

Issue Brief for the Massachusetts Citizens Commission

May 2019

Prepared by:



Johannes Epke, *Counsel*
Brian Boyle, *Senior Law Fellow*

Note from the Authors

American Promise Education Fund, Inc. is a 501(c)(3) organization that educates about and advocates in favor of a 28th Amendment to the United States Constitution which would fundamentally re-balance our political system by putting the rights of individual citizens ahead of the privileges of concentrated money, corporations, unions, political parties, and Super PACs.

American Promise Education Fund's sister organization, American Promise, Inc., was the primary sponsor of the 2018 Ballot Question 2 which created the **Citizens Commission Concerning a Constitutional Amendment for Government of the People** (the "Citizens Commission" or "Commission").

American Promise Education Fund has prepared this Issue Brief as an introductory resource for the members of the Citizens Commission. Our goal is to provide an overview of the legal issues that we anticipate the Citizens Commission will address over the next several months. As the Citizens Commission carries out its statutory functions, we would be happy to serve as an ongoing resource.

Johannes Epke, *Counsel*
johannese@americanpromise.net

Brian Boyle, *Senior Law Fellow*
brianb@americanpromise.net

Table of Contents

1	ABOUT THE CITIZENS COMMISSION	3
1.1	MISSION.....	3
1.2	OPERATING PRINCIPLES	3
1.2.1	<i>Oath of Office and Conflict of Interest</i>	3
1.2.2	<i>Role of Chair or Co-Chairs</i>	4
1.2.3	<i>Open Meeting Law</i>	4
1.2.4	<i>Public Records Law</i>	5
1.3	DUTIES AND WORK PRODUCT.....	5
1.3.1	<i>Gather Evidence, Testimony, and Advice</i>	5
1.3.2	<i>Receive Public Comments</i>	6
1.3.3	<i>Issue “Report of Findings and Recommendations”</i>	6
1.4	SAMPLE WORK TIMELINE.....	7
2	REGULATING CAMPAIGN FINANCE	8
2.1	THE SUPREME COURT’S CAMPAIGN FINANCE JURISPRUDENCE.....	8
2.2	STATE REGULATION.....	11
3	ARTIFICIAL ENTITIES AND CONSTITUTIONAL RIGHTS	13
4	REFLECTIONS ON THE NATURE OF CONSTITUTIONAL AMENDMENTS	16
4.1	DRAFTING CONSIDERATIONS.....	16
4.2	THE AMENDMENT PROCESS.....	17
5	PROPOSING AND ADVANCING A CONSTITUTIONAL AMENDMENT	19
5.1	KEY CONCEPTS FOR THE AMENDMENT	19
5.1.1	<i>Democratic Self-Government</i>	19
5.1.2	<i>Political Equality</i>	19
5.1.3	<i>Electoral Integrity and Anti-Corruption</i>	20
5.1.4	<i>Natural Persons vs. Artificial Entities</i>	23
5.1.5	<i>Freedom of the Press</i>	24
5.2	EXISTING PROPOSALS AND LANGUAGE REVIEW EFFORTS.....	24
5.2.1	<i>American Promise Education Fund’s Writing the 28th Amendment Program</i>	25
5.2.2	<i>Amendment Proposals Currently Introduced in Congress</i>	25

Executive Summary

This Brief provides an introductory overview of many of the legal issues that the Citizens Commission will address during its term of service.

Section 1 discusses the mission of the Commission, previews key operating principles (including compliance with the Open Meeting Law and Public Records Law), and describes the Commission's charge and anticipated work product. This section also provides a sample of a high-level meeting calendar that is organized by subject matter.

Section 2 outlines the Supreme Court's campaign finance jurisprudence, beginning with *Buckley v. Valeo* and continuing through *Citizens United*. Volumes can and have been written about this area of law; this Brief merely flags some of the most important issues. This section also notes the authority of the Office of Campaign and Political Finance to administer campaign finance laws in Massachusetts.

Section 3 discusses the issue of constitutional rights for artificial entities. This section demonstrates that the right to spend money as a form of political speech is just one of many constitutional rights that have been accorded to artificial entities over time.

Section 4 takes a step back from the specific legal issues and discusses the amendment process more generally. It points out drafting considerations that the Commissioners may keep in mind as they review proposed language, and it sets forth the different paths under Article V for proposing and ratifying an amendment.

Section 5 engages with several of the key concepts that potentially could be incorporated into an amendment. These concepts include democratic self-government, political equality, electoral integrity and anti-corruption, distinctions between natural persons and artificial entities, and freedom of the press. This section closes by describing American Promise's amendment language-review project and referencing amendment proposals that have been introduced in Congress.

1 About the Citizens Commission

On November 6, 2018, the people of Massachusetts voted overwhelmingly in favor of Ballot Question 2.¹ Question 2 created this first-of-its-kind Citizens Commission to advance a twenty-eighth amendment to the United States Constitution that would limit the influence of money in elections and clarify the distinctions between human beings and artificial entities (*e.g.*, corporations and unions) under the Constitution. Through the work of the non-partisan Commission, Massachusetts will lead the national effort to secure principles of self-government to our constitutional order and empower voters over money in the political process.

The people have chosen decisively to advance a constitutional amendment that will restore integrity to our political system. Now the Citizens Commission is responsible for completing the tasks set forth in Question 2.

1.1 Mission

The mission of the Citizens Commission is to advance the policy of Massachusetts in favor of amending the Constitution of the United States (1) to affirm that artificial entities do not possess the inalienable Constitutional rights of the people, and (2) to allow campaign contributions and spending to be regulated and limited in order to eliminate the undue influence of concentrated money on elections and on governmental policy.²

In evaluating proposed amendments, the Commission will assess whether the amendments are drafted so as to protect the integrity and fairness of elections and government; secure the right of all Americans to be represented and to participate in self-government as equal citizens; 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.

1.2 Operating Principles

1.2.1 Oath of Office and Conflict of Interest

¹ The vote was 1,871,989 (71.4%) in favor and 751,447 (28.6%) against. *See* http://electionstats.state.ma.us/ballot_questions/view/2749/.

² In carrying out its mission, the Commission is buttressed by the repeated and consistent support that Massachusetts residents have shown for an amendment. Both chambers of the Massachusetts Legislature have passed resolutions in favor of an amendment, as have dozens of cities and towns across the Commonwealth.

Massachusetts is not alone in this regard. Over 800 municipalities and 19 states have passed similar resolutions calling for an amendment. *See* <https://rl-americanpromise.nationbuilder.com/resolutions>.

All members of the Commission must take an oath of office prior to beginning service. Your appointing official may have instructed you about the swearing in process. Otherwise, to be sworn in, you may bring your appointment letter and a photo ID to the Office of the Secretary of the Commonwealth, Public Records Division, Room 1719, One Ashburton Place, Boston, MA 02018. Commissioners must be sworn in within ninety (90) days of appointment.

Members of the Commission are considered [special state employees](#) under the state’s Conflict of Interest Law, M.G.L. c. 268A. You should review [this summary](#) of the law and complete an [online training module](#).

For additional general information regarding service on a state board or commission, the Office of the Inspector General has published this [Guide for Members of Public Boards and Commissions](#).

1.2.2 Role of Chair or Co-Chairs

During their first meeting, members of the Citizens Commission should elect a chair or co-chairs by majority vote. The chair or co-chairs will call meetings to order and preside over discussions in a manner that facilitates meaningful participation. At each meeting, the chair or co-chairs will manage the agenda and declare the meeting adjourned when voted by the group. They will enforce order and civility, and they may exercise discretion when moderating discussions to ensure that comments are germane to the topics on the agenda. The chair or co-chairs may also be assigned primary responsibility for communicating with the public and media, including by serving as the Commission’s records access officer (RAO) for purposes of the Public Records Law.

1.2.3 Open Meeting Law

The proceedings and activities of the Citizens Commission are subject to the Open Meeting Law. Within two weeks of appointment, all members must [certify](#) that they have received the Open Meeting Law Materials³ and that they understand the requirements of the Open Meeting Law.

It is very important for members of the Commission to understand the definition of a “deliberation” under the Open Meeting Law: “an oral or written communication through any medium, including electronic mail, between or among a quorum of a public body on any public business within its jurisdiction.” Because the Commission’s deliberations must be open to the public, its members must avoid deliberating via email. However, as the Massachusetts Attorney General’s Office has explained:

³ The Open Meeting Law Materials are:

- 1) the [Open Meeting Law](#), M.G.L. c. 30A, §§ 18-25;
- 2) the [Attorney General’s Regulations](#), 940 CMR 29.00-29.11; and
- 3) the [Attorney General’s Open Meeting Law Guide](#).

Distribution of a meeting agenda, scheduling or procedural information, or reports or documents that may be discussed at a meeting is often helpful to public body members when preparing for upcoming meetings. These types of communications generally will not constitute deliberation, provided that, when these materials are distributed, no member of the public body expresses an opinion on matters within the body's jurisdiction.⁴

Under the Open Meeting Law, the Commission is also required to keep minutes of its meetings and make them available to the public in a timely manner. "A 'timely manner' is considered to be within the next three public body meetings or 30 days from the date of the meeting, whichever is later[.]"⁵

For further information, the Massachusetts Attorney General's Division of Open Government has created a series of [training videos](#) to educate members of public bodies about the Open Meeting Law. Members can also [register for a web training](#) coming up on May 23, and they may also contact the Open Meeting Law Hotline (617-963-2540) with specific questions.

1.2.4 Public Records Law

The proceedings and activities of the Citizens Commission are also subject to the [Public Records Law](#). Under the law, "[e]very record that is made or received by a government entity or employee is presumed to be a public record unless a specific statutory exemption permits or requires it to be withheld in whole or in part."⁶

To facilitate compliance with the Public Records Law, members of the Commission must correspond through a state-issued email address, if issued, or an email address created and dedicated exclusively for Commission business, or through letters issued by the chair or co-chairs. The Commission must also preserve copies of all documents that it makes or receives, including documents used during public meetings. The Commission's chair or co-chairs should serve as the records access officer (RAO), the primary person responsible for responding to requests for public records.

1.3 Duties and Work Product

1.3.1 Gather Evidence, Testimony, and Advice

The Commission is required to meet on a regular basis to gather evidence, testimony, and advice related to the objectives set forth in Question 2. The Commission should develop a list of subject-matter experts and invite them to offer written or oral testimony. The Commission should also maintain a record of all the reference materials that its members review (*e.g.*, books,

⁴ See [Attorney General's Open Meeting Law Guide](#) at 6.

⁵ *Id.* at 19.

⁶ Secretary of the Commonwealth's [Guide to the Massachusetts Public Records Law](#), at 1.

journal articles, written reports). Ideally, all testimony and reference materials should be made available online.

1.3.2 Receive Public Comments

During its meetings, the Commission should include a recurring agenda item that allows time for public comments. The chair of the meeting will recognize speakers, moderate the discussion to maintain order and civility, and ensure that comments are germane to the topics being considered.⁷

1.3.3 Issue “Report of Findings and Recommendations”

The Commission must deliver its first *Report of Findings and Recommendations* by December 31, 2019. The Report must address:

- 1) The nature and impact of political and election spending in Massachusetts;
- 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;
- 3) Recommendations as to the scope and language of one or more constitutional amendment resolutions that would address the problem and policies described in Question 2, and that would be prudent for the Commonwealth to ratify under Article V of the United States Constitution;
- 4) An analysis of the constitutional amendments that have been introduced in Congress to date in response to the Supreme Court’s decision in *Citizens United v. FEC*, including an assessment of their alignment with the policies and objections set forth in Question 2; and
- 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, to further promotion, proposal, and ratification of the recommended constitutional amendment or amendments.

⁷ See M.G.L. c. 30A, § 20(g).

1.4 Sample Work Timeline

Below is a sample work timeline that the Commission may use to chart progress toward completion of the *Report of Findings and Recommendations*.

MAY 2019	Organizational Meeting <ul style="list-style-type: none"> ▪ Select chair or co-chairs ▪ Review operating principles and confirm receipt of OML materials ▪ Discuss schedule and agendas for future meetings ▪ Discuss logistics for drafting the Report
JUNE 2019	Meeting re: Key Supreme Court Precedents <ul style="list-style-type: none"> ▪ Receive testimony and evidence regarding the development of the Supreme Court’s campaign finance jurisprudence ▪ Public Testimony Period
JULY 2019	Meeting re: Political/Election Spending <ul style="list-style-type: none"> ▪ Receive testimony and evidence regarding the nature and impact of political and election spending in Massachusetts ▪ Public Testimony Period
AUGUST 2019	Meeting re: Corporations and the Constitution <ul style="list-style-type: none"> ▪ Receive testimony and evidence regarding the Constitutional rights of non-human legal entities ▪ Receive testimony and evidence regarding limitations on the Commonwealth’s ability to reasonably regulate corporations and other entities ▪ Public Testimony Period
SEPTEMBER 2019	Meeting re: Introduced Constitutional Amendments <ul style="list-style-type: none"> ▪ Receive testimony and evidence concerning constitutional amendments that have already been introduced in the wake of <i>Citizens United</i> ▪ Public Testimony Period
OCTOBER 2019	Meeting I re: Scope and Language for Constitutional Amendment(s) <ul style="list-style-type: none"> ▪ Receive testimony and evidence concerning amendment language that would address the issues set forth in Question 2 ▪ Public Testimony Period
NOVEMBER 2019	Meeting II re: Scope and Language for Constitutional Amendment(s) <ul style="list-style-type: none"> ▪ Receive testimony and evidence concerning amendment language that would address the issues set forth in Question 2 ▪ Review and discuss draft of Report ▪ Public Testimony Period
DECEMBER 2019	Meeting re: Report <ul style="list-style-type: none"> ▪ Review and finalize Report of Findings and Recommendations ▪ Public Testimony Period

2 Regulating Campaign Finance

As noted in Section 1.1 above, Question 2 identified two policies to be advanced by an amendment: (1) affirm that artificial entities do not possess the inalienable Constitutional rights of the People, and (2) allow campaign contributions and spending to be regulated and limited in order to eliminate the undue influence of concentrated money on elections and on governmental policy. This Section will address the second policy topic (campaign finance reform), while Section 3 will address the first policy topic (rights of artificial entities).

The reason a *constitutional amendment* is necessary to advance campaign finance reform is that the Supreme Court has left no other option. Through a series of controversial campaign finance decisions, the Court has “constitutionalized” virtually every attempt to regulate political and election spending by Congress and the states.

2.1 The Supreme Court’s Campaign Finance Jurisprudence

The Court’s modern campaign finance jurisprudence first emerged in the 1976 decision of [*Buckley v. Valeo*](#).⁸ In the wake of President Nixon’s resignation and associated scandals, Congress in 1974 amended the Federal Election Campaign Act (FECA) to require disclosure of, and set limits for, campaign contributions and expenditures. Soon after the amended FECA became law, its constitutionality was challenged by candidates, organizations, and donors. Among other things, challengers argued that the limits contained in FECA violated the freedom of speech under the First Amendment.⁹

Buckley is a long and complex decision, but its key holdings regarding contributions and expenditures are the foundation of all subsequent campaign finance decisions. The Court upheld FECA’s limits on *contributions*, finding that they did not unduly burden protected First Amendment activity:

A limitation on the amount of money a person may give to a candidate or campaign organization . . . involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor’s freedom to discuss candidates and issues.¹⁰

⁸ 424 U.S. 1 (1976) (per curiam).

⁹ Before *Buckley* reached the Supreme Court, the Court of Appeals had largely upheld FECA’s constitutionality and described it as “by far the most comprehensive reform legislation [ever] passed by Congress concerning the election of the President, Vice-President, and members of Congress.” *Buckley v. Valeo*, 519 F.2d 821, 831 (D.C. Cir. 1975).

¹⁰ *Buckley*, 424 U.S. at 21.

But with respect to *expenditures* (i.e., money spent by candidates, or money spent by individuals and groups independent of candidates), the Court decided that FECA's limitations violated the First Amendment:

The expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech. . . . We find that the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify [FECA's] ceiling on independent expenditures.¹¹

In striking down the expenditure limits, the Court made two crucial doctrinal moves. First, it treated the spending of money as tantamount to the voicing of political speech.¹² Second, it announced that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."¹³ In other words, even if a legislature attempts to enhance democratic conversation and deliberation by ensuring that any American voice is not drowned out by the wealthiest spenders, such a governmental interest in promoting political equality, according to this theory of the First Amendment, is denigrated and disallowed.¹⁴

Over the next four decades, the Supreme Court invoked *Buckley* in striking down a number of attempts to regulate election spending. In *First National Bank of Boston v. Bellotti*, the Court invalidated a Massachusetts law that prohibited corporations from spending money to influence the outcome of a ballot referendum.¹⁵ When the Massachusetts Supreme Judicial Court considered the case, it framed the question as "whether business corporations . . . have First Amendment rights coextensive with those of natural persons or associations of natural persons," and answered no.¹⁶ The Supreme Court saw things differently:

The proper question . . . is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the statute]

¹¹ *Id.* at 19, 45.

¹² *See id.* at 19 ("A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.").

¹³ *Id.* at 48-49.

¹⁴ Justice White wrote a prescient dissent that predicted the corrosive effects that *Buckley* would have on electoral integrity: "It is critical to obviate or dispel the impression that federal elections are purely and simply a function of money, that federal offices are bought and sold or that political races are reserved for those who have the facility — and the stomach — for doing whatever it takes to bring together those interests, groups, and individuals that can raise or contribute large fortunes in order to prevail at the polls." *Buckley*, 424 U.S. at 265 (White, J., dissenting).

¹⁵ 435 U.S. 765 (1978).

¹⁶ *First National Bank of Boston v. Attorney General*, 371 Mass. 773, 783-784 (1977) ("It seems clear to us that a corporation does not have the same First Amendment rights to free speech as those of a natural person[.]").

abridges expression that the First Amendment was meant to protect. We hold that it does.¹⁷

As in *Buckley* (see note 14), Justice White again saw the threat to democracy posed by the Court's decision:

States have provided corporations with [special] attributes in order to increase their economic viability and thus strengthen the economy generally. It has long been recognized, however, that the special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process.¹⁸

One of the most well-known and controversial decisions in which the Supreme Court interpreted the First Amendment to strike down campaign finance regulations was [Citizens United v. Federal Election Commission](#).¹⁹ In a 5-4 decision, the Court concluded that corporations could make unlimited independent expenditures from their general treasuries to advocate for or against political candidates.²⁰ In so ruling, the Court reversed several decades of precedent, overruling a number of prior decisions in which a majority of the Court upheld spending limits, including [Austin v. Michigan Chamber of Commerce](#)²¹ and [McConnell v. Federal Election Commission](#).²²

Justice Kennedy invoked *Buckley* for the idea that we the people, through our legislatures, cannot limit election spending by powerful corporations to enable less powerful voices to be heard.²³ Such measures, according to the five-Justice majority, would amount to discrimination against corporations: “[T]he Government may not suppress political speech on the basis of the speaker’s corporate identity.”²⁴ The Court also concluded – contrary to experience and common sense – that although corporate expenditures could buy political influence and access, such “[i]ngratiation and access . . . are not corruption.”²⁵

¹⁷ *Bellotti*, 435 U.S. at 776.

¹⁸ *Id.* at 809 (White, J., dissenting).

¹⁹ 558 U.S. 310 (2010).

²⁰ *Citizens United v. FEC*, 558 U.S. 310, 364-366 (2010).

²¹ 494 U.S. 652 (1990).

²² 540 U.S. 93 (2003).

²³ *Id.* at 350 (“*Buckley* rejected the premise that the Government has an interest ‘in equalizing the relative ability of individuals and groups to influence the outcome of elections’” (quoting *Buckley*, 424 U.S. at 48)).

²⁴ *Id.* at 365.

²⁵ *Id.* at 360-361. *But see* Lawrence Lessig, [Corrupt and Unequal Both](#), 84 Fordham L. Rev. 445 (2015) (arguing that the Framers’ conception of corruption would have included institutional corruption through unequal influence and access).

Since *Citizens United* came down, the Court has issued a number of 5-4 decisions striking down campaign finance laws, including:

[*Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*](#), 564 U.S. 721 (2011) (invalidating Arizona's public financing scheme in which candidates received supplemental funds based on an opponent's spending).

[*American Tradition Partnership, Inc. v. Bullock*](#), 567 U.S. 516 (2012) (per curiam) (announcing that the holding of *Citizens United* also applies to state campaign finance laws).²⁶

[*McCutcheon v. Federal Election Commission*](#), 572 U.S. 185 (2014) (holding that aggregate limits applicable to individuals' contributions are unconstitutional).

The Citizens Commission should seek information and testimony to shed further light on the Supreme Court's campaign finance jurisprudence. But the bottom line is clear: through a series of decisions, the Court has imposed a First Amendment interpretation that makes it nearly impossible for the people, states, or Congress to enact reasonable limits on, or otherwise regulate, money in elections to combat systemic corruption or protect the rights of Americans to be represented and participate in self-government as citizens on equal terms.

2.2 State Regulation

In Massachusetts, the state's campaign finance laws²⁷ are administered by the independent Office of Campaign and Political Finance ([OCPF](#)).

According to OCPF, a *contribution* is money or anything of value given to a campaign for the purpose of influencing the election. A summary of the annual contribution limits applicable to individuals is available [here](#).

With respect to corporations, Massachusetts law prohibits direct campaign contributions from corporations, LLCs, LLPs, and partnerships to all candidates and political committees, but permits contributions to independent expenditure PACs and ballot question committees.²⁸

An *independent expenditure* is "an expenditure made to expressly advocate for the election or defeat of a candidate, without coordinating with any candidate or candidate's committee."²⁹ An *independent expenditure political action committee* (IEPAC) can receive unlimited

²⁶ Dissenting from the *per curiam* decision, Justice Breyer wrote that the Court should reconsider *Citizens United*: "Montana's experience, like considerable experience elsewhere since the Court's decision in *Citizens United*, casts grave doubt on the Court's supposition that independent expenditures do not corrupt or appear to do so." *Bullock*, 567 U.S. at 517 (Breyer, J., dissenting).

²⁷ See generally [M.G.L. c. 55](#) (disclosure and regulation of campaign expenditures and contributions) and [M.G.L. c. 55C](#) (limited public financing of campaigns for statewide elective office).

²⁸ See [The Campaign Finance Law & Businesses](#).

²⁹ [Campaign Finance Guide: Independent Expenditure PACs](#), at 3.

contributions from individuals, corporations, and other entities. After *Citizens United*, OCPF determined that it could no longer enforce the Massachusetts law that had banned corporate expenditures in candidate elections.³⁰

The Commission should seek testimony and evidence from OCPF concerning the nature of political and election spending in Massachusetts.

³⁰ See OCPF Issues of Interest: Citizens United and Independent Expenditure PACs <https://www.ocpf.us/Legal/IssuesOfInterest>.

3 Artificial Entities and Constitutional Rights

Over the course of American history, corporations have pushed relentlessly, and with noteworthy success, to gain the same rights as individuals under the Constitution.³¹

This Section addresses the first policy topic set forth in Question 2: to affirm that artificial entities do not possess the inalienable Constitutional rights of the People.

In his recent book, Professor Adam Winkler traces the history of how business corporations have won rights under the Constitution. Corporations (and other artificial entities such as unions) are not mentioned in the Constitution. Professor Winkler explains: “Although the Founders at the Constitutional Convention never considered whether corporations should be afforded individual rights under the Constitution,” it wasn’t long before the Supreme Court faced its first corporate rights case.³²

In [*Bank of the United States v. Deveaux*](#), the issue before the Court was whether the bank, a corporation, had a constitutional right to sue in federal court.³³ Answering yes, Chief Justice Marshall observed that a corporation “is defined as a mere creature of the law, invisible, intangible, and incorporeal. Yet, when we examine the subject further, we find that corporations have been included within terms of description appropriated to real persons.”³⁴ In order to protect the rights of the corporation’s members (*i.e.*, natural persons), Marshall believed that a corporation should be able to sue in federal court.

Bank of the United States was the first in a series of Supreme Court cases that gave constitutional rights to artificial entities:

[*Dartmouth College v. Woodward*](#), 17 U.S. 518 (1819) (contract clause of the Constitution precludes state from taking over university corporate charter).

[*Louisville, Cincinnati, and Charleston Rail-road Company v. Letson*](#), 43 U.S. 497 (1844) (corporations could be deemed “citizens” of the states where they are incorporated for purposes of federal diversity jurisdiction).

[*Santa Clara County v. Southern Pacific Railroad Company*](#), 118 U.S. 394 (1886) (corporations may use the Fourteenth Amendment’s equal protection clause to avoid state regulation).

³¹ Adam Winkler, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS*, at xvii (2018).

³² *Id.* at 31.

³³ 9 U.S. 61 (1809).

³⁴ *Id.* at 88.

[*Hale v. Henkel*](#), 201 U.S. 43 (1906) (the Fourth Amendment “right of the people to be secure in their persons, houses, papers and effects” applies to corporations).

[*United States v. Martin Linen Supply Co.*](#), 430 U.S. 564 (1977) (corporations are protected by the Fifth Amendment’s double jeopardy clause).

[*First National Bank of Boston v. Bellotti*](#), 435 U.S. 765 (1978) (corporations have a First Amendment right to spend money to publicize opposition to a ballot initiative).

[*Lorillard Tobacco Co. v. Reilly*](#), 533 U.S. 525 (2001) (corporations have a First Amendment right to place tobacco advertising within 1,000 feet of schools and playgrounds).

[*Citizens United v. Federal Election Commission*](#), 558 U.S. 310 (2010) (corporations have a First Amendment right to make unlimited independent expenditures in elections).

[*Burwell v. Hobby Lobby Stores, Inc.*](#), 573 U.S. ____ (2014) (corporations can exercise religious commitments by refusing to provide contraceptive healthcare to employees).

As the Commission gathers evidence regarding artificial entities and Constitutional rights, it may want to consider the following questions:

- How do artificial entities — *e.g.*, for-profit corporations, non-profit corporations, closely held corporations, and unions — differ from one another?
- If artificial entities do not receive the same Constitutional rights as natural persons, will the rights of natural persons be diminished?
- Should the rights of artificial entities be left to the normal legislative process at the federal and state levels?

Many legal scholars have explored the question of what constitutional rights should be held by artificial entities. Below is a non-exhaustive list of suggested resources for further reading:

Margaret M. Blair & Elizabeth Pollman, [*The Derivative Nature of Corporate Constitutional Rights*](#), 56 WM. & MARY L. REV. 1673 (2015).

David Ciepley, [*Beyond Public and Private: Toward a Political Theory of the Corporation*](#), 107 AM. POL. SCI. REV. 139 (2013).

John C. Coates IV, [*Corporate Speech & The First Amendment: History, Data, and Implications*](#), 30 CONST. COMMENT. 223 (2015).

David H. Gans & Douglas T. Kendall, [*A Capitalist Joker: The Strange Origins, Disturbing Past and Uncertain Future of Corporate Personhood in American Law*](#) (Constitutional Accountability Center 2010).

Kent Greenfield, [*Corporate Constitutional Rights: Easy and Hard Cases*](#), 98 B.U. L. REV. ONLINE 40-43 (2018).

Daniel J. H. Greenwood, [*Person, State, or Not: The Place of Business Corporations in Our Constitutional Order*](#), 87 U. COLO. L. REV. 351 (2016).

Tamara R. Piety, [*Why Personhood Matters*](#), 30 CONST. COMMENT. 361 (2015).

Elizabeth Pollman, [*Reconceiving Corporate Personhood*](#), 2011 UTAH L. REV. 1629.

john a. powell & Stephen Menendian, [*Beyond Public/Private: Understanding Excessive Corporate Prerogative*](#), 100 Kentucky L. J. 43 (2011).

Adam Winkler, [*Corporate Personhood and the Rights of Corporate Speech*](#), 30 SEATTLE U. L. REV. 863 (2007).

4 Reflections on the Nature of Constitutional Amendments

When people try to amend the Constitution – that is, the document – they are not ultimately concerned about the document; they are concerned about the institutional arrangements that the document is supposed to control. If those institutions do not change, then the constitution in practice – the small-“c” constitution...has not changed, even if the text of the Constitution has changed.³⁵

The Commission’s ultimate objective is to promote one or more constitutional amendments. An amendment is a textual vessel that contains constitutional values and expresses constitutional purposes. Every single word of a proposed amendment must be scrutinized to assess its alignment with those values and purposes. The Commission should therefore always be asking, “How will this word or phrase serve the values and purposes that we are trying to encapsulate in this amendment?”³⁶

In this section, we briefly explore drafting considerations for assessing a constitutional amendment, and we describe the amendment process set forth in the Constitution.

4.1 Drafting Considerations

A constitutional amendment should functionally serve its intended purposes well into the future. Drafters should therefore pay careful attention to the *formal features* of the proposed amendment. For example, they should assess the amendment’s prescriptiveness, generality, definiteness, manner of expression, and mode of encapsulation.³⁷ The choice and arrangement of particular words, the structure of clauses and sentences, the use of punctuation – all of these formal features will play a role in the future interpretation and application of the amendment.³⁸

The Commission should also bear in mind that there are various “modes of constitutional interpretation” that figure into judicial review.³⁹ Drafters should therefore consider how those modes may be applied to particular words or phrases in an amendment. They should also

³⁵ David A. Strauss, [The Irrelevance of Constitutional Amendments](#), 114 HARV. L. REV. 1457, 1459-60 (2001).

³⁶ The nation’s first Chief Justice recognized that constitutional language must often be broad and principle-laden: “A constitution, from its nature, deals in generals, not in detail. Its framers cannot perceive minute distinctions which arise in the progress of the nation, and therefore confine it to the establishment of broad and general principles.” *Bank of the United States v. Deveaux*, 9 U.S. 61, 87 (1809).

³⁷ See Robert S. Summers, FORM AND FUNCTION IN A LEGAL SYSTEM, at 137 (2006).

³⁸ Citizens for the Constitution offers the following drafting advice: “To be enduring, constitutional amendments should usually be cast, like the Constitution itself, in general terms. Both powers and rights are set forth in our basic document in broad and open-ended language.” *Infra* note 42 at 10.

³⁹ See, e.g., Congressional Research Service, [Modes of Constitutional Interpretation](#) (2018) (describing and giving examples of the most common modes of constitutional interpretation).

consider how the Supreme Court’s prior precedents will shape the interpretation of particular words or phrases in the proposed amendment.⁴⁰

According to some modes of constitutional interpretation, judges will consult extraneous material to understand the drafters’ intent.⁴¹ The Commission should therefore consider the value to posterity in creating a set of resources that sit outside the text of the amendment but nonetheless shed light on its purpose and meaning.

At the close of the last century, a bipartisan group of public officials, scholars, journalists, and others collaborated to develop guidelines for constitutional change. This group, Citizens for the Constitution, sounded a cautionary note: “[N]o matter what our individual views about the merits of a particular amendment, we are united in the conviction that the Constitution should be amended only with the utmost care, and in a manner consistent with the spirit and meaning of the entire document.”⁴² To ensure due consideration of proposed amendment language, the Commission should assess:

- Is the proposed amendment language consistent with related constitutional doctrine that the amendment leaves intact?
- Does the proposed amendment language embody enforceable, and not purely aspirational, standards?
- Have proponents of the proposed amendment language attempted to think through and articulate the consequences of their proposal, including the ways in which the amendment would interact with other constitutional provisions and principles?

4.2 The Amendment Process

[Article V of the Constitution](#) offers four paths for proposing and ratifying an amendment:

1. Both the House and Senate propose an amendment with two-thirds votes, and then three-fourths of the state legislatures approve it.
2. Both the House and Senate propose an amendment with two-thirds votes, and then three-fourths of the states approve it through ratifying conventions.
3. Two-thirds of the state legislatures request that Congress hold an amendments convention, and then three-fourths of the state legislatures approve an amendment.

⁴⁰ See *Eisner v. Macomber*, 252 U.S. 189, 205 (1920) (a constitutional amendment “must be construed in connection with the . . . clauses of the original Constitution and the effect attributed to them before the amendment was adopted.”).

⁴¹ See [Modes of Constitutional Interpretation](#) at 7 (according to the “original meaning” mode, drafters’ intent “may be found in sources outside of the text”).

⁴² See [“Great and Extra Occasions”: Developing Guidelines for Constitutional Change](#), at ix (The Century Foundation Press, 1999).

4. Two-thirds of the state legislatures request that Congress hold an amendments convention, and then three-fourths of the states approve an amendment through ratifying conventions.

So far, all amendments to the Constitution were proposed by a two-thirds vote of Congress (*i.e.*, via paths 1 or 2). Our nation has never held an “amendments convention” to propose an amendment.⁴³

The Commission should be aware that our nation has a history of amending the constitution to correct Supreme Court mistakes. Of the existing twenty-seven amendments, eight were proposed and ratified to counteract erroneous or unpopular Supreme Court decisions.⁴⁴

⁴³ The Citizens Commission is not tasked with recommending a particular path of proposal and ratification. For a general discussion of the pros and cons of different paths, *see* <https://www.americanpromise.net/two-methods-to-pass-an-amendment-pros-cons-and-our-point-of-view/>.

⁴⁴ *See*

- U.S. CONST. amend. XI (nullifying *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 453 (1793), which held 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 *Dred 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 Fourteenth Amendment did not protect a 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))

5 Proposing and Advancing a Constitutional Amendment

One of the Commission’s fundamental duties is to identify concepts and language that will generate consensus in favor of a constitutional amendment. The following subsection identifies some of the key concepts to be considered for inclusion in an amendment.

5.1 Key Concepts for the Amendment

5.1.1 Democratic Self-Government

The United States was founded on the idea of self-government.⁴⁵ The primacy of self-government is reflected in the language and structure of the Constitution and the Bill of Rights. Indeed, “a primary purpose of First Amendment rights is to make possible the value of self-government, and . . . this purpose requires public trust that elections select officials who are responsive to public opinion.”⁴⁶

The value of self-government is threatened by a jurisprudence that is blind to the effects of money in politics. As Justice Kagan has explained, “[t]he First Amendment’s core purpose is to foster a healthy, vibrant political system full of robust discussion and debate. . . . [so] that government may be responsive to the will of the people.”⁴⁷ Instead, a narrow majority of the Supreme Court has used the First Amendment to suffuse the domain of campaign finance with a free-market ideology.⁴⁸ To correct course, a proposed amendment should make constitutional space for campaign finance regulations that serve the people’s interest in democratic self-government.

5.1.2 Political Equality

Like the notion of self-government, political equality is also a central and enduring component of the American constitutional system.⁴⁹ Professor Cass Sunstein has summarized the intersection between campaign finance regulations and the principle of political equality:

⁴⁵ See, e.g., Gordon S. Wood, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 532 (1998) (“Relocating sovereignty in the people by making them ‘the fountain of all power’ seemed to make sense of the entire system. Once the Federalists perceived ‘the great principle of the primary right of power in the people,’ they could scarcely restrain their enthusiasm in following out its implications.”).

⁴⁶ Robert C. Post, *CITIZENS DIVIDED 4* (2014).

⁴⁷ *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011) (Kagan, J., dissenting) (slip op. at 3) (quotation marks omitted).

⁴⁸ See, e.g., Deborah Hellman, [Resurrecting the Neglected Liberty of Self-Government](#), 164 U. PA. L. REV. ONLINE 233 (2016) (“While the Court has aggressively protected the individual’s interest in spending money to speak, without interference by the state, the Court has neglected the individual’s interest in deciding, along with others, that politics ought to be walled off from the market.”).

⁴⁹ See, e.g., Jeffrey D. Clements, “*But it Will Happen:*” *A Constitutional Amendment to Secure Political Equality in Election Spending and Representation*, 13 HARV. L. & POL’Y. REV. (forthcoming 2019) (manuscript at 221-230) (tracing the idea of political equality throughout American legal history).

People who are able to organize themselves in such a way as to spend large amounts of cash should not be able to influence politics more than people who are not similarly able. . . . Of course economic inequalities cannot be made altogether irrelevant for politics. But the link can be diminished between wealth or poverty on the one hand and political influence on the other. The "one person-one vote" rule exemplifies the commitment to political equality. Limits on campaign expenditures are continuous with that rule.⁵⁰

However, since *Buckley*, the goal of political equality has been largely excluded from the Court's analysis of campaign finance regulations. As noted above in Section 2.1, *Buckley* declared that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."⁵¹ A majority of the Court has come to understand this *Buckley* principle as barring any attempts at regulating campaign finance to "level the playing field."⁵²

Many acknowledge that the Court's current campaign finance jurisprudence undermines political equality.⁵³ And as Jeff Clements explains, an amendment grounded on political equality "will significantly improve the effectiveness and fairness of participation and representation for Americans in self-government, combat systemic corruption, and increase the responsiveness and resiliency of American self-government."⁵⁴ The Commission should therefore consider whether a constitutional amendment intended to fix the problems generated by *Buckley* and *Citizens United* should explicitly refer to the concept of political equality.

5.1.3 Electoral Integrity and Anti-Corruption

America's electoral system is based on representative democracy.⁵⁵ The element of representation is crucial; Madison viewed it as the "pivot" around which our system moves.⁵⁶

⁵⁰ Cass R. Sunstein, [Political Equality and Unintended Consequences](#), 94 COLUM. L. REV. 1390, 1392 (1994).

⁵¹ *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

⁵² See, e.g., [Transcript of Oral Argument](#) at 48, *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011) (No. 10-238) (Chief Justice Roberts: "I checked the Citizens' Clean Elections Commission website this morning, and it says that this act was passed to, quote, 'level the playing field' when it comes to running for office. Why isn't that clear evidence that it's unconstitutional?").

⁵³ See, e.g., Lawrence Lessig, [Corrupt and Unequal, Both](#), 84 Fordham L. Rev. 445, 445-446 (2015) ("Our current system for funding campaigns is corrupt, but it is corrupt precisely because it violates a certain kind of equality. The violation is not an equality of speech, but an equality of citizenship.").

⁵⁴ See Clements, *supra* note 49, at 205.

⁵⁵ See THE FEDERALIST NO. 10 (J. Madison) (contrasting "pure Democracy," in which "a small number of citizens . . . assemble and administer the Government in person," with the American system, "in which the scheme of representation takes place").

⁵⁶ THE FEDERALIST NO. 63 (J. Madison).

“No political conception was more important to Americans in the entire Revolutionary era than representation.”⁵⁷

How did the Founders conceptualize electoral representation? It is “the delegation of the Government . . . to a small number of citizens elected by the rest.”⁵⁸ When the voters elect an officeholder, they are trusting that person to advance the community’s interests, and they are consenting to the legitimacy of the laws created by the body of elected representatives. In this manner, the electoral process enables self-government. The electoral process generates representative integrity by creating a link – a dependency⁵⁹ – between the officeholders and the voters. According to Madison, because “it is essential to liberty that the government in general should have a common interest with the people,” our system of elections should create “an immediate dependence on, and an intimate sympathy with, the people.”⁶⁰

When the link of dependency between politicians and the voters begins to break, it threatens the integrity of electoral representation. The history of democratic reforms in America – particularly campaign finance reforms – can be understood as an effort to maintain and improve electoral integrity.⁶¹

The problem of corruption: The Framers understood corruption as a “threat to the integrity of self-government.”⁶² In drafting the Constitution, they included a number of elements intended to countervail corrupting influences.⁶³ “They considered anti-corruption measures essential to an enduring republican system of government.”⁶⁴

In politics, corruption is not merely when an individual uses a public office to extract private gain (*i.e.*, the quintessential “quid pro quo”). Political corruption is also institutional.⁶⁵ Professor Lessig defines “dependence corruption” as “the state of an institution or an individual that has developed a dependence different from a, or the, dependence intended or desired.”⁶⁶

Dependence corruption undermines representation because it interferes with the relationship between the people and the officeholders. This is precisely what the Framers were trying to

⁵⁷ Gordon S. Wood, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 164 (1998).

⁵⁸ *THE FEDERALIST NO. 10* (J. Madison).

⁵⁹ See *THE FEDERALIST NO. 52* (J. Madison) (arguing that the House of Representatives “ought to be dependent on the people alone”).

⁶⁰ *Id.*

⁶¹ See generally Robert C. Post, [Representative Democracy: The Constitutional Theory of Campaign Finance Reform](#), Tanner Lectures on Human Values (2013).

⁶² Zephyr Teachout, [The Anti-Corruption Principle](#), 94 *CORNELL L. REV.* 341, 342, 346-373 (2009) (demonstrating the Framers’ focus on corruption and tracing an anti-corruption principle within the Constitution).

⁶³ See *id.* at 355 (chart of anti-corruption provisions in the Constitution).

⁶⁴ Brief for Professor Lawrence Lessig as Amicus Curiae Supporting Appellee at 2, *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) (No. 12-536).

⁶⁵ See Lawrence Lessig, [A Reply to Professor Hasen](#), 126 *HARV. L. REV. F.* 61, 65 (2013).

⁶⁶ *Id.*

avoid. Madison envisioned a “government which derives all its powers directly or indirectly from the great body of the people . . . not from an inconsiderable proportion, or a favored class of it.”⁶⁷ The desired dependency was between officeholders and “the great body of the people of the United States,” not between officeholders and “the rich, more than the poor.”⁶⁸

In addition to the anti-corruption provisions that were included in the original Constitution,⁶⁹ several of the subsequent amendments also serve anti-corruption purposes. The First Amendment, for example, protects the right of the people to criticize and petition the government.⁷⁰ These communicative rights allow the people to call out and fight corruption. As the Supreme Court has explained, “[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.”⁷¹

As Professor Lessig and others have discussed, under the current campaign finance regime, officeholders are not dependent on “the people,” they are dependent on “the funders.”⁷²

[I]t is a tiny slice of the 1% that funds political campaigns: .26% of Americans give more than \$200 in any congressional campaign; .05% give the maximum amount to any congressional candidate; .01% give more than \$10,000 in any election cycle. Congress is thus plainly “dependent” upon that tiny slice of the 1%, and that dependence plainly conflicts with a dependence “on the people alone.”⁷³

The relationship between corruption and public cynicism: The Framers wanted to create a system that would allow for resilience and correction in the face of corruption. In a representative democracy like ours, the risk posed by the failure to correct dependence corruption is that trust in government will spiral downward in a vicious cycle of public cynicism.

Public cynicism is an outlook that doubts the sincerity and integrity of officeholders’ motives and behavior. A cynical public believes that politicians frequently lie or dissemble. Thoroughgoing cynicism therefore nullifies trust, and it destabilizes political institutions by undermining their legitimacy. When cynicism saturates the public, it can crystallize into

⁶⁷ THE FEDERALIST NO. 39 (J. Madison).

⁶⁸ THE FEDERALIST NO. 57 (J. Madison).

⁶⁹ See Teachout, *supra* note 62, at 355.

⁷⁰ U.S. CONST. amend. I.

⁷¹ *Stromberg v. California*, 283 U.S. 359, 369 (1931).

⁷² See, e.g., Lessig, *supra* note 65, at 65-66. See also Post, *supra* note 61, at 273 (“If some persons have a great deal more money than others, and if their money exerts a correspondingly greater influence on the outcome of elections, it follows that representation has become dependent upon funders rather than people and that a distortion of the decision-making structure of representation has occurred.”).

⁷³ Lessig, *supra* note 65, at 66.

political apathy. An apathetic public no longer believes in even the *potential* of a government that is responsive to its needs.

There is ample evidence that public cynicism is undermining trust in our political institutions. In the 1990s, more than half of Americans had a favorable view of Congress, but now only one-third do.⁷⁴ A large majority (72%) believe that people who contribute to campaigns have more influence than other people.⁷⁵ Most Americans (76%) also believe that the government is run by a few big self-serving interests.⁷⁶

Yet there is cause for hope. Americans' negative views of our political system are coupled with a desire for reform. "[T]here is broad support for making sweeping changes to the political system: 61% say 'significant changes' are needed in the fundamental 'design and structure' of American government to make it work for current times."⁷⁷ Specifically with regard to campaign finance, a wide bipartisan majority of Americans (77%) believe that there should be limits on campaign spending.⁷⁸ There is also bipartisan agreement on the importance of voting: 76% of Republicans and 75% of Democrats say it's very important.⁷⁹ The public opinion data suggest that Americans are yearning for representative integrity, and they understand that citizens should participate in the creation of such integrity by voting.

As the Commission reviews proposed amendment language, it should assess whether and to what extent the language supports the principles of electoral integrity and anti-corruption.

5.1.4 Natural Persons vs. Artificial Entities

As discussed in Section 3 above, artificial entities (such as business corporations) have been recognized as holders of a variety of constitutional rights. But when it comes to First Amendment protections for political speech, many have argued that artificial entities should not automatically be entitled to the same rights as natural persons.

For example, Chief Justice Strine of the Delaware Supreme Court has highlighted the deep tension between the tenets of conservative corporate law theory and the holding of *Citizens United*. On the one hand, conservative corporate theory posits that the duty of corporate managers is to maximize stockholder wealth; such managers should only consider the interests of other constituencies in relation to profit maximization.⁸⁰ On the other hand, the flesh-and-blood stockholders "often have diverse concerns . . . that lead them to vote for political candidates for reasons other than the prospect that the candidate will vote for the policies most

⁷⁴ Pew Research Center, *The Public, the Political System and American Democracy*, 20 (April 2018).

⁷⁵ *Id.* at 25-26.

⁷⁶ *Id.* at 72. By contrast, in the mid-1960s, only 29% of Americans said that government was run for the benefit of big interests.

⁷⁷ *Id.* at 1.

⁷⁸ *Id.* at 73.

⁷⁹ *Id.* at 94.

⁸⁰ See Leo E. Strine Jr. & Nicholas Walter, [Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and Citizens United](#), 100 Cornell L. Rev. 335, 346-350 (2015).

likely to increase their household wealth.”⁸¹ By treating corporations as legal persons capable of formulating and expressing political viewpoints, *Citizens United* allows corporate managers to spend corporate funds to influence elections in ways that might run counter to the actual beliefs and preferences of stockholders – not to mention employees, customers, neighbors, and others affected by the corporation’s behavior.

Professor Tamara Piety is likewise troubled by the Supreme Court’s treatment of corporations as “people” in the First Amendment context:

A corporation is a legal fiction. It has the attributes the law gives it, no more, no less. There does not seem to be any good reason that the entity, as such, needs protection for freedom of expression or freedom to exercise a religion.⁸²

She contends that *Citizens United* poses a danger to democracy by giving artificial entities the same First Amendment protections as actual human beings: “[M]any of the Framers expressed deep suspicions and fears of the corrupting potential of great aggregations of wealth. . . . [T]he rule announced by *Citizens United* seems to expand the dangers of the abuse of power from great aggregations of wealth.”⁸³

When analyzing proposed amendments, the Commission should consider whether they strike an appropriate balance between the interests of artificial entities and those of natural persons.

5.1.5 Freedom of the Press

Commentators have expressed concern that attempts to rein in corporate political spending would catch press/media corporations in their net.⁸⁴ However, many others believe that there are principled ways to demarcate “the press” protected by the First Amendment.⁸⁵

The Commission should review proposed amendment language to ensure its consistency with the constitutional value of freedom of the press.

5.2 Existing Proposals and Language Review Efforts

The Citizens Commission will build on substantial progress made in drafting and examining amendment language options.

⁸¹ *Id.* at 343.

⁸² Tamara R. Piety, [Why Personhood Matters](#), 30 CONST. COMMENT. 361, 364-365 (2015).

⁸³ *Id.* at 384.

⁸⁴ See, e.g., Michael W. McConnell, [Reconsidering Citizens United as a Press Clause Case](#), 123 YALE L. J. 412 (2013).

⁸⁵ See, e.g., Sonja R. West, [The Media Exemption Puzzle of Campaign Finance Laws](#), 164 U. PA. L. REV. ONLINE 253, 258 (2016) (“There is simply no reason to assume that when it comes to defining the press, the task of constitutional interpretation is unusually difficult.”).

5.2.1 American Promise Education Fund's *Writing the 28th Amendment* Program

The most substantial examination of 28th Amendment language proposals thus far is the American Promise Education Fund's *Writing the 28th Amendment* program. Started in 2017 and ongoing in 2019, the goals of the program include defining consensus goals and principles the amendment should seek to secure, vetting existing amendment proposals, identifying or drafting the strongest consensus language possible, and engaging as many Americans in these conversations as possible.

With over a dozen amendment proposals introduced in Congress since 2010, and five of those reintroduced in the first few months of the 116th Congress, there remains a significant opportunity to find more consensus and consolidate support behind one version that is effective and can be ratified.

In examining the goals and principles to amendment must secure or vindicate, the program has focused on political equality, anti-corruption, popular sovereignty, the proper role of corporations in our society, and freedom of speech and press. White papers and law review articles on these issues are forthcoming.

The amendment concepts considered for how to secure these principles include granting authority to Congress and the state to regulate political spending, restricting the ability of corporations and other economic entities to claim constitutional rights of people, banning partisan gerrymandering, enumerating a constitutional right to vote, electing the President by popular vote, limiting the number of terms members of Congress can serve.

The program began with a series of conference calls with [leading constitutional scholars and amendment advocates](#) to deliberate what the amendment should seek to do, and what it must therefore say. Further deliberations have focused on specific language considerations, such as whether the amendment should authorize or require Congress and the states to put limits on political spending.

The program is now in a public participation phase, engaging Americans on the question about what the amendment should do or say through a series of nine town hall meetings across the country and an [interactive online platform and poll](#). A final report and recommendations is expected late 2019.

5.2.2 Amendment Proposals Currently Introduced in Congress

Over a dozen amendment proposals to address political spending and/or corporate rights have been introduced in Congress since *Citizens United* was decided in 2010, with varying degrees of support.⁸⁶

⁸⁶ See generally <http://united4thepeople.org/amendments/>.

The leading proposal in Congress, by number of cosponsors, is House Joint Resolution 2 (H.J.Res. 2), introduced in January 2019 by Representatives Deutch (D-FL), Katko (R-NY), Raskin (D-MD), and McGovern (D-MA):^{87, 88}

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.

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.

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

The other proposals represent different approaches to addressing the political spending issue, ranging from redefining political spending as not protected speech under the First Amendment, to authorizing Congress and the states to regulate political spending, to requiring Congress and the states to regulate political spending.

The proposals also vary in whether and to what extent they address corporate rights, ranging from not addressing the issue at all on one end of the spectrum, to the middle approach seen above in H.J.Res. 2, to removing all constitutional rights for corporations at the other end.

⁸⁷ See <https://www.congress.gov/bill/116th-congress/house-joint-resolution/2>.

⁸⁸ This version currently has over 100 cosponsors in the House, and had over 200 cosponsors in the 114th Congress between the House and Senate Versions:

<https://www.congress.gov/bill/114th-congress/senate-joint-resolution/5/cosponsors>
<https://www.congress.gov/bill/114th-congress/house-joint-resolution/22/cosponsors>

Conclusion

We wish to extend our appreciation to all the members of the Citizens Commission for volunteering to carry out its important work. If we can be of service, please contact us.

Johannes Epke, *Counsel*
johannese@americanpromise.net

Brian Boyle, *Senior Law Fellow*
brianb@americanpromise.net