# In the Aftermath of *CU* and *HL,* What Can Be Done?

The CU and HL decisions were controversial from the start and in the years since they were handed down by the Supreme Court their continuing impact (detailed previously in the HL Postscript and CU's Impact on Campaign Finance) has been perceived by many as a profoundly negative influence on our democratic government and pluralistic society. As would be expected in our current politically and culturally polarized nation, many others believe these decisions and their aftermath are positive developments. Those unhappy with the current situation are seeking to change the legal landscape by neutralizing these decisions and their progeny. In this connection, no fewer than three constitutional amendments have been proposed. These efforts raise a number of questions: Can the law concerning corporate personhood be changed? If so, how? And will the proposed "fixes" create more problems than they solve?

The following Constitutional Amendments have been proposed:

## People's Rights Amendment

> **SECTION 1.** We the people who ordain and establish this Constitution intend the rights protected by this Constitution to be the rights of natural persons.
>
> **SECTION 2.** The words people, person, or citizen as used in this Constitution do not include corporations, limited liability companies or other corporate entities established by the laws of any State, the United States, or any foreign state, and such corporate entities are subject to such regulation as the people, through their elected State and Federal representatives, deem reasonable and are otherwise consistent with the powers of Congress and the States under this Constitution.
>
> **SECTION 3.** Nothing contained herein shall be construed to limit the people's rights of freedom of speech, freedom of the press, free exercise of religion, freedom of association and all such other rights of the people, which rights are unalienable.
>
> <u>My Comments:</u>
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> Problem of Overbreadth: The amendment would strip all corporate entities - - for-profit and nonprofit alike - - of their constitutional rights, opening the door to the following negative consequences:

Removing the protection afforded by freedom of the press to media corporations, thereby subjecting them to governmental censorship at every level as well as to potentially ruinous defamation lawsuits, since virtually all newspapers, magazines, broadcasting entities, and online journalism operations are corporate entities..

It would nullify the HL decision and amend the definition of "person" in the Dictionary Act, but it would also remove the First Amendment protections currently possessed by most religious groups, since almost all religious organizations are incorporated.

Subjecting tens of thousands of nonprofit corporate advocacy groups like the Sierra Club, the NRA, NARAL, NAACP, etc. to hostile regulation by Congress, state legislatures and local governments.

Permitting the seizure of corporate-owned property for public uses without paying just compensation.

Denying corporations the protections of the Sixth Amendment in federal criminal proceedings.

## Citizens' Equality Amendment

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

(1) the amount of contributions to candidates for nomination for election to, or for election to, federal office; and
(2) the amount of funds that may be spent by, in support of, or in opposition to such candidates.

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

(1) the amount of contributions to candidates for nomination for election to, or for election to, state office; and
(2) the amount of funds that may be spent by, in support of, or in opposition to such candidates.

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

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

My Comment:

Section 2 of the “We the People Amendment” (below), would appear to accomplish the same result as the “Citizens’ Equality Amendment”, but would do so more succinctly.

## We the People Amendment

Section 1. [Artificial Entities Such as Corporations Do Not Have Constitutional Rights]

The rights protected by the Constitution of the United States are the rights of natural persons only.

Artificial 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.

Section 2. [Money is Not Free Speech]

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 their 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 government 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.

Section 3.

Nothing in this amendment shall be construed to abridge freedom of the press.

My Comment:

Section 1 of this proposed amendment is, like the "People's Rights Amendment", overbroad and, therefore, objectionable for the same reasons.

Section 2 could accomplish the reversing of *Citizens United, Bellotti, Buckley v. Valeo* and similar court decisions without any need for Section 1.

*New Justices - - New View of Free Speech?*

Achieving the goals of Section 2, without a constitutional amendment, might be possible with the appointment of new Justices to the Supreme Court. Although that Court's decisions striking down campaign finance laws have done so on the ground that those laws abridge freedom of speech, what if the Court's fundamental premise - - that money is speech - - is wrong.

The equivalence of money and speech is not self-evident and the dissenting justices in a number of cases have argued that money and speech are two quite different things. For example in *Nixon v. Shrink* (Sup. Ct. 2000), Justice Stevens succinctly summed up his view on the issue: "Money is property; it is not speech."

In *Buckley v. Valeo,* a decision foundational to *Bellotti* and *CU*, Justice White, denying that regulating money equaled regulating speech, wrote in dissent:

> As an initial matter, the argument that money is speech and that limiting the flow of money to the speaker violates the First Amendment proves entirely too much. Compulsory bargaining and the right to strike, both provided for or protected by federal law, inevitably have increased the labor costs of those who publish newspapers, which are, in turn, an important factor in the recent disappearance of many daily papers. Federal and state taxation directly removes from company coffers large amounts of money that might be spent on larger and better newspapers. The antitrust laws are aimed at preventing monopoly profits and price-fixing, which gouge the consumer. It is also true that general price controls have from time to time existed, and have been applied to the newspapers or other media. But it has not been suggested, nor could it be successfully, that these laws, and many others, are invalid because they siphon off or prevent the accumulation of large sums that would otherwise be available for communicative activities.

And in *Randall v. Sorrell*, 548 U.S. 230 (2006), Justice Stevens, again echoing White, argued in dissent: "It is quite wrong to equate money and speech."

So a differently constituted Court might well find that the Majority in *CU, Bellotti*, and *Buckley* erred in holding otherwise.

Likewise, such a court might disagree with previous expansive interpretations of RFRA