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 Right's 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 preveneting 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/py6eztl (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/qfvnvmu (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 Decisiv*e, 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 RASKIN

TO QUESTIONS FOR THE RECORD FROM SENATOR GRASSLEY

SENATE 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 Wet 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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