



United States Senate Committee on the Judiciary

Statement for the Record at the Hearing:

“Examining a Constitutional Amendment to Restore Democracy to the American People”

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June 3, 2014

Common Cause is a national nonpartisan advocacy organization founded in 1970 by John Gardner as a vehicle for ordinary citizens to make their voices heard in the political process. Mr. Chairman, on behalf of our 400,000 members and supporters, we appreciate the opportunity to submit this statement for the record.

S.J. Res. 19, the proposed constitutional amendment you are examining at this hearing, will restore First Amendment principles of democratic self-government and the voices of average, ordinary Americans in our elections. The proposed amendment stands for the proposition that voters and constituents should matter more than donors. It will protect the ability of representatives and candidates to hear from a vibrant cross-section of the country, after special interests have for too long pushed voters into a secondary role.

Two years ago, we wrote in testimony to a subcommittee of this Committee that unlimited political spending was transforming our elections “into the sport of kings.”¹ The trend continues unabated. Billionaires, corporations and other special interests, emboldened by a recent series of 5-4 Supreme Court decisions that radically altered the scope and meaning of the First Amendment, continue to pour record, astronomical sums of money – often in secret – into elections. Those with economic power purchase political power and undue influence over government decisions, drowning out the voices and votes of the rest of us. This renders speech anything but free.

Elections are supposed to be about voters choosing their representatives. That central purpose is lost if those seeking favors and policies from the government so dominate campaign spending that elected officials are more beholden to campaign donors than to constituents.

¹ *Taking Back Our Democracy: Responding to Citizens United and the Rise of Super PACs: Hearing Before the Subcommittee on The Constitution, Civil Rights and Human Rights of the United States Senate Committee on the Judiciary*, 112th Cong. 1 (2012) (statement for the record of Bob Edgar, Common Cause President & CEO).

The Money, The Donors, The Secrecy.

The 2014 midterm elections are on pace to shatter all records to become the most expensive races in American history. Already, candidates for the House of Representatives and Senate have raised more than \$894 million.² Meanwhile, outside spending from groups like Super PACs, nonprofit business associations and social welfare organizations has already topped \$100 million, which is more than three times the spending of outside groups at this point in the last midterm election cycle in 2010.³ Spending by Super PACs in the 2014 cycle has already surpassed the total amount Super PACs spent in the 2010 midterms.⁴ This spending comes on the heels of the 2012 presidential election cycle, which was our nation's first federal election cycle to cost more than \$6 billion, an amount that does not even count the billions spent in state races.

The money fueling these 2014 midterms comes from an extraordinarily small and unrepresentative segment of the population. One-tenth of 1% is delivering 64% – over one billion dollars – of the total contributions to federal candidates, PACs and political parties.⁵ During the 2012 presidential election, former Speaker of the House Newt Gingrich made a disturbing yet frank assessment for why his campaign failed. Although he said that running for President is not “a rich man’s game,” he continued that “[i]t’s certainly a game which requires you to have access to a lot of money. We couldn’t have matched Romney’s Super PAC, but in the end, **he had I think sixteen billionaires and we had one, and it made it tough.**”⁶ The billionaire that Mr. Gingrich mentions that he “had” is Las Vegas casino magnate Sheldon Adelson, who spent at least \$98 million in the 2012 election cycle, including more than \$20 million to a Super PAC backing Mr. Gingrich.⁷

A significant amount of the outside spending comes from secret sources, without any disclosure. Thirty percent of the outside spending in 2012 – over \$310 million – came from undisclosed sources.⁸ So far in the current midterm cycle-to-date, over 25% of total outside

² Center for Responsive Politics, 2014 Election Overview, <http://www.opensecrets.org/overview/> (last accessed June 2, 2014).

³ Andrew Mayersohn, “2014 Outside Spending Hits the \$100 Million Mark,” CENTER FOR RESPONSIVE POLITICS, May 30, 2014, <http://www.opensecrets.org/news/2014/05/2014-outside-spending-hits-the-100-million-mark/> (last accessed May 31, 2014)

⁴ Compare Center for Responsive Politics, 2014 Outside Spending, by Super PAC, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2014&chrt=V&disp=O&type=S> with Center for Responsive Politics, 2010 Outside Spending, by Super PAC, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=S> (last accessed June 2, 2014).

⁵ Center for Responsive Politics, Donor Demographics, <http://www.opensecrets.org/overview/donordemographics.php> (last accessed May 31, 2014).

⁶ Jonathan Karl et al., *Newt Gingrich’s Advice for Mitt Romney: Sharpen Your Animal Instincts*, ABC NEWS/YAHOO! NEWS, June 19, 2012, <http://news.yahoo.com/blogs/power-players/newt-gingrich-advice-mitt-romney-sharpen-animal-instincts-105728293.html> (last accessed June 1, 2014) (emphasis added).

⁷ Theodoric Meyer, “How Much Did Sheldon Adelson Really Spend on Campaign 2012?,” PROPUBLICA, Dec. 20, 2012, <http://www.propublica.org/article/how-much-did-sheldon-adelson-really-spend-on-campaign-2012>.

⁸ Center for Responsive Politics, Outside Spending by Disclosure Excluding Party Committees, <http://www.opensecrets.org/outsidespending/disclosure.php?range=tot> (last accessed May 31, 2014).

spending (more than \$25 million) has come from undisclosed sources.⁹ One group in particular, the Koch brothers' Americans for Prosperity, plans to spend more than \$125 million on an "aggressive ground, air and data operation" which "would be unprecedented for a private political group in a midterm, and would likely rival even the spending of the Republican and Democratic parties' congressional campaign arms."¹⁰ Unlike the political parties' campaign arms, however, Americans for Prosperity is under no legal obligation to disclose the donors funding its "aggressive" campaign to influence voters in any of its targeted races.

Money Amplifies the Speech of Some and Shuts Others out of the Process.

A substantial sum of the money that candidates and outside groups raise is used to pay for broadcast airtime, which is scarce and finite. According to an April 2014 analysis by the Wesleyan Media Project, 109,701 television advertisements have already aired in Senate races this election cycle, which is a 45% increase from this point in 2012.¹¹ More than half of the total advertisements so far are from outside groups, with more than half of *those* ads coming from nonprofit organizations that do not disclose any donors.¹²

This has major implications for equality in the political process, particularly if outside groups and wealthy individuals purchase a disproportionate share of airtime – especially in swing states. In the run-up to the 2012 election, *National Journal* predicted that the supply and demand of airtime would force broadcast prices to "skyrocket" as "candidates who wait too long to buy time could find themselves priced out of the market."¹³ Although federal law requires that federal candidates obtain "reasonable access" to the airwaves, one television sales manager warned in 2012 that in "the battleground states, running out of inventory is a possibility."¹⁴ That means state and local candidates will be shut out from airing advertisements. One campaign trade publication explained that because "[d]own ballot [non-federal] candidates and issue groups ... aren't protected by ... most-favored advertiser status, ... [t]hey can be bumped to less favorable ad times, have their ads dropped for other content, or [be] told that there isn't room for them on the airwaves."¹⁵

Money Undermines Confidence in Democratic Government.

Vast sums of money sloshing through our elections, independent or otherwise, dangerously threaten the representative nature of democracy. When participation wanes because

⁹ Center for Responsive Politics, Outside Spending by Disclosure Excluding Party Committees Cycle to Date, <http://www.opensecrets.org/outsidespending/disclosure.php?range=ytd> (last accessed May 31, 2014).

¹⁰ Kenneth P. Vogel, "Koch Brothers' Americans for Prosperity Plans \$125 million Spending Spree," POLITICO, May 9, 2014, <http://www.politico.com/story/2014/05/koch-brothers-americans-for-prosperity-2014-elections-106520.html>.

¹¹ Wesleyan Media Project at Wesleyan University, "Interest Group Advertising Pours Into Senate Races," April 29, 2014, <http://mediaproject.wesleyan.edu/2014/04/29/interest-group-advertising-pours-into-senate-races/#more-2969> (last accessed June 1, 2014).

¹² *Id.*

¹³ Reid Wilson, "Buy Early and Often," NATIONAL JOURNAL, May 23, 2012, <http://www.nationaljournal.com/columns/on-the-trail/buy-early-and-often-20120523>.

¹⁴ Sean J. Miller, "Could We Run Out of Airtime?," CAMPAIGNS & ELECTIONS, March 21, 2012, <http://www.campaignsandelections.com/print/314232/could-we-run-out-of-airtime.thtml>.

¹⁵ *Id.*

citizens no longer think their speech matters, so does our system's legitimacy. Even before the Supreme Court's decision in *Citizens United*, a majority of voters thought their voices and views were less influential than those of campaign donors. In one poll taken 11 months before the Court handed down *Citizens United*, "[60%] of voters [said] members of Congress are more likely to vote in a way that will please their political contributors, compared to just 20% who think that they vote for the best interests of their constituents."¹⁶ In another survey taken more than two months after *Citizens United*, two-thirds of those Americans surveyed said that voters and donors do not have the same access and influence to candidates.¹⁷ In that same survey, more than 81% of Republicans, 79% of Democrats and 77% overall "agreed that members of Congress are more likely to act in the interest of a group that spent millions to elect them than to act in the public interest," and "two in three Americans [including 67% of Republicans and 69% of Democrats] say that they trust government less because big donors to Super PACs have more influence than regular voters."¹⁸ Even worse, "[o]ne in four Americans – 26% – say that they are less likely to vote because big donors to Super PACs have so much more influence over elected officials than average Americans."¹⁹

The Supreme Court Has Radically Narrowed the First Amendment Interests Governing Money in Politics.

Ever since the Supreme Court's decision in *Buckley v. Valeo*, the Court has struggled to balance the role money plays in the electoral process with meaningful participation of all people, regardless of wealth. It failed to appropriately accept the inherent differences between money and speech. Although the Court correctly recognized the risk and appearance of corruption that come with campaign contributions, it incorrectly rejected as a constitutional interest the threat of money's capacity to drown out everyone else's speech and with it "the reality and appearance of equal access to the political arena."²⁰ The Court has also long discounted the corrupting influence of so-called "independent" spending.

Still, the Court did at least acknowledge a broad definition of corruption to justify campaign contribution limits. It has long reasoned that corruption constitutes more than mere bribery. Specifically, *Buckley* held that "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical ... if confidence in the system of representative Government is not to be eroded to a disastrous extent.'"²¹

The Court repeatedly affirmed this broad definition of corruption over several decades. In *Shrink Missouri Government PAC*, the Court spoke of "'improper influence' and 'opportunities

¹⁶ Lake Research Partners and The Tarrance Group, Memorandum: National Polling on Support for a Proposal to Tackle Big Money in Congressional Elections, February 2009, <http://www.commoncause.org/atf/cf/%7Bfb3c17e2-cdd1-4df6-92be-bd4429893665%7D/POLLING%20MEMO%20FEB%202009%20FINAL.PDF> (last accessed June 1, 2014).

¹⁷ Brennan Center for Justice, "National Survey: Super PACs, Corruption, and Democracy," Opinion Research Corporation Survey, April 2012, <http://www.brennancenter.org/analysis/national-survey-super-pacs-corruption-and-democracy> (last accessed June 1, 2014).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See *Buckley v. Valeo*, 424 U.S. 1, 287 (1976) (Marshall, J., concurring in part and dissenting in part).

²¹ *Id.* at 27 (per curiam).

for abuse’ in addition to ‘*quid pro quo* arrangements’ [that recognized] a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors.”²² In *Beaumont*, the Court held that corruption was “understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder’s judgment.”²³ As recently as 2003, the Court held that its cases have “firmly established that Congress’ legitimate interest extends beyond preventing simply cash-for-votes corruption to curbing ‘undue influence on an officeholder’s judgment, and the appearance of such influence.’”²⁴ This includes “the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who made large financial contributions valued by the officeholder.”²⁵

Recently, however, an activist five-Justice majority ignored these decisions and dramatically narrowed the Court’s concept of corruption. In *Citizens United*, the Court wrote that “[w]hen *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption.”²⁶ The Court doubled down on this cramped interpretation earlier this year in *McCutcheon v. FEC*, writing that “Congress may target only a specific type of corruption – ‘*quid pro quo*’ corruption” and that “the Government may not seek to limit the appearance of mere influence or access.”²⁷ This comes on the heels of the Court’s decision in *Citizens United*, which ruled by fiat, without any evidentiary record, that “independent expenditures, *including those made by corporations*, do not give rise to corruption or the appearance of corruption.”²⁸ Worse, the “appearance of influence or access ... will not cause the electorate to lose faith in our democracy.”²⁹

These two decisions have done tremendous damage to our democracy. Fueling an arms race of special interest money and insatiable hunger for cash, *Citizens United* and *McCutcheon* have paved the way to a government bought and paid for by people and artificial entities with the biggest reserves of money – whether in a corporate treasury or a personal account. In *Citizens United*, the Court ruled that corporations have a First Amendment right to spend unlimited amounts of money from their general treasury funds advocating the election or defeat of candidates. In *McCutcheon*, the Court swept aside any concerns of corruption that arise with soliciting and writing multi-million dollar checks directly to joint candidate and party campaign committees, striking down for the first time in American history a federal contribution limit (in this case, the aggregate contribution limit).

In addition to severely narrowing what counts as corruption, *Citizens United* and *McCutcheon* magnify the problem of *Buckley*’s categorization of money and speech. Last decade, Justice Stevens called for a “new beginning” in campaign finance jurisprudence post-

²² *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 389 (2000).

²³ *FEC v. Beaumont*, 539 U.S. 146, 156 (2003).

²⁴ *McConnell v. FEC*, 540 U.S. 93, 150 (2003).

²⁵ *Id.* at 153.

²⁶ *Citizens United v. FEC*, 558 U.S. 310, 359 (2010).

²⁷ *McCutcheon v. FEC*, 134 S. Ct. 1434, 1450 (2014).

²⁸ *Citizens United*, 558 U.S. at 315 (emphasis added).

²⁹ *Id.* at 314.

Buckley and articulated how money and speech are different. In his concurrence to *Nixon v. Shrink Missouri PAC* he wrote:

Money is property; it is not speech. Speech has the power to inspire volunteers to perform a multitude of tasks on a campaign trail, on a battleground, or even on a football field. Money, meanwhile, has the power to pay hired laborers to perform the same tasks. It does not follow, however, that the First Amendment provides the same measure of protection to the use of money to accomplish such goals as it provides to the use of ideas to achieve the same results.³⁰

S.J. Res. 19 Will Restore First Amendment Values of Democratic Self-Government and Equality in the Political Process.

S.J. Res. 19 will further enshrine two constitutional principles: the integrity of democratic self-government and political equality for all.

“Where enough money calls the tune, the general public will not be heard,” wrote Justice Breyer in his dissent to *McCutcheon*.³¹ He elegantly articulates the First Amendment’s purpose, which is to advance “not only the individual’s right to engage in political speech, but also the public’s interest in preserving a democratic order in which collective speech *matters*.”³² The First Amendment is as much about protecting one’s right to speak as it is for that speech to be heard by fellow citizens and the government itself.

A constituent’s interest in securing government action with his or her voice and vote should be the paramount importance – not a check from an out-of-district campaign donor or an artificial corporate entity whose only interest is its private interest bottom line. Money and the undue access and influence it provides undermine democratic integrity because they “break[] the constitutionally necessary ‘chain of communication’ between the people and their representatives. It derails the essential speech-to-government-action tie.”³³ It is not merely *quid pro quo* corruption that our Constitution guards against. It is the broader threat of unrepresentative government when too much money sets priorities and frames public discourse.

Representative democracy stakes its legitimacy on the participation of every citizen. The undue influence of money distorts the political process. It makes it extraordinarily difficult, if not impossible, for average Americans to have their views heard over the din of corporate and billionaire funded campaign commercials. It results in a political system where elected officials are perceived as more responsive to those funding their campaigns than constituents living in their districts. S.J. Res. 19 would allow Congress and the states to recognize “the distinction

³⁰ *Nixon*, 528 U.S. at 398.

³¹ *McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting).

³² *Id.*

³³ *Id.*

between money provided by ... constituents and money provided by non-voters, such as corporations and people living in other jurisdictions.”³⁴

But the corrupting influence of money does more than corrode public policy and skew public debate in favor of those with the most money, corporate or otherwise. As Justice Breyer wrote in his dissent to *McCutcheon*, it also subverts “interests rooted in the First Amendment itself. They are rooted in the constitutional effort to create a democracy responsive to the people – a government where laws reflect the very thoughts, views, ideas, and sentiments, the expression of which the First Amendment protects.”³⁵

S.J. Res. 19 is consistent with First Amendment interests that promote robust debate where everyone can participate and be heard by their elected officials, irrespective of wealth. It preserves what our campaign finance laws long sought to protect: the separation of economic wealth and political power. Such laws existed for decades as compatible with the First Amendment. But the radical judicial activism of five Supreme Court justices has re-shaped the contours of the First Amendment in a way that threatens to replace democracy of the many with democracy for the moneyed.

Specifically, S.J. Res. 19 empowers Congress and the states to pass laws that advance “the integrity of the legislative and electoral processes.” In so doing, S.J. Res 19 will restore the central First Amendment interest of voters and constituents participating in the political process with their speech, thoughts, and ideas. Campaign finance laws that reasonably limit the raising and spending of money to influence elections would “strengthen, rather than weaken, the First Amendment.”³⁶

S.J. Res 19 also has its purpose advancing “the fundamental principle of political equality for all.” This, too, is rooted in the First Amendment. When Justice John Paul Stevens testified in the Senate Rules Committee last month and endorsed an amendment to the Constitution, he correctly observed that it is “fundamentally wrong to assume that preventing corruption is the only justification” for our campaign finance laws.³⁷ Indeed, “the rules should give rival candidates – irrespective of their party and incumbency status – an equal opportunity to persuade citizens to vote for them.”³⁸ Persuasion and communication are at the heart of the First Amendment, and these interests are undermined when one can purchase and use a bullhorn to drown out the voices of everyone else.

Money Out, Voters In: Americans Across the Country are Calling on Congress to Amend the Constitution and Restore First Amendment Principles of Participation for All

Since *Citizens United*, sixteen states representing a population over 95 million people have called for a constitutional amendment to overturn the decision and other campaign finance

³⁴ *Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect 2014 and Beyond, Hearing Before the United States Senate Committee on Rules & Administration*, 113th Cong. 3 (2014) (testimony of Justice John Paul Stevens (retired)).

³⁵ *McCutcheon*, 134 S. Ct. at 1468 (Breyer, J., dissenting).

³⁶ *Id.*

³⁷ Stevens, *supra* note 34, at 2.

³⁸ *Id.*

cases that privilege campaign money over voters.³⁹ Some have done so via resolutions that passed both chambers of a state's legislature. During the 2012 election, voters in Colorado (Amendment 65) and Montana (Initiative 166) voted on nonbinding statewide ballot questions to instruct their congressional delegations to advance a constitutional amendment that would overturn *Citizens United*. Voters passed both initiatives with 74% of the vote. Over 500 cities and towns large and small from coast to coast have passed resolutions to overturn the decision, too. The movement is palpable and citizens are empowered that this Committee has heard their call.

Conclusion

Mr. Chairman, your leadership and that of this Committee is of critical importance to restoring First Amendment values that protect the voice and participation of voters in their elections.

We do not make our call for a constitutional amendment lightly. The Supreme Court's new radical jurisprudence has led us close to the breaking point in the realm of money in politics, fueling a self-perpetuating cycle of cynicism that will unravel our democracy if left unchecked. Citizens have emphatically made this call across the country, demanding our collective attention.

At the same time, there is no simple solution. There is, of course, a full slate of policies to promote an accountable and representative democracy that does not require amending the Constitution, including public financing and disclosure legislation. We continue to work and call for these essential reforms.

However, a constitutional amendment will bolster their effectiveness and enshrine constitutional values that promote the integrity and equality of democratic self-government so that the Supreme Court will never again disregard those interests in reviewing our campaign finance laws. We look forward to working with the Committee to strengthen language concerning the restoration of democratic self-government.

Common Cause thanks you for the opportunity to submit this statement for the record.

³⁹ In reverse chronological order of adoption: Oregon; Delaware; Illinois; Maine; West Virginia; Colorado; Montana; New Jersey; Connecticut; Massachusetts; California; Rhode Island; Maryland; Vermont; New Mexico and Hawaii.