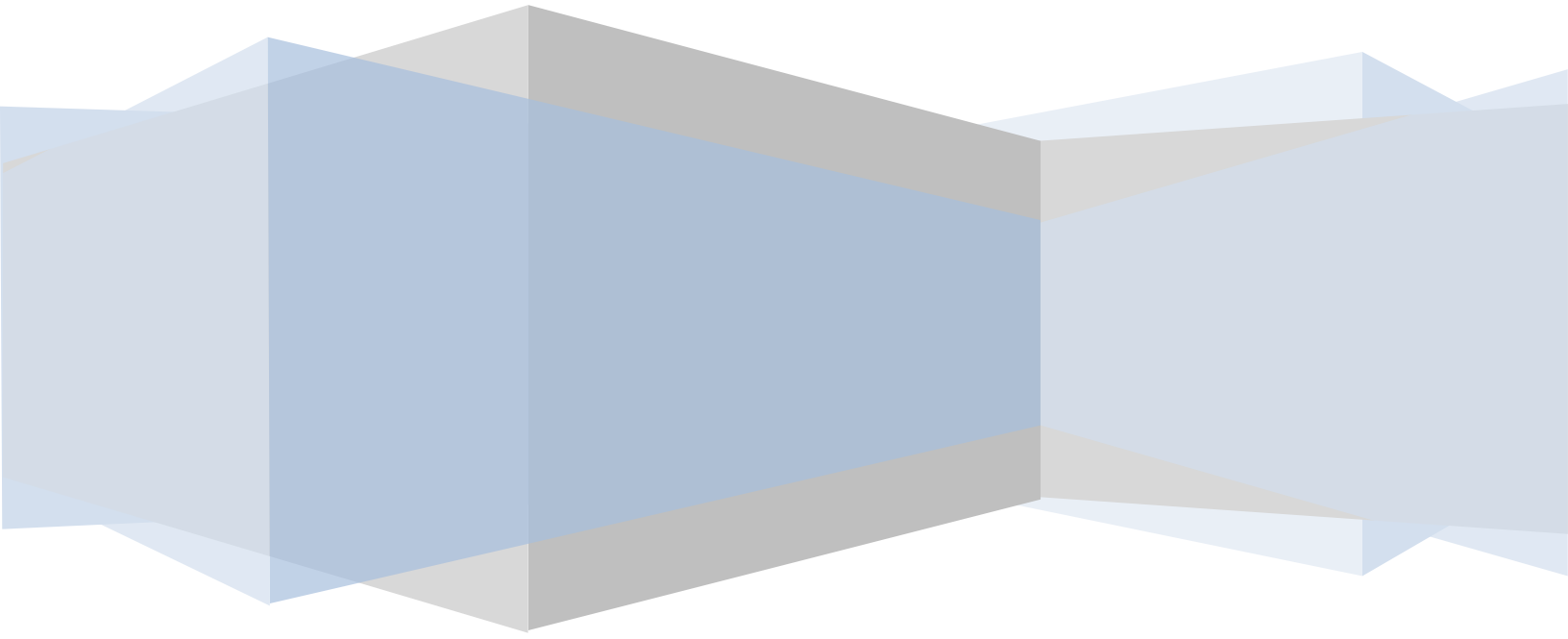
League of Women Voters

Money in Politics: Developing a Common Understanding of the Issues

A Primer for Engagement of League Members and Fellow Citizens - 2014



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Disclaimer: The information presented in this paper is background information. It does not necessarily imply that the LWVUS supports or opposes any particular concept or piece of legislation. For information about where the LWVUS stands on a particular piece of legislation, please go to LWVUS.org or contact the LWVUS at 202-429-1965. If you are a League member and are approached to take a position in the name of the League and/or to advocate in the name of the League, contact your state League or LWVUS before proceeding.

I. Introduction

> *"Money in politics affects and afflicts every issue that the League works on and cares so much about. We all know that as long as money flows into politics at the unchecked rate that it does, the voice of the public will be drowned out by the special interests. For this reason, the LWV has focused on this as far back as the 1970's when the Watergate scandal demonstrated what the effects of unchecked money and* quid pro quo *practices have done to undermine governance for the public good."*
>
> Judy Duffy, Advocacy Committee Chair, report to Convention 2012

> *"At bottom, the Court's opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics."*
>
> Justice John Paul Stevens, dissenting opinion in the Supreme Court decision in *Citizens United v. Federal Election Commission*, 2010

> *"This political system is awash in money… The effect of all this, unfortunately, leads to the cynicism and the frustration of the American people and their lack of confidence in the system. It's got to change..."*
>
> Senator John McCain, David Letterman show, Jan. 12, 2012

Whatever else it may or may not have done, the Supreme Court's 2010 decision in the case of *Citizens United v. Federal Election Commission* galvanized the campaign finance reform (CFR) movement and aroused huge numbers of citizens who had never been involved in that movement before. New civic organizations sprang up across the country, proposals for Constitutional amendments proliferated, and action was demanded from regulators, legislators, courts and even corporate boards of directors.

The League of Women Voters has been an active participant in CFR for over four decades. It formally adopted a Campaign Finance position in 1974. It continually monitors, and when appropriate, advocates for campaign finance reform in legislative, judicial and regulatory forums at the federal and state levels. It lobbied strongly for the passage of the Bipartisan Campaign Reform Act, cosponsored by Senators McCain and Feingold and passed in 2002. It calls public attention to the issues through regular press releases and *op ed* pieces, and it works in coalition with other organizations.

But the League, no less than the movement at large, faces challenges in the post-*Citizens United* landscape. The two-track strategy described in its biennial publication *Impact on Issues* ("achieve incremental reforms where possible in the short term, and build support for public financing as the best long-term solution") seems to be running up against new barriers erected by the Supreme Court at every turn, although the League continues to advocate strongly within the remaining Constitutional arena. A resolution passed at the 2012 LWVUS Convention urged the League to enlarge that arena by considering other means of challenging the Supreme Court's interpretations, including amending the Constitution.

In January 2012, LWVUS established a new Campaign Finance Task Force (CFTF). In her report to the 2012 Convention, Judy Duffy described its mission as follows:

> With the Supreme Court busy undercutting protections against corruption in our political system, the task force is looking at the variety of steps the League at all levels can take, both over the short term and the long term, to address the situation. http://www.lwv.org/content/advocacy-report-june-2012

The LWVUS Board charged the task force with researching issues related to the *Citizens United* decision, including possible Constitutional amendments. A review of the Constitutional amendments before the 112th Congress, then in session, was prepared. (See Appendix G of this Primer.) After the 2012 Convention, the task force continued its work, completing an informational paper on the history of LWV action on campaign finance and what Leagues can do now, available at http://www.lwv.org/content/lwv-us-action-campaign-finance.

The next task of the CFTF was to prepare a money-in-politics discussion guide to be used by Leagues across the country for members and for the public. A tentative outline and a call for materials were published in early 2013. This Primer is the result of work by members of the CFTF as well as other League members active on state CFR committees.

II. Using this Presentation and Discussion Guide

This Primer has been written for the use of League members as part of informing themselves, their Leagues and the general public. It is not a League study guide, and the questions that are included are intended only to provide starting points for discussion. They are in no sense "consensus questions" like those in a formal League study. The goal, as stated in the title, is to develop a common understanding of the issues. Such an understanding may eventually form the basis for a League study designed to reach consensus on the solutions it wishes to pursue.

In the following sections of this text, we pull together the background that is needed to understand how campaign finance in the United States has evolved into the dysfunctional system now on display, as well as the many remedies that have been proposed. While the League's CFR history is very important to the users of this Primer, the discussion of proposed remedies must go beyond the League's past and current work if we are to have any hope of arriving at a "common understanding."

Section III is a non-legalistic formulation of the basic issues. Since campaigning and campaign finance are ultimately about communication, what principles might apply to such communications? Should they be regulated at all? If so, how? If not, does that imply that some rights are being sacrificed for others, and do we agree with that choice? Should entities other than voters and candidates be allowed to communicate? If so, what types of entities and to what extent are voters entitled to know about the special interests that may be behind those entities?

Section IV provides a brief history of campaign finance in the United States, outlining the victories and defeats of the reform movement, especially since the League adopted its position on the subject in 1974. Section V summarizes areas of continuing legal controversy. It also provides a few snapshots and anecdotes illustrating where we are today, designed to address more concretely the questions: Is money in politics really a

problem? How big a problem? Has citizen participation already been reduced to a meaningless choice among pre-screened candidates, none of whom represent their views?

Section VI describes recent LWVUS actions and strategies for addressing campaign finance reform. Relevant LWVUS positions are included here. State and local Leagues are invited to add notes to this guide that reflect their own state's history and League action.

Section VII attempts to provide an evenhanded view of possible approaches to further campaign finance reform. The reform movement today is not helped by the fact that there are two main camps: one continues to work within the Constitutional framework as defined by current Supreme Court rulings while the other believes that the Supreme Court has so severely constricted that framework that reform is no longer viable without overturning at least some of its decisions through Constitutional amendments. Here then may be the crux of the problem of "developing a common understanding of the issues." But here also we may discover a unique role for the League of Women Voters, with its profound understanding of how our representative democracy works and its ability to forge constructive paths forward through informed discussion and consensus.

To jumpstart discussion, a few more questions are offered in Section IX.

Specific references are scattered throughout the text, but the Resources section provides an annotated bibliography, largely organized by section. The appendices cover definitions of useful terms; a brief discussion of the Bill of Rights; a discussion of the First Amendment; a timeline of significant CFR events; a brief guide to IRS rules on political action by non profits; an overview of the proposed American Anti-Corruption Act (included because it is a fairly complete compendium of the legislative remedies available post-*Citizens United);* the LWVUS review of Constitutional amendments before the 112th Congress; and a table of the amendments that have been introduced in the current 113th Congress (2014)..

III. Overview of the Issues

Political campaigning is ultimately about communication. The goal of campaigning is to convince voters, either for or against a candidate or issue.

Here are the essential questions about campaign communications with which legislatures and courts have been wrestling for more than a century:

- How should these communications be regulated? We acknowledge that the right to free speech has its limits (don't yell "fire" in a crowded theater). Should there be limits on the right to free speech in the political arena?

  The issue of limits is at the heart of the Supreme Court decision in *Buckley v. Valeo,* which held that the expenditure of money is a form of speech protected by the First Amendment, and therefore may not be abridged. Others have argued that money merely amplifies speech, and therefore its volume, like that of a physical sound system, can be limited by law.

- Are other rights being ignored when the courts privilege First Amendment rights over all others? For example, is the right of citizens to a government uncorrupted by their representatives' dependence on the wealth of a few, or their right to participate fully in the political process, or the right of candidates and ideas to compete equitably in the

electoral “marketplace," to be ignored because these rights are not so clearly stated in the Constitution?

The *per curiam* opinion in *Buckley v. Valeo* states that “...the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment...” But others have argued that the Equal Protection clause of the Fourteenth Amendment must also be applied, because unconstitutional discrimination occurs “when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole," to quote a Supreme Court in an unrelated decision (*Davis v. Bandemer* 1986).

Other arguments concerning citizen and candidate rights beyond those conferred by the First Amendment have been advanced. The League has criticized the narrow definition of “corruption” used by the Supreme Court—essentially only *quid pro quo*, also known as bribery—pointing out that there is corruption when citizens' right to a representative government is threatened. The League has also consistently supported public funding of elections and the inclusion of independent and minor party candidates in the forums and debates that it sponsors as ways to promote equitable competition among candidates.

- Who has a right to communicate their opinions? Candidates and voters, of course, must be allowed to communicate opinions, but how about others who do not directly participate in an election? Should organizations of citizens formed specifically to advocate for a candidate or issue be allowed to speak? Should organizations such as corporations, unions or other nonprofits be allowed to express political opinions if their purpose/mission will be affected by the outcome?

  This issue is at the heart of the Supreme Court decision in *Citizens United v. FEC*, which declared that “associations of citizens," like natural persons, enjoy First Amendment rights to free speech that may not be abridged, regardless of the nature or purpose of the association. It therefore follows from the earlier decision in *Buckley v. Valeo* that such associations cannot be restrained from raising and spending as much money as they like to communicate with the voters, provided this is done independently of candidates and their PACs. The Supreme Court in *Citizens United* continued to allow limits on direct contributions to candidates and their PACs by associations as well as individuals.

  Opponents of the *Citizens United* decision argue that rights protected by the Constitution, or at least First Amendment rights, pertain only to “natural persons," while the rights and privileges of collective entities such as corporations, unions and other “associations of citizens” are specified by statute, and moreover are not inalienable as are the rights protected by the Constitution. This argument has been accepted by the Supreme Court with respect to some other Constitutional rights, such as the right not to incriminate oneself.

- How important is transparency? How much are the voters entitled to know about whom, exactly, is “speaking” to them?

  When organizations speak, it is not always clear what constituencies or interests they represent, particularly if the organization has an ambiguous name. How important is it

for voters to know these things in order to evaluate what they are told? How far does the citizen's right to know extend in this arena? In the *Citizens United* decision, the court indicated that it would uphold disclosure laws, but so far Congress has not acted on disclosure bills.

IV. A Brief History of Campaign Finance Reform

Money and politics have always been intertwined in our nation's history. The Constitution itself was the result of negotiations among powerful representatives of the different moneyed interests in the Colonies. Among the resulting compromises, for example, the franchise was initially extended only to free men of property. To this day, the Constitution contains no general right to vote, although several hard-won amendments forbid the abridgement of that right on the basis of various criteria including race and gender. A proposed Constitutional Amendment, H.J. Res. 44, has been introduced in the 113th Congress (the current Congress) to rectify this situation.

In the early Republic, candidates provided lavish free meals and beer to voters on Election Day. After his election in 1828, Andrew Jackson introduced a political patronage system to reward his political party operatives, setting a precedent for subsequent elections. Such appointees were expected to contribute part of their government pay back to the political machine that appointed them.

Similar political fundraising practices expanded through the next several decades. This led to civil service reform legislation for all federal workers in the 1870s, prohibiting these practices. Political parties then turned to other forms of fundraising from corporations and individuals, which ultimately led to new problems. In 1904, Theodore Roosevelt called for further reform legislation and the Tillman Act of 1907 prohibited corporations and nationally chartered (interstate) banks from making direct financial contributions to federal candidates, though the law was not enforced.

Other reform legislation followed. Disclosure requirements and spending limits for House and Senate candidates were enacted in the Federal Corrupt Practices Act (1910, amended 1911). General contribution limits were enacted in a revised version in 1925. An amendment to the Hatch Act of 1939 set an annual ceiling of $3 million for political parties' campaign expenditures and $5,000 for individual campaign contributions. The Taft-Hartley Act (1947) extended the corporate contributions ban to labor unions.

Much of this legislation turned out to be ineffective, easily circumvented, and rarely enforced. To address this situation, in 1971 Congress passed the Federal Election Campaign Act (FECA), requiring broad disclosure of campaign finance. Then in 1974, fueled by public reaction to the Watergate scandal, Congress amended FECA, establishing a comprehensive system of regulation and enforcement, including public financing of presidential campaigns and a central enforcement agency, the Federal Election Commission. Other provisions included limits on contributions to campaigns and expenditures by campaigns, individuals, corporations, and other political groups. These provisions were challenged in the landmark case, *Buckley v. Valeo*.

The 1976 US Supreme Court's decision in *Buckley v. Vale*o has had a profound impact on campaign finance legislation at both federal and state levels. The Court did sustain FECA's limits on individual contributions to candidates, as well as the disclosure and reporting provisions and the public financing scheme. However, the limitations on

campaign expenditures, on independent expenditures by individuals and groups, and on expenditures by a candidate from personal funds were struck down. The Court reasoned that campaign contributions and spending are a form of political speech and association within the meaning of the First Amendment. The Court did rule that because direct contributions raised the specter of corruption in the form of *quid pro quo* exchanges, FECA's limitations on direct contributions to candidates could generally be justified. However, the Court struck down limitations on spending by candidates and spending by others undertaken independently of candidates on the grounds that spending money was not corrupting--that it did not, by definition, involve such *quid pro quo* candidate/donor exchanges.

The most recent significant reform legislation is the Bipartisan Campaign Reform Act (BCRA) of 2002, also known as "McCain-Feingold" after its sponsors, Republican Senator John McCain and Democratic Senator Russ Feingold. BCRA revised some of the legal limits on expenditures set in 1974 and prohibited unregulated contributions (commonly referred to as "soft money") to national political parties. "Soft money" also refers to funds spent by independent organizations that do not specifically advocate the election or defeat of candidates, and to funds that are not contributed directly to candidate campaigns. In particular, BCRA sought to regulate the issue ads that target federal candidates by eliminating corporate and union funding for such electioneering communications 30 days before primary elections and 60 days before general elections. It was this provision of BCRA that was challenged in *Citizens United*.

In 2010, relying on the money-equals-speech logic of *Buckley*, the Supreme Court overturned several other long-standing precedents in its decision in *Citizens United v. Federal Election Commission*. In this case, the Supreme Court found that limiting or prohibiting the financing of independent communications by "associations of citizens" was an unconstitutional abridgement of free speech, and therefore, following the precedent of *Buckley v. Valeo*, these entities may spend their own money to support or oppose political candidates through independent communications like television advertisements.

Some, including the popular press, have depicted this decision as permitting corporations and unions to donate to candidate campaigns and/or removing limits on how much a donor can contribute to a candidate campaign. This is incorrect since the decision did not affect the 1907 Tillman Act's ban on corporate contributions to candidates (as the Court noted explicitly in its decision) or its prohibition on foreign corporate donations to American candidate campaigns, nor did it in any way concern contribution limits to candidate campaigns. The *Citizens United* decision did, however, remove the previous ban on corporations and organizations using their treasury funds for independent expenditures and electioneering communications. These groups are now allowed to use unlimited funds to expressly endorse or call to vote for or against specific candidates, or on electioneering communications, actions that were previously prohibited.

Subsequent decisions have further extended the Court's ruling in *Citizen United*. In *SpeechNOW.org v. FEC*, the Appellate Court, following the *Citizens Unite*d holding that independent expenditures do not create actual or apparent *quid pro quo* corruption, found that applying limits to contributions for independent expenditures would violate the First Amendment rights of SpeechNOW.org and its donors. The Court held that SpeechNOW.org, a political action committee (PAC), was entitled to accept unlimited

contributions from individuals for this purpose, as long as it made only independent expenditures. The ruling would not apply if a PAC made contributions to candidates. When coupled with *Citizens United*, however, the ruling meant that corporations and unions could contribute unlimited amounts to independent-expenditure-only PACs, now commonly called Super PACs.

On June 27, 2011, ruling in the consolidated cases *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* and *McComish v. Bennett*, the US Supreme Court deemed unconstitutional an Arizona law that provided extra taxpayer-funded support for publicly funded office seekers who have been outspent by privately funded opponents or by independent political groups. A 5-4 majority of justices said the law violated free speech, concluding the state was impermissibly trying to "level the playing field" through a public finance system and rejecting the Arizona lawmakers' claim that there was a compelling state interest in equalizing resources among competing candidates and interest groups. Chief Justice John Roberts said in the court's majority opinion that the law substantially burdened political speech and was not sufficiently justified to survive First Amendment scrutiny. As a consequence of the decision, states and municipalities are blocked from using triggered matching funds, a method of public financing that is simultaneously likely to attract candidates fearful that they will be vastly outspent and sensitive to avoiding needless government expense.

In December 2011, the Montana Supreme Court, in *Western Tradition Partnership, Inc. v. Attorney General of Montana*, upheld that state's law limiting corporate independent expenditures. Examining the history of corporate interference in Montana government that led to the Corrupt Practices Law, the majority concluded that the state still had a compelling reason to maintain the restrictions. It ruled that these restrictions on speech were narrowly tailored and withstood strict scrutiny and thus did not contradict *Citizens United*.

In granting permission to file *a certiorari* petition, the US Supreme Court agreed to stay the Montana ruling, although Justices Ginsburg and Breyer wrote a short statement urging the Court "to consider whether, in light of the huge sums of money currently deployed to buy a candidate's allegiance, *Citizens United* should continue to hold sway." In June 2012, over the dissent of the same four judges who dissented in *Citizens United*, the Court simultaneously granted *certiorari* and rejected the Montana Supreme Court arguments in a two-paragraph opinion, stating that these arguments "either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case." The ruling makes clear that states cannot bar corporate and union political expenditures in state elections.

The cumulative impact of *Citizens United* and subsequent decisions on state legislation has been enormous. The New York Times reported that 24 states with laws prohibiting or limiting independent expenditures by unions and corporations would have to change their campaign finance laws because of the rulings.

In addition to indirectly providing support for the creation of Super PACs, *Citizens United* allowed public advocacy groups (such as the National Rifle Association or the Sierra Club, as well as the group Citizens United itself) to make unlimited expenditures in political races. Many such advocacy groups are organized under Section 501 of the Internal Revenue Code for tax purposes (see Appendix E.) Such groups may not, under

the tax code, have as their "primary purpose" engaging in electoral advocacy. These organizations must disclose their expenditures, but unlike Super PACs they generally are not required to include the names of their donors in their FEC filings or in their tax filings to the IRS. Since 2010, a number of partisan organizations, such as Karl Rove's influential Crossroads Grassroots Policy Strategies or 21st Century Colorado, have registered as tax-exempt 501(c)(4) "social welfare" groups and engaged in substantial political spending. This has led to claims of large secret donations, which could include foreign donors, and questions about whether such groups should be required to disclose their donors.

V. Money in Politics: The Current Scene

Debate within the legal establishment

The Supreme Court decisions of the past four decades have left plenty of room for legal argument within academia and on the Court itself. The issues include:

1. The Role of the Legislative Branch: The Supreme Court's decisions elevate the judgment of the Court over that of Congress as to the role of money in elections and limit the role of those elected officials with the most practical knowledge of the effects of money in politics. (See Justice White's dissent in *Buckley*.)

2. The Definition of Corruption: The Court has narrowly defined the government's interest in regulating political speech as preventing "corruption," and they have limited the definition of "corruption" to some form of *quid pro quo* transaction. While the Court has recognized that independent expenditures in judicial elections could influence the actions of judges, the majority does not believe that the factual record substantiates the risk of corruption or the appearance of corruption from independent expenditures in elections for political office. The Court has rejected enhanced access or influence as a rationale for regulation in political campaigns.

3. The Marketplace of Political Speech: The Court holds that the First Amendment keeps the government from interfering in the "marketplace of ideas" or from "rationing" speech and that it is not up to the legislatures or the courts to create a sense of "fairness" by restricting speech. In this the Court may be ignoring other rights protected by the Constitution that some would argue are equally applicable to the functioning of this "marketplace," such as the equal protection clause of the Fourteenth Amendment. (See Raskin and Bonifaz, "Equal Protection and the Wealth Primary.")

4. The Role of Corporations: The Court grants corporations the same free speech rights as individuals in the marketplace of political speech. In his dissenting opinion in *Citizens United*, Justice Stevens wrote,

> Corporations help structure and facilitate the activities of human beings, to be sure, and their "personhood" often serves as a useful legal fiction. But they are not themselves members of "We the People" by whom and for whom our Constitution was established.

Justice Stevens in dissent also argued that corporate spending "should be viewed as a business transaction designed by the officers or the boards of directors for no purpose other than profit-making." Corporations "unfairly influence" the electoral

process with vast sums of money that few individuals can match, which distorts the public debate."

Remaining Federal contribution limits

For the 2013-2014 election cycle, the following individual federal contribution limits remain on the books:

- To candidates for federal office: $2,600 per person per election
- To national party committees: $32,400 per person per year
- To state, district, or local party committees: $10,000 per person per year
- To political action committees (PACs):
    - Earmarked for a candidate: $5,000 per person per calendar year, which counts against the original contributor's limit for that candidate
    - Money to be spent independently of the candidate: no limit
- Aggregate contribution limits per person per biennium:
    - $48,600 in total to candidates
    - $74,600 in total to party committees

  for $123,200 overall. (These aggregate limits are currently under challenge in *McCutcheon v. FEC*.)

These as well as limits on contributions by party committees, campaign committees and PACs are found at http://www.fec.gov/pages/brochures/contriblimits.shtml. The FEC does not address contributions to 501(c)(4) social welfare nonprofit organizations (Super PACs), as these fall outside its purview. Currently, such contributions are neither limited nor disclosed.

The experience of recent elections

Although the defeats of some well-funded candidates were well publicized in 2012, candidates who raise and spend the most money still win in the majority of cases—84% of House races and 67% of Senate races in 2012.

Perhaps more significantly, money plays a huge role in determining who runs for office in the first place. The existence of a "money primary" is widely understood from the left "Early Money Is Like Yeast," EMILY's list to the right "Several of the GOP's top potential presidential candidates gathered in the home of New York Jets owner Woody Johnson Monday night for a fundraiser that doubled as an early audition in front of the party's elite money crowd," http://politicalwire.com/archives/2013/09/24/the_gop_money_primary_kicks_off.html.

This effect amplifies the advantages enjoyed by incumbents, who were able to raise and spend five times as much as their challengers in 2012 U.S. House and Senate races. The challengers had to depend on self-financing for more than 20% of their funds, putting such challenges out of reach of all but the very wealthy. But this system comes at a price even for incumbents. The amount of time that members of Congress in both parties spend fundraising takes up a significant portion of a typical day, whether in Washington

or back home in their district (http://www.huffingtonpost.com/2013/01/08/call-time-congressional-fundraising_n_2427291.html).

Post-*Citizens United*, the growth in outside spending in top Senate races has accelerated. It was 12 times greater in 2012 than in 2006. Big outside spenders are also driving up the cost of down-ballot races, even at the level of city council. For example, Chevron put $1.2 million into a campaign committee backing three candidates for city council in Richmond, California, in 2012 (http://www.contracostatimes.com/news/ci_21726523/chevron-spends-big-richmond-elections).

The newly minted Super PACs dominated outside spending in 2012, aggregating huge sums from millionaires and billionaires and accounting for more than 60% of the total $1.03 billion in outside spending reported to the FEC. This dwarfed the $313 million raised from over 3.7 million individual donors to the Obama and Romney campaigns. And despite the perhaps naïve view of the majority on the Supreme Court, it turns out that the "independent groups" are not so independent. Nearly 60% of the Super PACs active in the 2012 election cycle were devoted to supporting or defeating a single candidate, and many of these Super PACs were run by people who had previously worked for the campaign of that candidate or had other close ties to the candidate.

A large fraction of outside spending goes to negative TV ads, about 85% of spending by the 15 top-spending organizations making such expenditures, "Citizens United Funds Negative Spending" *Public Citizen*, November 2012). While negative campaigning has been on the rise for years, candidates can now distance themselves from it and avoid direct backlash. Indeed, secrecy insulates not only candidates but also big "independent" spenders from accountability. Nearly half of all spending by unrestricted outside groups to influence 2012's top Senate races came from groups not required to disclose their donors. In addition, some Super PAC donors were able to hide their identities behind for-profit "shell corporations" that accounted for an additional $17 million in spending.

Perhaps most importantly in the long run, campaign funders get to frame the issues. Consider that the policy agendas of wealthy donors may differ from those of other citizens, especially on economic issues. And politicians fearful of the powerful fossil fuel industry barely uttered the words "climate change" during a 2012 election season marked by record droughts, forest fires, and super storm Sandy.

VI. LWVUS positions and efforts related to CFR

The positions quoted below have been used by the League to address issues related to money in politics. The League's positions, along with extensive histories of their adoption and subsequent use, are found in its publication *Impact on Issues*, updated after each LWVUS Convention.

Position on Campaign Finance

The League of Women Voters of the United States believes that the methods of financing political campaigns should ensure the public's right to know, combat corruption and undue influence, enable candidates to compete more equitably for public office and allow maximum citizen participation in the political process (1974, 1982).

Position on Individual Liberties

The League of Women Voters of the United States believes in the individual liberties guaranteed by the Constitution of the United States. The League is convinced that individual rights now protected by the Constitution should not be weakened or abridged (1982).

Position on Citizens' Right to Know/Citizen Participation

The League of Women Voters of the United States believes that democratic government depends upon informed and active participation at all levels of government. The League further believes that governmental bodies must protect the citizen's right to know by giving adequate notice of proposed actions, holding open meetings and making public records accessible. (1984)

Position on Congress

The League of Women Voters of the United States believes that structures and practices of the U.S. Congress must be characterized by openness, accountability, representativeness, decision making capability and effective performance. [This is followed by five criteria for "responsive legislative processes".] (1972, 1982)

Using these positions, the League has worked toward two main goals in recent years:

1. Transparency in campaign finance

Protect the public's right to know by ensuring timely disclosure of campaign finance information. Disclosure methods must allow voters and candidates to find and report information in a manner that is easy to follow and use. Expanding disclosure requirements to include all organizations that spend large sums to influence elections will eliminate "dark money" contributions, and real-time disclaimers of who is paying must be included on all political advertising. All disclosure must be done in time for voters to obtain the information before an election.

2. Fighting Corruption and Providing Equal Opportunities for Candidates

The League has advocated for free airtime for campaigns and continues to promote public funding options at all levels. Public funding has the potential to encourage broad-based contributions and widespread citizen engagement while limiting the necessity to seek large contributions from private sources. In keeping with current Supreme Court rulings, the League works to limit the amounts that candidates can receive in contributions from all sources, including from PACs and large individual donors, and seeks to close "soft money" loopholes. The League works to better define "independent expenditures" and "coordination" to block the use of loopholes around contribution limits and to limit unlimited spending by outside groups. The League guards against legislation that limits resources to challengers in a way that protects incumbents and tries to close public benefit loopholes for incumbents such as postage and reduced broadcasting costs. Although spending limits have been largely ruled out, the League continues to support them, encouraging voluntary as well as mandatory spending limits.

The overriding goal of the League is to ensure that government serves the interests of all the people, not just those (including but certainly not limited to corporations) with money. Current (2012-2013 and into 2014) work at the national level consists of:

- Working for new and effective rules by the IRS to ensure that 501(c)(4) organizations are not used for unlimited secret spending.
- Encouraging the President to appoint members of the Federal Election Commission and seeking reform of the FEC
- Supporting all legislation addressing disclosure
- Participating in an amicus brief regarding *McCutcheon v. Federal Election Commission*

VII. Approaches for Addressing the Issues and Problems

Today there continues to be much debate about how to address the situation created by *Citizens United* and other recent Supreme Court decisions. Much can be done legislatively or by the development of regulations to implement existing statutes. Legislative approaches include strict disclosure laws and public funding of elections. Regulatory approaches include strengthening the Federal Election Commission and adopting disclosure rules proposed by the Securities and Exchange Commission (SEC). Many believe, however, that the Supreme Court has removed so many of the pillars upon which the regulation of money in elections has been based for more than a century that the problem must also be addressed at the Constitutional level through one or more amendments to the U.S. Constitution. The debate is summarized in this section.

Approaches not requiring Constitutional change

The following approaches remain fully constitutional in the wake of the Supreme Court decisions of the past four decades. As noted below, only some of these are currently endorsed by the League of Women Voters of the U.S.

Legislative approaches:

Disclose the donors funding outside spending (action by Congress and the States). The Supreme Court in its *Citizens United* decision upheld disclosure as a means of providing information to the electorate and avoiding corruption or the appearance of corruption. Since the *Citizens United* decision, legislation has been introduced in Congress to expand disclosure, but the bills have not moved forward. The League is a strong advocate of disclosure of the sources of spending, and we hope this bill will come up for a vote and pass. States are introducing, and in some instances passing, stronger disclosure laws for political spending.

Tighten the rules governing coordination in order to limit "independent" spending (action by Congress and the States). Supreme Court decisions allowing unlimited campaign spending by outside groups are premised on the notion that such spending is truly independent and not coordinated with a candidate in any way. But, in fact, the current rules are quite weak and allow coordination in a number of ways. Through legislation, Congress and the states can tighten these rules.

Adopt public funding for all candidates (action by Congress and the States). Congress could expand public funding of candidates for all federal offices and more states could adopt public financing. Currently, only candidates for president are entitled to public funding at the federal level, and in the past two presidential elections, the candidates have opted out of the public funding system. Resources to support public financing would need to be established. Some states offer public financing to candidates for some offices, although in some, perhaps most, of these the funding is insufficient and/or unreliable. In all cases, public financing is a voluntary option. Both LWVUS and many state Leagues consistently support public financing of elections.

Prohibit Members of Congress from fundraising from the interests they most directly regulate (action by Congress). Congress could prohibit contributions from the PACs and lobbyists associated with Federal government contractors, for example. It could close the "revolving door" by significantly extending the existing time limitations on negotiating or accepting a high-paying job with a firm with whom they have been involved as members of Congress. The League has actively lobbied for similar legislative ethics reforms in the past.

Pack the U.S. Supreme Court with justices friendly to reform (action by Congress and/or the President). Congress would be within its constitutional rights to expand the court, adding additional justices to change the majority. This was last attempted during the Roosevelt administration. The League has no position on this approach currently.

Use state corporate law (action by States). There are efforts to use or expand state corporate laws to regulate the behavior of corporations. One possibility would be to require directors to obtain shareholder approval before making campaign donations and expenditures, as well as public disclosure of such spending. However, many corporations are incorporated in states such as Delaware that are not likely to adopt these laws. This piecemeal approach would have to move state-by-state, giving corporations the opportunity to seek safe haven in unregulated jurisdictions. Another possibility being considered sidesteps the jurisdictional question by requiring noninterference in state and local elections as a condition for obtaining a business license in a given state, although the constitutionality of this approach is questionable. Again, the League has no position on this.

<u>Regulatory approaches:</u>

Enforce campaign finance laws (action by the Federal Election Commission and state regulatory agencies). The Federal Election Commission (FEC), established in 1974, could be much more effective at enforcing remaining federal campaign finance laws, such as disclosure requirements and coordination rules. Lawsuits are pending to force FEC action in these areas. At present, the Commission is not functioning effectively and needs a complete structural overhaul according to The American Constitution Society for Law and Policy. As of the end of 2013, the FEC no longer exercises its enforcement powers. The League advocates for better enforcement by the FEC. Questions would remain: Can the FEC become an agency with enforcement teeth? Can its rules be expanded to regulate PACs, Super PACs, and Hybrid PACs more effectively?

Adopt a Securities and Exchange Commission rule governing corporate political expenditures (action by the SEC or possibly Congress). In 2011, a group of 10 corporate- and securities-law professors petitioned the Securities and Exchange

Commission to require public companies to disclose their political activities, including campaign donations and lobbying efforts. http://www.sec.gov/rules/petitions/2011/petn4-637.pdf. Since then, more than 600,000 comments have been received, most in support of the petition. An SEC rule change would not require Congressional approval. LWVUS endorses this rule change. A related bill, Shareholder Protection Act (H.R.1734) has been introduced in the 113th Congress.

Strengthen and enforce 501(c)(4) political activity rules (action by the IRS). LWVUS also supports strict enforcement of the rules applicable to 501(c)(4) social welfare organizations by the Internal Revenue Service (IRS). To be tax-exempt as a social welfare organization according to the Internal Revenue Code (IRC) section 501(c)(4), an organization must not be organized for profit and must be operated **exclusively** to promote social welfare. It is argued that the promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office. However, under long-standing IRS regulations a section 501(c)(4) social welfare organization is allowed to engage in some political activities, so long as that is not its **primary** activity. The League has submitted comments urging the IRS to close the loopholes that allow unlimited secret spending in elections by 501(c)(4) groups and continues to work for effective IRS regulation while protecting truly non-partisan voter service activity.

Other approaches

We have other entirely Constitutional options with respect to the Supreme Court itself to:

Seek to have *Buckley* and/or *Citizens United* overturned by the Supreme Court. One example promoted by Lawrence Lessig is to move the Court using a case with an originalist justification for broadening the definition of corruption. Lessig, a Harvard law professor, submitted an *amicus* brief along these lines in the case of *McCutcheon v. FEC* (http://www.lessig.org/2013/07/the-original-meaning-of-corruption/.) New state laws can be passed that seek to plug loopholes or continue to challenge the Court's erroneous decisions.

Wait. The composition of the Court is sure to change in time, the pendulum will swing back, and the closely divided decisions of the recent Court may eventually be overturned.

The League regularly files *amicus* briefs in relevant cases when they appear on the docket of the Supreme Court, most recently in the case of *McCutcheon v. FEC*. Such cases originate in lower courts where the plaintiff is an individual, organization or class with "standing" to challenge a statute or decision.

And finally individuals, although not the League of Women Voters as an organization, can:

Work electorally for a Congress comprised of members committed to reform (action by the grassroots). Individual members, not acting for the League, can support the election of candidates committed to reform.

Proposals for Constitutional amendments

The number of citizens' organizations formed in the last few years to address the problem of money in elections, and the variety of proposals they have put forth, is unprecedented. These include organizations focused on legislative, judicial and administrative remedies

outlined above, such as Represent Us and Rootstrikers. But an increasing number, including both long-time League coalition partner Common Cause and a myriad of newer groups such as Free Speech for People and the coalition Move To Amend, have adopted another approach. Those organizations believe that the rulings of the Supreme Court must be overturned by amending the Constitution.

While the wording of the amendment resolutions offered to the current (113th) Congress—more than a dozen so far—is varied, most of the potential provisions fall into one of two categories, addressing the *Buckley* and *Citizens United* decisions respectively:

1. Restore the authority of Congress and the states to limit campaign spending.

Some of the proposed amendments in this category are fairly limited, allowing Congress and the states to regulate contributions and expenditures only by corporate entities. But most state simply that Congress and the states shall have the power to regulate both contributions and expenditure. Some specifically say that regulation must be "content-neutral," while others explicitly protect freedom of the press. Some mention only elections of candidates, while others include spending on ballot measures.

2. Assert that the rights protected by the Constitution are those of natural persons only.

Some of these proposals address First Amendment speech rights only. Those that are broader go on to point out that the privileges of corporate entities and other collective entities are created by statute and, unlike the rights of natural persons protected by the Constitution, are not inalienable.

Additional clauses in some of these proposals:

- allow Congress and the states to enact measures such as public financing and disclosure in order to protect the integrity and fairness of elections, to limit the corrupting effect of private wealth, and to guarantee the dependence of elected officials on the public alone;
- forbid the judiciary from construing the expenditure of money as protected speech;
- state that nothing in the amendment shall be construed as limiting freedom of the press.

Pros and cons for the two main approaches

Proponents of a Constitutional amendment are concerned that legislative, regulatory and judicial measures will be insufficient to control the growing influence of private money in our political system. In some cases, the key actor is an agency unlikely to be moved by public opinion or citizen engagement. (For example, despite a deluge of comments favoring a rule change that would require public companies to disclose their political activities, the proposal appears to have been dropped from the SEC agenda for 2014 http://www.opensecrets.org/news/2013/12/sec-drops-political-spending-disclo.html.) While most or all regulatory agencies are required to seek and nominally to consider public comment as part of their rule making, the judiciary is largely insulated from public opinion. In many cases, the key actors are Congress or state legislatures already indebted to big money.

As of mid-September, 2013, sixteen states had formally called for an amendment to the US Constitution by ballot measure, resolutions passed by the legislature, or official letters (http://www.freespeechforpeople.com/sites/default/files/Release-One-Third%202013-09-24-4.pdf). Some advocates are working to have Congress pass an amendment and send it for ratification by the required ¾ of the states. Others, fearing that Congress will never act without significant pressure, are working for state legislatures to call a US Constitutional Convention.

Those who do not support the Constitutional amendment approach, like those concerned about the legislative or judicial routes, are concerned about the length of time the proposed remedy will take. They point out that a constitutional amendment requires a 2/3 vote by each branch of Congress at a time when there has been difficulty passing campaign finance legislation by majority vote. Proponents, on the other hand, note many of the existing amendments to the Constitution came about in reaction to Supreme Court decisions, and many were in fact enacted relatively rapidly, certainly in less time than it may take to change the composition of the Supreme Court.

Proponents of each approach claim the ability to generate public interest, provide opportunities to educate the public, and increase pressure for action from the grassroots. Supporters of amending the Constitution agree that implementing legislation will also be necessary, but they do not believe that legislation alone will be sufficient. Many of those pursuing the legislative and regulatory reform route view efforts to pass one or more Constitutional amendments as a dangerous distraction from goals that they believe are more immediately achievable. Some also suggest that the Supreme Court could simply reinterpret a Constitutional amendment rendering it ineffective.

As the LWVUS analyzed proposed amendments introduced in the 112th Congress (Appendix E), the potential for unintended consequences was emphasized, especially in the case of amendments that seek to take on the issue of the applicability of Constitutional rights to entities other than natural persons, like the League itself. The League is also concerned that the amendment approach gives unnecessary support to the Supreme Court's assumption of its superiority over other branches of government in the governance of elections. The League's analysis further suggests that there remain potential ambiguities in the definitions of key words, like "contributions" and "expenditures," that would be resolved only in the implementing legislation or in Supreme Court decisions.

VIII. Some Discussion Starting Points

Some basic questions were put forth at the start of this document, and hopefully others have suggested themselves in the sections on the history, League work, and proposed remedies for campaign finance issues. Below are some further suggestions gleaned from various state League studies and other sources.

To start, here are three questions from the Brennan Center's 2010 Conference on Money, Politics & the Constitution:

1. Does the First Amendment limit reform of money in politics? Can reform enhance First Amendment values?
2. Do voters have First Amendment interests at stake in the financing of political campaigns?

3. Should we look beyond the First Amendment to other constitutional principles?

The Kettering Institution held a National Issues Forum in 2001, well before *Citizens United*, when the amount of money being spent in a presidential election year was a mere $2 billion or so, where the discussion was framed in terms of three choices:

> CHOICE 1: Reform the campaign fundraising system
>
> CHOICE 2: Rein in lobbyists and politicians
>
> CHOICE 3: Publicize all political donations; don't regulate them

And here are some questions from a 2004 LWV Oregon state study of campaign finance reform:

1. Why is funding of political campaigns important?
2. What should be the goals of campaign finance reform?
3. Should there be limits on campaign contributions?
4. Should there be voluntary spending limits?
5. Are there legal and constitutional ways to regulate independent expenditures made on behalf of candidates?
6. Should there be public funding of campaigns?
7. Are contribution limits necessary for a successful public funding system?
8. What role does disclosure of campaign contributions and expenditures play in campaign finance reform?

Ten or twelve years later, do the choices and questions offered in these earlier programs still appear relevant? Do they offer a sufficient range of options? Has *Citizens United* along with other recent Supreme Court decisions fundamentally reframed the problem, or are new solutions needed to the basic issues underlying campaign finance?

IX. Conclusion

> Founded by the activists who secured voting rights for women, the League has always worked to promote the values and processes of representative government. Protecting and enhancing voting rights for all Americans, assuring opportunities for citizen participation, working for open, accountable, representative and responsive government at every level—all reflect the deeply held convictions of the League of Women Voters. (*Impact on Issues, 2012-2014*, p. 9)

As the debate continues, the League of Women Voters remains committed to fighting for effective campaign finance reforms at all levels of government. And debate on the best strategies for moving forward continues within the League, no less than among other citizens. The impact of money on our system has once again reached the crisis point. Good people may prefer different or multiple approaches. However, the need to reassess the current political realities and all possible remedies to reassert the voice of the people in the political and democratic process is clear.

Perhaps discussions based on this Primer and on other information sought out by the Leagues that use it will help the League to coalesce around a set of strategies that can move us forward on this issue. Perhaps they will lead to proposals for updating our

existing positions, or for studies to address completely new issues, such as those related to the rights of natural persons vs. those of collective or incorporated entities, from membership organizations to corporations to political committees. We will count our work a success if it contributes to keeping the League a vital, evolving part of the solution to this as well as many other problems. Democracy is not a spectator sport!

Resources

General resources

The Brennan Center for Justice at New York University School of Law is a non-partisan public policy and law institute that focuses on the fundamental issues of democracy and justice, including "lead[ing] the jurisprudential movement to curb the rise of unfettered money in politics post-Citizens United and put a self-governing democracy at the center of our Constitution" http://www.brennancenter.org/issues/combating-citizens-united See also http://www.brennancenter.org/issues/money-politics.

The Campaign Legal Center, a nonpartisan, nonprofit organization that works in the areas of campaign finance and elections, political communication and government ethics, is a good source for all aspects of this issue. Its president is Trevor Potter, principal author of the American Anti-Corruption Act http://www.campaignlegalcenter.org/.

A nonpartisan panel, comprised of accomplished Colorado citizens with varying backgrounds, spent nearly a year examining the landscape of campaign finance at the request of the University of Denver. Their wide-ranging report, "Money, Elections and Citizens United: Campaign Finance Reform for Colorado", is available on line at http://www.du.edu/issues/media/documents/CampaignFinanceReportFinal.pdf.

ProPublica has an ongoing investigative series at http://www.propublica.org/series/buying-your-vote.

The FEC has some excellent publications, including a compilation of federal election campaign laws http://www.fec.gov/law/feca/feca.pdf and a campaign guide for corporations and labor organizations http://www.fec.gov/pdf/colagui.pdf.

The Wikipedia article at http://en.wikipedia.org/wiki/Campaign_finance_in_the_United_States is a good overview with links to other articles. (Note: There are other Wikipedia articles on campaign finance, but this seems to be the best one.)

And last but definitely not least, Lawrence Lessig's 2011 "book talk" for his book *Republic, Lost,* one version of which is available at http://www.youtube.com/watch?v=Ik1AK56FtVc. This talk does a great job of introducing the issue and some or all of it could be a great resource for a public meeting. Don't skip the Q&A at the end of the youtube version!

Introduction

Recent Supreme Court decisions can be found at the Supreme Court's web site http://www.supremecourt.gov, but this site appears to go back only to about 2008. More comprehensive sites are http://supreme.justia.com and the Legal Information Institute at http://www.law.cornell.edu/supremecourt/text/home. (The former has a more satisfactory search engine, while the latter provides information in a nice format once you find it.)

Impact on Issues 2012-2014, http://www.lwv.org/content/impact-issues.

Overview of the issues

"How Much Money Does It Take to Corrupt a Campaign?", League of Women Voters, November 1, 2013, http://www.care2.com/causes/how-much-money-does-it-take-to-corrupt-a-campaign.html#ixzz2jY0hc6yv.

A brief history of campaign finance reform

Here are some other interesting history articles on line:

> Charles W. Bryant, "How Campaign Finance Works" (probably 2008) http://money.howstuffworks.com/campaign-finance1.htm/printable. This one includes sections on campaign finance reform at the state level and also internationally.
>
> Kate Pickert, "Campaign Financing: A Brief History" (2009) http://content.time.com/time/nation/article/0,8599,1819288,00.html.
>
> Jill LePore, "Money Talks: Who's Fighting for Campaign Finance Reform?" (2012) http://www.newyorker.com/online/blogs/comment/2012/07/money-talks-whos-fighting-for-campaign-finance-reform.html. Things you did not know about campaigning in 19th century America.
>
> Bradley L. Smith, "The Myth of Campaign Finance Reform" (2010) http://www.nationalaffairs.com/publications/detail/the-myth-of-campaign-finance-reform.

Money in Politics: The Current Scene

See notes on Supreme Court decisions above.

J. Raskin and J. Bonifaz (1993). "Equal Protection and the Wealth Primary," Yale Law and Policy Review 11(2), pp. 273-332. Available at http://www.jstor.org/stable/40239404.

Robert Post (2014). *Citizens Divided: Campaign Finance Reform and the Constitutions*. Harvard University Press. The book contains a series of lectures interpreting *Citizens United.*

Here are some sources for the experiences in the 2012 elections:

> B. Bowie and A. Lioz (Dēmos and U.S. PIRG, 2013)."Billion-Dollar Democracy: The Unprecedented Role of Money in the 2012 Elections," www.demos.org/publication/billion-dollar-democracy-unprecedented-role-money-2012-elections. Much other useful material is also available on the Dēmos site.
>
> A. Crowther (Public Citizen, 2012). "Outside Money Takes the Inside Track," http://www.citizen.org/documents/outside-spending-dominates-2012-election-report.pdf.
>
> A. Crowther (Public Citizen, 2012). "'Dark' Money Casts Shadow over Top Senate Races," http://www.citizen.org/documents/citizens-united-dark-money-top-senate-races-2012-report.pdf.

T. Lincoln (Public Citizen, 2012). “Super Connected." http://www.citizen.org/documents/super-connected-candidate-super-pacs-not-independent-report.pdf.

There are also several web sites devoted to the tracking of money in politics, from which the above reports obtain most of their data:

FEC Campaign Finance Disclosure Portal http://www.fec.gov/pindex.shtml

Follow the Money http://www.followthemoney.org

Open Secrets http://www.opensecrets.org/

LWVUS Positions and Efforts Related to CFR

Impact on Issues 2012-2014. This includes not only complete positions but also extensive histories related to each. http://www.lwv.org/content/impact-issues

LWVUS comments to the IRS on political activity of 501(c)(4) organizations. http://www.lwv.org/content/league-submits-comments-irs-regarding-proposed-guidance-tax-exempt-social-welfare

For additional details of the League's recent activities, see LWVUS, http://www.lwv.org/issues/reforming-money-politics.

Approaches for Addressing the Issues and Problems

Represent Us https://represent.us is sponsoring the American Anti-Corruption Act, downloadable at http://anticorruptionact.org. This Act addresses a fairly comprehensive list of the constitutional remedies still available in the wake of recent Supreme Court decisions. A summary of its provisions is contained in Appendix D.

F. Wertheimer and D. Simon (2013). “The FEC: The Failure to Enforce Commission." http://www.acslaw.org/sites/default/files/Wertheimer_and_Simon_-_The_Failure_to_Enforce_Commission.pdf.

Current “revolving door” regulations for Congress and staff, as well as other Federal government employees, are summarized in “Post-Employment, 'Revolving Door,' Laws for Federal Personnel,” http://www.fas.org/sgp/crs/misc/97-875.pdf.

The petition for an SEC corporate disclosure rule is File 4-637 at www.sec.gov. It has not yet reached the status of a proposed rule. The 2013 Shareholder Protection Act is H.R. 1734.

Information about IRS tax exempt status under the IRS code is found on the IRS web site at http://www.irs.gov/Charities-&-Non-Profits. Information about tax exempt organizations and political intervention is collected at http://www.irs.gov/Charities-&-Non-Profits/Tax-Exempt-Organizations-and-Political-Campaign-Intervention. The downloadable document “Tax Exempt Status for Your Organization,” http://www.irs.gov/pub/irs-pdf/p557.pdf describes most 501(c) organizations. A separate page http://www.irs.gov/Charities-&-Non-Profits/Political-Organizations deals with political organizations filing under Section 527. See Appendix C.

Appendix E is a review of the Constitutional amendments proposed in the 112th Congress, prepared for the LWVUS Campaign Finance Task Force. In general, LWVUS has opposed the amendment route. A review of the amendments proposed in the 113th Congress by a pro-amendment group, Free Speech for People, can be found at http://freespeechforpeople.org/node/593.

The provisions contained in the amendments before the 113th Congress are outlined in the table of Appendix F. To find the complete text of these proposals (all of which are short House or Senate Joint Resolutions), go to http://thomas.loc.gov/home/LegislativeData.php?n=BSS;c=113 and use the search engine there. Searching on the phrase "proposing an amendment" brings up all of them, for example (and it is interesting to see what else you get!). Additional information, such as the number of cosponsors and the current committee assignments, are also available.

Some Discussion Starting Points

In 2010, the Brennan Center convened a conference on "Money, Politics & the Constitution: Building a New Jurisprudence." Transcripts of the panel discussions are available at http://www.brennancenter.org/event/money-politics-constitution-building-new-jurisprudence.

The moderators' guide and report from the National Issues Forums of the Kettering Foundation are available on line at http://kettering.org/nif/money-and-politics/.

The Oregon state study of CFR is at http://voteoregon.org/files/pdf/CFR2004.pdf.

Additional Resources

New Jersey Election Law Enforcement Commission. March 2014. *Independents' day: Seeking disclosure in a new era of unlimited special interest spending*. www.elec.state.jn.us

Torres-Spelliscy, Ciara. April 7, 2014. *The history of corporate personhood*, Brennan Center for Justice.

Appendix A. Definitions

Corporation: An organization formed with State governmental approval to act as an artificial person to carry on business or other activities, which can sue or be sued, and (unless it is non-profit) can issue shares of stock to raise funds with which to start a business or increase its capital. One benefit is that a corporation's liability for damages or debts is limited to its assets, so the shareholders and officers are protected from personal claims, unless they commit fraud.

Labor union: An association, combination, or organization of employees who band together to secure favorable wages, improved working conditions, and better work hours, and to resolve grievances against employers.

Nonprofit: A corporation or an association that conducts business for the benefit of the general public without shareholders and without a profit motive. Nonprofits are also called not-for-profit corporations. In order to obtain tax-exempt status from the IRS, it is generally necessary to be organized as a nonprofit, but that is by no means a sufficient condition.

Membership Organization: A labor organization or a trade association, cooperative or other organization that is composed of members who have the authority to administer the organization according to bylaws that state qualifications for membership and are made available to its members. A membership organization expressly seeks members and acknowledges the acceptance of membership. Membership organizations are not organized primarily for the purpose of influencing an election (*FEC Campaign Guide: Corporations and Unions*, pp. 21-22).

The official source of definitions for many terms is found in the various statutes dealing with campaign finance reporting. For example, many terms are defined in the FEC's compilation of federal election campaign laws http://www.fec.gov/law/feca/feca.pdf (which also has an excellent index). These include:

> "election," "candidate"
>
> "political committee," "campaign committee." "authorized committee." "connected organization," "national committee," "state committee," "political party" "contribution," "expenditure," "independent expenditure," "public communication"

For convenience, unofficial definitions of some of these terms and others follow, but it is important to know that for legal purposes many of these have detailed and well-established meanings in law that are only approximated here. The FEC's campaign guide for corporations and labor organizations also has a comprehensive, non-legalese glossary including pointers to the relevant portions of law http://www.fec.gov/pdf/colagui.pdf.

> **Contribution -** gifts, money, loans, or anything of value given for the purpose of influencing an election (candidate or ballot initiative). Voluntary services and limited in-kind donations are excluded.
>
> **Expenditure** – use of money or anything of value for the purpose of influencing an election (candidate or ballot initiative). It includes the transfer of money or anything of value between political committees.

Independent Expenditure – An expenditure made to advocate for the election or defeat of a clearly identified candidate that is not coordinated with any candidate or party and not made at the request of a candidate or coordinated with a candidate's campaign.

Electioneering Communication – Broadcast, cable, or satellite transmissions that refer to a clearly identified candidate, targeted to the relevant electorate. FEC rules concern electioneering communications "shortly before" an election, defined as 30 days before a primary election or 60 days before a general election. See http://www.fec.gov/pages/brochures/electioneering.shtml or http://www.opensecrets.org/527s/electioneering.php.

Express Advocacy - Political communications, often in the form of television and radio advertisements, that explicitly advocate for the defeat or election of a clearly identified federal candidate. In the 1976 *Buckley v. Valeo* decision, the Supreme Court listed examples of the so-called "magic words" that constitute express advocacy, including "vote for," "elect," "defeat," "support," "vote against," "reject," "Smith for Congress," and "cast your ballot for." However, the FEC definition in 11 C.F.R. § 100.22 includes a second, much broader definition (referred to by Chief Justice Roberts as "the functional equivalent of express advocacy") that has recently survived a court challenge (http://www.insidepoliticallaw.com/2013/06/26/tenth-circuit-upholds-fecs-broader-definition-of-express-advocacy/). Since *Citizens United*, corporations, unions and other groups have been allowed to use their general treasuries to fund express advocacy independently of candidates and their PACs.

Issue Advocacy - Political communications, usually in the form of advertising that is framed around an issue. Issue advocacy does not specifically instruct the audience to vote for or against a candidate. Issue ads that explicitly mention or depict a candidate that are broadcast within 30 days of a primary election or 60 days of a general election must be reported to the Federal Election Commission as electioneering communications.

Soft Money – Contributions to a political party for "party-building activities" are known as "soft money." The FEC sets no limits on soft money contributions. The funds can come from individuals and political action committee, but they can also come from any other source, such as corporations. The law says that this money can only be used in advocating the passage of a law and voter registration and not for advocating for a particular candidate in an election.

Hard Money – Direct contributions to a political candidate are known as "hard money" contributions. These contributions may only come from an individual or a political action committee, and must follow the strict limits set forth by the FEC. Corporations and unions may not contribute directly to federal candidates.

Secret Money or Dark Money - Political spending, the source of which is not disclosed under current disclosure regulations. This is typically accomplished through an arrangement whereby the originating donor contributes to a nonprofit corporation (that is not required to disclose) and that in turn makes an expenditure disclosed under the name of the corporation rather than the originating donor.

Political Action Committee (PAC) - Popular term for a political committee that is neither a party committee nor a candidate committee. PACs sponsored by a corporation or labor organization are called separate segregated funds. PACs without a corporate or labor sponsor are called nonconnected committees. Many politicians also form "Leadership PACs" as a way of raising money to help fund other candidates' campaigns.

Super PAC - A type of PAC created after the U.S. Court of Appeals decision in *Speechnow v. FEC* (2010). Super PACs make no contributions to candidates or parties. They do, however make independent expenditures in federal races, running ads or sending mail or communicating in other ways with messages that specifically advocate the election or defeat of a specific candidate. There are no limits or restrictions on the sources of funds that may be used for these expenditures. These committees are required to file timely financial reports with the FEC which include their donors along with their expenditures

Public Financing – Money used to fund campaigns provided by local state, or federal governments. Participation by candidates in public financing is voluntary. The two most common types of public financing systems are: Fair Elections or Small Donor Matching Funds. In Small Donor Matching Funds, candidates raise small donations, usually $200 or less, from constituents, which are then matched by public funds with a multiplier such as 4:1. In Fair Elections, after meeting a qualifying threshold of small contributions, the candidate receives a block grant in an amount sufficient to fund the campaign. Another variant is a Tax Voucher system, where taxpayers receive a small ($50 or $100) tax credit that can be used for political contributions; this is the system proposed in the America Anti-Corruption Act.

Appendix B. Bill of Rights

The Bill of Rights consists of ten amendments to the U.S. Constitution that were written to protect individual rights and freedoms from violation by the federal government. The First Amendment to the Constitution states: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

In 1976 the Supreme Court of the United States (SCOTUS) ruled in *Buckley v. Valeo* that the use of money for both contributions and expenditures is a form of speech protected by the First Amendment. The Court found that contributions to candidate campaigns could be regulated because they create a risk of quid pro quo corruption. However, the Court found no such danger in independent expenditures that expressly advocate the election or defeat of a clearly identified candidate and are not coordinated with any candidate or party.

In 2009 in *Citizens United v. FEC*, the Supreme Court held that the government could not restrict political speech based on the speaker being a corporation and not a natural person.

Between these two decisions (there are others), *Buckley v. Valeo* and *Citizens United v. FEC*, the Supreme Court has held simply stated, money is a form of speech and speech cannot be limited even for corporations. For many this line of reasoning by the court causes concern about the power of money and wealthy corporations in politics and is a catalyst for the fear that our freedom and democracy can be purchased.

Appendix C: The First Amendment

No discussion of campaign finance reform can be complete without a basic understanding of the First Amendment, which protects freedom of speech, the press, and association. There are a number of significant questions that courts, citizens, and our representative democracy have wrestled with in interpreting and applying the First Amendment over our Nation's history.

One of the critical questions of the last forty years is the issue of money and speech. While some maintain that "money is speech," and argue that limitations on money in politics unconstitutionally limit free speech, others ridicule the notion that money and speech are synonymous – that a billion-dollar corporation spending unlimited amounts in political campaigns can be the same as a single person speaking at a public meeting. However, the relationship of money and speech is not so black and white -- in either direction.

Clearly, in our current media-saturated society, it is necessary to spend money to get one's views to the public for consideration. Thus government regulation of what a citizen running for political office can spend implicates the First Amendment in some fundamental way. On the other hand, it does seem strange to say that a special interest group can spend unlimited money buying a megaphone that drowns out the speech of others.

When fundamental rights like freedom of speech, press, and association are involved, the usual constitutional analysis asks three questions: Is there a significant or compelling governmental interest that justifies some limitation; is the limitation the appropriate or the least restrictive means of protecting that governmental interest; and does the limitation apply too broadly, to situations where the governmental interest is not in play?

In campaign finance, the Supreme Court decision in *Buckley v. Valeo*, authored by Justice Brennan in 1974, said that blocking "corruption or the appearance of corruption" is a fundamental governmental interest that justifies some limitations on First Amendment freedoms. The Court then examined whether the limitations passed by Congress in the Federal Election Campaign Act were, in fact, the least restrictive or appropriate means.

In *Buckley* and subsequent cases, the Court set a number of fundamental holdings:

1. Spending limits are unconstitutional because there is no link between the spending of money by candidates and "quid pro quo" corruption.
2. Contribution limits are constitutional because the giving of money to political candidates can lead to corruption or the appearance of corruption.
3. Disclosure of both spending and contributions can be required because disclosure diminishes the opportunity for corruption and enables the public to evaluate candidates.
4). Independent, uncoordinated expenditures cannot be limited because there is no gift to the candidate that could be corrupting.
5. A variety of additional restrictions, such as contribution and solicitation limits on political parties, are acceptable because they prevent circumvention of contribution limits.

The Supreme Court under Chief Justice Roberts purports to apply the *Buckley* structure but has made far-reaching and fundamental changes that are unraveling basic protection in our campaign finance system, by holding that:

1. The right of citizens to hear and the right of corporations to speak means that the ban on corporate participation in candidate elections is unconstitutional. Independent expenditures do not corrupt (*Citizens United* building on *Bellotti*).
2. The limit on the total amount an individual can give to candidates, political parties and political committees cannot be justified. There is no additional threat of corruption from a large number of contributions so long as the basic contribution limits are in place and the restriction is not the least restrictive means of preventing circumvention of those basic contribution limits (*McCutcheon*).
3. There is no place in campaign finance law for the rationale of fair competition, a level playing field, or protecting representative democracy – only corruption or the appearance of corruption justifies limits on the First Amendment (*Citizens United* overruling *Austin*; *McCutcheon*).
4. Quid pro quo corruption should be interpreted very narrowly so that gaining special access to an elected official, influencing an official's or a party's approach to an issue without vote buying, and soliciting million-dollar contributions don't give rise to corruption or the appearance of corruption (*Citizens United*; *McCutcheon*).

Thus by strictly applying First Amendment analysis, drastically limiting what constitutes a compelling governmental interest, and rigorously searching for less restrictive means, the Roberts Court has turned campaign finance law on its head. While some may say that this exclusive focus on the right of individuals and associations to spend money on speech is a "pure" approach, as the ACLU would maintain, others believe that this one-sided analysis ignores the fundamental role that the First Amendment should play in protecting a representative form of government under the Constitution.

In *Citizens United* and *McCutcheon*, the Court overruled the 1990 decision in *Austin v. Michigan Chamber of Commerce*, where that Supreme Court recognized a compelling state interest in combating a "different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." In rejecting that compelling state interest and in rejecting that form of corruption, the current Court has embarked on a dangerous path.

There are a number of other questions that must be considered when looking at the First Amendment in the campaign finance context. One complicating issue is that freedom of speech normally includes not only the right to speak, but it also protects the right to hear. The rights or identity of the speaker is not the only relevant consideration -- the need for citizens in a democracy to hear full discussion of issues is also protected. Thus in *Citizens United*, as in previous decisions by a more liberal Court, the right to hear was included in the First Amendment reasoning. Even if corporations should not have full free speech rights to spend unlimited sums in a candidate election, the right for the public to hear the views of corporations was constitutionally important.

Also, traditionally, freedom of the press and freedom of speech protect the same rights. These rights are not different based on the identity of the writer or the speaker. The lone blogger and the New York Times are protected by freedom of the press, even though one is a single individual and the other a large, for-profit corporation. Because campaign finance law has statutory exemptions for the press, allowing newspapers to spend money endorsing candidates, for example, constitutional law has not gone down the difficult path of defining "the press" that would be required if attempts were made to limit spending in the speech context but not limit freedom of the press. Should the press, however, defined, have different rights than individuals?

Another controversial issue is the question of corporate versus individual rights. Obviously, First Amendment freedoms belong to individuals; what are the limits of First Amendment rights when it comes to associations of individuals? After all, the First Amendment protects the right to associate as well as speech and press. Associations take many forms in American society; from political parties to churches and other religious organizations; from giant limited-liability, for-profit international corporations to local charitable organizations; from newspapers and media outlets owned by corporations to the League of Women Voters, with affiliated organizations in 50 states and more than 750 communities. Do all these associations or should all these associations have the same or different rights under the First Amendment, and how should they be differentiated in law?

Only relatively recently have limited-liability corporations created by state law had free speech rights to advertise their commercial products. But now they can "speak" and spend freely in candidate elections. Should the preacher of a tax-exempt church be allowed to urge parishioners to vote for a particular political party, and what is a "religious organization" anyway? What are the appropriate limits, if any, for a political party raising and spending funds to help its candidates in an election? Could the government set such limits too low?

As we see, there are many different currents in the First Amendment river, and channeling them in ways that both enhance political freedom and protect representative government is not a simple task. And as circumstances change, can the law respond appropriately? How are individual bloggers and media giants to be treated? Are the rights of a billionaire in a society marked by disparity of income really the same as the candidate for school board?

A final, enduring question is about the role of the Supreme Court in defining and enforcing First Amendment protections for individuals, the press and associations. In this area of constitutional law, as in others, the Constitution says what the Supreme Court says it says. Since *Marbury v. Madison* in 1803, the Supreme Court has become the final arbiter of constitutional interpretation. For better or for worse, the only fully effective way to change constitutional interpretation is to change the composition of the Supreme Court.

Some historical examples make the point. Whether one agrees or disagrees with the outcomes in *Roe v. Wade* (right to privacy in reproductive choice), *Reynolds v. Sims* (one

person, one vote), or *Engel v. Vitale* (blocking state-sponsored prayer in schools), it is fair to say that these were controversial decisions that changed constitutional interpretation which opponents have not yet been able to reverse, despite years of trying.

Appendix D: Timeline of Significant Congressional Acts and Supreme Court Decisions

1907 Congress Tillman Act	*Prohibits*:	Contributions to candidate campaigns from corporate treasuries and interstate banks
1910 Congress Federal Corrupt Practices Act; amended 1911; revised and expanded 1925	*Establishes*: *Requires*:	Spending limits for candidates for U.S. Senate and House of Representatives Public disclosure of spending
1947 Congress Taft Hartley Act	*Prohibits*:	Contributions from union dues (adding to Tillman Act)
1971 Congress Federal Election Campaign Act (FECA); amended 1974	*Establishes*: *Allows*: *Requires*: *Limits*: *Limits*: *Prohibits*: *Prohibits*: *Prohibits*: *Prohibits*: *Prohibits*:	Federal Election Commission Public funding for presidential primaries & general elections Disclosure of sources of campaign contributions Contributions by an individual to a candidate, party or PAC Candidate campaign expenditures and independent (PAC) expenditures Contributions directly from corporations, unions and national banks Contributions from government contractors Contributions from foreign nationals Cash contributions over $100 Contributions in the name of another Candidate self-funding own campaign
1976 Supreme Court *Buckley v. Valeo*	*Upholds*: *Upholds*: *Overturns*: *Overturns*:	Limits on campaign contributions Public funding for candidate campaigns Limits on candidate's self-funding their own campaign Limits on campaign expenditures by candidates and by PACs—"spending money to influence elections is constitutionally protected free speech."
1978 Supreme Court *1st National Bank of Boston v. Bellotti*	*Overturns:*	Prohibitions on corporate expenditures in non-candidate elections (initiatives, referendums, etc.) as an infringement on First Amendment rights.
1990 Supreme Court *Austin v. Michigan Chamber of Commerce*	*Upholds*:	Restrictions on corporate expenditures to support or oppose candidates based on the notion that "corporate wealth can unfairly influence elections."

2002 Congress Bipartisan Campaign Reform Act (BCRA)	*Prohibits*:	Corporations and unions from using general treasury funds to make electioneering communications (ads, movies, etc.) within 30 days of a primary or 60 days of a general election.
	Raises:	Contribution limits for those running against a self-financed candidate (so-called Millionaire's Amendment).
2003 Supreme Court *McConnell v. FEC*	*Upholds*:	Key provisions of BCRA, including the constitutionality of government having a legitimate interest in preventing "both actual corruption threatened by large financial contributions and…the appearance of corruption that might result from those contributions."
	Upholds:	Limits on and regulation of electioneering communications.
2007 Supreme Court *Wisconsin Right to Life v. FEC*	*Overturns*:	Limits on electioneering communications previously upheld in *McConnell*.
	Affirms:	Right of corporations to speak through ads.
2008 Supreme Court *Davis v. FEC*	*Overturns:*	Millionaire's Amendment, preserving low contribution limits on candidates facing self-funding opponents, who are free to spend their own money without limit.
2009 Supreme Court *Caperton v. A.T. Massey Coal Co.*	*Upholds*:	A due process violation for an elected judge hearing a case involving a major campaign contributor, even when that spending was done independently, acknowledging that independent spending in judicial races might create a probability of bias.
2010 Supreme Court *Citizens United v. FEC*	*Upholds*:	Disclosure (does not speak to the issue of undisclosed funds flowing into campaigns)
	Affirms:	A corporation's right to spend unlimited money in elections (still may not contribute directly to candidate)
2010 Federal Appeals Court *SpeechNow.org v. FEC*	*Upholds*:	Disclosure
	Overturns:	FEC rules limiting contributions to PACs as long as the PACs make only independent expenditures, no campaign contributions. Based on ruling in *Citizens United*.
	Creates:	Legal framework for Super PACs

2011 Federal Court * *Carey v. FEC* (*FEC not contesting decision at this date)	*Allows:*	PACs to use a segregated fund to accept unlimited contributions, i.e., allows a traditional PAC to merge with a Super PAC (a PAC has contribution limits and can give directly to a candidate; a Super PAC has no contribution limits but cannot give directly to a candidate. The decision creates the Hybrid PAC).
2011 Supreme Court *McComish v. Bennett*	*Overturns:*	Triggered matching funds in Arizona's public financing program, which preserved a "level playing field" by granting additional public funds to participating candidates who were outspent by privately financed opponents or independent groups.

2014 Supreme Court *McCutcheon v. FEC*	*Overturns:*	Federal aggregate limits on campaign contributions to candidates, political parties and political committees

We wish to express appreciation to the Massachusetts and California Leagues for their contributions to this Timeline.

Appendix E: Regulations pertaining to tax-exempt organizations

The chart below compares seven federal tax law attributes of five common types of tax-exempt organizations. [LTD = Limited]

	501(c)(3)	501(c)(4)	501(c)(5)	501(c)(6)	527
May receive tax-deductible (for the donor) charitable contributions	YES	NO	NO	NO	NO
May receive contributions or fees deductible for the donor as a business expense	YES	YES	YES	YES	NO
Substantially related income exempt from federal income tax	YES	YES	YES	YES	YES
Investment income exempt from federal income tax	LTD*	YES	YES	YES	NO
May engage in legislative advocacy	LTD	YES	YES	YES	LTD
May engage in candidate election advocacy	NO	LTD	LTD	LTD	YES
May engage in public advocacy not related to legislation or election of candidates	YES	YES	YES	YES	LTD

*Private foundations are subject to tax on net investment income.

Source: http://www.irs.gov/Charities-&-Non-Profits/Common-Tax-Law-Restrictions-on-Activities-of-Exempt-Organizations.

Briefly, the entities in the table above are defined as follows:

- 501(c)(3): A corporation, community chest, fund, or foundation that is organized and operated exclusively for one or more of the following purposes: religious, educational, charitable, scientific, literary, testing for public safety, fostering amateur sports competition (but not if its activities include providing facilities or equipment), or preventing cruelty to children or animals. See "Tax Exempt Status for Your Organization" (http://www.irs.gov/pub/irs-pdf/p557.pdf). The Educational Funds of Leagues of Women Voters are organized as 501(c)(3)s.
- 501(c)(4): Civic leagues, social welfare organizations, and local associations of employees operated on a nonprofit basis and operated primarily to further the common good and general welfare of the people of the community (such as bringing about civic betterment and social improvements). Promoting social welfare does not include direct

or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office. However, a section 501(c) organization (except a 501(c)(3)) can set up a separate segregated fund that will be treated as an independent political organization (i.e., a 527, see below).. Most Leagues (apart from their Education Funds) are organized as 501(c)(4)s, a status that is easily available to all Leagues because it has already been granted to LWVUS.

- 501(c)(5): Labor, agricultural and horticultural associations. Labor unions belong in this category.
- 501(c)(6): Business leagues, chambers of commerce, real estate boards, etc. organized to improve business conditions in one or more lines of business.
- 527: Party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions and/or making expenditures for the primary purpose of influencing or attempting to influence the selection, nomination, election or appointment of an individual to a federal, state, or local public office or office in a political organization, http://www.irs.gov/Charities-&-Non-Profits/Political-Organizations/Exemption-Requirements-Political-Organizations.

While tax-related information must be available to the public, a list of donors to tax-exempt organizations is not included in the public information.

Appendix F. Provisions of the American Anti-Corruption Act and Other Acts

Source: http://anticorruptionact.org

1. Stop politicians from taking bribes

Prohibit members of Congress from soliciting and receiving contributions from any industry or entity they regulate, including those industries' lobbyists. Prohibit all fundraising during Congressional working hours.

2. Limit Super PAC contributions and coordination

Require Super PACs to abide by the same contribution limits as other political committees. Toughen rules regarding Super PACs' and other groups' coordination with political campaigns and political parties.

3. Prevent job offers as bribes

Close the "revolving door" where elected representatives and senior staff sell off their legislative power for high-paying jobs. Stop them from negotiating jobs while in office and, once they leave, bar them from all lobbying activity for 5 years.

4. Call all people who lobby, lobbyists

Significantly expand the definition of and register all lobbyists to prevent influencers from skirting the rules.

5. Limit lobbyist donations

Limit the amount that lobbyists and their clients can contribute to federal candidates, political parties, and political committees to $500 per year and limit lobbyist fundraising for political campaigns. Federal contractors are already banned from contributing to campaigns: extend that ban to lobbyists, high-level executives, government relations employees, and PACs of federal government contractors.

6. End secret money

Mandate full transparency of all political money. Require any organization that spends $10,000 or more on advertisements to elect or defeat federal candidates to file a disclosure report online with the Federal Election Commission within 24 hours. List each of the donors who gave $10,000 or more to the organization to run such ads. This includes all PACs, 501c nonprofits, or other groups that engage in electioneering.

7. Empower all voters with a tax rebate

Build up the influence of voters by creating a biennial $100 Tax Rebate that they can use to make qualified contributions to federal candidates, political parties and political committees. Flood elections with small-donor contributions that will offset the huge spenders. Candidates and political groups will only be eligible for these funds if they agree to a set of contribution limits: they will only accept money from small donors (giving $500 or less a year), other groups abiding by the limits, and the Tax Rebates themselves.

8. Disclose "bundling"

Require federal candidates to disclose the names of individuals who "bundle" contributions for the member of Congress or candidate, regardless of whether such individuals are registered lobbyists.

9. Enforce the rules

Strengthen the Federal Election Commission's independence and strengthen the House and Senate ethics enforcement processes. Provide federal prosecutors the additional tools necessary to combat corruption, and prohibit lobbyists who fail to properly register and disclose their activities from engaging in federal lobbying activities for a period of two years.

Government by the People Act – H.R.20 (2014)

Establishes public financing for congressional election through small donor matches. Includes a tax credit for small donors.

Empowering Citizens Act – H.R. 270 (2014)

Establishes public financing for congressional elections through small donor matches. Fixes the presidential public financing system, tightens the coordination rules for "independent" spending, improves bundling disclosure for presidential races, and stops candidate-specific Super PACs.

Fair Elections Now Act (2013)

Establishes public financing by providing initial grants to candidates for public office and matching of small contribution by a ratio of 5:1.

Grassroots Democracy Act (2013)

Establishes 1:1 or 5:1 public financing match of small contributions by individuals depending on voluntary small contribution limit. Individuals would receive a tax credit for small contributions to candidates. Candidates contending with large amounts of outside spending would qualify for additional funds.

Appendix G: Review of Constitutional Amendments Proposed in Response to *Citizens United*

[Prepared for the LWVUS Campaign Finance Task Force. Note that the amendments reviewed in this Appendix are those that were introduced in the Congress of 2011-2012. Many are similar, but not identical, to those before the current, 113th Congress, summarized in Appendix F.]

The following discussion is about federal Court decisions interpreting laws and the Constitution regulating free speech, money, corporations, politics, and elections. Proposals to amend the Constitution arise out of fears that the First Amendment to the Constitution is being interpreted in such a way that our freedom, indeed our democracy, can be purchased. Here's what the First Amendment says:

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

Background of *Citizens United v. Federal Election Commission (FEC)* [1]

Supreme Court Decisions. In *Citizens United v. FEC,* the Supreme Court struck down long-standing provisions of federal campaign finance law prohibiting the use of corporate general treasury funds for independent expenditures[2]and electioneering communications[3]. The Court found that these provisions constituted a "ban on speech" and were unconstitutional under the First Amendment. The Court held that government could not restrict political speech based on the speaker being a corporation and not a natural person.

In its ruling, the Court invoked its landmark 1976 decision, *Buckley v. Valeo,* which held that the use of money, for both contributions and expenditures, is a form of speech protected by the First Amendment. In *Buckley*, the Court found that contributions to candidate campaigns could be regulated because they create a risk of *quid pro quo* corruption. However, the court found no danger of corruption in independent expenditures or in expenditures by candidate campaigns, which therefore could not be limited. The Court defines corruption narrowly to include votes-for-money *quid pro quo* or the appearance thereof but generally to exclude the other distorting effects that big money has on politics or government.

Following the Supreme Court's reasoning in *Citizens United*, the US Court of Appeals for the District of Columbia ruled in *Speechnow.org v. FEC* that since independent expenditures do not create actual or apparent *quid pro quo* corruption, individual and corporate contribution limits to PACs are impermissible if the PACs do not contribute to candidate campaigns but make only independent expenditures.

Impact on Federal Campaign Finance Law. Prior to the *Citizens United* ruling, corporations and labor unions were prohibited from using general treasury funds to make independent expenditures and electioneering communications. In the new, post-*Citizens United* world, corporate and labor union general treasuries are permitted to fund independent expenditures and electioneering communications. Subsequent to *Speechnow.org*, they may also give unlimited amounts to PACs or other entities that

make independent expenditures. Corporations and labor unions are still prohibited from making direct contributions to candidate campaigns or political parties.

Prior to *Speechnow.org*, individuals were allowed to spend unlimited amounts directly on independent expenditures, but they were bound by contribution limits to PACs. After *Speechnow.org*, individuals are also allowed to make unlimited contributions to PACs that make only independent expenditures.

Amending the Constitution. Since the Court's decision is one of constitutional (not statutory) interpretation, amending the Constitution is an option for reversing the effects of these rulings. To date, 14 resolutions have been introduced in Congress to respond to *Citizens United*. Such resolutions require approval by two-thirds of both the House and the Senate, and they require ratification by the legislatures of three-fourths of the states.

Analysis of Proposed Constitutional Amendments

The 14 proposed resolutions vary considerably. For example, some of the resolutions give Congress very broad power to regulate both contributions and expenditures by candidates, political parties, political action committees (PACs), and individuals. Some limit the application of such regulation to corporations and other business-related entities. Because *Citizens United* invalidated state as well as federal laws, most proposals give both Congress and the states some power to regulate in this area. Instead of permitting Congress to regulate, two of the proposals directly prohibit corporate and labor union expenditures.

Although *Citizens United* was the flash point for introducing these resolutions, some of them suggest remedies that go beyond merely restoring the prior status quo. Some would affect corporate rights well beyond the sphere of political campaigns. Others would affect the contributions and expenditures of entities beyond those of corporations and labor unions.

Some of the resolutions use terms such as "contributions" and "expenditures" without definition, and it is unclear how the courts will interpret them. Courts may rely on the plain meaning of such terms, but they may also refer to other material including current campaign finance law. How these terms are ultimately understood by the courts will make a critical difference in what type of campaign finance law is permitted. Those resolutions that define key terms and contain the greatest specificity are best positioned to avoid uncertainty.

Furthermore, many of these proposals raise the question of what Congress and state legislatures can or should regulate and what checks would remain on the improper or overreaching use of that legislative power.

The following discussion highlights selected issues raised by the 14 joint resolutions.

Rights of "Natural Persons." Three resolutions propose to limit the rights protected by the Constitution to "natural persons." One (H.J. Res. 88) would provide that such protected rights are the rights of "natural persons," and that the terms "people, person, or citizen" as they are used in the Constitution do not include corporations, limited liability companies, or "other corporate entities." This means that both for-profit and non-profit corporations could be excluded. Two other resolutions (H.J. Res 90 and S.J. Res. 33) are similar but their effect on non-profits is unclear.

Specifying that rights protected by the Constitution are only those of natural persons, and not of corporations, might not have the effect amendment sponsors intend. According to the Supreme Court, "the First Amendment does not allow political speech restrictions based on a speaker's corporate identity." In other words, it is the speech that will be protected, regardless of the identity of the speaker.

In addition, excluding corporations and other entities from all the rights protected by the Constitution might create unintended consequences for property rights under the Fifth and Fourteenth Amendments, Fourth Amendment rights against unreasonable search and seizure, and Fifth Amendment protection against double jeopardy.

"***Political Speech" of Corporations in Elections.*** Two resolutions contain provisions that exclude application of the First Amendment to the political contributions and expenditures of corporations and other business entities. This could reverse elements of *Buckley* and permit limits on independent expenditures made directly with corporate general treasury funds. It might also strengthen the argument that it is permissible to prohibit the use of such funds for contributions to PACs.

The proposed new language does not restrict regulation to the brief periods before a primary or a general election. However, there are ambiguities in the language of the resolutions. Precisely what is covered by the terms "contributions," "expenditures," and "disbursements . . . in connection with public elections" would be open to interpretation by the courts.

Regulate Expenditures or Disbursements by Corporations. Two resolutions permit regulation of expenditures and disbursements by corporations. Determining what type of corporate activity would be affected by these resolutions depends on interpretation of the language. Under a legalistic interpretation, one of these resolutions (H.J. Res. 82) could permit regulation only of coordinated expenditures, as well as independent expenditures. Under a plain meaning interpretation, the language may be broad enough to allow for the regulation of all contributions, not just coordinated expenditures, and it might permit regulation of both independent expenditures and electioneering communications, as well.

The other resolution (H. J. Res. 92) allows regulation of "the disbursement of funds for political activity." This broad terminology might permit the regulation of funds spent not only for independent expenditures, but also for electioneering communications and contributions. The term "political activity" is very broad and might allow for regulation of activity not usually associated with elections or campaign finance, such as true issue ads. This proposal specifies the types of entities that could be regulated, specifically, "for-profit corporations, other for-profit business entities, or other business organizations," thereby exempting those non-profit corporations that are not business organizations.

Both of these resolutions also might permit regulation beyond the scope of the law prior to *Citizens United*, including restrictions on spending at all times, not just during the periods immediately prior to an election.

Ban Corporate Contributions and Expenditures. In contrast to resolutions that provide Congress and the states with the *power* to regulate, two proposals directly ban corporations and other business-related entities from making "contributions" or "expenditures" in any candidate election or ballot measure. While the terms

"contributions" and "expenditures" are subject to interpretation by the courts, these provisions leave little room for Congressional regulation.

Regulate Expenditures and Contributions. Going beyond *Citizens United,* nine of the resolutions contain provisions that authorize Congress and the states to regulate both expenditures and contributions. Of these, only two (H. J. Res. 78 and S. J. Res. 35) attempt to limit the entities that could be regulated. The other seven seem to permit restrictions on expenditures by candidates, parties, political action committees (PACs), and individuals, as well as corporations and labor unions.

With all nine of these resolutions, determining how they would work will depend largely on how a court defines "expenditure" and "contribution."

Expenditures Not Protected Speech. One resolution contains very broad language that would exempt expenditures in almost all political contexts from First Amendment protection and thereby permit spending limits. Excluding all political expenditures from the protections of free speech, without limitation as to the source of expenditures, could mean that spending limits would apply not only to corporations, but also to candidates, political parties, political action committees (PACs) and individuals. Additionally, the expansive language of this resolution could permit legislation to restrict currently protected independent expenditures and electioneering communications, which refer only to candidates without expressly advocating for or against the candidate, and it could allow such legislation to restrict electioneering communication at any time during the election season, not just in the 30-day period before a primary or the 60-day period before a general election. The very broad language of this resolution gives unlimited regulatory power to state and federal legislatures, which could no longer be checked by the judiciary.

Freedom of the Press. Five resolutions seek to explicitly protect the free speech rights of the press while permitting regulation of other political speech. "Freedom of the press" is currently a protected right under the First Amendment separately from "freedom of speech" – "Congress shall make no law . . . abridging the freedom of speech, or of the press." Until now, courts have not treated them separately.

However, with the proposals to restrict corporate "speech," the exemption for "freedom of the press" brings challenges. One issue is how a media corporation is differentiated form other types of corporations, particularly with the proliferation of the Internet, Twitter, and other modern media and the decline of print and broadcast media. Another press exemption conundrum is how to carve out the press exemption for a "media" corporation that is part of a conglomerate owning other unrelated businesses, using its media outlet to promote its agenda, when other corporations do not have the same opportunity to speak.

Conclusion. These proposals illustrate the complexity of this issue, the risk of unintended consequences, and the difficulty of crafting precise language in the form of a constitutional amendment.

Overview of Proposed Congressional Resolutions responding to *Citizens United* (112th Congress)

Bill #	Rights of "Natural Persons"	"Political Speech" of Corporations	Regulate Expenditures and Disbursements by Corporations	Ban Corporate Contributions and Expenditures	Regulate Expenditures and Contributions	Expenditures Not Protected Speech	Freedom of the Press
HJR 88 [4]	x						x
HJR 90 [5]	x			x	x		x
SJR 33	x			x	x		x
HJR 7		x					
HJR 6		x			x		
HJR 92			x				
HJR 82			x				x
HJR 97						x	
HJR 8					x		
HJR 72					x		
HJR 78					x		
HJR 86					x		
SJR 29					x		
SJR 35					x		x

[1] As of 3/12/2012. Source: Congressional Research Service Memo.

[2] Independent expenditures are communications that expressly advocate the election or defeat of a clearly identified candidate and are not coordinated with any candidate or party.

[3] Electioneering communications are broadcast, cable or satellite transmissions that refer to a clearly identified federal candidate and made within 60 days of a general election or 30 days of a primary.

[4] HJR 88 is very close in text to the amendment being proposed by Free Speech for People.

[5] Move to Amend's proposal has different language but covers the same areas as HJR 90 and SJR 33.

Appendix H: Provisions in Amendments before 113th Congress

HJR 12 (Kaptur)	• Congress/States shall have the power to limit both contributions and expenditures in support of or opposition to a candidate for nomination or election to Federal/State office.
HJR 13 (Kaptur)	• The First Amendment does not apply to corporations and other business organizations with respect to contributions or expenditures of funds related to elections.
HJR 14 (Kaptur)	• Combines HJR 13 and HJR 12.
HJR 20 (McGovern) SJR 19 (T. Udall) (not quite identical)	• Congress/States shall have the power to limit both contributions and expenditures in support of or opposition to a candidate for nomination or election to Federal/State office.
HJR 21 (McGovern) SJR 18 (Tester)	• The words people, persons, citizens as used in the Constitution do not apply to corporate entities, which are subject to regulation by Congress and the states. • Nothing herein to be construed as limiting the people's inalienable rights to free speech, freedom of the press, freedom of association, etc.
HJR 25 (Edwards)	• Nothing in this Constitution shall prohibit Congress and the states from regulating and restricting expenditures by corporate entities for political activity. • Nothing herein shall be construed to abridge freedom of the press.
HJR 29 (Nolan)	• The rights protected by the Constitution are those of natural persons only. The rights of corporate and other entities are determined by statute and are not inalienable. • Congress/States/local jurisdictions shall have the power to limit both contributions and expenditures for candidates and ballot measures. The judiciary shall not construe the expenditure of money as protected speech. • Nothing herein shall be construed to abridge freedom of the press.
HJR 31 (Schiff)	• Nothing in this Constitution shall prohibit Congress and the states from regulating and restricting expenditures by corporate entities for political activity, or from enacting systems of public funding including those with “trigger” mechanisms.
HJR 32 (Schrader)	• Congress/States shall have the power to limit both contributions and expenditures in support of or opposition to a candidate for Federal/State office or a ballot measure, provided statutes enacted with respect to individuals treat all individuals the same, and those enacted with respect to collective entities treat all such entities the same. • Non citizens may not contribute funds or make expenditures to influence the outcome of elections.

HJR 34 (Deutch) SJR 11 (Sanders)	• The ability to make contributions and expenditures to influence elections, like the right to vote, shall apply only to natural persons. • Congress and the states may act to protect the integrity and fairness of elections, to limit the corrupting effect of private wealth, and guarantee the dependence of elected officials on the public alone through measures such as public financing and disclosure. • Nothing herein shall be construed to abridge freedom of the press.
SJR 5 (Baucus)	• Congress/States shall have the power to regulate contributions and expenditures by corporations, for-profit organizations and labor unions relative to elections. • Nothing herein shall be construed to abridge freedom of the press.

Appendix I. State Information

[This section may be completed by the individual states to provide state-specific history and legislation on campaign finance regulation and/or to review the state and local League's positions and history of advocacy in this area.]