

## Questions for the Record

### Examining a Constitutional Amendment to Restore Democracy to the American People

Senator Mike Lee

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Floyd Abrams

I believe the proposed amendment would limit Americans' freedom of speech. During the committee hearing, Senator Cruz expressed similar concern that the proposed amendment would limit the First Amendment's guarantee to the freedom of speech by "muzzling" individuals, interest groups, and corporations. Senator Schumer, on the other hand, argued that the First Amendment is not absolute and cited examples such as anti-child pornography laws and libel laws that can be used in a balancing test to limit the scope of the freedom of speech.

- Why would the freedom of speech be unavoidably and harmfully limited by the proposed amendment?

**It is worth beginning with the purpose and intended effect of the proposed amendment. It is aimed not at money or the supposedly inequitable distribution of it but at one specific and content-driven use of money: speech in election campaigns. In that context, S.J. Res. 19 has been drafted with the intent of limiting who may speak, what they may speak about, and how much they may spend. So my response is that freedom of speech would necessarily be limited by the proposed amendment. This would, in fact, be true regardless of the motives of its drafters. By its terms, S.J. Res. 19 only applies "with respect to" federal and state elections and empowers Congress and the states to "se[t] limits" on expenditures "in support of, or in opposition to" candidates for elections as well as contributions that would be used by those candidates in furtherance of their speech. As such, the amendment not only deals directly with speech and thus the First Amendment but also with an area in which that constitutional provision "has its fullest and most urgent application"—i.e. "during a campaign for public office." *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989).**

In your testimony you suggested that this proposed amendment would give Congress the ability to redefine "political equality" and decide whose speech should be allowed in order to achieve it. Were Congress to have this power, the ruling party could craft legislation aimed at reducing the political power of its opponents, and the courts would be powerless to stop it. Such an outcome would have disastrous consequences for the American democratic process.

- How would this use of legislative power affect the First Amendment right to the freedom of speech?

**By limiting it. By ending much of it. It thus necessarily intrudes on well-established principles of freedom of speech. Moreover, a Congress once empowered in the name of equality to limit election-related speech could plainly be empowered as well to limit speech in areas far from elections if it chose to do so. Courts routinely make decisions based on analogies: If x is constitutional, why not y? I do not suggest that this amendment would be directly applied outside the election area but it certainly could be cited to justify other proposed limitations on the First Amendment as well. And in the election area itself, the impact on the First Amendment would be particularly egregious. Spending for television ads could be limited by statute to such a low level that those limits would all but insure that candidates running against incumbents could not purchase enough ads to make their names or views known. Contributions could be all but banned in state races far from significant media centers, thus limiting the distribution of leaflets, the use of outdoor advertising or the like. In each of these two scenarios – and others could easily be drafted -- the right to participate in the electoral process could be constricted to the point that the right would become all but non-existent.**

In your written statement you mentioned that this amendment seeks to enhance the speech of some by restricting the speech of others. As you noted, the *Buckley v. Valeo* Court observed 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...” You said “the notion that democracy would be advanced – saved, “restored” – by *limiting* speech is nothing but a perversion of the English language” (emphasis in original).

- Why is it that a government cannot enhance democracy by restricting the freedom of speech?

**Freedom of speech is an essential ingredient in any system that views itself as democratic in nature. To say that democracy may be *enhanced* by limiting speech is itself a contradiction of terms. A nation that does not protect freedom of speech cannot be viewed as democratic. It is easy for nations to promise to afford freedom of speech. Section 67 of the Constitution of the Democratic People’s Republic of North guarantees “freedom of speech, the press, assembly, demonstration and association,” and “guarantees . . . conditions for the free activities of democratic political parties and social organizations.” I make no comparisons between our nation and that despotic nation. But even we must constantly be alert to limitations on our freedom and S.J. Res. 19 would impose major limitations of the sort.**

Supporters of the proposed amendment have said that the amendment would merely limit campaign spending and not limit the freedom of speech.

- Are campaign spending and speech unavoidably linked?

**Yes. Campaign spending and speech are by their nature inexorably joined. As a general rule, a method of speech becomes progressively more expensive as its dissemination and capacity to reach voters increase. A candidate that cannot spend money on his or her campaign can rarely communicate with voters at all. A citizen who cannot either spend his or her money or contribute it to a candidate is severely limited in participating in the single most significant civic act our society offers: the decision of which individuals shall be elected to serve the rest of us.**

- Why do you believe that this amendment will not accomplish the goal of limiting only campaign spending?

**Limiting campaign spending limits speech. The amendment not only authorizes limits on spending one's own money in support of a candidate but in making direct contributions to candidates or parties. It would even bar candidates from engaging in self-funding of campaigns despite the fact that such an activity by definition poses zero risk of corruption.**