of the Republican leadership of the Senate."[44]

"But this is a campaign year, and the majority appears to want the Senate to spend time on topics which defer and deflect us from concentrating finding solutions to pressing issues facing our Nation...

– Sen. Jack Reed

Sen. Jack Reed (2006): "But this is a campaign year, and the majority appears to want the Senate to spend time on topics which defer and deflect us from concentrating finding solutions to pressing issues facing our Nation: restoring fiscal discipline, creating safe and affordable housing for working families, securing our borders, expanding health insurance coverage to the uninsured, ensuring students have the skills and tools to compete in an ever-expanding global economy, and redeploying our troops as quickly as possible out of Iraq. Unfortunately, the majority has provided limited time to debate most of these issues."[45]

44 *Ibid.* 37.

45 Senator Reed (RI). *Congressional Record* 152:826 (June 28, 2006) p. 6628. Retrieved on May 28, 2014. Available at: http://beta.congress.gov/crec/2006/06/28/CREC-2006-06-28-pt1-PgS6627-3.pdf.

Conclusion

The arguments marshaled in opposition to a constitutional amendment to ban desecration of the flag logically also apply to one that grants Congress authority to control political speech rights in unprecedented ways. In some cases, the arguments are even more applicable.

The Udall amendment would rebuke nearly four decades of campaign finance jurisprudence from the Supreme Court and greatly reduce the quantity of debate in this country. The amendment could be read as a broad grant to Congress to regulate virtually all political speech and association. It reads like a rhetorical document, introduced during an election year, and displays little care in drafting.

Sen. Udall has said of his proposed amendment, "[i]t's clearer than ever that we need a constitutional amendment to restore integrity in our election system… I'm looking forward to working with Senator Schumer to bring common-sense campaign finance reform to a vote as soon as possible so we can ensure our elections are about the quality of ideas and not the quantity of cash."[46] Here, the Senator sounds like the proponents of an amendment to punish flag desecration, parading vague terms like "integrity" and "common-sense" instead of interrogating these advocates and the censorship they serve to justify. When the debate was over desecration of the flag, then-Rep. Udall opposed it because it "would diminish the First Amendment's guarantee of freedom of expression."[47] Now, apparently, the standard has changed from protecting guaranteed free expression for all, to promoting "quality of ideas" as understood by the U.S. Congress.

Once again, we see that politicians' fidelity to the First Amendment appears to come second to getting re-elected. Perhaps unsurprisingly, Sen. Udall's constitutional amendment, if adopted, would help entrench those in Congress by insulating incumbent politicians from criticism and granting the same politicians abundant power to make laws regulating political speech.

46 Matthew Reichbach, "Senate will vote on Udall campaign finance constitutional amendment," *New Mexico Telegram*. Retrieved on May 29, 2014. Available at: http://www.nmtelegram.com/2014/04/30/senate-will-vote-on-udall-constitutional-amendment/ (April 30, 2014).

47 *Ibid*. 25.

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NATIONAL REVIEW ONLINE

Udall's Futile Fight against Free Speech

By Luke Wachob

National Review Online
Published September 8, 2014

As the country worries about conflict in the Middle East, police militarization at home, and historically low approval ratings for Congress, Democratic Senate majority leader Harry Reid plans to use what little time remains in session before the November election on a misguided proposal to amend the Constitution — an amendment that everyone knows will never pass.

The amendment in question, sponsored by New Mexico senator Tom Udall, would give Congress and the states unprecedented authority to regulate and limit every penny raised and spent to say anything about any candidate. If that description sounds vague, it's because the amendment's poorly drafted language is hopelessly vague. Even Paul S. Ryan of the Campaign Legal Center, which advocates for greater restrictions on political speech, told *Salon*, "I think it's entirely impossible to predict the impact of this amendment, even if ratified, because of the broad language in the amendment itself."

While the amendment's policy implications are shrouded in uncertainty, it would mark a significant step away from the nation's First Amendment tradition that "Congress shall make no law . . . abridging the freedom of speech" and toward a system where incumbent politicians could heavily regulate any speech they deem to "influence elections." Amendment supporters argue that the proposal is necessary to achieve "political equality" and reduce corruption, while opponents argue that it's a dangerous power grab by politicians seeking to silence criticism and that, as revealed in the IRS scandal, the government has already proven itself corrupt when tasked with examining political speech. But amid all the controversy, there is one thing supporters and opponents of the Udall amendment agree on: It will not pass. It will not even come close to passing.

Senator Ted Cruz observed in the pages of the *Wall Street Journal* way back in June that, "thankfully, any constitutional amendment must first win two-thirds of the vote in both houses of Congress. Then three-fourths of the state legislatures must approve the proposed amendment. There's no chance that Sen. Udall's amendment will clear either hurdle." In the liberal *Talking Points Memo*, Sheila Kapur noted, "The proposal stands virtually no chance of gaining the two-thirds majority required in the House and Senate to amend the Constitution, much less being ratified by three-fourths of states."

The consensus that the amendment is doomed to fail leaves its supporters in a tough bind. If they truly believe Majority Leader Reid's hyperbolic claim that we are facing a "hostile takeover of American democracy," proposing a course of action to combat it that is certain to fail is not a serious response. The Udall amendment is a wholly symbolic act to communicate

to voters that its supporters are the "good" ones. Coming from people with actual power, symbolic acts ring hollow.

Udall-amendment supporters might actually be banking on the fact that the amendment won't pass. Its vague language allows them to say whatever they want about it while casting its opponents as having been "bought" by "big money," a highly useful political tactic during a heated election season. But would senators really fabricate a crisis of "dark money" and propose to amend the First Amendment merely to attract a few headlines and scare a few campaign donations out of their constituents? Even in politics, it's hard to believe people could act so cynically.

Well, believe it. In *Politico*, Byron Tau explained that the amendment is, "in part, meant to support Democratic talking points on the Koch brothers and big money spending." Kapur says it is "part of Democrats' election-year strategy in 2014."

The amendment was never designed to succeed. Its sponsors simply want to cash in on the ever-popular rhetoric of being for "the people" and against the "special interests," whatever that means. But this goes far beyond politics as usual. To risk tampering with the First Amendment and weakening protections for free speech just to score political points in the run-up to an election is a frightening strategy and one that could lead to other measures that could impose real damage to First Amendment speech freedoms.

The past year has brought a rising tide of disrespect and animosity toward First Amendment freedoms, particularly among our nation's leaders. For defenders of free speech, even a futile movement to amend the First Amendment should set off alarms.

Luke Wachob is the McWethy Fellow at the Center for Competitive Politics.

EDITOR'S NOTE: *This piece has been amended since its initial posting*.

NATIONAL REVIEW ONLINE

Does Religious Speech Threaten Democracy?

By Zac Morgan

National Review Online
Published July 11, 2014

The Senate Judiciary Committee yesterday approved by a 10–8 vote a constitutional amendment that, if passed, would functionally eliminate the political rights of speech and association. While the committee made the language more succinct than in its original iteration, the law still poses a profound threat to fundamental liberties.

For instance, Congress probably would have the power to ban religious sermons and church literature.

Section 1 of the amendment permits Congress and the states to "advance democratic self-government" — whatever that means — "and political equality" by "regulat[ing] and set[ting] reasonable limits on the raising and spending of money by candidates and others to influence elections."

Section 2 specifically permits the federal and state governments to "distinguish between natural persons and corporations or other artificial entities created by law, including prohibiting such entities from spending money to influence elections."

And section 3 — in a perfect demonstration that the eight Judiciary Committee members who are lawyers, yet voted for the measure, failed to pay attention in law school — claims to prevent anyone from reading the amendment in such a way as "to grant Congress or the States the power to abridge the freedom of the press."

The First Amendment, as drafted by men such as Fisher Ames and James Madison, protects five freedoms: speech, press, assembly, petition, and religion. The newly minted constitutional amendment mentions only one of those as being untarnished — "press."

Under a longstanding principle of statutory interpretation — *expressio unius est exclusio alterius* — the explicit naming of one member of a class means that the other members of that class are excluded. So, under this amendment, as long as the interests of "democratic self-governance" and "political equality" are "reasonably" at issue, Congress or the states may infringe on speech, assembly, petition, and religious freedoms.

There's honestly no limit to the number of examples of "reasonable" restrictions that could be drawn under this amendment, but let's discuss a particularly troubling one.

Section 2 allows Congress to explicitly ban corporations or other associations from spending money to influence elections — but Lord only knows what "influencing elections" actually

means. (To give you an idea, a surprising number of states, even with the protections of the current First Amendment, seem to believe it includes saying the name of a candidate a couple of months before an election, regardless of context.) Many places of worship incorporate as nonprofit entities. Worse, section 3 explicitly puts the religion clauses up for grabs.

Do you know of any churches, mosques, or synagogues that discuss current events? Maybe they sometimes discuss the morality of war? Maybe, sometimes, candidates running for office are associated with a current war? Congratulations! A message from your priest, imam, or rabbi might actually be — to use a campaign-finance term — the "functional equivalent" of virtually any presidential campaign conducted in the 21st century. And because religious organizations are often incorporated, I certainly hope that the messages being delivered advance "democratic self-governance."

Lest you think this is crazy, the state of Montana did go after a church for allegedly violating campaign-finance laws just a few years ago. The church in question was an "incorporated religious institution" whose pastor aired a simulcast of an anti-same-sex-marriage religious broadcast during the same time he allowed a member of his church to "place[] roughly twenty copies" of an anti-same-sex-marriage petition in the church's foyer.

The Ninth Circuit overruled the effort of the state of Montana to declare the church an "incidental" PAC. But this ruling was only because of the First Amendment's requirement that Montana's regulations must pass a heightened form of analysis. If the case had turned on mere "reasonableness," as the new amendment allows, or even "political equality" — the church probably did not show the pro-same-sex-marriage side of things — the outcome could well have been different.

And of course, this same principle applies to the other non-press freedoms protected by the First Amendment. Lobbyists (petition) and protest groups (assembly) would have to make certain that they were acting in the interest of "political equality."

(It's worth noting that supporters of this amendment probably believe that the protection of "the press" is really a protection of institutional media corporations, such as the New York Times Company or MSNBC. But the Supreme Court has repeatedly disavowed such an interpretation of the Press Clause — so it is entirely unclear whether any protections would actually attach to media corporations. Apparently none of the amendment's drafters have cracked open a con-law book.)

The First Amendment was the product of careful thought and cautious deliberation by some of the greatest political minds of the 18th century. This amendment, even as shortened by the Judiciary Committee, and while undoubtedly undertaken in good faith, still represents a shoddy, unserious, intellectually bankrupt piece of work.

It should be soundly defeated and never, under any circumstances, resurrected.

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Flag-desecration and First Amendment hypocrisy in the US Senate

By Luke Wachob

The Washington Examiner
Published June 23, 2014

Political posturing trumps the First Amendment. That is the clear message being sent by at least 15 senators who, less than a decade ago, were some of the most ardent opponents of a flag-burning constitutional amendment.

Now, with an election on the horizon, some senators have proposed a constitutional amendment that would give Congress the ability to control essentially all political speech, from how many billboards a candidate can buy to how many hours you can spend going door-to-door.

Forty-three senators are co-sponsoring the amendment, S.J. Res. 19, which was originally introduced by Sen. Tom Udall, D-N.M.

The proposal was the subject of a June 3 Senate Judiciary Committee hearing that featured testimony from both Senate Majority Leader Harry Reid of Nevada and Senate Minority Leader Mitch McConnell of Kentucky.

The amendment, introduced under the auspices of making political races more "equal" by controlling who can spend money in federal and state elections, will undoubtedly and quite purposefully have the chilling effect of limiting First Amendment rights.

These types of restrictions would have outraged some of these same senators only eight years ago.

Consider, for example, what current Udall amendment co-sponsor Sen. Dick Durbin, D-Ill., said when speaking against a proposed flag-burning amendment in 2006:

"The Bill of Rights has served this nation since 1791, and with one swift blow of this ax, we are going to chop into the First Amendment."

Durbin chided those who thought they could do better than the Founding Fathers, remarking "so many of my colleagues are anxious to take a roller to a Rembrandt."

He wasn't alone. Sen. Barbara Boxer, D-Calif., now a co-sponsor of the Udall amendment, said this in 2006:

"This Constitution is more than just an outlet for our justifiable frustrations. It is concise. It has worked. It is the enduring ideal of our nation, and we should not unnecessarily amend it."

Sen. Barbara Mikulski, D-Md., explained her opposition to the flag desecration amendment by saying, “I cannot support an Amendment to the United States Constitution which would, for the first time in our nation's history, narrow the reach of the First Amendment guarantee of freedom of speech.”

Where once there was humility, now there is hubris. Senators Durbin, Boxer, and Mikulski are all co-sponsors of the Udall amendment that narrows the reach of the First Amendment.

The delusion that Congress can improve on the 45-word eloquence of the First Amendment is apparently contagious.

Udall, who also voted against the flag amendment then, announced last summer, “I am proud to be introducing this amendment to change the way we do business in Washington and get money out of a broken system that puts special interests over people.”

That kind of evergreen political rhetoric is no substitute for constitutional analysis. Famed First Amendment attorney Floyd Abrams offered his opinion of the Udall amendment at a hearing on the measure, saying it “would shrink the First Amendment and in doing so set a precedent that would be both disturbing and alarming.”

Reid, who has supported other flag-desecration amendments, recently said of the Udall proposal that "we’re going to push a constitutional amendment so we can limit spending because what is going on today is awful.”

But what is going on today is just that citizens, empowered by Supreme Court rulings upholding speech rights, are speaking out in higher volumes, and many incumbent politicians dislike it.

Sponsors of the Udall amendment used to have more backbone in the face of criticism. Boxer wisely observed in 2006 that “in a great country like the United States of America, you don't fear dissent. In a great country you allow dissent ...”

Sen. Tom Harkin, D-Iowa, another co-sponsor of the Udall amendment, observed during the previous flag desecration amendment debates that the Bill of Rights “has stood unchanged for more than two centuries, despite Civil War, Depression, two world wars, and powerful internal movements of dissent. Even at those times of profound turmoil, we resisted any temptation to amend the Bill of Rights.”

Yet all it took for Harkin and other Udall amendment co-sponsors to abandon this view of the Bill of Rights’ resilience was for citizens to spend some money on political speech.

Profound turmoil, indeed. They also must have abandoned the former view of Mikulski, who said during the flag desecration amendment debates, “we cannot change the culture by changing the Constitution. We change the culture by living the Constitution, by speaking out responsibly and by organizing. I support amendments to expand the Constitution, not constrict it.”

A lot has changed over the years. Instead of trying to change the culture by speaking out and organizing, now 43 Senators are trying to change the Constitution to prevent people from speaking out and organizing.

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ROLL CALL

A Constitutional Right to Incumbency?

By Eric Wang

Roll Call
Published June 3, 2014

Imagine if, 20 years ago, Congress had passed a law limiting each car manufacturer or retailer to spending no more than a certain amount per year on research and development or expanding its operations. Large, established institutions like General Motors or Walmart might have done just fine. But startups like Tesla and Amazon.com would never have been able to make the capital-intensive investments to get off the ground, and consumers would have been worse off for it.

Today, the Senate Judiciary Committee will hold a hearing on S J Res 19, a proposal to amend the U.S. Constitution to allow Congress and state legislatures to pass exactly this type of law when it comes to how much money politicians, their critics, and their supporters may raise and spend in appealing to voters about who may wield the lawmaking power in the first place. Specifically, the proposed amendment language would authorize limits on "the amount of contributions to candidates" for elective office, as well as "the amount of funds that may be spent by, in support of, or in opposition to such candidates."

Perhaps it is fitting that the sponsor of this proposal is Sen. Tom Udall, D-N.M., the scion of a political dynasty that stretches back more than 100 years and includes his cousin Sen. Mark Udall, D-Colo., his father, former Secretary of the Interior and Rep. Stewart Udall, D-Ariz., and his uncle, former Rep. "Mo" Udall, D-Ariz. It is thus also ironic that Sen. Udall's amendment declares that its purpose is "to advance the fundamental principle of political equality for all."

If, by "political equality," Sen. Udall means a playing field that would favor an entrenched political establishment at the expense of newcomers, challengers, and critics, then his amendment is certainly apropos. While forcing every candidate to abide by the same spending limit may seem "equal" on the surface, it is not hard to see how someone like Sen. Udall, who has a name recognition and political network established over four generations in power, would still start far ahead of any challenger under such a regime. These same advantages generally would exist for all incumbents, who enjoy the privileges of communicating with their constituents at taxpayer expense, and regularly appearing before public audiences and in news stories by virtue of their status as public officials.

All this is not to suggest that our laws should tilt to the opposite extreme by trying to compensate for every advantage and disadvantage a candidate may face. After all, some politicians are more charismatic, articulate, or photogenic. To focus on the less superficial, some politicians also are more competent or experienced, or have better policies and ideas, and are thus more worthy of support, whether it is in the form of campaign contributions or votes. The purpose of the law shouldn't be to legislate or constitutionalize "political equality." Rather, the law should stand

back so that the candidates, parties, and advocacy groups can duke it out in the court of public opinion and the voters can decide.

In the campaign finance reform liturgy, the quest for equality is often accompanied by the reduction of corruption. Thus, the second purported aim of Sen. Udall's amendment is "to protect the integrity of the legislative and electoral processes." Over the last forty years of campaign finance jurisprudence, limits on how much contributors may give to a politician generally have been accepted as a legitimate means to prevent corruption. But limits on spending have never been justified on such pretexts, and for good reason. Suppose the publisher of Ralph Nader's "Unsafe at Any Speed" had been limited by law as to how much it could spend to publish his exposé of the auto industry's wrongdoing. Under what anticorruption theory could such spending limits possibly be defensible?

If candidates, political parties, and advocacy groups are limited in how much they may spend to expose their adversaries' malfeasance, then the media will be left as the public's primary source of such information. Naturally, Sen. Udall's amendment provides that "[n]othing in this article shall be construed to grant Congress the power to abridge the freedom of the press." Thus, it seems that, under the amendment's mantle of "political equality," some speakers are more equal than others. But if there is one thing that critics like Noam Chomsky on the left and Brent Bozell on the right both agree on, it is that the media cannot necessarily be relied on as an impartial source of information.

While Sen. Udall is probably well-intentioned in sponsoring his constitutional amendment, its effects cannot be ignored. Quite simply, the proposal would limit political speech, thereby favoring the political and media establishment and undermining the very core of our constitutional structure.

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The Washington Times

Amend the First Amendment to curb political speech?

By Luke Wachob

The Washington Times
Published May 12, 2014

Democratic Sen. Tom Udall of New Mexico and dozens of other senators apparently find the elegant simplicity of the First Amendment offensive. It's hardly surprising that politicians don't like the sound of "Congress shall make no law abridging freedom of speech" when they want to silence critics.

Not satisfied with the most popular amendment in the Bill of Rights, Mr. Udall and at least 36 of his Democratic colleagues (including independent Sen. Angus S. King Jr. of Maine, who caucuses with the Democrats) have been promised a vote on their constitutional amendment to the First Amendment, which would more than quadruple its length. It seems it's time to close that pesky "freedom of speech" loophole that lets citizens go unpunished for criticizing their government or elected officials.

The announcement there would be a vote on the amendment came during a Senate hearing titled "Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect the 2014 Election and Beyond." During the hearing, Mr. Udall, and fellow Democratic Sens. Charles E. Schumer of New York and Amy Klobuchar of Minnesota took a hard line against both dollars and sense.

Their case for amending away Americans' most important freedom played like a greatest-hits album of the worst arguments for censorship. Mr. Schumer achieved a trifecta of free speech faux pas all by himself, pointing out that freedom of speech is not absolute by comparing restrictions on political speech first to laws against pornography, then to falsely crying "fire" in a crowded theater, and finally to noise pollution.

Of course, no one argues that freedom of speech is absolute and, in fact, political speech today actually enjoys less First Amendment protection than does pornography. However, there's even more to take issue with here than his straw men. Mr. Schumer's view that political speech is no different from pornography, noise pollution or lying to cause a panic illustrates his appalling lack of respect for freedom of speech and the extreme recklessness of those who endeavor to replace the First Amendment with government control of campaign speech.

No one who takes free speech seriously should be quoting the "fire in a crowded theater" metaphor, which was first used by Justice Oliver Wendell Holmes in Schenck v. United States — the case where the Supreme Court ruled it constitutional for the government to suppress dissent during wartime and upheld the imprisonment of Socialist Charles Schenck. The Schenck

decision is a shameful episode in First Amendment history, not something to quote approvingly from nearly a century later.

Those who want to amend the First Amendment do not seem to want a discussion of its history. They simply want to make it history. Actions speak louder than words, and the platitudes offered at the hearing about wanting a "nonpartisan" approach are contradicted by supporters of the amendments' willingness to use irrelevant and discredited arguments to advance their cause.

In his opening remarks at the hearing, Mr. King said he was "deeply worried about the future of our democracy." If his view that we should replace the First Amendment becomes common, we should all be worried. Our freedoms of speech and association will diminish if government power to limit political participation grows. No republic worthy of the name should consider that a good thing. As the Supreme Court warned in the McCutcheon decision that triggered the hearing, "those who govern should be the last people to help decide who should govern."

The First Amendment is not conditioned upon a level playing field. In fact, there has never been a time in American history where everyone spoke equally and was heard equally, and there never will be. Few will ever be as famous as Oprah, run a newspaper or host a television program. The purpose of the First Amendment is to protect us from being censored or punished for our views by government, so that we may always speak truth to power. This amendment threatens that sacred right, by concentrating power in the hands of incumbent politicians.

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What Sen. Schumer and Rep. Deutch Get Wrong About the Senate's Constitutional Amendment Proposal

By Scott Blackburn
Center for Competitive Politics
Published July 17, 2014

On Tuesday, Sen. Chuck Schumer and Rep. Ted Deutch penned an opinion piece in *Politico Magazine* purporting to respond to criticisms of a Democratic effort to amend the Constitution to overturn *Buckley v. Valeo* and *Citizens United v. FEC*. It, unfortunately, is riddled with obfuscations, straw man arguments, and factual inaccuracies. The entire article is excerpted below, along with *italicized commentary* explaining its many errors.

> Texas Sen. Ted Cruz is shrewdly aware that Americans of every political persuasion are disgusted by big money in politics.

Just as New York Sen. Chuck Schumer and Florida Rep. Ted Deutch are keenly aware that Americans of every persuasion love the First Amendment and don't want to see it changed for partisan political ends.

> He knows that hundreds of elected officials representing millions of people and 16 states have already endorsed a constitutional amendment to overturn *Citizens United* and related court decisions.

And even more elected officials, representing even more millions of Americans and 34 states, oppose an amendment that would allow the government to ban movies and books. If the amendment had the overwhelming support implied, it would already be part of the Constitution – that's how democracy works. Scare tactics would be unnecessary.

> And because he knows that defending the ability of corporations and a few billionaires to spend millions upon millions of dollars influencing elections is no winning position, he has taken to framing these efforts as plots to repeal the First Amendment.

Another possibility, of course, is that Sen. Cruz actually thinks that altering the First Amendment (which even supporters of this new amendment agree would happen) to allow Congress to ban certain types of political speech is a fundamentally undemocratic idea. Perhaps, he believes that Congress has not demonstrated a propensity to be "reasonable" in the past, and it would be

unwise to let incumbent politicians decide what "reasonable" restrictions on political speech look like.

> The constitutional amendment that was reported out of the Senate Judiciary Committee last week will not, as Sen. Cruz claims, allow legislators to ban books or silence political opponents. But Sen. Cruz is trying to replace logic with hyperbole, saying that if you're for this amendment, you're against the First Amendment.

This new constitutional amendment is expressly intended to "overturn Citizens United." That case was about the government's ability to ban a political movie, because the movie was funded by a non-media corporation. Indeed, that was the government's litigating position at the first oral argument held in front of the Supreme Court. And the justices agreed – they ruled against the government in Citizens United*, at least in part, because of the frightening implications of book banning.*

> His overheated rhetoric is an attempt to ignore an important truth in the history of our Constitution: We have always had balancing tests for every amendment. No amendment is absolute.

As a lawyer, Senator Schumer also knows that the Supreme Court has consistently applied balancing tests in free speech cases. Indeed, in the 1976 Buckley v. Valeo *opinion, the Court upheld a number of restrictions on speech and association. The problem is that the restrictions this amendment's proponents want now could never pass those balancing tests – because they want to wholesale ban entire categories of speech and association.*

> Sen. Cruz's argument at a Judiciary hearing that any restriction on speech will cause an inexorable slide into censorship and tyranny defies the constitutional tradition of balancing the right to free speech with other important ideals like safety, privacy and democratic equality. The first balancing test is safety: Does Sen. Cruz really believe that everyone should be allowed to falsely cry "fire" in a crowded theater? Another is privacy: Libel laws protect against the use of speech to defame or slander without evidence. Anti-child pornography laws are an eminently justifiable regulation on the First Amendment for both safety and privacy reasons. Does Sen. Cruz oppose those?

No. Child pornography is a disgusting, immoral, breach of basic decency. What Citizens United did in 2008 – create a documentary which criticized Hillary Clinton – is not the same as child pornography. If Senator Schumer and Representative Deutsch believe that criticism of Hillary Clinton is equivalent to filming the sexual violation of a child…there actually are not words to describe how horrifying that worldview is.

> A third balancing test for the First Amendment should be a political system that has an equality of speech, which is why campaign spending limits are so important.

"Equality of speech" is a new balancing test, one that has never been used before in America. For good reason. What does equality of speech mean? Does it mean that every citizen has a right to be published in the pages of The New York Times*? Does it mean anyone who wants to run for*

political office must be included in every political debate, regardless of political party or polling numbers? Does it mean that candidates should be limited to the same number of volunteers, so that one candidate can't gain an advantage handing out flyers? All it seems to mean, in the context of this amendment, is that certain Americans should be prohibited from spending money expressing their opinion – because they have too much money.

> The constitutional amendment we propose will not infringe on citizens' First Amendment rights;

The proposed amendment makes an exception for the media. It says, "Nothing in this article shall be construed to grant Congress the power to abridge the freedom of the press." Why does it make an exception for just that particular part of the first amendment? Because it necessarily infringes on the rest of the First Amendment and the new amendment's supporters wanted to make it clear that the portion of the First Amendment they still like remains unaffected. Sorry, if your church is a § 501(c)(3) and discusses political issues though – the amendment would let Congress ban that.

> [R]ather, it will restore the constitutional legitimacy to laws that set reasonable limits on spending in our elections.

It would be unwise to allow Koch Industries to decide on a "reasonable" level of pollution. Should the 535 politicians and campaigners in the House and Senate be allowed to decide what is a "reasonable" level of spending and, therefore, a "reasonable" amount of speech? It is easy to see why incumbent politicians might want to limit the amount of ads run against them, but doing so is hardly an argument for "constitutional legitimacy."

> If anything, such an amendment should be seen as a bulwark for the First Amendment, which seeks balance among the cacophony of voices that exist in a free society. If Sen. Cruz believes so strongly in free speech, he should be concerned about billionaires from both ends of the political spectrum drowning out the voices of average Americans.

The notion that banning certain speech in order to make other speech "more equal" is the ultimate perversion of the First Amendment. Oprah Winfrey speaks "more loudly" with her national television audience and billion dollar media empire. Should we prohibit Ms. Winfrey from voicing her opinions about politics? Congress should not be able decide what speech is "too loud" or "too influential."

> Because it is not with the same dearness that we hold the right to get up on a soapbox and make a speech, or to write for a brochure or a newspaper, as we do to put the 11,427th negative ad on the air or to make sure that all the ad space is bought so your opponent can't get on the air.

And this is exactly why Congress cannot be in the "reasonable" speech business. Of course incumbent politicians want to prohibit negative ads – they are making the case to voters that incumbent politicians have done a bad job! Congress will necessarily divide the political speech world into speech they like (soapboxes and newspapers) and speech they don't (ads that make

Congress look bad). This also begs the question, which ad is too much speech? Is the first negative ad? The 1,000th? Or is it the 11,427th? Once again, is it really a good idea to let members of Congress decide how many ads their opponents can run against them?

> With billions of dollars cascading into the system and distorting our politics, this false equivalency — likening the free speech of an individual to the campaign spending of a multibillion-dollar corporation — is dangerous and insulting to the American voter.

"Billions of dollars" don't vote. The money in politics, whether from individuals (still by far the primary source of funding), corporations, or any source, is used to advocate for a candidate's positions and message. Then, voters decide if that message is worthy of their vote. There are untold examples of candidates and campaigns that heavily outspent their opponent and lost. Indeed, Rep. Deutsch probably still has Eric Cantor's phone number, if he wants to check.

> Indeed, Americans' free speech rights flourished throughout the 20th century alongside numerous laws aimed at shielding government from the influence of well-funded special interests. Sen. Cruz must know that there was no book burning, no voter intimidation or disenfranchisement caused by these campaign finance restrictions in the period before *Citizens United*.

Again, the facts of the case in Citizens United *concerned the government's desire to ban a movie. Perhaps banning movies is a "reasonable" restriction, but banning books is outlandish hyperbole?*

> These laws simply tried to protect the voices of average citizens from being shoved to the margins by the overwhelming power of moneyed interests to broadcast their message, which is stronger than ever. And now *Citizens United* has opened the floodgates to billions of dollars coming into the system undisclosed, unregulated and unanswered.

It is simply factually inaccurate to claim that there are billions of "undisclosed, unregulated and unanswered" political donations. The vast majority of political donations are disclosed – indeed, we know that 95% of political spenders in 2012 disclosed their donors. All political activity is subject to untold regulations from the IRS and FEC, which, as recent scandals have shown, are incapable of applying these regulations in a non-partisan manner. And, as is appropriate in a free society, every political ad can be answered by the media with honest reporting, by opposition candidates with their own beliefs, and by other citizens, who raise their own funds and use the innumerable communication platforms available today to get their message out.

> Today, in terms of the ability to influence officeholders, the scales are tilted heavily in favor of corporations over voters, and wealthy individuals over middle-class families. Giving corporations and a few hundred individuals — whether it's Sheldon Adelson or George Soros — the right to buy unlimited influence in our elections undermines our entire system of elected representation and self-government

This amendment doesn't concern corporations or wealthy interests' ability to influence office holders. This amendment is about ***influencing voters****. Congress is afraid that "Sheldon Adelson*

or George Soros" might run an ad that changes voters' minds, and that voters might decide that current officeholders are no longer right for the job. That doesn't "undermine" elected representation – that is *elected representation.*

> [A]nd could force elected officials to spend more time courting donors and avoiding corporate attack ads than listening to the needs of their constituents.

If elected officials truly wanted to spend less time fundraising, they would advocate for eliminating contribution limits. Then, they could spend all of that saved fundraising time listening to the needs of constituents.

> It is clear that, throughout history, the application of the First Amendment has always required a balancing test, and there is no more important balance to be achieved than the noble goal of making sure our democracy works in an equal and fair way. That is what our amendment would do — it would restore some semblance of the principle of one person, one vote, and help us move toward the level of equality that the Founding Fathers sought in our political system.

As Chief Justice Roberts observed in FEC v. Wisconsin Right to Life, *we all too often forget to mention the actual language of the First Amendment: "Congress shall make no law … abridging the freedom of speech, or of the press."*

Our Founding Fathers may not have been very familiar with ensuring that democracy is "equal" or "fair" – but they certainly knew that Congress needed to stay out of the business of policing thought, speech, and publication.

Exploring a Constitutional Amendment to Amend the First Amendment and Promote Incumbents

By Luke Wachob
Center for Competitive Politics
Published June 4, 2014

At a June 3 hearing, the Senate Judiciary Committee turned its infinite wisdom to the subject of amending the U.S. Constitution to empower Congress and the states to restrict fundraising, spending, and in-kind equivalents (which aren't defined in the amendment text) made in support of or opposition to candidates for public office. The amendment, formally known as S.J. Res. 19 and originally proposed by Sen. Tom Udall (NM), currently has 43 co-sponsors in the Senate.

Senate Majority Leader Harry Reid (NV) and Senate Minority Leader Mitch McConnell (KY) made a rare joint appearance before the Committee to offer their thoughts on the Udall amendment, Sen. Reid in support and Sen. McConnell in opposition. After their statements, a panel featuring North Carolina State Senator Floyd McKissick, Jr, famed First Amendment attorney Floyd Abrams, and American University Law Professor and Maryland State Senator Jamie Raskin gave testimony and took questions from the Committee.

McKissick, Jr. focused his testimony on issues affecting North Carolina that he felt were connected to the *Citizens United* ruling, ranging as far as teacher tenure, Medicaid expansion, and unemployment insurance. In other words, McKissick wants a constitutional amendment to prevent people in power from implementing policies he doesn't like. Raskin argued that a century-old wall between democracy and plutocracy was being eroded by a "free market" ideology equating money with speech. He won the prize for most hyperbolic on the panel, accusing the Supreme Court of having "bulldozed" the campaign finance system and warning of momentum to "strike down all campaign finance laws." Abrams took a far different position, noting that the Udall amendment's intention was to limit speech, which fundamentally contradicts the purpose of the First Amendment, and that it would reverse not only *Citizens United* and *McCutcheon*, but also the 1976 landmark campaign finance ruling, *Buckley v. Valeo*. While McKissick and Raskin thought the 2012 elections were proof that the Court's rulings had done serious damage to democracy, Abrams contended they were proof that the system worked: more money was spent, enabling more people to speak.

Members of the Committee went back and forth debating whether the Udall amendment was a necessary response to recent Supreme Court rulings or a dangerous attempt to reduce First Amendment rights and expand government power. Sen. Schumer (NY) again compared limiting

political speech to noise ordinances, libel laws, and child pornography laws, showing off his profound ignorance of free speech. I've written about Sen. Schumer's inability to distinguish between free speech exceptions – such as noise ordinances, libel laws, and true threats – and restrictions, such as telling a citizen "you've spent enough on speech this election cycle," before. It's troubling, to say the least, that a senior U.S. Senator doesn't get the difference.

CCP President David Keating submitted a statement to the committee that can be read here. It says, in part, "If adopted, Senator Udall's constitutional amendment would help entrench those in Congress by insulating incumbent politicians from criticism and granting members of Congress unprecedented power to regulate the speech of those they serve."

CCP also performed a legal analysis of the Udall amendment, available here. It concludes, "The Udall amendment would rebuke four decades of campaign finance jurisprudence from the Supreme Court and greatly reduce the quantity of debate in this country. The amendment could be read as a broad grant to Congress to regulate virtually all political speech and association, and fundamentally miscomprehends the free press clause. It is a rhetorical document, introduced during an election year, which highlights the difficulty in tampering with the First Amendment."

In addition to our legal analysis, CCP looked at how some Senators "evolved" their views on the First Amendment since opposing efforts to amend the constitution to ban desecration of the U.S. flag in the 1990s and 2000s. We discovered that 22 of the Udall amendment's 43 co-sponsors cast votes on flag desecration amendments, 15 voted no, and at least 8 current Senators took to the House or Senate floor to argue against the flag burning amendments on a variety of pro-First Amendment grounds. Our report collects pro-free speech quotes from current Udall amendment co-sponsors made during the flag desecration debates that suggest a declining reverence for the Bill of Rights among those members. That report can be found here.

Whatever its intentions, the Udall amendment would give government the power to limit a tremendous amount of political activity that is currently protected under the First Amendment. It's hard to see how limiting political speech could ever help democracy, much less "save" it as the sponsors of the amendment purport. More likely, turning down the volume on campaign speech will serve to satisfy incumbent politicians' desire to quiet criticism and amplify their own voices above those of the citizens they serve.

For more information, all of CCP's resources on the Udall amendment are available on this page. We will continue to track and educate the public on efforts to amend the First Amendment and increase government power over election campaigns. As Chief Justice John Roberts wisely wrote in the *McCutcheon* decision, "those who govern should be the *last* people to help decide who *should* govern."

POLITICO MAGAZINE

The Democrats' Assault on Free Speech

By Senator Mitch McConnell

Politico Magazine
Published September 7, 2014

Throughout August, senators had the opportunity to travel around their states and listen to the concerns of their constituents. The American people have a lot on their minds these days — important issues they expect the Democrat-run Senate to address: things like high unemployment, threats of terrorism, rising health care costs and the ongoing crisis at the border.

Unfortunately, hardly any of those things will be on the Senate's agenda when it returns Monday.

That's because the Democrats who control the Senate say they're more interested in repealing the free speech protections the First Amendment guarantees to all Americans. Their goal is to shut down the voices of their critics at a moment when they fear the loss of their fragile Senate majority. And to achieve it, they're willing to devote roughly half of the remaining legislative days before November to this quixotic anti-speech gambit.

The proposal they want to consider would empower incumbent politicians to write the rules on who gets to speak and who doesn't. And while no one likes to be criticized, the way for Senate Democrats to avoid it is to make better arguments, or even better, to come up with better ideas — not shut up their constituents.

Not surprisingly, a proposal as bad as the one Senate Democrats are pushing won't even come close to garnering the votes it would need to pass. But to many Democrats, that's just the point. They want this proposal to fail because they think that somehow would help them on Election Day — they think it will help drive to the polls more left-wing voters who don't like having to defend their ideas.

If all this seems like an object lesson in why most Americans are so disgusted with Washington right now, that's because it is. With legislative priorities like this, it's no wonder a recent Quinnipiac poll found that just 14 percent of respondents say they think the government in Washington can be counted on to do what's right most or all of the time.

A more sensible approach would be for the Democrats who run the Senate to take up the slew of job-creation bills the Republican-controlled House already has passed, some with overwhelming bipartisan support. But Senate Democrats prefer to spend their time on bizarre sideshows like trying to take an eraser to the First Amendment.

None of this should be surprising to even the most casual observer of the Senate these days. Earlier this year, the Democratic leadership rolled out a partisan playbook drafted by campaign staffers that spelled out just how they planned to run the Senate in the run-up to November. It was filled with partisan proposals designed specifically to fail so Democrats could campaign on the failure of that legislation, blaming Republicans for what wasn't done.

Senate Democrats have followed the script dutifully ever since, and the next two weeks in the Senate promise to be a legislative crescendo of poll-tested electioneering from the Democratic majority.

For months, the Senate has done little more than consider more creative ways to save the jobs of Democratic politicians in November. Yet at a time when millions of Americans are unemployed, middle-class families struggle each month just to pay the bills, the government is failing our veterans and serious crises overseas only seem to grow worse by the day, Democratic leaders shouldn't be focused on legislative show-votes, including their latest attempt this week to silence the voices of the American people.

Instead, they should work with Republicans to help these Americans out. That means, as a start, clearing the dozens of jobs bills already passed by the Republican-led House of Representatives. It also means helping us pass any number of bipartisan proposals aimed at kicking the economy into gear, helping alleviate the stresses and financial burdens on working families and formulating true bipartisan health reform that doesn't punish the middle class the way Obamacare does.

All of this is within reach and easily doable if Democrats would only put aside their political playbook for once.

Over the decades, the U.S. Senate has shown itself to be a place of high purpose and serious debate in moments of national need. Sadly, today's Democratic-controlled Senate falls far short of that ideal. That doesn't have to be the last word on today's Senate Democratic leaders, but at the moment, they don't seem terribly bothered by the prospect.

That's a shame. With Americans increasingly cynical about Congress, this is a time to show we can work together on ways to make life easier for our constituents, not to provide them with fresh evidence of Washington's worst traits — things like trying to shut up critical American voices.

If Senate Democrats want to convince Americans that they, as lawmakers, are not completely out of touch, they should stop the games. Because Americans aren't demanding that Congress repeal the free speech protections of the First Amendment. They just want Washington to show that it can work for, not against, them for a change.

Mitch McConnell of Kentucky is the Senate Republican leader.

The Augusta Chronicle

Purely partisan 'reform'

By The Augusta Chronicle Editorial Staff

The Augusta Chronicle
Published June 23, 2014

How pathetic is it that one of Senate Democrats' biggest priorities this summer – campaign-finance reform – is merely a ploy to raise campaign cash before November?

Their proposed constitutional amendment to give state and federal governments more power to regulate political fund-raising – a blatant attempt to silence conservative candidates – has zero bipartisan support.

Not even Democrats' most reliably liberal ally – the American Civil Liberties Union – will get behind it, calling it a danger to civil liberties.

Democrats know there's no chance of securing the 67 Senate votes needed to advance the joint resolution. So what, then, is the point?

We'll let *The Atlantic* spell it out for you: "These amendments are catnip to the Democratic base," the magazine said. "The Senate debate this August ... is certain to raise a ton of campaign cash for Democrats – just in time for the 2014 elections."

That's something to keep in mind this summer when Republicans are sure to be denounced for rejecting a plan to restore "sanity" to campaign laws.

The only thing the Democrats are trying to restore is a decades-old system dominated by their Big Labor allies, which is why U.S. Sen. Tom Udall of New Mexico introduced S.J. Res. 19 last year.

An analysis by the nonpartisan Center for Responsive Politics shows 14 of the top 25 political donors since 1989 are Democrat-leaning groups – 13 are labor unions. Of the rest, eight are bipartisan and only three lean Republican.

Like its House companion – H.J. Res. 20, introduced by U.S. Rep. Jim McGovern, D-Mass. – Udall's resolution seeks to gut recent *Citizens United* and *McCutcheon* Supreme Court cases that ruled campaign contributions are First Amendment-protected political free speech.

Democrats want Congressional oversight of federal political campaign finances, including independent political-action committees.

The ACLU insightfully recognized the danger in allowing the government – regardless of who's running it – control over how Americans choose to endorse political candidates.

The ACLU said S.J. Res. 19 would "lead directly to government censorship of political speech and result in a host of unintended consequences that would undermine the goals the amendment has been introduced to advance" and that doing so would "fundamentally break the constitution and endanger civil rights and civil liberties for generations."

Free speech, one. Politburo-style thuggery, zero.

Still, the Senate promises a vote this summer.

"The First Amendment is sacred, but the First Amendment is not absolute," said co-sponsor U.S. Sen. Charles Schumer, D-N.Y. "By making it absolute, you make it less sacred to most Americans."

While you wrap your head around that statement, know that Schumer and Udall happen to be among the nine senators recently listed in a Senate Select Committee on Ethics complaint for improperly asking the Internal Revenue Service to investigate conservative groups.

The senators were upset *Citizens United* paved the way for the creation of super-PACs and the proliferation of nonprofit advocacy groups to engage in large-scale political activity dominated by labor unions.

The other senators listed in the Center for Competitive Politics' complaint: Carl Levin, D-Mich.; Dick Durbin, D-Ill.; Michael Bennet, D-Colo.; Sheldon Whitehouse, D-R.I.; Jeanne Shaheen, D-N.H.; Al Franken, D-Minn.; and Jeff Merkley, D-Ore.

"Richard Nixon faced impeachment charges for attempting to use the IRS for political purposes," said David Keating, president of the Center for Competitive Politics. "To varying degrees, each of these senators did exactly this kind of conduct."

Americans can see plainly what's going on here. The ham-fisted attempt to "restore integrity in our election system," as Udall says, is a naked attempt to muzzle the voice of conservatives by restricting their campaign activities.

Their plan to use the IRS backfired, so now its on to plan B – an assault on the Constitution.

Liberals have never been concerned about "special interests" and big-money in campaigns until the interests and money were directed against them. Now, apparently, it's a problem so paramount as to require an addendum to the supreme law of the land.

Bloomberg

Don't Mess With the First Amendment

By Jonathan Bernstein
Bloomberg
Published June 4, 2014

I've argued that the Democrats are acting irresponsibly by pushing a constitutional amendment on campaign finance.

On the substance, I agree with Rick Hasen that it's the wrong way to go. On the politics, a serious party shouldn't focus on go-nowhere constitutional amendments, especially barely thought-out ones. It's a way of ducking responsibility.

I've bashed Republicans for amendments that were chiefly intended to raise money and fool the rubes into thinking the party was being tough (on abortion, or the budget, or flag-burning, etc ...). The Democrats deserve bashing when they do the same thing.

There's a big debate going on about whether Democrats are trying to "repeal," "tamper with"or touch" the First Amendment. Repeal is hyperbole and overkill, but it is fair to say that an amendment that would change the First Amendment as it has been interpreted by the Supreme Court for 40 years would touch or tamper with it. Just as a flag-burning amendment would. One may believe that the restrictions are justified, or that the court has interpreted speech too broadly, but it's still a question of adding restrictions.

On the larger issue, I'm ambivalent about the court's money-is-speech doctrine, which means campaign expenditures cannot be limited. Whatever the logic, the idea that contributions could be regulated but expenditures could not was a workable solution. Is money speech? Not exactly … but it isn't exactly not speech, either.

After all, we certainly would recognize it as a violation of speech rights if the government decided one party couldn't use the airwaves, or a microphone, or host a web page, or any of the other ways people use to amplify their voices, even if no restriction applied to setting up a soapbox, standing on it, and saying whatever one wanted.[1] It may be that spending the money to purchase the means of amplification is somehow different than the amplifying itself, but that isn't self-evident.

None of which means this is an easy area. In a world with limited amplification (and yes, we still live in that world), one person's ability to amplify amounts to a restriction on everyone else's

[1] Not to mention that the government could take away the soapbox, too.

ability to do so. And given unequal distribution of money … well, that's something worth thinking about.[2]

Again, I was all in favor of the kluge (that is, the make-do compromise) of regulating contributions but not expenditures. And as I read the evidence, most people hugely overrate the effects, both in elections and in governing, of campaign-finance arrangements.

But back to the main point: Democrats aren't trying to repeal the First Amendment, but they are messing with it, and that's a lousy idea.

[2] But it's still not an easy topic. There are other ways that political resources are distributed unequally. Some people have more spare time than others; some have more energy; some have better connections; some have electioneering skills; some have better persuasive skills. It's not self-evident that regulating money to equalize access is more justified than regulating those other things.

LAS VEGAS REVIEW-JOURNAL

Money Talks

Editorial

Las Vegas Review-Journal

Published June 1, 2014

Endangered Washington Democrats are so desperate to distract Americans from their policy failures that they're proposing a constitutional amendment.

Not a repeal of the Second Amendment, mind you. Even in the aftermath of Sandy Hook and last month's Santa Barbara massacre, shredding Americans' gun rights is a political loser.

No, Democrats are attacking the First Amendment. Forty of the U.S. Senate's 55 Democrats have co-sponsored an amendment written by Sen. Tom Udall, D-N.M., to give government the power to tightly limit all campaign contributions and all spending remotely tied to elections.

The U.S. Supreme Court ruled in Citizens United v. FEC that the First Amendment prohibits Congress from limiting independent campaign expenditures by companies, unions and advocacy groups. In McCutcheon v. FEC, the court ruled that the First Amendment prohibits Congress from capping total contributions by an individual donor during a single election. The rulings left most campaign finance limits unconstitutional.

Democrats face bleak prospects in this fall's election, thanks to Obamacare. The Affordable Care Act has held back hiring and pummeled the finances of millions of households, increased health care costs and forced untold numbers of Americans to find new doctors. Democrats own the law and all of its consequences.

But Democrats have another explanation for the harm they've inflicted on the middle class: Super-rich donors have bought government and rigged the economy to their benefit at the expense of working stiffs. This conspiratorial nonsense plays right with Senate Majority Leader Harry Reid's tirades against the billionaire Koch brothers. Democrats know their plan has no chance of becoming the 28th Amendment. They want to distract and score points with voters, and nothing more.

However, if anything, the electorate should be repulsed by the proposal because it's an incumbent-protection scheme. Giving elected officials control over the speech of their adversaries is a dangerous idea. Americans should remain free to ruthlessly criticize their government — and blow a fortune doing so, if they wish.

THE WALL STREET JOURNAL

The Democratic Assault on the First Amendment

By Senator Ted Cruz

The Wall Street Journal
Published June 1, 2014

For two centuries there has been bipartisan agreement that American democracy depends on free speech. Alas, more and more, the modern Democratic Party has abandoned that commitment and has instead been trying to regulate the speech of the citizenry.

We have seen President Obama publicly rebuke the Supreme Court for protecting free speech in Citizens United v. FEC; the Obama IRS inquire of citizens what books they are reading and what is the content of their prayers; the Federal Communications Commission proposing to put government monitors in newsrooms; and Sen. Harry Reid regularly slandering private citizens on the Senate floor for their political speech.

But just when you thought it couldn't get any worse, it does. Senate Democrats have promised a vote this year on a constitutional amendment to expressly repeal the free-speech protections of the First Amendment.

You read that correctly. Forty-one Democrats have signed on to co-sponsor New Mexico Sen. Tom Udall's proposed amendment to give Congress plenary power to regulate political speech. The text of the amendment says that Congress could regulate "the raising and spending of money and in-kind equivalents with respect to federal elections." The amendment places no limitations whatsoever on Congress's new power.

Two canards are put forth to justify this broad authority. First, "money is not speech." And second, "corporations have no free speech rights."

Neither contention bears even minimal scrutiny. Speech is more than just standing on a soap box yelling on a street corner. For centuries the Supreme Court has rightly concluded that free speech includes writing and distributing pamphlets, putting up billboards, displaying yard signs, launching a website, and running radio and television ads. Every one of those activities requires money. Distributing the Federalist Papers or Thomas Paine's "Common Sense" required money. If you can prohibit spending money, you can prohibit virtually any form of effective speech.

As for the idea that the Supreme Court got it wrong in Citizens United because corporations have no First Amendment rights, that too is demonstrably false. The New York Times is a corporation. The television network NBC is a corporation. Book publisher Simon & Schuster is a corporation. Paramount Pictures is a corporation. Nobody would reasonably argue that Congress could restrict what they say—or what money they spend distributing their views, books or movies—merely because they are not individual persons.

Proponents of the amendment also say it would just "repeal Citizens United" or "regulate big money in politics." That is nonsense. Nothing in the amendment is limited to corporations, or to nefarious billionaires. It gives Congress power to regulate—and ban—speech by everybody.

Indeed, the text of the amendment obliquely acknowledges that Americans' free-speech rights would be eliminated: It says "[n]othing in this article shall be construed to grant Congress the power to abridge the freedom of the press." Thus, the New York Times is protected from congressional power; individual citizens, exercising political speech, are not.

If this amendment were adopted, the following would likely be deemed constitutional:

Congress could prohibit the National Rifle Association from distributing voter guides letting citizens know politicians' records on the Second Amendment.

Congress could prohibit the Sierra Club from running political ads criticizing politicians for their environmental policies.

Congress could penalize pro-life (or pro-choice) groups for spending money to urge their views of abortion.

Congress could prohibit labor unions from organizing workers (an in-kind expenditure) to go door to door urging voters to turn out.

Congress could criminalize pastors making efforts to get their parishioners to vote.

Congress could punish bloggers expending any resources to criticize the president.

Congress could ban books, movies (watch out Michael Moore) and radio programs—anything not deemed "the press"—that might influence upcoming elections.

One might argue, "surely bloggers would be protected." But Senate Democrats expressly excluded bloggers from protection under their proposed media-shield law, because bloggers are not "covered journalists."

One might argue, "surely movies would be exempt." But the Citizens United case—expressly maligned by President Obama during his 2010 State of the Union address—concerned the federal government trying to fine a filmmaker for distributing a movie criticizing Hillary Clinton.

One might argue, "surely books would be exempt." But the Obama administration, in the Citizens United oral argument, explicitly argued that the federal government could ban books that contained political speech.

The contemplated amendment is simply wrong. No politician should be immune from criticism. Congress has too much power already—it should never have the power to silence citizens.

Thankfully, any constitutional amendment must first win two-thirds of the vote in both houses of Congress. Then three-fourths of the state legislatures must approve the proposed amendment. There's no chance that Sen. Udall's amendment will clear either hurdle. Still, it's a reflection of today's Democratic disrespect for free speech that an attempt would even be made. There was a time, not too long ago, when free speech was a bipartisan commitment.

John Stuart Mill had it right: If you disagree with political speech, the best cure is more speech, not less. The First Amendment has served America well for 223 years. When Democrats tried something similar in 1997, Sen. Ted Kennedy was right to say: "In the entire history of the Constitution, we have never amended the Bill of Rights, and now is no time to start."

Mr. Cruz, a Republican senator from Texas, serves as the ranking member on the Senate Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Human Rights.

BOSTON Herald

Should It Be against Law to Criticize Harry Reid?

By Trevor Burrus

The Boston Herald

Published May 27, 2014

U.S. Senate Majority Leader Harry Reid (D-Nev.) has launched a campaign against the Koch brothers from the floor of the Senate. He has mentioned them approximately 140 times, and has gone so far as to call them un-American. Now Reid has gone from rhetoric to action by endorsing Sen. Tom Udall's (D-N.M.) proposed amendment that would give Congress a free hand to regulate and limit political spending.

Giving elected representatives the power to regulate the process by which they get elected is a terrifying proposition. A cursory look at history shows why.

Wars on political speech are a predictable and time-honored tradition in Washington, D.C. From the Alien and Sedition Acts of 1798, which made it illegal to say anything that would "bring members of the government into contempt or disrepute," to the Sedition Act of 1918, which prohibited "disloyal, profane, scurrilous, or abusive language" about the U.S. government, to modern campaign finance laws, politicians have long tried to silence critics in the name of the "public interest."

Standing between the base motives of politicians and total censorship of dissent, however, was the First Amendment. Now, Udall's amendment hopes to give politicians the power to brush aside that inconvenient little freedom.

When the Bipartisan Campaign Reform Act was first debated, senators chomped at the bit for the opportunity to squelch their critics. Apparently, anyone who criticizes a sitting senator is a public nuisance who must be stopped.

Former Sen. Jim Jeffords (I-Vt.) complained that "negative attack ads" caused a candidate's "20-percent lead to keep going down" and, although "what they are saying is totally inaccurate, you have no way to refute it."

The obvious solution is censorship, because Jim Jeffords's "20-percent lead" is more important than free speech.

Sen. John McCain (R-Ariz.) complained that political ads just "drive up an individual candidate's negative polling numbers and increase public cynicism for public service in general."

McCain's polling numbers and positive views of "public service" are certainly more important than free speech.

McCain also told his fellow senators that political ads just "demeaned and degraded all of us because people don't think very much of you when they see the kinds of attack ads that are broadcast on a routine basis." Those ads "are negative to the degree where all of our approval ratings sink to an all time low."

Protecting the approval ratings of sitting senators is definitely public issue No. 1.

Sen. Dick Durbin (D-Ill.) told a story about how he sat down in a chair to watch TV, and "somewhere between the news and "Saturday Night Live," up pops four television commercials, one after the other, and every one of them blasting me. What a treat that was to sit in the chair and get pummeled by four different commercials."

Clearly, criticizing Dick Durbin should be against the law.

The world has never seen, and never will see, a law aimed at eliminating the praise of the lawmakers. Give them a chance to silence critics, however, and there is no end to what they will do.

They will couch their blatant attempts at censorship as vital to the "public interest," but the light at the end of the tunnel will be to solidify their approval ratings and to make sure that no one can seriously challenge a sitting politician ever again.

Whatever happened to healthy cynicism when it comes to the self-interested motivations of politicians? When a sitting senator complains about people criticizing him the proper response is catcalls of derision, not support.

Reid fully demonstrated the dangers of giving elected representatives power over political spending when he made a spurious distinction between the spending of the Koch brothers, who are "in it to make money," and the spending of Las Vegas casino billionaire Sheldon Adelson, "who is not in this for money." As a former chairman of the Nevada Gaming Commission, surely Reid's impartial judgment on the matter can be trusted.

The Koch brothers, liberal billionaire Tom Steyer, Sheldon Adelson, and George Soros may all have self-interested motives when it comes to political spending, but it pales in comparison to the self-interested motives of politicians using power and censorship to keep their jobs.

Trevor Burrus is a research fellow at the Cato Institute's Center for Constitutional Studies.

Bloomberg

Watch the Democrats Engage in Constitutional Mischief

By Jonathan Bernstein
Bloomberg
Published May 16, 2014

The constitutional amendment on campaign finance that Majority Leader Harry Reid and many Senate Democrats are pushing is a bad idea. Even supporters of strict regulation of money in politics (and I'm not in that camp) should oppose it.

Yesterday, Reid argued for an amendment on the Senate floor, and Judiciary Committee Chairman Pat Leahy has promised a hearing. As Greg Sargent has shown, this is part of the Democratic election strategy of running against plutocrats and focusing on income inequality and economic opportunity. Whatever its merits as campaign strategy, it's bad policy and bad for democracy.

For a detailed case, see campaign-finance scholar (and regulation advocate) Rick Hasen's paper on bad strategies for reacting to Citizens United.[1] On the constitutional amendment path, he concludes

> Given the hydraulic nature of campaign regulation, in which campaigns, parties, individuals, and groups adapt their strategies and organizational forms in an effort to circumvent regulatory frameworks, the task of enshrining durable rules into a single constitutional provision seems unlikely. Certainly none of the many attempts at drafting constitutional amendments that I have seen come close to dealing with loopholes, unintended consequences, and an appropriate balance between speech and robust debate concerns on the one hand, and anticorruption and political equality concerns on the other.
>
> In short, drafters will either write a narrow constitutional amendment "reversing" Citizens United, which would not address many of the evils within our current campaign finance regime, or a very broad amendment, which would raise speech-squelching dangers and the potential for unintended consequences across a variety of social and political issues.

It's usually the Republicans who engage in constitutional mischief, whether with balanced--budget amendments, term limits or marriage. Whoever is doing it, it can't be good for the system to have people running to change the Constitution every time the Supreme Court rules in a way

[1] Just skip Section IV, where he goes after me. OK, don't skip it, especially if you're a regular reader here; you should be aware of the intelligent version of the case against my position on this.

they don't like. Especially when the changes being proposed are in the neighborhood of infringing on the First Amendment.

The worst aspect of this kind of reaction is that it represents an irresponsible abdication of policy reaction. Saying that an impossible-to-pass constitutional amendment is the only thing that can be done is no way for a serious political party to act. It’s bad when the Republicans do it, and it’s sad to see Democrats start to follow their example.

NATIONAL REVIEW ONLINE

Harry's Dirty Amendment

By Charles C. W. Cooke

National Review Online
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In the same week as it was posited that a "literal reading" of the First Amendment would likely guarantee the right's extension to robots and to drones, Senate Democrats moved to remove the protection from a pair of living, breathing human beings. On Thursday, Majority Leader Harry Reid announced that he was now on board with a plan to amend the Bill of Rights. "Let's keep our elections from becoming speculative ventures for the wealthy," Reid implored of his colleagues, "and put a stop to the hostile takeover of our democratic system by a couple of billionaire oil barons."

Those "oil barons" have had quite the effect on Reid's mental health. Of late, he has taken to parading around the Senate floor, incessantly rehearsing the terms of his fatwa as a bookish sixth-grader might run clankingly through his lines in a tuneless middle-school production of Peter Pan. At first, the Kochs were merely a symbol of a wider problem; then they were singled out as being somehow different from others with deep pockets and a keen political interest; finally, as is inevitable with all hunts for the monster at the village gates, they were marked for execution. Death by constitutional amendment — for now, at least.

The move is the final act of a contrived and hamfisted morality play, whose purpose is to cast the Democratic party and its allies as champions of the people and the Kochs as a proxy for all that ails America. Lofty as its broader goal may seek to be, the whole endeavor nevertheless carries with it the ugly smack of the Bill of Attainder — of a change to the nation's constitutional settlement that serves largely to punish two people that the man with the gavel disdains. Rambling in the general direction of a BuzzFeed reporter earlier this week, Reid inadvertently revealed something about his motivations. His reelection to the Senate in 1998, he griped, "was awful": "I won it, but just barely. I felt it was corrupting, all this corporate money." Translation: I almost lost my seat once, so I need the supreme law to protect me. Corruption, schmorruption. This is about power.

It is wholly unsurprising that well-connected and flush incumbents covet the power to determine how their competitors might execute their challenges. Politics, of course, is a dirty game. But, knowing this, we must be most skeptical of those who would accord to the instinct of self-preservation the imprimatur of morality. As we all know too well, government interventions typically attract two types of supporters: the true believers and the cynics. Thus do we see teachers' unions astutely acting to protect their jobs and their benefits while supporters run around, butter in mouth, shouting about "the children." Thus do we see an established rent-seeker such as the New York City Taxi Commission safeguarding its market against the cleaning influence of competition with nebulous and disingenuous talk of "public safety." And thus do we

see the ringmasters of our expansive federal circus gluing themselves to their thrones with the potent adhesive of "campaign finance reform."

Reid's coadjutors are typically zealous in their accord. Their slogan, "money isn't speech," is popular among the sort of people who like slogans and who believe that chanting is a vital part of any serious political movement, and it is no doubt entrancing to the class of voter whose civic acuity is sufficiently stunted to make casting a ballot for Harry Reid seem like a reasonable way of spending a Tuesday. But, beyond brevity, it has little to recommend it. Money, after all, is merely a tool that permits other activities. In what other circumstance, pray, do we draw such a harsh distinction between the cash itself and the purposes for which it is spent? To borrow a line from Eugene Volokh, were the federal government to ban spending on abortion tomorrow, would the assembled champions of Planned Parenthood shrug their blood-soaked shoulders and lament, "oh well, I suppose that money isn't abortion"? Likewise, if an Occupier were legally restricted from spending his money on a May Day protest sign, would we expect him to throw up his hands and to concede that it was only his bank account that was being controlled? ("Mic check: Money isn't paper!") Hardly. The material point here, as Volokh concludes, is that "restricting the use of money to speak . . . interferes with people's ability to speak."

Reid's favored amendment contains a provision reassuring critics that it is not to "be construed to grant Congress the power to abridge the freedom of the press." Benevolent as it is of him to protect this principle, the caveat still rather misses the mark. The truth is, the New York Times can look after itself — prohibitive laws or none. Deborah's Garden Club for Progressive Change in Seattle, on the other hand, cannot. It is telling that the seminal campaign-finance case of the last few years did not involve a magazine such as National Review or a television station such MSNBC, but a nonprofit advocacy group called Citizens United.

It is all very well for Reid to limit his rhetoric to "the rich" — "the flood of special-interest money into our American democracy," he averred grandly this week, "is one of the greatest threats our system of government has ever faced" — but there is no evidence whatsoever that his preferred solution would not affect the little guy with just as much, if not more, force. Had Citizen United's appeal been rejected — as the collective Left appears devoutly to wish that it had been — the federal government would have quite literally banned the release of a film that was critical of Hillary Clinton. Why? Because the film would have interfered with the way that the Congress of which she was a part wanted the election to be run. To whom exactly were our self-appointed better angels sticking it?

Glenn Greenwald — no right-wing fire breather he — inquired at the time of Citizens United whether anybody could doubt that such action was "exactly what the First Amendment was designed to avoid." The rules, Greenwald noted, are not restrictive merely of the Exxons of the world, but of smaller "non-profit advocacy corporations, such as, say, the ACLU and Planned Parenthood, as well as labor unions, which are genuinely burdened in their ability to express their views by these laws." Are we really to consider the censorship of smaller political actors to be acceptable providing that the state-defined "press" is left alone? Are we honestly to bless a rule that allows News Corp to say whatever it wishes about the running of the country but keeps Apple quiet? I think not.

And we won't, of course. Constitutional amendments are difficult to pass precisely because the purpose of the Constitution is to rein in the transient majority and to ossify general principles that may not be altered absent a genuine and sustained change in national thinking. Harry Reid does a sterling impression of a man who is auditioning for a place in the Richard III Ward at the Monty Python Hospital for Overacting, and often he reaps the rewards. Here, however, he has his sordid little work cut out. The idea is almost certainly dead on arrival in the Senate; it is without a shadow of a doubt moribund in the House; and it will be likely ratified by no more than hollow laughter in a significant number of the 38 states that would be required to acquiesce in order for a change in the law to be forthcoming.

Gloomy as I often am about the prospects of the free world, I should say now that I can think of nothing more delicious for the forces of liberty to run against in 2014 and beyond than a Democratic party that is openly attempting not merely to repeal the First Amendment but to replace it with an ersatz substitution that has been authored by a reedy-voiced Napoleon like Reid. Presently, the Senate majority leader is banking on being able to turn a couple of American citizens into modern day Emmanuel Goldsteins and to ride the wave of two-minute-hates straight through Article 5 and into the heart of the Bill of Rights. The big joke? "Polling," Bloomberg informs us, "indicates that Reid is better-known than the Koch Brothers — and more disliked." Just wait till you see what people think of him when he's done trying to take his Ritz-Carlton matchbook to James Madison's masterpiece.

Charles C. W. Cooke is a staff writer at National Review.