TESTIMONY OF PROFESSOR JAMIN B. RASKIN
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BEFORE THE UNITED STATES SENATE JUDICIARY COMMITTEE

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

TUESDAY, JUNE 3, 2014

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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.[xii] *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.

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[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 Tymkovitch, 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. Hapersett*, 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.