

## A comparison of Constitutional Amendment bills responding to *Citizens United* in the 113<sup>th</sup> Congress, as of August, 2013

Free Speech For People endorses S.J.Res. 18 (Tester), S.J. Res. 19 (Udall), H.J.Res. 20 (McGovern), and H.J.Res. 21 (McGovern)

Bill number and principal sponsor	Has bi-partisan cosponsorship.	States that corporations do not have constitutional rights. (Overturns <i>Citizens United</i> entirely.)	Restores authority of Congress and states to limit campaign spending by corporations. (Overturns part of <i>Citizens United</i> .)	Restores authority of Congress and states to limit campaign spending in all categories. (Overturns <i>Buckley</i> on spending limits entirely.)	Restores authority of Congress and states to limit campaign spending in some categories. (Overturns part of <i>Buckley</i> .)	Addresses other matters (specified in cells below).
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### ***Bills relating to the claim of corporate constitutional rights:***

<b>S.J.Res. 18:</b> Sen. Jon Tester (D-MT)*	NO	YES	n/a	NO	NO	n/a
<b>H.J.Res. 21:</b> Rep. Jim McGovern (D-MA)*	Rep. Walter Jones (R-NC)	YES	n/a	NO	NO	n/a
<b>H.J.Res. 29:</b> Rep. Richard Nolan (D-MN)	NO	YES	n/a	YES	n/a	Requires: <ul style="list-style-type: none"> <li>• Regulation of campaign gifts and spending;</li> <li>• Disclosure of campaign gifts and spending</li> </ul>
<b>H.J.Res. 13:</b> Rep. Marcy Kaptur (D-OH)	NO	NO	YES	NO	n/a	n/a
<b>H.J.Res. 14:</b> Rep. Marcy Kaptur (D-OH)	NO	NO	YES	YES	n/a	n/a

### ***Bills relating to campaign finance:***

<b>S.J.Res. 19:</b> Sen. Tom Udall (D-NM)*	NO	NO	NO	YES	n/a	n/a
<b>H.J.Res. 20:</b> Rep. Jim McGovern (D-MA)*	NO	NO	NO	YES	n/a	n/a
<b>S.J.Res. 5:</b> Sen. Max Baucus (D-MT)	NO	NO	YES	NO	NO	n/a

\*: Dotted lines between rows indicate companion bills across chambers; S.J.Res. 19 and H.J.Res. 20 have different wording but the same effect.

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### *Bills relating to campaign finance (continued):*

<b>S.J.Res. 11:</b> Sen. Bernie Sanders (I-VT)*	NO	NO	YES	YES	n/a	Specifically allows: <ul style="list-style-type: none"> <li>• Public funding of elections;</li> <li>• Disclosure of campaign gifts and spending</li> </ul>
<b>H.J.Res. 34:</b> Rep. Ted Deutch (D-FL)*	NO	NO	YES	YES	n/a	Specifically allows: <ul style="list-style-type: none"> <li>• Public funding of elections;</li> <li>• Disclosure of campaign gifts and spending</li> </ul>
<b>H.J.Res. 25:</b> Rep. Donna Edwards (D-MD)	NO	NO	YES	NO	NO	n/a
<b>H.J.Res. 31:</b> Rep. Adam Schiff (D-CA)	NO	NO	NO	NO	YES	Specifically allows full or partial public funding of elections.
<b>H.J.Res. 12:</b> Rep. Marcy Kaptur (D-OH)	NO	NO	NO	YES	n/a	n/a
<b>H.J.Res. 32:</b> Rep. Kurt Schrader (D-OR)	NO	NO	NO	NO	YES	<ul style="list-style-type: none"> <li>• Bars campaign gifts and spending by non-U.S. citizens and by foreign entities.</li> </ul>

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## **Introduction**

Free Speech For People is pleased to present this analysis of the 14 constitutional amendment bills introduced so far in the 113<sup>th</sup> Congress. This analysis is presented graphically in a grid on the previous two pages, and continues in narrative form below.

This is our second such analysis; our first one, focused on amendment bills in the 112th Congress, was published in August, 2012, and is [linked here](#).

## **The Bills We Support**

Of the 14 bills currently in play in Congress, Free Speech For People endorses these four:

- A pair of identical bills, [S.J. Res. 18](#), introduced in the Senate by Sen. Jon Tester (D-MT) and [H.J. Res. 21](#), introduced in the House by Rep. Jim McGovern (D-MA), *and*:
- Another companion pair, [S.J. Res. 19](#), introduced in the Senate by Sen. Tom Udall (D-NM), and [H.J. Res. 20](#), also introduced in the House by Rep. Jim McGovern (D-MA).

## **Background and Context**

The *Citizens United* ruling presents two serious threats to our democracy: (1) the claim that corporations have constitutional rights, as if they were people, including First Amendment “free speech” rights; and (2) the assertion that corporations may not be barred from spending money to influence the outcomes of our elections.

Here’s a very brief refresher on how these two problems arose, and why it’s vital that we correct them both, through one or more constitutional amendments.

The central problem in *Citizens United* is the claim that corporations have constitutional rights, as if they were people, which is fundamentally absurd. A corporation is an artificial entity, created and allowed to exist by a state

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government acting on behalf of real people. Our laws assign certain legal rights and responsibilities to corporations, such as the right to enter into contracts and the potential for corporations to be sued. Our laws also grant corporations great privileges, such as limited liability, perpetual life, and the ability to aggregate wealth. But that's all based on simple laws, subject to change and limitation as we the people, represented by Congress and our state governments, see fit. In contrast, our *constitutional rights* are of a higher order. These rights, such as our rights to free speech, freedom of religion, freedom of the press, and freedom of assembly, safeguard the values that define America. They're uniquely powerful, because if a state or federal law conflicts with a constitutional right, the constitutional right prevails, and the law gets tossed out by the courts. Corporations are now claiming the extraordinary power of constitutional rights, and abusing it, persuading courts to strike down not only our campaign finance laws, but also other democratically enacted laws in the fields of health care, consumer rights, civil rights, and environmental protection. So, it's incredibly important that we pass a constitutional amendment to make it clear that constitutional rights are only for actual people, and not for corporations.

*Citizens United* is best known for striking down our laws banning corporations from spending money to influence our elections. The result has been an opening of the floodgates to billions of dollars that are now expected to be spent on both sides of the 2012 elections. Although *Citizens United* related mainly to corporate spending, its practical effect has also included unleashing hundreds of millions of dollars in campaign spending by individuals, leading to the recent proliferation of SuperPACs. These results are partly due to *Citizens United*, and also partly due to an earlier Supreme Court case, *Buckley v. Valeo*, from 1976. *Buckley* said that money spent on political campaigns is a form of "free speech" and that there can be no limits on spending by candidates' campaigns or by individuals acting independently to support a candidate. (*Buckley* let stand limits on contributions directly to campaigns.) Together, *Buckley* and *Citizens United* have led to today's situation: big money drowning out the voices of regular people.

To solve the first problem, we need a constitutional amendment to make it clear that corporations do not have constitutional rights (overruling *Citizens United*). This is the crux of the popular slogan, "corporations are not people".

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To solve the second one, we need an amendment to restore Congress' and the states' authority to limit campaign spending (overruling *Buckley* on spending limits). This is the essential meaning of the slogan, "money is not speech".

America urgently needs one or more constitutional amendments to resolve both of these issues.

### **Analysis of the 14 Bills**

Of the [14 amendment bills](#) related to these issues currently in play in Congress, only five, the bicameral companion pair S.J. Res. 18 (Tester) / H.J. Res. 21 (McGovern), H.J. Res. 29 (Nolan), H.J. Res. 13 (Kaptur) and H.J. Res. 14 (Kaptur) directly address the claim of corporate constitutional rights.

**[S.J. Res. 18 \(Tester\)](#)** and the identical **[H.J. Res. 21 \(McGovern\)](#)** are the best of these, in our view, for three reasons. First, they state clearly that corporations do not have constitutional rights as if they were people, fully refuting the claim to the contrary at the core of *Citizens United*. Second, this pair has been introduced in both the Senate and the House, with identical language. Third, H.J. Res. 21 enjoys bipartisan support, with the co-sponsorship of Rep. Walter Jones (R-NC), along with many Democratic co-sponsors. As of this writing, it is the only amendment among the 14 currently introduced that has bipartisan support. Full disclosure: we at Free Speech For People helped write this bill, and in a survey about a year ago, more than 90% of the Free Speech For People members who responded endorsed it. For all these reasons, Free Speech For People endorses this pair of bills, alongside S.J. Res. 19 and H.J. Res. 20, which are discussed below.

**[H.J. Res. 29 \(Nolan\)](#)** is a great bill which covers a lot of ground, both fully refuting the claim that corporations have constitutional rights, thereby overturning *Citizens United*, and also fully restoring Congress' and the states' authority to limit campaign gifts<sup>i</sup> and spending in all categories, thus overturning *Buckley*. However, this bill currently has very little support in Congress, with just one co-sponsor, so we are pragmatically focusing our endorsement on the other two pairs, S.J. Res. 18 (Tester) / H.J. Res. 21 (McGovern) and S.J. Res. 19 (Udall) / H.J. Res. 20 (McGovern), which, together, cover the same essential ground.

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**H.J. Res. 13 (Kaptur)** is one of three bills by Rep. Kaptur; along with H.J. Res. 14 (discussed immediately below), it is one of two by her which clarify that the First Amendment does not apply to corporations, associations, and other business organizations with respect to campaign gifts and spending. However, because H.J. Res. 13 and H.J. Res. 14 only address the fabricated claims of these entities under the First Amendment, rather than clarifying that corporations do not have constitutional rights whatsoever, these bills do not overturn *Citizens United* entirely.

In addition, Rep. Kaptur's bills are among six amendments currently in play that contain, in their respective "Resolved" sections, a strategically unhelpful time limit of seven years, within which ratification by 38 states must be completed, following passage by Congress. The Equal Rights Amendment had a similar timeline that elapsed before ratification by 38 states, contributing to the failure of that important effort, despite widespread support for it.

**H.J. Res. 14 (Kaptur)** contains all the same language as in H.J. Res. 13 (also by Kaptur, discussed immediately above), plus additional language that restores Congress' and states' authority to limit campaign spending in all categories, thus overturning *Buckley* entirely with respect to spending limits. The campaign finance aspects of H.J. Res. 14 are very strong, and difficult to distinguish substantively from our endorsed bills, S.J. Res. 19 (Udall) and H.J. Res. 20 (McGovern). However, H.J. Res. 14 has neither a companion bill in the Senate nor any co-sponsors in the House; for this practical reason we are focusing our endorsement in the campaign finance sphere on S.J. Res. 19 (Udall) and H.J. Res. 20 (McGovern). This bill, unfortunately, also contains the same unhelpful seven-year time limit on ratification by the states as H.J. Res. 13 (Kaptur).

The remaining nine amendment bills do not address the claim of corporate constitutional rights, but relate instead to the regulation of campaign spending, public funding of elections, and other election administration matters.

**S.J. Res. 19 (Udall)** and **H.J. Res. 20 (McGovern)** comprise a companion pair that are differently worded but have the same effect: they both do a thorough job of restoring Congress' and the states' authority to limit campaign spending in all categories, entirely overturning *Buckley* with respect to spending limits.

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Both these bills do this one thing and do it well, rather than encumbering this central purpose with additional objectives. Both these bills also contain an important preamble, "To advance the fundamental principle of political equality for all,..." which refutes the Supreme Court's assertion in *Buckley* and subsequent cases that there is no constitutional basis for campaign finance legislation to support a level political playing field. Furthermore, the Udall bill has considerable momentum in the Senate, with 19 Senate co-sponsors as of this writing; the [previous version of Senator Udall's bill](#) had [25 Senate co-sponsors](#) in the 112<sup>th</sup> Congress. Free Speech For People endorses this pair of amendment bills, alongside S.J. Res. 18 (Tester) and H.J. Res. 21 (McGovern).

**S.J. Res. 5 (Baucus)** restores Congress' and the states' authority to regulate campaign spending by corporations specifically, but does not address the claim of corporate constitutional rights, nor does it address campaign spending by individuals or by candidate campaigns. In our view, this bill does not cover enough of the necessary ground, either in terms of corporate constitutional rights or in terms of campaign spending. In addition, this bill, like the Kaptur bills, contains the same unhelpful seven-year time limit on ratification by the states.

**S.J. Res. 11 (Sanders)** and the identical **H.J. Res. 34 (Deutch)** cover two important points related to campaign finance. First, they make clear that only natural persons, not corporations, may give or spend money to influence the outcomes of elections; this is a helpful step but, unfortunately, does not touch on the claim, at the core of *Citizens United*, that corporations have constitutional rights. Second, these two bills restore Congress' and the states' authority to regulate campaign gifts<sup>ii</sup> and spending in all categories, thus fully overturning *Buckley* with respect to spending limits. In addition, these bills clarify Congressional authority to enact public funding of elections and to require disclosure of campaign gifts and spending. While the language regarding public funding of elections is helpful, it is unnecessary, in our view, if authority is restored to Congress to enact mandatory campaign spending limits, enabling a voluntary public funding system to be effective. These two bills' greatest strength, in our view, is their effect fully overturning *Buckley*; however, S.J. Res. 11 (Sanders) has only one Senate co-sponsor, far fewer than the number on S.J. Res. 19 (Udall), which covers the same ground equally well; in the

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House, both companion bills, H.J. Res. 34 (Deutch) and H.J. Res. 20 (McGovern) have substantial numbers of co-sponsors. Because of the significant difference in Senate co-sponsorships, we are, again, focusing our endorsement in the campaign finance sphere on S.J. Res. 19 (Udall) and H.J. Res. 20 (McGovern).

**H.J. Res. 25 (Edwards)**. We have great respect for Congresswoman Edwards and worked with her office to help draft this amendment. Nonetheless, our analysis is that, much like S.J. Res. 5 (Baucus), it only restores Congress' and states' authority to regulate campaign spending by corporations, and is regrettably silent both on the fabricated claim of corporate constitutional rights and on campaign spending by individuals and by candidate campaigns. Thus, like S.J. Res. 5 (Baucus), it, unfortunately, does not cover sufficient ground in either area.

**H.J. Res. 31 (Schiff)** would accomplish some worthy goals, in particular restoring Congress' and the states' authority to limit independent expenditures, but it is silent on direct spending by candidate campaigns, and thus falls short of fully reversing *Buckley* with respect to spending limits. It also clarifies Congressional authority to enact public funding of elections; but as with S.J. Res. 11 (Sanders) and H.J. Res. 34 (Deutch), while this is helpful language, it is unnecessary, in our view, if authority is restored to Congress to enact mandatory campaign spending limits, enabling a voluntary public funding system to be effective. Also, like H.J. Res. 13 and 14 (Kaptur), and S.J. Res. 5 (Baucus), this Schiff bill contains the same unhelpful seven-year time limit on ratification by the states.

**H.J. Res. 12 (Kaptur)**, the third amendment bill introduced by Rep. Kaptur, restores Congress' and states' authority to limit campaign spending in all categories, overturning entirely *Buckley* with respect to spending limits. Just like H.J. Res. 13, it is difficult to distinguish substantively from S.J. Res. 19 (Udall) and H.J. Res. 20 (McGovern), but, also like H.J. Res. 13, it has neither a Senate companion nor any co-sponsors in the House. So, for these pragmatic reasons, we continue to focus our endorsement in the campaign finance sphere on S.J. Res. 19 (Udall) and H.J. Res. 20 (McGovern). And, like the other two Kaptur bills and the Baucus and Schiff bills, this bill contains the same unhelpful seven-year time limit on ratification by the states.

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**H.J. Res. 32 (Schrader)** restores Congress' and the states' authority to limit campaign spending only on media advertisements, leaving spending on any other item unaffected. It addresses neither campaign spending by corporations, nor the claim of corporate constitutional rights, with the exception that it bars foreign entities from making political donations and expenditures in U.S. elections. (It also bars foreign persons from doing so, but [that is already barred by federal law.](#)) And this bill too contains the same unhelpful seven-year time limit on ratification by the states as S.J. Res. 5 (Baucus) and H.J. Res. 31 (Schiff), and H.J. Res. 12, 13, and 14 (Kaptur).

### Graphic Key to the Accompanying Table

The table above reflects this analysis by:

- Indicating with bold boxes Free Speech For People's endorsement of the Tester, Udall, and McGovern bills.
- Indicating with green shading where bills have elements we think are necessary, including any or all of the following:
  - Stating that corporations do not have constitutional rights (overturning *Citizens United* entirely);
  - Restoring Congress' and states' authority to limit campaign spending in all categories (overturning *Buckley* on spending limits entirely); and/or;
  - Bipartisan co-sponsorship.
- Withholding green shading on bills that accomplish only part, but not all, of either major objective: stating that corporations do not have constitutional rights, or restoring Congress' and states' authority to limit campaign spending.

### Summary of Our Analysis

Only S. J. Res. 18 (Tester), H.J. Res. 21 (McGovern), and H.J. Res. 29 (Nolan) fully overturn *Citizens United*. Of these, we believe the Tester-McGovern pair has the best chance of success, based on bicameral sponsorship, bipartisan support in the House, and the number of House co-sponsors.

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An amendment to overturn *Buckley* on spending limits is also needed. Several amendments cover this ground effectively, including S.J. Res. 18 (Udall), H.J. Res. 20 (McGovern), S.J. Res. 11 (Sanders), H.J. Res. 34 (Deutch), H.J. Res. 29 (Nolan), H.J. Res. 12 (Kaptur), and H.J. Res. 14 (Kaptur). Of these, we think the S.J. Res. 19 (Udall) / H.J. Res. 20 (McGovern) pair is the most promising, both because it covers this base fully yet without extra provisions, and because the Udall bill has so much traction in the Senate.

Accordingly, Free Speech For People endorses these two pairs: S.J. Res. 18 (Tester) / H.J. Res. 21 (McGovern), and S.J. Res. 19 (Udall) / H.J. Res. 20 (McGovern).

### **One Bill or Two?**

These two pairs of companion bills currently exist side by side, and we support them in that configuration. There have been previous instances in American history, notably in the Progressive era, when multiple amendments have passed in clusters, close together in time. With this in mind, we see the passage of both a 28th and a 29th amendment, one related to the claim of corporate constitutional rights, the other related to campaign spending, as a realistic possibility and a scenario worthy of support.

We are also open to supporting an alternative scenario, wherein these two pairs of companion bills -- S.J. Res. 18 (Tester) / H.J. Res. 21 (McGovern) and S.J. Res. 19 (Udall) / H.J. Res. 20 (McGovern) -- might be combined into one, covering both bases, as in H.J. Res. 29 (Nolan). This would offer the advantage of a single point of focus for the amendment movement. As noted above, however, we currently see more traction in the two-bill approach.

### **Conclusion**

Free Speech For People strongly urges Congress to pass S.J. Res. 18 (Tester) and H.J. Res. 21 (McGovern) to overrule *Citizens United* and make it clear that corporations don't have constitutional rights, and also to pass S.J. Res. 19 (Udall) and H.J. Res. 20 (McGovern), to overrule *Buckley* and restore Congress' and the states' authority to limit campaign spending.

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<sup>i</sup> Although campaign gifts are currently regulated, such regulation is currently facing review by the Supreme Court in the *McCutcheon* case, so constitutional affirmation on this point may soon be needed.

<sup>ii</sup> The same point as in the above note applies here as well.