CENTER for COMPETITIVE POLITICS

Congress shall make no law...

WWW.CAMPAIGNFREEDOM.ORG

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

---

[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]

This section begins with a constitutional rarity: a preamble.[15] Consequently, while it grants Congress the power to limit contributions and expenditures concerning candidates, it also justifies 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

---

[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.")

[14] "S. J. Res. 19 (113th Congress, 1st Session)," United States Government Printing Office. Retrieved on June 2, 2014. Available at: http://www.gpo.gov/fdsys/pkg/BILLS-113sjres19is/pdf/BILLS-113sjres19is.pdf (June 18, 2013).

[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.

---

[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.

---

[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.