



June 3, 2014

The Honorable Patrick Leahy
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Bldg.
Washington, DC 20510

The Honorable Charles Grassley
United States Senate Committee on the Judiciary
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Re: ACLU Opposes the Udall Amendment

Dear Chairman Leahy and Ranking Member Grassley:

The American Civil Liberties Union strongly opposes S.J. Res. 19, a proposed constitutional amendment, sponsored by Sen. Tom Udall (D-NM), that would severely limit the First Amendment, 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—namely encouraging vigorous political dissent and providing voice to the voiceless, which we, of course, support.

As we have said in the past, this and similar constitutional amendments would “fundamentally ‘break’ the Constitution and endanger civil rights and civil liberties for generations.”¹

Were it to pass, the amendment would be the first time, save for the failed policies of Prohibition, that the Constitution has ever been amended to *limit* rights and freedoms.² Congress has had the wisdom to reject other rights-limiting amendments in the past, including the Federal Marriage Amendment, the School Prayer Amendment, the Victims’ Rights Amendment and, of course, the Flag Desecration Amendment, which many of the sponsors of this resolution opposed. It should likewise reject the Udall amendment.

¹ Laura W. Murphy, ‘Fixing’ Citizens United Will Break the Constitution, Huffington Post, June 28, 2012.

² Even the 18th Amendment, which authorized Prohibition, did not weaken specifically enumerated rights and freedoms in the Constitution. This would.

1. Description of the Amendment

While short, the Udall amendment is deceptively complex and presents several concerns.³

Section 1 provides 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.”

Specifically, Subsection (1)(1) would allow limits on “contributions to candidates for nomination for election to, or for election to, Federal office.” Subsection (1)(2) would allow limits on “the amount of funds that may be spent by, in support of, or in opposition to such candidates.” Section 2 provides the same authorities to each state with respect to state elections.

Section 3 says that “[n]othing in this article shall be construed to grant Congress the power to abridge the freedom of the press.” And, Section 4 grants express authority to the states and Congress to implement these limits through “appropriate legislation.”

2. The Amendment is Unnecessary and Would be Corrosive to Vigorous Political Debate About the Issues of the Day

Congress and the states already have the authority to limit contributions to candidates, including limits on expenditures like advertisements in support of a campaign or candidate paid for by an outside group and coordinated with that campaign or candidate. They have had this authority since the landmark *Buckley v. Valeo* Supreme Court case in the 1970s, which remains good law and only placed First Amendment limits on the ability of the government to control *independent* expenditures (that is, uncoordinated express advocacy for or against a candidate).⁴

Citizens United's holding, that corporations (including non-profit advocacy groups like the ACLU and thousands of others) and labor organizations may spend general treasury funds on independent expenditures, is entirely consistent with the reasoning of *Buckley*.⁵

Subsections (1)(1) and (2)(1) are therefore both unnecessary and redundant of existing law, which, notably, already also places some limits on independent expenditures, namely reporting requirements and less favorable tax treatment.⁶ Such redundancy can be dangerous for civil

³ S.J. Res. 19, 113th Cong. (2014).

⁴ See 424 U.S. 1 (1976). As noted below, a subsequent case, *Randall v. Sorrell*, 548 U.S. 230 (2006), found that contribution limits could be challenged under the First Amendment if they are too low.

⁵ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

⁶ For instance, political committees and other persons must report independent expenditures under 11 C.F.R. §§ 104.4 and 109.10 (2014).

liberties, in that it invites courts to ask why lawmakers said the same thing twice, and whether duplication means that the second statement confers additional powers.

In other words, while the inclusion of contribution limits in the Udall amendment is presumably an attempt to get at *McCutcheon*'s ban on aggregate limits,⁷ it could also permit other laws limiting contributions that would severely harm political debate, exacerbate the incumbency advantage, give certain political parties an unfair leg up and disproportionately impair third parties, many of whom cannot afford the sophisticated legal counsel necessary to navigate the complex new laws this amendment would allow. The contribution section could, for instance, allow a federal law limiting contributions to the point where challengers cannot mount an effective campaign, and third parties simply can't afford to stay in business.⁸

More important, however, is the proposed change in Subsections (1)(2) and (2)(2), which would permit the federal and state governments to limit the amount of funds spent "in support of, or in opposition to" candidates for office. Right now, under existing law, there is a distinction between express advocacy ("vote Romney/Ryan" or "support Obama/Biden") and "issue advocacy" ("call Speaker Boehner and tell him to stop blocking NSA surveillance reform"). Historically, campaign finance reform efforts, including constitutional amendments such as this one, have sought to restrict "sham" issue advocacy—that is, communications that some claim are express advocacy disguised as issue advocacy.

As a practical matter, however, the staff vested with the responsibility of distinguishing between the two at the Federal Election Commission ("FEC") or the Exempt Organizations Division of the Internal Revenue Service are ill-equipped to draw these lines in a consistent and principled manner.

For instance, would an ACLU ad urging members of Congress to support Patriot Act reform, which runs shortly before the November 2004 election (when that issue is at play in the election), be construed as an issue ad exhorting voters to support reform or a covert attempt to influence voters to oppose members who do not support reform? Similarly, would an ad by a group urging repeal of the Affordable Care Act, which runs before the 2012 presidential election, be issue advocacy or covert express advocacy?

⁷ *McCutcheon v. Fed. Election Comm'n*, 572 U.S. ___ (2014).

⁸ See *Randall*, 548 U.S. at 230 (finding unconstitutionally low strict Vermont limit on campaign contributions). Note also the recent case of *Libertarian National Committee v. Federal Election Commission*, which involved a bequest of approximately \$220,000 to the Libertarian Party. Under current contribution limits, the Federal Election Commission insisted that the bequest, which was included in the decedent's will unbeknownst to the LNC, be split up into annual installments capped at the limits in 2 U.S.C. §§ 441a(a)(1) and 441a(c) (2012). While that case presented a legitimate as-applied challenge under the current First Amendment, it would almost certainly be a non-starter under the Constitution as amended by the Udall amendment. See 930 F. Supp. 2d 154 (D.D.C. 2013), *motion to amend denied*, 950 F. Supp. 2d 58, *aff'd*, No. 13-5094, 2014 WL 590973 (D.C. Cir. Feb. 7, 2014). The two major parties are able to source small-dollar donations from larger numbers of contributors, which provides a significant advantage relative to third parties, which often must rely on a smaller number of larger-dollar donors. Without the availability of as-applied challenges to excessive contribution limits, which this amendment would very likely preclude, that advantage will be amplified.

Given the inability of the world's best election law lawyers, let alone overworked line revenue agents and attorney-advisors, to make a principled determination on any such ads, lawmakers tend to overcorrect and restrict all issue advocacy in order to suppress any covert express advocacy. The Bipartisan Campaign Reform Act attempted to do exactly that by criminalizing any broadcast, cable or satellite communication that simply mentioned a candidate in the 30 days before a primary or 60 days before a general election.⁹

Recognizing both the severe harm to political debate through overbroad laws that suppress all issue advocacy mentioning a candidate for office, and the difficulty in making principled distinctions between issue and express advocacy under a totality of the circumstances approach, the courts have rightly rejected measures that allow the government to restrict issue advocacy at all.¹⁰

Sections (1)(2) and (2)(2) are designed to, and would, completely overturn that legal distinction between issue and express advocacy and permit the government to criminalize and censor all issue advocacy that mentions or refers to a candidate under the argument that it supports or opposes that candidate.

To give just a few hypotheticals of what would be possible in a world where the Udall proposal is the 28th Amendment:

- Congress would be allowed to restrict the publication of Secretary Hillary Clinton's forthcoming memoir "Hard Choices" were she to run for office;¹¹

⁹ Pub. L. 107-155, 116 Stat. 81 (2002). This restriction on electioneering communications was narrowed by the Supreme Court in *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007) ("WRTL"), and struck down in *Citizens United*. The ACLU filed an amicus brief in *Citizens United* solely on the question of whether the restriction, even as limited by WRTL to the "functional equivalent" of express advocacy, passed First Amendment muster. We concluded it did not. Amicus Curiae Br. of the Am. Civil Liberties Union in Support of Appellant on Supplemental Question, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (No. 08-205), 2009 WL 2365203.

¹⁰ See, e.g., *Citizens United*, 558 U.S. at 310 (holding unconstitutional ban on feature length documentary critical of Hillary Clinton paid for by non-profit corporation); *WRTL*, 551 U.S. at 449 (limiting electioneering communications restriction solely to "functional equivalent" of express advocacy); *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) (finding even restriction on express advocacy unconstitutional as applied to non-profit, privately funded corporation publishing newsletter urging supporters to "vote pro-life"); *Buckley*, 424 U.S. at 1 (finding unconstitutionally vague restriction on communications "relating to" a clearly identified candidate); *Am. Civil Liberties Union v. Jennings*, 366 F. Supp. 1041 (D.D.C. 1973), *vacated as moot sub nom., Staats v. Am. Civil Liberties Union*, 422 U.S. 1030 (1975) (finding unconstitutional as applied regulation of ACLU ad critical of President Richard Nixon for opposition to school desegregation); *United States v. Nat'l Comm. for Impeachment*, 469 F.2d 1135 (2d Cir. 1972) (finding same for regulation of ads urging impeachment of President Nixon).

¹¹ Granted, there would likely a First Amendment challenge to a government restriction on a book based on the press clause, but the government admitted, freely, that the law at issue in *Citizens United*,

- Congress could criminalize a blog on the Huffington Post by Gene Karpinski, president of the League of Conservation Voters, that accuses Sen. Marco Rubio (R-FL) of being a “climate change denier”;¹²
- Congress could regulate [this website](#) by reform group Public Citizen, which urges voters to contact their members of Congress *in support* of a constitutional amendment addressing *Citizens United* and the recent *McCutcheon* case, under the theory that it is, in effect, a sham issue communication in favor of the Democratic Party;¹³
- A state election agency, run by a corrupt patronage appointee, could use state law to limit speech by anti-corruption groups supporting reform;
- A local sheriff running for reelection and facing vociferous public criticism for draconian immigration policies and prisoner abuse could use state campaign finance laws to harass and prosecute his own detractors;
- A district attorney running for reelection could selectively prosecute political opponents using state campaign finance restrictions; and
- Congress could pass a law regulating *this letter* for noting that all 41 sponsors of this amendment, which the ACLU opposes, are Democrats (or independents who caucus with Democrats).

Such examples are not only plausible, they are endless. Currently, we do not have to worry about viewpoint discrimination, selective enforcement and unreasonable regulations that unnecessarily stifle free speech without advancing a legitimate state interest because of the First Amendment, and these protections would not apply to speech covered by this proposed amendment. Tinkering with the First Amendment in this way opens the door to vague and overbroad laws, which both fail to address the problem that Congress wishes to solve and invariably pull in vast amounts of protected speech.

Vague and overbroad laws regulating pure speech are also exceedingly dangerous to democratic processes because they can be misused by various parochial interests. During the civil rights era,

which would be permitted again under the Udall amendment, applied to full length books like campaign biographies. Transcript of Oral Argument at 64-65, *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (No. 08-205). Then-Solicitor General Kagan did note that the FEC had never attempted to regulate publication of a book, and that an as-applied challenge would be available to the aggrieved publisher, but nevertheless argued that the government could conceivably restrain publication of a book supporting or opposing a candidate, including, potentially, one written by the candidate herself. *Id.*

¹² Gene Karpinski, *Climate Change Deniers Are Ignoring the Facts and Doubling Down on Their Extreme Beliefs*, Huffington Post, May 23, 2014, <http://huff.to/1oVwUh2>.

¹³ See Public Citizen, *Democracy is for People* (last visited May 31, 2014), <http://bit.ly/U412g8>; *McCutcheon v. Fed. Election Comm’n*, 572 U.S. ___ (2014).

for instance, southern states often tried to use laws forcing groups exercising their First Amendment rights to disclose their membership, in a bid to run them out of town.

Rather than “equalizing” the debate and giving voice to the voiceless, laws that allow criminalization of issue advocacy—which this, on its face, would permit—actually give the advantage to special interests with significant resources, because they can now call on the law to regulate their policy opponents. By exempting this class of political speech from the scope of the First Amendment (and potentially other rights), it would provide no protection at all for disfavored minority groups on both the left and right. Congress would, for instance, be free to pass laws targeting only “political” speech by groups like ACORN.

3. The Amendment Could Perversely Harm Freedom of the Press and Would Directly Eviscerate the Freedoms of Speech, Assembly and Petition

In addition to allowing Congress and the states to criminalize issue advocacy, the amendment’s third section, exempting “freedom of the press” from its reach, poses four major problems.

First, it could actually make matters worse. Those with enough money can afford to buy newspapers or journalistic websites, which are indisputably press outlets, and would be completely outside the scope of the laws permitted by this amendment. William Randolph Hearst’s newspaper empire, for instance, was at first a vigorously partisan supporter of Franklin Roosevelt (and then critic), and such partisan electioneering by the mass media would unquestionably be permitted under this amendment.

Second, it invites government inquiry into what constitutes “the press,” which is increasingly problematic in the age of citizen journalism and the internet. Here, the government would have to determine if the Daily Kos or Red State qualify as “the press.” If yes, they can blog freely. If no, they could be censored or even go to jail. The potential for abuse is obvious.

Accordingly, the reference to freedom of the press could perversely limit that freedom. Legally, “the press” has been defined broadly. It encompasses not only the “large metropolitan publisher” but also the “lonely pamphleteer.”¹⁴ “Freedom of the press is a fundamental personal right,” the Supreme Court has written, “which is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.”¹⁵

The reference to freedom of the press will force the government and courts to draw difficult lines between non-traditional media and the “large metropolitan publisher.” More often than not, the latter, simply because of the breadth of issues covered in their media, is going to appear less “political” than the pamphleteer handing out circulars urging greater gun control, reproductive freedom or a path to citizenship for undocumented immigrants. The courts interpreting the laws

¹⁴ *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972) (noting the administrative difficulty in recognizing a “newsman’s privilege” with respect to grand jury testimony).

¹⁵ *Id.* (internal citations omitted).

permitted by this amendment are therefore more likely to move away from the notion of “lonely pamphleteer” as press.

Finally, fourth, the reference to the press clause expressly incorporates the speech, assembly and petition clauses into the Udall amendment by omission. In other words, the amendment makes clear—through lack of reference to the speech clause—that this amendment is meant to directly constrain the existing speech, assembly and petition rights, and potentially all other constitutional rights that could conceivably apply, with respect to both the state and federal governments. That is both unprecedented and exceedingly worrisome.

Additionally, we note that Section 3 appears to only apply to Congress, suggesting that *states* may be free to “abridge” the freedom of the press.

4. Amending the Constitution to Limit a Specifically Enumerated Constitutional Right is Unprecedented in the History of the Republic

It bears emphasizing that this would be the first time the amendatory process has been used to directly limit specifically enumerated rights and freedoms. Many argue that such an amendment is not unprecedented.¹⁶ What they mean, however, is that amending the Constitution in response to an unpopular court case is not unprecedented. In those cases, however, the amendment either had little to do with individual rights or it restored lost rights. In no case, did it limit the right and freedom that vouchsafes our ability to advocate for all of our other rights and freedoms.¹⁷

Finally, while rights-limiting amendments are unprecedented, proposals to do so are legion.

The ACLU has aggressively lobbied against, to name just a few, the Flag Desecration Amendment, which would have overturned the Supreme Court cases prohibiting the state and federal governments from criminalizing defacement of the American flag; the Victims’ Rights Amendment, which would have limited the rights of criminal defendants; an amendment to deny automatic citizenship to all persons born in the United States; the School Prayer Amendment, which would have given school officials the power to dictate how, when and where students pray; and the Federal Marriage Amendment, which would have denied marriage rights to same-sex couples in committed relationships.

Were this to pass, the Udall amendment would grease the skids of these and other proposals to limit fundamental constitutional rights.

* * *

¹⁶ See, e.g., Geoffrey Stone, *Fixing Citizens United*, Huffington Post, June 12, 2012, <http://huff.to/1txTNY7>.

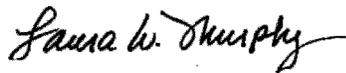
¹⁷ Those four amendments are the 11th (states cannot be sued in federal court), the 14th (expanding equal protection and due process as part of the Civil War amendments), the 16th (federal income tax not unconstitutional) and 26th (changing voting age to 18).

For all of these reasons, we strongly urge you to oppose the Udall amendment, and to focus Congress's attention on enacting effective public financing laws, tightening up the coordination rules, ensuring prosecutors have effective resources to pursue straw donations and other common sense measures for promoting the integrity of our political system.

What you must not do is "break" the Constitution by amending the First Amendment.

Please do not hesitate to contact Legislative Counsel/Policy Advisor Gabe Rottman at 202-675-2325 or grottman@aclu.org if you have any questions or comments.

Sincerely,



Laura W. Murphy
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