

**EXAMINING A CONSTITUTIONAL
AMENDMENT TO RESTORE DEMOCRACY
TO THE AMERICAN PEOPLE**

HEARING
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
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TUESDAY, JUNE 3, 2014

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:32 a.m., in Room SH-216, Hart Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Feinstein, Schumer, Durbin, Whitehouse, Klobuchar, Franken, Coons, Blumenthal, Hirono, Grassley, Hatch, Sessions, Cornyn, Cruz, and Flake.

**OPENING STATEMENT OF HON. PATRICK J. LEAHY,
A U.S. SENATOR FROM THE STATE OF VERMONT**

Chairman LEAHY. I just thought, before I start, I think—and I am joined in this by Senator Grassley—that today’s hearing deals with a serious issue, and I am delighted to see so many members of the public who are interested and are here. Also, of course, as is the practice that I began with the Judiciary Committee, we stream these hearings live. But I expect all members of the public understand this is a serious matter and will act accordingly.

The rules of the Senate prohibit outbursts, clapping, demonstrations of any kind, including both for or against positions I might take or any other Senator might take or Members might take, including the Democratic Leader and Republican Leader.

Also, you are prohibited from blocking the view of people around you, which means if you hold up signs that block people’s views, I will have to ask the Capitol Police to remove you—again, whether those signs are favorable to our position or not. A lot of people have stood in line a long time. Everybody deserves the courtesy of being able to watch. I understand—and there will be plenty of room outside for people to demonstrate, hold up their signs, and hope they will get in the press, either for or against, or to do whatever they want to get press, and I do not want to stop them from doing that. But there will be the press corps outside, and the most—I might say I find those who can be the most imaginative in stating their position, whether they are in the minority or majority, usually end up getting in the paper, and God bless them.

This morning the Senate Judiciary Committee begins its consideration of a constitutional amendment to repair the damage done by a series of flawed Supreme Court decisions that overturned

longstanding precedents of the Court and eviscerated campaign finance laws. I believe that, left unanswered, these rulings will continue to erode fundamental aspects of our democratic process. Therefore, the Congress and the American people have to act.

Years ago, Congress passed campaign finance laws to preserve the integrity of the electoral process, to prevent and deter corruption, and to limit the undue influence of the wealthy and special interests in our election, rules that each of us have had to follow, and these were passed by large majorities, Republican and Democratic, in the Senate and House. But five Justices have now repeatedly overturned these common-sense and time-honored protections—through the *Citizens United* and *McCutcheon* cases. In doing so, the Supreme Court has opened the floodgates to billionaires who are pouring vast amounts of unfettered and undisclosed dollars into political campaigns across the country. Justice John Paul Stevens had it right when he wrote that the Court's decision in *Citizens United* "threatens to undermine the integrity of elected institutions across the Nation."

I have heard from countless Vermonters about how the Supreme Court's decisions threaten the constitutional rights of hardworking Americans who want to have their voices heard, not drowned in a sea of corporate special interests and a flood of campaign ads on television. They also would like to know who is actually behind ads for or against a particular person.

The American people continue to voice their support through other avenues. More than 2 million individuals signed petitions calling for a constitutional amendment to fight back against the corrosive effects of the Supreme Court's decisions regarding money in politics. Those petitions have been brought, I believe, to our hearing room today, and they are in those boxes in the back, those large white boxes. They are a tangible reminder that Americans are calling on Congress to act.

You know, the ability of all Americans—not just wealthy ones—to express their views and have their voices heard in the political process is vital to self-government. The common sense of the American people tells us that corporations are not people. The Supreme Court says corporations are people, but while we would like a General Eisenhower President, we are probably not going to like a General Electric President. Those who claim to adhere to the original intent of the Constitution cannot reasonably argue that the Framers viewed the rights of corporations as central to our electoral process.

I have served in the Senate for nearly 40 years, as Chairman of the Judiciary Committee for nearly 10 years. I have long been wary of attempts to change the Constitution because I have seen so many hundreds of proposals that I have opposed used like bumper stickers merely to score political points. Our fundamental charter is sacred, and amending it should only be done as a last resort. But like most Vermonters, I strongly believe that we must address the divisive and corrosive decisions by the Supreme Court that have dismantled nearly every reasonable protection against corruption in our political process.

We have tried for years to pass a law to require transparency and disclosure of political spending to let people know where the

money is coming from and from whom and which special interests it might be. Unfortunately, Senate Republicans have repeatedly filibustered that legislation, known as the DISCLOSE Act. It would have at least allowed people to know who is pouring the money into our electoral process. So I hope that we will be able to convince enough of my friends on the other side of the aisle to overcome the filibuster of this transparency matter. But because the Supreme Court based its rulings on a flawed interpretation of the First Amendment, a statutory fix alone will not suffice.

I am going to turn first, of course, to Senator Grassley. Then we want to hear from both Senator Reid and Senator McConnell. And I want to thank my friends Harry Reid and Mitch McConnell for being here. I think their joint appearance is a first in this Committee's history, as near as we can tell. I can only speak for 40 years of the Committee's history, but it underscores the importance of the public discussion we are having today. While we may disagree on some issues, both of the Senators are good friends of mine, and I am glad to have them here.

[The prepared statement of Chairman Leahy appears as a submission for the record.]

**OPENING STATEMENT OF HON. CHUCK GRASSLEY,
A U.S. SENATOR FROM THE STATE OF IOWA**

Senator GRASSLEY. Mr. Chairman, our Leaders, and my colleagues on this Committee, I cannot think of a more important hearing than our Committee could hold. After all, what is more important than protecting our Bill of Rights?

However, this hearing also shows as clearly as possible the differences between conservatism and progressivism today. So let us start with First Principles. The Declaration of Independence states that everyone is endowed by their Creator with certain unalienable rights that governments are created to protect. Those preexisting rights include the right to liberty. The Constitution was adopted to secure the blessings of liberty to all Americans. In the period of time 1787 to 1789, Americans rejected the view that the structural limits on government power contained in the original Constitution would adequately protect the liberties that they had fought a revolution to preserve. So they insisted at that time on the adoption of a Bill of Rights. The Bill of Rights protects individual rights regardless of whether the Government or a majority approves of their use. The First Amendment in the Bill of Rights protects the freedom of speech. That freedom is basic to self-government. Other parts of the Constitution foster equality or justice or representative government. But the Bill of Rights is only about one thing—individual freedom.

Free speech creates a marketplace of ideas in which citizens can learn, debate, and persuade fellow citizens on the issues of the day. At its core it enables the citizenry to be educated to cast votes to elect their leaders. Today freedom of speech is threatened as it has not been in many decades. Too many people are impatient and will not listen and debate and persuade. Instead, they want to punish, intimidate, and silence those with whom they disagree. A corporate executive who opposed same-sex marriage—the same position that President Obama held at that time—is to be fired. Universities

that are supposed to be fostering academic freedom cancel graduation speeches by speakers that some students find offensive. Government officials order other Government officials not to deviate from the party line concerning proposed legislation. Now, today, S.J. Res. 19, cut from the same cloth, would amend the Constitution for the first time to diminish an important right that Americans have that is contained in the Bill of Rights. In fact, it would cut back on the most important of these rights: core free speech about who should be elected to govern ourselves. The proposed constitutional amendment would enable Government to limit funds contributed to candidates and funds spent by or in support of candidates. That would give the Government the ability to limit speech. The amendment would even allow the Government to set the limit at zero. There could be no contributions. There could be no election spending. There could be no public debate on who should be elected. As you can conclude, incumbents like us here at the table would find that outcome to be very acceptable. They would know that no challenger could run an effective campaign against them. Rationing of speech at low limits would produce similar results.

What precedent would this amendment create?

Suppose Congress passed limits on what people could spend on abortions or what doctors or hospitals could spend to perform them? What if Congress limited the amount of money people could spend on guns? Or to limit how much people could spend of their own money on their own health care? Should Congress limit how much people can give to charities or how much a charity can spend? Under this amendment, Congress could do what the *Citizens United* decision rightfully said it could not. For instance, it could not make it a criminal offense for the Sierra Club to run an ad urging the public to defeat a Congressman who favors logging in the national forests. It could not stop the National Rifle Association—or it could stop the National Rifle Association from publishing a book seeking public support for a challenger to a Senator who favors a handgun ban; or for the ACLU to post on its website a plea for voters to support a Presidential candidate because of his stance on free speech. That should be a frightening prospect to all of us.

Under this amendment, Congress and the States could limit campaign contributions and expenditures without limit and without complying with existing constitutional provisions. Congress could pass a law limiting expenditures by Democrats but not by Republicans, by opponents of Obamacare but not by supporters.

And what does the amendment mean when it says that Congress can limit funds spent in opposition to candidates? If an elected official says he or she plans to run again, long before any election, Congress under this amendment could criminalize any criticism of that official as spending in opposition to a candidate. A Senator on the Senate floor, appearing on C-SPAN free of charge, could with immunity defame a private citizen. The Member could say that the citizen was buying elections. If the citizen spent any money to rebut the charge, he could end up being charged. We would be back then to the days when criticism of elected officials was a criminal offense, and you remember the history of the Alien and Sedition

Acts. And yet its supporters say this amendment is necessary for democracy. It is outrageous to say that limiting speech is necessary for democracy.

The only existing right that the amendment says it will not harm is freedom of the press. So Congress and the states could limit the speech of anyone except those corporations that control the media. That would produce an Orwellian world in which every speaker is equal but some speakers are more equal than others. Freedom of the press has never been understood to give the media special constitutional rights denied to others.

After years of denying it, supporters of political spending limits now admit that enacting their agenda of restricting speech may require an amendment to our fundamental charter of liberty. But in light of recent Supreme Court decisions, an amendment soon may not be needed at all. You know, there are four Justices right now who would allow core political speech to be restricted. Were a fifth Justice with this view to be appointed, there would be no need to amend the Constitution to cut back on freedom.

Justice Breyer's dissent for these four Justices in the *McCutcheon* decision does not view freedom of speech as an end in itself. Of course, our Founding Fathers did view that as an end in itself. Just Breyer thinks free political speech is about "the public's interest in preserving a democratic order in which collective speech matters."

To be sure, individual rights often advance socially desirable goals. But our constitutional rights do not depend on whether unelected judges believe they advance democracy as they conceive it. Our constitutional rights are individual. They are not collective. Never in 225 years has any Supreme Court opinion described our rights as "collective." So as the Declaration of Independence states, our rights, they come from God and not from the Government or the public.

Consider the history of the last 100 years. Freedom has flourished where rights belonged to individuals that governments were bound to respect; where rights were collective and existed only at the whim of a government that determines when they serve socially desirable purposes, the results have been literally horrific.

So we should not move even one inch in the direction of liberal Justices and where this amendment would take us. The stakes could not be higher for all Americans who value their rights and freedoms. Speech concerning who the people's elected representatives should be, speech setting the agenda for public discourse, speech designed to open and change the minds of our fellow citizens, speech criticizing politicians, and speech challenging government policies are all in this Nation's vital rights. This amendment puts all of them in jeopardy upon penalty of prosecution. It would make America no longer America. And so I intend to do what I can to stop it and urge others to do the same.

Thank you.

Chairman LEAHY. Thank you, Senator Grassley. I appreciate what you said about the Supreme Court. Who knows? Someday we will have Supreme Court Justices who will actually follow the precedents that they swore under oath during their confirmation hearing they would follow.

But what I want to do is hear from Senator Reid and Senator McConnell, and then, because they are the Chair and Ranking Member of the Subcommittee that will be handling this, very brief remarks from Senator Durbin and Senator Cruz.

Senator Reid.

**STATEMENT OF HON. HARRY REID, MAJORITY LEADER,
A U.S. SENATOR FROM THE STATE OF NEVADA**

Senator REID. Mr. Chairman, thank you very much for convening this hearing. I know you remind me all the time about all the work that is done out of this Committee. Having served in State legislature in a Judiciary Committee, I understand much of the work is funneled through this Committee, either on a State level or Federal level.

Senator Grassley, thank you also for your statement.

I am very impressed with the attendance here today. It is really heart-warming to see everyone caring so much about this issue.

Mr. Chairman, Members of the Committee, I am here because the flood of dark money into our Nation's political system poses the greatest threat to our democracy that I have witnessed during my tenure in public service. The decisions by the Supreme Court have left the American people with a status quo in which one side's billionaires are pitted against the other side's billionaires.

So we sit here today with a simple choice: We can keep the status quo and argue all day and all night, weekends, forever, about whose billionaires are right and whose billionaires are wrong; or we can work together to change the system, to get this shady money out of our democracy and restore the basic principle of one American, one vote.

Mr. Chairman, just a little bit of history from my perspective. I ran for the Senate in 1974, and I had to be educated about the Federal laws, because in Nevada we had an entirely different system. Cash was available to politicians.

In the Federal system, that is not the case, and that was not the case. One of Paul Laxalt's very close advisers, a man by the name of Wayne Pearson, who was supporting me, said, "Under the Federal rules, be very careful. You cannot take any cash from anybody. The rules are very strict. Whoever gives you money, there is a limit to how much they can give. You give their address, their occupation, and be very careful any money you take. There is a new system."

Well, Mr. Chairman, I have been asking Nevadans to vote for me for decades, and I have seen firsthand how this dark money is perverting our political system. Way back then, 40 years ago, it was pretty easy to follow the rules. But I have seen it change.

In 1998, I had a very close election with John Ensign. We each spent about \$10 million. And we were allowed to do that because the Supreme Court again created an opening that said you could divert money into the State party. And that money could be corporate money or it could be any kind of money. It could be used for denigrating the other person or building the person up. It was a bad situation. I felt so unclean, for lack of a better word. A person could give lots of money. One person gave a quarter of a mil-

lion dollars to the State party. Of course, he wanted me to know that he had done it.

Now, Mr. Chairman, I know that did not corrupt me. But it was corrupting. And after 1998, two good Senators got together and worked very hard to change the system. We passed the McCain-Feingold law that took corporate money out of politics. So when I ran in 2004, it was like I had taken a bath and I felt so clean. Everyone who was involved in a Federal election had to list where they got their money. There was a limit of how much you could ask and get from someone else. You listed their occupation and, you know, so on. That was wonderful.

And then comes 2010, and we went back into the sewer with *Citizens United*. In January, the Supreme Court had ruled that no holds barred, any money could come from any source, with rare, rare exception. And that race was, as far as I was concerned, not a lot of fun.

The race in 2010 made 1998 seem like a picnic in the park, money coming from every place, without a suggestion as to where the money came from. Citizens for Good Government, good guys, sponsored this one.

In 2010, in that race in Nevada, probably \$120 million was spent in that race. Can you imagine that? No one knew where the money came from, and the people in Nevada were subjected to false and misleading ads, not knowing anything about these shadow groups. That was 2010.

The *Citizens United* case and the other decisions the Supreme Court has made only made it worse. During the 2012 Presidential campaign, outside groups spent more than \$1 billion. That is a conservative estimate. That is about as much money as was spent in the previous 12 elections. But this spike in the amount of shadowy money being pumped into elections is not surprising. Recent decisions rendered by the U.S. Supreme Court—I have mentioned *Citizens United* and *McCutcheon*—have eviscerated our campaign finance laws and opened the floodgates for special interests.

The cynics may scoff at the idea of us working together on an issue as critical as good government, but it was not all that long ago that the issue of campaign finance reform enjoyed support from both Democrats and Republicans. Campaign finance reform has been proposed a number of times before—even by my friend, the Republican Leader, Senator McConnell.

Senator McConnell's own constitutional amendment empowered Congress to enact laws regulating the amount of independent expenditures by any person which, quote, from his legislation, "can be made to expressly advocate the election or defeat of a clearly identified candidate for Federal office." In advocating for this reform, Senator McConnell said, "We Republicans have put together a responsible and constitutional campaign reform agenda. It would restrict the power of special interest PACs, stop the flow of all soft money, keep wealthy individuals from buying public office."

There is a lot more that he said, but that gives you the general idea that at one time Senator McConnell agreed without question with me and most of the people behind me. Senator McConnell had the right idea then. And I am hopeful that we can rekindle a way to bring forth those noble principles again.

I find it hard to fathom why my Republican colleagues would want to defend the status quo. Is there any Member of this Committee who really believed the status quo is good?

Although he opposed billionaires using their own money to run for office, Senator McConnell now supports billionaires' ability to fund today's campaigns and independent expenditures. In fact, he even declares today, "In our society, spending is speech." How could everyday, working American families afford to make their voices heard if money equals free speech? American families cannot compete with billionaires if free speech is based on how much money you have.

My Republican colleagues attempt to cloak their defense of the status quo in terms of noble principles. They defend the money pumped into our system by the Koch brothers as "free speech." Mr. Chairman, I defy anyone to determine what the Koch brothers are spending money on today politically. They have all these phantom organizations. They have one on veterans. They have another one on senior citizens. They must have 15 different phony organizations that they use to pump money into the system, to hide who they really are. These two wealthy men are only interested in their bottom line.

Our involvement in Government should not be dependent on our bank account balances. The American people reject the notion that money gives the Koch brothers, corporations, or special interest groups a greater voice in Government than a mechanic, a lawyer, a doctor, a healthcare worker. They believe, as I do, that elections in our country should be decided by voters—those Americans who have a constitutional and fundamental right to elect their representatives. The Constitution that everybody loves to talk about does not give corporations a vote, and it does not give dollar bills a vote.

The "undue influence" that my friend decried three decades ago has not magically transformed into free speech. David Copperfield in Las Vegas, the great illusionist, could not come up with that one. It is still bad for America. It is bad for the body politic. We must undo the damage done by the Supreme Court's recent campaign finance decisions. And we need to do it now.

I support this constitutional amendment. I admire and I congratulate Senator Tom Udall and Senator Michael Bennet for their authoring this amendment, which grants Congress the authority to regulate and limit the raising and spending of money for Federal political campaigns. Senators Udall and Bennet's amendment will rein in the massive spending of super PACs, these secret organizations, which has grown so, so much since that January 2010 decision of *Citizens United*.

The constitutional amendment also gives the States the authority to institute campaign spending limits at the State level.

Simply put, a constitutional amendment is what the Nation needs to bring sanity back to political campaigns and restore Americans' confidence in their elected leaders. The American people want change. They want their voice in Government to be protected. Free speech should not cost the American people a penny, a dime, certainly not a dollar.

So, Mr. Chairman, Members of the Committee, I am happy, if you have questions that you want to ask me, to wait. I am happy to do that. Otherwise, I would ask your leave, and I will leave because I have places to go.

[The prepared statement of Senator Reid appears as a submission for the record.]

Chairman LEAHY. Thank you. I know both you and Senator McConnell have a great deal of things, and following the tradition of the Committee, we will let you both speak and leave. We will have enough time for questions on the floor. So I thank you very much, Senator Reid.

Senator REID. And, Mr. President, I want to make sure that my leaving does not take away at all from my friendship with Mitch McConnell. We have heard each talk and criticized each other for years, so he will not be upset that I am leaving.

Senator MCCONNELL. No. No problem.

[Laughter.]

Chairman LEAHY. Well, as I noted—and I appreciate the sobriquet of “Mr. President.” I assume you are referring to my role as President Pro Tem and dean of the Senate. But “Chairman” is fine.

And I would also note, as I have said before, both Senator Grassley and I are friends of both Senator McConnell and Senator Reid and have been for years. I keep my baseball bat in my office that—

Senator MCCONNELL. You never know when you might need it.

Chairman LEAHY. No, I have it from my visit with you in Kentucky. Please go ahead, Senator McConnell.

**STATEMENT OF HON. MITCH MCCONNELL, MINORITY LEADER,
A U.S. SENATOR FROM THE STATE OF KENTUCKY**

Senator MCCONNELL. Thank you, Mr. Chairman. Given how incredibly bad this proposed amendment is, I cannot blame my friend, the Majority Leader, for wanting to talk about things like the Koch brothers or what I may have said over a quarter of a century ago. I am going to confine my remarks to what is before us, and I want to start by thanking Senator Grassley for an absolutely outstanding observation about what the First Amendment was supposed to be about. And at the very core of it, of course, was political speech.

Americans from all walks of life understand how extraordinarily special the First Amendment is. Like the Founders, they know that the free exchange of ideas and the ability to criticize their Government are necessary for our democracy to survive.

Benjamin Franklin noted that “whoever would overthrow the liberty of a nation must begin by subduing,” as he put it, “the freeness of speech.” The First Amendment is the constitutional guarantee of that freedom, and it has never, never been amended. Ever.

Attempts to weaken the First Amendment—such as the proposal before this Committee—should, therefore, pass the highest scrutiny. Senate Joint Resolution 19 falls far, far short of that high bar.

It would empower incumbent politicians in Congress and in the States to write the rules on who gets to speak and who does not. And the American people should be concerned—and many are al-

ready—that those in power would use this extraordinary authority to suppress speech that is critical of them, as Senator Grassley pointed out.

Now, I understand that no politician likes to be criticized. And some of us are criticized more often than the rest of us. But the recourse to being criticized is not to shut up your fellow citizens, which, believe me, this is designed to do, to give us the power to pick winners and losers in the political discussion in this country. That is what this amendment is all about. It is to defend you—the solution to this is to defend your ideas, to defend your ideas more ably in the political marketplace, to paraphrase Justice Holmes, or simply to come up with better ideas.

The First Amendment is purposefully neutral when it comes to speech. It respects the right of every person to be heard without fear or favor, whether or not their views happen to be popular with the Government at any given moment.

The First Amendment is also unequivocal. It provides that “Congress shall make no law”—“Congress shall make no law . . . abridging the freedom of speech.” The First Amendment is about empowering the people, not the Government. The proposed amendment has it exactly backward. It says that Congress and the States can pass whatever law they want abridging political speech—the speech that is at the very core of the First Amendment.

If incumbent politicians were in charge of political speech, a majority could design the rules to benefit itself and diminish its opponents. And when roles reversed, you could expect a new majority would try to disadvantage the other half of the country. And on and on it would go.

You can see why this is terrible policy. You can also see how this is at odds with the First Amendment.

That is why the last time a proposal like this was considered, in 2001—2001, we had a vote on this—it was defeated on a bipartisan basis. Now, I get the impression all the Democrats now have walked away from the First Amendment. But back then, Senator Kennedy and Senator Feingold and several other Democratic colleagues voted against it. A similar proposal was likewise defeated in 1997.

Our colleagues who voted against those proposals were right. And I respectfully submit that they would be wrong now to support the latest proposal to weaken the First Amendment. This is especially clear when one compares the language of the amendments.

Senate Joint Resolution 4 back in the 107th Congress would have empowered the Government to set “reasonable limits”—whatever that is—on political speech. The same was true of Senate Joint Resolution 18 in the 105th Congress. As bad as those proposals were—and they were awful—they at least limited the Government’s power to setting “reasonable limits” on speech—again, whatever that is.

By contrast, the amendment we are discussing today would drop that pretense altogether. It would give the Government complete control—complete control—over the political speech of its citizens, allowing it to set unreasonable limits on their political speech, including banning it outright, reminiscent of the Alien and Sedition Acts, as Senator Grassley pointed out.

Not only would S.J. Res. 19 allow the Government to favor certain speakers over others, it would guarantee such preferential treatment. It contains a provision, not found in prior proposals, which expressly provides that Congress cannot “abridge the freedom of the press.” This is really great if you are a corporation that owns a newspaper. This is terrific news for you. You get your speech, but nobody else does. The media wins and everybody else loses.

Now, everyone on this Committee knows this proposal is never going to pass Congress. This is a political exercise, and that is all it is.

The goal here is to stir up one party’s political base so they will show up in November, and it is to do it by complaining loudly about certain Americans exercising their free speech and associational rights, while being perfectly happy that other Americans—those who agree with the sponsors of this amendment—are doing the same thing.

But the political nature of this exercise should not obscure how shockingly bad this proposal is. This is embarrassingly bad to be advocating for the first time in our history that we amend the First Amendment to restrict the rights of citizens to speak.

When it comes to free speech, we should not substitute the incumbent-protection desires of politicians for the protection the Constitution guarantees to all Americans.

I can remember a time when, on a bipartisan basis, we all agreed to that, or at least most of us did. It is too bad we cannot agree on it now.

So I would urge the Committee to reject this dangerous proposal to dramatically weaken one of our most precious freedoms.

Mr. Chairman, I appreciate the opportunity to be here and would love to stay for the rest of your hearing, but I will have to talk to you later.

[The prepared statement of Senator McConnell appears as a submission for the record.]

Chairman LEAHY. I have a feeling you will be able to overcome your sorrow at not being able to be here, but I know you—to quote the statement most often heard among 100 Senators, “Of course, I will read your statement in the record afterwards.” Thank you.

Senator Durbin.

**OPENING STATEMENT OF HON. DICK DURBIN,
A U.S. SENATOR FROM THE STATE OF ILLINOIS**

Senator DURBIN. Mr. Chairman, thank you very much. As Chairman of the Subcommittee of the Senate Judiciary on Constitutional Amendments, I have had a personal point of view on this for a long time when it comes to the nature of amendments being offered. I think the Constitution as written, with the amendments that have been adopted, constitute a sacred document that has guided this country well for decades and centuries.

Too often I have seen proposals for constitutional amendments which, in my view, take a roller to a Rembrandt, and I have resisted many efforts to entice me into cosponsoring constitutional amendments with regard exceptions. This is one of those exceptions. I am cosponsoring this amendment offered by Senators Tom

Udall and Michael Bennet. I believe the time has come for us to do something to save this democracy and the political process that supports it.

Second, let me say at the outset that there is hardly a politician or elected official alive who has not changed his or her position on an issue, and that happens. I can recall when Abraham Lincoln was criticized for changing his position on an issue, and he said, "I would rather be right some of the time than wrong all the time." So we all at least can be charged with having done that in the past and maybe be guilty of the charge.

But it is breathtaking the change that has taken place with the Republican Party in the United States Senate on this issue. In 1987, the Republican Senate leader who just testified, Senator McConnell, introduced a constitutional amendment—a constitutional amendment very similar to the one before us today, and this is what he said on the floor of the Senate in introducing it, about his amendment: "This would give the Congress an opportunity to level the playing field, to eliminate the millionaire's loophole, put everybody on the same footing, so that the meat cutter and coal miner and taxicab driver, and anybody else in American society who can go out and get a lot of support from a lot of people could still raise the money, use the television, get into the race, and build a contest."

He went on to say, "The fellow who inherited it or is shrewd enough to go and get it could not use his personal money to buy political office. He would have to get the same broad-based support the rest of us who are not millionaires must do. That is a problem we can cure immediately."

That is what Senator McConnell said about his constitutional amendment offered in 1987 which parallels the amendment before this Committee today. And then time passed, and by 2002 the story was different. By 2002 we were debating McCain-Feingold, the elimination of soft money in the campaign process. And then the position was taken by the Senator from Kentucky and many on his side, we just want full disclosure. We just want to know who is contributing the money. The American people have a right to know. That was the mantra for a long period of time. I just asked my colleague Senator Schumer, as Chairman of the Rules Committee, whether any Republicans supported our effort when we introduced the DISCLOSE bill, which would have disclosed the contributors to political campaigns. And our best memory is no, they now do not support disclosure.

And so here we are today. Many of us had hoped that Fair Elections Now, a public financing bill which I introduced 7 years ago and keep reintroducing, might have a chance. But with the *Citizens United* decision, I am afraid that is not likely.

When you look at the reality of what we are facing, so far this year spending by outside groups in campaigns has tripled—tripled—since the last midterm election: 27.6 million in 2010, 97.7 million so far this year. In 2006, before *Citizens United*, these groups spent \$3.5 million.

In 2012, super PACs spent more than \$130 million on Federal elections; 60 percent of all super PAC donations that year came from an elite class of 159 Americans. One hundred and fifty-nine

Americans accounted for 60 percent of the money from super PACs going into these election campaigns.

In North Carolina, that elite group had one member; 72 percent of all outside spending in 2010 came from a millionaire named Art Pope. Can you guess who Governor Pat McCrory named as North Carolina's budget chief writer in 2013? Mr. Pope, who bankrolled the Governor's campaign and supported the Republican super majority that recently enacted the most restrictive voter suppression law in America.

Mr. Chairman, we need to do this to save the political process in America. What is at stake here is going to discourage mere mortals from engaging in this process. When you are up against multimillionaires from the start with unlimited contributions through *Citizens United*, you will lose the appetite for the contest. We cannot let that happen. Neither political party can let that happen.

Chairman LEAHY. Senator Durbin, I thank you, and I know at some point you are going to be taking over the gavel in the hearing. Senator Cruz—

Senator GRASSLEY. Senator Cornyn wants a statement in the record.

Chairman LEAHY. And Senator Cornyn has requested a statement for the record, and, of course, without objection, it will be made part of the record.

[The prepared statement of Senator Cornyn appears as a submission for the record.]

Senator Cruz.

**OPENING STATEMENT OF HON. TED CRUZ,
A U.S. SENATOR FROM THE STATE OF TEXAS**

Senator CRUZ. Thank you, Mr. Chairman.

America is an exceptional country. When our country was founded, we crafted a Constitution that Thomas Jefferson explained would "serve as chains to bind the mischief of Government." There has never been more mischief of Government than there is right now.

And the Bill of Rights, the first ten amendments to the Constitution, are precious to every American. The Bill of Rights begins with the First Amendment. For over two centuries, Congress has not dared to mess with the Bill of Rights. This amendment here today, if adopted, would repeal the free speech protections of the First Amendment.

Mr. Chairman, when citizens hear that, they gasp. As immune as we are to abuse of power from Government, citizens are still astonished that Members of Congress would dare support repealing the First Amendment.

And let us be clear. This amendment does not just do it for corporations; it does not just do it for billionaires. Nothing in this amendment is limited to corporations or billionaires. This amendment, if adopted, would give Congress absolute authority to regulate the political speech of every single American, with no limitations whatsoever. This amendment is about power and it is about politicians silencing the citizens.

Mr. Chairman, when did elected Democrats abandon the Bill of Rights? Mr. Chairman, where did the liberals go? You know, in

1997, when a similar amendment was introduced, here is what Ted Kennedy said about it: "In the entire history of the Constitution, we have never amended the Bill of Rights, and now is no time to start. It would be wrong to carve an exception to the First Amendment. Campaign finance reform is a serious problem, but it does not require that we twist the meaning of the Constitution."

Mr. Chairman, here is what Democrat Russ Feingold said at the time: "Mr. President, the Constitution of this country was not a rough draft. We must stop treating it as such. The First Amendment is the bedrock of the Bill of Rights. It has as its underpinnings that each individual has a natural and fundamental right to disagree with their elected leaders. Not if this amendment passes. If this amendment passes, Congress can say you, the citizens, are no longer citizens, you are subjects, because we have repealed the First Amendment and taken away your ability to speak."

Senator Feingold in 2001 said the following about a very similar amendment: "This proposed constitutional amendment would change the scope of the First Amendment. I find nothing more sacred and treasured in our Nation's history than the First Amendment. It is the bedrock of the Bill of Rights. It has as its underpinnings the notion that every citizen has a fundamental right to disagree with his or her Government. I want to leave the First Amendment undisturbed."

Mr. Chairman, I agree with Ted Kennedy and Russ Feingold. And where are the liberals today? Why is there not a liberal standing here defending the Bill of Rights and the First Amendment?

Mr. Chairman, 42 Democrats have signed their name to a constitutional amendment that would give Congress the power to muzzle Planned Parenthood and the National Right to Life; 42 Democrats have signed their name to giving Congress the right to muzzle the Sierra Club, to muzzle the National Rifle Association and the Brady Center on Handgun Violence, to muzzle Michael Moore and Dinesh D'Souza, to muzzle the Teamsters and the National Education Association, to muzzle the NAACP, to muzzle the Anti-Defamation League, to muzzle pastors and priests and rabbis who organize their parishioners to be involved in politics.

Mr. Chairman, I am today introducing two bills to further protect the free speech rights of individuals, and I will be discussing those later in this hearing. But I would note this amendment, if adopted, would give Congress the power to ban books and to ban movies.

And, by the way, *Citizens United* was about fining a movie maker who made a movie critical of Hillary Clinton.

Mr. Chairman, Ray Bradbury would be astonished because we are seeing Fahrenheit 451 Democrats today. The American people should be angry about this. And, Mr. Chairman, the Senators who put their name to this should be embarrassed that they have signed up for repealing the free speech amendment, the First Amendment.

Thank you.

Chairman LEAHY. The statements have been completed, and I wonder if Senator McKissick and Mr. Abrams and Professor Raskin could join us at the appropriate places at the table.

The first witness will—you know, it does—Officer, please remove the man holding up the sign, contrary to the rulings of the Chair.

As the Committee knows, I have not taken a position one way or the other on these constitutional amendments, but we are having a hearing, and I want people who are for or against them to be able to be here. But I do not want people blocking the views of others. You have plenty of time to do your photo ops outside both for and against it. But let us hear from the witnesses.

The first witness is Senator Floyd McKissick. He has served in the North Carolina State Senate since 2007. He is currently the Deputy Minority Leader as well as a partner at the law firm of McKissick and McKissick. I would also note in the audience—Senator, I apologize for the voice. It is allergies. But I also would note for the record that your son is here in the audience. I note that for some day when somebody is looking through the McKissick archives, they will see that.

Please go ahead, Senator.

STATEMENT OF HON. FLOYD B. MCKISSICK, JR., STATE SENATOR, NORTH CAROLINA GENERAL ASSEMBLY, RALEIGH, NORTH CAROLINA

Mr. MCKISSICK. Thank you, Mr. Chairman. It is a privilege and honor to be here this morning. I want to thank all of you for this opportunity to testify. My name is Floyd McKissick, Jr. I am a long-time resident of North Carolina, and I have the honor of serving in the North Carolina State Senate, where I represent Durham and Granville Counties and act as the Deputy Democratic Leader. I first entered the legislature in 2007, so my time there can be roughly divided into two different periods: before *Citizens United* and after.

I entered politics for the same reason I am sure that many of you did. I saw ways that North Carolina's government could work more effectively to make a difference for the people in my community who needed a hand up, a solid education, better jobs, and safer communities.

All that changed after *Citizens United*. In 2010 alone, Americans for Prosperity, a group funded in large part by the Koch brothers, spent more than a quarter of a million dollars in North Carolina. Another group, Civitas Action, spent more. A new organization that sprang up, called Real Jobs North Carolina, spent almost \$1.5 million. Overall, three-quarters of all the outside money in State races that year were tied to one man: Art Pope. Pope and his associates poured money into 22 targeted races, and the candidates they backed won in 18 of those races.

In 2012, \$8.1 million in outside money flooded into the Governor's race. A large portion of that money was tied to Mr. Pope. And before he had even been sworn into office, our new Governor announced who would be writing the new State budget. Surprise, surprise. Art Pope is our State budget director this time. He could afford to spend lavishly, and he certainly did, and he got his money's worth.

When Justice Kennedy wrote his decision in *Citizens United*, he said that limitless outside spending "[does] not give rise to corrup-

tion or the appearance of corruption.” Try telling that to anyone who saw how the sausage got made in North Carolina.

There are winners and losers in every budget. And in the budget he produced, it is undeniable that Mr. Pope won big. Our State slashed corporate income taxes and lowered the share paid by the State’s wealthiest people.

As for the losers, there were plenty. Tens of thousands of people lost their unemployment benefits. Public education funding was drastically cut back. Half a million low-income people were refused access to Medicaid that we had already paid for. And while millionaires got a tax break, some working families actually got a tax hike.

But that is not all. After the tide of dark money flooded into our elections, we saw two more big changes that should cause great concern for all of us.

First, it got harder for ordinary people to vote. A month after the Supreme Court gutted Section 5 of the Voting Rights Act, North Carolina passed one of the most restrictive anti-voter laws in the country. It cut the early vote period from 17 days down to 10 days. It eliminated the ability of teenagers to preregister to vote before their 18th birthday. And it eliminated same-day voter registration. It also enacted a rigid voter identification requirement that required forms of ID that more than 300,000 North Carolinians do not have. Those restrictions have had the biggest impact on the students, the elderly, the poor, and people of color. Simply put, Art Pope, Americans for Prosperity, and the Koch brothers paid big money to roll back the civil rights advances that generations of Americans have paid for in their blood.

Second, it got easier for rich people to pour money into elections. Big donors got new opportunities to write even bigger checks to candidates, and they got more ways to avoid any kind of disclosures. And any public financing system that we had in the State, including one that provided for clean judicial elections, was gutted. The result of that decision was particularly painful to me this year because I watched one of our sitting Supreme Court Justices, Robin Hudson, attacked in the most despicable and dishonest way. A million dollars in outside money was poured into that primary race, with more than \$650,000 coming from a Washington-based organization trying to protect the anti-voter tactics and suppression laws that were pushed through the legislature. I cannot think of a more vicious cycle than taking a little more power from the voters and handing it to the big spenders.

Well, once big money got into our elections, that is exactly what happened. I believe that public service is a calling. We are called to use our gifts to create laws, to exercise our judgment, and to administer our cities, our States, and our Nation. *Citizens United*, the *McCutcheon* decision, and the Supreme Court decisions that have occurred have made this a mockery.

What is left does not look like democracy. Democracy is when the Government represents the people. Today it seems that big money and big donors pull the strings while ordinary people find it harder and harder for their voices to be heard. You have a chance to restore this democracy, to restore the First Amendment, and to make

clear that our Government should represent all the people, not just the wealthy few.

I urge you to support Senate Joint Resolution 19.

[The prepared statement of Mr. McKissick appears as a submission for the record.]

Chairman LEAHY. Thank you very much, Senator.

The next witness is Mr. Floyd Abrams, a senior partner at the law firm Cahill Gordon and Reindel in New York, and not a stranger to this Committee or this Senator over the years.

Mr. Abrams, please go ahead, sir.

**STATEMENT OF FLOYD ABRAMS, PARTNER,
CAHILL GORDON & REINDEL LLP, NEW YORK, NEW YORK**

Mr. ABRAMS. Thank you, Senator Leahy. I appreciate your invitation for me to appear here today. The description of the constitutional amendment that is before you today states in its text that it “relate[s] to contributions and expenditures intended to affect elections.”

That is one way to say it. I think it would have been more revealing to say that it actually “relate[s] to speech intended to affect elections.” I think it would be even more accurate to say that it relates to limiting speech intended to affect elections. And that is the core problem with it. It is intended to limit speech about elections and it would do just that.

To start at the beginning—and this has been said before; it is worth repeating—no ruling providing First Amendment protection has ever been reversed by a constitutional amendment. No ruling by the Supreme Court. No speech that the Supreme Court has concluded warranted First Amendment protection has ever been transformed by a constitutional amendment into becoming unprotected speech and, thus, subject of criminal sanctions.

Think of what we protect under the First Amendment. Chief Justice Roberts in the *McCutcheon* opinion observed that money in politics may be “repugnant to some, but so too does much of what the First Amendment vigorously protects. If the First Amendment protects flag burning, funeral protests, and Nazi parades—despite the profound offense such spectacles cause—it surely protects political campaign speech despite popular opposition.”

The proposed amendment before you today deals with nothing except political campaign speech. It does not deal with money that is spent for any other purpose other than persuading people to vote for or against. And as such, it would limit speech that is at the heart of the First Amendment. And the fact that the amendment is proposed in the name of equality makes it no less threatening.

The Supreme Court observed, I think with particular prescience, in the *Buckley* case, in an opinion joined by great liberal jurists—Justice Brennan, Justice Marshall, Justice Potter Stewart, stalwart defenders of the First Amendment—that the concept that Government may restrict some elements—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. It is that view, however, which is at the core of this amendment which would reverse the *Buckley* case as well as *Citizens United*. This amendment is not a *Citizens United* amendment. It goes way back to the 1970s, and

it would reverse *Buckley's* ruling as well that independent expenditures are protected by the First Amendment.

The title of the proposed amendment goes even farther. It says that it would "Restore Democracy to the American People." I am willing to pass over in silence rhetorical overkill about what democracy means, but the notion that democracy would be restored—saved—by limiting speech is a perversion of the English language. It is inconsistent with any notion of democracy to say the way to accomplish it is to limit speech.

So let me say in the most direct manner that it is deeply, profoundly, obviously undemocratic to limit speech about who to elect to public office.

The other pervasive problem with the amendment is that it is rooted in the disturbing concept that those who hold office in Federal and State legislatures, armed with all the advantages of incumbency, may effectively prevent their opponents from becoming known as a result of spending money to put ads on describing who they are.

I would just conclude with this thought: It is not a coincidence that until today the First Amendment has never been amended. It is not a coincidence that no decision of the Supreme Court affirming First Amendment rights has ever been overruled by constitutional amendment. Emotions have run high before about decisions of the Court which provided higher levels of liberty than Members of this body thought was appropriate. But self-restraint won the day, and I urge that self-restraint win the day today.

Thank you.

[The prepared statement of Mr. Abrams appears as a submission for the record.]

Chairman LEAHY. Thank you, Mr. Abrams.

The next witness is Jamie Raskin. Professor Raskin teaches constitutional law, legislation, and the First Amendment at American University's Washington College of law here in Washington, DC. If that is not enough to keep him busy, he also serves as a Senator in the Maryland State Legislature.

So, Professor Raskin, welcome.

STATEMENT OF JAMIN B. "JAMIE" RASKIN, PROFESSOR OF LAW AND DIRECTOR, PROGRAM ON LAW AND GOVERNMENT, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, WASHINGTON, DC

Professor RASKIN. Thank you very much, Mr. Chairman. Delighted to be with you.

We have built two walls to protect American democracy. The first is Jefferson's wall of separation between church and state, which protects a flourishing religious realm and a nation free from theocracy. The other is the wall we have built brick by brick in statute over a century to separate plutocratic money from democratic politics.

Starting with the 1907 ban on corporate contributions in Federal races, which still stands, we have worked to wall off vast corporate wealth and personal fortunes from campaigns, defining the electoral arena as a place of equality. But 4 years ago, in *Citizens United*, a bitterly divided 5–4 Court bulldozed a major block of the

wall, the one that kept trillions of dollars in corporate wealth from flowing into our campaigns.

Three years ago, in *Arizona Free Enterprise Club*, the same five Justices struck down public financing programs that use matching funds to amplify the voices of poorer candidates competing to be heard over the roar of big money. In a “world gone topsy-turvy,” Justice Kagan wrote in dissent, the majority treated “additional campaign speech and electoral competition” as “a First Amendment injury” and struck down a State law that “expands public debate” and “provides more voices, wider discussion, and greater competition.”

This year, in *McCutcheon*, the same five took a sledgehammer to aggregate contribution limits, empowering tycoons to max out to every Member of Congress and all of their opponents.

After five 5–4 decisions like these, the wall between democracy and plutocracy is crumbling. If we keep waiting around, the last few bricks will be removed soon, including contribution limits, the ban on corporate contributions, rules against coordinated expenditures, and the ban States have on writing campaign checks in legislative session—all of them at odds with the Orwellian dogma of five Justices, that money is speech, corporations are people, and to identify corruption you have got to find a bribe.

S.J. Res. 19 will enable us to protect democratic politics and free market economics. In politics, we need to revive democratic self-government where all voices can be heard and not drowned out by billionaires who turn up the volume on their sound tracks to ear-splitting levels and CEOs who write checks with “other people’s money,” as Justice Brandeis called it.

In economics, we need to strengthen businesses that practice free market competition and pull the plug on rent-seeking corporations that spend freely on campaigns now to obtain tax breaks, sweetheart deals, and public subsidies later.

Adam Smith, who favored honest competition and feared industry capture of Government, would tell us that in campaign finance, “laissez isn’t fair.”

When Justice Scalia went on CNN and defended *Citizens United*, he invoked everyone’s favorite Founder: “I think Thomas Jefferson would have said, ‘The more speech, the better,’” he opined. But the Sage of Monticello never equated corporations with citizens, and he voiced dread at the prospect of plutocracy. He warned future generations not to embrace a “splendid government of an aristocracy, founded on banking institutions” and corporations “riding and ruling over the plundered ploughman and beggared yeomanry.” This nightmare vision sounds a lot like the *Citizens United* era. The vast majority of Americans are appalled. Eighty percent oppose *Citizens United* and unlimited spending; 74 percent of voters in Colorado and Montana voted to call for this amendment; and 79 percent of the people favor limits on campaign money.

This amendment protects our power to set such limits, not by creating perfect equality—billionaires will always have greater resources—but by assuring that the rich will at least inhabit the same polity as nurses, teachers, and small business people. It is one thing to tell middle-class Americans that their \$100 contribution has to go up against a \$5,000 contribution, a scale of 50:1,

quite another to say it has to go up against a \$5 million contribution or expenditure, a scale of 50,000:1. A regime like that fits plutocracy, not democracy.

I do think the amendment should more clearly empower the people to wall off campaigns from corporate treasury wealth, which has been seen as a peril to democracy for more than a century. This is no assault on the First Amendment because *Citizens United* did not increase the rights of a single citizen to express his or her views. All it did was confer power on CEOs to write checks on the corporate treasury account for political campaigns without a vote of the shareholders and without notice to the shareholders. The case has nothing to do with increasing free speech of the people and everything to do with increasing the power of the CEOs over the people. If we do nothing now, pretty soon the people will no longer govern the corporations; the corporations will govern the people.

At times like this, when the Court has undermined democracy, we have amended the Constitution. We did it with the disenfranchisement of women, and we did it when the Court upheld poll taxes. Most of the amendments added since the Bill of Rights have strengthened the progress of democratic self-government and expanded the political rights of the people even as the defenders of inequality and elite privilege protested that their rights were being violated. So do not be intimidated. The people are with you.

[The prepared statement of Professor Raskin appears as a submission for the record.]

Chairman LEAHY. Thank you, Professor Raskin.

Let me begin in my time, and then I am going to turn the gavel over to Senator Durbin. Of course, I will be followed by Senator Grassley.

Senator McKissick, the story of our Constitution has been one of progressive inclusion, as I read it. In fact, many of our Founding Fathers believed only white land owners should be allowed to participate in our elections. Each generation of Americans has expanded on the promise of our founding: the march toward a more perfect union.

We have amended the Constitution many times to ensure our representative democracy. The 14th and 15th Amendments, for example, they transformed the Constitution. They guaranteed the equal protection of law for all Americans, and they prohibited the abridgment of the right to vote on the basis of race.

The 17th Amendment gave Americans the right to elect Senators of their choosing because there was a concern that corporations were corrupting our State legislatures so they would elect Senators who were beholden to those corporations.

We continued with the 19th Amendment, expansion of the right to vote to women; the Civil Rights Act of 1964; the Voting Rights Act of 1965; the 26th Amendment's extension of the vote to young people.

Now, I mention all of those because they mark progress on the path of inclusion and make our country more representative. And I fear that these Supreme Court decisions have reversed that course.

Your father was a civil rights leader. You continue his legacy as an elected official in North Carolina. Do you believe the unprecedented money that flowed into State races in the wake of *Citizens United* has led to a more representative State government in North Carolina?

Mr. McKISSICK. It absolutely has not led to a more representative government in North Carolina at all. The will of the people of the State of North Carolina is not being heard, and I think that is represented by these Moral Monday demonstrations which have occurred in our State. They started out with 500 people coming out every Monday when we convened our sessions protesting many of these regressive policies that have been implemented. They grew to masses of 7,500 people. There were close to 1,000 people arrested because they were absolutely opposed to the policies, initiatives, and legislation that were coming out of Raleigh. I mean, these were actions that were not only impacting voting rights for individuals. If you had polled people about these voter suppression laws that were passed and asked them whether they liked the early vote period, well, we have eliminated now 1 week of that early vote period. In 2008, we had over 700,000 people vote that first week. By the time 2012 came, it was over 900,000 people voting.

People also had the right to do same-day voter registration when they came in for early voting. There were people getting able to preregister when they were 17 years old so they could vote at 18 years old.

If you asked the vast majority of North Carolinians did they like the early vote period, did they like the right to exercise their constitutional privilege in a broader, more expansive way, the answer would be resoundingly yes.

Chairman LEAHY. Thank you.

And, Professor Raskin, you have heard some who have characterized the Udall amendment where we are concerning today as an effort to repeal the First Amendment. Now, I do not believe that is accurate, but I hear it in paid ads and others, and I guess if some of the billionaires are going to profit by this, paying for that enough time in advertisements, Americans may believe it.

You are a constitutional law scholar. If this proposed constitutional amendment were to be ratified, would it repeal the First Amendment?

Professor RASKIN. Of course not. The first thing we have to remark is that the *Citizens United* case did not endow a single individual with any right to speak that he or she did not already have. All the employees of the corporation, all of the members of the board, all of the executives could go out and spend whatever they wanted of their own money. All that *Citizens United* did was to say that the CEO could take the corporate checkbook and start writing checks to put into politics, and that CEO could already have spent his own money in politics. So what we have done is we have converted every corporate treasury in the country into a potential political slush fund.

But, you know, in a deeper sense, Mr. Abrams raised the question about *Buckley v. Valeo* and the rights not of corporations but, say, of billionaires in order to spend. You know, there is a very important Supreme Court decision called *Ward v. Rock Against Rac-*

ism in 1989 where there was a terrific group called “Rock Against Racism” which would put on concerts in Central Park, but they wanted to crank the sound all the way up so that the preschool could not meet and the yoga class could not meet and other people who were doing other musical exercises could not do it, and the Central Park authorities told them they had to turn it down. And the Supreme Court said that is appropriate because you do not have the right under the First Amendment to drown out everybody else’s speech. And I think if you understand that case, you can understand why the billionaires should not be able to take over whole States like North Carolina or like Montana. And I would urge everybody to read the filings of the State of Montana in the *Bullock* case because what the State described was a history of massive corporate corruption from outside of the State to take over their democracy, and the ban on corporate spending there was an attempt for the people of Montana to govern themselves. And that is really what all of this is about—self-government, so that democracy is for the people.

Chairman LEAHY. Well, I have further questions which I will submit for the record because I want to keep within our time limits.

[The questions of Chairman Leahy appears as a submission for the record.]

Chairman LEAHY. My time is up, and I yield to Senator Grassley.

Senator GRASSLEY. Thank you. Before I ask my first question of Mr. Abrams, I want to correct something that often shows up in the press, and one of my colleagues has said the same thing today. *Citizens United* said—I mean the comment was made that *Citizens United* opened the door to millions of dollars in contributions. What *Citizens United* dealt with, and only, is with expenditures and has no effect on campaign contributions.

Mr. Abrams, last Friday, a front-page article of The Washington Post wrote, “Political nonprofit groups have become major players in elections since the Supreme Court’s 2010 *Citizens United* decision paved the way for unlimited political spending by corporations and unions.”

Now, I know that political nonprofit groups have been active in campaigns for at least 10 years, long before *Citizens United* was decided. My question: Am I right in thinking this point made in The Washington Post article as well as other outlets is incorrect?

Mr. ABRAMS. Well, I would say that I do not think it is correct to say that these groups are playing an enormously greater role than they used to. As you point out, they have been around for a while. There is also nothing wrong with them playing a greater role. The underlying thesis of critics of this is that—and you have heard it today a lot—outside money is bad money, is money that should not be around, should not be allowed. And I reject that, and the Supreme Court has rejected that.

On the specific issue of nonprofits, nonprofits do not have to publicly report their spending, except in certain areas, so it is hard to know exactly how much more involvement that they have had. But only a small percentage, this we do know, of the \$7 billion spent in the 2012 election came from nonprofit groups or other unreported sources.

Senator GRASSLEY. Again, Mr. Abrams, there are organizations in Washington that say they want to limit the role or influence of money in politics. Is that goal consistent with the First Amendment?

Mr. ABRAMS. Well, I think what they are really saying is that they want to limit the speech that money allows. When people complain that there is going to be more of this and more of that or that the speech will contain falsehoods or that politicians or others will be accused in ways that they find uncongenial, you know, what they are really saying is that the money is doing bad things, and that is at its core inconsistent with the First Amendment. The First Amendment favors speech. It favors more rather than less speech. It favors speech from diverse sources. It rejects the notion that speech can be constrained or limited because one person has more than another person.

All of that comes with the First Amendment, and so a general denunciation of money in politics is really a denunciation of politics itself and of the public debate that we have in politics.

Senator GRASSLEY. My next question deals with a point you made in your opening remarks, and I ask it only by way of giving you an opportunity to emphasize what I think is a very important point. Supporters of the proposed amendment think that it is needed to prevent wealthy donors from drowning out ordinary citizens and to restore democracy. Could you elaborate on how this position is fundamentally at odds with the constitutional protection of free speech?

Mr. ABRAMS. Yes. When somebody says that my speech will drown out someone else's speech and, therefore, I should say less, it is the functional equivalent of telling a newspaper, "You really ought to have fewer editorials. You really should not spend your space denouncing one candidate for office. It is just not fair. You have too much power."

I grew up at a time when Democrats—Adlai Stevenson was running against the one-party press. Every newspaper was Republican—just about every one in those days. No one would have thought that the answer to the so-called one-party press was saying the press cannot print something or they are printing too much or they are drowning out the opposition. That comes on the menu of the First Amendment, and that menu includes as much speech as one wants.

Senator DURBIN [presiding]. I would like to address my first comment and question to Professor Raskin. We recently invited retired Justice John Paul Stevens to testify before the Senate Rules Committee, which was an exceptional opportunity for us to hear his thinking, and he raised some interesting questions about this issue. He said, "While money is used to finance speech, money is not speech. Speech is only one of the activities that are financed by campaign contributions and expenditures. Those financial activities should not receive the same constitutional protection as speech itself. After all, campaign funds were used to finance the Watergate burglaries, actions that clearly were not protected by the First Amendment."

Then in closing in his remarks, he proffered a sample constitutional amendment on the subject of reversing *Buckley v. Valeo*, and

I think he made an observation that we ought to consider, even those of us who support Senate Joint Resolution 19. He basically suggested that we should include the word “reasonable” when we are talking about limitations on campaign spending, and here is what he said: “I think it wise to include the word ‘reasonable’ to ensure that legislatures do not prescribe limits that are so low that incumbents have an unfair advantage or that interfere with the freedom of the press.”

Do you believe that the word “reasonable” would be a positive addition to this Senate joint resolution?

Professor RASKIN. I do, and it appears in the Fourth Amendment, of course, and I think it would make sense to appear in the 28th Amendment as well. Of course, reasonableness applies to all of the constitutional amendments, and you can find dozens of Supreme Court cases which read a reasonable requirement in, which is why I found some of the rhetoric a little overheated that this is an attempt to impose unreasonable limits. Nonetheless, I would definitely take care of that problem by inserting the word.

Your other point, though, about money not equaling speech is a critical issue for people to understand. I mean, there are lots of forms of purchase and exchange that we criminalize—for example, buying sex. We do not say if someone wants to purchase the services of a prostitute, well, that is just an expression of their speech, because we look at what the social meaning and context of the use of money in that way is. We look at the meaning not just of the speech involved, but the act itself.

And I think even Mr. Abrams and the people on the other side on this issue take the position that laws against bribery are okay, and it is not clear according to their position why. After all, if I just feel very strongly about an issue and I want to give you \$1,000 or \$1 million to go my way, why shouldn't you be able to accept it? And I think it is because we believe that within the governmental process and the electoral process, there are right reasons for those who hold public office to make decisions, and there are wrong reasons. And a wrong reason is the money that you are either going to put in your pocket or huge amounts of money that you are going to put in your campaign or lots of spending to take place. So why can't we take into account the entire social context of money? Why just when the politician gets rich?

So Justice Stevens has repeatedly argued, money, of course, is not speech, money is property. It is a medium of exchange. Speech has verbs and adjectives and nouns, and it is simply what the philosophers call a “category error” to mix them up.

Senator DURBIN. Well, I might say, Mr. Abrams, the Fair Elections Now bill that I have introduced, you suggested incumbents are trying to protect themselves by arguing against *Citizens United*. I commend that bill to you because we offer, for those who wish to voluntarily become part of that process, a greater opportunity for challengers that experience suggests that they currently experience—that they currently have under the law.

Senator McKissick, one of the things that has been raised consistently is that we ought to let a thousands flowers bloom here, and we have been chided, saying we are not being good liberals by not expanding this. Let me ask you, when it comes to the issue of

North Carolina and this gentleman Mr. Pope, whom I have not met, it appears that he was responsible for 72 percent of all outside spending in your State in the year 2010, the 2010 election. Instead of really being an open process in North Carolina, it turned out to be a very elite situation, an elite situation where his wealth gave him more power than the average person living in North Carolina to express his political will.

Could you comment on what has happened to the North Carolina political process because of this favoritism toward the elite?

Mr. MCKISSICK. Well, I think as a result of Art Pope's capacity to give millions and millions of dollars, he basically tainted the whole election process in many respects because he had influence substantially disproportional to the number of people who shared his beliefs.

When it comes to the political process, as we have seen it today, there are many people who feel as if they have been disenfranchised in terms of voting rights, in terms of women rights. They have gone in now, and as a result of legislation that has been adopted, there will be new ambulatory standards applied to abortion clinics. As a result, in North Carolina—there are 16 abortion clinics—all of them will be closed except for one. They have gone in and purged people from boards and commissions that have been previously appointed by prior Governors and prior members of the General Assembly, either by the President Pro Tem or Speaker of the House. All of their terms were shortened so they could go in and appoint people that shared their philosophies.

When it comes to public education, there was legislation that was passed that would virtually eliminate teacher tenure in our State. That was challenged in the court and found to be unconstitutional. But many measures affecting public education that the vast majority of North Carolinians are opposed to that in many respects have now been adopted and been legislated. I mean, no limitation on the number of kids in the classroom; we are 46th in teacher pay in this country—things that are putting North Carolina behind. And many of these positions, many of these issues, many things dealing with unemployment compensation, we have now—rather than giving people 26 weeks of benefits, we only have gone to 12 to 20 weeks of benefits. We are the only State in America to disqualify our residents from receiving long-term unemployment benefits that were eligible for and it cost us \$780 million, as well with the failure to expand Medicaid.

So a lot of things have happened in our State that the vast majority of North Carolinians, if polled, would not agree with, but they have been implemented as a result of the amazing level and financial capacity of Art Pope to give and to influence the outcome of 18 critical races.

Senator DURBIN. Senator Cornyn. I am sorry. Senator Hatch.

Senator HATCH. Well, thank you, Mr. Chairman.

Mr. Abrams, I am not the only one who believes that you are the leading First Amendment lawyer in the country. You have—and you are not a member of my party either.

Mr. ABRAMS. That is true. Not yet.

[Laughter.]

Senator HATCH. I would like that. I like the thought.

We are very privileged to have you here today, and we are grateful to have you other witnesses as well.

Now, Mr. Abrams, this is not the first constitutional amendment proposed to restrict political speech. This one, however, goes beyond what we have seen in the past. As far as I can tell, for example, Senator Joint Resolution 19 is the fifth one for the purpose of achieving what it calls political equality. Under this amendment, the Government could constitutionally redefine political equality and decide whose speech must be suppressed or should be suppressed or allowed in order to achieve it.

Isn't this at odds with America's entire history regarding Government control of speech?

Mr. ABRAMS. Well, it is. It gives, you know, enormous power to the legislatures, to Congress and to the State, to enforce the law. And I would assume that the courts would be very deferential to anything that those legislatures did. And that being said, while there might be an equal protection or other arguments made, I really believe that an amendment of this breadth would change substantially and in an irrevocable way, except if there were another constitutional amendment, the whole nature of American society as a speech-protecting society.

Senator HATCH. Well, another difference is that this amendment would give the Government authority to control not only money but also what it called "in-kind equivalence." Like the notion of political equality, this is something completely new.

Now, it appears to me that if this amendment passes, the Government will be able to define this category however it wants and, therefore, control of what—they would be able to control whatever Government wants.

Now, how far do you think this new dimension of regulation extends? And do you expect there would have to be litigation to figure out how it applies?

Mr. ABRAMS. Oh, there is no doubt of that. There would have to be enormous litigation. Look, the reality is—how shall I say this to Members of Congress here? If you provide the Congress or State legislatures with power, they are likely to use it.

Senator HATCH. Right.

Mr. ABRAMS. And they are likely to use it in this area in a speech-destructive way. I mean, that is what this whole thing is about. I understand the argument of equality that more people—few people have great wealth, that wealth gives more power, as has been said. But the effect of this amendment would be to embody into our law by changing, substantively changing and limiting the First Amendment in a way in which at the least we are going to have years and years of litigation. But I fear—I do not mind that personally—but what we are going to have beyond that is a significantly diminished ability to have the sort of ongoing confrontations at length that we have in our electoral process. The 2012 election, in my view, was a good example of the system working. There was lots of money out there. There was lots of speech. People heard, sometimes more than they wanted to, but they heard the views of the parties and had a chance to vote. That is the way the system ought to work, and that is threatened by this legislation, this amendment.

Senator HATCH. In his prepared statement, Professor Raskin says that the Supreme Court's decision in *Citizens United v. FEC* eliminated the statutory provision "that kept trillions of dollars in corporate . . . wealth from flowing into Federal campaigns." I think that is a misleading description of the case. As I read it, the *Citizens United* case involved a nonprofit organization, not a wealthy for-profit corporation, and the case did not involve campaign contributions at all. Am I right?

Mr. ABRAMS. Yes. It did not involve contributions at all, and it left standing the contribution section.

Senator HATCH. Also, have we seen a flood of corporate wealth flowing into Federal campaigns since the *Citizens United* decision?

Mr. ABRAMS. We have seen a lot of individuals giving money. That is where the big money has come from. We have seen an increase in the amount of money from what I would call Main Street rather than Wall Street. What we have not seen is precisely what was predicted. We have not seen enormous sums, let alone trillions of dollars, from the biggest companies in America flowing into the electoral process. That just has not happened.

Senator HATCH. My time is up, Mr. Chairman.

Senator DURBIN. Thank you, Senator Hatch.

Senator Schumer? And I might note that there are two roll call votes on the floor, so if you see the movement around here, it is an effort to try to make the vote and keep the Committee hearing continuing. Senator Schumer?

Senator SCHUMER. Thank you, Mr. Chairman, and I appreciate all the witnesses being here, as well as Leader Reid and Leader McConnell being here as well.

I have been sort of really surprised at the level of rhetoric that we have heard from Senator McConnell and Senator Cruz. In fact, I think they want to replace logic with hyperbole. The bottom line is Senator McConnell says how shockingly bad this proposal is. Well, I will tell you what most people, most Americans think is shockingly bad: that our system has become distorted by a few who have a lot of money drowning out the voices of the others.

When John Stuart Mill said the answer to restrictions of speech is more speech, he did not mean just from one side. And the world did not exist that way then. But it exists now.

Then Senator Cruz said Americans would gasp if they heard what Democrats are trying to do. I will tell you what makes the American people gasp: It is that a small handful of people can have a huge effect on our political system, and not just defending incumbents. What a canard that is. Most of the money that has come from the super PACs and from many of these groups are knocking out incumbents, particularly those from the other side, whether they be Republican or Democrat.

Senator Cruz says that we should be embarrassed about this amendment? I will tell you, Senator Cruz, I am embarrassed about how our system is distorted by literally now billions of dollars coming into this system undisclosed, unregulated, and unanswered.

And Senator Cruz, maybe he fancies himself to be a constitutional expert. He knows that no amendment is absolute. His rhetoric, his over-the-top rhetoric here makes it seem like if you support this amendment, you are against the First Amendment.

Well, I want to ask you, Senator Cruz. Are you against anti-child pornography laws? He is not here, but would he be against anti-child pornography laws? Does that make him against the First Amendment? Is he an absolutist on the First Amendment? Is he against the ability to falsely scream—that you should—does he think everyone should be allowed to falsely scream “Fire” in a crowded theater? And if anyone is opposed to that, are they opposed to the whole First Amendment and against free speech? Libel laws? If you are for libel laws, does that mean you are against free speech and you are against the First Amendment? Absolutely not. We have always had balancing tests for every amendment.

Some of my colleagues on the other side I know do not believe there should be one for the Second Amendment. I believe there should, but I believe there is a right to bear arms. And I do not like seeing it through a pinhole. But that is neither here nor there.

We have always had balancing tests for every amendment. They are not absolute. And to say that you cannot have some regulation when billions of dollars cascade into the system and that is unconstitutional is false. It is absolutely false. It is against 100 years of the tradition in this country.

And we know what is going on here. I guarantee you that Senator McConnell would not have flipped his position, particularly on disclosure, if the vast majority of the money, unregulated money coming into the system were from Democrats not Republicans. We know that, because I remember him being here, the strongest advocate of disclosure. We cannot get a Republican to be on a single disclosure bill. I am sure even Mr. Abrams would agree that disclosure—the Supreme Court does agree—is not against the First Amendment.

Mr. ABRAMS. Yes. Yes, that is correct.

Senator SCHUMER. And I am sure he might agree that disclosure would be salutary even if he were not for limiting the amount of money that could be spent. Would you agree with that?

Mr. ABRAMS. I think some more disclosure would be salutary, yes.

Senator SCHUMER. Okay. So here is what I—I mean, to say that when it comes to money there should be no balancing test but when it comes to other parts of this amendment and other amendments there should be a balancing test is logically false, demonstrably false. And all the rhetoric, the overheated rhetoric, the hyperbole that we heard from Senator Cruz just defies logic, defies constitutional tradition. And it is not going to make us back down.

I do not believe the Koch brothers are being denied their First Amendment rights or would be under any legislation this Congress would pass. I do not believe it is the same exact part of the Constitution, same dearness that we hold in free speech to get up on a soapbox and make a speech or to publish a broadside or a newspaper as it is to put the 11,427th ad on the air, in fact, to make sure you buy all the available ad space on the air so your opponent cannot get a word in—I do not believe that is in the spirit of free speech, not just today but when James Madison, Thomas Jefferson, and our great, great Founders, the most brilliant group of men ever assembled, in my opinion—people, although they were just men; we wish there were some women there.

[Laughter.]

Senator SCHUMER. I do not think this is—I think if Thomas Jefferson were looking down, the author of the Bill of Rights, on what is being proposed here, he would agree with it. He would agree that the First Amendment cannot be absolute. He would agree that to keep a democracy going you cannot have a handful of a few who are so wealthy that they can influence the process and drown out the voices of the others. Any of us who has run for office and faced one of these super PACs knows, yes, you can get on your soapbox and distribute a leaflet and answer it, but in the way our political system works, you do not have a choice.

So I would like to get back to a fact-based, history-based debate on this measure and not this overheated rhetoric that if you are for this constitutional amendment, you are against the First Amendment. The First Amendment has always, always, always had a balancing test. It did then, it does now. And if there ever is a balance that is needed, it is to restore some semblance of one person, one vote, some of the equality that the Founding Fathers sought in our political system.

I have gone over my time because I was a little bit excited.

[Laughter.]

Senator KLOBUCHAR. Okay. They are asking us to take a brief recess, or I will miss the vote, which will be monumental. So we will return very soon when Senator Durbin returns. Thank you very much. We are in recess.

[Whereupon, at 12:14 p.m., the Committee was recessed.]

[Whereupon, at 12:21 p.m., the Committee reconvened.]

Senator WHITEHOUSE. My apologies for what we are facing here, but we are trying to get two votes in and keep the Committee active. And so Senator Whitehouse has already voted on the first amendment, and I am going to recognize him at this point. So if you see the musical chairs here, it is an effort to keep two things going at once. Senator Whitehouse?

Senator WHITEHOUSE. We can indeed walk and chew gum.

Nice to have you all here. I appreciate this, and I appreciate the lively debate that has taken place. I think the debate about the First Amendment and the lurid descriptions of how this is the first time in history Congress has tried to amend the First Amendment does overlook a rather significant fact in the room—indeed, the elephant in the room—which is that five conservative activists sitting on the U.S. Supreme Court for the first time decided that unlimited spending in elections was A-OK. And in doing so, they departed dramatically from the American people. Recent polling shows the Court in unprecedented bad odor with the American people as a result of that. The most damning polling information was from a recent Melman poll that shows by 9:1—by 9:1—Americans believe that this Supreme Court will favor corporations over individuals. And I would suggest that there is plenty of evidence in the Supreme Court's recent record, particularly the record of 5:4 decisions driven by the right-wing activists, to justify that concern. I do not think you can get by 9:1 Americans to agree that the sun rises in the east. So when they are concerned that this Court will favor corporations over individuals in that kind of number, I think that is a real warning shot across the bow of this Court that they

need to stop being activist and start trying to find consensus and start trying to rebuild this.

So if you omit the fact that five activist conservatives for the first time kicked down hundreds of years of controls over election spending and unleashed corporations, which are not even mentioned in the Constitution or the Bill of Rights, to spend unlimitedly in elections, you are omitting a relatively salient fact from the discussion. And I think that fact is really at the heart of this discussion. I see what we are trying to do as to repair an erroneous decision by the Supreme Court, a decision that is likely to end up in the category of *Lochner* and *Plessy* as really embarrassing moments in the history of a Court.

Let me make one additional point, and then I will ask anybody who wishes to comment, point one being we are trying to fix a Court that kind of went berserk by a narrow five conservative judge margin and did so to massive benefit to the corporate interests that in many cases actually backed those judges getting on the Court.

The second point is that the decision overlooked some very important factors. First of all, they got the whole business of the transparency totally wrong, and they have not admitted that they got it totally wrong, but it is undeniable that they got it totally wrong because it is totally untransparent.

But another important thing that they overlooked is that there is—I think I am correct in this, Mr. Abrams—a First Amendment limit in this area that allows us to protect the electoral process against fraud and against corruption. That is well-established First Amendment doctrine, is it not?

Mr. ABRAMS. Yes.

Senator WHITEHOUSE. Yes, and so in order to get around that little problem on the way to unlimited corporate spending, they had to pretend that unlimited corporate spending could not—not just might not or probably would not—could not create any risk of corruption in campaigns, because if it did, which it obviously does, then Congress would have the right and ability under the First Amendment—under the First Amendment—to legislate in this area. And the thing that as a prosecutor I have noticed—and it is not just me; Senator McCain and I wrote a brief together to the Supreme Court that made precisely this point, so it is a bipartisan point. If a corporation is allowed to spend unlimited money, particularly if it is allowed to do it anonymously, guess what? It is allowed by them to threaten and to promise to spend unlimited money. And all the safeguards that the Supreme Court said were going to be there about seeing the ads up on the TV and knowing who was behind them and having it add to the public debate falls to ashes when you are talking about a corporate lobbyist going into a Member of Congress and saying here is the ad we are going to play, we are going to put \$5 million behind it in your district unless you vote right.

And so the power to spend that kind of money is also the power to threaten, and that power to threaten is the power to corrupt. And that is a nexus that I think we have to remember, and I will yield back my time.

Professor Raskin, would you care to comment?

Professor RASKIN. Please. Thank you very much, Senator Whitehouse. There are several points I would like to make.

One is that the *Citizens United* decision overthrew essentially two centuries of understanding of what a corporation is. If you go back to 1819, Chief Justice John Marshall, the great conservative Justice, said in the *Dartmouth College* case, that a corporation is an artificial entity, invisible, intangible, existing only in contemplation of law, and possessing only the rights that the State legislature confers upon it through the charter. Because of that, for more than a half century we have forbidden corporations—

Senator WHITEHOUSE. Which was also the understanding of the Founding Fathers, correct?

Professor RASKIN. Well, there were very few corporations and they were on an extremely short leash, and you can find lots of quotations from Thomas Jefferson who said we have got to keep them on a short leash because something that Justice White ended up saying might happen. Justice White said in *First National Bank of Boston v. Bellotti*, the State has created the corporation and the State need not permit its own creation to consume it. But, of course, they have made that the law in *Citizens United*.

But in the *Austin v. Michigan Chamber of Commerce* case and in the *McConnell v. FEC* decision, the Supreme Court said, of course, the Government can keep corporate money from flowing into political campaigns on an independent expenditure basis because this is money that is in there for economic purposes. The reason why McDonald's has billions of dollars is because you eat their hamburgers, not because you agree with their politics. And so Justice Marshall, Thurgood Marshall, noted that there was a distinct corrupting effect in taking that money assembled for economic purposes through lots of State-conferred advantages—perpetual life, limited liability of the shareholders, favorable treatment of the assets of the company—and using it to entrench the political power of the corporation. This goes all the way back for two centuries, this understanding of why the corporation has got to be confined to the economic realm.

And the Court did say—and I wish Senator Hatch were still here, because he said that I was somehow unfair in taking a case that was just about a not-for-profit's use of a movie and saying that it applies to all of the political spending by private corporations in America. I agree it is unfair, but it was not my decision. That was the decision of the Supreme Court. When the case came to the Supreme Court, there was a very simple claim made by the *Citizens United* group, which I think they should have won on. It was a statutory claim, and they said what we have got is a pay-per-view, pay-on-demand movie that we are putting up there. It is not like a 30-second attack ad that everybody has got to see. We do not think that comes within the prohibition of McCain-Feingold. The plaintiffs could have won and they should have won on that point.

They also could have won because even if you counterintuitively view it as a TV ad, 50,000 people would have had to see it. They would have been lucky to have had 500 people watch their movie, right?

So there were lots of statutory ways to solve this case, and Chief Justice Roberts, who said he was committed to judicial minimalism

and the canon of constitutional avoidance, a central principle of constitutional adjudication, which is you do not reach a constitutional issue if there is a better statutory way of coming out in the same way, they destroyed the canon of constitutional avoidance for the purposes of *Citizens United* in that case. They rushed over five different ways that they could have found for the not-for-profit group in order to give the parties the command to go back and reargue the case based on all corporations everywhere at all times.

So when the Supreme Court came back and said all corporations have a First Amendment right to spend money in politics, that was way beyond what they were being asked to do originally, and it depended on reargument and rebriefing in the case. This was pure judicial activism.

Let me just say one other thing, which is a series of questions have been posed to the other side about whether they have an absolutist perspective on the First Amendment in terms of child pornography and libel and defamation and so on, and I would be curious on Mr. Abrams' take on that. But I think there are more direct questions that need to be asked, because what we see is a tremendous momentum on the Court and the people bringing these cases to strike down all campaign finance law, all of it, including the Tillman Act, going back to 1907. I think I saw an interview with Mr. Abrams where he agreed that contribution limits should be abolished. I think he would take the position, that since contribution limits should be lifted, and since corporations have now been transformed into citizens, they should also be able to give money directly to candidate campaigns, so as to abolish a century of practice of saying that there is a wall of separation between corporate contribution money and Federal political campaigns.

So what we are facing is the complete wipeout of campaign finance law if they have got the courage of their convictions. If Senator Cruz is right, which is that money is just speech, then you have got to let it flow entirely. And I would be curious at what point they stop.

Mr. ABRAMS. Could I respond?

Senator WHITEHOUSE. Mr. Abrams, go ahead.

Mr. ABRAMS. These issues have been with us a long time. The Court did not make this stuff up in *Citizens United*. Harry Truman vetoed in 1947 the Taft-Hartley bill, which was the first bill that imposed limits on expenditures. He vetoed it and said that a reason for vetoing it was it violated the First Amendment, the very sort of issue that your constitutional amendment would be passing on. The constitutional amendment that is before you is one which would not just reverse, as it were, *Citizens United* but the *Buckley* case as well. So we are going back, and we are not just talking about conservative jurists. We are talking about Justice Brennan, we are talking about Justice Marshall, we are talking about Justice Stewart, all of whom—

Senator WHITEHOUSE. None of them signed off on *Citizens United*.

Mr. ABRAMS. No, but all of them signed off on the proposition that independent expenditures could not be limited. That is what *Buckley* was about. *Citizens United* was not about contributions. *Citizens United* moved from *Buckley*, which dealt with independent

expenditures, to the independent expenditures of corporations—and unions, by the way, who have yet to be mentioned here today. But my point is simply that there has been a philosophical disagreement about this for many years with many Justices on the Supreme Court taking different positions so that this is—I really do not think—

Senator WHITEHOUSE. But through it all, through it all, the laws of the United States have limited contributions in Federal elections.

Mr. ABRAMS. And they still do.

Senator WHITEHOUSE. But in very important ways they do not. The idea that *Citizens United* did not change anything runs contrary to everybody's experience who is involved in politics. We see all around us how it has changed anything. You cannot just say it is part of an ongoing debate. It is a huge inflection point in the way in which democracy operates in this country. Look at the super PACs out there.

I see other Senators here, and I have used more than my time. So I will—

Mr. MCKISSICK. If I could comment briefly on that issue?

Senator DURBIN. Senator.

Mr. MCKISSICK. And I am an attorney, but obviously I am not an expert on First Amendment/free speech issues. But I can say that really as a practical reality, *Citizens United* has profoundly changed the landscape. I look at this recent May primary involving our State Supreme Court Justice Robin Hudson. These entities have gone in there with their dark money, spent over \$1 million to disproportionately impact the outcome of that race, to taint that Supreme Court Justice in a way that was unlike anything we have ever seen. And the only thing it is going to take is one race after another race after another race. In North Carolina, the control of that Supreme Court is at stake right now. And why is it a very significant issue? Because these laws that have been enacted in our State that superior court judges are determining to be unconstitutional will ultimately end up there. And if you can use these dark money fund to go in there and start changing the balance on a Supreme Court in our State, it can be done in any State. Should there be reasonable limitations? In my mind, it is absolutely imperative that we do so; otherwise, this disproportional impact that can come from people who are millionaires and billionaires to control the way decisions are made through our legislatures and our courts is—we are opening up a floodgate to change that is going to have a very negative impact on our political process and the rights of individuals.

Senator DURBIN. I am going to recognize Senator Cruz. I think Senator Hatch has already asked. I will recognize Senator Cruz and ask Senator Franken if he would come up here and preside while I go vote.

Senator FRANKEN [presiding]. Sure.

Senator CRUZ. Thank you, Mr. Chairman.

At the outset I would like to say I understand that in my absence Senator Schumer very kindly gave a lecture on civility and encouraged me not to go over the top while he then in the same breath accused me of supporting child pornography. So I appreciate that

demonstration in senatorial restraint from the senior Senator from New York.

Let me say to the members of this panel, welcome. Thank you for joining us. Let me in particular welcome Floyd Abrams. Mr. Abrams, you have been a lion of the First Amendment.

Mr. ABRAMS. Thank you.

Senator CRUZ. And I have admired your career pretty much all my life, the passion with which you have defended the First Amendment against assaults from members of your own party and pretty much anyone else, so I appreciate your being here.

Mr. ABRAMS. Thank you.

Senator CRUZ. I do wish there were Democratic Senators willing to defend the First Amendment. In our history, Democrats have been willing to do that, and we are in a strange point in time when Democrats abandon the First Amendment and, indeed, propose repealing it.

I want to address three canards that are put forth in support of this constitutional amendment.

Number one, this is all about nefarious billionaires. You know, it is interesting, if you look at the Open Secrets website, which I would note is a nonpartisan group, the top 16 donors to campaigns from 1989 to 2014, 100 percent of them support predominantly Democrats who are on the fence. The top three donors are Act Blue, which has spent over \$102 million; the American Federation of State, County, and Municipal Employees, which has spent over \$61 million; and the National Education Association, which has spent over \$58 million. Those are the top three. Koch Industries, who we have heard so much about, they are number 59.

You know, there is a pattern in politics where, when Government is trying to take the liberty of the citizens away, they try to distract them with shiny objects. So we have seen the Majority Leader repeatedly slandering two private citizens, the Koch brothers, on the floor of the Senate.

There is a rule in the Senate that when one Senator attacks and impugns the character of another Senator, you can rise on a point of personal privilege. And I would note there is unfortunately no rule in the Senate that allows a private citizen whose name is being dragged through the mud by the Majority Leader of the Senate for partisan political purposes to rise on that same point of personal privilege.

The second canard that is put forth is money is not speech. That has been repeated over and over again in this hearing. I would note any first-year law student who put that as his or her answer on an exam would receive an F because it is obviously demonstrably false, and it has been false from the dawn of the Republic. Speech is not just standing on a soapbox screaming on the sidewalk. From the beginning of the Republic, the expenditure of money has been integral to speech. The Supreme Court has said that pamphlets, The Federalist Papers, and Thomas Payne's "Common Sense" took money to print and distribute, putting up yard signs, putting up bumper stickers, putting up billboards, launching a website—every one of those requires the expenditure of money. I guarantee you every person in this room, if you think about it, disagrees with the proposition that expending money is not speech.

Publishing a book is speech. Publishing a movie is speech. Blogging is speech. Every form of effective speech in our modern society requires the expenditure of money from citizens.

The third canard is that corporations have no rights. That gets repeated an awful lot. Again, you would get an F in law school if you embraced that position.

The New York Times is a corporation. CBS is a corporation. Paramount Pictures and Simon & Shuster are corporations. The Sierra Club is a corporation. The NRA is a corporation. The NAACP is a corporation. La Raza is a corporation. None of the people who say corporations have no rights would possibly suggest that, well, Congress can then prevent the NAACP from speaking, can prevent La Raza from speaking, can muzzle the New York Times. That position is obviously false.

Nobody has disagreed with the litany of harms that could occur if Congress passed this bill, the ability to muzzle citizens, to muzzle labor unions from organizing because that is an in-kind expenditure, the ability to silence bloggers.

Now, I have today introduced two amendments to protect the free speech rights of Americans. The first is entitled, "The Super PAC Elimination Act of 2014." What this bill will do is, number one, eliminate campaign limits on individual contributions to Federal candidates. Right now the current system we have is stupid. You have got super PACs spending on the side, out of the control of campaigns, and it has grown because Congress has attempted to regulate and silence speech. The bill I have introduced would eliminate the individual contribution limits and provide immediate disclosure within 24 hours of any contribution made to a Federal candidate.

What that would do as a practical matter is make it all transparent and make super PACs irrelevant. A number of States have systems like this, and it works quite well.

The second bill that I have introduced today is the Free Speech for All Act. We have heard over and over again corporations are not people. What this bill says is very simple: Any restrictions on the rights, the free speech rights of citizens shall apply with equal force to media corporations like the New York Times, CBS, ABC, and NBC. That is provision one. And provision two simply says, to the extent any restriction is found unconstitutional as applied to that media corporation, it shall also be deemed invalid as applied to an individual citizen.

So if everyone who is arguing corporations are not people, I hope and expect all the Democrats to happily cosponsor this bill, because it says an individual citizen is at a minimum entitled to the same First Amendment protection that we give to these giant media corporations. It is free speech for all. We should be defending the Bill of Rights, not debating, amending, and repealing the free speech protections of the Bill of Rights.

Thank you, Mr. Chairman.

Senator FRANKEN. Thank you. I will recognize myself—or have you questioned yet?

Senator KLOBUCHAR. No.

Senator FRANKEN. Okay. Senator Klobuchar is our senior Senator and, therefore, gets to ask questions before I do.

Senator KLOBUCHAR. Thank you very much. Thank you, Chairman Franken, and thank you so much to the witnesses for being here.

I was actually in North Carolina, Mr. McKissick, and was able to speak at the Frye-Hunt Dinner and see “Meet your first African American Justice,” and also former Governor Hunt, and also hear about all the things that you have talked about today in terms of the effect of the big money in North Carolina and some of the policies that we have seen. And what was of particular concern to me was getting rid of the same-day registration, something that has put Minnesota at the top of voter turnout time and time again, whether we elected Tim Pawlenty, a Republican, or Governor Dayton, a Democrat, or Jesse Ventura, an Independent. The fact that we have people participate matters, and the fact that that has been cut back on in North Carolina matters a lot.

And I was interested hearing Mr. Abrams talk about how this should not be about bad policies, and I would agree. But I think what we are trying to get at here is that there is a line here between what is corruption and what is not corruption and what this leads to that I do not think was defined in the Supreme Court case, and I think for me is really the basis for why we have to look at this constitutional amendment.

I do not think anyone takes the idea of a proposed 28th Amendment in the Constitution lightly, but we know there have been times in our history where Congress has needed to act to restore our understanding of the constitutional rights of everyday people, and everyday people are getting drowned out.

In the past, the Supreme Court ruled that women did not have the right to vote. We responded with the 19th Amendment. After the Dred Scott decision, Congress responded by passing the Civil War Amendments. After the Supreme Court recent decisions about money in politics, we have been working on disclosure bills. But I have come to the conclusion and feel very strongly that those disclosure bills are important, and I appreciate you do not see them as unconstitutional, Mr. Abrams. But they are not going to fix this. They are not going to fix the fact that what I have seen in my State, where we used to have limits before these decisions, and still some of them are in place, that allowed someone like Jesse Ventura to run a campaign without having tons of money spent in and brought in from out of State that was undisclosed, that came as a result of that *Citizens United* decision.

My first elections I ran in, the maximum was \$500 for a local office. It allowed someone like me that had a third of the money of my opponent to still win an election. Otherwise, it would have been unlimited, and I know I never would have won, because as it was, my opponent ran all her ads on network. I could only run on a very, very few local cable stations with a black-and-white ad because of money. And I won by two votes per precincts. So I know this story.

I want to start out with a question of you, actually, Mr. Raskin, Professor Raskin, about the major shifts you have seen since the *Citizens United* and how you see this trend is continuing in the future.

Professor RASKIN. Thank you. Well, others have spoken about the deluge of money which has overtaken our politics. The Washington Post had a good piece on this showing how in 2006, before *Citizens United*, there was \$25 million in outside expenditures; in 2010, after the decision, there was \$250 million; and in 2012, it was over \$1 billion. And we are on pace to exceed that.

But the thing that I want us to focus on here is that there is a free market ideology which is animating the Justices on the Court, and I think this also infuses Mr. Abrams' testimony, and it will threaten to wipe out all of the campaign finance laws we have got.

I would be curious to know, do they think we should have limits on contributions? Or is that an unacceptable violation of people's speech? Should we continue to have the Tillman Act since 1907 which bans corporate contributions to people running for Federal office? Or is that an unacceptable violation on the freedom of speech—

Senator KLOBUCHAR. I think that is a good question to ask Mr. Abrams. You said, Mr. Abrams, that you supported disclosure laws when I was here when Senator Schumer asked that question. Do you support any other limits on campaign contributions such as the ones that Professor Raskin just mentioned?

Mr. ABRAMS. I have pretty well come to the conclusion that contribution limits as well ought to fall. I think they should be disclosed, but it seems to me that we have reached a point both in our jurisprudence and our politics where if we know what the money is and where the money is coming from, I think we can trust the public to make a rational decision. And where they do not make that decision, I think that we are constantly unnecessarily going through a cost-benefit analysis in terms of there is cost with speech. Speech does not do only good things. It is a good thing that we protect speech, but speech does some harm sometimes, and maybe the impact of having more speech paid for by fewer people will sometimes be harmful. But my view is that at the end of the day I think for myself that contribution limits as well probably should fall.

Senator KLOBUCHAR. Mr. Raskin, do you want to—

Professor RASKIN. I am taking it since he thinks that corporations should have the same rights as the people that corporations should also be able to give on an unlimited basis to every Member of Congress. This is where I think we are going. We have one philosophy which says that money should be treated like speech, corporations like people, and let the free market reign. We have another which tries to adhere to what I think is the American political tradition, which is that within the electoral realm, within the political realm, we try to maintain some rough approximation of political equality based on the core idea of one person, one vote.

I appreciate Mr. Abrams' candor because that is certainly where all the litigators on that side are going. That is where at least four Justices are going. But let me just say there is one Supreme Court decision which gives me a little bit of hope if people would pay attention to it. It came the year before *Citizens United*. It is called *Caperton v. Massey*, a 2009 case from West Virginia, a fascinating case where the CEO of the Massey Coal Mine Corporation had litigation against him and the company going, and they were losing

all the way up. So he decided to get involved in the election for the West Virginia Supreme Court, and he threw everything he had into a candidate, who later became Justice Benjamin. He gave the \$1,000 contribution that he could give. Then he gave \$2.5 million to a conveniently created and named not-for-profit entity called “For the Sake of the Kids.” So \$2.5 million went to For the Sake of the Kids. Then he spent another half million out of his own pocket on his own independent spending.

When that happened, the money he spent on his favorite candidate drowned out everybody else. It was more money than everybody else gave put together by a huge factor. Benjamin won the election, he gets in, and he serves on the Supreme Court panel reviewing the case. And what do you know? They reverse the verdict 3–2 against the corporation, against the Massey Company.

Well, that goes all the way to the U.S. Supreme Court, and that was too much not for the four Justices, Scalia, Alito, Roberts, and Thomas. They thought that there was no problem with it. But Justice Kennedy flipped over, joined the liberals there, and said, okay, that does compromise at least the appearance of due process, so we are going to send that one back and say that the judge should not have sat on the case.

Now, what is fascinating to me about it is the next year, we had the coal mine collapse from the Massey Company; 29 people died. The Governor issued a report and said that one of the factors in what happened was the failure of politicians to try to zealously enforce the laws and the regulations against the Massey Corporation because they were afraid of the political spending and the willingness to engage in independent expenditures of the CEO.

Senator KLOBUCHAR. Okay. Thank you, Professor Raskin. I think that I will have to look at that case. I have heard about it, and it is just one example, that story, of what has been going on. And I think your argument about the corruption and what this is leading to is of great merit. And I would also say that I am glad that you have come out there—Mr. Abrams said this. I mean, basically under this scenario, we would have no rules, we would have no limits on contributions, no limits on corporate contributions. And I just see more of the same. And I do not think this is what our Founding Fathers wanted.

Senator FRANKEN. Senator Sessions.

Senator SESSIONS. Thank you. Thank you all. It is an interesting and important panel and discussion.

When I came here, I felt a bit aggrieved. I had some opponents who had opposed me and spent millions of dollars. I did not have any money, but I was able to win. But I had some grievances. But, you know, as I looked at this, I asked myself a very simple question, 3 months into my tenure when this constitutional amendment was first brought forth, and the question was: At a fundamental level, do we want to pass an amendment to the Constitution that allows the Government of the United States to tell an American citizen or business they cannot run an ad and say, “Jeff Sessions is a skunk and ought to be voted out of office”? Or are they not able to advance their view that coal is good or coal is bad? Is America going to benefit if we constrict that right? Isn’t that contrary to the First Amendment? I suggest it is because we have an

amendment to amend the First Amendment, and I do not think the Supreme Court took any extreme position. I think the Supreme Court fundamentally interpreted the Constitution as it is written.

And with regard to that first constitutional proposal or amendment in 1997, it failed 38–61. Only 38 voted for it. And then when it came back in 2010, it failed 40–56, all well below any prospect of becoming a passage.

And it seems to me, Mr. Abrams, that this amendment would go further. Those amendments set reasonable limits which would at least given the Supreme Court, or five members thereof, some ability to constrict congressional power. Do you interpret this as giving almost carte blanche to the Congress to limit spending?

Mr. ABRAMS. Yes, I think it does just that, and I think that the Supreme Court itself would read it that way. And if a litigant go up in court and said but, look, this is really unreasonable, you cannot have a \$500 limit, one case out of Vermont, just a few hundred dollars, which the Court struck down, another case which this amendment would overrule, the Court struck it down just saying that is just not enough money to run a campaign. I do not think that would be at all the same.

I mean, under this amendment the State legislatures and the Congress would have, I believe, all but absolute authority to make these decisions and would be essentially unreviewable and certainly not reviewable on a reasonableness basis.

Senator SESSIONS. So you could not go to the Supreme Court and say we think this is an unreasonable limit because the Supreme Court would say you did not put that test in it; in fact, you explicitly passed this amendment after having rejected that word that was in a previous draft. I just think that is one of the things we need to recognize.

Mr. Abrams, one more thing. I do not know if you have commented on this, but the dissent, four votes, said that the public interest in preserving a democratic order in which collective speech matters, does that cause any unease? Should we be concerned? Some people have expressed concern. Do you share that—

Mr. ABRAMS. Well, I have expressed concern in writing about that. That is Justice Breyer's dissent, and, you know, my view is that the First Amendment is about protecting the individual's right. And it is not a collective right, and it is not to be interpreted in terms of in legal terms of everybody being able to work out social problems, which is a good thing, but not a First Amendment concern. The First Amendment concern is protecting the public from the Government.

Senator SESSIONS. Well, I just left simultaneously with this an Environment Committee hearing in which one of the witnesses, a professor, said he was severely damaged as a result of his questioning of some of the global warming arguments that are made out there. I think we are in a period of time when speech is being threatened more than we would like to admit. Political correctness has often run amuck, and it is fundamental that Americans be able to express their views without intimidation.

I think the great Democratic Party that was so classically liberal is now becoming the party of the progressives, and progressives tend to believe that little things like tradition, procedures, rules,

even sometimes I think honesty can be subjected to the agenda that they believe is best for America. And I am telling you, I think this is serious. And I feel it repeatedly in our country and in the debate that we are engaged in. I just think tradition and constitutional order should be respected, and in the long run we will be better off that we do not try to muzzle somebody who happens to have money and to keep him or her or this business from being able to express views that they think are important to the public and maybe even their own interest.

Thank you, Mr. Chairman.

Senator FRANKEN. Thank you. I am going to recognize myself. I think I just heard——

Senator SESSIONS. Are you sure you recognize yourself?

Senator FRANKEN. I do. If I look in the mirror, I recognize myself. [Laughter.]

Senator FRANKEN. And I recognize myself here.

Senator SESSIONS. I knew you would handle that deftly, and you did.

Senator FRANKEN. Thank you, and so did you.

[Laughter.]

Senator FRANKEN. It is good to see you, Mr. Abrams. You actually defended me on a First Amendment case.

Mr. ABRAMS. So I did.

Senator FRANKEN. And you won. It was a brilliant——

Mr. ABRAMS. Thank you. I remember what you said to me after I won.

Senator FRANKEN. What did I say?

Mr. ABRAMS. “Even a chimp could have won that case.”

[Laughter.]

Senator FRANKEN. And I was right.

[Laughter.]

Senator FRANKEN. But you are a brilliant lawyer. And I noticed that in your testimony, in your written testimony—and, Professor Raskin, I want you to speak to this. Mr. Abrams says that it “appears” that *Citizens United* has not caused a flood of new money in politics. He says it twice, actually. He uses the word twice. It “appears” that way.

Now, from my experience, I know Mr. Abrams is an excellent lawyer, so I know he chooses his words carefully when he says that it appears that way because there is really no way that we know. There is really no way that we know. And Mr. Abrams himself has said that he is for getting rid of all limits entirely. And we are talking about intimidation about speech. Suppose a corporation comes up—and there are no limits—and says to a Senator, “If you vote this way on this bill, we will spend \$100 million to defeat you.” It is fine. Isn’t that fine? I mean, according to this logic——

Professor RASKIN. Yes, but that is just free speech. Look, on the empirical question, let me just say this——

Senator FRANKEN. No, no. Then they need to put the \$100 million in or not. They do not even have to put it in to intimidate you.

Professor RASKIN. That is right. The numbers that I have seen have gone up dramatically, and for the numbers that we have not seen, the 501(c)(4)’s, the social welfare groups, the (c)(6)’s, the trade associations, the dark money, the estimates run into the billions.

But I do not even know why Mr. Abrams would bother to deny it. On his perspective that is just more speech, and that is something terrific.

Now, that is at odds with, I think, the people who are actually involved in politics, what they think is going on out there. And I think that, you know, the Senator from North Carolina has a much better sense of what this money actually means, you know, on the ground when it gets spent.

It seems to me that before we go any further, we have got to ask ourselves the question: Do we want to completely deregulate money? Because that is where the Court is going, that is where the litigators are going, that is where all the political argumentation is. Or do we think that there should be a structure in place?

The position that they are committed to is one where the people will have no say over it; that is, as a matter of First Amendment law, despite the fact that the people who wrote the First Amendment did not know anything about super PACs, dark money, or \$1 billion bailouts. In fact, on their campaigns they basically spent nothing. They stood for office. They did not go out and spend any money. They did not do it.

So in the name of the Founders, they are going to give us a completely unregulated political finance system, far more extreme than any other democratic nation on Earth, and then take away from the people the right to have any say over it.

Senator FRANKEN. Now, Senator Cruz talked about, you know, media companies like the New York times or Fox News or whatever. When there is an editorial in the New York Times, it is in the New York Times. It is disclosing. So, I mean, we had a vote on disclosure. We had not one Republican join us on disclosure. And, Mr. Abrams, you said that you are for unlimited contributions, but you would prefer to see disclosure. But we are not going to see that if you have to get 60 votes to do that.

So here is the key quote to me in *Citizens United* opinion, the majority opinion by Justice Kennedy: We now conclude that “independence expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.” That is just to me horribly outside of—that is out of touch with reality.

The Minnesota League of Women Voters—the Minnesota League of Women Voters, it is, like, you know, on a trust level with the Visiting Nurses Society. I mean, they issued a report in which it concluded that, “the influence of money in politics represents a dangerous threat to the health of our democracy in Minnesota and nationally.”

I agree with that. I know Senator McKissick agrees with that. What do you think of the Court’s analysis, Justice Kennedy’s analysis on this point, Professor Raskin?

Professor RASKIN. Well, I think it contradicts—

Senator FRANKEN. Is it too narrow? Is it too narrow a view?

Professor RASKIN. Okay. It is a far too narrow view that contradicts both what the Court has said before and what Justice Kennedy said in the *Massey* decision, *Caperton v. Massey*.

Now, in *Buckley v. Valeo*, the Court said that we could regulate not just in the interest of combating quid pro quo corruption, something like a bribe, but also the reality, the appearance of improper

influence and undue influence, and there is a whole sequence of Supreme Court decisions that follow in its train to say that the people understand, and legitimately so, that corruption can go far beyond just a narrow quid pro quo.

If you go back to *Caperton v. Massey*, Justice Kennedy joined the moderate-liberal Justices in saying that we are going to take that verdict away from the Massey Corporation precisely because of an independent expenditure that was spent in that way. And, by the way, Justice Kennedy in his decision in *Massey v. Caperton*, refers to independent expenditures as “contributions.” I mean, for him they are so closely connected that he calls them “contributions” in the first paragraph of the decision.

So I think that it cuts against logic and common sense and what the Court has always said before.

Senator FRANKEN. Thank you very much. And I will hand both the microphone and the gavel over to Senator Coons.

Senator COONS [presiding]. Thank you, Senator Franken, and thank you to our panel and to all who participated today.

Like many of my colleagues, I have been deeply disturbed by legal developments over the past few years and by what I think were the inevitable consequences of those decisions, particularly with regard to unrestricted campaign spending. As Professor Raskin just commented, *Buckley v. Valeo* established a principled framework for evaluating how and to what extent spending might be fairly characterized as speech and, therefore, entitled to protection under the Constitution and when it might be appropriately restrained.

Recent decisions, however, have lost all sight of that balance and of the importance of that balance and of the consequences of destroying that balance. And in my view, the recent Supreme Court majority opinions seem singularly focused on whether a specific person’s or corporation’s intended giving constitutes quid pro quo corruption while failing to consider other forms of corruption that are corrosive of our political order, that undermine public confidence, and that distract the deliberative workings of legislative bodies at all levels. And the cumulative impact of money, particularly secret money and big money in politics, I think is very negative, and we need to work in a bipartisan way to find a responsible solution to this challenge. If you look at the trajectory of recent decisions, I think we are just one or two decisions away from the removal of all limitations whatsoever.

So if I could, first, Senator McKissick, I just would be interested in your comments on what the elimination of restrictions presented through *Citizens United*, what has the impact of that been on your district, on politics in North Carolina, on campaigns using North Carolina as an example? In *Austin v. Michigan Chamber of Commerce*, some years ago, the Supreme Court held Congress’ interest in ensuring that expenditures that reflect actual public support for political ideas espoused by corporations justified a prohibition on political spending by corporations. They were concerned that corporations not be able to drown out the actual free speech rights of real living people. Post-*Citizens United*, what has the ground been like in North Carolina and what have the consequences been?

Mr. MCKISSICK. The consequences have been grave, to say the least, and what you really have unleashed is the capacity for these independent expenditure organizations to come in, some of which are based in North Carolina, many of which are based outside of North Carolina, they are having an impact on our council of State races, our legislative races, judicial races, you name it. And what you really see is simply a barrage of negative ads that are run literally around the clock that disproportionately highlight some specific issue that they think is narrowly based, but the design of these commercials, all of these barrage of commercials, it is simply to elicit an emotional response upon persuadable voters. And unfortunately at times it is doing so. It is having exactly that impact.

So, I mean, you find that perhaps these deep-pocket corporate donors, whether they are millionaires or they are coming from outside of the State, perhaps even billionaires on occasion, they have a vested self-interest. Many of them are highly conservative. Many of them do not perhaps share the mainstream perspective of the vast majority of North Carolina voters. I am not going to tell you that North Carolina is a progressive State. I am not going to tell you it is a conservative State. I am going to tell you it is basically a centrist State. But when you have a centrist State with voters that are centrist in perspective frequently, and you can see this massive amount of spending that is in some situations is three, four, five times the amount of money that individual candidates can put toward an issue or their campaigns, you see distorted outcomes—distorted outcomes across the board.

Senator COONS. Thank you, Senator. Thank you for that experience-based testimony about the impact of this flood of money on elections in North Carolina.

Professor Raskin, if I might turn to you, I have a limited amount of time left. Mr. Abrams referenced that the First Amendment is an individual right that is protected, a right to free speech that is embedded in our First Amendment. Is it true that money equals speech in the context of the current majority in the Supreme Court in recent decisions? And what grounding do you think there is in the text of the Constitution for extending that right to corporations equally with individuals? And what is the consequence?

Professor RASKIN. I think everybody would agree or should agree that money is not speech. Money can be a courier of speech. It can amplify speech. Furthermore, because the First Amendment right is an individual right and not a collective right, that is why the Supreme Court had always said up until *Citizens United* that corporations as artificial entities chartered by the State governments do not have the First Amendment rights of the people. As Justice Stevens put it, “Corporations do not have consciences, beliefs, feelings, thoughts, desires.”

And so there are three basic rationales for why we have a First Amendment. One is so people can express themselves. That obviously does not apply to a corporate entity. Two is for democratic self-government so that citizens can govern themselves. But we certainly do not allow foreign governments or foreign corporations and we did not allow our corporations to take over that process. And the third is the search for the truth. But corporations are not interested in the truth. Corporations are interested in profit, as they

should be, and our economy has been fantastically productive organizing it that way. To bring the press into it just confuses the issue because we have a whole separate clause that defends freedom of the press, and they have never been regulated under our campaign finance laws and never would be. And they certainly would not be under the constitutional amendment that is being suggested today.

Senator COONS. Thank you, Professor. Thank you to the panel.

I will now defer to Senator Blumenthal.

Senator BLUMENTHAL [presiding]. Good afternoon. I am going to take over the gavel. I am the latest and very likely the last of the Chairmen that you will have today. And I am going to ask Senator Hirono, who was before me in the line of questioning to go ahead.

Senator HIRONO. Thank you, Mr. Chairman.

The current Supreme Court is one of the most corporate-friendly Courts in history. Rulings like *Citizens United* and others have expanded the rights of corporations significantly in a variety of areas that undermine our democracy.

Mr. Chairman, I would like to enter into the record a 2013 New York Times article that reports on this troubling trend entitled, "Corporations Find a Friend in the Supreme Court."

Senator BLUMENTHAL. Without objection.

[The article appears as a submission for the record.]

Senator HIRONO. I would also like to enter into the record an April 2, 2014, editorial from the Charlotte Observer entitled, "Another window to corruption; Our View," talking about the Supreme Court's continuing on its path to dismantle the country's campaign finance laws.

Senator BLUMENTHAL. Without objection.

[The editorial appears as a submission for the record.]

Senator HIRONO. Senator McKissick, you described for us the post-*Citizens United* situation in North Carolina, and we have heard testimony today that the next step, because the Court is on the path of saying that constitutional rights are at stake in these decisions, the path of eliminating individual contribution limits. Now, would you describe for us what you think would happen in that instance? Because I think there is agreement that is the next Supreme Court campaign spending decision coming down the line.

Mr. McKISSICK. Well, Senator, that certainly appears the way the Supreme Court is drifting. I think it would be certainly the wrong direction for this country to move at this point in time. I mean, it is bad enough that you have unlimited corporate contributions coming in today that did not exist before. The worst possible thing that could happen is if you also eliminated these limitations on individual giving. What you would essentially do is distort the whole playing field. And when I say that, right now, whether those contributions are \$4,000 or \$5,000, let us say, in a State race in North Carolina, if you eliminate that cap, those individuals that want to give \$25,000, \$50,000, \$100,000 assure that their policy, their view, their perspective is actually the perspective that wins the day before our General Assembly, that the laws are adopted that protect those potential contributors' interests. When you really think about it, it undermines the integrity of our whole system.

Senator HIRONO. Well, these decisions, the *Citizens United* and the *McCutcheon* decisions, basically did not touch the individual—the contributions of individuals.

Mr. MCKISSICK. That is correct.

Senator HIRONO. Now, so there is kind of a little barrier. But when one can contribute in an unfettered way to individual candidates, that is you, that is all of us.

Professor RASKIN, do you think that that is the kind of undue influence that led States and the Federal Government to pass campaign spending laws in the first place?

Professor RASKIN. I think you are absolutely right, Senator. You know, first of all, on your first point about corporations, I did a report for people for the American Way, the session after *Citizens United*, to situate it in precisely the context you identify, which is an aggressive pro-corporate jurisprudence on the Court. And in that term of the Supreme Court, corporations won against shareholders, they won against workers, they won against consumers, they won against Government regulators. They won essentially every case that they had going on in the Supreme Court.

But the idea of undue influence and improper influence has now been taken away from Congress and the States as a legitimate rationale for regulating contributions, and the *McCutcheon* decision presses up very hard against the individual contribution limit because the idea is you cannot limit what people give overall, they should be able to give to everybody, because aggregate limits are limiting the overall quantity of speech.

Senator HIRONO. Yes.

Professor RASKIN. So does the regular contribution limit. The regular base limit also ultimately reduces what the candidate can spend, because if I could give you \$1 million instead of \$5,000, you could spend to the heavens. We have just deprived you of \$995,000 to spend.

Senator HIRONO. I think that I share the concerns that you express about unfettered giving to individuals, and I think that that does raise the undue influence concern that the people of America already have with regard to what goes on in the political arena.

So with these decisions and the next decision, I have no doubt, I have very little doubt that Senator Coons is correct and Mr. Abrams acknowledged that the lifting of those individual contribution limits will be next. I think that is a huge concern, which is why I believe we need to move ahead with this constitutional amendment bill.

Now, I think there is also agreement that we can put the reasonableness standard into this bill so that the States and the Federal Government do not go hog wild.

In addition, the Supreme Court—I am running out of time, but they set up a standard that is probably impossible, which is that the only way that we can enact legislation in this area, aside from disclosure, would be that we have to prevent a quid pro quo, basically bribery, which is already illegal. So basically the Supreme Court is saying, would you agree, Professor, well, aside from disclosure you all cannot do anything about what the Supreme Court is saying?

Professor RASKIN. I think that is absolutely right. And, by the way, the same people who brought us this line of decisions are now attacking disclosure, not just legislatively, and we know that there is a partisan divide on that. But, legally speaking, they are saying this is unconstitutional compelled speech under the First Amendment. It is like making the Jehovah's Witness kids salute the flag. And they are insisting there is a right to anonymous speech which makes disclosure laws impermissible.

So look at the political realm that they want to give to the American people. Corporations are treated like people. They can give on an unlimited basis directly to candidates. They can spend on an unlimited basis. And they do not have to tell anybody. And then they whine if anybody even calls a corporation out for doing it saying that somehow their First Amendment rights are being violated. That is a pretty special First Amendment they have got.

Senator HIRONO. Thank you. I am out of time, Mr. Chairman.

Senator BLUMENTHAL. I will be very brief. I want to begin by saying to Mr. Abrams, I hope that when Senator Franken said that a chimp could win that case, you doubled your fee to him.

[Laughter.]

Senator BLUMENTHAL. And you and I have been on different sides of cases, and I would never have—

Mr. ABRAMS. Yes.

Senator BLUMENTHAL [continuing]. Referred to you as a “chimp” in your argument. Far from it. You have been a very formidable and forceful advocate, as you have been today, and thank you all for being here.

I want to take a slightly different line because I think a lot of the ground has been covered, but from an institutional standpoint—and I want to pose this question to Mr. Abrams first, but any of you are free to comment. In its decisions, and most recently *McCutcheon*, the Supreme Court makes certain factual conclusions. For example, it says that the Government's scenarios are “implausible”—implausible factually to occur, the scenarios used to justify its argument. It concludes that technology offers a robust leavening sort of process to combat some of the evils that are raised. And, you know, I have worked for a Justice as a clerk. I have argued before the Court. I have come to know some of the Justices. And one fact about them has impressed me: They are enormously able, erudite, smart, and caring people, but they generally are not well informed as to the mechanics and the practical impacts because they have, by and large, never run for office, never been involved in campaigns, and many not even contributed to them.

Does it concern you—and I know they have to issue rulings on a great many areas from patents to communications cases where Internet—they may not be familiar with the details and so forth, and that is their job. But in this area that so vitally affects the fabric of our democracy and indeed their being where they are, because they are in those positions because of this system that they are now ruling on, are you concerned with the institutional weaknesses of this process that may lead them to reach conclusions that have huge unintended consequences way beyond what they thought would happen?

Mr. ABRAMS. I would like to answer that in two ways.

First, I think you are right that for members of the Court, secluded as they are and certainly out of the political mainstream, it is difficult, very difficult, difficult—the patent example is a very good one, just as some other very difficult areas of law where they have to reach to try to make decisions about impact of something on the future which is very hard to do, yes, that is a problem. I think it goes with the territory; that is to say, I do not think they can avoid it.

My own view and my second point is I believe that instead of characterizing as many members of this panel have, the Court, as I would say, simply conservative or simply pro-business, et cetera, I believe that the conservative members of this Court have concluded that the First Amendment impact of many campaign finance regulations are very real and very severe; that is to say, from their perspective and mine, the First Amendment side is really breached or at least threatened very badly by some of the legislation that has appeared before them.

Because of that, having reached that conclusion, I think they deliberately strive to impose tests that will not allow the First Amendment too easily to be overcome. And that is where I think the notion, for example, that only quid pro quo corruption is “corruption” for purposes of these cases. It is not that they do not understand that there could be some impact on the process or that money can be intimidating and necessary for candidates. It is that I think that, having concluded that the potential First Amendment harm is so great and that the First Amendment risks are so real, they deliberately narrow the legal test that they then apply that is necessary to overcome it.

So I do not think it is that they are being unrealistic. They may be wrong, as your question suggested, because they do not have the background. That is something else. But what I am saying is that they are doing it in the service, as they view it, of the First Amendment.

Senator BLUMENTHAL. I do not know whether anyone else had any observations on that question.

Mr. ABRAMS. That is so incontestable.

[Laughter.]

Mr. MCKISSICK. What I would say is, if I could be recognized briefly, I recognize the direction the Court is moving. I recognize that when the appropriate case comes, they might just eliminate individual contribution limitations. But I think what the Court has failed to do is to understand the potential impact upon First Amendment rights and other constitutional rights when you unleash the opportunity for those who are the wealthiest in our society to buy elections and to change outcomes. And there has to be a balancing of competing interests. I think the proposed amendment, if it were to go forward, and if it was passed by our States, it would allow for that careful balancing of competing interests by establishing in Congress the ability to have these reasonable limitations, and likewise within the States. There has to be a leveling of that fundamental playing field, because if it is not, what will simply be unleashed is the ability of the wealthiest in our society to dominate, control, and unduly influence outcomes in our political process, our judicial process, but, more importantly, the rights of

those that may be disenfranchised along the way, such as that occurred in North Carolina through our voter suppression laws that have been passed.

Senator BLUMENTHAL. Let me ask, Mr. Abrams, and I apologize if this question has been asked before, but can you imagine any circumstances or scenarios where you would favor some kind of limits on contributions?

Mr. ABRAMS. Yes, I mean, I do not have a firm view on contributions. I was asked that question, and my answer was I was sort of coming to the point where I thought that contributions too would—probably ought to be over the line. But that is not the most considered, certainly not final opinion on my part.

Now, I can see a distinction between contributions and expenditures, and I think that the *Buckley* case offered a perfectly rational and defensible compromise in treating expenditures differently than contributions. I do think, though, that if in this session or, you know, some later session of this body that you proceed with an amendment, you really ought to seriously consider why *Buckley* is even on the table. If your concern is what you think—I do not think, but you may think *Citizens United* did, indeed as one of the previous Senators observed that the *Buckley* case was a principled decision, if that were your view, you ought not to reverse it. And this constitutional amendment reverses a slew of constitutionally rooted cases, which require very serious deliberation. Thank you.

Senator BLUMENTHAL. Sir.

Professor RASKIN. Thank you, Senator. Let us see. A couple of things about that point.

One is that *Buckley* has been taken to an extreme. This is the problem, that we have a runaway faction on the Court which now has used the ideas of *Buckley* to strike down, for example, the public finance regime in Arizona, which got more candidates involved, increased speech, encouraged competition, as Justice Kagan pointed out, and they struck that down. And, by the way, the ACLU position is pro-public finance. And they have dramatically narrowed the meaning of corruption from *Buckley*, too.

Now, you know, I yield to no one in my respect and deference to Mr. Abrams in terms of his career as an ACLU and civil libertarian lawyer, but there is a big division within the ACLU and within civil libertarians on this. There is a letter that was written by Burt Neuborne and Norman Dorsen, Aryeh Neier, John Shattuck, and Mort Halperin taking the opposite position, because in our history free speech and democracy go together, and they stand best when they stand together. And what has happened in the name of free speech is now the development of alarming corporate domination, which had always been rejected both by democrats—small “D” democrats—and civil libertarians in the past.

So I think that we need to reunify democracy and civil liberty, and this constitutional amendment gives us the framework to work it out, because this faction on the Supreme Court is stealing away from democratic institutions the power to regulate money and to establish what has been a wall of separation between plutocratic wealth and democratic politics for a century.

Senator BLUMENTHAL. Thank you. My thanks to all of you, and to all of the audience for attending, and I am going to adjourn this

hearing, keep the record open for 1 week. Your testimony has been excellent and very helpful and informative, and on behalf of the Committee, our thanks. Thank you.

[Whereupon, at 1:30 p.m., the Committee was adjourned.]

[Additional material submitted for the record follows.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Witness List

Hearing before the
Senate Committee on the Judiciary

On

“Examining a Constitutional Amendment to Restore Democracy to the American People”

Tuesday, June 3, 2014
Hart Senate Office Building, Room 216
10:30 a.m.

Panel I

The Honorable Harry Reid
Majority Leader, United States Senate
State of Nevada

The Honorable Mitch McConnell
Minority Leader, United States Senate
State of Kentucky

Panel II

The Honorable Floyd B. McKissick, Jr.
State Senator
North Carolina General Assembly
Raleigh, NC

Floyd Abrams
Partner
Cahill Gordon & Reindel LLP
New York, NY

Jamie Raskin
Professor of Law and Director of the Law and Government Program
American University, Washington College of Law
Washington, DC

SENATE MAJORITY LEADER HARRY REID
REMARKS AT JUDICIARY COMMITTEE HEARING
TUESDAY, JUNE 3, 2014

Chairman Leahy, Ranking Member Grassley, and members of the committee, thank you for allowing me to be here today.

I am here because the flood of dark money into our nation's political system poses the greatest threat to our democracy that I have witnessed during my time in public service. The decisions by the Supreme Court have left the American people with a status quo in which one side's billionaires are pitted against the other side's billionaires.

So we sit here today faced with a simple choice: We can keep the status quo and argue all day about whose billionaires are right – or, we can work together to change the system, to get this shady money out of our democracy and restore the basic principle of one American, one vote.

I've been asking Nevadans to vote for me for decades, and I've seen firsthand how this dark money is perverting our political process.

I ran for re-election in 1998 against John Ensign, 5 years before the passage of McCain-Feingold. That election was a miserable experience, for both my opponent and me, because of the influence of special interests. In 2004, after we passed McCain-Feingold, the campaign felt as if the air had been cleared. But by 2010, following the Supreme Court's *Citizens United* decision, the situation was as bad as ever. Corporations and special interests were meddling in races like never before.

It has only gotten worse since.

During the 2012 presidential campaign, outside groups spent more than \$1 billion. That's about as much outside spending as took place in the previous 10 elections, combined. But this spike in the amount of shadowy money being pumped into elections is not surprising. Recent decisions rendered by the United States Supreme Court, such as the *Citizens United* and *McCutcheon* cases, have eviscerated our campaign finance laws and opened the floodgates for special interests.

The cynics may scoff at the idea of us working together on an issue as critical as good government, but it wasn't all that long ago that the issue of campaign finance reform enjoyed support from both Democrats and Republicans. Campaign finance reform has been proposed a number of times before – even by my counterpart, Senator McConnell.

In 1988, Senator McConnell's own constitutional amendment empowered Congress to enact laws regulating the amount of independent expenditures. In advocating for reform, Senator McConnell said:

"We Republicans have put together a responsible and Constitutional campaign reform agenda. It would restrict the power of special interest PACS, stop the flow of all soft money, keep wealthy individuals from buying public office."

Senator McConnell had the right idea then. I am optimistic that we can find a way to rekindle those noble principles in him now. I find it hard to fathom that my Republican colleagues would want to defend the status quo. Do any members of this committee really think the status quo is working?

Although he opposed billionaires using their own money to run for office, Senator McConnell now supports billionaires' ability to fund today's campaigns and independent expenditures. In fact, Sen. McConnell even declares that, *"In our society, spending is speech."* How could everyday, working American families afford to make their voices heard, if money equals free speech? American families can't compete with billionaires.

Yet my Republican colleagues attempt to cloak their defense of the status quo in terms of noble principles. They defend the money pumped into our system by the Koch brothers and others as "free speech." This constitutional amendment is about restoring freedom of speech to all Americans.

The Supreme Court has effectively said, the more money you have the more speech you get, and the more influence in our democracy. That is wrong. Our involvement in government should not be dependent on our bank account balances.

The American people reject the notion that money gives the Koch brothers, corporations or special interest groups a greater voice in government than American voters. They believe, as I do, that elections in our country should be decided by voters - those Americans who have a constitutional, fundamental right to elect their representatives. The Constitution doesn't give corporations a vote, and it doesn't give dollar bills a vote.

The "undue influence" that my friend decried three decades ago has not magically transformed into free speech. It is still bad for America. We must undo the damage done by the Supreme Court's recent campaign finance decisions. And we need to do it now.

I support this constitutional amendment, proposed by Senators Tom Udall and Michael Bennet, which grants Congress the authority to regulate and limit the raising and spending of money for federal political campaigns. Senators Udall and Bennet's amendment will rein in the massive spending of Super PACs, which has grown exponentially since the Citizens United decision. It also provides states with the authority to institute campaign spending limits at the state level.

Simply put, a constitutional amendment is what this nation needs to bring sanity back to political campaigns and restore Americans' confidence in their elected leaders.

The American people want change. They want their place in government to be protected.

Free speech shouldn't cost the American voter a dime.

Weakening the First Amendment

Testimony of Senate Republican Leader Mitch McConnell
Before the United States Senate Committee on the Judiciary
June 3, 2014

Mr. Chairman, Mr. Ranking Member, and Members of the Committee:

Americans from all walks of life understand how extraordinarily special the First Amendment is. Like the Founders, they know that the free exchange of ideas and the ability to criticize their government are necessary for our democracy to survive.

Benjamin Franklin noted that “whoever would overthrow the liberty of a nation must begin by subduing the freeness of speech.” The First Amendment is the constitutional guarantee of that freedom, and it has never been amended.

Attempts to weaken the First Amendment—such as the proposal before this Committee—should therefore pass the highest scrutiny. Senate Joint Resolution 19 falls far short of that high bar.

It would empower incumbent politicians in Congress and in the states to write the rules on who gets to speak and who doesn’t. And the American people should be concerned—and many are already—that those in power would use this extraordinary authority to suppress speech that is critical of them.

I understand that no politician likes to be criticized — and some of us are criticized more often than others. But the recourse to being criticized is not to shut up our fellow citizens. It’s to defend your ideas more ably in the political marketplace, to paraphrase Justice Holmes. Or it’s simply to come up with better ideas.

The First Amendment is purposefully neutral when it comes to speech. It respects the right of every person to be heard without fear or favor, whether or not their views happen to be popular with the government at a given moment.

The First Amendment is also unequivocal. It provides that “Congress shall make no law . . . abridging the freedom of speech.” The First Amendment is about empowering the people, not the government. The proposed amendment has it exactly backwards. It says that Congress and the states can pass whatever law they want abridging political speech—the speech that is at the very core of the First Amendment.

If incumbent politicians were in charge of political speech, a majority could design the rules to benefit itself and diminish its opponents. And when roles reversed, you could expect a new majority to try to disadvantage the other half of the country. And on it would go.

You can see why this is terrible policy. You can also see how this is at odds with the First Amendment.

That's why the last time a proposal like this was considered, in 2001, it was defeated on a bipartisan basis, with Senator Kennedy, Senator Feingold, and several other Democratic colleagues voting against it. A similar proposal was likewise defeated in 1997.

Our colleagues who voted against those proposals were right then. And I respectfully submit that they would be wrong now to support the latest proposal to weaken the First Amendment. That is especially clear when one compares the language of the amendments.

Senate Joint Resolution 4 in the 107th Congress would have empowered the government to set "reasonable limits" on political speech. The same was true of Senate Joint Resolution 18 in the 105th Congress. As bad as those proposals were, they at least limited the government's power to setting "reasonable limits" on speech. By contrast, the amendment we're discussing today would drop that pretense altogether. It would give the government complete control over the political speech of its citizens, allowing it to set *unreasonable limits* on their political speech, including banning it.

Not only would S.J. Res. 19 allow the government to favor certain speakers over others, it would guarantee such preferential treatment. It contains a provision, not found in prior proposals, which expressly provides that Congress cannot "abridge the freedom of the press." That's great if you're in the business of buying ink by the barrel; it's not so great for everyone else. The media wins and everyone else loses.

Now, everyone on this Committee knows this proposal will never pass Congress. This is a political exercise.

The goal here is to stir up one party's political base so they'll show up in November by complaining loudly about certain Americans exercising their free speech and associational rights, while being perfectly happy that other Americans—those who agree with the sponsors of this amendment—are doing the same thing.

But the political nature of this exercise should not obscure how shockingly bad this proposal is.

When it comes to free speech, we shouldn't substitute the incumbent-protection desires of politicians for the protection the Constitution guarantees to all Americans.

That's something we should all be able to agree on.

So I urge the Committee to reject this dangerous proposal to dramatically weaken one of our most precious freedoms.

And I thank the Chairman and the Ranking Member for the opportunity to testify.

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STATEMENT OF

FLOYD MCKISSICK, JR.

NORTH CAROLINA GENERAL ASSEMBLY

SENATOR FOR THE 20TH DISTRICT
DEPUTY DEMOCRATIC LEADER

BEFORE THE U.S. SENATE JUDICIARY COMMITTEE HEARING

"EXAMINING A CONSTITUTIONAL AMENDMENT TO RESTORE DEMOCRACY TO THE
AMERICAN PEOPLE"

TUESDAY, JUNE 3, 2014

Good morning and thank you for the opportunity to testify today.

My name is Floyd McKissick, Jr. I am a longtime resident of North Carolina, and I have the honor of serving in the North Carolina State Senate, where I represent Durham and Granville Counties and act as Deputy Democratic Leader.

I first entered the legislature in 2007, so my time there can be roughly divided into two different periods: before *Citizens United*, and after.

I entered politics for the same reason I'm sure many of you did. I saw ways that North Carolina's government could work more effectively to make a difference for the people in my community who needed a hand up, a solid education, better jobs, and safer communities.

There's no need to romanticize that time before *Citizens United*. Like every state capital, there was conflict. Sometimes legislators were in agreement and sometimes we weren't. We debated and fought and compromised. I think, even then, donors with deep pockets had too much influence, but ultimately it was the voters who were in charge. Trying to hash out legislation that addressed a wide range of competing interests wasn't always easy, but that's how democracy works, and it worked for North Carolina.

All of that changed after *Citizens United*.

Suddenly, no matter what the race was, money came flooding in. Even elected officials who had been in office for decades told me they'd never seen anything like it. We were barraged by television ads that were uglier and less honest than I would have thought possible. And they all seemed to be coming from groups with names we had never even heard of. But it was clear that corporations and individuals who could write giant checks had a new level of power in the state.

Sometimes, we knew where the money was coming from. Sometimes we didn't. But I've lived long enough to know the billionaires and big corporations who opened their wallets wanted something in return.

In 2010 alone Americans For Prosperity, a group funded in large part by the Koch brothers, spent more than a quarter of a million dollars in North Carolina. Another group, Civitas Action, spent more. A new organization that sprang up, called Real Jobs NC, spent almost \$1.5 million dollars.

Overall, three quarters of all the outside money in state races that year were tied to one man: Art Pope. Pope and his associates poured money into 22 targeted races, and the candidates they backed won in 18.

In 2012, \$8.1 million in outside money flooded into the governor's race—a large portion of which was tied to Mr. Pope. And before he'd even been sworn into office, our new governor announced who would be writing the new state budget: surprise, surprise. It was Art Pope.

He could afford to spend lavishly, and he certainly got his money's worth.

When Justice Kennedy wrote his decision in *Citizens United*, he said that limitless outside spending “[does] not give rise to corruption or the appearance of corruption.” Try telling that to anyone who saw how the sausage got made in North Carolina.

There are winners and losers in every budget. And in the budget he produced, it's undeniable that Mr. Pope won big. Our state slashed corporate income taxes and lowered the share paid by the state's wealthiest people.

As for the losers, there were plenty. Tens of thousands of people lost their unemployment benefits. Public education funding was drastically cut back. Half a million low-income people were refused access to Medicaid that we'd already paid for. And while billionaires got a tax break, some working families actually got a tax hike.

But that's not all. After the tide of dark money flooded into our elections, we saw two more big changes that should cause us great concern.

First, it got harder for ordinary people to vote.

A month after the Supreme Court gutted Section 5 of the Voting Rights Act, North Carolina passed one of the most restrictive anti-voter laws in the country. It cut early voting down from 17 days to 10 days. It eliminated the ability of teenagers to preregister before their 18th birthday. And it eliminated same day voter registration. It also enacted a rigid voter ID requirement that required forms of ID that more than 300,000 North Carolinians don't have. Those restrictions will have the biggest impact on students, the elderly, the poor, and people of color. Put simply: Art Pope, Americans For Prosperity and the Koch brothers paid big money to roll back the Civil Rights advances that generations of Americans have paid for in blood.

Second, it got even easier for rich people to pour even more money into elections.

Big donors got new opportunities to write even bigger checks to candidates, and they got more ways to avoid any kind of disclosure. And our public financing system was scrapped—even the part of the law that helped provide clean judicial elections, and which had always had bipartisan support. The result of that decision was particularly painful to me. This year, I watched one of our sitting Supreme Court Justices, Robin Hudson, attacked in the most despicable and dishonest way. A million dollars in outside money was poured into the primary race—with more than \$650,000 coming from a Washington-based organization trying to protect the anti-voter attacks pushed through the legislature.

Ads from a dark money group claimed that she coddled child molesters and “sided with predators” while on the bench. I can personally attest to Justice Hudson’s excellent character and it was painful to see her face such dishonest, dishonorable smears. Those ads were character assassination, plain and simple. And they were the result of the system created by the US Supreme Court. I have an article from the *New York Times* that gives more detail about those attacks, and I’d request that the committee enter it into the record.

I cannot think of a more vicious cycle than taking a little more power from the voters and handing it to the spenders. But once big money got into our elections, that’s exactly what happened.

Let me be clear: I personally oppose all of these changes. But I know in politics, sometimes you win and sometimes you lose.

What makes it most disturbing is the sense that I have—and which I know is shared by other members of our legislature and many members of the public—that We the People are no longer the ones calling the shots. The question isn’t whether a law is popular, or whether a law is right. The question is who has the deepest pockets and who can buy the most ads to smear and discredit anyone who stands in their way. Art Pope has the same right as every citizen to *participate* in our democracy, but he doesn’t have the right to *buy* our democracy like he has done in North Carolina. The same is true for the Koch brothers. They shouldn’t be able to hide behind groups like Americans For Prosperity to smear their opponents and buy a legislature or a governor’s mansion.

I believe that public service is a calling. We’re called to use our gifts to create laws, to exercise our judgment, and to administer our cities, our states and our nation. *Citizens United*, *McCutcheon* and other Supreme Court decisions have made a mockery of that sacred duty.

What’s left doesn’t look like democracy. Democracy is when the government represents the people. Today, it seems big money and big donors pull the strings, while ordinary people find it harder and harder for their voices to be heard.

You have the chance to restore our democracy, to restore the First Amendment, and to make clear that our government should represent all the people, not just the wealthy few.

I urge you to support SJ Res. 19.

Thank you.

STATEMENT OF
FLOYD ABRAMS
PARTNER, CAHILL GORDON & REINDEL, LLP

BEFORE THE
COMMITTEE ON JUDICIARY,
UNITED STATES SENATE

AT A HEARING REGARDING
SENATE JOINT RESOLUTION 19

PRESENTED ON
JUNE 3, 2014

STATEMENT OF FLOYD ABRAMS
BEFORE THE SENATE JUDICIARY COMMITTEE
AT A HEARING REGARDING S.J. RES. 19

TUESDAY, JUNE 3, 2014
WASHINGTON, D.C.

I appreciate your invitation to appear today to offer my views on S.J.19. The description of the constitutional amendment it proposes states, in its text, that it “relate[s] to contributions and expenditures intended to affect elections.” That’s one way to say it, but I think it would have been more revealing to have said that it actually “relate[s] to *speech* intended to affect elections.” And it would have been even more revealing, and at least as accurate, to have said that it relates to *limiting* speech intended to affect elections. And that’s the core problem with it. It is intended to limit speech about elections and it would do just that.

When James Madison introduced the Bill of Rights to the First Congress he stated that the courts—“independent tribunals of justice,” he called them—would “consider themselves ... the guardians of those rights,” that they would serve as an “impenetrable bulwark against every assumption of power in the legislative or executive” and that “they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution.”¹ In no area has that been more true than with respect to the First Amendment. “No other nation,” Charles Fried has written, “claims as fierce and stringent a system of legal protection for speech. It is the strongest affirmation of our national claim that we put liberty above other values.”² It has been, of course, the Supreme Court, serving as the guardian of the First Amendment, that has accomplished that

¹ James Madison, Speech to Congress (June 8, 1789).

² Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59, U.CHI. L. REV. 225, 229 (1994)

and has thus assured that the United States became and remains the freest nation that ever existed in the history of the world.

Of course, many of the Court's opinions have been controversial. Some have not withstood the demands or judgments of history. But no ruling before and after that in the *Citizens United* case, providing First Amendment protection, has ever been reversed by a constitutional amendment. No speech that the Court has concluded warranted First Amendment protection has ever been transformed, via a constitutional amendment, into being unprotected speech and thus a proper subject of criminal sanctions. In fact, no amendment has ever been adopted limiting rights of the people that the Supreme Court has held were protected by the Bill of Rights in any of the first ten amendments.

In that context, it's worth recalling at the outset what sort of speech we routinely protect under the First Amendment and how it compares with the sort of speech you are now being asked to permit both the federal and state governments to criminalize. Chief Justice John Roberts put it well in his recent opinion in *McCutcheon v. Federal Election Commission*. "Money in politics," he observed, "may at times seem repugnant to some, but so too does much of what the First Amendment vigorously protects. If the First Amendment protects flag burning, funeral protests, and Nazi parades—despite the profound offense such spectacles cause—it surely protects political campaign speech despite popular opposition."³

The proposed amendment you meet today to consider deals with nothing but political campaign speech. It does not deal with money that is spent for any purpose other than persuading the public who to vote for or against and why. As such, it would limit speech that is at the heart of the First Amendment. And S.J. 19 does so in a sweepingly broad manner. It would not only

³ *McCutcheon v. Federal Election Commission*, 134 S.Ct. 1434, 1441 (2014).

effectively reverse the *Citizens United* ruling and cases such as *McCutcheon* that followed it but also cases that long predate it. Most tellingly, it would reverse *Buckley v. Valeo*, the 1976 decision joined in by such free expression defenders as Justices William J. Brennan, Thurgood Marshall and Potter Stewart. S.J.19 rejects the central teaching of *Buckley* that Congress may not, for the asserted purpose of “equalizing the relative ability of individuals and groups to influence the outcome of elections,” limit the spending and hence the speech of those who wished to participate in the political process by persuading people who to vote for or against and why.⁴ Under *Buckley*, individuals and groups are thus free to make independent expenditures in any amount in the election process. In the most memorable observation of the Court in *Buckley*, it 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”⁵ Yet that is precisely the notion, in the name of equality, that is at the heart of this proposed amendment.

The title of the proposed amendment goes even farther, claiming that it would “Restore Democracy to the American People.” The notion that democracy has already been lost, as we begin what will obviously be a hard fought election season in which virtually anything can and will be said, could be dismissed as rather typical Washington rhetorical overkill. But the notion that democracy would be advanced – saved, “restored” – by *limiting* speech is nothing but a perversion of the English language. It brings to mind George Orwell’s observation, in his enduring essay “Politics and the English Language,” that “[i]n our time, political speech and writing are largely the defense of the indefensible,” and that the word “democracy,” in particular, “has several different meanings which cannot be reconciled with each other” and “is often used in a con-

⁴ *Buckley v. Valeo*, 424 U.S. 1, 48, 96 S.Ct. 612, 649 (1976).

⁵ *Id.* at 48-49.

sciously dishonest way.” So let me say in the most direct manner that it is deeply, profoundly, obviously undemocratic to limit speech about who to elect to public office.

There could be little disagreement, for example, that it would be undemocratic, not to say unconstitutional, for the federal or any state government to prevent a newspaper from repeatedly, even incessantly, praising or denouncing any candidate for public office, or to limit how often an Internet website could do so. There is no distinction in principle between what the First Amendment protects in these all but unthinkable hypothetical cases and what S.J.19 would leave unprotected.

Indeed, the Supreme Court, in its unanimous ruling in 1966 in *Mills v. Alabama*, struck down as violative of the First Amendment an effort to assure fairer elections by barring “electioneering,” including newspaper editorials, on Election Day only. The argument in favor of the statute, wrote Justice Hugo Black for the Court, was that it imposed only a brief limitation on expression to avoid the danger of a confused or misled public that could result from last minute charges and countercharges that “cannot be answered or their truth determined until after the election is over.”⁶ However reasonable that might seem to some, the Supreme Court could hardly have been clearer or more emphatic in concluding that “no test of reasonableness can save a state law from invalidation as a violation of the First Amendment when that law makes it a crime for a newspaper editor to do no more than urge people to vote one way or another in a publicly held election.” There is no reason to think that that case would have been decided differently if it had involved an entity other than a newspaper. As the Court there stated, “[w]e deal here with the rights of free speech and press in a basic form: the right to express views on matters before the electorate.”⁷ The same is true here.

⁶ *Mills v. Alabama*, 384 U.S. 214, 220, 86 S.Ct. 1434, 1437 (1966) (quoting the Alabama Supreme Court’s decision).

⁷ *Id.* at 221 (Douglas, J., concurring).

There is another pervasive problem with the proposed amendment. S.J. 19 is rooted in the disturbing concept that those who hold office in both federal and state legislatures, armed with all the advantages of incumbency, may effectively prevent their opponents from becoming known to the public, by adopting legislation, which the proposed amendment would empower them to do, limiting the total amounts they may raise and spend in an effort to do so. Put another way, the amendment will create countless David versus Goliath bouts, with Goliath allowed to make up the rules of the game as it goes along. Such problems have always existed as federal and state legislatures adopted regulations in this area. But they would be compounded by the adoption of S.J.19 which would appear to insulate such legislation from judicial review by providing unfettered legislative authority to “se[t] limits” on both the amount of contributions and expenditures. In this area, as Justice Antonin Scalia has observed, “as everyone knows ... evenhandedness is not fairness. If *all* electioneering were evenhandedly prohibited, incumbents would have an enormous advantage. Likewise, if incumbents and challengers are limited to the same quantity of electioneering, incumbents are favored. In other words, *any* restriction upon a type of campaign speech that is equally available to challengers and incumbents tends to favor incumbents.”⁸ Contribution limits, by way of example, make it more difficult for challengers to close this incumbent advantage gap. Historically, challengers have relied upon large contributions from a small group of family, friends and admirers to raise sufficient funds for TV ads and other mass media needed to familiarize the voting public with candidate and his or her views.

It is no secret that the prime target of the proposed amendment is the *Citizens United* opinion of the Supreme Court. I'd like to begin my commentary on that case by offering a very general comment. The jurists who joined in the *Citizens United* ruling did not conjure up the

⁸ *McConnell v. Federal Election Commission*, 540 U.S. 93, 249, 124 S.Ct. 619, 720-21 (2003).

First Amendment concepts they were articulating. Those concepts have been with us for many years. The first law that barred entities such as corporations and unions from using their funds to make independent expenditures designed to affect federal elections was the Taft-Hartley Act adopted in 1947. From its adoption, its constitutionality was viewed as dubious because of First Amendment concerns. President Harry S. Truman vetoed it, in part on just those grounds, concluding that it was a “dangerous intrusion on free speech.”⁹

The Supreme Court quickly questioned the constitutionality of the new provisions in *United States v. CIO*, and concluded that unless the Taft Hartley Act was read extremely narrowly, “the gravest doubt would arise in our minds as to [the statute’s] constitutionality.”¹⁰ In those days, it was the liberal jurists who were particularly concerned by the First Amendment implications of such legislation. In the *CIO* case, Justices Wiley Rutledge, Hugo Black, William O. Douglas, and Frank Murphy, probably the four most liberal jurists ever to sit on the Court at the same time, concluded that whatever “undue influence” was obtained by making such large expenditures was outweighed by “the loss for democratic processes resulting from the restrictions upon free and full public discussion.”¹¹ A decade later, in *United States v. Automobile Workers*, liberal jurists again expressed the gravest constitutional concerns about the law. A dissenting opinion by Justice Douglas (joined by Chief Justice Earl Warren and Justice Black) even more clearly presaged the later ruling of Justice Kennedy and the majority in the *Citizens United* case, concluding:

Some may think that one group or another should not express its views in an election because it is too powerful ... [b]ut these are not justifications for withholding First Amendment rights from any group—labor or corporate...First Amendment rights are part of the heritage of all persons and groups in this country. They are

⁹ Harry S. Truman, Veto of the Taft-Hartley Labor Bill (June 20, 1947).

¹⁰ *United States v. Congress of Industrial Organizations*, 335 U.S. 106, 121, 68 S.Ct. 1349, 1357 (1948).

¹¹ *Id.* at 143 (Rutledge, J., concurring).

not to be dispensed or withheld merely because we or the Congress thinks the person or group is worthy or unworthy.¹²

Justice Kennedy's ruling in *Citizens United* was rooted in views consistent with those set forth by the jurists I have just quoted in *CIO* and *Automobile Workers*. Two long established legal propositions were central to the ruling in *Citizens United*. The first was that political speech—and in particular political speech about who to vote for or against—was at the core of the First Amendment. This was and is hardly controversial. There is no doubt that generally, as Justice Kennedy put it, “political speech must prevail against laws that would suppress it, whether by design or inadvertence.”¹³ Nor is it disputable that, as Justice Kennedy repeated from an earlier case, that the First Amendment “has its fullest and most urgent application to speech uttered during a campaign for political office.”¹⁴

The second critical prong of Justice Kennedy's opinion addressed the issue of whether *Citizens United*'s corporate status could be held to limit its First Amendment rights. This too (and notwithstanding repeated public and press misapprehension as to the matter) was not in the slightest controversial. In support of the proposition that corporations routinely had received First Amendment protection for their speech, Justice Kennedy cited 25 Supreme Court cases in which that had been established. Many of them involved powerful newspapers owned by large corporations, entities capable of shaping public opinion to an extraordinary degree. Other cases involved non-press corporations such as a bank, a real estate company and a public utility company. Justice Stevens' dissenting opinion (but not much of the overheated public criticism of the

¹² *United States v. International Union United Automobile, Aircraft and Agricultural Implement Workers of America*, 352 U.S. 567, 597 (Douglas, J., dissenting).

¹³ *Citizens United v. Federal Election Commission*, 558 U.S. 310, 340 (2010).

¹⁴ *Id.* at 349 (quoting *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 233 (1989)).

Citizens United ruling) took no issue with any of this, stating that “[w]e have long since held that corporations are covered by the First Amendment.”¹⁵

The language in Section 3 of the proposed amendment purportedly exempting any conduct that falls within the rubric of freedom of the press (but not speech) hardly begins to solve the problems presented by S.J.19. One thing is clear about the language. By treating freedom of the press differently from and more protected than freedom of speech, the intention to limit the latter freedom is manifest. But why should the press, however defined, receive more protection than others to engage in the identical advocacy of or condemnation of candidates for public office? If *Citizens United* were treated as a speaker rather than as a publisher (as the Federal Election Commission did during the *Citizens United* case but not afterwards) why should it receive less protection because of that designation? Or if, as is the case now, *Citizens United* is viewed as a publisher, why should it receive greater protection than some other corporate entity that decided to verbally assault a candidate for public office?

For those of you who disagree with the *Citizens United* ruling, I want to be clear that in this brief testimony, I can make no extended effort to convert you to accept its correctness. The vote on the Supreme Court was close and while the ruling was, in my view, plainly correct and certainly supportable by significant First Amendment case law, it was contrary in significant respects to another ruling of the Court, also decided by a very close vote that went the other way just a few years before. Today’s issue, though, is not whether you agree with *Citizens United*. It is whether you are prepared to take the extraordinary, never before taken, step of amending the Constitution to assure that *less* in the way of First Amendment protection should be afforded than the Supreme Court has held was warranted.

¹⁵ *Id.* at 432 (Stevens, J., dissenting).

It is in that context that I ask you to consider the facts of the *Citizens United* case. As the 2000 campaign for the presidency commenced and prior to the political conventions of that year, a small conservative organization completed its creation of a documentary denouncing then-Senator Clinton, then viewed as the likely Democratic nominee. With a powerful and dramatic musical background, the documentary assembled an array of critics of the Senator, all of whom harshly, often mockingly, criticized her and all of whom made their concern explicit about her being elected President. It was the sort of piece that many find distasteful; it was angry, negative, defamatory. It was also a quintessential example of the sort of speech most obviously protected by the First Amendment—an attack on a sitting Senator who was seeking the presidency, an attack based on her supposed character flaws, lack of competence, and the like. It is inconceivable to me that that such speech could be viewed as unprotected by the First Amendment. But S.J.19 would permit a state (or the federal government) to impose “limits” on the funding of that documentary that would have made its production impossible.

Indeed, on the face of the federal statute challenged in the *Citizens United*, it violated the law for that film, produced by a corporation which was, in turn, partially funded by corporations, to be shown on television, cable or satellite, within 30 days of a primary or 60 days of a general election. And when, in the first of two arguments held in the case, counsel for the United States acknowledged—as he was obliged to in candor with the Court—that under the law “a corporation could be barred from using its general treasury funds to publish [a] book” supporting a candidate for the presidency within the time limits set in the statute,¹⁶ the die was cast for a potentially broad opinion by the Court, an opinion as broad as those dissenting opinions from earlier serving liberal justices might have suggested. And that was the opinion that the Court did issue,

¹⁶ Statement of Malcolm L. Stewart, Deputy Solicitor General, Transcript of Oral Argument at 29, *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (No. 08-205)

one rightly summarized by Professor Joel Gora as articulating “a unified, universal and indivisible view of the First Amendment, namely that the rights it protects should be available to all those individuals and groups which seek to exercise them and inform the public.”¹⁷

In quoting Professor Gora, I think I should mention that he had served as counsel for the American Civil Liberties Union in the *Buckley* case I cited earlier and that on the issue before you the ACLU has remained firm in its defense of the First Amendment. As Laura Murphy, the Director of the ACLU’s Washington Legislative Office, has stated: “if there is one thing we absolutely should not be doing, it’s tinkering with our founding document to prevent groups like the ACLU (or even billionaires like Sheldon Adelson) from speaking freely about the central issues in our democracy. Doing so will fatally undermine the First Amendment, diminish the deterrent factor of a durable Constitution and give comfort to those who would use the amendment process to limit basic civil liberties and rights. It will literally ‘break’ the Constitution.”¹⁸

I want to close with a comment or two about the supposed consequences of the *Citizens United* case itself. When the government submitted its brief to the Supreme Court in that case, it offered a doomsday scenario about what would occur if the Court were to rule as it finally did. Fortune 100 companies, the government argued (and I am quoting now) had “combined revenues of \$13.1 trillion and profits of \$605 billion. If those 100 companies alone had devoted just one percent of their profits (or one-twentieth of one percent of their revenues) to electoral advocacy, such spending would have more than doubled the federally-reported disbursements of all American political parties and PACs combined.”¹⁹ Such an “amount of corporate spending,” the gov-

¹⁷ Joel M. Gora, *The First Amendment . . . United*, 27 GA. ST. U. L. REV. 935, 950 (2011).

¹⁸ Laura W. Murphy, “Fixing” *Citizens United Will Break the Constitution*, HUFFINGTON POST POLITICS (June 28, 2012, 7:21 PM), available at http://www.huffingtonpost.com/laura-w-murphy/citizens-united_b_1632317.html.

¹⁹ Brief for Appellee at 17, *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (No. 08-205).

ernment urged, “could dramatically increase the reality and appearance of quid pro quo corruption.”²⁰

Over four years have passed since that brief was filed, and since the Supreme Court issued its *Citizens United* decision. Contrary to the government’s dire predictions, there is no basis to conclude that any increase in quid pro quo corruption has occurred within the federal government, within the 24 states that, as of the ruling in *Citizens United*, imposed restrictions on contributions or expenditures or, of course, in the 26 states that as of that time imposed no such restrictions. This result (or lack thereof) should come as no surprise. Studies repeatedly have shown no correlation between a state’s level of corruption and its campaign finance laws with respect to corporations. In fact, three of the five states deemed “best managed” in a recent non-partisan study allowed unlimited corporate contributions. The five states deemed “worst-governed?” Two of them limited corporate contributions, and the remaining three prohibited them entirely.²¹

Further, *Citizens United* has not caused any massive rush of spending, corporate or otherwise. While it is true that a few corporations have made large contributions to Super PACs from entities taking the corporate form, figures from the FEC, Center for Responsive Politics, and Campaign Finance Institute reflect that such contributions are extremely rare. In general, the corporations that have contributed to Super PACs are far more “Main Street” than “Wall Street” in nature. In fact, not a single Fortune 100 Company appears to have contributed even a cent to any of the ten highest-grossing Super PACs in either the 2010, 2012, or 2014 election cycles. To date, the *only* significant Super PAC contribution from a Fortune 100 company appears to have

²⁰ *Id.*

²¹ See Matt Nese, Center for Competitive Politics, Issue Analysis No. 7, *Do Limits on Corporate and Union Giving to Candidates Lead to “Good” Government?* (Nov. 2013), available at http://www.campaignfreedom.org/wp-content/uploads/2013/11/2013-11-20_Issue-Analysis-7_Do-Limits-On-Corporate-And-Union-Giving-To-Candidates-Lead-To-Good-Government.pdf.

been a \$2.5 million dollar contribution from Chevron to the Congressional Leadership Fund (ranked 13th in total receipts) in 2012.²² Two other Fortune 100 company contributions Super PACs – Express Scripts, Inc. and Walgreen Company each made a \$5,000 contribution to JANPAC, a Super PAC supporting Arizona Governor Jan Brewer. This insignificant level of corporate giving bears no resemblance to the tidal wave of corporate money from enormous corporate entities predicted by the government in its *Citizens United* brief. And based on figures from the FEC and the Center for Responsive Politics, as well as the Campaign Finance Institute, while the rate of overall spending has increased since the *Citizens United* ruling, the rate of increase has been consistent with that of past years. As Jan Baran has pointed out, the total amount of spending in presidential years after *Citizens United* “rose, although at a rate no higher than in previous elections.”²³ In fact, the highest rate of change occurred between 2000 and 2004 (51%) while the rate of increase from 2008 to 2012 was 20%.

I conclude as I began. It is not some sort of coincidence that until today no decision of the Supreme Court affirming First Amendment rights has ever been overruled by amendment. Emotions have run high before about decisions of the Supreme Court which provided a higher level of protection of liberties set forth in the Bill of Rights than many in this body would have thought appropriate. Self-restraint on the part of enough members of this body carried the day and no constitutional amendment followed. This proposed amendment, S.J. 19, would shrink the First Amendment and in doing so set a precedent that would be both disturbing and alarming.

²² See Open Secrets List of Highest Grossing Super PACs, 2012 Election Cycle, available at <http://www.opensecrets.org/pacs/superpacs.php?cycle=2012>. Thus far in the 2014 Election Cycle, Congressional Leadership Funds total receipts of \$1,319,028 rank it 37th among all Super PACs. See Open Secrets List of Highest Grossing Super PACs, 2014 Election Cycle, available at <http://www.opensecrets.org/pacs/superpacs.php?cycle=2014>.

²³ Jan Baran, *Symposium: McCutcheon and the Future of Campaign Finance Reputation*, SCOTUSBLOG (April 4, 2014, 2:59 PM).

TESTIMONY OF PROFESSOR JAMIN B. RASKIN
DIRECTOR, PROGRAM ON LAW AND GOVERNMENT
AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW

BEFORE THE UNITED STATES SENATE JUDICIARY COMMITTEE

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

TUESDAY, JUNE 3, 2014

TESTIMONY OF PROFESSOR JAMIN B. RASKIN
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Mr. Chairman and Members of the Committee:

Thank you for this invitation to testify on this most fundamental question of our times. Our Constitution reads like a narrative history of the people’s demands for inclusion, participation, equal suffrage, and strong political democracy. The Amendment we discuss today is the next logical unfolding in this dramatic history of a democratic and self-governing people.

The American people have built two essential walls to protect the integrity of political democracy. The original one is Jefferson’s “wall of separation” between church and state.ⁱ After two centuries, that wall still protects a flourishing religious realm and a government that is free of theocracy.

The second one is the wall that we have built brick-by-brick in federal and state law for more than a century which separates plutocratic money from democratic politics. Ever since Congress passed the Tillman Act in 1907 banning corporate contributions to federal candidates,ⁱⁱ both Congress and the states have worked to wall off vast corporate wealth and personal fortunes from our campaigns for public office, defining the electoral arena as a place of political equality and freedom for all citizens, not just the wealthy.

But, in several recent 5-4 decisions, the wall protecting democracy from plutocracy has been crumbling under judicial attack. Four years ago, in *Citizens United v. FEC*, the Roberts Court majority bulldozed an essential block of the wall, the one that kept trillions of dollars in corporate treasury wealth from flowing into federal campaigns.ⁱⁱⁱ In *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett* (2011), the Court stifled public debate and destroyed vast new opportunities for political speech by striking down public financing programs that use matching funds and a trigger mechanism to amplify the voices of less affluent candidates competing to be heard over the roar of big wealth.^{iv} In *McCutcheon v. FEC* (2014), the Court took a sledgehammer to the aggregate contribution limits, empowering political tycoons and shrewd business investors to max out to every Member of Congress and all their opponents.^v All of these assaults on political equality and free speech were justified in the name of the First Amendment.

If we wait around, we can expect to see the few remaining bricks of campaign finance law flattened, including contribution limits, the ban on corporate contributions to federal candidates, the rules against “coordinated expenditures” between candidates and independent spenders, and the limits in 29 states on making campaign contributions during legislative

sessions—all of them at odds with the absolutist dogmas of our day: that money is speech, corporations are people, and the only kind of political corruption we can acknowledge and regulate are *quid pro quo* transfers like bribery. The public interests we could once promote under *Buckley v. Valeo* (1976), like the regulation of “undue influence” and “improper influence,” are now forbidden by the Court’s fundamentalist free market ideology—undue influence is just political business-as-usual.

To protect the future of both democratic politics and free market economics, we need to pass S.J. Res. 19 and rebuild the political democracy wall.

** In politics, we need to protect the realm of democratic self-government where all voices can be heard and not drowned out by super-rich spenders who turn up the volume on their soundtracks to ear-splitting levels; a realm founded on political equality where the views of all have a chance to count without being nullified by CEOs writing gargantuan checks with “other people’s money,” as Justice Brandeis called it in a book of the same name, in order to advance narrow agendas.^{vi}

** In economics, we need to strengthen the private business sector that engages in free market competition, and pull the plug on rent-seeking corporations that profit by big-money independent expenditures followed by strategic raids on the public treasury to obtain tax breaks, sweetheart legislation, competitive advantages, and government subsidies. The great economic and moral thinker Adam Smith, who favored honest-to-goodness business competition and feared industry capture of government, warned that special-interest legislation should be “carefully examined . . . with the most suspicious attention.”^{vii} He would be as interested as Thomas Jefferson in seeing us rebuild the wall between free markets and democratic politics. In campaign finance, laissez simply isn’t fair.

When Justice Scalia went on CNN and defended *Citizens United*, he invoked everyone’s favorite founder. “I think Thomas Jefferson would have said, ‘The more speech, the better,’” he volunteered.^{viii} One must charitably assume Justice Scalia’s ignorance of Jefferson’s political philosophy and how much the Sage of Monticello dreaded the prospect of plutocratic takeover of our political institutions. Jefferson warned against the development of “a single and splendid government of an aristocracy, founded on banking institutions . . . riding and ruling over the plundered ploughman and beggared yeomanry.”^{ix}

Jefferson’s nightmare vision sounds a lot like the *Citizens United* era, where dramatic economic inequalities accompany a free market in political money. The vast majority of Americans are appalled by our condition. 80% of Americans — including 82% of Dems, 84% of Independents and 72% of Republicans — oppose *Citizens United* and the practice of unlimited spending in elections.^x According to a Gallup Poll in 2013, 79% of Americans—four out of five—favor imposing limits on the amount raised and spent in campaigns.^{xi}

But Congress can't enact the popular will because five Justices have put us in a policy straitjacket. Even if you pass the excellent Fair Elections Now Act in the Senate and the Government By the People Act in the House, which are presently on sound constitutional footing, as I hope you do, the Roberts Court could quite easily invalidate the public matching funds provision by dreaming up a creative new theory for why it works as an unconstitutional penalty on the free speech of privately funded candidates.

S.J. 19 restores our power to set reasonable limits on campaign giving and spending, not by creating perfect equality in our citizens' ability to give--since billionaires like Sheldon Adelson, the Koch brothers, and George Soros will always have greater resources than the working poor--but at least assuring that billionaires inhabit the same political universe as construction workers, teachers, and small businesspeople. It's one thing to tell middle-class Americans that their \$100 contribution has to go up against a \$5,000 contribution (a scale of 50-1), but quite another to say it has to go up against a \$5 million contribution or \$50 million independent expenditure (a scale of 50,000-1 or 500,000-1). A regime like that fits a plutocracy, not a democracy. We have no kings under our Constitution and no slaves; no titles of nobility and no serfs; no poll taxes and no white primaries; and our campaign finance practices should reflect the values not of a 1% Court setting up an exclusionary "wealth primary" but a democratic republic dedicated to the proposition that all of us are created equal--billionaires and bus drivers alike—and that we should be able to participate in politics as relative equals.

The proposed 28th Amendment should also unambiguously empower the people to wall off campaigns from corporate treasury wealth. Thus, I think that the Amendment should include additional explicit language that would allow Congress and the states to distinguish between corporations and persons. It should also include a brief preamble to set forth the purposes of the Amendment, including the advancement of democratic self-government, political equality and the protection of the integrity of the government and the electoral process.

Yet, even as our huge majorities of Americans support reclaiming our democracy, opponents of the Amendment are waving the flag of the First Amendment, as if political democracy and free speech are enemies. But the *Citizens United* era has nothing to do with free speech and everything to do with plutocratic power.

Citizens United did not increase the rights of a single citizen to express his or her views with speech or with money. Before the decision, all citizens, including CEOs, could express themselves freely, make contributions, and spend all the money they had to promote their politics. They could band together with the help of the corporation and form a PAC. All *Citizens United* did was confer a power on *CEOs* to write corporate treasury checks for political expenditures, without a vote of the shareholders, prior consultation or even disclosure. That breathtaking sleight of hand was imposed on the nation--and on the parties to the case, who had not even brought the constitutional question to the Court--by five Justices who trampled every canon of constitutional avoidance and bypassed multiple obvious statutory rulings for the

plaintiffs in order to reach an unnecessary constitutional result.^{xiii} *Citizens United* has nothing to do with increasing the free speech of the people and everything to do with increasing the political power of CEOs and corporate managers *over* the people.

The specific effect of *Citizens United* was to give CEOs the power to take unlimited amounts of money from corporate treasuries and spend it advancing or defeating political candidates and causes of their choosing. Its real-world consequence was thus not to expand the political *freedom* of citizens but to reduce the political *power* of citizens vis-à-vis CEOs presiding over huge corporations with vast fortunes. These corporations, endowed with limited shareholder liability and perpetual life, may now freely engage in motivated political spending to enrich themselves and their executives, leaving workers and other citizens behind.

Similarly, when the people of the states try to rescue democratic self-government with public financing programs that enable less-wealthy candidates to run for office and expand the political discourse, the five-justice bloc slaps them down. In the startling *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* (2011) decision, the majority thwarted the political speech of Americans who are not wealthy or backed by the wealthy, undermining their ability to compete in elections and entrenching political inequality.^{xiii}

In *Bennett*, following a political money scandal involving 10% of the state's legislators, the Arizona legislature passed the Clean Elections Act,^{xiv} a public financing system that dramatically increased the number of Arizonans who could run for office and win. Participating candidates were given an initial outlay of money after showing their seriousness, but were eligible for equal matching funds if they had privately financed opponents or outside groups who outspent them, except that once the publicly financed candidate received three times the amount of the initial disbursement, they could get no more matching funds regardless of how much they were being outspent. Thus, after an initial grant of \$21,479, an Arizona House candidate being outspent by a privately financed candidate could receive up to, but no more than, \$64,437, even if his or her opponent spent \$250,000.

In *Bennett*, the majority crushed this modest effort to amplify the speech opportunities of publically financed candidates running against well-heeled and independently-bankrolled opponents. Amazingly, the majority found that magnifying the speech of poorer candidates violated the First Amendment rights of the wealthier, well-financed candidates. As Justice Kagan put it in her impassioned dissent, in a "world gone topsy-turvy," the majority treated "additional campaign speech and electoral competition" as "a First Amendment injury"^{xv} and struck down a state law that "expands public debate"^{xvi} and "provides more voices, wider discussion, and great competition in elections."^{xvii}

The Court's majority today insists that millionaires and candidates backed by wealthy interests have not only a right to spend their fortunes to win office but a right to freeze their money speech advantages over publically financed candidates, whose campaigns may not be

aided in any way to enlarge their power to speak or to compete effectively. It acted on the same principle in *Davis v. FEC* (2008),^{xviii} which struck down the so-called “Millionaire’s Amendment” in the McCain-Feingold legislation and found that the rights of better-financed candidates are violated if the poorer candidates are given a greater chance to catch up. I know life isn’t fair, but the Supreme Court is using the Constitution to make that the law.

The 28th Amendment will restore the Court’s prior understanding of corporate corruption, as well as its traditional understanding of what a corporation is. In *Austin v. Michigan Chamber of Commerce* (1990), one of the several cases overruled by *Citizens United*, the Court upheld bans on corporate political independent expenditures as necessary to prevent the kind of corruption caused by “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”^{xix} Under the Amendment, Congress and the states can once again ban corporate political expenditures.

Similarly, the Amendment will restore the power of the people to exclude corporations from political activity. Before the Court’s 5-4 decision in *First National Bank of Boston v. Bellotti* (1978), which was the only real precursor to *Citizens United*, a corporation had never before enjoyed any of the political rights of the people, but was seen as an “artificial entity” chartered by the state to serve economic purposes.^{xx} In his historic dissenting opinion in *Bellotti*, Justice Byron White pointed out that we endow business corporations with extraordinary legal benefits and subsidies--“limited liability, perpetual life and the accumulation, distribution and taxation of assets,” all in order to “strengthen the economy generally.”^{xxi} But, he argued, a corporation has no right to convert its awesome state-enabled economic resources into political power. As he so cogently put it: “The state need not permit its own creation to consume it.” Chief Justice William Rehnquist agreed, arguing that, “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 . . .”

But if we allow the Roberts Court majority to follow the logic of its five 5-4 rulings dismantling campaign finance law, the final pieces of walling between the economic and political realms will be torn down. The people will not be governing the corporations, the corporations will be governing the people.^{xxii}

At times like this in American history, when the Court has undermined popular democracy and the political rights of the people, we have amended the Constitution to reverse the damage. We did it when the Court enthusiastically approved the disenfranchisement of women,^{xxiii} and when it upheld poll taxes.^{xxiv} Indeed, the majority of the 17 constitutional amendments we have added since the Bill of Rights—the 13th, 14th, 15th, 17th, 19th, 22nd, 23rd, 24th and 26th have strengthened the progress of democratic self-government and the political rights of the people even as the defenders of political inequality and elite privilege protested that

their rights were being violated. I commend the sponsors of this historic legislation and urge them to stand strong. The American people are with you.

* * * * *

ⁱ Letter from Thomas Jefferson to the Danbury Baptist Association (1802) (on file at the Library of Congress), available at <http://www.loc.gov/loc/lcib/9806/danpost.html>.

ⁱⁱ Tillman Act, Act of January 26, 1907, 34 Stat. 864, now a part of 18 U.S.C. Sec. 610. (Cited by the Supreme Court in *FEC v. Beaumont*, 539 U.S. 146 (2003) as “ch. 420, 34 Stat. 864.”)

ⁱⁱⁱ *Citizens United v. FEC*, 558 U.S. 310 (2010).

^{iv} *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011).

^v *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

^{vi} Louis D. Brandeis, *Other People’s Money and How the Bankers Use it* (Frederick A. Stokes Co., 1914).

^{vii} Adam Smith, *The Wealth of Nations: Book 1: Of the Causes of Improvement in the productive Powers of Labour* 392 (W. Strahan and T. Cadell, 1776).

^{viii} *Piers Morgan Interviews Justice Antonin Scalia* (July 18, 2012; posted May 5, 2013), available at <http://www.youtube.com/watch?v=it7sN2jqpNs>.

^{ix} Letter from Thomas Jefferson to William B. Giles (1825) (available at <http://www.freedomformula.us/classes/live-class-resources/jefferson-giles-12-26-1825/>).

^x Greenberg Quinlan Rosner poll, April 16-24, 2014, Stan Greenberg, James Carville, and Erica Seifert Memorandum, May 7, 2014.

^{xi} <http://www.gallup.com/poll/163208/half-support-publicly-financed-federal-campaigns.aspx>; see also Dan Eggen, Poll: Large majority opposes Supreme Court’s decision on campaign financing, Washington Post, February 17, 2010, 4:38pm, <http://www.freedomformula.us/classes/live-class-resources/jefferson-giles-12-26-1825/>.

^{xii} In following the canon of constitutional avoidance, the *Citizens United* Court could have found, with far greater reason and logic, that Citizen United’s pay-on-demand video was not an electioneering communication within the meaning of the Bipartisan Campaign Reform Act because viewers had to download it (unlike the television commercials which were the object of the law); because it was extremely unlikely that 50,000 eligible voters would order the video, meaning that the statute would not even apply; and because there was less than 1% corporate funding behind Citizens United and other courts had already recognized an exemption for electioneering communications with such a de minimis amount of corporate backing. In other words, there was no shortage of ways for the majority to rule for Citizens United without invalidating dozens of federal and state laws, toppling numerous Supreme Court precedents, and transforming corporations into rights-bearing political citizens of the republic.

^{xiii} In a parallel case called *Davis v. FEC*, the Court struck down the so-called “Millionaire’s Amendment” of the Bipartisan Campaign Reform Act of 2002, which provided that if a candidate for the U.S. House spent more than \$350,000 in personal funds, his or her opponent could collect individual contributions up to \$6,900 per contributor, or three times the normal limit of \$2,300. This was no guarantee, of course, that he or she could catch up, but the candidate at least would have had a chance raise and spend more.

^{xiv} Arizona Citizens Clean Elections Act, Ariz. Rev. Stat. Ann. § 16-940 *et seq* (2010) (West).

^{xv} (1(2834) 31 S. Ct. 2806, 2833)

^{xvi} *Bennett*, 131 S. Ct. at 2834.

^{xvii} *Id.*, 131 S. Ct. at 2835.

^{xviii} 554 U.S. 724 (2008).

^{xix} *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

^{xx} Chief Justice John Marshall wrote in the *Dartmouth College* case (1818) that, "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence."

^{xxi} *First National Bank v. Bellotti*, 494 U.S. 652, 658 (1990).

^{xxii} Already this Term, in *Hobby Lobby Stores v. Sebelius*, the Court is considering a federal appeals court decision agreeing with claims by a for-profit business corporation that it possesses the religious rights of the people and invoking the authority of *Citizens United* for its decision. See *Hobby Lobby Stores Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir., 2013), Judge Tymkovich, United States Circuit Court of Appeals for the Tenth Circuit for the majority) ("We see no reason the Supreme Court would recognize constitutional protection for a corporation's political expression but not its religious expression.")

^{xxiii} In 1875, in *Minor v. Happersett*, the Court ruled that the equal protection clause did not protect the right of women to vote, declaring that a woman's proper place was in the home and domestic sphere. The suffragettes spent decades pressing Congress and the states to adopt the 19th Amendment, which passed in 1920.

^{xxiv} Similarly, in *Breedlove v. Suttles* (1937), the Court upheld poll taxes in Georgia, and the people passed the 24th Amendment to the Constitution in 1964 banning poll taxes in federal elections. Later, in *Harper v. Virginia Board of Elections* (1966), 383 U.S. 663 (1966), the Court struck down poll taxes in state elections too.

**Statement of Senator Patrick Leahy (D-Vt.),
Chairman of the Senate Judiciary Committee,
Hearing On “Examining A Constitutional Amendment To Restore Democracy
To The American People”
June 3, 2014**

This morning the Senate Judiciary Committee begins its consideration of a constitutional amendment to repair the damage done by a series of flawed Supreme Court decisions that overturned longstanding precedent and eviscerated campaign finance laws. Left unanswered, these rulings will continue to erode fundamental aspects of our democratic process. It is time for Congress and the American people to act.

Years ago, Congress passed campaign finance laws to preserve the integrity of the electoral process, to prevent and deter corruption, and to limit the undue influence of the wealthy and special interests in our elections. Yet five justices have now repeatedly overturned these common sense and time-honored protections – through the *Citizens United* and *McCutcheon* cases. In doing so, the Supreme Court has opened the floodgates to billionaires who are pouring vast amounts of unfettered and undisclosed dollars into political campaigns across the country. Justice John Paul Stevens had it right when he wrote that the Court’s decision in *Citizens United* “threatens to undermine the integrity of elected institutions across the Nation.”

I have heard from countless Vermonters about how the Supreme Court’s decisions threaten the constitutional rights of hardworking Americans who want to have their voices heard, not drowned in a sea of corporate special interests and a flood of campaign ads on television. Not only have Vermonters urged me to advance a constitutional amendment in the Senate, but they have acted themselves on this vital issue by calling for a constitutional convention. Just as Vermonters led the nation in protecting gay rights, in pressing for the abolition of slavery, and in advancing the idea of public education, Vermonters now are determined to advance the debate over money in politics so that our democracy will not be transformed into an oligarchy. Vermont’s call for a constitutional convention is a separate approach for amending the Constitution that can operate on a parallel track to the congressional approach that we are initiating today. It is my hope that the two efforts can work in tandem to create even more momentum on this critical issue.

The American people also continue to voice their support through other avenues. More than two million individuals signed petitions calling for a constitutional amendment to fight back against the corrosive effects of the Supreme Court’s damaging decisions regarding money in politics. Those petitions have been brought to our hearing room today, and they are a tangible reminder that Americans are calling on Congress to act.

Several possible constitutional amendments have been suggested to respond to the Supreme Court’s decisions but the one that has received the most support thus far has been proposed by Senator Tom Udall of New Mexico. It would explicitly authorize Congress and the states to regulate the raising and spending of money for political campaigns, including independent expenditures. I expect that the Committee may consider improvements to the language of the amendment as a result of today’s hearing.

The ability of all Americans – not just wealthy ones -- to express their views and have their voices heard in the political process is vital to meaningful self-government. The common sense of the American people tells us that corporations are not people. Those who claim to adhere to the original intent of the Constitution cannot reasonably argue that the Framers viewed the rights of corporations as central to our electoral process. There must be some balance in our approach to the funding of political campaigns so that *all* Americans are represented and can be heard.

These sharply-divided rulings of the Supreme Court have undermined the fundamental notion that our democracy is supposed to be responsive to all Americans. Like my fellow Vermonters, I believe that all Americans and not just a wealthy few have a right to have their voices heard.

I have served in the Senate for nearly 40 years and as Chairman of the Judiciary Committee for nearly ten. I have long been wary of attempts to change the Constitution because I have seen proposals to amend the Constitution used, like bumper stickers, merely to score political points. Our fundamental charter is sacred, and amending it should only be a last resort. But like most Vermonters, I strongly believe that we must address the divisive and corrosive decisions by the Supreme Court that have dismantled nearly every reasonable protection against corruption in our political process.

Many of us on this Committee have tried for years to pass a law to require transparency and disclosure of political spending. Unfortunately, Senate Republicans have repeatedly filibustered that legislation, known as the DISCLOSE Act. This statutory approach would allow the American people to know who is pouring money into our electoral process. I hope that we will be able to convince enough Republicans to join this effort to overcome the Republican filibuster of this transparency measure. But because the Supreme Court based its rulings on a flawed interpretation of the First Amendment, a statutory fix alone will not suffice. Only a constitutional amendment can overturn the Supreme Court's devastating campaign finance decisions. And that is why I have convened this hearing.

After I turn to Ranking Member Grassley, we will hear from the Senate's Majority Leader, Harry Reid and then the Minority Leader, Mitch McConnell. I believe this joint appearance by the leaders is a first in this Committee's history and it underscores the importance of the public discussion we are having today.

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Senator Sheldon Whitehouse
Statement for the Record
Hearing: "Examining a Constitutional Amendment to
Restore Democracy to the American People"
Senate Committee on the Judiciary
June 3, 2014

Chairman Leahy, Ranking Member Grassley, thank you for convening this important hearing on the state of our democracy in the wake of the Supreme Court's decisions in *Citizens United v. FEC* and *McCutcheon v. FEC*, and on possible remedies to limit the corrupting influence of money in elections.

The Supreme Court's recent decision in *McCutcheon* continues the conservative justices' efforts to dismantle our country's campaign finance laws and eliminate all checks against excessive and potentially corrupt special interest and corporate influence. By striking down limits on the total an individual can give to all candidates and party committees in an election cycle, the Court once again chose to favor wealthy and powerful interests while ignoring precedent and public consensus on the corrupting nature of money in politics.

McCutcheon continues the disastrous course set by the Court's decision in *Citizens United* to allow unlimited corporate independent expenditures. As Justice Stevens wrote in dissent, the *Citizens United* decision represented "a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt."

McCutcheon shares *Citizens United*'s narrow definition of corruption, and shows and shows a Court dramatically out of touch with the realities of electoral politics. The reliance on *Citizens United* is particularly troubling given that the years since that decision have shown it to be based on irretrievably flawed assumptions. As Sen. John McCain and I pointed out to the Court in an *amicus* brief filed in *American Tradition Partnership v. Bullock*, *Citizens United* was premised on false assertions: among them, that "independent expenditures" would be truly independent, and that there would be full disclosure of political spending. Moreover, as we said, the Court was blind to the corruption threat of private promises and threats to use this new spending power.

A growing number of Court observers, who would previously never have dreamed of impugning the justices' motives, are beginning to see them as creatures of politics, rather than of the law. Linda Greenhouse of the *New York Times*, long reluctant to criticize the Court in this manner, recently wrote that "the problem is not only that the court is too often divided but that it's too often simply wrong: wrong in the battles it picks, wrong in setting an agenda that mimics a Republican Party platform, wrong in refusing to give the political system breathing room to make fundamental choices of self-governance." Another moderate voice, Norm Ornstein, wrote that "recent analyses have underscored the new reality of today's Supreme Court: It is polarized along partisan lines in a way that parallels other political institutions and the rest of society, in a fashion we have never seen."

Jeffrey Toobin, a well-respected legal commentator, wrote that “[i]n every major case since he became the nation's seventeenth Chief Justice, Roberts has sided with the prosecution over the defendant, the state over the condemned, the executive branch over the legislative, and the corporate defendant over the individual plaintiff.” And is it a coincidence that this pattern, to continue Toobin's quote, “has served the interests, and reflected the values of the contemporary Republican party”?

It is not only long-term Court watchers who are alarmed by the Court's activist turn. The general public has caught on as well. According to a recent poll, “[j]ust 35 percent of Americans give the Supreme Court a positive job performance rating.” The same poll found that “[b]y a nearly two-to-one ratio, Americans say that Supreme Court Justices OFTEN let their own personal or political views influence their decisions rather than deciding cases based on legal analysis.” As a striking indication of just how far public trust in the Court has fallen, a separate poll found that “by 9 to 1 (55% to 6%), voters believe the Court treats corporations more favorably than individuals,” and that “this view is held across partisan and ideological lines.” The public has abundant reason to feel this way about the Court's pro-corporate agenda.

With regard to *Citizens United* in particular, the numbers are just as clear, with 80 percent of Americans opposing the ruling when presented with a neutral description of it.

In light of the unprecedented polarization and politicization of the Court, it is appropriate that we are now considering a constitutional amendment to redress some of the Court's worst departures from legal and historic norms. Such an amendment could restore common sense to our campaign finance laws and allow Congress to once again protect our elections from the corrupting influence of money. I'm not sure we have the language exactly right yet – that's what hearings are for – but I applaud Sen. Tom Udall for his outstanding work to advance an amendment.

In addition, since *Citizens United*, I and many others have supported passage of disclosure legislation such as the DISCLOSE Act, which would require organizations spending large sums on elections to disclose their largest donors. While it would not be an end to unlimited spending in elections, this legislation would help ensure that billionaire donors and multi-national corporations (including foreign donors and corporations) cannot pour unlimited money into elections while using legal loopholes to keep their donations secret.

Once again, I thank the Judiciary Committee for holding this important hearing, and I will continue to work with reform advocates inside and outside of the Senate to repair our campaign finance system.

**Senate Judiciary Committee Hearing “*Examining a Constitutional Amendment to Restore Democracy to the American People*”
June 3, 2014**

Statement of Senator Cornyn

- Thank you, Mr. Chairman.
- Today is June 3rd, and we have just a few weeks before the August recess.
- So far this year, by my count, we have marked up just three bills in the Senate Judiciary Committee.
- The House Judiciary Committee, for its part, has marked up eleven bills this year.
- Not every bill is worth passing, to be sure. But the limited time we have raises the question: why are we considering today an amendment with no chance of becoming part of the Constitution?

- The reason, I suspect, is the same reason the Majority Leader has spent countless hours on the Senate floor not legislating, but attacking private citizens for their speech.
- The Majority Leader and his party – and now this Committee – are trying, desperately, to change the subject.
- They are trying to convince Americans that the reason for our troubles is not six years of the failed policies of the Democratic Party, but the fact that some who disagree with Democrats choose to participate in the political process.
- Americans are not going to fall for it.
- The Majority Leader states that “shadowy” and “dark” money “poses the greatest threat to our democracy that [he has] witnessed during [his] time in public service.”

- He gives us faceless “corporations and special interest groups” – and two individuals with faces – as villains, claiming that undoing the Constitution’s protection of free speech will cure all our ills.
- This sounds like fantasy because it is complete fiction.
 - As Mr. Abrams’ testimony shows, the Citizens United decision did not drive the increase in campaign spending the Majority Leader decries.
 - Nor will legislation under the proposed amendment lead to a decrease.
 - Take the 2002 McCain-Feingold campaign finance reform bill, which the Majority Leader claims cleared the air of the influence of special interests:
 - That law did not reduce campaign spending: in the 2008 election cycle, before *Citizens United*, President Obama and Senator McCain raised and

spent nearly twice as much as President Bush and Senator Kerry spent in 2004.

- While the proposed amendment will fail to achieve its stated goals, it will succeed in limiting free speech and empowering politicians.
- Don't take it from me: according to the ACLU, the amendment "would undermine the goals [of] ... encouraging vigorous political dissent and providing voice to the voiceless."
- It would "fundamentally 'break' the Constitution and endanger civil rights and civil liberties for generations."
- The proposed amendment will do so by eliminating the protection of free speech that the First Amendment provides.
- It will give legislators, including Congress, limitless power to regulate citizen involvement in the political process.

- Politicians will be authorized to impose any kind of regulation on political speech.
- Courts will have no standard they can use to rein in excessive infringement on free speech rights.
- And, as the proposed amendment makes clear, any law it authorizes will trump First Amendment rights like free speech and assembly.
- I can't tell you how this power would be used by the politicians it would arm – maybe they will be both benevolent and farsighted enough to avoid unintended consequences. But I doubt it.
- I suspect they will use their new power to protect themselves, setting contribution limits so low that challengers will never be able to run against them.

- I suspect they will blur the line between issue and express advocacy, to block political views they do not like, including criticism of themselves.
- Or perhaps the politicians will do exactly what proponents of say they fear: bar individual citizens from contributing to campaigns entirely, limiting that privilege solely to corporations. Because under this amendment, they could.
- The Majority Leader focuses on the impact the amendment would have on billionaires. But it would eliminate free speech and other protections for rich and poor alike.
- Politicians will be able to regulate the political process as they wish, and courts will be powerless to stop them.
- This attempt should frighten all Americans. It frightens me.

QUESTIONS SUBMITTED TO PROF. JAMIN B. RASKIN BY SENATOR DURBIN

Senator Richard J. Durbin

Follow Up Questions for the Record

SENATE JUDICIARY COMMITTEE HEARING ON "EXAMINING A
CONSTITUTIONAL AMENDMENT TO RESTORE DEMOCRACY TO THE
AMERICAN PEOPLE"

June 10, 2014

1. At last week's hearing, it was implied that no other constitutional amendment has ever removed or changed a right contained in the Bill of Rights?
 - a. Do you agree with that implication?
2. Is it true that S.J. Res. 19 would permit discrimination or censorship against specific political groups or causes based on their ideology?
3. What are the logical implications of the position articulated by Floyd Abrams and others advocating the lifting of all contribution limits?
4. In written testimony for the record, Art Pope said that the intent of S.J. Res. 19 is to silence incumbents' opposition and that *Citizens United* did not change the rules with respect to issue ads.
 - a. Is his view of the intent of S.J. Res 19 accurate?
5. Art Pope also wrote that the "history of North Carolina refutes the entire premise that elections can be 'bought' by one party or side spending the most money."
 - a. Do you agree with Mr. Pope's assessment?

QUESTIONS SUBMITTED TO FLOYD ABRAMS BY SENATOR GRASSLEY

QUESTIONS FOR THE RECORD FROM SENATOR GRASSLEYSENATE JUDICIARY COMMITTEE HEARING ON "EXAMINING A CONSTITUTIONAL AMENDMENT TO RESTORE DEMOCRACY TO THE AMERICAN PEOPLE"

- 1) Question for Prof. Raskin and Mr. Abrams:

Prof. Raskin cited Ward v. Rock Against Racism in support of the view that there were no First Amendment implications for government to prevent people from drowning out the speech of other people. That case involved a time, place, or manner restriction on the volume of speech through municipal payment for a sound system and a technician to control music at decibels not disturbing to other citizens. The Court upheld the arrangement because it was made "without reference to the content of the regulated speech, [was] narrowly tailored to serve a significant governmental interest, and that [it] le[ft] open ample alternative channels for communication of the information." In the proposed constitutional amendment, speech is being limited precisely because of its content, it is not narrowly tailored to achieve any significant governmental interest, and it vastly curtails alternative channels of communication. Does Ward really have any bearing on S.J. Res. 19?

- 2) Question for Mr. Abrams:

Several senators remarked at the hearing that S.J. Res. 19 is needed to safeguard the electoral process, to deter corruption, to prevent undue influence, and to enable the voices of Americans to be heard rather than drowned out. Do you think that allowing members of Congress to set the rules governing the ability of challengers to become known, as you testified, would advance those four goals?

- 3) Question for Mr. Abrams:

What is your response to Senator Reid's testimony that the law currently governing campaign finance poses a threat to democracy and one person, one vote? What about his argument that undue influence is not free speech or that restricting spending on campaigns would restore sanity and lead to greater public confidence in their elected leaders?

- 4) Question for Mr. Abrams:

At the hearing, one senator, referencing the Watergate scandal, argued that not all campaign spending should be protected. What is your response to that comment?

- 5) Question for Mr. Abrams:

Prof. Raskin testified, "Reasonableness applies to all of the constitutional amendments," and referenced a prohibition on buying sex. Has any Supreme Court

decision in the past 50 years held that Congress can restrict core political speech based on its content so long as the restriction is reasonable?

6) Question for Mr. Abrams:

What is your reaction to one senator's comparison of restrictions on political spending to restrictions on child pornography, or shouting "fire" falsely in a crowded theater? Is that senator correct in stating, "We have always had balancing tests for every amendment" as applied to the First Amendment's protection of core political speech? What about his statement that "The First Amendment has always, always, always had a balancing test. . . and if there ever is a balance that is needed, it is to restore some semblance of one person, one vote; some of the equality that the Founders sought in our political system."? And, how do you view his argument that it is false in light of 100 years of history to maintain that Congress cannot regulate political speech when billions of dollars enter the system?

7) Question for Mr. Abrams:

What is your response to the same senator's statement at the hearing that, "I don't believe it is the same exact part of the Constitution . . . in free speech to get up on a soapbox and make a speech or to publish a broadside or a newspaper as it is to put up the 11,427th ad on the air"?

8) Question for Mr. Abrams:

One senator claimed that "five conservative activists sitting on the Supreme Court for the first time decided that unlimited spending on elections is a-ok." Is this correct?

9) Question for Mr. Abrams:

The same senator reflected a commonly expressed view that unlimited corporate spending "obviously" creates a risk of corruption, and another agreed. What is your response?

10) Question for Mr. Abrams:

Two of my colleagues argued that unlimited corporate spending on elections permits corporations to intimidate elected officials by threatening to run, or actually running, ads criticizing the politician if the corporation is displeased by the politician's vote. I have no reason to think that either of these senators would ever be dissuaded from voting as they believe the public interest requires. But shouldn't politicians be made of sterner stuff? Shouldn't they be courageous enough to stand up for their votes and have the financial ability to explain their votes and outline the threats and that were made against them if they failed to vote in the public interest? From your experience representing media corporations, how newsworthy would it be if an elected official

informed the press about such a threat and what position do you think an editorialist would take on the subject?

11) Question for Mr. Abrams:

It was contended at the hearing that in Citizens United, Chief Justice Roberts failed to keep his promise to be committed to judicial minimalism and that he “destroyed the canon of constitutional avoidance” to enable all corporations to make independent expenditures at all times. Do you agree?

12) Question for Mr. Abrams:

At the hearing, the point that restrictions on corporate speech on elections affected media corporations as well as others was dismissed. The claim was made that the freedom of media corporations is already protected by the Free Press Clause of the First Amendment. Therefore, it was argued, there is no need to be concerned that denying other corporations the right to engage in independent expenditures would have any effect on media corporations. Do you agree?

13) Question for Mr. Abrams:

One senator at the hearing contended that Citizens United and Super PACs have so changed the political landscape that S.J. Res. 19 is now necessary. Do you believe that any changes effected by Citizens United justify enactment of S.J. Res. 19?

14) Question for Mr. Abrams:

One senator at the hearing compared Citizens United to the Supreme Court’s earlier decisions in Dred Scott and in denying women the right to vote, which were overturned by constitutional amendments that expanded the rights of ordinary people. Do you think that is an apt analogy?

15) Question for Mr. Abrams:

You testified that S.J. Res. 19 would “reverse[] a slew of constitutionally rooted cases. . . .” Could you please identify the cases that would be overturned and provide brief descriptions of the points of First Amendment free speech law that S.J. Res. 19 would reverse?

QUESTIONS FOR THE RECORD FROM SENATOR GRASSLEY

SENATE JUDICIARY COMMITTEE HEARING ON "EXAMINING A CONSTITUTIONAL
AMENDMENT TO RESTORE DEMOCRACY TO THE AMERICAN PEOPLE"

1) Question for Sen. McKissick:

You testified that the Supreme Court's decision in the Citizens United case made it easier for "rich people to write bigger checks to candidates." Did that decision affect contributions in any way?

QUESTIONS FOR THE RECORD FROM SENATOR GRASSLEY

SENATE JUDICIARY COMMITTEE HEARING ON “EXAMINING A CONSTITUTIONAL AMENDMENT TO RESTORE DEMOCRACY TO THE AMERICAN PEOPLE”

1) Question for Prof. Raskin:

You testified that Citizens United merely allowed corporate CEOs to speak with treasury funds. Did it not also allow individual citizens to associate and combine resources in the corporate form to participate more effectively in the political process?

2) Question for Prof. Raskin and Mr. Abrams:

Prof. Raskin cited Ward v. Rock Against Racism in support of the view that there were no First Amendment implications for government to prevent people from drowning out the speech of other people. That case involved a time, place, or manner restriction on the volume of speech through municipal payment for a sound system and a technician to control music at decibels not disturbing to other citizens. The Court upheld the arrangement because it was made “without reference to the content of the regulated speech, [was] narrowly tailored to serve a significant governmental interest, and that [it] le[ft] open ample alternative channels for communication of the information.” In the proposed constitutional amendment, speech is being limited precisely because of its content, it is not narrowly tailored to achieve any significant governmental interest, and it vastly curtails alternative channels of communication. Does Ward really have any bearing on S.J. Res. 19?

Questions for the Record**Examining a Constitutional Amendment to Restore Democracy to the American People****Senator Mike Lee****June 3, 2014**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?

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?

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?

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

RESPONSES OF FLOYD ABRAMS TO QUESTIONS SUBMITTED BY SENATOR GRASSLEY

QUESTIONS FOR THE RECORD FROM SENATOR GRASSLEYSENATE JUDICIARY COMMITTEE HEARING ON "EXAMINING A CONSTITUTIONAL AMENDMENT TO RESTORE DEMOCRACY TO THE AMERICAN PEOPLE"

1) Question for Prof. Raskin and Mr. Abrams:

Prof. Raskin cited Ward v. Rock Against Racism in support of the view that there were no First Amendment implications for government to prevent people from drowning out the speech of other people. That case involved a time, place, or manner restriction on the volume of speech through municipal payment for a sound system and a technician to control music at decibels not disturbing to other citizens. The Court upheld the arrangement because it was made "without reference to the content of the regulated speech, [was] narrowly tailored to serve a significant governmental interest, and that [it] le[ft] open ample alternative channels for communication of the information." In the proposed constitutional amendment, speech is being limited precisely because of its content, it is not narrowly tailored to achieve any significant governmental interest, and it vastly curtails alternative channels of communication. Does Ward really have any bearing on S.J. Res. 19?

The notion that a case affirming a community's power to limit the decibel level of rock music played in a park late at night could justify limiting the amount of political speech in an election campaign illustrates the "anything goes" willingness of supporters of S.J. Res. 19 to justify its assault on the First Amendment. For liberals, in particular, to advocate such a sweepingly overbroad reading of *Ward v. Rock Against Racism* is especially bizarre; they should reread the dissenting opinion of Justices Marshall, Brennan and Stevens in the case and ponder whether they really mean to interpret an already troubling precedent far more broadly than anything in the opinion could possibly justify. No reasonable reading of *Ward* could properly lead to its application here: unlike *Ward's* content-neutral limitation, S.J. Res 19 is a content-based restriction aimed at political speech which significantly curtails—and is meant to curtail--all channels of communication. *Ward* simply has no bearing on S.J. Res. 19.

2) Question for Mr. Abrams:

Several senators remarked at the hearing that S.J. Res. 19 is needed to safeguard the electoral process, to deter corruption, to prevent undue influence, and to enable the voices of Americans to be heard rather than drowned out. Do you think that allowing members of Congress to set the rules governing the ability of challengers to become known, as you testified, would advance those four goals?

No. The proposed amendment would undermine the very goals it purports to further. It is worth recalling that as broadly as the First Amendment has been interpreted, its text focuses on the danger that Congress will overreach. S.J. Res. 19 raises the very dangers the First Amendment aims to curtail by placing those in power—incumbents—in a position to make it still more difficult for their actual or potential challengers to become better known and thus more credible as their replacements. Chief Justice Roberts put it well in his *McCutcheon* opinion, concluding that “those who govern should be the *last* people to help decide who *should* govern.” *McCutcheon v. Federal Election Commission*, 134 S. Ct. 1434, 1441-42 (2014) (emphases in original).

3) Question for Mr. Abrams:

What is your response to Senator Reid’s testimony that the law currently governing campaign finance poses a threat to democracy and one person, one vote? What about his argument that undue influence is not free speech or that restricting spending on campaigns would restore sanity and lead to greater public confidence in their elected leaders?

The concept of “one person, one vote” was and is a significant democratic reform. The notion of “one person, one speech” or “one person, limited speech” is at war with the very dedication to freedom of expression that is essential to any meaningful concept of democracy. The notion that Congress could or should “set limits” on speech about who to support or oppose in an election by barring the funding of is as inconsistent with democratic principles as would be a limit on the amount of editorials a newspaper might print or a blogger might draft. For Congress to decide how much speech constitutes “undue influence” is itself a serious affront to First Amendment principles. For Congress to take steps aimed at rationing speech out of fear that it may be too effective in persuading people who to vote for is an attack on the concept of free speech itself—especially when, at the end of the day, votes are not dictated by which candidate spoke or spent more. Members may, in this respect, recall that House Majority Leader Eric Cantor recently outspent his opponent 26-to-one, yet lost the Republican Primary in his district. As for Senator Reid’s view that restricting speech in campaigns would “lead to greater public confidence in [the public’s] elected leaders”, I cannot know the answer but would offer my view that the public does not gain confidence in its elected representatives when it senses that they are seeking to limit public speech.

4) Question for Mr. Abrams:

At the hearing, one senator, referencing the Watergate scandal, argued that not all campaign spending should be protected. What is your response to that comment?

It is true that not all campaign spending is protected. The current legal framework does not protect, and in some cases criminalizes, campaign spending which risks even the appearance of corruption. Quid pro quo trades of votes for expenditures are criminal; contributions, as opposed to expenditures, are still subject to regulation. But to be consistent with the First Amendment (and to protect the integrity of our democratic process), the rule must be that election-related independent expenditures, akin to speech in a campaign, are rigorously protected.

5) Question for Mr. Abrams:

Prof. Raskin testified, “Reasonableness applies to all of the constitutional amendments,” and referenced a prohibition on buying sex. Has any Supreme Court decision in the past 50 years held that Congress can restrict core political speech based on its content so long as the restriction is reasonable?

No. Professor Raskin significantly understates the limits imposed by the First Amendment by asserting that “reasonable” limits on its scope are the norm. Almost all of the major First Amendment victories in the Supreme Court involved a competing interest that could well be viewed as reasonable. A clear majority of the Justices who voted to sustain the right of the New York Times to publish TOP SECRET documents in the Pentagon Papers case, *New York Times Co. v. United States*, 403 U.S. 713 (1971), expressed their belief that continued publication would harm national security.¹ The privacy interest in *Time Inc. v. Hill*, 385 U.S. 374 (1967) was also acknowledged to be substantial.² The interest in assuring that the public heard the view of someone who had been running for office and had been attacked by a newspaper was very real in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). The interest in avoiding the torture and killing of animals, recognized by all states and the federal government, was surely substantial in *United States v. Stevens*, 559 U.S. 460 (2010). Every one of these cases—and scores more I could cite—involved a serious and arguably “reasonable”

¹ See *id.* at 724 (Douglas, J. concurring) (In a concurrence joined by Justice Black, Justice Douglas noted that “[t]hese disclosures may have a serious impact. But that is no basis for sanctioning a previous restraint on the press.”); *Id.* at 730 (Stewart, J., concurring) (In a concurrence joined by Justice White, Justice Stewart expressed: “I am convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people.”)

² See *id.* at 384 (permitting play resembling appellee convicts life despite the fact that, “where private actions are involved, the social interest in individual protection may be substantial”).

competing interest to that embodied in the First Amendment, yet those interests were in each case deemed insufficient to overcome the force of that provision. This does not mean that the First Amendment always carries the day against all competing interests in all circumstances. But as a case cited by Justice Kennedy in his *Citizens United* opinion makes clear, the First Amendment “has its fullest and most urgent applications to speech uttered during a campaign for political office.” *Eu v. S.F. Cnty Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989). The First Amendment barrier to restrictive legislation is thus at its highest and most limiting in this very area.

6) Question for Mr. Abrams:

What is your reaction to one senator’s comparison of restrictions on political spending to restrictions on child pornography, or shouting “fire” falsely in a crowded theater? Is that senator correct in stating, “We have always had balancing tests for every amendment” as applied to the First Amendment’s protection of core political speech? What about his statement that “The First Amendment has always, always, always had a balancing test. . . , and if there ever is a balance that is needed, it is to restore some semblance of one person, one vote; some of the equality that the Founders sought in our political system.”? And, how do you view his argument that it is false in light of 100 years of history to maintain that Congress cannot regulate political speech when billions of dollars enter the system?

As my earlier responses indicate, I believe all the examples cited in this question are inapt. Child pornography receives no First Amendment protection because of the harm to the children it depicts; falsely crying fire in a crowded theater receives no such protection because it immediately imperils the lives of all in that theater. Neither scenario is in any way analogous to political speech which, as previously set forth, receives the highest level of First Amendment protection. I have previously responded to the “one man, one vote” reference; the First Amendment has *never* permitted the government to limit the amount of editorials, the amount of leaflets, the amount of blogs—I could go on. As for the proposition that a speech on a soapbox is protected, but the 11,427th ad on television is not, that too finds no support at all in First Amendment theory or case law. Such a media-aggressive campaign strategy may be foolhardy or wasteful and might even drive people to vote for others out of irritation, but the First Amendment does not recognize the concept of “too much speech”, let alone “too much speech because others have too little.” There are constitutionally permissible ways to deal with our nation’s very real inequalities. Limiting, not to say criminalizing, speech is not one of them. As my prepared statement observes, quoting language from such First Amendment stalwarts as Supreme Court Justices Brennan, Marshall and Stewart in *Buckley v. Valeo*,

the “concept that government may restrict the speech of some elements in our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.” The amount of money entering the system, whatever it may be, cannot overcome that core principle.

7) Question for Mr. Abrams:

What is your response to the same senator’s statement at the hearing that, “I don’t believe it is the same exact part of the Constitution . . . in free speech to get up on a soapbox and make a speech or to publish a broadside or a newspaper as it is to put up the 11,427th ad on the air”?

My response to Question 6 encompasses my response to this question.

8) Question for Mr. Abrams:

One senator claimed that “five conservative activists sitting on the Supreme Court for the first time decided that unlimited spending on elections is a-ok.” Is this correct?

No. “Unlimited spending”—i.e. unlimited independent expenditures—was first addressed by the Supreme Court in *Buckley v. Valeo*, in which the Court held the First Amendment protected such spending. *Citizens United* addressed whether that 1976 holding applied to corporations as well. The *Citizens United* Court—correctly, in my view—held that it did. More broadly, the notion that the *Citizens United* decision can simply be dismissed as the product of “five conservative activists” ignores the reality, referred to in my written submission to the Committee, that the thrust of the ruling was not dissimilar to what liberal jurists in the past had urged. Consider the language in a 1958 dissenting opinion of Justices Douglas, Black and Chief Justice Earl Warren, that “[s]ome may think that one group or another should not express its views in an election because it is too powerful...but these are justifications for withholding First Amendment rights from any group—labor or corporate. First Amendment rights are part of the heritage of all persons and groups in this country.” *United States v. Auto. Workers*, 352 U.S. 567, 597 (1958). These three liberal jurists were hardly “conservative activists”. If their views had simply been waved away on the grounds that they were “liberal activists,” that cursory dismissal should have been rejected just as the attacks on the *Citizens United* majority should be.

9) Question for Mr. Abrams:

The same senator reflected a commonly expressed view that unlimited corporate spending “obviously” creates a risk of corruption, and another agreed. What is your response?

There is obviously a risk that any money, let alone substantial sums of it, spent endorsing or criticizing candidate for public office could unduly influence those who benefit from it. But our current legal framework addresses this risk: bribery remains a crime,³ as does gratuity (which does not even require the quid pro quo showing that the proposed amendment’s advocates decry as too demanding).⁴ But as the Supreme Court has made plain, too broad a definition of corruption would interfere with the First Amendment right to active and meaningful participation in the political process. As a result, the Court’s definition of corruption is deliberately (and, in my view, wisely) limited to quid pro quo trades of money for votes.

10) Question for Mr. Abrams:

Two of my colleagues argued that unlimited corporate spending on elections permits corporations to intimidate elected officials by threatening to run, or actually running, ads criticizing the politician if the corporation is displeased by the politician’s vote. I have no reason to think that either of these senators would ever be dissuaded from voting as they believe the public interest requires. But shouldn’t politicians be made of sterner stuff? Shouldn’t they be courageous enough to stand up for their votes and have the financial ability to explain their votes and outline the threats and that were made against them if they failed to vote in the public interest? From your experience representing media corporations, how newsworthy would it be if an elected official informed the press about such a threat and what position do you think an editorialist would take on the subject?

Undoubtedly, such threats would not only be newsworthy and those who write editorials would be on the lookout for and no doubt leap to the chance to attack any company, union or individual on whose behalf such statements were made. In saying this, I am not minimizing the need for candidates to raise significant sums of money to run credible campaigns or the potential import of ads supporting or criticizing candidates for public office. In fact, one reason I believe *Citizens United* was correctly decided is that permitting unlimited expenditures from virtually all parties leads to more speech from more candidates for longer time periods, and ultimately to more competitive elections. That was true when Senator Eugene McCarthy

³ See 18 U.S.C. § 201(b).

⁴ See 18 U.S.C. § 201(c); but see *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999) (establishing gratuity requires showing of a nexus to an official act, but does not require a showing of quid pro quo).

sought the Democratic nomination for President in 1968 and it was just as true when former Speaker Newt Gingrich was only able to continue his effort to seek the Republican nomination in 2012 because of the outside expenditures spent in his support. Is there a level of risk that some candidates might abandon their principles in order to facilitate their possible election? Of course. But we cannot create a system which chills speech or bars it because of the possibility that “bad” or insincere speech will be uttered. Nothing guarantees that the voting public will like what they hear or base their votes on it. It is for the public to decide who is persuasive and who not and who is worthy of election. We should trust the public to make those decisions and avoid limiting the speech designed to persuade it.

11) Question for Mr. Abrams:

It was contended at the hearing that in Citizens United, Chief Justice Roberts failed to keep his promise to be committed to judicial minimalism and that he “destroyed the canon of constitutional avoidance” to enable all corporations to make independent expenditures at all times. Do you agree?

No. The Court’s decision in *Citizens United* and Chief Justice Roberts’s concurring opinion in that case dealt extensively with these issues and I will not repeat here what was said at length in those opinions about this topic (except to note that I do not recall any criticism of the Warren Court by liberal Democratic Senators for its failure to adhere to principles of “judicial minimalism”). I do, additionally, want to add a few words of my own which are similar in nature to what I urged upon the Supreme Court in my oral argument in *Citizens United* on behalf of Senator Mitch McConnell. There are cases which call for broader rather than narrower opinions precisely because of the importance of the constitutional issues raised and the need for judicial clarity in preserving constitutionally protected interests. In my argument, I cited as an example the great case of *New York Times v. Sullivan*, 376 U.S. 254 (1964), one in which the Supreme Court all but federalized much of the law of libel by establishing the “actual malice” test in cases involving public official (and later public figure) plaintiffs and in otherwise broadly assuring that libel law would not too easily trump First Amendment principles. The *Sullivan* Court had other alternatives. It could have avoided writing so broad a ruling by concluding that the Alabama court had no jurisdiction over the New York Times. It could, as well, have protected the press by limiting or banning punitive damages in libel cases. And it could have reversed the ruling based on a series of racist events that occurred in and out of court in the trial of the case. Instead, the *Sullivan* Court decided to walk down none of those paths because it was important to write an opinion that dealt directly with the protections afforded by

the First Amendment in the area of libel. I think the Court acted wisely and prudently in doing so just as I think that the Court did the same in *Citizens United*.

12) Question for Mr. Abrams:

At the hearing, the point that restrictions on corporate speech on elections affected media corporations as well as others was dismissed. The claim was made that the freedom of media corporations is already protected by the Free Press Clause of the First Amendment. Therefore, it was argued, there is no need to be concerned that denying other corporations the right to engage in independent expenditures would have any effect on media corporations. Do you agree?

The proposition that media corporations receive more protection than other corporations (or individuals) in the freedom of expression realm do is one with which I am indeed familiar. I made just such an argument in an article I wrote some years ago. But such a position has never been adopted by the Supreme Court and, if anything, the law seems headed in quite the opposite direction, one rooted in the notion that the press clause is no broader or more protective than that relating to freedom of speech. In more recent years, I have come to the same conclusion. As my written testimony sets forth, “why should the press, however defined, receive more protection than others to engage in the identical advocacy of or condemnation of candidates for public office?” Far more significantly, Justice Brennan (together with Justices Marshall, Blackmun and Stevens), dissenting in *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985), put it this way: “We protect the press to ensure the vitality of First Amendment guarantees. This solicitude implies no endorsement of the principle that speakers other than the press deserve less First Amendment protection”. The notion that only the press should have full First Amendment protection and non-press entities should have watered down protection is indefensible.

13) Question for Mr. Abrams:

One senator at the hearing contended that *Citizens United* and Super PACs have so changed the political landscape that S.J. Res. 19 is now necessary. Do you believe that any changes effected by *Citizens United* justify enactment of S.J. Res. 19?

No. In fact, many of *Citizens United*'s claimed ill-effects, to the extent that they are true (which they are generally not), are not the result of *Citizens United* at all. Wealthy individuals such as Sheldon Adelson and George Soros have been able to spend their money, in unlimited amounts, to support candidates of their choice since at least the Supreme Court's 1976 ruling in *Buckley v. Valeo*. And, to cite only one additional example, *Citizens United*

had no impact on corporations' long-standing ability to make unlimited donations to 501(c)(4) non-profits, which are often accused of buying elections with "dark," non-disclosed money (despite the fact that no more than half of their spending can be politically-related). What *Citizens United* did do, however, is permit corporations to also contribute to PACs that are required to disclose all donors *and* engage only in independent expenditures. If anything, *Citizens United* is a pro-disclosure ruling which brought corporate money further into the light.

14) Question for Mr. Abrams:

One senator at the hearing compared *Citizens United* to the Supreme Court's earlier decisions in *Dred Scott* and in denying women the right to vote, which were overturned by constitutional amendments that expanded the rights of ordinary people. Do you think that is an apt analogy?

The notion that a Supreme Court opinion protecting First Amendment rights should be viewed as comparable to ones *depriving* slaves or women of their rights is both intellectually flawed and morally repugnant. How can constitutional amendments assuring freedom to slaves and equality for women possibly be viewed as analogous to one *taking away* citizens' First Amendment rights? I understand that critics of *Citizens United* do not believe it correctly interprets the First Amendment and that it reads it too expansively. But there is simply no comparison between amending the Constitution to limit the scope of the freedoms the Supreme Court has held it provides (which is what S.J. Res. 19 would do) and amending it to expand those freedoms.

15) Question for Mr. Abrams:

You testified that S.J. Res. 19 would "reverse[] a slew of constitutionally rooted cases. . . ." Could you please identify the cases that would be overturned and provide brief descriptions of the points of First Amendment free speech law that S.J. Res. 19 would reverse?

S,J. Res. 19 would overturn the following cases, more specifically the points of law listed, which are crucial to protecting citizens' First Amendment right to political speech:

- ***Buckley v. Valeo*, 424 U.S. 1 (1976) -**
 - Striking down limits on spending by candidates and their committees (with the exception of Presidential candidates participating in the public funding program).
 - Striking down limits on independent expenditures by all individuals.

- Striking down limits on candidates' spending of their own personal funds.
- *First National Bank v. Bellotti*, 435 US 765 (1978) –
 - Protecting a corporation's First Amendment right to contribute to a ballot initiative campaign.
 - Finding that the value of particular speech "does not depend upon the identity of its source, whether corporation, association, union, or individual."
- *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 US 290 (1981)
 - Striking down ordinance placing \$250 limit on contributions to groups supporting or opposing referendums.
- *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480 (1985) -
 - Striking down limits on independent expenditures by political committees.
 - Finding that contributions to political committees did not pose risk of corruption.
- *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986)
 - Protecting nonprofit, nonstock corporation's right to use general treasury funds to engage in express advocacy.
- *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996)
 - Striking down limits on independent expenditures made by political party committees.
 - Rejecting notion that all party expenditures should be treated as "coordinated" as a matter of law.
- *Randall v. Sorrell*, 548 U.S. 230 (2006)
 - Striking down state law limiting contributions on the grounds that such low limits interfere with a candidate's right to raise funds necessary to run a competitive election and disproportionately burden the rights of citizens and political parties to help candidates get elected.
- *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 US 449 (2007)
 - Striking down restrictions on issue ads (ads that do not engage in "express advocacy") during the 30/60 day primary/general pre-election window.
- *Davis v. Federal Election Commission*, 554 U.S. 724 (2008)
 - Striking down BCRA's "Millionaires' Amendment" on the grounds that leveling electoral opportunities for candidates of

- different personal wealth is not a legitimate government objective.
- Finding that the strength of the governmental interest in campaign finance disclosure requirements must reflect the seriousness of the actual burden on First Amendment rights.
 - *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010)
 - Striking down BCRA’s prohibition on independent expenditures by corporations and labor unions, including electioneering communications.
 - Permitting corporate and labor union contributions to groups which engage only in independent expenditures (and do not give directly to candidates).
 - Announcing that political speech cannot be suppressed on the basis of the speaker’s corporate identity.
 - Finding that independent expenditures made in support of candidates by corporations do not give rise to corruption or the appearance of corruption.
 - *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011)
 - Finding that public financing provisions cannot be drawn so as to burden the speech of privately-financed candidates and independent expenditure groups absent a compelling state interest.
 - *McCutcheon v. Federal Election Commission*, 134 S. Ct. 1434 (2014)
 - Striking down aggregate limits on how much a donor may contribute to federal candidates, political parties and PACs over a two-year election cycle.
 - “Contributing money to a candidate is an exercise of an individual’s right to participate in the electoral process through both political expression and political association.”
 - Finding that “[t]he First Amendment does not protect the government, even when the government purports to act through legislation reflecting ‘collective speech.’”

Questions for the Record

Examining a Constitutional Amendment to Restore Democracy to the American People

Senator Mike Lee

June 3, 2014

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.

Professor Jamie Raskin's Responses to

Senator Richard J. Durbin

Follow Up Questions for the Record

**SENATE JUDICIARY COMMITTEE HEARING ON "EXAMINING A
CONSTITUTIONAL AMENDMENT TO RESTORE DEMOCRACY TO THE
AMERICAN PEOPLE"**

June 25, 2014

1. At last week's hearing, it was implied that no other constitutional amendment has ever removed or changed a right contained in the Bill of Rights? Do you agree with that implication?

No, I do not.

Actually, more than simply implied, it was asserted repeatedly that no other constitutional amendment had ever removed or changed a right contained in the Bill of Rights. For example, Floyd Abrams said, "In fact, no amendment has ever been adopted limiting rights of the people that the Supreme Court has held were protected by the Bill of Rights in any of the first ten amendments." *Examining a Constitutional Amendment to Restore Democracy to the American People: Hearing on S.J. Res. 19 Before the S. Comm. on the Judiciary*, 113th Cong. (June 3, 2014) (statement of Floyd Abrams, Partner, Cahill Gordon & Reindel LLP).

This is plainly false, and is directly contradicted by the Reconstruction Amendments to the Constitution, among several other Amendments.

Consider the obvious case of the Thirteenth Amendment, which in 1865 abolished slavery and involuntary servitude and thus overturned nearly a century of Supreme Court authority and federal and state law enshrining the property rights that slave masters had in their slaves.

By abolishing slavery, the Amendment essentially expropriated and confiscated what the slave masters—and, more to the point, the law and the Supreme Court—regarded as hundreds of

millions of dollars of private property that they owned in other human beings. *See Osborn v. Nicholson*, 80 U.S. 654, 658 (1871) (holding that the Thirteenth Amendment extinguishes “the title and possession of the [slave owner]” to the slave); *see also* Akhil Reed Amar, *The Supreme Court, 1999 Term – Foreword: The Document and the Doctrine*, available at <http://tinyurl.com/n8elb4y>, (Yale 2000) (“Indeed, the Thirteenth Amendment itself expropriated legal ‘property’ – that is, slaves – without compensation . . .”)

In 1857, the *Dred Scott* decision had, of course, constitutionalized slavery and white supremacy, ruling that a slave or a descendant of slave could not be a “citizen” for the purposes of diversity jurisdiction in federal court and “had no rights which the white man was bound to respect.” *Scott v. Sandford*, 60 U.S. 393, 19 How. 393, 407 (1857).

According to Justice Roger Taney’s decision, the Missouri Compromise violated the Fifth Amendment Due Process rights of slave owners because it purported to make slaves—constitutionally protected property—free upon passage into the Territories. *Id.* at 451-452. This understanding of slaves as the legitimate and irrevocable private property of their masters was so well-entrenched in our law and history that when President Lincoln issued the Emancipation Proclamation in 1863 in the middle of the Civil War, it was carefully defined as an emergency *war measure* that only freed those slaves held in the rebel states of the Confederacy. *See* ALLEN C. GUELZO, *LINCOLN’S EMANCIPATION PROCLAMATION: THE END OF SLAVERY IN AMERICA* 3 (Simon & Schuster 2004) (“The Proclamation was an emergency measure, a substitute for the permanent plan that would really rid the country of slavery . . .”). Lincoln understood that, under *Dred Scott*, he lacked the constitutional power to free slaves in border states, like Maryland, Delaware and Missouri, which had remained loyal to the Union, at least without first rendering just compensation to the slave masters under the requirements of the Fifth

Amendment. See PHILLIP SHAW PALUDAN, *LINCOLN AND THE GREELEY LETTER: AN EXPOSITION* in *LINCOLN RESHAPES THE PRESIDENCY* (Charles M. Hubbard, ed., Mercer Univ. Press, 2003); see also Kaimpono David Wenger, *Slavery as a Takings Clause Violation*, 53 AM. U. L. REV. 191, 242 n.249 (2003) (“Slaves in border states were not affected by the emancipation proclamation and were freed by operation of the Thirteenth Amendment.”). Emancipation outside of the military context would have constituted a taking of the private property of the slave masters and a violation of Fifth Amendment Due Process, as the Court had clearly found in the portion of the *Dred Scott* decision invalidating the Missouri Compromise. See *Scott*, 60 U.S. at 450 (holding that the Fifth Amendment protects a slave owner from being deprived of his property interest in his slaves without due process of law).

It took passage of the enormously controversial Thirteenth Amendment to establish that people cannot be property in the United States of America. At the time, the slave masters and their apologists, of course, cried foul and complained, among other things, that the Thirteenth Amendment was a massive violation of property rights conducted by a tyrannical federal government. See Rick Beard, Editorial, *The Birth of the 13th Amendment*, N.Y. TIMES, April 8, 2014, available at <http://tinyurl.com/Birth-of-the-13th-Amendment> (“[O]pponents [of the Thirteenth Amendment] fell back on the standard pro-slavery arguments that slaves were property and were racially inferior.”). It may be a harsh and inconvenient historical truth, but the Thirteenth Amendment clearly overturned the property rights of the slave masters that were enshrined not only in the Constitution but in the Bill of Rights itself by the *Dred Scott* decision. See *Scott*, 393 U.S. at 393-454 (grounding a slave owner’s right to hold slaves, even in free territory, in Articles One, Four, and Six, and Amendments Five, Nine, and Ten); DON E. FEHRENBACHER, *SLAVERY, LAW, AND POLITICS: THE DRED SCOTT CASE IN HISTORICAL*

PERSPECTIVE 300 (Oxford Univ. Press 1981) (noting that the “principal rulings of the Dred Scott decision were . . . overturned by the Thirteenth and Fourteenth Amendments”).

Given this central aspect of American history in which slave masters were constitutionally protected in the “property” they owned in their slaves, one can only regard with amazement the solemn assurance that no Amendment has ever “limited” settled rights and expectations under the Bill of Rights.

We can multiply the examples with the Fourteenth Amendment, which similarly upset numerous settled expectations and vested rights of white supremacy in the Constitution. To choose just one especially clean and irrefutable example, Section 4 of the Fourteenth Amendment blocked and made illegal any future compensation of slave masters for the confiscation of their vested property rights in their slaves. It reads: “But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.” (emphasis added).

Thus, while the Thirteenth Amendment abolished slavery and was silent as to the question of compensation to the slave owners, Section 4 of the Fourteenth Amendment made it impossible for the slave owners ever to achieve restitution for confiscation (liberation) of what used to be their constitutionally protected property under the Bill of Rights’ Fifth Amendment and *Dred Scott*. This provision in the Fourteenth Amendment directly debunks the disoriented claim that “no amendment has ever been adopted limiting rights of the people that the Supreme Court has held were protected by the Bill of Rights in any of the first ten amendments.”

There are numerous other examples we could explore, including the clearly relevant history of the Eleventh Amendment, but perhaps we should say a word about the Nineteenth

Amendment and woman suffrage because it allows us to confront not just the historical error but the real logical and moral fallacy at work here.

There seems to be an assumption that the progress of democracy and freedom in our Constitution has been seamless and that no one is ever aggrieved by the addition of new rights for the people as a whole. When you think about it, this is a manifestly absurd assumption. Nearly every expansion of the rights of the people has encountered ferocious opposition by those invested in the status quo, many of whom were able to invoke the explicit doctrine or evident sympathy of the Supreme Court.

In *Minor v. Happersett*, 88 U.S. 162, 21 Wall. 162 (1874), the Supreme Court had rejected a constitutional challenge to the disenfranchisement of women, thus validating the regime of male supremacy. The Court's imprimatur on the disenfranchisement of women formed part of a wall of sexist constitutional doctrine. For example, in *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873), the Court upheld a state law excluding women from the bar, explaining that, "[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator." It took decades of agitation and civil disobedience by Suffragettes to get the 19th Amendment enacted, and its opponents interpreted its adoption as a dramatic limitation on their exclusive rights to govern and rule in a patriarchal system, which surely it was. See Paul Halsall, ed., *The Passage of the 19th Amendment, 1919-1920: Articles from The New York Times*, in MODERN HISTORY SOURCEBOOK (dated 1997) available at <http://tinyurl.com/62amx>. From the standpoint of male opponents, doubling the size of the electorate to include women cut the value of the male political franchise in half, diluting male voting rights. See, e.g., CAL. STATE SEN. J.B. SANFORD, ARGUMENT AGAINST WOMEN'S SUFFRAGE: ARGUMENT AGAINST SENATE CONSTITUTIONAL AMENDMENT NO. 8 (June 26, 1911)

in CAL. STATE ARCHIVES: ELECTION PAPERS (used to prepare a 1912 voting manual) *available at* <http://preview.tinyurl.com/JB-sanford>; *See also* Eleanor Barkhorn, 'Vote No on Women's Suffrage': Bizarre Reasons for Not Letting Women Vote," THE ATLANTIC MAGAZINE (Nov. 6, 2012, 5:37pm ET), *available at* <http://tinyurl.com/opposing-female-suffrage>.

In truth, the people have been forced to amend the Constitution multiple times to reverse reactionary decisions of the Supreme Court that freeze into place the constitutional property rights and political privileges of the powerful against the powerless. The oft-repeated suggestion at the hearing that we have never enacted a constitutional amendment to limit or nullify existing rights under the Bill of Rights seems, at best, superficial and, at worst, terribly misleading.

2. Is it true that S.J. Res. 19 would permit discrimination or censorship against specific political groups or causes based on their ideology?

No. The 28th Amendment would reaffirm and restore congressional and state power to regulate campaign finance, but nothing in it could interfere in any way with the First Amendment doctrines of viewpoint and content neutrality as they would apply to such regulations.

The 28th Amendment would, for example, empower Congress to restore the aggregate candidate contribution limits that had been in place under FECA for decades and were just invalidated by the Supreme Court in the 5-4 *McCutcheon* decision, 134 S. Ct. 1434 (2014). However, Congress would remain unable to selectively impose these limits on Republicans, Democrats, Libertarians, Greens, conservatives, liberals, pro-choice or pro-life groups, or people decrying or denying the mortal threat of global climate change. *See RAV v. St. Paul*, 505 U.S. 377, 382 (1992) ("The First Amendment generally prevents government from proscribing speech . . . or even expressive conduct . . . because of disapproval of the ideas expressed."); *Police Dept. of Chic. v. Mosley*, 408 U.S. 92, 95 ("But, above all else, the First Amendment means that

government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”). Congress could never have passed a viewpoint or content-based campaign finance restriction like that in the past, and nothing in the 28th Amendment would allow it to do so in the future. *See Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”). All the Amendment does is restore to Congress and the states the power to set reasonable – that is, viewpoint and content-neutral, as well as proportional – limits on campaign contributions and expenditures, a traditional power that has been stripped, or is in the process of being stripped, away from them by the Court.

Official neutrality towards the content and viewpoint of political speech and ideology is not just a central principle of the First Amendment principle, but of Equal Protection too. Laws that disfavor the equal participation of specific groups in the political process are not considered rational, much less compelling, under Equal Protection. As the Court put it in *Romer v. Evans*, 517 U.S. 620 (1996), which struck down a state constitutional amendment that imposed a selective disadvantage on pro-gay rights groups: “laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected,” and “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” 517 U.S. at 634 (emphasis added).

The Amendment will just establish that, in regulating the raising and spending of money for elections, Congress and states have intrinsically valid and compelling interests in promoting democratic self-government, political equality and the integrity of representative institutions, and

that these interests will justify distinctions between natural persons and corporate entities. These are essential constitutional interests that reinforce and strengthen political free expression, and they will be considered against claims by billionaires and corporations that they have an unlimited right to spend and give in the electoral field. However, even when we define these interests as inherently compelling – which surely they must be in a modern political democracy – regulations enacted in their name will pass muster only if they do not restrict speech based on its viewpoint or content and only if they are reasonably designed to serve the appropriate purposes. In other words, the Amendment would establish the intrinsic legitimacy of the ends of democratic self-government, political equality and representative integrity, which have been denied and devalued by five justices on the Court, and it would preserve judicial scrutiny of the means used to effectuate these ends under both reasonableness analysis and existing First Amendment doctrine.

3. What are the logical implications of the position articulated by Floyd Abrams and others advocating the lifting of all contribution limits?

It is the logical implication of the “market fundamentalism” ascendant on the Court, and it is the enthusiastic agenda of its champions in the bar, to dismantle *all* campaign finance regulation, with the possible exception of some disclosure laws (as Floyd Abrams suggested). Existing doctrine inherited from *Buckley v. Valeo*, 424 U.S. 1 (1976), holds that campaign expenditures may not be capped at all because such limitations constitute a direct “quantity restriction” on political speech. *Buckley*, 424 U.S. at 57. *Citizens United v. FEC*, 558 U.S. 310 (2010), wiped out the power to restrict any and all corporate political expenditures. 558 U.S. at

365. *McCutcheon* has eliminated aggregate contribution limits. 134 S. Ct. 1434 (2014). James Bopp and the other lawyers driving this train have readily professed their interest in wiping out what remains of campaign finance law, and they have tremendous momentum. See *James Bopp: What Citizens United Means for Campaign Finance*, FRONTLINE (July 27, 2012; published October 30, 2012) <http://tinyurl.com/BoppInterview> (stating his sweeping goals to include the elimination of all election-spending reporting requirements, all coordinated spending restrictions, and most donor disclosure requirements; and that “[t]he endgame is the repeal of contribution limits”).

The next step for the Court may be to strike down the rules treating campaign expenditures by corporations, unions, and other outside actors that are “coordinated” directly with candidates as campaign contributions. See Paul Blumenthal, *Supreme Court Bound? The Next Big Campaign Finance Case Set To Pick Up GOP Support*, THE HUFFINGTON POST: HUFFPOST POLITICS (May 7, 2014, 4:50pm), <http://tinyurl.com/NextCase> (discussing Bopp’s most recent case, a challenge to soft money and coordinated expenditure limits). It will be argued forcefully under the money-is-speech dogma that “coordination” simply means speech and associational activity, and that the anti-coordination rules therefore strike right at the heart of political free expression and association.

At that point, with unlimited independent spending and free coordination between candidates and corporations and unions, the time will be ripe to attack the \$5,200 base limits on individual campaign contributions in federal races along with all such limits on campaign contributions at any level. The logic of this move will be straightforward: if someone wants to give your campaign one million dollars but is limited to giving \$5,200, the government has just imposed a drastic “quantity restriction” on your spending and thus, according to the doctrine,

reduced your political spending and expression by \$994,800. In any event, your benefactor can spend \$1 million on your behalf and, if the doctrine falls in the right direction, coordinate it with your campaign, so what is the real difference between a coordinated expenditure of \$1million and a \$1 million contribution that could justify the burden on the donor's right to associate and the candidate's right to spend? The Roberts Court would love to find that the *Buckley* Court made the right call on abolishing expenditure caps but erred in upholding contribution limits. The Court would correct this "mistake" by treating both campaign expenditures and contributions as essentially off-limits to public regulation.

The final lingering hope in current doctrine for maintaining contribution limits—the government's compelling interest in combatting "'improper influence' and 'opportunities for abuse' in addition to 'quid pro quo arrangements,'" as recognized in *Shrink Missouri Government PAC*, 528 U.S. 377 (2000), and other cases following *Buckley v. Valeo*-- has already been reduced to near-nothingness by the Court's recent jurisprudence. Chief Justice Roberts, speaking for the majority in the *McCutcheon* decision, stated that, "Any regulation [of campaign contributions] must instead target what we have called 'quid pro quo' corruption or its appearance." 134 S. Ct. at 1441. That Latin phrase, of course, captures the sense of a direct exchange of an official act for money or other consideration, which is what is already prohibited under 18 U.S.C. 201 (2012).

By thus reducing all potential political corruption to what is, in essence, criminal bribery, as Fred Wertheimer has observed, the Court's majority took away the power to regulate forms of structural corruption that it had long recognized before as "'improper influence' and 'opportunities for abuse,'" *Shrink Mo. Gov't PAC*, 528 U.S. at 388, "undue influence," *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 441 (2001), and "undue

influence on an officeholder's judgment, and the appearance of such influence," *McConnell v. FEC*, 540 U.S. 93, 150 (2003). The Court has thus discarded the basic understanding in *Buckley v. Valeo* itself that "laws making criminal the giving and taking of bribes deal only with the most blatant and specific attempts of those with money to influence governmental action," and that campaign finance regulation is required to deal with the more subtle forms of corruption. *Buckley*, 424 U.S. at 27-28.

Given that limits on contributions to candidates can be easily redefined by the Court as limits on what candidates can spend, and given that *Buckley's* robust definition of corruption has been whittled down to naked acts of criminal bribery, there is no available justification left for contribution limits that can survive the Roberts Court majority. The interest in preventing the reality and appearance of *quid pro quo* corruption is already vindicated by existing criminal laws against bribery, and no other definition of corruption has survived the jaundiced eye of the Roberts Court majority.

Finally, for the majority, it follows logically and quickly from *Citizens United* that the 1907 Tillman Act, 2 U.S.C. § 441b, banning corporate contributions to candidates, is constitutionally indefensible. Because the "identity of the speaker" is now officially irrelevant in the campaign finance context and the corporate identity of the speaker can no longer be used to isolate it from electoral politics, corporations will enjoy the same right to make individual campaign contributions to candidates as natural persons enjoy. Any protest that corporate treasury contributions are uniquely corrupting will be rejected as obsolete under the reasoning of both *Citizens United* and *McCutcheon*. See *Citizens United v. FEC*, 558 U.S. 310 (2010) ("No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."); *McCutcheon*, 134 S. Ct. 1434 (2014) ("[G]overnment regulation may not target

the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford. Ingratiation and access . . . are not corruption. They embody a central feature of democracy. . . .”) (internal citations omitted). If a corporation bribes a politician, criminal liability will attach to the corporation and the responsible officers, but short of *quid pro quo* bribery, Congress and the states cannot treat corporate contributions to candidates as any more intrinsically corrupting than individual contributions, and the anti-circumvention rationale has been largely nullified in *McCutcheon*. *Id.* at 1457 (requiring an unprecedented and practically insurmountable standard for any regulation to be justified by the anti-circumvention interest). If and when the Court knocks down the base limits on individual contributions to candidates and then the ban on corporate contributions directly to candidates, we will live in a political system where CEOs can write checks of unlimited amounts directly to candidates for public office. This is the logical destination of the Court’s free-market fundamentalism in the political campaign field, and it presages a totally unregulated free market in campaign money, as Floyd Abrams candidly suggested at the hearing. *Examining a Constitutional Amendment to Restore Democracy to the American People: Hearing on S.J. Res. 19 Before the S. Comm. on the Judiciary*, 113th Cong. (June 3, 2014) (statement of Floyd Abrams, Partner, Cahill Gordon & Reindel LLP).

As I stated in my original testimony, the path of the Roberts Court leads to demolition of our campaign finance laws, with the possible exception of certain disclosure rules. *Examining a Constitutional Amendment to Restore Democracy to the American People: Hearing on S.J. Res. 19 Before the S. Comm. on the Judiciary*, 113th Cong. (June 3, 2014) (statement of Jamin Raskin, Professor of Law and Director of the Law and Government Program). Of course, emboldened by their dramatic success with the Roberts Court, the same forces attacking our

campaign finance laws have now turned with a vengeance on campaign finance disclosure and invite us to view mandatory disclosure of contributions and expenditures as a form of unlawful and dangerous compelled speech under the First Amendment. *See, e.g.*, Charles Krauthammer, *The Zealots Win Again*, WASH. POST, available at <http://tinyurl.com/m4hmtkg> (April 17, 2014); Sen. Ted Cruz, *The Democratic Assault on the First Amendment*, WALL ST. J., available at <http://tinyurl.com/p7o6n8l> (June 1, 2014, 6:35pm); Mike B. Wittenwyler, *Wisconsin Right to Life v. Barland* (7th Cir. May 14, 2014), GODFREY & KAHN, S.C., <http://tinyurl.com/pv6cztl> (May 15, 2014); Ellen Goodman, *First Amendment Liberties and the Right-to-Know – Commercial Disclosure Imperiled*, RUTGERS INST. FOR INFO. POL. AND L. (RIIPL), <http://tinyurl.com/qfynvmu> (April 24, 2014); Tania N. Archer, *Disclosure Laws Under Attack: Campaign Finance Restrictions and Reporting of Donors*, Insights, BLOOMBERG BNA, <http://tinyurl.com/lf4ylos> (Mar. 8, 2012). All the more reason to pass an Amendment establishing the people’s compelling interest in promoting democratic self-government, political equality, and integrity of representative relationships in the campaign finance arena.

4. In written testimony for the record, Art Pope said that the intent of S.J. Res. 19 is to silence incumbents’ opposition and that *Citizens United* did not change the rules with respect to issue ads.

a. Is his view of the intent of S.J. Res 19 accurate?

No. The manifest purpose of S.J. Res. 19 is to restore the power of the people to regulate campaign finance in the interests of safeguarding democratic self-government, political equality, and the integrity of representative institutions.

If Congress or the states tried to use their powers under the Amendment to set lower spending limits for challengers than for incumbents or to forbid independent expenditures to criticize incumbents, such efforts would be struck down as blatantly unreasonable and discriminatory violations of both the First Amendment and Equal Protection, for all the reasons described above. Nothing in the new Amendment touches the First Amendment doctrines of viewpoint and content discrimination, and nothing subtracts from Equal Protection guarantees.

If Mr. Pope's claim is that challengers would be, in practice, more disadvantaged than incumbents by any legislation enacted under the Amendment, there are two massive problems facing this argument. The first, of course, is that we do not know the shape or thrust of the legislation yet to come so it is hard to know what he has in mind. The second is that, if we assume that Congress and the states will reenact the kinds of reform legislation that the Supreme Court has been invalidating recently, these reforms are far more likely to help challengers, not incumbents.

For example, the aggregate limits on individual campaign contributions which were struck down in *McCutcheon* are surely more likely to limit the overall amount that incumbents collect rather than what challengers do. After all, the big spenders who lobby Congress or state legislatures have a built-in incentive to "max out" to all incumbents, who hold the keys to official power, not to their challengers. Every systematic study I have seen shows that incumbents outspend challengers with what the Center for Responsive Politics calls "an insurmountable advantage in campaign cash," so it stands to reason that any contribution or expenditure limits will help the challengers, not the incumbents who have cornered most of the relationships with special interests and can exploit them assiduously. *See, e.g.*, CENT. FOR RESPONSIVE POL., THE DOLLARS AND CENTS OF INCUMBENCY, <http://tinyurl.com/l4hz958> (last

accessed June 24, 2014); CENT. FOR RESPONSIVE POL., INCUMBENT ADVANTAGE, <http://tinyurl.com/mem34gy> (last accessed June 24, 2014); CAMPAIGN FIN. INST., INDEPENDENT SPENDING ROUGHLY EQUALED THE CANDIDATES' IN CLOSE HOUSE AND SENATE RACES; WINNING CANDIDATES RAISED MORE THAN ANY PREVIOUS ELECTION, <http://tinyurl.com/ohk77at> (Nov. 9, 2012); THISNATION.COM, 2004 CONGRESSIONAL ELECTION SPENDING, <http://tinyurl.com/m5toj3c> (last accessed June 24, 2014); *see also* Sara Fritz and Dwight Morris, *Incumbents' Money Advantage Decisive*, L.A. TIMES, available at <http://tinyurl.com/orckaba> (Nov. 8, 1990).

With Congressional incumbent rates routinely soaring over 95% under the increasingly deregulated and plutocratic campaign finance regime that we have, I find the claim that the 28th Amendment might entrench incumbents to be a slightly comic and irrelevant distraction from the real debate. After all, the point of the Amendment is not to help incumbents or challengers but rather to liberate everyone in American politics, both voters and candidates, from the unequal, undemocratic and distorting power of plutocratic wealth. The reason that commanding majorities of Americans favor the Amendment is not because they want to strengthen incumbents or challengers or this or that political party, but because they favor meaningful democratic self-government and reject systematic corruption of the public interest by big money.

- b. Art Pope also wrote that the “history of North Carolina refutes the entire premise that elections can be ‘bought’ by one party or side spending the most money.” Do you agree with Mr. Pope’s assessment?

I am no expert on the politics and economics of North Carolina and will allow Senator McKissick to respond in detail to this question. If you will permit me one

observation, it is this: the broader purpose of the Amendment is not to prevent the purchase of elections by “one party or side,” but rather to prevent the purchase of dramatically unequal power over government by *anyone*. The shrewdest strategic actors give money to both parties when convenient and press a bipartisan plutocratic agenda. I am much less interested in following the win-loss record of particular strategic actors working with the political parties and much more interested in promoting a campaign finance regime that promotes true democratic participation, political equality and representative integrity.

Thank you for your questions.

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ANSWERS OF PROFESSOR JAMIE RASKINTO QUESTIONS FOR THE RECORD FROM SENATOR GRASSLEYSENATE JUDICIARY COMMITTEE HEARING ON “EXAMINING A CONSTITUTIONAL
AMENDMENT TO RESTORE DEMOCRACY TO THE AMERICAN PEOPLE”

June 25, 2014

1) Question for Prof. Raskin:

You testified that Citizens United merely allowed corporate CEOs to speak with treasury funds. Did it not also allow individual citizens to associate and combine resources in the corporate form to participate more effectively in the political process?

Response:

No, that had nothing to do with *Citizens United* because we already had that right as individual citizens. In *F.E.C. v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), the Supreme Court determined that individual citizens have a constitutional right to associate and combine resources in the corporate form in order to participate in the political process. *Citizens United* added nothing to this well-established First Amendment right of the people, but simply gave CEOs the power to use corporate treasury funds to spend *other people's money* advocating for or against candidates in political campaigns. That has nothing to do with the political free speech rights of the people.

In *Massachusetts Citizens for Life*, the Court held that the general ban on corporate treasury spending “in connection with” federal elections, found in Section 316 of the Federal Election Campaign Act (FECA), could not be applied to the political campaign spending of Massachusetts Citizens for Life, a nonprofit corporation organized to participate in the political process and to advance a legislative agenda. The group’s purpose was “to foster respect for human life and to defend the right to life of all human beings, born and unborn, through educational, political, and other forms of activities.” *Mass. Citizens for Life*, 479 U.S. 238, 241 (1986) (quoting App. 84).

When Massachusetts Citizens for Life published and distributed materials in the 1978 election cycle promoting “pro-life” candidates, the FEC brought an action against the group alleging that its spending violated FECA’s ban on corporate political spending, but the Supreme Court found this ban in violation of the First Amendment as applied to this nonprofit corporation because it burdened speech by citizens acting politically through the corporate form without advancing any “compelling justification” for such burden. *Id* at 263.

Significantly, the *Massachusetts Citizens for Life* Court found that the generally compelling rationale for excluding corporate spending from politics is missing when the participating entity is a non-profit, non-stock corporation organized for political purposes. As the court put it, “The concern underlying the regulation of corporate political activity – that

organizations that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace” -- is simply absent. 479 U.S. 238, 263 (1968) (internal quotation marks omitted). As a nonprofit political corporation, Massachusetts Citizens for Life “was formed to disseminate political ideas, not to amass capital.” *Id* at 259.

Thus, if the justification being offered for *Citizens United* is to “allow individual citizens to associate and combine resources in the corporate form to participate more effectively in the political process,” as the question posits, then this justification is hollow and specious because all Americans already had that right. Without a rationale for the decision that explains specifically why the managers of for-profit business corporations must have the power to spend corporate treasury resources on political campaigning—the power, that is, to convert economic wealth amassed in business by a corporation into political finance capital—we are left with the implication that five justices on the Court overturned multiple constitutional precedents, *see, e.g., Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990) (upholding as constitutional a state law that prohibited corporations from using general treasury funds for independent expenditures to support or oppose a political candidate); *McConnell v. F.E.C.*, 540 U.S. 93 (2003) (finding limitations on the corporate and union funding of “electioneering communications” to be facially constitutional), and struck down dozens of federal and state laws, all simply in order to increase the political power of corporate executives and the candidates they may choose to fund.

If any speech-related justification for the decision can be imagined, it must be to increase the overall *quantity* of political spending for speech regardless of the corporate or institutional identity of the source, but that dangerously expansive rationale would require the Court to strike down not only the ban on corporate political spending and contributions but also the ban on spending and contributions by *foreigners* in our politics, something the Court has already declined to do. *Bluman v. F.E.C.*, 132 S. Ct. 1087 (2012) (affirming that federal, state, and local governments can exclude foreign citizens from funding campaigns in American elections). Furthermore, this sweeping rationale—maximizing the quantity of speech without regard to the identity of the speaker—would also require the Court to strike down the ban on foreign *government* spending in our politics, the ban on federal, state and local government spending and contributions in our campaigns, the ban on conduit contributions, the ban on spending and contributions by five year olds and newborns, the ban on anonymous spending, and the ban on criminal money entering our political campaigns through independent expenditures. 2 U.S.C.S. §§ 441e (2014); 2 U.S.C.S. §§ 441i, 452 (2014); 2 U.S.C.S. § 441(a)(8) (2014); 2 U.S.C.S. § 434(b) (2014); 2 U.S.C.S. 441k (2014); 11 CFR 110.4(b)(2)(i). All of these readily available pools of political finance capital have been kept away from elections because we have properly defined them as being at odds with the compelling purposes of democratic self-government, political equality, and the integrity of representative and judicial institutions. But if speech is speech and all of it is protected regardless of the “identity of the speaker,” as the Court majority has found, *Citizens United v. F.E.C.*, 558 U.S. 310, 364 (2010), surely all of them must be allowed.

In any event, there is no individual free speech justification for empowering corporate management in private for-profit, joint-stock business corporations to spend shareholders’

money advocating political causes and candidates, and *Citizens United* has nothing to do with the expressive political freedoms of the people.

2) Question for Prof. Raskin and Mr. Abrams:

Prof. Raskin cited Ward v. Rock Against Racism in support of the view that there were no First Amendment implications for government to prevent people from drowning out the speech of other people. That case involved a time, place, or manner restriction on the volume of speech through municipal payment for a sound system and a technician to control music at decibels not disturbing to other citizens. The Court upheld the arrangement because it was made “without reference to the content of the regulated speech, [was] narrowly tailored to serve a significant governmental interest, and that [it] le[ft] open ample alternative channels for communication of the information.” In the proposed constitutional amendment, speech is being limited precisely because of its content, it is not narrowly tailored to achieve any significant governmental interest, and it vastly curtails alternative channels of communication. Does Ward really have any bearing on S.J. Res. 19?

Response:

Yes, it does. *Ward v. Rock Against Racism* and other decisions upholding reasonable “time, place, and manner” restrictions teach us that, in a democracy, we often have to limit the volume and quantity of speech at certain times in certain places in order to achieve other significant public interests, including especially the vindication of the free speech rights of *other* speakers, the efficacy of democratic self-government, and the integrity of representative and judicial institutions. The Amendment will simply make this (painfully obvious) principle clear in the context of campaign contributions and spending, allowing us to restore some balance to an area that the Supreme Court majority has trampled with its lopsided and activist interventions on behalf of plutocratic power.

The principle at the heart of *Ward* is so obvious and ubiquitous as to be banal. At the Judiciary Committee Hearing on June 3, each witness was given only five minutes to testify before the buzzer went off. I know that all of us had a lot more to say, but the five-minute restriction was not only perfectly constitutional but also reasonable and, to a certain extent, inevitable. Moreover, there were surely a lot of other people in the audience who wished to testify, but the rules of the Senate and the Committee properly structured the discussion to allow for the ventilation of major schools of thought through a handful of witnesses. The idea that any of these rules created a First Amendment violation is just silly. The same principle governs the practices of the very Supreme Court that handed down *Citizens United* and *Buckley v. Valeo*, where the majority professed that “the concept that government may restrict the speech of some in order to enhance the relative voice of others is wholly foreign to the First Amendment.” *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). In fact, the parties appearing before the Court in *Buckley*, like all other Supreme Court litigants, were strictly allotted a period of argument time to facilitate an orderly dialogue in which all parties could be fairly heard. The Court created opportunities not for *unrestricted* and *unequal* speech but for *tightly restricted* and *equal* speech precisely to give both sides a fair chance and to systematically illuminate the issues for the

Court. No one else from the outside was allowed to speak, no matter how eloquent, important or affluent they were. The U.S. House of Representatives also conducts its normal business on the floor according to rigid allotments of time for debate, as does the Senate, where even the occasional filibuster can be shut down in the world's greatest deliberative body with the appropriate number of votes.

It is these speech-limiting rules which actually make speech audible, intelligible, meaningful, and effective. They are replete not just in federal but in state and local legislatures and courts, where the central action of democratic self-government takes place, and they dominate in elections themselves, where the Supreme Court has permitted states to ban all electioneering within a certain distance of polling places, to prevent write-in ballots, to impose rather dramatic restrictions on candidates' access to a position the ballot, and also to limit participation in televised government-sponsored debates to the most "viable" political candidates in order to prevent "cacophony." *Burson v. Freeman*, 504 U.S. 191 (1992); *Burdick v Takushi*, 504 U.S. 428 (1992); *Jenness v. Fortson*, 403 U.S. 431 (1971); *Forbes v. Ark. Educ. Television Comm'n*, 982 F.2d 289 (1992). Whatever the merits of each of these decisions--and in most of them I think the Supreme Court tilted wrongly against greater inclusion of more voices and openness--the principle was generally accepted that opportunities for political speech may be, indeed must be, structured by law to permit for meaningful debate and effective self-government.

Now, I invoked *Ward v. Rock Against Racism* because it will be reasonably pointed out that the rules for structured debate and argument in our governmental and formal electoral institutions do not necessarily apply to political expression "in the street." Whereas "the room will not hold all" at a Senate Judiciary Committee hearing, everyone should be able to speak to his or her heart's content in the political world outside the halls of power. In other words, there are structured formal contexts which call for regulation because there are only possibilities for limited and *finite* speech within them and there are unstructured informal contexts which call for deregulation because there are possibilities there (theoretically anyway) for *infinite* speech.

This distinction has great validity, and the basic First Amendment principle for political speech in the public forum is the excellent one that "debate on public issues should be uninhibited, robust, and wide-open . . ." *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964). However, the Supreme Court has paired this principle with the corresponding principle of reasonable time, place, and manner restrictions. As Justice Kennedy wrote in *Ward*, "Even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" 491 U.S. 781 at 791. He emphasized that the regulation "must be narrowly tailored to serve the government's legitimate content-neutral interests but that it need not be the least-restrictive or least-intrusive means of doing so." *Ward, id.* at 798.

Therefore, when the Court comes to examine the constitutionality of campaign contribution and expenditure limits under the new Amendment, it will follow generally the *Ward* analysis as informed by the new constitutional language. The first question will be whether the limits actually advance any of the significant and compelling ends of democratic self-

government, political equality, and the integrity of representative institutions, which are the textually identified purposes of the Amendment. If not, the limits will be outside of the power of Congress and the states. If so, the question then becomes whether the limits are targeted at the viewpoint or content of the speech that may be limited by the expenditure or contribution caps, rather than these other ends. If they are targeted at the political viewpoint, message or subject matter, then they will be invalid under the First Amendment because they will not be “reasonable”; if they are targeted effectively, and in a viewpoint and content-neutral way, at the ways in which the big money system corrupts officeholders and distorts their time and attention, shakes down private citizens, entrenches plutocracy and inequality, or undermines the integrity of representative relationships, then they will be valid. If so, then the Court will look, finally, to see whether the regulation leaves open “ample alternatives channels for communication.”

The last prong relating to “ample alternative channels for communication” has a dramatically different contextual meaning in the age of the Internet. The worldwide web actually makes a wide-open and unlimited marketplace of ideas far more of a reality than ever it was before, and everyone—from a pauper to a billionaire—can quite readily access the Internet and express him or herself on an uncensored, unrestricted and free and continuous basis, which is one reason why the doleful complaints about the censorship of a handful of billionaires who want to spend tens of millions of dollars purchasing more political power and influence are so tinny and off-point in this discussion. In the Internet age, there are always “alternative channels of communication” available for *everyone*, including billionaire political activists. The ease with which people can ceaselessly communicate their views places the campaign finance demands of billionaire tycoons in the proper light: they are not seeking the opportunity to *speak endlessly*, for this they already enjoy like the rest of us. They are seeking rather the opportunity to use their wealth to *dominate the public discourse and agenda* in ways that are not remotely available to the vast majority of citizens and that reflect not a concern for *expression* but for *power*.

Let us imagine how different laws might be treated under the Amendment.

If Congress and the states were to categorically ban corporate contributions and expenditures under the new Amendment—that is, to renew the Tilman Act, which hangs by a doctrinal thread today, and to revive the now-invalidated bans on corporate political spending—all of this would almost certainly pass muster because there is a long history of pre-*Citizens United* Supreme Court jurisprudence affirming that democratic self-government requires that states be permitted to build a wall of separation between corporate treasury wealth and democratic elections. The ban would apply, as the Tilman Act does today, on a viewpoint and content-neutral basis: it prevents corporate contributions both to Democratic candidates and to Republican candidates (and others) and by businesses whose CEOs who believe that climate change is the world’s most pressing problem and whose who believe it is a complete fiction. This, in fact, is the very heart of the Amendment’s meaning: to allow our political democracy to operate free from plutocratic distortion regardless of the content or viewpoint of the agenda being pressed.

Thus, if the Amendment passes, Montana could reenact its popular Corrupt Practices Act, which forbade all corporate political spending in connection with candidate campaigns and was struck down in *Western Tradition Partnership v. Montana* in the wake of *Citizens United*. *W.*

Tradition P'ship v. Mont. Attorney Gen., 2010 Mont. Dist. LEXIS 412 (2010). The Act, which was overturned by the categorical and utterly fact-resistant ideology of *Citizens United*, would almost certainly be upheld under the 28th Amendment.

Montana first passed its Corrupt Practices Act in 1912 after decades of experience with naked political domination of its legislative, judicial, and executive branches of government by mining and industrial corporations that purchased political free rein to exploit the state's mineral and natural resources. The law drew upon more than a century of jurisprudential understanding that corporations are artificial entities endowed with enormous state-created privileges for *economic* purposes and do not enjoy the *political speech or spending* rights of the people. By its terms, the new Amendment would revive the power to distinguish between real people and corporations and thus empower Montana to renew its old ban on corporate spending in campaigns. This is not a content-based speech suppression; it is a constitutional policy statement that business corporations chartered for economic reasons play a completely different role in society than citizens do and should not be able to convert their economic advantages into self-perpetuating political power over everyone else. Such a ban is narrowly tailored, indeed surgically targeted, to remove the corporate threat to democratic self-government, political equality, free and fair markets undistorted by rent-seeking operations, and the basic integrity of representative institutions.

However, if Congress and the states were to ban corporate or personal expenditures of over \$100,000 denying the existence of climate change, this would violate the First Amendment as a clear case of viewpoint discrimination. See *RAV v. St. Paul*, 505 U.S. 377, 382 (1992) (“The First Amendment generally prevents government from proscribing speech . . . or even expressive conduct . . . because of disapproval of the ideas expressed.”). If they sought to ban *any* expenditures dealing with the question of climate change, this too would violate the First Amendment as a content or subject matter-based regulation. See *Police Dept. of Chic. v. Mosley*, 408 U.S. 92, 95 (“But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its *subject matter*, or its *content*.”) (emphasis added).

Now take a different scenario. Imagine that West Virginia passes a law responding to the judicial election money scandal at the center of *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), by limiting any independent expenditures, corporate or personal, in state judicial elections to \$100,000. Would such a law, in fact, limit speech “because of its content,” as the question suggests, and in a way that is “not narrowly tailored to achieve any significant governmental interest” and that “vastly curtails alternative channels of communication”?

The hypothetical West Virginia law would be in response to the real-world expenditure in 2004 of more than \$3 million dollars in a judicial election by the CEO of the Massey Corporation, Don Blankenship, who was disgruntled with a \$50 million verdict handed down by a jury against his company for fraud, concealment and tortious interference with contract in its business dealings. Blankenship's spending went to pay for nasty television ads against a sitting judge and to promote a West Virginia Supreme Court of Appeals candidate, Brent Benjamin, who won the race and then promptly came to cast the deciding judicial vote to overturn the \$50 million verdict against Massey. This appalling sequence of events was the basis for Justice

Kennedy's majority opinion in *Caperton* overturning the state court decision on Due Process grounds and holding that the vast campaign spending of Mr. Blankenship created a "probability of bias" in Justice Benjamin's jurisprudence, compromising in appearance, if not in reality, the ability of the plaintiffs to receive a fair hearing in the West Virginia Supreme Court of Appeals.

To be sure, Chief Justice Roberts asked 40 penetrating and skeptical questions about this decision in his dissenting opinion in *Massey Coal*, such as: "1. How much money is too much money? What level of contribution or expenditure gives rise to a 'probability of bias'? 2. How do we determine whether a given expenditure is 'disproportionate'? Disproportionate to *what*? 3. Are independent, non-coordinated expenditures treated the same as direct contributions to a candidate's campaign? What about contributions to independent outside groups supporting a candidate? . . . 9. What if the case involves a social or ideological issue rather than a financial one? Must a judge recuse from cases involving, say, abortion rights if he has received 'disproportionate' support from individuals who feel strongly about either side of that issue? . . . 13. Must the judge's vote be outcome-determinative in order for his non-recusal to constitute a due process violation? . . . 32. Are contributions or expenditures in connection with a primary aggregated with those in the general election?" *Id.* at 888 (Roberts, C.J. dissenting). And so on.

To my mind, these questions do not undermine the integrity or logic of the decision but rather demonstrate that there will be awesomely complicated and intractable line-drawing questions if the Court is forced to revisit judicial and legislative decisions *after the fact* to determine whether certain spending in judicial races is so massive and egregious as to thwart due process. Rather, the proper answer to these questions is that the legislative branch should set reasonable and well-understood limits *in advance* to guarantee standards of proportion and fairness in campaign spending that are consistent with democratic self-government, political equality and representative integrity. Running around after the fact to try to determine if certain spending was too great, or the corruption is too apparent and egregious, is a fool's errand and wholly unworkable, as Chief Justice Roberts shrewdly suggests.

A \$100,000 limit would still have allowed Blankenship to spend more than anyone else in the state did and to get his message out in a powerful and unmistakable way. This \$100,000 worth of spending—when combined with direct campaign contributions and the powerful free resource of the Internet, to which nearly all citizens have access—would still likely leave Blankenship's voice as the loudest in the state but it would prevent him from spending so much as to create the reality or appearance of such vastly disproportionate and decisive political dominance that it would violate Due Process to permit his chosen candidate to render judgment on his business interests in a court case.

A law with a \$100,000 limit would target not the *content* or *viewpoint* of the speech but its *quantity* or *volume*, much like the volume of the speech that the Rock against Racism organizers had to adjust in Central Park so that other citizens could simply be heard in the park. There are plainly significant and compelling interests—democratic self-government, political equality, and the reality and appearance of judicial integrity and fairness, not to mention saving the time of the courts from having to repeatedly adjudicate whether certain campaign expenditures are so egregious as to compromise Due Process—to justify such laws if they are appropriately tailored and leave open other ample channels of communication. After maxing out

on his \$100,000, a sum that the vast majority of West Virginians could only dream of spending in a judicial election (even if they had an important case pending relating to millions of dollars or something like, say, child custody), Blankenship could still spend to the heavens generally warning people of the dangers of too much regulation or the fraud of global climate change. The Amendment would thus allow the people of West Virginia to treat a tycoon's candidate-focused political expenditures as the equivalent of campaign contributions, which is precisely how Justice Kennedy, perhaps unconsciously, treated them in his analysis. See *Caperton*, 556 U.S. 868 at 901 (2009) (referring in passing to Blankenship's spending as "contributions" to Justice Benjamin when in fact the vast majority of money spent was, legally speaking, in the form of independent expenditures).

Remember that New York City's requirement that Rock Against Racism use the City's sound technician and turn the music down actually did restrict the "volume" and "quantity" of the speech and thus, theoretically, the number of people who could get the group's message. But the Supreme Court found that the restriction had "nothing to do with content" because it applied not only to rock music but to classical and jazz, it served the important interest of allowing people to pursue the other valuable activities going on in Central Park, thus *promoting* free expression, and it left open lots of other avenues for Rock Against Racism to get its message out in other contexts. In other words, it was perfectly "reasonable." This is pure common sense.

Obviously a court looking at a \$100,000 limit on spending on judicial campaigns in West Virginia would have to examine all of the surrounding facts and circumstances to determine its reasonableness. But one can well imagine it being deemed constitutional.

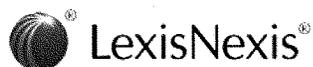
In *Citizens United* and *Buckley v. Valeo*, the Supreme Court took these questions off of the table of democracy by categorically rejecting any corporate and individual spending limits as a direct "quantity restriction" on speech. After *McCutcheon*, the Court also seems to be directly on course to invalidate contribution limits, which end up being, according to the accelerating new dogma, a kind of expenditure limit too. (If you could give me \$1 million but are limited to \$5,200, my ability to spend the extra \$994,800 has just been stifled.) In order to get back to a *Ward*-style analysis of campaign finance laws, where reasonableness governs, we need to pass the 28th Amendment, restoring and assuring to Congress and the states the power to set reasonable limits on contributions and expenditures in order to advance democratic self-government, political equality, and the integrity of government and electoral democracy.

I also cited *Ward v. Rock Against Racism* to demonstrate that if the Supreme Court majority were not under the spell of a new market fundamentalism in the campaign finance field, it could find ample doctrinal resources in First Amendment law today with which to uphold traditional campaign finance laws protecting democratic self-government from big money domination. It can no longer do so because it has committed itself to a series of dogmas that leave no room for doctrinal, much less democratic political, maneuver: money is speech; corporations have the political free speech rights of the people; the only acceptable interest for limiting the flow of money in campaign finance is to prevent corruption; corruption must be tantamount to bribery; and it violates the free speech rights of privately financed candidates to increase the speech opportunities for publicly financed candidates.

While campaign money flows freely, the Court has put political and legislative democracy in a straitjacket. The Court has eliminated recognition of the compelling interests that Congress and the states have in promoting democratic self-government, political equality and the integrity of representative institutions. It has reduced the anti-corruption interest to meaninglessness. It has come close to abolishing the distinction between natural persons and corporate entities that has been central to campaign finance regulation for more than a century. And it has disabled the power of states to create strong public financing mechanisms that actually work to expand speech, debate, competition and participation.

It will take a constitutional amendment to restore a balance so that our law resembles something like *Ward v. Rock against Racism* in the campaign finance field.

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We're a bit more attuned in Charlotte these days to the corruptive influence of money in politics. A briefcase with twenty grand in the mayor's office has a way of making you contemplate the temptations our public servants can face.

The U.S. Supreme Court, however, thinks we all should be more trusting of politicians and the people who wave money in front of them. In its ruling Wednesday on *McCutcheon v. Federal Election Commission*, the Court continued its dangerous dismantling of the country's campaign finance laws. Four years ago, in *Citizens United*, the justices lifted restrictions on political contributions from corporations. Wednesday's ruling might be worse.

In *McCutcheon*, the Court struck down aggregate limits on campaign contributions to candidates for Congress and president, as well as limits on contributions to political party committees. Gone is the overall contribution cap of \$123,000 a year, as well as a separate \$48,600 cap on total contributions made only to candidates.

That means that while people are still limited to giving individual candidates \$2,600 a year, they can contribute millions to that candidate's party and political action committees, which can funnel the money right back into specific campaigns. And those politicians will know who the benefactor is, of course.

That's important for two reasons: First, those with the money will have more access to candidates and influence over the national conversation during elections. As Justice Ruth Bader Ginsberg said during oral arguments in *McCutcheon* last October: "By having these

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limits, you are promoting democratic participation. Then the little people will count some and you won't have the super-affluent as the speakers that will control the elections."

At least as important is the control the affluent may have over the candidates. The contribution limits eliminated Wednesday were introduced in 1974 in the wake of the Watergate scandal, and they were upheld by the Court two years later in *Buckley v. Valeo*. In that ruling, the court said that regulating campaign contributions is justified because of the potential for corruption.

The Roberts Court thinks that's overblown, and supporters of the decision already are crowing about how the *McCutcheon* ruling was a victory for the First Amendment right to voice your political preferences with your checkbook. Their next target: The \$2,600 annual limit on giving to individual candidates. Justice Clarence Thomas, in his *McCutcheon* assent Wednesday, said that cap also should have been whacked.

McCutcheon, by itself, does enough damage. It gives more power to the well-financed few, who now have near limitless freedom to dangle that money in front of public officials. That shouldn't be a worry, a majority of the Court said Wednesday. In Charlotte, and too many places like it, we know better.

LOAD-DATE: April 3, 2014

The New York Times

May 4, 2013

Corporations Find a Friend in the Supreme Court

By ADAM LIPTAK

NOT long after 10 a.m. on March 27, a restless audience waited for the Supreme Court to hear arguments in the second of two historic cases involving same-sex marriage. First, however, Justice Antonin Scalia attended to another matter. He announced that the court was throwing out an antitrust class action that subscribers brought against Comcast, the nation's largest cable company.

Almost no one in the courtroom paid attention, despite Justice Scalia's characteristically animated delivery, and the next day's news coverage was dominated by accounts of the arguments on same-sex marriage. That was no surprise: the Supreme Court's business decisions are almost always overshadowed by cases on controversial social issues.

But the business docket reflects something truly distinctive about the court led by Chief Justice John G. Roberts Jr. While the current court's decisions, over all, are only slightly more conservative than those from the courts led by Chief Justices Warren E. Burger and William H. Rehnquist, according to political scientists who study the court, its business rulings are another matter. They have been, a new study finds, far friendlier to business than those of any court since at least World War II.

In the eight years since Chief Justice Roberts joined the court, it has allowed corporations to spend freely in elections in the Citizens United case, has shielded them from class actions and human rights suits, and has made arbitration the favored way to resolve many disputes. Business groups say the

Roberts court's decisions have helped combat frivolous lawsuits, while plaintiffs' lawyers say the rulings have destroyed legitimate claims for harm from faulty products, discriminatory practices and fraud.

Whether the Roberts court is unusually friendly to business has been the subject of repeated discussion, much of it based on anecdotes and studies based on small slices of empirical evidence. The new study, by contrast, takes a careful and comprehensive look at some 2,000 decisions from 1946 to 2011.

Published last month in The Minnesota Law Review, the study ranked the 36 justices who served on the court over those 65 years by the proportion of their pro-business votes; all five of the current court's more conservative members were in the top 10. But the study's most striking finding was that the two justices most likely to vote in favor of business interests since 1946 are the most recent conservative additions to the court, Chief Justice Roberts and Justice Samuel A. Alito Jr., both appointed by President George W. Bush.

The study was prepared by Lee Epstein, who teaches law and political science at the University of Southern California; William M. Landes, an economist at the University of Chicago; and Judge Richard A. Posner, of the federal appeals court in Chicago, who teaches law at the University of Chicago.

In the Comcast case, subscribers seeking \$875 million in damages charged that the company had swapped territory with other cable companies to gain market power and raise prices. But the legal issue before the court was technical. It concerned the sort of evidence needed to allow two million subscribers in the Philadelphia area to band together as a class.

Justice Scalia said the plaintiffs' evidence was not enough to allow them to proceed as a class. They could still, he said, pursue their complaints individually. But the difficulty of mounting such suits over insignificant sums would not make them very attractive to most lawyers.

The decision, however, went far beyond the Comcast subscribers. By reaffirming Wal-Mart v. Dukes, a 2011 blockbuster case in which the court threw out a large employment sex discrimination class, the Comcast case limited class actions more broadly.

The question of whether plaintiffs have enough in common to sue as a class is different from whether they deserve to win. The first question is generally resolved early in the case. The second one may await trial.

But the Wal-Mart and Comcast decisions said the two questions often overlap and may call for an early answer. The decisions essentially required early scrutiny — by a judge, not a jury — of the ultimate legal question in high-stakes cases, sometimes before all the relevant evidence has been gathered. This delighted business groups, which have pushed to limit class actions.

“The court is telling lower courts across the country they really do have to fulfill their gate-keeping function and keep these meritless classes out of the courts,” said Kate Comerford Todd, a lawyer with the litigation unit of the United States Chamber of Commerce.

Justices deeply unhappy with a decision sometimes read their dissents from the bench. It happens perhaps three times a year. Justice Scalia, in remarks at George Washington University in February, said such oral dissents were a way to call attention to a grave misstep.

“I only do it in really significant cases,” he said, “where I think the court’s decision is going to have a really bad effect upon the law and upon society, a really, really big case.”

By that standard, the dissenters thought the Comcast decision was very bad indeed. It gave rise to two oral dissents, from the two senior members of the court’s liberal wing, Justices Ruth Bader Ginsburg and Stephen G. Breyer.

Justice Ginsburg accused the justices in the majority of unseemly judicial gamesmanship. She said they had reframed the legal issue in the case so they could rule for Comcast. “Thus the plaintiffs had no unclouded opportunity to brief and argue with precision the issue the court decides against them,” she said. “And that’s not cricket.”

THE Supreme Court decides one case at a time, and its jurisprudence is the sum of incremental and sometimes inconsistent rulings driven by quirky facts and shifting judicial alliances.

The law, that is to say, does not always move in a straight line, and the Roberts court's decisions have not all favored corporations. Employees suing over retaliation for raising discrimination claims have fared quite well, for example. Nor has the court always been receptive to companies claiming that state rules and injury awards from state juries should be struck down because they are in conflict with federal laws.

But the court's general track record, particularly in low-profile but important procedural rulings, has been decidedly pro-business, said Arthur R. Miller, a law professor at New York University. The upshot, he said, is that businesses are free to run their operations without fear of liability for the harm they cause to consumers, employees and people injured by their products.

"The Supreme Court has altered federal procedure in dramatic ways, one step at a time, to favor the business community," he said, by, among other things, "increased grants of summary judgment, tightening scientific evidence, rejecting class actions, heightening the pleading barrier and wholesale diversions into arbitration."

In a despairing overview published last month in The New York University Law Review, Professor Miller criticized many rulings from the Roberts court, including the Wal-Mart decision, which rejected a class of some 1.5 million female employees, and AT&T Mobility v. Concepcion, which allowed companies to escape class actions by insisting on one-by-one arbitrations, even over trivial amounts, in standard-form contracts.

Jason M. Halper, a lawyer at Cadwalader, Wickersham & Taft in New York, said the collective message of those and related cases was clear: "When you take all of them together, the effect is certainly to make the use of class actions much more difficult."

It is easy to understand why companies hate class actions. Once a class is certified, the damages sought are often so enormous that the only rational calculation is to settle even if the chances of losing at trial are small. The costs of litigation — for lawyers, experts and the exchange of information — are also far larger in class actions. And it is not always clear that the plaintiffs, as opposed to their lawyers, receive very much in the settlements.

Plaintiffs' lawyers, on the other hand, say class actions are the only way to vindicate small harms caused to many people. The victim of, say, a fraudulent charge for a few dollars on a billing statement will never sue. But a lawyer representing a million such people has an incentive to press the claim.

"Realistically," Professor Miller wrote, "the choice for class members is between collective access to the judicial system or no access at all."

So the Supreme Court's rulings making it harder to cross the class-certification threshold have had profound consequences in the legal balance of power between businesses and people who say they have been harmed.

Arbitration, in which the two sides agree to resolve disputes outside of court using informal procedures, is more complicated.

Depending on how they are structured, arbitrations can offer benefits in speed and cost to both sides, though the car rental companies or cellphone stores that have customers sign nonnegotiable contracts presumably do not have their best interests at heart.

Minor claims in arbitration raise harder questions. In theory, there is no reason that consumers and others could not join together in a mass arbitration, just as they file class actions in court.

But the AT&T Mobility decision limited that recourse for consumers. The case was brought by a California couple who objected to a \$30 charge for what was presented as a free cellphone. They had signed a "take it or leave it" form that required them to resolve disputes through arbitration and barred them from banding together with others, whether in arbitration or in court.

The Supreme Court said the contract was lawful, and in doing so it gave businesses a powerful tool.

"The decision basically lets companies escape class actions, so long as they do so by means of arbitration agreements," Brian T. Fitzpatrick, a law professor at Vanderbilt University, said on the day of the decision. "This is a game-changer for businesses. It's one of the most important and favorable cases for businesses in a very long time."

The central legal issues in the Wal-Mart, AT&T Mobility and Comcast cases were decided by 5-to-4 votes. In each, the justices in the majority were appointed by Republican presidents and the dissenters by Democratic ones.

Since World War II, the Minnesota Law Review study found, “justices appointed by Republican presidents are notably more favorable to business than justices appointed by Democratic presidents.” Indeed, it said, “on the current court, no Republican-appointed justice is less favorable to business than any Democrat.”

That does not mean that the Roberts court’s pro-business decisions are always decided by 5-to-4 votes. They are often lopsided or unanimous.

That is a consequence, Judge Posner said in an e-mail, of broader trends: “American society as a whole is more pro-business than it was before Reagan and this is reflected in the votes of Democratic as well as Republican Supreme Court justices.”

In March, for instance, the court unanimously rejected an attempt by class-action lawyers in Arkansas to keep their case out of federal court by promising that their clients would accept less money than they might deserve. (The case had been filed in Miller County, Ark., where courts, according to business groups, are notorious for coercing large settlements from out-of-state defendants.)

But sometimes unanimity masks division. The most important business decision of the current term, Kiobel v. Royal Dutch Petroleum, severely limited human rights suits against corporations based on charges of complicity in abuses abroad. All nine justices agreed that the particular suit before them had to be dismissed, largely because every significant aspect of the case was foreign: the plaintiffs were Nigerian, the companies they sued were based in England and the Netherlands, and the atrocities the companies were said to have aided took place in Nigeria.

Yet the court split 5 to 4 along the usual lines about how far to leave the door open to similar suits. Chief Justice Roberts, writing for the majority, suggested that it would be the rare case indeed that was proper. Certainly, he said, it should not be enough that a multinational corporation does business in the

United States. “Corporations are often present in many countries,” he wrote, “and it would reach too far to say that mere corporate presence suffices.”

Justice Breyer, in dissent, said such suits could play an important role in bringing to justice “torturers and perpetrators of genocide.”

THE Minnesota Law Review study did not rely on the common political science technique of coding each Supreme Court decision as conservative or liberal. To draw its main conclusions, it relied on a simpler formula, looking at cases with a business on one but not both sides. (The adversary might be an employee, job applicant, shareholder, union, environmental group or government agency.)

A vote for the business was counted as a pro-business vote.

By that standard, the study found, “the Roberts court is indeed highly pro-business — the conservatives extremely so and the liberals only moderately liberal.” Justices Ginsburg and Breyer, who spoke up in the Comcast case, were only slightly less likely to vote for business than the median justice in the survey but were in the bottom six for such votes in 5-to-4 decisions.

The arrival of Chief Justice Roberts in 2005 and Justice Alito in 2006 seem to have affected the behavior of the justices already on the court. The probability that the other three more conservative members of the court — Justices Scalia, Anthony M. Kennedy and Clarence Thomas — would vote for business grew to 56 percent from 52 percent. And the probability that Justices Ginsburg and Breyer would do so dropped to 32 percent from 38 percent.

Scholars who look at doctrine rather than data also say there is something distinctive about the current court.

“The Roberts court is the most pro-business court since the mid-1930s,” said Erwin Chemerinsky, the dean of the law school at the University of California, Irvine. “I think this helps understand it far more than traditional liberal and conservative labels.”

Others are wary of generalizations. Jonathan H. Adler, a law professor at Case Western Reserve University, said the Roberts court was “not particularly welcoming to efforts by plaintiffs’ lawyers to open new avenues of litigation,

but it has not done much to cut back on those avenues already established by prior cases.”

Business groups have been enthusiastic litigants in the Roberts court. Adam D. Chandler, a recent Yale Law School graduate and a Justice Department lawyer, published a [new study](#) along these lines on [Scotusblog](#) (noting that his views were not those of his employer). Looking at friend-of-the-court briefs supporting petitions seeking Supreme Court review over a roughly three-year period ended in August 2012, he found that pro-business and anti-regulatory groups accounted for more than three-quarters of the top 16 filers.

“My data indicate that, as the court shapes its docket, it hears conservative voices far more often than liberal ones, and the disparity is growing,” he wrote.

He found that the Chamber of Commerce was “the country’s pre-eminent petition pusher,” with 54 filings in the period. It also had an enviable success rate: the court grants one out of every hundred petitions; for ones supported by the chamber, it granted 32 percent.

Ms. Todd, the chamber lawyer, said her group would continue to be active. The aftermaths of the Wal-Mart and AT&T Mobility decisions, on class actions and arbitration, “are really where a lot of our focus and resources are going right now,” she said.

“These cases have a huge impact on the business community and on the American economy more broadly,” Ms. Todd said.

The Comcast decision is just over a month old. But lower courts have already relied on it to reject class actions contending harm from defective trucks, poisoned drinking water, discrimination against disabled workers, misrepresentations in insurance policies and improperly docked wages.

Some of the plaintiffs in those cases will now pursue their claims in individual suits. But many will not, and the businesses accused of wrongdoing will, thanks to the Roberts court, breathe a little easier.

Senator Tom Udall
Statement for the Record
Senate Judiciary Committee hearing on:
Examining a Constitutional Amendment to Restore Democracy to the American People
June 3, 2014

Good morning Chairman Leahy, Ranking Member Grassley, and members of the Committee. Thank you for holding this important hearing on the constitutional amendment that Senator Bennet and I introduced last June.

Like you Mr. Chairman, I don't take amending the Constitution lightly. In *The Federalist* No. 49, James Madison argued that our founding document should be amended only on "great and extraordinary occasions." I agree, but I also believe we have reached one of those occasions.

The integrity of our elections, and ultimately our governance, depends on a vigorous debate in which American citizens truly have a voice. Unfortunately, our elections no longer focus on the needs and interests of individual voters, but are instead shaped by multi-million dollar ad campaigns funded by special interest groups and billionaires with seemingly limitless resources.

According to a joint study by Brookings and the American Enterprise Institute, outside groups spent \$457 million to influence Senate and House races in 2012. In the 2008 election, before *Citizens United*, groups spent \$43.7 million. In 1992, they spent \$6.2 million on congressional elections. There is an obvious trend here, and it's deeply troubling.

I have long been an advocate for reforming our campaign finance system, but the need has never been greater than it is today. In January 2010, the Supreme Court issued its opinion in *Citizens United v. FEC*. Two months later, the DC Circuit Court of Appeals decided the *SpeechNow v. FEC* case. These two cases opened the door to Super PACs. Millions of dollars now pour into negative and misleading campaign ads, often without disclosing the true source of the donations.

Four years after *Citizens United*, the damage continues. In April, a narrow majority of the Court issued its latest misguided decision in *McCutcheon v. FEC*. That case struck down the aggregate contribution limits an individual can make in each election cycle. Most Americans don't have unlimited dollars to spend on elections around the country. They only get their one vote. They can support one candidate – the one who represents their district or state. But for the wealthy, and the super wealthy, *McCutcheon* says they get so much more. That decision gave them a green light to donate to an unlimited number of candidates. Now a billionaire in one state gets to influence the elections in 49 other states.

Under *McCutcheon*, one donor can dole out \$3.6 million every two years directly to candidates and parties. To put that into perspective, an average American working full-time, making minimum wage, would have to work 239 years to make that much money. Our campaign finance system is completely out of balance, and it is time to fix it.

What was more troubling about the *McCutcheon* decision, however, was that Chief Justice Roberts said that preventing quid pro quo corruption – bribery – is the only sufficient

justification for Congress to pass campaign finance laws. Under this extremely narrow definition the Court has laid the groundwork to strike down nearly all remaining regulations. We are likely to see new challenges against laws that limit the amount an individual may contribute to a candidate, as well as laws prohibiting contributions to candidates from corporations.

Senator John McCain said after *McCutcheon* that, “there will be scandals involving corrupt public officials and unlimited, anonymous campaign contributions that will force the system to be reformed once again.” I’m afraid my friend will prove to be correct; our elections are headed back to the pre-Watergate era.

It is now crystal clear that an amendment to the Constitution is necessary to allow meaningful campaign finance rules.

But this problem didn’t start in 2010 with the *Citizens United* decision. Our campaign finance system was hardly a model of democracy before these recent opinions. We have been on this dangerous path for a long time. *Citizens United* and *McCutcheon* may have picked up the pace, but the Court laid the groundwork many years ago.

We can go all the way back to 1976. That year, the Court held in *Buckley v. Valeo* that restricting campaign spending, as well as limiting independent expenditures, violates the First Amendment right to free speech. In effect, the Court said that money and speech are the same thing.

This is a flawed premise, but the Court has continued to rely on it to issue more disastrous opinions, such as *Citizens United* and *McCutcheon*. The damage is clear. Elections have become more about the quantity of cash, and less about the quality of ideas. More about special interests, and less about public service.

We cannot truly fix this broken system until we undo the flawed, inherently undemocratic premise that spending money on elections is the same thing as exercising free speech. That can only be achieved in two ways. The Court could overturn *Buckley* and the subsequent decisions based on it – which seems highly unlikely given its current ideological makeup. Or we amend the Constitution to not only overturn the previous bad Court decisions, but to also prevent future ones. Until then, we will fall short of the real reform that is needed.

That is why Senator Bennet and I, along with several members of this committee, introduced S.J. Res. 19 last June. This amendment is similar to bipartisan proposals in previous Congresses. It would restore the authority of Congress – stripped by the Court – to regulate the raising and spending of money for federal political campaigns, including independent expenditures, and it would allow states to do so at their level. It would not dictate any specific policies or regulations. But, it would allow Congress to pass sensible campaign finance reform legislation that withstands constitutional challenges.

Many of my Republican colleagues and conservative groups claim that our amendment is a partisan election year stunt to rally progressive voters. This ignores the facts.

Since 2010, Americans from across the political spectrum have come out overwhelmingly in support of an amendment. People For the American Way recently summed up the grassroots support for amending the Constitution:

Since the landmark *Citizens United* decision, 16 states and over 550 municipalities, including large cities like New York, Los Angeles, Chicago and Philadelphia, have gone on record supporting congressional passage of a constitutional amendment to be sent to the states for ratification. Transcending political leaning or geographic location, voters in states and municipalities that have placed amendment questions on the ballot have routinely supported these initiatives by large margins.

Our Republican colleagues also ignore the fact that this movement started decades ago – by a Republican. Many of our predecessors from both parties understood the danger. They knew the corrosive effect that money from sources across the political spectrum has on our electoral system. They spent years championing the cause.

In 1983 – the 98th Congress – Senator Ted Stevens, a Republican icon from Alaska, introduced an amendment to overturn *Buckley*. Senator Stevens already saw the deteriorating effect unlimited campaign expenditures was having on Congress. In a speech on the Senate floor on the day he introduced the amendment, Senator Stevens said:

I, for one, would like to see the time come when there would be a limitation on the expenditures and the upward pressure on candidates, so that those who are seeking reelection, those who are seeking to challenge incumbents, or those who are seeking to fill a vacancy would not have this pressure that is brought about by the necessity to raise ever-increasing amounts to campaign for Federal office.

Senator Stevens recognized over thirty years ago that we were in an arms race – that the drive for money would only get worse and Congress’s ability to function would suffer.

This was only the beginning of the movement to amend the Constitution. In every Congress from the 99th to the 108th, Senator Fritz Hollings introduced bipartisan constitutional amendments similar to mine. Senators Schumer and Cochran continued the effort in the 109th Congress.

That was all before the *Citizens United* and *McCutcheon* decisions, before things went from bad to worse. The out of control spending since those decisions has further poisoned our elections. But no matter how bad things get, an amendment can only succeed if Republicans join us in this effort, as they have in the past. I know the political climate of an election year makes it even more difficult, but I’m hopeful that we can work together and reach consensus on a bipartisan constitutional amendment.

Many critics argue that such an amendment would repeal or amend the First Amendment’s free speech protections. But it does the exact opposite – our amendment is an effort to restore the First Amendment so that it applies equally to all Americans. Right now, a narrow majority of the Supreme Court believe that money and speech are the same thing. That leads to an unacceptable

conclusion – that the wealthiest Americans have greater speech rights than everyone else. Our access to constitutional rights shouldn't be based on our net worth.

They also claim that if Congress can regulate campaign finance spending, it “could” pass sweeping laws that will gut the First Amendment. “Could” is the key word here – the critics like to make radical claims about what Congress “could” do.

Take Senator Ted Cruz's op-ed in the Wall Street Journal on June 1. Senator Cruz states that under this amendment:

Congress *could* prohibit the National Rifle Association from distributing voter guides letting citizens know politicians' records on the Second Amendment. Congress *could* prohibit the Sierra Club from running political ads criticizing politicians for their environmental policies. Congress *could* penalize pro-life (or pro-choice) groups for spending money to urge their views of abortion. Congress *could* prohibit labor unions from organizing workers (an in-kind expenditure) to go door to door urging voters to turn out. Congress *could* criminalize pastors making efforts to get their parishioners to vote. Congress *could* punish bloggers expending any resources to criticize the president. Congress *could* ban books, movies (watch out Michael Moore) and radio programs. [emphasis added]

Spreading fear is one way to argue against this constitutional amendment, but such hyperbole is easily rebutted with facts. The fact is we already know what kinds of laws Congress *would* pass if its authority is restored.

Norm Ornstein, one of the nation's leading scholars on these issues, laid out the history of campaign finance reform at a recent Senate Rules Committee hearing:

The first actual restriction on campaign funding came after the Civil War, with an 1867 provision prohibiting the solicitation of contributions from naval yard government employees. ... Corruption in the administration of Ulysses S. Grant led to more calls for reform, culminating in the Pendleton Act in 1883, which resulted in the end of the patronage system and assessments. The end of the spoils system led to the rise in influence of corporations, which filled the vacuum in party and campaign funding. A backlash against huge corporate and business contributions, including allegations of outsized corporate influence on President Theodore Roosevelt, led Roosevelt to lead a new reform movement in 1905 and 1906; that led to the Tillman Act of 1907. The Tillman Act made it illegal for “any national bank, or any corporation organized by authority of any laws of Congress” to make a contribution relating to any election for federal office. In 1910, the Federal Corrupt Practices Act required national party committees and congressional campaign committees to disclose their contributions and expenditures after each election.

Scandal continued to spur reform efforts and reform. The Teapot Dome scandal resulted in the Federal Corrupt Practices Act of 1925, which expanded disclosure and adjusted the spending limits upward. Reports of abuse of federal employees working for the re-

election of Speaker of the House Alben Barkley in 1938 led to passage of the Hatch Act in 1939, a revision of the 1883 Pendleton Act, which prohibited partisan political activity by most federal employees and also banned solicitation of contributions from workers on federal public works programs.

Labor's increasing political activity during the presidency of Franklin D. Roosevelt led to several efforts to limit labor's contributions, like those of corporations. In 1947 the Republican Congress made a ban on labor contributions to campaigns permanent, as part of the Taft-Hartley Act.

The Watergate scandal spurred the Federal Election Campaign Act of 1974, which was substantially revised by the landmark *Buckley v. Valeo* decision in 1976. The Bipartisan Campaign Reform Act of 2002 was spurred by scandals over soft money fundraising and the misuse of the funds from corporations and unions for electioneering communications.

These reforms were not radical – they were narrowly tailored responses to restore Americans' faith in the political system after a lack of regulations led to scandals or corruption. While conservatives will present a list of far-reaching laws that Congress "could" pass, a long history demonstrates that Congress will use its authority to enact modest reforms. And let's not forget, any law must pass both houses of Congress and get signed by the president – that is a significant check against any radical legislation getting passed.

Critics also fail to acknowledge that our amendment does not give Congress free rein to pass any and all campaign finance laws. When the Court interprets any amendment to the Constitution, it generally reads in a reasonableness requirement. This means that even if Congress does abuse its authority, and pass the extreme laws conservatives suggest, they can still be overturned as unreasonable. But more importantly, members of Congress who pass extreme laws can be held accountable by their constituents. The same can't be said for Supreme Court justices willing to strike down sensible regulations by a narrow majority.

Another argument against the amendment is that it is intended to protect incumbents. This again misses the point. Under the system as it exists, the pressure to raise money discourages many qualified Americans from ever running for office. When faced with the prospect of needing to raise 10, 15, or 20 million dollars for a Senate seat, many of our country's best leaders simply opt to stay in other careers.

And if you're lucky enough to raise the mountain of cash needed to get elected, that is just the beginning. Senator Hollings recognized the deterioration of our legislative branch due to the increasing influence of money on our elections. In a Huffington Post piece, he wrote:

"Money has not only destroyed bi-partisanship but corrupted the Senate. Not the senators, but the system. In 1966 when I came to the Senate, Mike Mansfield, the Leader, had a roll call every Monday morning at 9:00 o'clock in order to be assured of a quorum to do business. And he kept us in until 5:00 o'clock Friday so that we got a week's work in . . . Today, there's no real work on Mondays and Fridays, but we fly out to California early Friday morning for a luncheon

fundraiser, a Friday evening fundraiser, making individual money appointments on Saturday and a fundraising breakfast on Monday morning, flying back for perhaps a roll call Monday evening.”

I agree with his assessment, and also remember when fundraising wasn't the priority it is today. My father was elected to Congress in 1954, when I was in first grade. Back then, the legislative branch was a Citizens' Congress. Members were in Washington for six months, and then they went home for six months and worked at their profession. But during those six months in session, Congress focused on legislating.

Unfortunately, our current campaign finance system has locked members of Congress into an endless campaign cycle. Elected officials spend far too much time raising money for campaigns, and not enough time carefully considering legislation or listening to constituents. The drive to raise money is constant, and allowing vast new amounts of special interest money into the system will only increase the pressure. This causes a deterioration of Congress's ability to function, including its ability to adequately represent and respond to its constituents. As the money raised and spent on campaigns by special interests continues to climb, members of Congress will have to devote more time trying to keep up in the fundraising race. It is no wonder that, as the pursuit of campaign money has come to dominate politics, the American people have become increasingly dissatisfied with Congress' performance.

Money has poisoned our political system. And the Supreme Court has wrongly equated that money with speech, leaving us with one option for real reform. We must work towards a constitutional amendment that will restore integrity to our elections and legislative process. We, as Americans, believe in government “of the people, by the people, for the people.” Generations of Americans before us have spoken out, worked tirelessly, and even given up their lives so that we might have the chance to have such a government. We cannot sit by as that ideal is lost.

Free and fair elections are a founding principle of our democracy. They should not be for sale to the highest bidder.

Thank you again for holding this hearing.



Statement for the Record

**Chris Kromm
Executive Director
Institute for Southern Studies**

**Hearing on "Examining a Constitutional Amendment to Restore
Democracy to the American People"**

U.S. Senate Judiciary Committee

Hearing Date June 3, 2014

Testimony Submitted June 10, 2014

Mr. Chairman, Mr. Ranking Member, and members of the Committee:

I would like to thank Chairman Leahy and members of the Senate Judiciary Committee for this important hearing on solutions to the growing influence of the wealthy and special interests in our elections. I appreciate the opportunity to submit this statement, which will discuss the problem of escalating election spending in states like North Carolina, and the importance of common sense reforms.

The Institute for Southern Studies is a nonprofit research, media and education center founded by civil rights veterans in 1970, based in Durham, North Carolina. For more than three decades, the Institute has investigated the corroding influence of special interest money in politics, including reports published in our award-winning journal *Southern Exposure* and our online magazine *Facing South* (www.southernstudies.org).

The Institute has also been a longstanding advocate for common-sense campaign finance reform, and is a member of N.C. Voters for Clean Elections, a statewide coalition of 35 groups seeking to curb special interest influence and strengthen the voice of ordinary voters.

North Carolina: Ground Zero for the New Money in Politics Landscape

States have become increasingly important arenas for election spending. According to the National Institute on Money in State Politics, in the 2012 election cycle more than \$2.7 billion in contributions flooded into state-level candidates and political committees.

As a key battleground state, North Carolina has been a magnet for political money. According to the National Institute, over the last three election cycles more than \$230 million has poured into North Carolina state elections.

North Carolina has also emerged as a magnet for outside spending by Super PACs, nonprofit business associations and social welfare nonprofits. In the wake of the Supreme Court's 2010 *Citizens United* decision, the Institute for Southern Studies began investigating the growing role of outside groups in North Carolina and other state-level races in the South. In 2012, the Institute launched FollowNCMoney.org, one of the first websites in the country to focus on tracking spending by independent groups in state-level races.

The numbers tell the story: In 2012, Institute for Southern Studies research revealed that outside groups unleashed more than \$14.5 million into North Carolina state elections. Ninety percent of the outside spending came from just 10 groups, seven of them conservative/Republican-leaning committees. Much of the money came from groups outside North Carolina: The top independent spending group was the Washington, D.C.-based Republican Governors Association, which spent \$4.9 million to benefit Gov. Pat McCrory.

Perhaps most alarmingly, the second-biggest race for outside spending in 2012 was for a seat on the N.C. Supreme Court. More than \$2.8 million flowed through a maze of Super PACs and independent committees, with nearly 90 percent of the money benefiting conservative incumbent Paul Newby. Several of the leading donors behind the 2012 judicial spending spree were companies and committees that have had or currently have cases pending in North Carolina state courts, including Duke Energy, Reynolds American and the Washington, D.C.-based Republican State Leadership Committee.

The election spending arms race, including outside election spending, shows no signs of stopping in North Carolina. Heading into the state's May 2014 primary elections, more than \$2.5 million was spent by outside groups on state-level races. The biggest outside spender was a little-known Super PAC, Justice for All NC, which spent at least \$760,000 on TV ads attacking incumbent state Supreme Court Justice Robin Hudson. One long-time North Carolina political reporter called the ad "perhaps the most despicable political advertisement ever aired in the state."

Art Pope's North Carolina Political Influence Machine

In North Carolina, one person has become a compelling symbol for the corrosive influence of wealthy donors in state politics: Raleigh businessman, former state legislator and multimillionaire donor Art Pope.

Art Pope is the president, chairman and CEO of Variety Wholesalers, a discount retail chain started by his father. Over the last decade, Art Pope's family, business and family foundation have pumped more than \$40 million into political campaigns and committees, outside election spending groups, and conservative policy organizations.

In a state awash in money spent by special interests, Art Pope supports and orchestrates an unparalleled political influence network in North Carolina. What's more, Pope and his network have fought to dismantle North Carolina's widely hailed initiatives for election spending reform, heightening the ability of wealthy donors like himself to influence state politics. Art Pope's network includes three key channels to exert influence:

Pope's Family Fortune

Between 2001 and 2012, Art Pope and his close family members contributed more than \$1.6 million to North Carolina candidates and committees, with more than \$490,000 of those contributions coming in the 2010 and 2012 cycles alone. These donations included more than \$30,000 for the 2008 and 2012 gubernatorial campaigns of Republican Pat McCrory. Shortly after McCrory's election in 2012, Pope was appointed first to the governor's transition team and then to one of the most important positions in Gov. McCrory's cabinet, director of budget policy.

Pope's Corporate Treasury

Since 2002, Pope's company Variety Wholesalers has contributed more than \$1.9 million to independent political committees. In 2010 and 2012 alone, Pope's business contributed more than \$900,000 to these committees. The full amount isn't known because at least one Pope-backed group, Americans for Prosperity, is not required to fully disclose its donors.

In 2010, three of the groups in Pope's network—Americans for Prosperity, Civitas Action and Real Jobs NC—played a key role in North Carolina's legislative elections. All three were financially backed by Pope's business, and Pope served on their boards of directors. According to the N.C. FreeEnterprise Foundation, a pro-business nonprofit, those three groups accounted for more than 70 percent of the outside money that flooded into N.C. House and Senate races.

In large part due to Pope's groups, in 2010 North Carolina Republican legislative candidates enjoyed a 10-to-1 advantage in spending by independent committees benefiting their campaigns, helping fuel the GOP's historic capture of the state legislature. In North Carolina's Senate District 50 in the mountains, Civitas Action and Real Jobs NC unleashed more than \$265,000 worth of outside spending to benefit the Republican candidate; the incumbent Democrat, Sen. John Snow, ended up losing by just 161 votes.

Pope's Conservative Network

Over the last decade, the John William Pope Foundation, which is led by Art Pope, has spent more than \$30 million on a network of think tanks and advocacy groups to promote a conservative policy agenda, according to an Institute for Southern Studies analysis of the foundation's tax filings. These groups, which include the Americans for Prosperity Foundation, John Locke Foundation, John W. Pope Civitas Institute, N.C. Center for Constitutional Law and Pope Center for Higher Education Policy, receive the vast majority of their money from Pope's foundation. Until recently, Pope also sat on the boards of many groups in his network.

Pope's groups have been the architects and leading advocates of a policy agenda in North Carolina that has included draconian restrictions on voting access, tax cuts disproportionately benefiting corporations and the wealthy, cuts to public schools, and opposition to environmental standards.

Put together, Art Pope's money and network have given him singular and undeniable influence in North Carolina, reaching into the executive, judicial and legislative branches of state government. After the 2010 elections, for example, Pope was appointed as a pro bono "co-counsel" to the General Assembly's newly-elected Republican leadership to help draw new political maps for the legislature and Congress. In May 2014, The Washington Post declared three of North Carolina's Congressional districts to be among the 10 most gerrymandered in the country.

Art Pope's Attack on Campaign Finance Reform

But Art Pope has done more than generously spend and channel money for political influence in North Carolina. He also spearheaded the attack on widely praised "clean elections" reforms that had been successful in lessening the influence of special interest money in elections in the state.

In 2003, North Carolina became a national model for campaign finance reform when it launched the N.C. Public Campaign Fund. The voluntary program, passed with bipartisan support, aimed to help free judges from relying on deep-pocketed—and potentially compromising—special-interest donors to get elected. The Fund awarded candidates for the N.C. Supreme Court and N.C. Court of Appeals with a grant to run their campaigns if they raised at least 350 small donations and agreed to strict spending limits.

North Carolina's judicial public financing program was hailed as a resounding success. Eighty percent of all eligible judges used the program, including registered Democrats, Republicans and independents. A 2014 report by the National Institute on Money in State Politics found that, under the program, the share of judicial candidates' money coming from private interests dropped by more than 40 percent. More women and African Americans were elected to the bench. In May 2013, 13 of the state's 14 N.C. Court of Appeals judges wrote a letter to the state legislature saying the program was "an effective and valuable tool for protecting public confidence in the impartiality and independence of the judiciary."

In 2007, North Carolina lawmakers enacted similar public financing programs for three Council of State races—Commissioner of Insurance, State Auditor, and State Superintendent of Public Instruction—and a pilot program for city council races in Chapel Hill, North Carolina. Once the laws went into effect, Democratic and Republican candidates participated. Perhaps most significantly, dozens of campaign donors went on record to support North Carolina's efforts to curb special interest influence and return political power to state voters.

But not Art Pope. While a bipartisan group of good government advocates, campaign donors and lawmakers sought to curb the reliance of state candidates on special interest money, Pope and his network spearheaded an all-out assault on North Carolina's campaign finance reforms.

As the Institute for Southern Studies has documented, think tanks and activist groups largely funded by Pope and his family foundation—including Americans for Prosperity, the John W. Pope Civitas Institute and the John Locke Foundation—relentlessly attacked North Carolina's clean elections programs in the media. Members of the North Carolina General Assembly backed by Pope and his groups pushed to defund and eliminate the programs.

In March 2013, in the first budget Art Pope presented in his capacity as Gov. Pat McCrory's budget director, Pope zeroed out funding for the judicial public financing program. What's

more, when state lawmakers were considering a compromise that would have continued the program with reduced funding, Pope personally intervened to help scuttle the amendment, effectively eliminating the program.

Conclusion

Mr. Chairman, I believe the story of North Carolina and the growing influence of special interest money in state politics holds important lessons in our efforts to protect the voice of ordinary voters in elections.

The Supreme Court's recent decisions in *Citizens United v. FEC* and *McCutcheon v. FEC* have helped fuel a new election spending arms race that has expanded the influence of wealthy donors and special interests, and diminished voter confidence in the political process.

As the North Carolina experience shows, this new election spending landscape can have a dramatic impact on state politics, where infusions of spending by wealthy donors and outside groups can play an especially significant role in shaping the outcome of elections.

As the example of Art Pope and his political network in North Carolina further shows, growing influence by wealthy interests can also create a more hostile climate for passing or protecting common-sense election spending reforms.

I thank you again for your leadership and the opportunity to submit this statement for the record.

Testimony of Senator Bernard Sanders and Congressman Ted Deutch
Senate Committee on the Judiciary
Hearing on “Examining a Constitutional Amendment
to Restore Democracy to the American People”
June 3, 2014

Mr. Chairman, thank you for convening a hearing on the critically important issue of restoring democracy to the American people.

We are at a pivotal moment in American history. The democratic foundations of our country are now facing the most severe attack, both economically and politically, that we have seen in modern times.

The history of this country has been an arduous and difficult journey, but one which has moved forward towards a more inclusive democracy—a form of government President Lincoln described as “of the people, by the people, for the people.” As part of that struggle to expand democracy throughout the ages, courageous Americans have risked their lives, and died defending those ideals.

When this country was founded, let us not forget that only white male property owners over the age of 21 could vote. After the Civil War, we amended the Constitution to allow non-white men to vote. In 1920, fully 72 years after the Seneca Falls convention, we ratified the Nineteenth Amendment, extending the franchise to women. It took another fifty years to outlaw discrimination at the polling place on the basis of skin color, ban poll taxes, and lower the voting age to 18. But each hard-fought change was worth the sacrifices required to make our democracy inclusive of, and responsive to, more and more Americans.

At the same time, we have made the election process more transparent and less corrupt. Historically, as the influence of corporate money crept into politics, ordinary people spoke out to right the process. During the Gilded Age there was rampant political corruption. Government workers were expected to pay off their political bosses in order to keep their jobs. Candidates relied heavily on corporate contributions of robber barons, and there were no federal requirements mandating disclosure or even the most basic forms of record-keeping.

But the people spoke out, and in response to allegations involving improper contributions to his own presidential campaign, Teddy Roosevelt signed the Tillman Act into law. The first comprehensive campaign finance reform bill in American history, the Tillman Act banned campaign contributions from corporations and national banks.

In the years since, we have placed greater, sensible restrictions on campaign finance, often in response to election scandals, culminating in the 2002 Bipartisan Campaign Reform Act, led by Senators McCain and Feingold.

Despite these efforts—or perhaps, because of them—a handful of billionaires, including the Koch brothers, have worked doggedly to try to circumvent and dismantle these regulations and return us to an era where the wealthy and powerful have an unlimited ability to influence—or

outright purchase—elections. In that process, they have been aided and abetted by the five conservative members of the US Supreme Court.

The 2010 Court decision in *Citizens United v. Federal Election Commission* opened the floodgates for a rush of secret money to flow into elections, and those of us interested in clean and fair elections saw our worst fears play out in during the 2010 and 2012 cycles.

Thanks to *Citizens United* and its progeny, the new “super PACs” were able to collect and spend literally hundreds of millions of dollars, often from only a handful of donors. In fact it only took 32 major super PAC donors to contribute more than the \$313 million that all the small donors gave to the Obama and Romney campaigns combined. Further analysis from the US Public Interest Research Group and Demos showed that only 159 Americans, each giving more than \$1 million, combined to donate more than \$500 million to super PACs in the 2012 election cycle.

All the more disturbing is that this is only the money we know about; this does not include millions of dollars of “dark” money, funneled through political nonprofits. Through those organizations, secret millions are shielded from the standards applied to political parties and campaigns.

Even if we accept the premise that money equals speech, we cannot let a handful of wealthy individuals drown out the voices of millions. Americans are disgusted with this pay-to-play system of politics, as poll after poll shows the American people do not want a political system awash in corporate cash, with politicians beholden to the mega-donors who put them in power.

Unfortunately, this year, the 5-4 majority on the Supreme Court extended their reasoning in *Citizens United* even further with its ruling in *McCutcheon v. Federal Election Commission*. In this case, a wealthy donor from Alabama claimed his First Amendment rights were violated by the \$123,200 limit on total contributions to federal candidates during an election cycle. The Court agreed and struck down that limit, paving the way for wealthy individuals to donate up to \$6 million to federal candidates, political parties, and joint election funds during a single election cycle. That’s more than 120 times the median income in America.

Already, several donors have taken advantage of the *McCutcheon* ruling by surpassing the now defunct \$123,200 limit. Though the limits still stand on donations to individual candidates and parties, challenges to those limits are already making their way through the court system, including one filed in May by the Republican National Committee. A bill to abolish the limits would never be passed and signed into law under this Congress and this President, so instead the wealthy opponents of free and fair elections are turning to their allies in the last available branch of government.

Yet the most dangerous assertion made by the Supreme Court in *McCutcheon* does not involve aggregate limits; it is the 5-4 majority’s holding that the First Amendment gives campaign donors just as much of a right to influence elected officials as the very voters who elected them.

Such an opinion undermines the very concept of elected representation, for those donors are actually able to exert more influence on public officials than their own constituents.

The issue of campaign finance reform and the role of the Supreme Court may sound like a lawyers' debate over abstract constitutional issues. The truth is there is no single issue more important to the needs of ordinary Americans than the issue of money in politics. If we cannot control the power of the billionaire class to buy elections, there is no question that more and more people elected to office will be responsive to the needs of a wealthy few, rather than working to safeguard the interests of all their constituents, including the sick, the poor, and working families.

Candidates should be elected based on their ideas, not their ability to raise huge sums of money. The votes we take should be based on the best interests of the American people, not the fear of retribution from shadowy figures prepared to spend millions of dollars on negative advertisements.

Frankly, we are not great fans of constitutional amendments and we would rather be able to enact sensible regulations through the regular lawmaking process. But when the Supreme Court says, for purposes of the First Amendment, that corporations are people, that writing checks from the company's bank account is constitutionally-protected speech, and that attempts by the federal government and states to impose reasonable restrictions on campaign ads are unconstitutional, it is time to pass a constitutional amendment to address that absurdity.

That is why we introduced the Democracy is for People Amendment (S. J. Res. 11/H. J. Res. 34).

Our amendment would allow Congress to set reasonable limits on campaign spending. One of the major problems with the *Citizens United* ruling is the Court's insistence that the only permissible reason to regulate campaign finance is to prevent *quid pro quo* corruption—the Court goes so far as to say “Ingratiation and access . . . are not corruption” and “Independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption.”

Insisting on such a narrow definition of corruption leads to some truly bizarre scenarios. Take, for example, a Member of Congress who is opposed to the Keystone XL pipeline. If that Member is offered a dollar to vote for the pipeline, and does so, we all agree that equals corruption. However, if that Member is threatened with millions of dollars of negative ads unless they support the pipeline, and they succumb to the pressure to avoid the onslaught of super PAC spending, then the Supreme Court deems that acceptable.

We do not find the latter scenario at all acceptable. While preventing *quid pro quo* corruption is important, we must also be able to maintain the integrity of the electoral process and prevent both actual corruption and the appearance of corruption, in order to keep the faith of American voters.

Other amendments offered by our colleagues, including the one at issue here today from Senator Udall, are also positive steps forward. While there are some differences in language, we all agree on the most important point—*Citizens United* is an affront to our democracy and must be overturned.

Together we must advance a constitutional amendment that overturns these deeply flawed decisions.

Such an amendment must do away with the absurd distinction drawn by the Court decades ago in *Buckley v. Valeo*, which allowed for limitations on campaign contributions but not individual expenditures.

Such an amendment must make clear that limits on contributions and expenditures do not disenfranchise the wealthy few but promote the political equality of all Americans in our democracy.

And finally, such an amendment must make clear that limits on spending in our elections, systems of public financing for elections, and the promotion of transparency all represent legitimate exercises of congressional power.

Eventually, in an ideal world, we would establish a system of total public financing—completely barring private donations and expenditures. But in the meantime, Congress must be allowed to do its job and set up reasonable limits on money in politics.

At a time when 16 states and more than 500 towns and cities have passed resolutions supporting a constitutional amendment, we see there is also strong grassroots support for this approach.

Congress must be able to make it clear to the country that elections should express the priorities of all Americans, not a handful of billionaires who choose to invest a fraction of their net worth by spending millions in our elections. Unfortunately, the Supreme Court has largely tied our hands in this regard.

A constitutional amendment is therefore the best approach to restore our democracy to the American people, and we thank the Committee for taking up this very important issue.

