

**First Report by the Commonwealth of  
Massachusetts Citizens Commission  
Concerning a Constitutional  
Amendment for  
Government of the People**

December 31, 2019



## Introduction

This is the first Report of the Citizens Commission Concerning a Constitutional Amendment for Government of the People (“the Citizens Commission” or “the Commission”).

The 2018 general election in the Commonwealth of Massachusetts included Ballot Question 2, which asked the voters the following question:

Do you approve of a law summarized below?

This proposed law would create a citizen’s commission to consider and recommend potential amendments to the United States Constitution to establish that corporations do not have the same Constitutional rights as human beings and that campaign contributions and expenditures may be regulated.

The result was overwhelmingly affirmative. Of the 2,623,436 citizens who voted on the question, 1,871,989 (71.4%) voted in favor and 751,447 (28.6%) opposed.<sup>1</sup>

This result was memorialized into statute as Chapter 322 of the Acts of 2018 (the Act). Pursuant to the Act, citizens submitted applications and appointments were made to assemble the Commission. The members and their respective appointing authorities are shown in the Appendix. The business of the Commission has been conducted in accordance with Public Meeting and Open Records requirements. The Commission has organized and conducted numerous meetings and workshops around Massachusetts. The agenda and minutes of these meetings are posted on the [Commission website](#).

The Commission believes there is an abundance of evidence, and widespread concern, that there is a serious problem with the influence of money in federal, state, and local elections. Based on research and testimony, the Commission has concluded:

- The degree of spending related to elections has gotten out of hand.
- The influence of money has eroded the principle of fairness in our electoral process. It is not fair for voters or candidates that candidates cannot compete unless they can raise huge sums of money or have others spend in a manner that aligns with their interests. It is not consistent with principles of republican self-governance when concentrated money distorts and overwhelms public discourse.
- Large amounts of concentrated money from an extremely small portion of the American people now dominate our political system. This money, in the form of independent expenditures and large contributions to candidates, parties, and political committees, as well as the new ability for a single donor to give millions of dollars in total to numerous candidates in a single election cycle, is the source of the problem.
- The U.S. Supreme Court has ruled that independent expenditures cannot be limited. Independent expenditures can be made by human beings or by artificial entities (examples of artificial entities include economic organizations such as corporations and unions). The reasoning of the Court was that dollar limits on independent expenditures violate the First Amendment right of shareholders to



freedom of expression. Further, the Court has determined that the right to freedom of expression applies to both human beings and artificial entities.

- As the people of Massachusetts established in voting for the Act creating the Citizens Commission, and the Commission concurs, one or more amendments to the U.S. Constitution are warranted, to improve the current situation by permitting the people to enact reasonable rules to ensure government is more accountable to the people.
- There is consensus on the Commission that a constitutional amendment can be effectively drafted to enable citizens in Massachusetts (and other states) to consider approaches to independent expenditures and campaign contributions that would ensure both that money impacting elections comes from a broad cross-section of citizens (rather than predominantly from a concentrated “donor class” or artificial entities) and that the interests of local constituents and states are not overwhelmed by vast amounts of money.
- The Commission believes artificial entities do not possess the inalienable constitutional rights of the People. However, it is critical to recognize the serious implications of addressing this topic too broadly in a constitutional amendment. The Commission requires further advice, study, and deliberation about how an amendment may best affirm that corporations or other “artificial entities do not have the same inalienable constitutional rights as human beings.”
- There are several formulations of language for a possible amendment and several resolutions are currently pending in the U.S. Congress. In this initial report, the Commission does not recommend specific, preferred language. The Commission does include guiding principles to help frame language and an analysis of currently filed amendments. Recommending preferred language is one focus of the future work of the Commission.
- A strategy is needed to successfully implement passage of such a constitutional amendment. Defining such a strategy is a second focus of the future work of the Commission. This strategy must exhibit the following features:
  - An effective solution to the problem
  - A process of deliberation and debate that is inclusive and engages all states and stakeholders
  - Amendment language for an amendment that will earn widespread support across the states and stakeholders necessary for ratification

In the Act, the Citizens Commission was given the responsibility to address five specific questions. The balance of this report is organized around each of these questions. Supporting information is presented in the Appendix.

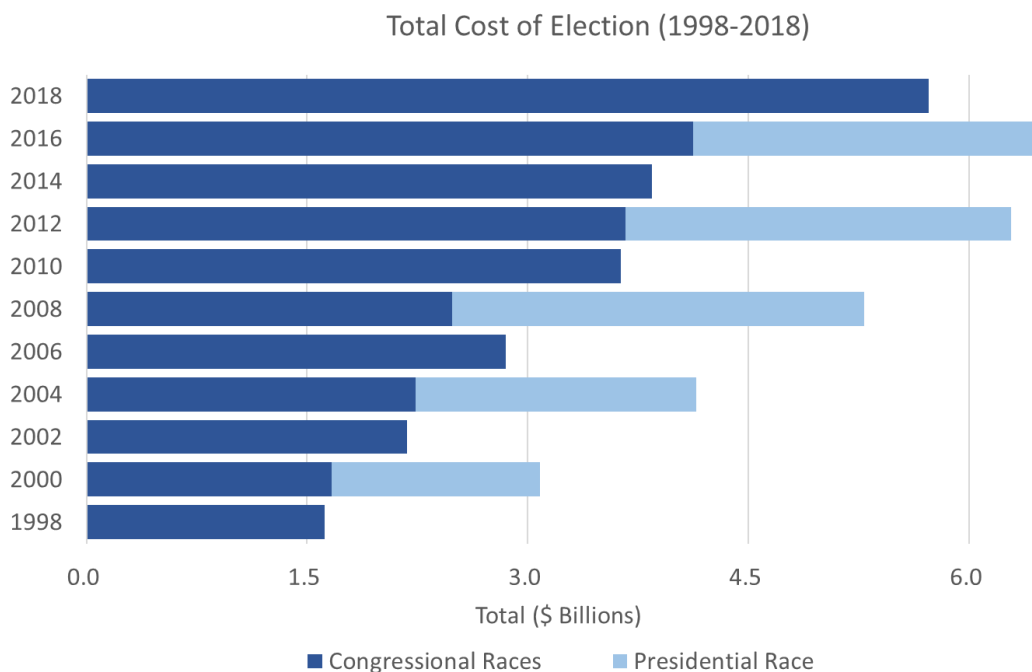


## Section 1. The nature and impact of political and election spending in Massachusetts.

There are three reasons why the Commission concludes that the nature and impact of political and election spending in Massachusetts, and across the nation, is out of hand. The Commission provides our rationale for each of these reasons in the narrative that follows.

### 1. A vast amount of money influences elections.

In the decade since the Supreme Court’s 2010 decision in *Citizens United v. Federal Election Commission*, approximately \$700 million has poured into Massachusetts elections and ballot initiatives.<sup>1</sup> This compares with \$260 million in the ten years before a 5-4 majority in *Citizens United* recognized a “free speech” right of unlimited independent spending to influence elections.<sup>2</sup> The growth in election spending in Massachusetts is reflected across the United States. The 2016 federal election cost more than \$6.4 billion, double the money spent in the 2000 federal races.



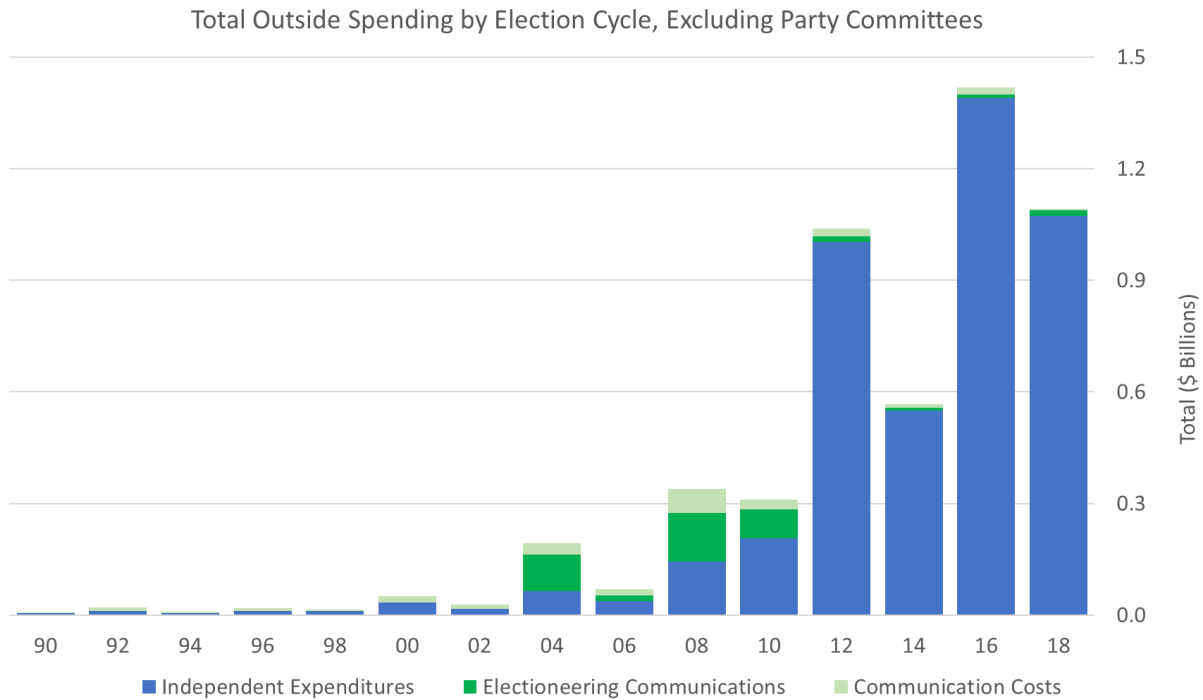
Includes all money spent by presidential candidates, Senate and House candidates, political parties and independent interest groups to influence federal elections.

Source: *Center for Responsive Politics, OpenSecrets.org*<sup>3</sup>

Since the *Citizens United* decision ten years ago, outside spending in elections has risen dramatically, compared to the ten and twenty years before that decision. “Outside spending” and “independent expenditures” refer to money used to influence elections that is spent by people, groups, or entities without coordination with the candidate campaigns or party committees.<sup>4</sup> Previously, Massachusetts,



other states, and the federal government applied limits on spending notwithstanding whether that spending was done “directly” or “indirectly.” Under current Supreme Court interpretations of the First Amendment, direct contributions to a campaign may be limited to some extent, but independent contributions or spending for or against a candidate may not be limited at all. Independent expenditures have subsequently grown from \$33 million in 2000 to \$1.4 billion by 2016.<sup>5</sup>



Source: Center for Responsive Politics, OpenSecrets.org<sup>6</sup>

### Massachusetts Federal Office Elections (2014-2018)

Donations to the 2014, 2016 and 2018 federal campaigns (U.S. House of Representatives, U.S. Senate, and contributions to presidential candidates) in Massachusetts totaled \$146.4 million. Donors contributed over \$85 million to Massachusetts federal campaigns for one U.S. Senate and Massachusetts’ nine Congressional districts in 2018.<sup>7</sup> In 2016, contributions totaled \$15.2 million in the federal campaigns for the nine seats in the House of Representatives (no Senate seat was up for election that year) and gave Presidential candidates over \$22 million that year, most of which went to former U.S. Secretary of State Hillary Clinton.<sup>8</sup> The 2014 federal elections saw contributions and spending of over \$24.2 million in the federal races, which included both the nine House seats and a Senate seat.<sup>9</sup>

As with state campaign committees, these direct contributions to federal candidate and party committees were subject to limits per donor. Nonetheless, wealthy individuals, corporations, and unions all spent money well in excess of these limits to influence the outcome of elections and policy by making “independent expenditures,” also known as “outside spending.”



### *Massachusetts Independent Expenditures - Federal Office Elections*

Some Massachusetts federal elections have seen significant outside spending. The last, closely-contested U.S. Senate race was in 2012, when Elizabeth Warren (D) challenged US Senator Scott Brown (R). The campaigns raised and spent a record \$77 million. In this election cycle, the candidates' agreement, "The People's Pledge," restricted independent expenditures to \$8 million.<sup>10</sup>

One Super PAC,<sup>11</sup> America 360 Committee, was primarily funded by a dozen wealthy individuals and corporations and spent over \$1 million in opposition to Elizabeth Warren.<sup>12</sup> Another Super PAC, ReThink PAC, spent over \$1 million on advertisements attacking Senator Scott Brown. It was funded primarily by large unions and wealthy individuals.<sup>13</sup>

While Massachusetts has not seen the level of independent expenditures experienced elsewhere, the Commission believes we cannot be complacent. In federal campaigns, independent expenditures are directed in much higher amounts toward hotly contested races that may decide control and power at the national level—such as the Presidency or control of the Senate. For this reason, billions of dollars in independent expenditures has been spent in recent federal elections, particularly in Presidential and Senate races. A few examples help illustrate the impact of outside spending, even in states with relatively small populations like New Hampshire and Nevada. In New Hampshire, the 2016 U.S. Senate election had over \$92M in outside spending, with \$52.9M for candidate Ayotte and \$40.4M for Hassan.<sup>14</sup> In Nevada, also in the 2016 U.S. Senate election, outside spending for Heck was \$45.4M and for Mastro was \$45.7M, for a total over \$91M.<sup>15</sup>

### *Massachusetts State Office Elections (2014-2018)<sup>16</sup>*

In 2018, the candidate and party committees for elections for Governor, other statewide offices, and for the state legislature raised and spent approximately \$65 million.<sup>17</sup> In 2016, with no gubernatorial race, these campaigns spent approximately 23 million.<sup>18</sup> In 2014, donors contributed \$55 million to state campaigns, including over \$32 million in the Governor's race alone.<sup>19</sup>

This money does not include significant additional spending by independent political action committees and other entities; instead, it is comprised only of the money raised by candidates and the political parties.

### *Massachusetts Independent Expenditures - State Office Elections*

In Massachusetts state elections, independent expenditures in the 2014, 2016 and 2018 state elections came to over \$30 million. These independent expenditures largely paid for negative attack advertisements on gubernatorial and other candidates. The sources of these independent expenditures are Super PACs, political organizations such as the Republican or Democratic Governors Associations,<sup>20</sup> and advocacy groups organized as non-profit corporations.<sup>21</sup> Corporations, other PACs, unions, and large donors also provide money to these groups. While some of these independent spenders disclose donors, several do not. Massachusetts law does not require disclosure of the original donors.<sup>22</sup>



## Massachusetts Citizen Ballot Initiatives

In 1978, a 5-4 decision of the Supreme Court, *First National Bank of Boston v. Bellotti*, held that corporations may spend money to influence votes of the people, such as citizen ballot initiatives. The decision struck down a Massachusetts law curbing corporate spending on the Massachusetts citizen initiative process.<sup>23</sup> In the intervening timeframe, ballot campaign spending across the nation has soared.<sup>24</sup>

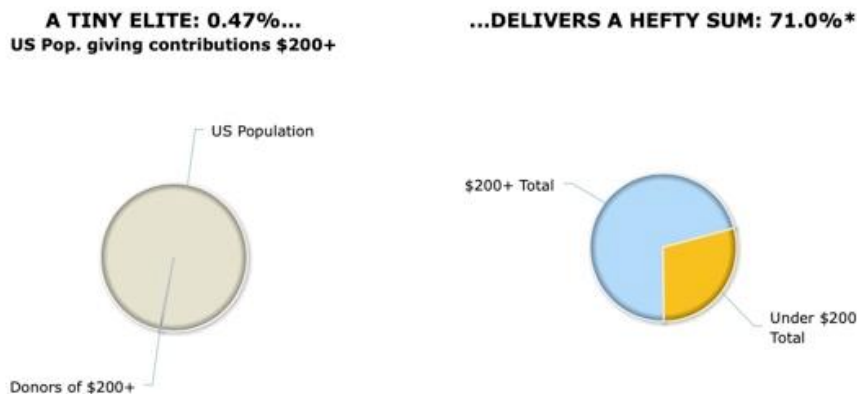
Specifically, in 2018, spending on the three Massachusetts ballot measures exceeded \$41 million.<sup>25</sup> The lowest amount was spent on Question 2 (which created this Citizens Commission), for which proponents raised \$104,159 from over 1,800 donors.<sup>26</sup> By contrast spending on Question 1 (Patient-to-Nurse Limits), exceeded \$35 million.<sup>27</sup>

The 2016 ballot questions totaled over \$61 million in spending, including \$40 million on the question of charter school expansion and nearly \$10 million on the question of marijuana legalization.<sup>28</sup>

In 2014, spending on ballot initiatives was approximately \$33 million, with nearly half of it spent by gambling companies opposing a measure to repeal the Massachusetts casino law.<sup>29</sup>

## 2. Most of the money comes from a small “donor class.”

Most of the regulated money spent nationally in elections comes from less than half of one percent of Americans.<sup>30</sup>



Source: Center for Responsive Politics, OpenSecrets.org<sup>31</sup>

Over 99% of Americans cannot or chose not to make political contributions over \$200. Indeed, for many citizens, contributions over \$200 could be an economic hardship. According to the Federal Reserve, 40% of Americans could not meet a \$400 emergency expense without hardship or borrowing.<sup>32</sup> In 2018, as in previous years, most of the money spent in federal elections came from relatively few, large donors.<sup>33</sup> Over 90% of the independent expenditures in the 2016 state elections across the country came from



only 300 donors.<sup>34</sup> This problem has been exacerbated by the Supreme Court decision in *McCutcheon v. FEC*, 572 U.S. 185 (2014), which struck down a federal prohibition on the aggregate amount of money that an individual could contribute to a campaign. Thanks to this decision, it is difficult for Massachusetts and other states to cap the amount of money that wealthy donors can contribute.

State political party money also comes from relatively few donors. Over 20% of the money comes from those who give more than \$200,000 each. Several make contributions to state parties of over \$1 million each.<sup>35</sup> By 2016, forty-two donors to state party committees accounted for 38% of the money received from all individual donors. The average contribution of those forty-two donors was \$521,000.<sup>36</sup> The number of small donations to the state parties has “precipitously declined” in the same time period.<sup>37</sup>

Further exacerbating the influence of money in politics is the geographic concentration of the donor class. For example, Massachusetts donors who account for most of the political money disproportionately come from metropolitan Boston. In 2018, donors in Boston contributed \$143 million, compared to \$2.8 million from the Springfield metro area.<sup>38</sup>

**3. Massachusetts citizens have less voice and less choice – elections frequently fail to offer a meaningful range of choices, whether of candidates or ideas – and exclusion, frustration and cynicism with and about government threatens the foundational belief of the people in effective democracy and self-government.**

The Citizens Commission believes the degree and manner of political and election spending endangers democracy, republican self-government, and the equal rights of Massachusetts citizens and all Americans. Based on our research and testimony, the Commission has identified the following effects:

- Undue and corrupting influence on the elections and political process
- Less free speech, fewer ideas and candidates, and less knowledge and consideration of a wide range of ideas or issues due to the domination of candidates, issues, and media by concentrated money
- Less time and attention of candidates and elected officials with constituents due to the inordinate amounts of time and attention needed to raise money from a small but wealthy segment of donors
- Systemic effects from a culture and appearance of pay-to-play, or special access and ingratiation between those who provide most of the money and elected officials, that drives cynicism, alienation, and loss of faith in Americans for democracy and a fair shot
- Unequal access, influence, and opportunity to serve, run for office, and be represented
- Overwhelming incumbent advantage, fewer competitive elections, and lack of choice

A recent study concludes that economic elites and corporations have a dominant impact on policy (whether advocating action or inaction), but average citizens have virtually no impact.<sup>39</sup> While the Commission did not find a causal relationship, there is certainly a sentiment that correlates record amounts of money from concentrated factions in elections<sup>40</sup> with low voter turnout<sup>41</sup> and lack of satisfaction with candidates,<sup>42</sup> elected officials,<sup>43</sup> and the direction of the country generally.<sup>44</sup> More than 80% of Americans agree that corporate political spending leads to political inequality and democratic corruption.<sup>45</sup> According to research by Robert P. Jones et al, “By nearly a 2-to-1 margin, Americans





believe their ‘vote does not matter because of the influence that wealthy individuals and big corporations have on the electoral process.’”<sup>46</sup>

The testimony heard by the Citizens Commission reflects these perceptions. Below is a sample of the commentary from the numerous public meetings conducted by the Commission around Massachusetts:

- “If money equals speech, I should be here with tape over my mouth. The amount of money I have to make my opinion known to my legislators would equal zero and neither they nor I would bother with any form of communications or petition...99% of citizens would be shut out of the political process.”  
- **Barbara Hopcroft, Norwood, MA**
- “Congress is not responsive to the people. Members of the U.S. Congress are forced to devote a large proportion of their time on fundraising, rather than doing their jobs.”  
- **David Rosenberg, Norfolk, MA**
- “The country has been taken over by the greed of special interest groups and lobbyists.”  
- **Ann Ferry, Cape Cod, MA**
- “There is a pervasive feeling that politics is an alien realm controlled by people and forces that we cannot understand. Turnout in our elections is low, and my neighbors or people I meet at the tiny bar on Forest Street do not want to talk about politics—not so much because it is divisive, but because it feels futile. If anything truly important came up for a vote, they argue, someone would just buy the outcome anyway. The presence of money in all levels of the democratic process forms a kind of invisible barrier that every year deters possible leaders from even trying to enter into politics.”  
- **Sam Biagetti, North Brookfield, MA**
- “On January 21, 2010, [*the day of the Citizens United v. Federal Election Commission decision*] I was with Mayor Susan Kay of Weymouth waiting to meet with a lobbyist who was a personal friend of hers. He was going to help her with marketing on her upcoming re-election campaign. He came into the restaurant, sat down, and said ‘this is the day that our Democracy died.’ These words, coming from a lobbyist, were chilling and, ultimately, true.”  
- **Alice Arena, Weymouth, MA**
- “We need to bring back Congress to the people.”  
- **Sonya Coleman, Arlington, MA**
- “I am very uncomfortable as an American citizen with the inherently corrupt, money-based political system in which we live today. America once prided itself on being a beacon of democracy for the world but now we are more of an oligarchy ruled by corporations and billionaires. I feel like my voice is being drowned out by special interests.”  
- **Sandy Theodorou, Beverly, MA**



## **Section 2. The limitations, if any, on the legal ability of the Commonwealth and its citizens to reasonably regulate corporations and other entities due to the Supreme Court's conclusion that corporations may assert Constitutional rights of human beings.**

The Commission concludes there exist currently several limitations on the legal ability of the Commonwealth and its citizens to regulate corporations and other entities. The table below outlines some categories of public regulation that Massachusetts and other states are constrained from considering due to decisions by the Supreme Court. The Commission does not make a judgment about whether the regulations were good or bad, reasonable or unreasonable. These are simply a few of the many examples of regulations that the people or their representatives decided were necessary or prudent, and that were struck down and prohibited due to corporations claiming constitutional rights to block the regulations.

These and related decisions of the Supreme Court invalidated state and federal laws regulating corporations based on corporations asserting constitutional rights such as freedom of speech, due process, equal protection, privacy, and protection against unreasonable search and seizure. The Commissioners, however, have not concluded how to interpret these decisions. On the one hand, they could be interpreted as recognition by the Court that artificial entities have constitutional rights. On the other hand, they could be interpreted as recognition by the Court that people using an artificial entity to engage in economic or other activity have constitutional rights that the entity may assert to protect. Further exploration of and deliberation about this issue is necessary.



Category of Public Regulation	Example of Forbidden Regulation	Case
<b>Elections &amp; Money</b>	Limit or prohibit corporations from using corporate funds to influence outcome of citizen ballot initiatives	<i>First National Bank of Boston v. Bellotti</i> , 435 U.S. 765 (1978)
<b>Elections &amp; Money</b>	Limit or prohibit corporations from spending corporate funds to influence outcome of federal, state, or local elections	<i>Citizens United v. Federal Election Commission</i> , 558 U.S. 310, 370 (2010).
<b>Elections &amp; Money</b>	Limit or prohibit contributions by individuals and corporations to independent political action committees	<i>SpeechNow.org v. FEC</i> , 599 F.3d 686 (D.C. Cir. 2010).
<b>Elections &amp; Money</b>	State attempt to limit or prohibit corporate spending in elections	<i>American Tradition Partnership v. Bullock</i> , 567 US 516 (2012).
<b>Elections &amp; Money</b>	Limit on total contributions to candidates and parties during an election cycle	<i>McCutcheon v. FEC</i> , 572 US 185 (2014).
<b>Data &amp; Privacy</b>	Protect patient health care information from doctors' drug proscriptio from data-mining and sale to pharmaceutical corporations for drug promotions (leaving information available for health research)	<i>IMS Health, Inc. v. Sorrell</i> , 564 U.S. 552 (2011)
<b>Public Health</b>	Protect children from advertising of addictive, poisonous consumer products (tobacco/nicotine)	<i>Lorillard Tobacco Co. v. Reilly</i> , 533 U.S. 525 (2001).
<b>Public Health</b>	Curb alcohol marketing to decrease drinking and enhance public health	<i>Robert E. Rubin, Secretary of the Treasury v. Coors Brewing Company</i> , 514 U.S. 476 (1995)  <i>LiquorMart, Inc. v. Rhode Island</i> , 517 U.S. 484 (1996)
<b>Public Health</b>	Require covered access for employees to birth control options on employer-provided health insurance plans by for-profit corporations	<i>Burwell v. Hobby Lobby</i> , 573 US 682 (2014)
<b>Environment</b>	Limit advertising that promotes electricity use	<i>Central Hudson Gas &amp; Elec. Corp. v. Public Service Comm'n</i> , 447 U.S. 557 (1980)
<b>Environment</b>	Require regulated public utility corporation to include other viewpoints in customer billing inserts	<i>Pac. Gas &amp; Elec. Co.</i> , 475 U.S. 1 (1986)
<b>State Judicial Process &amp; Punitive Damages for Corporate Misconduct</b>	Impose punitive damages for harm caused by corporations beyond nine times the amount of compensatory damages	<i>State Farm Mutual Automobile Insurance Co. v. Campbell</i> , 538 U.S. 408 (2003)



One implication of this series of Supreme Court decisions has been to shift the relative influence of individuals *vis-à-vis* corporations and other artificial entities in the electoral and policy-making processes. This opinion is exemplified by the following quote from the former chief justice of the Delaware Supreme Court, Leo Strine, an expert on the law of corporations:

Taken together, the [Supreme Court] decisions...had the practical effect of increasing the power of corporations to influence the electoral and regulatory process, diminishing the ability of human citizens to constrain their corporate creations in the public interest, and reducing the practical ability of Congress and executive agencies to adopt and implement externality regulations and new social welfare regulation. The result has been to alter the relationship between society and the corporations that it has created.



### **Section 3. Recommendations as to the scope and language of one or more constitutional amendment resolutions that would address the problem and policies described herein, and that would be prudent for the Commonwealth of Massachusetts to ratify under Article V of the United States Constitution.**

The Commission believes additional deliberation and public input is warranted before recommending specific, preferred language for one or more constitutional amendments relevant to the Act. In considering guidance from the Act creating the Commission, the Commission has organized its analysis into four parts.

#### **1. The “problem and policies described” in the Act**

The Act describes two categories of “problem and policies” that constitutional amendments should address.

First, the “undue influence of concentrated money on elections and governmental policy.” The Act seeks to advance a constitutional amendment that would enable the people to pass laws regulating and limiting money in elections so as to combat corruption, secure Americans’ equal rights of speech and representation, and protect the integrity of elections and government.<sup>1</sup>

Second, the Act seeks a constitutional amendment that would “affirm that artificial entities do not possess the inalienable Constitutional rights of the People.”<sup>2</sup>

#### **2. Considerations of prudence**

The Act instructs the Citizens Commission to weigh considerations of prudence.<sup>3</sup> In doing so, the Citizens Commission considered the guidelines in the Act itself, as well as considerations inherent in any proposal to amend the Constitution.

The Act’s concern for prudence is clear. The Commission favors a constitutional amendment that enables regulation and limits concentrated money in elections. As the Act makes clear, any such amendment must do so while “protect[ing] the integrity and fairness of elections and government... secur[ing] the right of all Americans to be represented and to participate in self-government as equal citizens [and] protect[ing] the freedom of speech, of the press and other rights of all Americans...”<sup>4</sup>

Additionally, the Act seeks to advance an amendment to affirm that corporations or other artificial entities do not possess the inalienable constitutional rights of the people. The Act also provides the



context for such an amendment (i.e., concern about the power of corporations to spend money in elections, and about the restriction on the ability of the people to regulate corporations in the public interest, while still ensuring the “sound operation of corporations and other economic entities”).<sup>5</sup>

The Act also instructs the Citizens Commission to consider whether any proposed amendment may have unintended consequences, whether it may raise unanswered questions, and whether more than one amendment, rather than a single amendment, may better address each aspect of the problem and policies described in the Act.<sup>6</sup>

In addition to guidance in the Act, it is prudent to consider other issues which are inherent in the constitutional amendment process itself. For example, any recommended constitutional amendment must be reasonably likely to earn the support of the majority of Americans and must successfully navigate the rigorous and high hurdles provided for in the amendment process.<sup>7</sup>

Further, the proposed amendment(s) should be worded “with the utmost care, and in a manner consistent with the spirit and meaning of the entire [Constitution].”<sup>8</sup> The amendment’s scope and words must address current concerns but also be effective for generations to come.

The Commission believes it is prudent for every word of an amendment to be scrutinized to assess how the expressed values and purposes are likely to be actualized by participants in our constitutional system—the people, the states and elected branches of government, and the courts. The language of the amendment should consider how the words relate to existing legal understandings and doctrines, and how the words will work changes in the law. Though no ironclad method can prevent an amendment from being contorted by interpretation in the future, it is prudent to choose the language that is most likely to achieve the desired effects.

Finally, in considering the scope and language of a proposed amendment, the Commission kept in mind the goal of a better connection of our government to the will of the American people.<sup>9</sup>

### **3. Considerations of modern Supreme Court doctrine**

As described in the Act, the question of a constitutional amendment and the Commission’s current task arose from certain Supreme Court decisions and doctrine in recent decades.<sup>10</sup> It is noteworthy that eight of America’s twenty-seven constitutional amendments to date have nullified Supreme Court decisions.<sup>11</sup> Because the disputed Supreme Court doctrine is relevant to the recommended scope and language of the proposed constitutional amendment(s), a brief summary of the most pertinent Supreme Court decisions is helpful.

Federal and state laws have regulated how money is used in elections for more than a century. Not until 1976 did the Supreme Court apply the First Amendment to *any* federal or state election contribution or spending limit, and not until 2010 did the Supreme Court rule that corporations or unions have a free speech right to use corporate or union funds to influence the outcome of elections.<sup>12</sup>



*Buckley v. Valeo*, 424 U.S. 1 (1976). *Buckley* is the linchpin of the Court’s modern campaign finance jurisprudence. Certain aspects of that decision raise questions that a well-crafted amendment can address.

The *Buckley* decision did not simply declare “money is speech,” but rested on the conclusion that money in some form is necessary to amplify or distribute speech in modern society. Indeed, even had the Court gone further to equate money with speech, “speech” is not the same as “freedom of speech.” Offering a bribe is “speech,” yet there is no “free speech” right to bribe. Yelling loudly—or blasting a speaker—for hours on end may be “speech,” but there is no “free speech” right to do so if you deprive the equal rights of other Americans. Indeed, it has always been the case that regulations on the *volume* or *extent* of speech by some may be permissible to protect the free speech or other rights of others.<sup>13</sup>

Even if money in elections is viewed as speech, a constitutional amendment that permits limits and reasonable regulation of that money is necessary to protect the equal free speech—and rights of representation and political self-government—of other Americans, regardless of their wealth.

*Buckley* employed a narrow definition of “quid pro quo” corruption as the only interest that can justify campaign finance regulations.<sup>14</sup> Even where there is no outright “quid pro quo,” the Commission believes that when money from a tiny slice of Americans dominates the political process, there is *systemic corruption*. The result is a government more accountable to a class of large donors rather than to the people themselves and avoiding that danger should be ample grounds for limits and regulation of how money is used in our political system.

The *Buckley* conclusion is that money has some relationship to First Amendment speech in modern politics. A constitutional amendment is necessary to more carefully balance the concern for the speech aspects of money with the dangers of “drowning out” other speakers or the systemic corruption of the political process when the people are prevented from enacting even-handed regulations on the use of money in politics.

*First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). In *Bellotti*, the Court struck down a Massachusetts law that prohibited spending by corporations on ballot initiatives.<sup>15</sup> Instead of asking whether corporations have the same First Amendment freedoms as human beings, the Court framed the question as whether the regulation “abridge[d] expression that the First Amendment was meant to protect.”<sup>16</sup>

The majority in the *Bellotti* decision may not have appreciated that First Amendment values are primarily meant to protect individual expression, and that corporations and other economic entities established by state law are not the same as individuals or associations of people.

The Commission is inclined to agree with the views of Justice William Rehnquist, who argued that a decision of the people of a state to keep money from corporations out of ballot initiatives is perfectly consistent with the First Amendment:

A State grants to a business corporation the blessings of potentially perpetual life and limited liability to enhance its efficiency as an economic entity. It might reasonably be concluded that



those properties, so beneficial in the economic sphere, pose special dangers in the political sphere. Furthermore, it might be argued that liberties of political expression are not at all necessary to effectuate the purposes for which States permit commercial corporations to exist. So long as the Judicial Branches of the State and Federal Governments remain open to protect the corporation's interest in its property, it has no need, though it may have the desire, to petition the political branches for similar protection. Indeed, the States might reasonably fear that the corporation would use its economic power to obtain further benefits beyond those already bestowed.<sup>17</sup>

The Commission believes the proposed amendment should give Congress and the States the flexibility to create different campaign finance rules for entities (as opposed to human beings).<sup>18</sup>

*Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). In *Citizens United*, the Court struck down portions of the Bipartisan Campaign Reform Act, a law that prohibited corporations and unions from spending directly from their general treasury funds to influence candidate elections.

As in *Buckley*, the Court adopted a narrow conception of “corruption,” which placed significant constraints on the types of anticorruption laws that the people and our representatives may consider enacting. The majority in *Citizens United* decided that “independent expenditures, including those made by corporations [and, unions or others with vast amounts of money], do not give rise to corruption or the appearance of corruption.”<sup>19</sup> The Court added that “[t]he appearance of influence or access...will not cause the electorate to lose faith in our democracy” and that “[i]ngratiation and access...are not corruption.”<sup>20</sup>

The Commission is concerned that the appearance of influence and access *does* and *will* cause the electorate to lose faith in our democracy. The Commission believes a proposed amendment should include language that broadens the scope of the anticorruption interests that can justify contribution and expenditure limits.

*Speechnow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010). In *Speechnow*, the U.S. Court of Appeals for the D.C. Circuit struck down a federal law that limited the amount of money that could be contributed to a political action committee sponsored by an “independent expenditure group” unaffiliated with a political campaign. The decision led to the rise of so-called Super PACs whose political expenditures are difficult to regulate. The Commission believes that a proposed amendment should include elements that would be interpreted as overruling the result in *Speechnow*.

*Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011). In this case, the Court struck down an Arizona public campaign financing program which gave participants access to matching funds that were triggered when opponents spent large amounts of money. According to the Court, the matching funds to a program participant constituted a “burden” on a well-funded opponent’s exercise of First Amendment freedoms.<sup>21</sup> But as Justice Kagan noted in her dissent, before this case the Court had “never, not once, understood a viewpoint-neutral subsidy given to one speaker to constitute a First Amendment burden on another.”<sup>22</sup> The Commission believes a proposed amendment should include elements that would be interpreted as overruling the result in *Arizona Free Enterprise*.





*American Tradition Partnership v. Bullock*, 567 U.S. 516 (2012). Shortly after *Citizens United*, which struck down a federal prohibition on corporate expenditures, the Supreme Court applied the logic of *Citizens United* to strike down a state prohibition on corporate expenditures. The Commission believes that a proposed amendment should allow states to regulate corporate political expenditures.

*McCutcheon v. Federal Election Commission*, 572 U.S. 185 (2014). The Court in *McCutcheon* invalidated the aggregate limit on the amount that a wealthy individual could contribute to all federal candidates, parties, and PACs. This was a step further than even the *Buckley* Court was willing to go. As Justice Breyer explained in his dissent:

[The majority's decision] understates the importance of protecting the political integrity of our governmental institutions. It creates a loophole that will allow a single individual to contribute millions of dollars to a political party or to a candidate's campaign. Taken together with [*Citizens United*], today's decision eviscerates our Nation's campaign finance laws, leaving a remnant incapable of dealing with the grave problems of democratic legitimacy that those laws were intended to resolve.<sup>23</sup>

In addition, as described in Section 2 of the Report, several Supreme Court decisions have struck down state and federal laws regulating corporations or commercial activity on constitutional grounds.

#### **4. Guiding principles for the approach to recommendations regarding scope and language of a proposed Constitutional amendment**

To last the test of time, constitutional amendments must be carefully devised and written. Amendments without broad-based support will not be adopted, while those ignoring key, powerful constituencies are doomed to fail. History also demonstrates that very general or poorly drafted amendments are easily misinterpreted and undermined by the courts and changing political winds.

What are the characteristics of a successful amendment?

- Like most amendments already adopted, any new amendment should align America closer to the founding principles of equal rights, human liberty, and successful, lasting self-government;
- It should promise actual, rather than merely symbolic or marginal, effect on public policy;
- It should be widely popular;
- It should be a subject that most Americans, and our state and federal lawmakers, can understand and appreciate;
- Finally, it should be a subject that Congress, the States and/or the Courts have failed to address effectively and, in light of political instincts to preserve power, may be unlikely to address without intervention of the people exercising our right and duty to move the amendment process forward.<sup>24</sup>

The Commission has reviewed numerous versions of amendments relevant to the goals sought by the people of Massachusetts through the Act in constitutional amendments.<sup>25</sup> Proposed amendments that have been introduced in Congress are described in the next section of the Report. Other proposals not



yet introduced in Congress but advanced by various parties have been brought to the attention of the Commission.

Together, these proposed amendments fall into several categories:

1. Proposed amendments to address the role of money in elections and combat corruption;
2. Proposed amendments to clarify that corporations do not have the same constitutional rights of the people;
3. Proposed amendments that combine (1) and (2); and
4. Proposed amendments that to various degrees combine (1) and related issues concerning the integrity of elections, government, and representative democracy (e.g., term limits or gerrymandering).

Constitutional amendments require consensus on the objective. There is consensus on the Commission and, we believe, in the country, that the scope of the proposed constitutional amendment should ensure that Congress and the States enact reasonable limits on campaign and election spending, including limiting and/or prohibiting such spending by corporations, unions, or other artificial entities.

However, there remain open questions. While the Commission concurs with the guidance of the Act affirming that corporations or other artificial entities do not have “the inalienable Constitutional rights of the people,” the Commission also believes additional deliberation is warranted on the matter of an amendment that would prevent corporations from asserting constitutional rights in other contexts outside of the political spending area. Some of these unresolved considerations include:

- Whether the Supreme Court has conferred upon corporations the constitutional rights of people, or whether the Supreme Court determined in decisions involving corporations that the rights of the people (not just the corporations) were violated;
- Whether it would be prudent to propose an amendment that could sow confusion about relatively non-controversial assertions of constitutional rights by corporations (e.g., a right to a trial, due process, to contest a government seizure or destruction of property of the corporations);
- Whether combining two different (albeit possibly related) matters in a single amendment will fail to advance the objectives of the Act as well or as quickly as addressing the undue influence of concentrated money in state and federal elections in one amendment, and the impact of corporations asserting constitutional rights in another amendment.

In the end, to most readers of this Report and to the citizens of Massachusetts that voted to establish this Commission, the most logical objective for the Commission might seem to be the drafting of the “perfect” amendment.

Yet, upon review of the mandate of the Act, the objectives behind it, the testimony of the public, the collection of data from across the country and the Commonwealth, and textual analysis of the current Amendments, it has become clear to this Commission that the reason a 28<sup>th</sup> Amendment has not moved



close to ratification is not simply because the alternatives have been poorly drafted. Thus, one more draft of a proposed amendment, no matter how thoughtful, is unlikely to change this dynamic.

In this initial report, the Commission believes that rather than simply penning a “new and improved” amendment version or endorsing a single alternative currently under consideration in Congress or elsewhere, our priority is to recommend clear parameters for the amendment along with new, more effective steps and action to accelerate the amendment process.

In the next steps toward our final report, therefore, the Committee plans to focus on:

- Concurrence on parameters (and the implied choices within)
- Strategies for how Massachusetts can help to break the gridlock within Congress and the States

Over the course of the next six months, final deliberation on these topics will be our focus as a Commission. This does not preclude recommendations on language for one or more effective amendments. The Commission, however, is inclined toward the view that providing more examples of specific language may not be the key point that creates the most likely path to successful adoption of language that addresses the urgent concerns described in the Act.

The Commission believes that the determination of the recommended scope and language of an effective amendment or amendments should address the following issues:

Key Issue	Discussion
Shall vs. May	A fundamental decision point is whether an Amendment may enable the Congress and the States with the <i>power</i> to do something, or if the Amendment <i>mandates</i> that Congress or the States “shall” do something, forcing either into action. Traditionally, the Constitution has been viewed as a document that affirms rights, allocates and balances power, and enumerates federal authority. The Commission believes further deliberation is needed.
Rights of Natural Persons Applied to Artificial Entities	The Act favors an amendment to assert that corporations and similar entities do not have the inalienable rights of the people. However, a fundamental issue not yet determined is how broad or narrow to be with the implementation of this principle. While consensus exists as to applying this to money in politics, there is less consensus about the risks and benefits inherent in consideration of amendment language that would broadly apply this point across the entire Constitution. Again, the Commission believes further deliberation is needed.
One or More Amendments	An amendment should address the ability of the people to enact limits and regulations on the undue influence of money in elections, but the same amendment need not attempt to explicitly address other areas where



	<p>corporations have asserted constitutional rights outside of the expenditure of money to influence elections. The Commission notes the Act’s recognition that “one or more” constitutional amendments may be needed to address, firstly, the undue influence of concentrated money in our political system, and secondly, the assertion by corporations of constitutional rights of the people outside of the electoral process. The Commission is exploring whether separate, albeit related, issues would better be addressed by separate amendments.</p>
<p>Address Money in Politics Broadly or Limit Mandate</p>	<p>It is clear from the Commission's analysis (and that of many others) that there is a massive amount of money in our electoral politics. This money is not just limited to that which is emphasized by the Act authorizing this Commission. There is both a massive amount of money contributed in ways currently subject to regulations—such as direct campaign or party contributions—and significant money being spent “outside” the regulated process through “independent expenditures” by individuals and artificial entities. Any amendment will need to wrestle with how broadly to address these distinct forms of using money to influence elections and public policy.</p>
<p>Flexibility for the Courts</p>	<p>Any amendment can be specific or narrow in other dimensions as well. An amendment can include concepts that are very limited to the topic at hand or more expansive to include fundamental principles of self-government. The more language that is included that expands the potential perceived “intent” of the drafters, the more flexibility current and future courts have to interpret its meaning against directly relevant cases but also against unforeseen situations. For example, including language about the need for “political equality,” an extremely important goal in the opinion of the Commission, may or may not open other issues in the future in unexpected (positive or negative ways). Consider future treatment of artificially intelligent entities, for example, and how this language may be applied if not carefully crafted in the context of the overall amendment.</p>
<p>Relationship to Other Key Constitutional Principles and the Bill of Rights</p>	<p>Any amendment must contend with and work carefully within the context of the other foundational principles of our Republic. How will the language in the eventual 28<sup>th</sup> Amendment interact with Freedom of Speech, Freedom of the Press, the Right to Assembly, and the myriad other inalienable rights that have formed the foundation of our system of government to this day? The best amendment will reaffirm these rights for the Natural Person and enshrine them even further for the next years of the American Republic.</p>



## **Section 4. An analysis of the constitutional amendments that have been introduced to Congress to date in response to the Supreme Court's decision in *Citizen United v. FEC*, an assessment of their alignment with the policies and objectives set forth in this Act.**

Members of Congress have introduced several amendment proposals to address political spending and/or corporate rights since the Supreme Court's decision in *Citizens United*. We believe all the introduced amendments are compiled here: <http://united4thepeople.org/amendments/>

The following is a summary of the currently proposed amendments. In this initial report, the Commission does not indicate a preference on these proposals. The bill numbers refer to the resolution pending in the House or Senate in the 116<sup>th</sup> Congress.

### **A. H.J. Res. 2 / Sen. J. Res. 51 - A Joint Resolution Proposing an Amendment to the Constitution relating to contributions and expenditures intended to affect elections.<sup>1</sup>**

*Section 1. To advance democratic self-government and political equality, and to protect the integrity of government and the electoral process, Congress and the States may regulate and set reasonable limits on the raising and spending of money by candidates and others to influence elections.*

This section would authorize limits on the raising and spending of money to influence elections, whether by campaigns or independent expenditures (e.g., Super PACs) in federal and state elections. The amendment provides guidance on what governmental interests would justify such limits, including the advancement of “democratic self-government,” the equal rights of Americans (“political equality”), and the “integrity” of government and elections. The authorization for limitations on spending applies to all sources of money (e.g., people, corporations, unions). The Commission notes that the term “influence” may be overly broad and “reasonable” may be overly narrow.

*Section 2. Congress and the States shall have power to implement and enforce this article by appropriate legislation and may distinguish between natural persons and corporations or other artificial entities created by law, including by prohibiting such entities from spending money to influence elections.*

This section implies that corporations “or other artificial entities created by law” do not have the same rights as people, and thus may be (but are not required to be) limited or prohibited from spending money to influence state or federal elections.

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



Media (i.e., “the press”) often operate through the corporate form (i.e., The New York Times Company is incorporated under New York corporate laws; Fox News Corporation is incorporated under Delaware law). This section clarifies that while election spending from corporate treasuries may be subject to regulation (as with union, individual, or other fund sources), the amendment does not limit in any way the press functions performed by those media companies.

Taken as a whole and construed in good faith by the courts after ratification, this amendment would unsettle most of the problematic precedents discussed in Section 3. Going forward, it would prompt a substantial reshaping of the Supreme Court’s campaign finance jurisprudence.<sup>2</sup>

**B. H.J. Res. 48 - Proposing an amendment to the United States Constitution providing that the rights extended by the Constitution are the rights of natural persons only.<sup>3</sup>**

*Section 1. The rights protected by the Constitution of the United States are the rights of natural persons only. Artificial entities, such as corporations, limited liability companies, and other entities, established by the laws of any State, the United States, or any foreign state shall have no rights under this Constitution and are subject to regulation by the People, through Federal, State, or local law. The privileges of artificial entities shall be determined by the People, through Federal, State, or local law, and shall not be construed to be inherent or inalienable.*

This section declares that corporations and similar entities do not have any rights under the Constitution. This seeks to reverse Supreme Court holdings that permit corporations to assert rights under the First Amendment, 14<sup>th</sup> Amendment, and many other parts of the Constitution and in matters well beyond election spending. Supreme Court decisions about corporations asserting constitutional rights have been decided under a wide variety of results and theories of the corporate entity and of the Constitution over the past two centuries.

This amendment language states that while corporations do not have constitutional rights, their rights, privileges, and duties may nevertheless be created and enforced by way of state or federal legislation rather than constitutional law.

*Section 2. Federal, State and local government shall regulate, limit, or prohibit contributions and expenditures, including a candidate’s own contributions and expenditures, to ensure that all citizens, regardless of their economic status, have access to the political process, and that no person gains, as a result of that person’s money, substantially more access or ability to influence in any way the election of any candidate for public office or any ballot measure. Federal, State, and local governments shall require that any permissible contributions and expenditures be publicly disclosed. The judiciary shall not construe the spending of money to influence elections to be speech under the First Amendment.*

This section requires (not merely authorizes) limits and regulations on expenditures in elections so as to seek to ensure equal access to the political process and prevent unequal access and influence on elections or ballot initiatives based on wealth; requires disclosure of contributions and spending; and



mandates that any judicial review not construe spending of money in elections to constitute free speech.

*Section 3. Nothing contained in this amendment shall be construed to abridge the freedom of the press.*

The purpose of this section is the same as Section 3 of H.J. Res. 2 above.

Like H.J. Res. 2, this amendment would work substantial changes in the Supreme Court's campaign finance jurisprudence. However, it may unsettle corporate rights in other areas of constitutional law. It would also *require* Congress and the States to regulate, and this could limit the ability of states to experiment with other potential ways of addressing problems of corruption and political inequality.

C. **H.J. Res. 57 - Proposing an amendment to the United States Constitution relating to the authority of Congress and the States to regulate contributions and expenditures in political campaigns and to enact public financing systems for such campaigns.**<sup>4</sup>

This amendment in its entirety states:

*Nothing in this Constitution shall be construed to forbid Congress or the States from imposing reasonable content-neutral limitations on private campaign contributions or independent election expenditures, or from enacting systems of public campaign financing, including those designed to restrict the influence of private wealth by offsetting campaign spending or independent expenditures with increased public funding.*

In effect, this language authorizes Congress and the States (1) to enact limits on election contributions and spending, provided they are neutral as to content, message, party, politics, etc., and (2) to enact systems of public funding for elections, including those that may contain triggering mechanism for additional public funding to respond to large private campaign or independent expenditures. This second section would nullify the Supreme Court's holding in *Arizona Free Enterprise PAC v. Bennett*, 564 U.S. 721 (2011).

Through its particular formulation ("*Nothing in this Constitution shall be construed to forbid...*"), this proposed amendment neatly sends the message that the Supreme Court has erred in viewing the Constitution as a barrier to reasonable, viewpoint-neutral<sup>5</sup> campaign finance restrictions. One possible downside is that the amendment (unlike H.J. Res. 2) does not set forth specific governmental interests that can serve as justifications for campaign finance laws (e.g., political equality, electoral integrity, self-government).



D. **H.J. Res. 21 - Proposing an amendment to the United States Constitution giving Congress the power to regulate campaign contributions for Federal elections.**<sup>6</sup>

*Section 1. The Congress shall have power to prohibit, limit, and otherwise regulate the contribution of funds or donation of in-kind equivalents to candidates standing for election to a Federal office in the United States and to prohibit, limit, and otherwise regulate the expenditure of funds or donation of in-kind equivalents used to support or purchase media advertisements intended to influence the outcome of an election for Federal office in the United States.*

*Whenever Congress should exercise such power, it must apply equally and uniformly to all individual persons recognized as citizens of the United States.*

*Whenever Congress should exercise such power on associations of citizens of the United States, it must apply equally and uniformly to all associations of citizens of the United States.*

This section authorizes limitations on contributions to federal candidates and limitations on expenditures “used to support or purchase media advertisements” to influence elections. It does not provide justifications for such limitations (e.g., political equality, electoral integrity, self-government), and is unclear about whether all independent expenditures are covered or only those used to purchase media advertisements.

This section requires equal application of limits to all citizens (suggesting that contributions or spending by non-citizens may be more limited or prohibited entirely). The final clause may seek to require equal application to groups (e.g., parties, PACs, non-profits) but is unclear whether it is meant to apply to corporations (most scholars and practitioners of corporate law would not view corporations as an “association of citizens”).

*Section 2. Each of the several States shall have power to prohibit, limit, and otherwise regulate the contribution of funds or donation of in-kind equivalents to candidates standing for election to public office in the State and to prohibit, limit, and otherwise regulate expenditure of funds or donation of in-kind equivalents used to support or purchase media advertisements intended to influence the outcome of an election for public office or plebiscite in the State.*

*Whenever a State should exercise such power, it must apply equally and uniformly to all individual persons recognized as citizens of the State.*

*Whenever a State should exercise such power on associations of citizens of the State, it must apply equally and uniformly to all associations of citizens of the State.*

This section authorizes states to apply the same limitations and in the same manner as described above for Section 1.





*Section 3. A person who is not a citizen of the United States, including an association of persons who are not citizens of the United States, a foreign government, or any person acting as an agent thereof, may not contribute funds or donate in-kind equivalents to candidates standing for election to public office in the United States or otherwise expend funds or donate in-kind equivalents in a manner intended to influence the outcome of an election for public office or plebiscite in the United States.*

This section prohibits non-citizens, foreign government, or their agents from contributing or spending money to influence elections. Again, it is unclear whether “an association of persons who are not citizens of the United States” is intended to refer to corporations.

*Section 4. The powers provided by this article are limited to the content neutral regulation of political contributions and political expenditures.*

This section affirms traditional First Amendment principles so that even where even-handed regulations or limits may be authorized, no such regulation or limit can be based on or discriminate with respect to the content message, viewpoint, or politics of the person or group seeking to spend money to influence elections.

*Section 5. Congress shall have the power to enforce this article by appropriate legislation.*

**E. H.J. Res. 39**<sup>7</sup>

*Section 1. The first article of amendment does not apply to the political speech of any corporation, partnership, business trust, association, or other business organization with respect to the making of contributions, expenditures, or other disbursements of funds in connection with public elections.*

*Section 2. Congress shall have power to set limits on the amount of contributions that may be accepted by, and the amount of expenditures that may be made by, in support of, or in opposition to, a candidate for nomination for election to, or for election to, Federal office.*

*Section 3. A State shall have power to set limits on the amount of contributions that may be accepted by, and the amount of expenditures that may be made by, in support of, or in opposition to, a candidate for nomination for election to, or for election to, State or local office.*

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

This proposal is similar to others that empower Congress and the states to set limits on election contributions and spending. The first section, however, takes a different approach suggesting that a fairly wide category of speech may simply be carved out of First Amendment protections.



**F. H.J. Res. 73**<sup>8</sup>

*Section 1. The only source of funding to directly or indirectly support or oppose a campaign for election to public office shall be either contributions by individual citizens to the principal campaign committee controlled by the candidate or funds provided under a system of public election financing or voter education established by Congress, the State, or other jurisdiction as appropriate.*

*Section 2. The only source of funding that may be used to directly or indirectly support or oppose a ballot measure to amend a State constitution or other initiatives or referenda shall be either contributions made by individuals who are eligible to vote on the measure or funds provided under a system of public election financing or voter education established by the State.*

*Section 3. Congress, the States, and local jurisdictions shall establish limits on the amount of contributions individuals may make with respect to a single campaign for election to Federal, State, or local office, respectively, including limits on the amount of contributions an individual who is a candidate for such office may make with respect to the individual's own campaign, and the States and local jurisdictions shall establish limits on the amount of contributions individuals may make with respect to a ballot measure.*

*Section 4. Congress and the States shall have the power to carry out this article through appropriate legislation.*

*Section 5. Nothing in this article shall be construed to grant Congress or the States the power to abridge the freedom of the press.*

Rather than focus on the limitation of rights of corporations *per se*, this proposal confines all sources of money to influence elections to contributions to a candidate from individual citizens or a system of public funding. In either case, it appears to require that not only corporations, but also PACs and Super PACS, unions, non-profit organizations, or any other group that is not a “principal campaign committee” or a public funding system be prohibited from spending money to influence elections.

This amendment is unclear as to how political parties (as opposed to “principal campaign committees”) would be able to advocate for or against a candidate, and raises a host of complex questions, including whether it would totally prevent *any* associations of citizens from making campaign contributions.

**G. H.J. Res. 33**<sup>9</sup>

*Section 1. Financial expenditures, or in-kind equivalents, with respect to a candidate for Federal office, without regard to whether or not a communication expressly advocates the election or defeat of a specified candidate in the election, shall not constitute protected speech, as guaranteed by this Constitution or any amendment to this Constitution.*



*Section 2. Congress shall have the power to enact a mandatory public financing system to provide funds to qualified candidates in elections for Federal office, which shall be the sole source of funds raised or spent with respect to Federal elections.*

*Section 3. Congress shall have power to enforce the provisions of this article by appropriate legislation.*

As with H.J. Res. 39 above, this proposal also carves out of First Amendment protection any spending “with respect to a candidate for Federal office.” It is not clear how broad “with respect to a candidate” may be, particularly since the proposal makes clear that it seeks to go beyond “a communication [that] expressly advocates the election or defeat of a specified candidate.”

The proposal does not address corporations, nor does it expressly address state elections or the authority of the states to regulate spending in elections and only applies to federal candidates.

Finally, the proposal authorizes Congress to enact a system of publicly funded campaigns and elections which would be mandatory, thus abolishing private campaign contributions or expenditures.

H. **Sen. J. Res. 36**<sup>10</sup>

*Section 1. The rights enumerated in this Constitution and other rights retained by the people shall be the rights of natural persons.*

*Section 2. As used in this Constitution, the terms ‘people’, ‘person’, and ‘citizen’ shall not include a corporation, a limited liability company, or any other corporate entity established by the laws of any State, the United States, or any foreign state.*

*Section 3. A corporate entity described in section 2 shall be subject to such regulation as the people, through representatives in Congress and State representatives, may determine reasonable, consistent with the powers of Congress and the States under this Constitution.*

*Section 4. Nothing in this Constitution shall be construed to limit the rights enumerated in this Constitution and other rights retained by the people, which are unalienable.*

As with H.J. Res. 48, this amendment proposal removes corporations from any constitutional definition of “person,” “people,” and “citizen.” The Commission’s concern over such a broad approach is explained above under H.J. Res. 48.

This proposal does not address election contributions or spending, but presumably Congress and the States would be authorized to regulate or prohibit such spending by corporations because corporations would not have constitutional rights to preclude such regulation.



## **Section 5. Recommendations for actions to be taken by Congress, the General Court of Massachusetts, the Governor, Secretary of the Commonwealth, the Attorney General and other public officials and bodies, and citizens of the Commonwealth of Massachusetts to further promotion, proposal, and ratification of the recommended constitutional amendment or amendments.**

Passing and ratifying amendments is hard. Nearly 12,000 have been introduced, thirty-three advanced to the States, and only twenty-seven ratified. The Commission recognizes that a clear strategy and bold action are required to fulfill our mandate.

The Commission believes the strategy for a successful campaign for the 28<sup>th</sup> Amendment is based on a groundswell of support, and that means offering a bold and inspirational plan that appeals across the political spectrum. The Commission will focus its work over the next six months to refine such a strategy based on the following principles:

**Leverage multiple paths.** Redundancy in effort means more chances at movement towards the ultimate objective. Massachusetts should support and find ways to (1) work through Congress, (2) support a limited-purpose Article V convention, and (3) invest in building a further groundswell of support across the nation.

**Mobilize a more broadly inclusive process.** While the Commission heard testimony from many passionate citizens in Massachusetts, the Commission believes we should engage additional viewpoints on the topic of money in politics and find a way to acknowledge and consider the views of those who might object to an amendment. The Commission believes the Constitution is a document that must be accepted by all 330 million Americans today and for generations to come. By definition, the principles enshrined in an amendment must be foundational in nature to stand the test of time.

**Launch proactive outreach with more engagement of many constituencies and interests.** The Citizens Commission has had many hearings around the Commonwealth and gathered significant information, but we need to hear the views and ideas from many more constituencies. We will seek more testimony and feedback from business and labor; local, state, and national media; state and national legislators, political and civic leaders, including those in other states. These groups would rightfully expect to have input on the amendment's wording and rationale; prematurely locking in on a specific wording will make any future compromise impossible. Flexibility and holding true to our principles are key to success. For this reason, the Commission is not currently endorsing any specific amendment language because we



need more information and input from citizens and constituencies in Massachusetts and across the nation.

With the strategy reflecting the above as principles in mind, the Commission recommends the following steps now:

1) *Article V Congressional Path*: Gaining Congressional support and pushing an amendment through Congress is the method through which all prior twenty-seven amendments have been passed. However, it appears this approach requires overcoming partisan deadlock in Washington. The Commission proposes the Massachusetts Congressional delegation take the lead to help break this impasse. Specifically, the Commission would like to collaborate with the Massachusetts Congressional delegation to find “common ground” with traditionally opposing viewpoints and activist groups to catalyze a broad coalition of stakeholders. A model we believe could be effective (though not to the exclusion of others) is the one that spurred recent criminal justice reform efforts.<sup>1</sup>

2) *Article V Convention Route*: After significant review of a broad collection of materials, the Commission supports the approach for a limited-purpose convention under Article V. The intent is to either propose the amendment or to force the issue in Congress. In the final report, the Commission intends to outline this option and make direct recommendations to the Commonwealth on how it might proactively accelerate this initiative, but in the meantime, the Commission is supportive of any efforts in the Legislature, or the Commonwealth more broadly. The Commission encourages the Massachusetts Legislature, the Governor, the Secretary of State, and the Attorney General to proactively promote this process. While the intention of this recommendation comes with the goal of spurring an Article V convention, our hope is that serious movement in this area would spur Congress to action, as it has historically. The Commission supports a Massachusetts application for such a limited-purpose amendment convention.

3) *Citizens Congress*: The above tactics are the most conventional and directly operate “within the system” of constitutional processes. While we believe the Commonwealth can help drive both avenues, the Commission also believes, after hearing much testimony, that this might not be enough. Thus, in the next six months the Commission will seek further testimony about how Massachusetts can facilitate novel and “outside the process” approaches to driving change.

Philosophically, this is the foundation of our unique experiment as a nation. The Constitution itself was written and created from the chaos of direct debate among the people. In this vein, the Commission recommends Massachusetts proactively advocate, sponsor, and host a venue for a national “Citizens Congress.” This meeting would draw out the issues of campaign finance and challenges to republican governance in a more holistic fashion. The Commission sees this meeting as a path to accelerate grassroots momentum and support across the states. There is evidence that more than twenty other states are pursuing policies similar to Massachusetts. The Commission is keen to hear ideas on how the Commonwealth could make such a Citizens Congress a reality.



4) *Successor Citizens Commission*: The Commission believes our current mandate should come to an end with publication of a Final Report by June 30, 2020. At the same time, the overwhelming support for the Act creating the Commission, the broad diversity of public testimony heard by the Commission, and the recommended strategy for advancing an amendment points to the need for the Commonwealth to establish an ongoing Commission. The successor Commission would be empowered by law to advance the overall strategy and three specific recommendations above, and thereby ensure that Massachusetts is well-represented in ongoing interactions among the states on these constitutional matters. In addition, the successor Commission could include the mandate to evaluate related issues of civics, republican self-governance, and to drive momentum and recommendations for how citizens within the Commonwealth can make progress on areas such as gerrymandering, term limits, national voter day, and other constitutionally-relevant topics that have massive public interest, but little public outlet.

The Commission believes that too many people feel they no longer have a voice in our governance. This is not the spirit of our system. Happiness is the “right to participate,” with your neighbors, in how you are governed. This is unique to the American experiment, and Massachusetts should continue to push to find ways for this spirit to be refreshed and to continue.



## Closing

The work of the Citizens Commission is not yet done. Over the ensuing months the Commission will continue with more research, meetings, and workshops to create another version of the Report. Areas of specific focus, and thus elaboration in the next version of the Report, include the following:

Regarding Question 1, **the nature and impact of political and election spending in Massachusetts**, the Commission believes existing data is compelling. The Commission is open to additional research as new data becomes available.

Regarding Question 2, **the limitations, if any, on the legal ability of the Commonwealth and its citizens to reasonably regulate corporations and other entities due to the Supreme Court's conclusion that corporations may assert Constitutional rights of human beings**, the Commission believes we have identified limitations to address this question. The Commission is open to examining additional limitations if warranted.

Regarding Question 3, **recommendations as to the scope and language of one or more constitutional amendment resolutions that would address the problem and policies described herein, and that would be prudent for the Commonwealth of Massachusetts to ratify under Article V of the United States Constitution**, the Commission will prioritize its work to develop specific, preferred language. This will be the focus of the subsequent Report of the Commission.

Regarding Question 4, **an analysis of the constitutional amendments that have been introduced to Congress to date in response to the Supreme Court's decision in Citizen United v. FEC, an assessment of their alignment with the policies and objectives set forth in this Act**, the Commission believes we have described this analysis and answered this question. The Commission is open to conducting additional analysis if warranted.

Regarding Question 5, **recommendations for actions to be taken by Congress, the General Court of Massachusetts, the Governor, Secretary of the Commonwealth, the Attorney general and other public officials and bodies, and citizens of the Commonwealth of Massachusetts to further promotion, proposal, and ratification of the recommended constitutional amendment or amendments**, the Commission will develop a strategy for Massachusetts and the nation to promote and ratify the proposed constitutional amendment. Again, this will be the focus of the subsequent Report of the Commission.



## Appendix

### Members of the Massachusetts Citizens Commission

Commissioner	Appointed by
Noval Alexander	Senate President Karen E. Spilka
Nikolas Bowie	Secretary of the Commonwealth William F. Galvin
Jeff Clements	Attorney General Maura T. Healey
Cheryl Clyburn-Crawford	Attorney General Maura T. Healey
Carmine Gentile	House Speaker Robert A. DeLeo
William Kilmartin	Governor Charles D. Baker
Bopha Malone	Governor Charles D. Baker
Jay Marsden	Senate President Karen E. Spilka
Scott McDermott	House Speaker Robert A. DeLeo
Matthew McKnight	Governor Charles D. Baker
Costas Panagopoulos	Senate President Karen E. Spilka
Dominick Pangallo	House Speaker Robert A. DeLeo
Joyce Sanchez	Attorney General Maura T. Healey
Jennifer Taub	Secretary of the Commonwealth William F. Galvin





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## End Notes

### Introduction

<sup>1</sup> See [https://electionstats.state.ma.us/ballot\\_questions/view/7304/](https://electionstats.state.ma.us/ballot_questions/view/7304/)

### Section 1

<sup>1</sup> See <https://www.followthemoney.org/tools/election-overview?s=MA&y=2018>

<https://www.followthemoney.org/tools/election-overview?s=MA&y=2016>

<https://www.followthemoney.org/tools/election-overview?s=MA&y=2014>

<https://www.followthemoney.org/tools/election-overview?s=MA&y=2012>

<https://www.followthemoney.org/tools/election-overview?s=MA&y=2010>

<sup>2</sup> See <https://www.followthemoney.org/tools/election-overview?s=MA&y=2008>

<https://www.followthemoney.org/tools/election-overview?s=MA&y=2006>

<https://www.followthemoney.org/tools/election-overview?s=MA&y=2004>

<https://www.followthemoney.org/tools/election-overview?s=MA&y=2002>

<https://www.followthemoney.org/tools/election-overview?s=MA&y=2000>

<https://www.opensecrets.org/races/summary?cycle=2000&id=MAS1&spec=N>

<sup>3</sup> See <https://www.opensecrets.org/overview/cost.php>

<sup>4</sup> The terms “outside spending” and “independent expenditures” are used as synonyms in this Report.

<sup>5</sup> See [https://www.opensecrets.org/outsidespending/cycle\\_tots.php?cycle=2020&view=A&chart=N#summ](https://www.opensecrets.org/outsidespending/cycle_tots.php?cycle=2020&view=A&chart=N#summ)

<sup>6</sup> See [https://www.opensecrets.org/outsidespending/cycle\\_tots.php?cycle=2020&view=A&chart=N#summ](https://www.opensecrets.org/outsidespending/cycle_tots.php?cycle=2020&view=A&chart=N#summ)

<sup>7</sup> See <https://www.followthemoney.org/tools/election-overview?s=MA&y=2018>

<sup>8</sup> See <https://www.opensecrets.org/states/pres.php?cycle=2016&state=MA>

<sup>9</sup> See <https://www.followthemoney.org/tools/election-overview?s=MA&y=2014>;

<https://www.opensecrets.org/races/summary?cycle=2014&id=MAS2&spec=N>

<sup>10</sup> See <https://www.opensecrets.org/races/candidates?cycle=2012&id=MAS1&spec=N>

<sup>11</sup> According to the Center for Responsive Politics, “technically known as independent expenditure-only committees, super PACs may raise unlimited sums of money from corporations, unions, associations and individuals, then spend unlimited sums to overtly advocate for or against political candidates. Unlike traditional PACs, super PACs are prohibited from donating money directly to political candidates, and their spending must not be coordinated with that of the candidates they benefit. Super PACs are required to report their donors to the Federal Election Commission on a monthly or semiannual basis – the super PAC’s choice – in off-years, and monthly in the year of an election.”

<sup>12</sup> See <https://www.opensecrets.org/pacs/pacgave2.php?cycle=2012&cmte=C00520411>

<sup>13</sup> See <https://www.opensecrets.org/pacs/pacgave2.php?cycle=2012&cmte=C00503870>

<sup>14</sup> See <https://www.opensecrets.org/races/outside-spending?cycle=2016&id=NHS1>

<sup>15</sup> See <https://www.opensecrets.org/races/outside-spending?cycle=2016&id=NVS2>

<sup>16</sup> The Citizens Commission presents data from the three election cycles of 2014, 2016 and 2018 to provide an accurate overview and to take into account some of the variables that occur election cycles: presidential versus “off-year” elections; gubernatorial races; highly contested elections, for example.

<sup>17</sup> See <https://www.followthemoney.org/tools/election-overview?s=MA&y=2018>

<sup>18</sup> See <https://www.followthemoney.org/tools/election-overview?s=MA&y=2016>

<sup>19</sup> See <https://www.followthemoney.org/tools/election-overview?s=MA&y=2014>

<sup>20</sup> According to the Center for Responsive Politics, a 527 Group “is a tax-exempt group organized under section 527 of the Internal Revenue Code to raise money for political activities. These groups are typically parties, candidates, committees or associations organized for the purpose of influencing an issue, policy, appointment or election, be it



federal, state or local. Such organizations can raise unlimited funds from individuals, corporations or labor unions, but they must register with the IRS and disclose their contributions and expenditures.”

<sup>21</sup> According to the Center for Responsive Politics, 501(c) Groups are “nonprofit, tax-exempt groups organized under section 501(c) of the Internal Revenue Code that can engage in varying amounts of political activity, depending on the type of group. For example, 501(c)(3) groups operate for religious, charitable, scientific or educational purposes. These groups are not supposed to engage in any political activities, though some voter registration activities are permitted. 501(c)(4) groups are commonly called “social welfare” organizations that may engage in political activities, as long as these activities do not become their primary purpose. Similar restrictions apply to Section 501(c)(5) labor and agricultural groups, and to Section 501(c)(6) business leagues, chambers of commerce, real estate boards and boards of trade.”

<sup>22</sup> Between 2010 and 2016, the Republican Governors Association, the Democratic Governors Association and the U.S. Chamber of Commerce alone spent well over \$2 billion to influence elections, including in Massachusetts. While these groups try to conceal the source of the money, various sources confirm the largest donors to the RGA, DGA and Chamber are global corporations, including Aetna, Microsoft, Merck, Monsanto, Pfizer and many more, as well as (for the DGA) some big unions.

<sup>23</sup> See *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

<sup>24</sup> See PUBLIC CITIZEN, BIG BUSINESS BALLOT BULLIES 4 (Sep. 28, 2016), <https://www.citizen.org/sites/default/files/big-business-ballot-bullies-corporate-money-report.pdf> [<https://perma.cc/EP7F-BWAV>]. Note, by November the multiple of corporations outspending opponents in ballot races had grown to 33-1. See PUBLIC CITIZEN, POST-ELECTION BALLOT INITIATIVE CORPORATE MONEY REPORT (Nov. 9, 2016), <https://www.citizen.org/sites/default/files/2016-post-election-ballot-initiative-corporate-money-report.pdf> [<https://perma.cc/JRC8-DBZP>].

<sup>25</sup> See <https://www.followthemoney.org/show-me?s=MA&y=2018&f-type=B&gro=f-eid>

<sup>26</sup> See <https://www.followthemoney.org/show-me?s=MA&y=2018&f-type=B&gro=f-eid>

<sup>27</sup> See <https://www.followthemoney.org/show-me?s=MA&y=2018&f-type=B&gro=f-eid>

<sup>28</sup> See <https://www.followthemoney.org/tools/election-overview?s=MA&y=2016;>

<sup>29</sup> See <https://www.followthemoney.org/tools/election-overview?s=MA&y=2014;>

<https://www.followthemoney.org/show-me?s=MA&y=2014&f-type=B&gro=f-eid>

<sup>30</sup> See <https://www.opensecrets.org/overview/donordemographics.php?cycle=2018&filter=A>

<sup>31</sup> See <https://www.opensecrets.org/overview/donordemographics.php?cycle=2018&filter=A>

<sup>32</sup> <https://www.federalreserve.gov/newsevents/pressreleases/other20180522a.htm>

<sup>33</sup> See <https://www.opensecrets.org/states/summary.php?state=MA>

<sup>34</sup> See J.T. Stepleton, *Independent Spending Overview, 2015 and 2016*, FOLLOWTHEMONEY.ORG (Feb. 14, 2018), <https://www.followthemoney.org/research/institute-reports/independent-spending-overview-2015-and-2016> [<https://perma.cc/8JDG-HVN8>].

<sup>35</sup> See NAT’L INST. ON MONEY IN STATE POLITICS, *Funding the State Political Party Committees Pre-Post-BCRA, 1999-2016* at 14 (2017), <https://www.followthemoney.org/assets/Uploads/PartyCmteAnalysis6.16.17BauerGinsberg.pdf> [<https://perma.cc/P4SU-69ZD>].

<sup>36</sup> *Id.* at 15.

<sup>37</sup> *Id.* at 16.

<sup>38</sup> See <https://www.opensecrets.org/states/geog.php?cycle=2018&state=MA>

<sup>39</sup> See Martin Gillens & Benjamin I. Page. *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*. 12(3) PERSPECTIVES ON POLITICS, 564–81 (2014).

<sup>40</sup> See Drew Desilver & Patrick Van Kessel, *As more money flows into campaigns, Americans worry about its influence*, FACTTANK, PEW RESEARCH CTR. (Dec. 7, 2015), <http://www.pewresearch.org/fact-tank/2015/12/07/as-more-money-flows-into-campaigns-americans-worry-about-its-influence/> [<https://perma.cc/XC7W-K28Z>].

<sup>41</sup> See Drew Desilver, *U.S. trails most developed countries in voter turnout*, FACTTANK, PEW RESEARCH CTR. (May 21, 2018), <http://www.pewresearch.org/fact-tank/2018/05/21/u-s-voter-turnout-trails-most-developed-countries/> [<https://perma.cc/TPC7-SHLY>].

<sup>42</sup> See Gustavo Lopez & Antonio Flores, *Dislike of candidates or campaign issues was most common reason for not voting in 2016*, FACTTANK, PEW RESEARCH CTR. (June 1, 2017) <http://www.pewresearch.org/fact->



tank/2017/06/01/dislike-of-candidates-or-campaign-issues-was-most-common-reason-for-not-voting-in-2016/  
[<https://perma.cc/FV2W-7F3F>].

<sup>43</sup> See *Congressional Job Approval, Polls*, REALCLEAR POLITICS,

[https://www.realclearpolitics.com/epolls/other/congressional\\_job\\_approval-903.html](https://www.realclearpolitics.com/epolls/other/congressional_job_approval-903.html) [<https://perma.cc/U958-D2J9>] (last visited Oct. 20, 2018).

<sup>44</sup> See Michael Smith & Jeffrey M. Jones, *U.S. Satisfaction Remains Low Leading Up to Election, News*, GALLUP (Oct. 13, 2016) <https://news.gallup.com/poll/196388/satisfaction-remains-low-leading-election.aspx> [<https://perma.cc/AL4V-K2Q9>].

<sup>45</sup> See Liz Kennedy, *Citizens Actually United: the Bi-Partisan Opposition to Corporate Political Spending and Support for Common Sense Reform*, DEMOS (Oct. 25, 2012), <https://www.demos.org/publication/citizens-actually-united-bi-partisan-opposition-corporate-political-spending-and-support> [<https://perma.cc/U34L-VGW5>].

<sup>46</sup> See Harold Myerson, *Americans See a Government of, by, and for the Rich*, WASH. POST (November 18, 2015) [https://www.washingtonpost.com/opinions/americans-see-a-government-of-by-and-for-the-rich/2015/11/18/8c8e001a-8e19-11e5-acff-673ae92ddd2b\\_story.html?utm\\_term=.60b5e0948791](https://www.washingtonpost.com/opinions/americans-see-a-government-of-by-and-for-the-rich/2015/11/18/8c8e001a-8e19-11e5-acff-673ae92ddd2b_story.html?utm_term=.60b5e0948791) [<https://perma.cc/S594-YE4X>] (citing ROBERT P. JONES ET AL., PUB. RELIGION RESEARCH INST., ANXIETY, NOSTALGIA AND MISTRUST: FINDINGS FROM THE 2015 VALUES STUDY (2015)).

### Section 3

<sup>1</sup> See 2018 Mass. Acts 322, § 1(a) (“to eliminate the undue influence of concentrated money on elections and governmental policy, campaign contributions and spending may be regulated and limited”); 1(b) (“to protect the integrity and fairness of elections and government; prevent corruption; secure the right of all Americans to be represented and to participate in self-government as equal citizens”); 4(a)(i) (“the nature and impact of political and election spending in Massachusetts”).

<sup>2</sup> See 2018 Mass. Acts 322, § 1(a) (“affirm that artificial entities do not possess the inalienable Constitutional rights of the People”); 1(b) (“protect the freedom of speech, of the press and other rights of all Americans over the privileges of artificial entities; and ensure the constitutionality of sound regulation and operation of corporations and other economic entities by the people”); 2(a) “inalienable Constitutional rights are the rights of individual living human beings and not of artificial entities or aggregations of people”); 4(a)(ii) (“limitations, if any, on the legal ability of the Commonwealth and its citizens to reasonably regulate corporations and other entities due to the Supreme Court’s conclusion that corporations may assert Constitutional rights of human beings.”)

<sup>3</sup> See *id.* §§ 2(b) and 4(a)(iii) (requiring prudent consideration).

<sup>4</sup> See *id.* § 1(b).

<sup>5</sup> See *id.* §§ 1(a), 1(b), 2(a), and 4(a)(ii).

<sup>6</sup> See *id.* §§ 1(c) and 2(c) (Citizens Commission’s recommendations are to assist in “*promoting, proposing and ratifying* such constitutional amendment(s)”; 2(b) (Citizens Commission “will ensure *prudent* consideration of such a constitutional amendment ... during the ratification process to follow Congressional approval”); 4(a)(iii) (recommended amendment(s) should not only address the problems and policies identified in the Act, but “would be prudent for the Commonwealth of Massachusetts to ratify”); 4(e) (“the recommended constitutional amendment *or amendments.*”)

<sup>7</sup> Under Article V of the U.S. Constitution, an amendment must be proposed by a vote of 2/3 of Congress (or by a Convention called by 2/3 of the States), and then be ratified by 3/4 of the States.

<sup>8</sup> See “*Great and Extraordinary Occasions*”: *Developing Guidelines for Constitutional Change*, at ix (The Century Foundation Press, 1999).

<sup>9</sup> See e.g. Federalist No. 37 (“The genius of Republican liberty, seems to demand on one side, not only, that all power should be derived from the people; but, that those entrusted with it should be kept in dependence on the people, by a short duration of their appointments; and, that, even during this short period, the trust should be placed not in a few, but in a number of hands.”); Federalist No. 39 (explaining that American government “derives all its powers directly or indirectly from the great body of the people”).



<sup>10</sup> See 2018 Mass. Acts 322, §§ 2(a) (referencing “three decades” of Supreme Court decisions); 4(a) (referencing *Citizens United v. Federal Election Commission*).

<sup>11</sup> See U.S. CONST. amend. XI (nullifying *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 453 (1793) which held that Article III of the Constitution to permit creditors of the States to sue in federal court); U.S. CONST. amend. XIII, XIV and XV (repudiating *Scott v. Sandford*, 60 U.S. (19 How.) 393, 400 (1857)); U.S. CONST. amend. XVI (nullifying the holding of *Pollock v. Farmers Loan & Trust Co.*, 158 U.S. 601, 637 (1895) that Congress lacks power to enact a progressive income tax); U.S. CONST. amend. XIX (nullifying *Minor v. Happersett*, 88 U.S. 162, 170 (1874) holding that the 14<sup>th</sup> Amendment did not protect any right of women to vote); U.S. CONST. amend. XXIV (barring poll taxes in federal elections, negating *Breedlove v. Suttles*, 302 U.S. 277, 281 (1937)); U.S. CONST. amend. XXVI (empowering 18, 19 and 20-year-olds with the right to vote, overriding *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970)).

<sup>12</sup> See Melvin I. Urofsky, *Campaign Finance Reform Before 1971*, 1 ALB. GOV'T L. REV. 1 (2008) (Before *Buckley*, the Court considered First Amendment challenges to the Hatch Act, which limited the political activities of federal employees, and to the Taft-Hartley Act, which limited the use of money from unions to influence elections.); *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 556 (1973) (“neither the First Amendment nor any other provision of the Constitution invalidates a law barring ... partisan political conduct by federal employees.”); *United States v. Cong. of Indus. Orgs.*, 335 U.S. 106, 122 (1948) (use of union funds for a union newspaper that backs a candidate is not a prohibited ‘expenditure in connection with any election’ within the Act because Congress did not intend to reach *bona fide* press activities); *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

<sup>13</sup> See *Kovacs v. Cooper*, 336 U.S. 77, 88 (1949) (“To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself.”); See also *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2222 (2015); *Schacht v. United States*, 398 U.S. 58, 63 (1970); *Red Lion Broad. v. Fed. Comm’n. Comm’n.*, 395 U.S. 367, 387 (1969) (“The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others.”); *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

<sup>14</sup> *Id.* at 45-51.

<sup>15</sup> See *Bellotti*, 435 U.S. at 795. The Massachusetts statute *did* allow corporations to spend money if a ballot question “materially affect[ed] any of the property, business or assets of the corporation.” *Id.* at 768.

<sup>16</sup> See *Bellotti*, 435 U.S. at 776.

<sup>17</sup> *Id.* at 825-26 (Rehnquist, J. dissenting)

<sup>18</sup> Justice White recognized that fidelity to First Amendment values could depend on the type of entity at issue. As he noted in dissent, “some corporations [are] formed for the express purpose of advancing certain ideological causes shared by all their members, or, as in the case of the press, of disseminating information and ideas.” *Bellotti*, 435 U.S. at 805 (White, J., dissenting).

<sup>19</sup> See *Citizens United*, 558 U.S. 310 (slip op. at 42).

<sup>20</sup> *Id.* (slip op. at 44, 52).

<sup>21</sup> See *Arizona Free Enterprise Club’s Freedom Club PAC*, 564 U.S. 721 (slip op. at 2).

<sup>22</sup> *Id.* (slip op. at 16) (Kagan, J., dissenting).

<sup>23</sup> *McCutcheon*, 572 U.S. 185 (slip op. at 2) (Breyer, J., dissenting).

<sup>24</sup> See Robert Natelson, *Amending the Constitution by Convention: Practical Guidance for Citizens and Policymakers*.

<sup>25</sup> See An Act For A Law Relative To Establishing A Citizens Commission Concerning A Constitutional Amendment To Secure Government Of The People, 2018 Mass. Acts 322.

## Section 4

<sup>1</sup> See <https://www.congress.gov/bill/116th-congress/house-joint-resolution/2> This resolution currently has over 150 cosponsors in the House and 47 in the Senate.

<sup>2</sup> A full legislative history and analysis of this amendment proposal is contained in Commissioner Clements’ recent article, *‘But It Will Happen’: A Constitutional Amendment to Secure Political Equality in Election Spending and Representation*, 13 Harv. Law & Pol. Rev. 373 (2019), available at <https://harvardlpr.com/wp-content/uploads/sites/20/2019/07/Clements.pdf>



<sup>3</sup> See <https://www.congress.gov/bill/116th-congress/house-joint-resolution/48/cosponsors> This resolution has 65 co-sponsors in the House. It has not been introduced in the Senate.

<sup>4</sup> See <https://www.congress.gov/bill/116th-congress/house-joint-resolution/57/text> (sixteen sponsors)

<sup>5</sup> The Commission believes that “viewpoint-neutral” may be a more appropriate term than “content neutral.”

<sup>6</sup> See <https://www.congress.gov/bill/116th-congress/house-joint-resolution/21/text> (one sponsor)

<sup>7</sup> See <https://www.congress.gov/bill/116th-congress/house-joint-resolution/39> (two sponsors)

<sup>8</sup> See <https://www.congress.gov/bill/116th-congress/house-joint-resolution/73/text> (two sponsors)

<sup>9</sup> See <https://www.congress.gov/bill/116th-congress/house-joint-resolution/33> (three co-sponsors)

<sup>10</sup> See <https://www.congress.gov/bill/116th-congress/senate-bill/736/text>

## Section 5

<sup>1</sup> See <https://www.wsj.com/articles/obama-koch-brothers-in-unlikely-alliance-to-overhaul-criminal-justice-143709073>