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S.J.RES. 19

JUNE 16, 2014

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BACKGROUND

On June 18, 2013, Democratic Senator Tom Udall of New Mexico, along with 14 other Senate Democrats[1] introduced Senate Joint Resolution 19 (S.J.R. 19), proposing an amendment to the United States Constitution. The stated purpose of the amendment is to "advance the fundamental principle of political equality for all, and to protect the integrity of the legislative and electoral processes." S.J. Res. 19, §1. The actual purpose, however, is to override the First Amendment free speech protections established in the United States Supreme Court decisions addressing the financing of political speech during elections. S.J.R. 19, one of 32 similar Resolutions proposed by House and Senate Democrats over the past two Congressional Sessions,[2] provides:

> Section 1. To advance the fundamental principle of political equality for all, and to protect the integrity of the legislative and electoral processes, Congress shall have power to regulate the raising and spending of money and in-kind equivalents with respect to Federal elections, including through setting limits on—

[1] Senators Bennet, Harkin, Schumer, Shaheen, Whitehouse, Tester, Boxer, Coons, King, Murphy, Wyden, Franken, Klobuchar, and Udall of Colorado joined Senator Udall. S.J. Res. 19, 113th Cong. (2013).

[2] Of the thirty-two constitutional amendment resolutions proposed during the 113th and 112th Congresses, all were sponsored by Democrats: H.J. Res. 107, 113th Cong. (2014); S.J. Res. 19, 113th Cong. (2013); S.J. Res. 18, 113th Cong. (2013); S.J. Res. 11, 113th Cong. (2013); H.J. Res. 34, 113th Cong. (2013); H.J. Res. 32, 113th Cong. (2013); H.J. Res. 29, 113th Cong. (2013); H.J. Res. 31, 113th Cong. (2013); H.J. Res. 25, 113th Cong. (2013); S.J. Res. 5, 113th Cong. (2013); H.J. Res. 21, 113th Cong. (2013); H.J. Res. 20, 113th Cong. (2013); H.J. Res. 14, 113th Cong. (2013); H.J. Res. 13, 113th Cong. (2013); H.J. Res. 12, 113th Cong. (2013); H.J. Res. 111, 112th Cong. (2012); S.J. Res. 35, 112th Cong. (2012); H.J. Res. 100, 112th Cong. (2012); H.J. Res. 97, 112th Cong. (2011); S.J. Res. 33, 112th Cong. (2011); H.J. Res. 92, 112th Cong. (2011); H.J. Res. 90, 112th Cong. (2011); H.J. Res. 88, 112th Cong. (2011); H.J. Res. 86, 112th Cong. (2011); S.J. Res. 29, 112th Cong. (2011); H.J. Res. 82, 112th Cong. (2011); H.J. Res. 78, 112th Cong. (2011); H.J. Res. 72, 112th Cong. (2011); H.J. Res. 65, 112th Cong. (2011); H.J. Res. 8, 112th Cong. (2011); H.J. Res. 7, 112th Cong. (2011); H.J. Res. 6112th Cong. (2011). *Federal Amendments of the 113th & 112th Congress*, UNITED FOR THE PEOPLE, http://www.united4thepeople.org/amendments.html (last visited June 10, 2014).

(1) the amount of contributions to candidates for nomination for election to, or for election to, Federal office; and

(2) the amount of funds that may be spent by, in support of, or in opposition to such candidates.

Section 2. To advance the fundamental principle of political equality for all, and to protect the integrity of the legislative and electoral processes, each State shall have power to regulate the raising and spending of money and in-kind equivalents with respect to State elections, including through setting limits on –

(1) the amount of contributions to candidates for nomination for election to, or for election to, State office; and

(2) the amount of funds that may be spent by, in support of, or in opposition to such candidates.

Section 3. Nothing in this article shall be construed to grant Congress the power to abridge the freedom of the press.

Section 4. Congress and the States shall have power to implement and enforce this article by appropriate legislation.

ANALYSIS

S.J.R. 19 represents the gravest threat to freedom of political speech since the Alien and Sedition Acts of 1798.[3] S.J.R. 19 would grant Congress carte blanche authority over political speech about candidates for federal office. It would similarly grant the States such authority over speech about candidates for state office. S.J.R. 19 contains no qualifying language, nor does it suggest that any First Amendment protections limit Congress's power under the amendment. As an independent Amendment to the Constitution, S.J.R. 19 is fundamentally incompatible with bedrock First Amendment guarantees and therefore renders possible an unprecedented clash between two Constitutional provisions. *Marbury v. Madison* instructed that "[i]t cannot be presumed that any clause in the constitution is intended to be without effect," *Marbury v. Madison*, 5 U.S. 137, 174 (1803), yet S.J.R. 19 would ultimately produce that result. If S.J.R. 19 became the Twenty-eighth Amendment, and a case arose in which the Twenty-eighth Amendment presented a conflict with the First Amendment, the Supreme Court of the United States would likely apply the Twenty-eighth. *See, e. g., Fitzpatrick v. Bitzer*, 427 U.S. 445, 452–456 (1976) (Fourteenth Amendment, by expanding federal power at the expense of state

[3] The Alien and Sedition Acts were passed by the Federalists, purportedly to protect the "peace and safety of the United States," but they actually suppressed the political speech of immigrants who generally supported the Jeffersonian Democrats. The Alien and Sedition Acts cost Federalists the 1800 presidential election and were repealed in 1802.
Primary Documents in American History: Alien and Sedition Acts, LIBR. OF CONG. http://www.loc.gov/rr/program/bib/ourdocs/Alien.html (last visited June 9, 2014).

autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution, granting Congress the power to intrude upon the province of the Eleventh Amendment).

A. S.J.R. 19 Authorizes Congress to Impose Draconian Restrictions on Political Speech.

The First Amendment "'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. San Francisco County Democratic County Democratic Central Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 272 (1971)). Therefore, "political speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

S.J.R. 19 would cripple political speech by allowing Congress unfettered power to limit the amount of money spent to speak out on political issues and engage in vigorous advocacy. Political advocacy is powerless if it is not publicized, and it cannot be publicized without money. The amendment would undo Supreme Court cases recognizing that the imposition of financial constraints on political speech hampers political advocacy and impairs "the essential mechanism of democracy." *Id.*

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. 18This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

Buckley v. Valeo, 424 U.S. 1, 19 (1976).

B. S.J.R. 19 Would Permit Content and Viewpoint Discrimination

The First Amendment bars government from regulating speech based on disapproval of the ideas expressed – its content and viewpoint. *See R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995). The Supreme Court has long held that content-based regulations are presumptively invalid, precisely because they raise "the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). A corollary of the ban on content and viewpoint discrimination is speaker discrimination in which government controls the content of speech by restricting who may speak. *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

At issue in the *Citizens United* case was a film entitled *Hillary: The Movie*, which contained a critical depiction of then-Senator Hillary Clinton. 558 U.S. at 319–20.[4] The film was produced by a nonprofit corporation and was therefore in violation of a federal statute banning corporations and unions "from using their general treasury funds to make independent expenditures for speech defined as 'electioneering communication' or for speech expressly advocating the election or defeat of a candidate." *Id*. at 319.

The Court struck down the ban, holding that the law was a ban on speech whose "purpose and effect are to silence entities whose voices the Government deems to be suspect." *Id.* at 339.

If S.J.R. 19 were adopted, Congress would be authorized to reenact the speaker discrimination law struck down in *Citizens United*, or otherwise criminalize the speech of disfavored groups. Congress could, in fact, restrict or ban the publication of all biographies of candidates for public office.[5]

C. S.J.R. 19 Could Destroy Political Accountability for the Elected Branches of Government

In authorizing Congress to limit political speech by limiting the financing of such speech, the amendment could destroy political accountability. First, in authorizing Congress and the states to limit speech, the amendment would suppress "the means to hold officials accountable to the people." *Citizens United*, 558 U.S. at 339. Second, Congress could tilt the playing field against challengers and in favor of incumbents by limiting the amount of money that challengers could raise.

D. S.J.R. 19's Claim that Congress May Not Abridge the Freedom of the Press is Either Potentially Discriminatory or Inherently Contradictory

S.J.R. 19 grants Congress plenary authority over money spent to publish political opinions except for when such money is spent by the "Press." S.J.R. 19 does not define the term "Press," nor does it indicate that it intends the First Amendment's protections for freedom of the press to prevail. S.J.R. 19 therefore raises the possibility that Congress will arrogate power to itself to define press in subsequent legislation in a manner that discriminates in favor of mainstream media such as the *New York Times* or CNN. Congress could skew political discourse to suit its own partisan agenda by arbitrarily determining which media would be able to spend unlimited amounts of money and which media would be subject to restrictions.

If the amendment were construed to incorporate the First Amendment Press Clause and Supreme Court cases interpreting it, an inherent inconsistency arises. As Chief Justice Burger noted, there is no there is no meaningful distinction between political "expression" and the

[4] A similar film, entitled *Fahrenheit 911*, produced by Michael Moore, was very critical of President George W. Bush but was not banned under federal law even though it was produced in 2004, when President Bush was running for reelection.

[5] See Transcript of Oral Argument at 60–64, *Citizens United v. FEC*, 558 U.S. 310 (2010) (Solicitor General conceded that law at issue empowered Congress to restrain publication of any book supporting or opposing a candidate).

"dissemination" of political ideas. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 800 (1978) (Burger, C.J., concurring):

> The Speech Clause standing alone may be viewed as a protection of the liberty to express ideas and beliefs, while the Press Clause focuses specifically on the liberty to disseminate expression broadly and comprehends every sort of publication which affords a vehicle of information and opinion. Yet there is no fundamental distinction between expression and dissemination. The liberty encompassed by the Press Clause, although complementary to and a natural extension of Speech Clause liberty, merited special mention simply because it had been more often the object of official restraints. Soon after the invention of the printing press, English and continental monarchs, fearful of the power implicit in its use and the threat to Establishment thought and order -- political and religious -- devised restraints, such as licensing, censors, indices of prohibited books, and prosecutions for seditious libel, which generally were unknown in the pre-printing press era. Official restrictions were the official response to the new, disquieting idea that this invention would provide a means for mass communication.

First Nat'l Bank v. Bellotti, 435 U.S. 765, 799–800 (1978) (Burger, C.J., concurring) (citations omitted).

The Supreme Court of the United States has, in fact, defined "Press" broadly, such that the movie at issue in *Citizens United* arguably qualifies.

> The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. *The press, in its historic connotation, comprehends every sort of publication which affords a vehicle of information and opinion.* What we have had recent occasion to say with respect to the vital importance of protecting this essential liberty from every sort of infringement need not be repeated.

Lovell v. City of Griffin, 303 U.S. 444, 452 (1938) (emphasis added). In *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), the Court held that banning a theatrical production violated the First Amendment, explaining that the "basic principles of freedom of speech and the press . . . do not vary," and they "make freedom of expression the rule." 420 U.S. at 558 (quoting *Joseph Burstyn v. Wilson*, 343 U.S. 495, 503 (1952)).

To claim authority to reinstate the federal law banning *Hillary – the Movie*, while asserting that Congress lacks the power to abridge the freedom of the press is oxymoronic. As the concurring opinion in *Citizens United* pointed out:

> Historical evidence relating to the textually similar clause "the freedom of . . . the press" also provides no support for the proposition that the First Amendment excludes conduct of artificial legal entities from the scope of its protection. The freedom of "the press" was widely understood to protect the publishing activities

> of individual editors and printers. But these individuals often acted through newspapers, which (much like corporations) had their own names, outlived the individuals who had founded them, could be bought and sold, were sometimes owned by more than one person, and were operated for profit. See generally F. Mott, American Journalism: A History of Newspapers in the United States Through 250 Years 3-164 (1941); J. Smith, Freedom's Fetters (1956). Their activities were not stripped of First Amendment protection simply because they were carried out under the banner of an artificial legal entity. And the notion which follows from the dissent's view, that modern newspapers, since they are incorporated, have free-speech rights only at the sufferance of Congress, boggles the mind.

Citizens United, 558 U.S. at 390 (Scalia, J., Alito, J., Thomas, J., concurring) (case citations omitted).

Conclusion

That the President of the United States[6] and a significant number of Democrats in both Houses of Congress could support the evisceration of the First Amendment freedom of speech is profoundly disturbing. The ACLJ joins First Amendment advocates from across the political spectrum[7] in opposing S.J.R. 19.

[6] Byron Tau, *Obama Calls for Constitutional Amendment to Overturn Citizens United*, Politico (Aug. 29, 2012), http://www.politico.com/politico44/2012/08/obama-calls-for-constitutional-amendment-to-overturn-133724.html.

[7] *See, e.g.*, Letter from the American Civil Liberties Union to Senators Patrick Leahy and Charles Grassley (June 3, 2014) (S.J.R. 19 would "break the Constitution"), *available at* http://www.scribd.com/doc/227981894/6-3-14-Udall-Amendment-Letter-FINAL.