
BOOK REVIEW

FIXING WASHINGTON

REPUBLIC, LOST: HOW MONEY CORRUPTS POLITICS — AND A PLAN TO STOP IT. By Lawrence Lessig. New York, N.Y., and Boston, Mass.: Twelve Press. 2011. Pp. xiii, 383. \$26.99.

CAPITOL PUNISHMENT: THE HARD TRUTH ABOUT WASHINGTON CORRUPTION FROM AMERICA'S MOST NOTORIOUS LOBBYIST. By Jack Abramoff. Washington, D.C.: WND Books. 2011. Pp. iii, 303. \$25.95.

*Reviewed by Richard L. Hasen**

I. INTRODUCTION

It is a tired cliché that Washington is “broken” and needs fixing. A 2011 Gallup poll found that sixty-four percent of voters had low or very low trust in members of Congress, the lowest percentage ever recorded by Gallup for a profession and below trust ratings for lobbyists, telemarketers, and car salespeople.¹ The recent economic downturn has not only coincided with record-low approval ratings for Congress² and with general lack of trust in government³ but also produced two protest movements: the Tea Party on the right and the Occupy

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¹ Jeffrey M. Jones, *Record 64% Rate Honesty, Ethics of Members of Congress Low*, GALLUP POL. (Dec. 12, 2011), <http://www.gallup.com/poll/151460/record-rate-honesty-ethics-members-congress-low.aspx>.

² In February 2012, congressional approval hit a record low of ten percent. Frank Newport, *Congress' Job Approval at New Low of 10%*, GALLUP POL. (Feb. 8, 2012), <http://www.gallup.com/poll/152528/Congress-Job-Approval-New-Low.aspx>.

³ Lydia Saad, *Americans Express Historic Negativity Toward U.S. Government*, GALLUP POL. (Sept. 26, 2011), <http://www.gallup.com/poll/149678/Americans-Express-Historic-Negativity-Toward-Government.aspx> (“Confidence in Congress hit a new low this month, with 31% of Americans saying they have a great deal or fair amount of confidence in the legislative branch . . . Americans’ confidence in the people who run for or serve in office is also at a new low; however, the decline has been more recent, dropping from 66% in 2008 to 49% in 2009 and 45% today.”).

movement on the left.⁴ Despite the fact that these movements come from the fringes of the Republican and Democratic parties, they share some common critiques of federal lawmaking: they condemn the role of lobbyists in Washington and the “crony capitalists” who hire them. From President Obama to Senator Rand Paul and former Governor Sarah Palin, there is a widespread sentiment that money in Washington skews political outcomes and that lobbyists are the fixers who cut the deals that help insiders benefit themselves at the expense of the public interest.⁵

In their new and very different books, Harvard Professor Lawrence Lessig from the left and disgraced lobbyist Jack Abramoff from the right come to similar conclusions about what is wrong with Washington. Lessig’s book is a populist call to action for the people to “take back Washington” through campaign finance reform. Abramoff’s book is an autobiography that is part apology and part justification for a promising career that veered badly off track.

Despite the different starting points, the books end in much the same place. Lessig and Abramoff both want to take lobbyists out of the fundraising business, breaking the connection between money and lobbyists’ legitimate information-providing function. They seek to close the revolving door between Congress and lobbying shops because of the inherent conflict that arises when officeholders or staffers start thinking about post-government lobbying jobs. They part company on what else is needed, however: Lessig wants publicly financed campaign finance vouchers to lessen further the power of special interests, while Abramoff wants to shrink the size of government to give lobbyists a smaller target.

Together, Lessig and Abramoff offer a mostly convincing critique of how lobbying skews public policy and can harm the United States. The books demonstrate that lobbying can thwart the public interest, especially when players with much at stake use lobbyists to block or alter legislation on issues that lack salience with the general public. Although it is tempting to focus on Abramoff’s admittedly illegal behavior, both books illustrate that much of the problem with the relationship among money, politics, and lobbying stems from what is legal, not illegal. Indeed, although both Abramoff and Lessig present the problem as one of “corruption,” the real concern should be less with exchanges of dollars for political favors and more with the decline in national economic welfare that occurs thanks to lobbyist-facilitated

⁴ Paul West, *Is Occupy Wall Street a Tea Party for Democrats?*, L.A. TIMES (Oct. 6, 2011), <http://articles.latimes.com/2011/oct/06/nation/la-na-occupy-political-20111007>.

⁵ See Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 193–94 (2012) (discussing the left and right’s criticisms of lobbyists and the role of campaign contributions in Washington politics).

rent-seeking.⁶ Lessig also appears concerned with political inequality, although he distances himself from egalitarian arguments for reform. Defining the problem as one other than quid pro quo corruption, however, threatens the constitutionality of reforms in a post-*Citizens United* world.⁷

Nonetheless, while the critiques of the Washington status quo are well made, both books offer incomplete reform agendas and unconvincing paths to enacting reform. Much of what is wrong with Washington has nothing to do with money in politics. Instead, partisan gridlock and the divergence of legislative action from the apparent public interest emerge from the highly partisan and ideological nature of Congress and the presidency; polarized views on the nature of the public interest; the breakdown of civility and an era of “gotcha” politics; and structural impediments to enacting legislation, such as the Senate filibuster and changes in the House committee structure.

The current state of toxic politics and institutions inadequate to constrain such politics arose not from an outsized influence of money on politics but from a variety of sources, including the party realignment in the South following the civil rights movement and the resurgence of partisan media (and now social media). Even if the authors’ complete reform agendas were enacted and the amount of rent-seeking legislation procured by lobbying significantly curbed, it is far from clear that Washington would be “fixed.” Lessig, for example, claims that money has prevented both the left and the right from getting their agendas passed. It is hard to see that money has been the primary stumbling block to enacting competing agendas simultaneously. When it comes to high-salience, big legislative questions such as immigration reform, the primary barriers to reform are partisanship, deadlock, and vetogates,⁸ not the role of money. In the rare circumstance when major legislative reform does pass, as in the case of health care reform, the passage of legislation further fuels partisan recriminations.

Nor is it clear that the kinds of fundamental campaign finance reforms that Lessig advocates stand any realistic chance of being enacted under current political conditions. Lessig acknowledges the hard road ahead, but even so he seems overly optimistic. For example, he suggests there is a ten percent chance that a call for a constitutional convention to amend the Constitution to allow new campaign finance and lobbying reform could succeed. But the same partisan, sclerotic poli-

⁶ See *id.*

⁷ See *Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010).

⁸ “Vetogates” are the “choke points in the [legislative] process,” such as the ability to kill a bill in committee or subject it to a Senate filibuster. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION* 66 (4th ed. 2007).

tics that would make reform of money in politics only a partial solution to a broken Washington would also make the chances of calling a constitutional convention to enact a reform agenda much slimmer than one in ten. Fixing Washington's money problems may have to await widespread scandal, and fixing its broader problems likely will have to await a societal shift that alleviates the partisanship currently gripping national politics.

Part II of this Review describes each author's motivation to focus on the role of money in politics, their views on how money affects politics, and their reform proposals. Part III considers whether the authors have accurately described the influence of money on politics. Finally, Part IV examines whether each author's core reform proposals are constitutional, whether the reforms could be enacted in the current partisan atmosphere, and whether the reforms, if enacted, would "fix" Washington.⁹ There are doubts on all three fronts.

II. THE CLAIMS

A. Motivations: Money Is the Root of All Evil

Unlike those academics who write regularly about the intersection of money and politics, Lessig, a leader in the fields of intellectual property and Internet law, came to the issue in a roundabout way: "I was driven to this shift when I became convinced that the questions I was addressing in the fields of copyright and Internet policy depended upon resolving the policy questions — the corruption — that I address here" (pp. xii–xiii). Indeed, at the beginning of the book, Lessig endorses television commentator Cenk Uygur's view that campaign finance reform "is [the] only issue in this country" and is the one to which "every important issue in American politics today is tied" (p. xi).

Lessig, now a liberal but formerly a young Reagan delegate at the 1980 Republican National Convention (p. 93), sees the campaign money issue as politically transcendent, with appeal to the left and right (pp. xi, 7). He recounts speaking recently at the national Tea Party convention and notes that although he and the attendees differed on many issues, such as gay marriage, "we were united in the view that this republic can do better" (p. 325). According to Lessig,

Change on the Left gets stopped because strong, powerful private interests use their leverage to block changes in the status quo. Change on the Right gets stopped because strong, powerful public interests, Congress, work to block any change that would weaken their fund-raising machine. . . . The current system of campaign funding radically benefits the status quo —

⁹ The analysis below focuses more on Lessig's book than on Abramoff's because Lessig's analytical framework and proposals for reform are more developed than Abramoff's.

the status quo for private interests and the status quo of the Fund-raising Congress. (pp. 211–12)

While Lessig's book is written as a call to action, Jack Abramoff's book is a personal autobiography that offers an insider's view into the Washington world of money and power. Abramoff too grew up a Reagan Republican, beginning his activism during the Reagan Administration in the College Republicans with compatriots Grover Norquist (now of the powerful Americans for Tax Reform) and former Christian Coalition executive Ralph Reed (pp. 9–23).

When Republicans took control of Congress in 1994, Republican lobbyists were suddenly in demand, and Abramoff began a career that at one point made him one of the most powerful lobbyists in Washington, with the ability to manipulate congressional legislation and action. He succeeded in getting Representative Bob Ney twice to submit remarks in the congressional record criticizing an offshore company that Abramoff was negotiating to buy to influence the sale (p. 205). (Ney later went to prison because of Abramoff-related improprieties.¹⁰) Abramoff's spectacular lobbying career flamed out with a plea bargain landing him in federal prison for conspiracy, mail fraud, wire fraud, and tax evasion.¹¹

Abramoff now is out of prison, and he is presenting himself to the public as a reformer,¹² giving seminars on ethics,¹³ speaking to the good-government group Public Citizen¹⁴ and at Lessig's ethics center,¹⁵ and blogging about reform matters.¹⁶ He does take some responsibility for his actions in his book, admitting he did wrong and acted illegally (p. 277).¹⁷ But he is not harsh enough on himself, suggesting

¹⁰ *Former Rep. Bob Ney Released from Prison*, FOXNEWS.COM (Feb. 20, 2008), <http://www.foxnews.com/story/0,2933,331535,00.html>.

¹¹ The *Washington Post* provided extensive coverage of the Abramoff scandal. Its coverage is collected at *Investigating Abramoff — Special Report*, WASH. POST, <http://www.washingtonpost.com/wp-dyn/content/linkset/2005/06/22/LI2005062200936.html> (last visited Oct. 27, 2012).

¹² The "Speaking" page of Abramoff's new website explains how to book Abramoff for a speech on the topic: "Can Washington Be Fixed? The Ultimate Insider Shows Us Why the System's Broken, and How to Reform It." *Speaking*, JACK ABRAMOFF, <http://abramoff.com/jack-abramoff-speaking.html> (last visited Oct. 27, 2012).

¹³ Julie Bykowicz, *Abramoff as Ethics Guru Latest Chapter in Political Second Acts*, BLOOMBERG (Jan. 3, 2012, 12:00 AM), <http://www.bloomberg.com/news/2012-01-03/abramoff-as-ethics-guru-latest-chapter-in-political-second-acts.html>.

¹⁴ Dana Milbank, *Look Who's Crusading for Campaign Finance Reform*, WASH. POST, Feb. 7, 2012, at A2.

¹⁵ News Release, Lewis Rice, Harvard Law Sch., At HLS, Jack Abramoff Talks About Corruption in Washington (Dec. 9, 2011), http://www.law.harvard.edu/news/2011/12/09_jack_abramoff_talks_about_corruption.html.

¹⁶ Rick Hasen, *Strange Bedfellows Dept.*, ELECTION LAW BLOG (Feb. 4, 2012, 10:07 PM), <http://electionlawblog.org/?p=29239>.

¹⁷ His fullest *mea culpa* is the following:

at one point that he broke federal criminal statutes unwittingly, but was nonetheless charged because “intentions [do not] matter” under federal law (p. 234).¹⁸ One of his greatest faults, he explains in a bit of false modesty, was that he was giving away *too much money* to charity while he was raking in funds from competing Native American tribes and taking money on the side for his consulting work with business partner Mike Scanlon in an arrangement he did not disclose to his clients (pp. 166, 193).¹⁹

For Abramoff, as for Lessig, money is at the root of all evil in Washington, leading to what Abramoff characterizes as legalized bribery (p. 90). He claims to have spent in excess of \$1.5 million a year in some years on sports and concert tickets for members of Congress and their staffs (p. 163); he describes lucrative golf trips, junkets, meals, and other goodies given to Congress and staff (pp. 90, 94–95, 207, 239); and he recounts what — if accurate — could be described only as a brash shakedown of Microsoft by former House Majority Leader Tom DeLay, a close Abramoff ally.²⁰

I was the cause of my difficulties. Regardless of my rationalizations, I was the one who didn't disclose to my clients that there was a conflict of interest in the arrangement I had with my partner to split the profits from the programs they funded. I was the one who lavished contributions, meals, event tickets, travel, golf, and jobs on innumerable federal public officials with the expectation or understanding that they would take official actions on my behalf or on behalf of my clients. I was the one who diverted income from those activities to non-profits and other entities thereby evading federal income taxes. These activities added to the corruption which engulfs our nation's capital, and I'm not proud of my part in it. (p. 277)

¹⁸ “I wasn't the devil that the media were so quick to create, but neither was I the saint I always hoped to become. I was somewhere in the middle, but no where near where I wanted to be” (p. 277).

¹⁹ At many points in the book, Abramoff describes himself in the best possible light. He downplays his business prowess in explaining his questionable SunCruz dealings with Adam Kidan (p. 138). He further says that it “never occurred to us” that his use of a nonprofit organization to launder funds from Native American tribes to himself and Scanlon was illegal (p. 190). He even hedges on the main charge of self-dealing with the tribes:

I neglected to tell my clients how much I was profiting from these grassroots efforts. I reasoned that the tribes and clients were happy with their victories, that our efforts were priced in accordance with their value and that they were paying what they agreed to pay to stop threats they identified to us, after proper fee negotiations. Plus, I wasn't even keeping the money I made anyway. I was giving away upwards of 80 percent of my income for good causes and to help people. What could possibly be wrong with any of this? (p. 193)

Abramoff also lacks self-awareness about the nature of influence and access. He tells the story of Sugar Ray Robinson's making a call to help get Abramoff admitted as an undergraduate student into Brandeis University (pp. 7–8). He expresses gratitude for the help but does not pause to consider whether using personal connections to get ahead is wrong. Similarly, Abramoff describes without shame how he lobbied a Georgetown law professor to get into an entertainment law class, including through offers to his professor to meet the nation's leading conservatives, go to the opera, and obtain dining privileges in the West Wing of the White House (pp. 44–45).

²⁰ Abramoff recounts a story of DeLay's interaction with a Microsoft executive who had declined to make a campaign contribution supporting Republicans:

At this point, a caveat is in order. There is no way to verify many of the facts in the book, such as the DeLay-Microsoft exchange, and there are reasons to doubt the book's veracity and accuracy. Perhaps there is no better illustration of Abramoff's lack of credibility than a passage in his book discussing offensive email exchanges that came to light during the criminal investigation. In those emails, many of which were between Abramoff and Scanlon, Abramoff described some of his Native American tribe clients by epithets including "monkeys," "morons," "[f'ing] idiot[s]," and "f'ing troglodytes."²¹ Abramoff's explanation for writing these emails defies credulity. He explains that he "was using reverse psychology" on Scanlon to get him to continue doing work for the tribes when Scanlon was reluctant to do so (p. 213). Abramoff said he decided "to use inappropriate language to show my angst was as great, if not greater than his" (p. 213). Not only is the explanation inherently incredible, it is also at odds with the more credible explanation Abramoff offered to an NPR interviewer in 2011: "I wrote into my emails dumb, stupid things; jocular, idiotic thoughts."²²

Abramoff's book also surprisingly shows some naïveté about partisan politics. For example, Abramoff explains how he was trying to get language favorable to his client inserted into an unrelated election reform bill, the Help America Vote Act of 2002²³ (HAVA). He says that reform bills were the best vehicles for slipping in helpful language, because they could easily pass out of a partisan Congress. HAVA, he explains, was simply "[a] non-controversial reform bill" (p. 206). In fact, Democrats and Republicans battled mightily over HAVA, with Republicans wanting the bill to contain antifraud and voter identification measures and Democrats wanting the bill to contain measures making

One of the Microsoft executives firmly brushed off his solicitation, prompting DeLay to deliver a stern message. When he was a freshman in Congress, he told them he approached Walmart for a campaign contribution. The government affairs director of Walmart told him that Walmart didn't like to "sully their hands" with political involvement. Staring intently at the Microsoft executives, DeLay continued: "A year later, that government affairs rep was in my office asking me to intervene to get an exit built from the federal highway adjacent to a new Walmart store. I told him I didn't want to sully my hands with such a task. You know what? They didn't get their ramp. You know what else? They will never get that ramp."

DeLay smiled, without taking his eyes off the quivering executives. As we would often say in the lobbying business: They finally got the joke. A \$100,000 check was soon delivered to the Republican Congressional Committee, and Microsoft's relationship with the American right commenced. (p. 65)

²¹ *Oversight Hearing Regarding Tribal Lobbying Matters, et al.: Hearing Before the S. Comm. on Indian Affairs*, 108th Cong. 62–63, 66, 325 (2004) (appendix collecting Abramoff's emails); see also Robert Moore, *Special Report: Jack Abramoff's Private Emails Disparaged Tiguas*, *ELPASOTIMES.COM* (Dec. 11, 2011), http://www.elpasotimes.com/ci_19521484.

²² *Tell Me More: Jack Abramoff Calls D.C. Politics Dirty as Ever* (National Public Radio broadcast Nov. 18, 2011), available at <http://www.npr.org/2011/11/18/142506539/jack-abramoff-calls-d-c-politics-dirty-as-ever>.

²³ Pub. L. No. 107-252, 116 Stat. 1666 (codified in scattered sections of the U.S. Code).

it easier for people to vote.²⁴ It almost did not pass,²⁵ a point Abramoff later recognizes (p. 207). While Abramoff proclaims that no bill is easier to get through Congress than a reform bill,²⁶ these days, reform bills are among the hardest to get through Congress.

Despite these serious concerns about aspects of the book and the danger that Abramoff offered false or exaggerated descriptions to boost his post-prison standing, the book is worth close examination, both to study its description of the various ways in which lobbyists may attempt to buy influence in Washington and to consider Abramoff's proposals to diminish such influence.

B. Mechanisms: Money, Reciprocity, and Influence

Lessig and Abramoff present a picture of Washington in which lobbyists act as a hub for the exchange of influence and favor between Congress and those willing to pay to persuade. Lobbyists secure their influence by acting as campaign fundraisers, doling out favors (such as gifts and food) in a culture of reciprocal exchange, and trading on their personal relationships, something made especially easy by the fact that many lobbyists went through the revolving door from Congress to K Street (the traditional home of Washington lobbying firms). As Lessig points out, it is a "gift economy," where "[e]ach side subsidizes the work of the other (lobbyists by securing funds to members; members by securing significant benefits to the clients of the lobbyists)" (p. 235).

Abramoff describes the heavy lobbying work he did for the Commonwealth of the Northern Mariana Islands (CNMI) (pp. 66–82) and later for various Native American tribes (pp. 86–91). The work for CNMI, an American protectorate, consisted mainly in ensuring that U.S. labor protections were not extended to the area, an extension that would have undermined the protectorate's competitive advantage in the garment industry and in other industries as a source of cheap labor. Much of Abramoff's work for the Native American tribes involved actions to secure gaming rights for the tribes or to block or delay the gaming proposals of competitors.²⁷

Abramoff explains how he took "scores of Congressmen and staff" to CNMI to educate them about the issues. "Of course, these trips were not all hard work. The Marianas are exotic and beautiful, not to

²⁴ See Leonard M. Shambon, *Implementing the Help America Vote Act*, 3 ELECTION L.J. 424, 428 (2004).

²⁵ *Id.* at 437.

²⁶ Abramoff states:

For years, it has been difficult to pass legislation in the charged partisan congressional atmosphere. So a lobbyist trying to enact his client's wishes needs to get his amendment onto a bill likely to pass both the House and the Senate and then to be signed by the president. No bill is more likely to pass than a reform bill. (p. 205)

²⁷ "It's always easier to stop a bill than to put one through" (p. 197).

mention equipped with golf, the favorite pastime of Congressmen and lobbyists alike. . . . To most lobbyists, a game of golf is just another day at the office” (p. 78).

Securing influence on these issues and others required “all manner of perquisites, sponsored by my clients, and administered by my staff and me. Golf, elaborate meals, tickets to sporting events — any favor a representative or staff needed, we were there to provide. Why? To create a relationship that would help get our clients’ messages to decision makers quickly” (p. 90). Some of this behavior was illegal already, though the ethics laws were not well enforced when Abramoff acted;²⁸ some of Abramoff’s activities were made illegal through federal reform legislation that followed the lobbying scandal.²⁹

Abramoff also explains the payoffs to both sides from lobbying-induced reciprocity: “DeLay’s tenacity in removing the gaming tax saved the tribes tens of billions of dollars over the years. As a lobbyist, I thought it only natural and right that my clients should reward those members who saved them such substantial sums with generous contributions” (p. 90).

Access is a necessary, if not sufficient, condition to legislative influence, and so the lobbying game requires finding paths to representatives, senators, and their staff:

Of course, having the best arguments and presentations is essential, but arguments not heard by anyone are irrelevant. Many times lobbyists had better arguments than we did. Our clients were not perfect, after all. But since it was we who had the meetings with the decision makers, and not they, we won. We had access, the second key to winning lobbying. How did we get this access? By hiring people who already had access of their own. (p. 92)

The best way to secure access is by hiring “Capitol Hill staff who were well connected and who could play hardball when needed. . . . The Congressional staff were the only ones who really got things done” (p. 93). Abramoff describes the particularly insidious nature of the lobbyist revolving door:

Once I found a congressional office that was vital to our clients — usually because they were incredibly helpful and supportive — I would often become close to the chief of staff of the office. In almost every congressional office, the chief of staff is the center of power. . . . After a number of meetings with them, possibly including meals or rounds of golf, I

²⁸ “We spent our days looking for loopholes, and when we couldn’t find one, we just did what we had to do anyway. The rules were not being enforced, certainly not against the lobbyists” (p. 91). Abramoff also claims to have violated ethics laws with his “Signatures” restaurant: “Flaunting the by now much-trampled gift ban rules, I became a virtual cafeteria for large groups of representatives and staff” (p. 171).

²⁹ Harry Reid, *Foreword to the Fourth Edition of THE LOBBYING MANUAL*, at v (William V. Luneburg et al. eds., 4th ed. 2009).

would say a few magic words: “When you are done working for the Congressman, you should come work for me at my firm.”

With that, assuming the staffer had any interest in leaving Capitol Hill for K street — and almost 90 percent of them do, I would own him and, consequently, that entire office. . . . No one even knew what was happening, but suddenly, every move that staffer made, he made with his future at my firm in mind. (p. 95)

C. Reform Proposals

Both Abramoff and Lessig spend much more time in their books discussing the problems with Washington than defending their reform proposals. But both suggest wide-ranging, and in some senses radical, changes to transform the relationship among money, politics, and influence.

Both authors advocate that we take lobbyists out of the business of fundraising and close the revolving door between Congress and K Street. Lessig endorses the proposal of the American Bar Association’s Task Force on Lobbying³⁰ and of former Bush Administration ethics czar Richard Painter³¹ to take lobbyists out of the fundraising business (pp. 118–19). “[I]f lobbyists weren’t able to channel funds to campaigns, and hence, if congressmen didn’t depend upon lobbyists to get them the resources they need to run, then the value of lobbying services would decline” (p. 218).

Abramoff agrees:

[W]e need to entirely eliminate any contribution by those lobbying the government, participating in a federal contract, or otherwise financially benefitting from public funds. . . . If you choose to lobby, if you choose to take money from our nation, if you choose to perform federal contracts, or if you draw your compensation from any entity which does, you need to abstain from giving campaign contributions. . . . Not only should lobbyists be banned from contributing to officials’ organizations and campaign funds, they should be banned from gift-giving as well. . . . No finger food, no snacks, no hot dogs. . . . Remove all temptations.³² (p. 273)

³⁰ AM. BAR ASS’N, REPORT OF THE TASK FORCE ON FEDERAL LOBBYING LAWS, LOBBYING LAW IN THE SPOTLIGHT: CHALLENGES AND PROPOSED IMPROVEMENTS 19–21 (2011) [hereinafter ABA TASK FORCE], available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/administrative_law/lobbying_task_force_report_010311.authcheckdam.pdf. As a matter of disclosure, I was a member of this task force.

³¹ RICHARD W. PAINTER, GETTING THE GOVERNMENT AMERICA DESERVES 257 (2009) (“It is, however, meaningless to criminalize buying a fifty-dollar lunch or cigarbox for a lawmaker, yet allow a lobbyist to raise \$50,000 in campaign contributions for the same lawmaker and invite clients to meet the lawmaker. Prohibiting the former may even be a smokescreen for ignoring the latter.”).

³² It is not clear if Abramoff literally means to bar contributions from anyone who benefits financially from public funds. If so, this policy would seem to cut off a large segment of the U.S. population from the ability to make campaign contributions.

Lessig hopes that the decline in the power of lobbyists that would come from taking them out of the fundraising business would dry up lobbying firms' abilities to pay large salaries to former members of Congress (p. 218). Abramoff would solve the revolving-door problem more directly: "[T]he lure of post-public service lobbying employment needs to be eliminated. . . . If you choose to serve in Congress or on a congressional staff, you should be barred for life from working for any company, organization, or association which lobbies the federal government. That may seem harsh — and it is" (p. 273).³³ He would also prevent former members from avoiding the lobbying ban by becoming "consultants." He would have them get out of Washington and get a "real job" (p. 274).

Despite agreement on lobbyist fundraising bans and closing the revolving door, Abramoff and Lessig part company on reform proposals, with Abramoff tacking right and Lessig going left. Abramoff is skeptical about eliminating earmarks, saying that doing so makes it "much harder . . . [to] legitimately control[] inappropriate executive branch choices" and noting that previous reforms eliminating earmarks did not stop corruption (p. 125). Lessig, in contrast, paints earmarks as a major part of the problem, seeing them as a prime way in which lobbyists get what they want for their clients (pp. 111–16).³⁴

Abramoff is ready to impose term limits on Congress to make it harder for lobbyists to build relationships on which they can cash in (p. 274), make Congress subject to the laws it passes (p. 275), and repeal the Seventeenth Amendment (p. 275), returning to state legislatures the power to choose U.S. senators. He suggests members of Congress should be "barred from proposing, lobbying for, and perhaps even voting on projects in their districts and states" (p. 274).

Most importantly, Abramoff wants to shrink the size of the federal government. "There is no way to eliminate corruption in human endeavors, but the removal of temptation is always a good place to start. In the case of the federal government, that means paring back the size and scope of its activities" (p. 272).³⁵

³³ This prohibition too seems quite broad. Abramoff would bar former members of Congress and staffers not only from working *as* lobbyists but also from working for any entity *that lobbies* the federal government. This prohibition would seem to include most large private and public companies, and many government and educational entities.

³⁴ Earmarks are a relatively small part of the federal budget and not a major source of economic distortion. *See* Hasen, *supra* note 5, at 235 n.257. But Lessig appears to use the term more broadly. For example, he spends time discussing the rent-seeking associated with the misnamed American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418 (codified in scattered sections of the U.S. Code) (p. 117). It is an excellent example of rent-seeking. *See* Hasen, *supra* note 5, at 233. But it was a normal bill, not an earmark.

³⁵ On why shrinking the size of the government, even if possible, would not seriously curtail the amount of interest group rent-seeking, see Hasen, *supra* note 5, at 244–49.

Until the government is cut down to size, Abramoff sees lobbyists as necessary to counter government tyranny. In his short section on reform at the end of the book, he begins with a hypothetical case involving a small business owner who manufactures picture frames. The owner needs to hire a lobbyist to fight against an irrational “Senator Yankee” who proposes a bill to regulate picture frames after the Senator drops a frame on his toe.

No one in their right mind would blame you for doing everything you could to stop the destruction of your company. Few would think Senator Yankee was using his governmental power properly. But the lobbyist confuses us. We resent that there is someone with such a strong connection to those with power, but without him, the picture frame factory would most certainly be shuttered. (p. 271)

Lessig, whose political orientation is much more liberal than Abramoff’s, suggests a very different direction. While Abramoff wants to eliminate contribution limits to candidates entirely (except for contributions by lobbyists and federal contractors) (p. 273), Lessig advocates a campaign finance voucher system that would put money in the hands of every voter to allocate to candidates, parties, and groups (p. 266).

Lessig’s proposal is similar to the proposal for vouchers that I advanced in 1996³⁶ and that Professors Bruce Ackerman and Ian Ayres advocate in their 2004 book, *Voting with Dollars*.³⁷ In a bit of sloganeering reminiscent of Ackerman and Ayres’s use of the term “Patriot dollars,”³⁸ Lessig talks about the “Grant and Franklin Project” and “democracy vouchers” (pp. 265–66). Each voter would be given \$50 to donate to congressional candidates, plus the voter could give up to \$100 of her own money to candidates. Candidates would voluntarily opt into the program in order to be eligible to get the public financing, and the program could put \$6 billion into the campaign finance system every two years. Candidates opting in could take no other private

³⁶ See Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CALIF. L. REV. 1, 5 (1996). Lessig notes that I made my proposal before the Supreme Court overruled *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), and rejected its rationale (pp. 365–66 n.6). However, both my proposal and Lessig’s proposal (if either is going to work) would require either a constitutional amendment or the Supreme Court’s reversing course on its First Amendment campaign finance jurisprudence.

³⁷ See generally BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS* (2002). Lessig opposes the other aspect of their proposal — anonymous campaign contributions. He says this proposal is ingenious, but it might work too well and “limit the amount of money contributed to campaigns, at least if the contributions were for the purpose of influencing legislation” (pp. 261–63). Further, “the mechanics are too complex; the sources of suspicion are too great” (p. 263). On the other side of the disclosure question, Lessig says that campaign finance disclosure will do enough work. Although disclosure provides incomplete information about donors and their motivations, it is “critically important to avoiding more grotesque forms of corruption” (p. 257).

³⁸ ACKERMAN & AYRES, *supra* note 37, at 4.

money (pp. 266–68). The benefit of the voucher system, according to Lessig, is that “no one could believe that money was buying results” (p. 268).³⁹ He says that \$3 billion a year is cheap to fix democracy and restore public confidence (p. 269).

In a discussion that reveals Lessig’s (perhaps subconscious) concern with political equality, he says that any bundling of campaign finance vouchers would be unobjectionable: “The problem with American democracy is not that people try to aggregate their influence. It is that the influence they aggregate is so wildly disproportionate to the influence the system intended — votes” (p. 270).

Lessig’s voucher proposal hinges on “one critical assumption” (p. 270): that corporate independent expenditures will not “simply evolve into another kind of dependency” (p. 271). Lessig wrote his book just before the explosion of super PACs, but he clearly saw the explosion coming. He says that the Supreme Court’s decision in *Citizens United v. FEC* has caused massive growth of “‘independent’ political expenditures,”⁴⁰ with the word “‘independent’ in quotes because whether they are indeed independent or, just as important, whether they are perceived to be independent is an open question” (p. 271). Legislators’ dependence on independent spenders leads to policy distortion and undermines public trust (p. 243).

Even if the extent of independent spending growth is not yet known, in a post-*Citizens United* world, rational congressional candidates likely will not opt into voucher public financing if they know that they could face massive independent spending against them. Further, even if candidates opt in, the amount of independent spending could create dependency and undermine public confidence in the elec-

³⁹ Emphasis has been omitted.

⁴⁰ Lessig does not adequately demonstrate that *Citizens United* has caused a growth in independent spending. He points to what he calls an “explosion” of independent money (p. 239), which he says followed *Citizens United*. He includes a chart that shows a huge leap in independent spending from \$68.9 million in 2006 to \$294.7 million in 2010, a 428% increase. He suggests that the increase is due to *Citizens United* (p. 239).

However, according to the Center for Responsive Politics, in 2008 outside money totaled \$301 million. *Total Outside Spending by Election Cycle, Excluding Party Committees*, CENTER FOR RESPONSIVE POL., http://www.opensecrets.org/outsidespending/cycle_tots.php (last visited Oct. 27, 2012). This spending, which Lessig does not cite, preceded *Citizens United*. True, 2008, and not 2006 or 2010, was a presidential election year, with higher total spending on the election. But Lessig’s analysis on this point seems overly simplistic nonetheless.

Subsequent analysis supports Lessig’s position. I examined the Center for Responsive Politics’s data on outside spending from the last three presidential election cycles up to March of each presidential election year, and the data strongly suggest that since *Citizens United* outside spending has grown markedly. Richard L. Hasen, *The Numbers Don’t Lie: If You Aren’t Sure Citizens United Gave Rise to Super PACs, Just Follow the Money*, SLATE (Mar. 9, 2012, 2:56 PM), http://www.slate.com/articles/news_and_politics/politics/2012/03/the_supreme_court_s_citizens_united_decision_has_led_to_an_explosion_of_campaign_spending.html. I expect data available at the end of the 2012 election cycle to confirm an outside-money explosion.

toral process. Lessig gives the example of an industry group threatening to fund \$1 million in ads against any senator voting for climate change legislation. “After *Citizens United*, limits on independent expenditures are removed. And while the threats [to legislators] must still be independent, there are many ways that corporate wealth can be translated into significant political influence that would never be revealed by any system of disclosure alone” (p. 259).

For this reason, Lessig says that Congress should be able to limit independent expenditures to prevent corruption resulting from dependence. As discussed below, Lessig recognizes that this proposal may be unconstitutional under current Supreme Court doctrine, and “[i]t may well be that we need constitutional reform to ensure congressional independence” (p. 272).

III. THE DISEASE

A. *How Lobbyists Affect Public Policy*⁴¹

Lessig’s and Abramoff’s descriptions of how lobbyists achieve success jibe with the best social science understanding of lobbying. Lobbyists use a variety of tools to achieve influence, including mobilizing individual citizens to contact legislators (grassroots lobbying), testifying at hearings, submitting written comments to an agency or committee, publishing press releases, and engaging in other activities.⁴² But lobbyists’ most important tool is personal contact with legislators and staff members.⁴³ A lobbyist with access to a legislator is in the best position to influence public policy. Once a lobbyist secures access, she influences policy primarily by providing a legislator or staffer with credible information with which that legislator or staffer can argue for a particular legislative action.

Lobbyists often provide support and useful information for a position a legislator already holds.⁴⁴ At other times, the issue of interest to the lobbyist (and her client) is one about which the legislator has no

⁴¹ The next five paragraphs appeared in substantially similar form in Hasen, *supra* note 5, at 219–26.

⁴² FRANK R. BAUMGARTNER ET AL., *LOBBYING AND POLICY CHANGE* 151 tbl.8.1 (2009) (summarizing various methods by which federal lobbyists worked to achieve their policy goals); *see also* ANTHONY J. NOWNES, *TOTAL LOBBYING* 18 tbl.2 (2006) (discussing a study of thirty-four lobbyists on the federal, state, and local levels); KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* 148 (1986) (representing an earlier study discussing lobbying tactics used to influence Congress).

⁴³ *See* BAUMGARTNER ET AL., *supra* note 42, at 151 tbl.8.1, 152; NOWNES, *supra* note 42, at 200, 213–15. Citizen volunteers report using similar tools when engaging in local lobbying. BRIAN E. ADAMS, *CITIZEN LOBBYISTS* 134 tbl.7.1 (2007).

⁴⁴ *See* Richard L. Hall & Alan V. Deardorff, *Lobbying as Legislative Subsidy*, 100 AM. POL. SCI. REV. 69, 70 (2006).

firm position or even no knowledge, and one to which the public is not paying any attention. In such circumstances the legislator is often willing to help a friendly lobbyist achieve her client's interests, especially when the client is a constituent or has business affecting the legislator's district.⁴⁵

Lobbyists rarely can sway resistant legislators on high-salience issues to which the public appears to be paying a great deal of attention.⁴⁶ Lobbyists for the banking industry, for example, could not stop a bill to revamp the student loan program once it became a priority for the Obama Administration.⁴⁷ Rather than working primarily to change legislative minds on issues of high public salience, lobbyists, like mushrooms, thrive in areas of low light.⁴⁸ As Lessig attests, influence is easiest to wield "on the margin" (p. 121), where the public is paying the least attention and lobbyists' push for changes in line with their clients' interests is least likely to generate attention and opposition.⁴⁹ Indeed, lobbyists can win even after losing, getting bad parts of bills rewritten in committee or regulations implemented.⁵⁰

B. Money and Access

Lobbyists gain access through the cultivation of relationships with legislators and staffers using a variety of tools permissible under the law,⁵¹ especially the raising of campaign contributions for legislators. Campaign contributions are a key part of a culture of reciprocity.⁵² Feelings of reciprocity are formed easily and without the outlay of considerable resources,⁵³ but those who help out the most are likely to get

⁴⁵ See John M. de Figueiredo & Brian S. Silverman, *Academic Earmarks and the Returns to Lobbying*, 49 J.L. & ECON. 597, 599–600 (2006).

⁴⁶ Jeffrey Birnbaum and Alan Murray, for example, describe in painstaking detail how even the most highly paid professional lobbyists were unable to derail a large corporate tax increase that became part of the politically popular Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085, a major tax bill passed during the Reagan Administration with bipartisan support. JEFFREY H. BIRNBAUM & ALAN S. MURRAY, *SHOWDOWN AT GUCCI GULCH* 235–37 (1987).

⁴⁷ Peter Baker & David M. Herszenhorn, *Obama Signs Overhaul of Student Loan Program*, N.Y. TIMES, Mar. 30, 2010, at A14.

⁴⁸ See BAUMGARTNER ET AL., *supra* note 42, at 120–21.

⁴⁹ Abramoff provides the following examples: "We worked on arcane issues related to where a shipping vessel could be based, what routes it could take, and other mind-numbing conundrums" (p. 63).

⁵⁰ See BIRNBAUM & MURRAY, *supra* note 46, at 236–37.

⁵¹ NOWNES, *supra* note 42, at 17–19.

⁵² GENE M. GROSSMAN & ELHANAN HELPMAN, *SPECIAL INTEREST POLITICS* 11 (2001).

⁵³ See Thomas M. Susman, *Private Ethics, Public Conduct: An Essay on Ethical Lobbying, Campaign Contributions, Reciprocity, and the Public Good*, 19 STAN. L. & POL'Y REV. 10, 15–17 (2008) (describing experiments in which experimenters created feelings of reciprocity through the provision of a soft drink); see also Lloyd Hitoshi Mayer, *What Is This "Lobbying" that We Are So Worried About?*, 26 YALE L. & POL'Y REV. 485, 524 (2008) (citing means by which interest groups and lobbyists secure access and influence).

the greatest access. It is a natural instinct to help someone out who has helped you. In this context, why *shouldn't* a legislator help a lobbyist supporter by favoring her client's interests on an issue about which the legislator has no personal preference?⁵⁴

Lobbyists often do much more than contribute money themselves to these pivotal legislators; they have become prolific fundraisers and bundlers of campaign contributions for key legislators and party leaders.⁵⁵ Another key means of securing legislative access is through the revolving door. Many prominent former senators and members of Congress have become lobbyists, and dozens of former staffers of sitting senators and members of Congress have done so as well.⁵⁶ Indeed, half the senators who left office between 1998 and 2004 became lobbyists.⁵⁷ The value of these former staffers is directly tied to access to their still-sitting former bosses. A study by Professors Jordi Blanes i Vidal, Mirko Draca, and Christian Fons-Rosen found that lobbyists with past working experience in the office of a U.S. senator suffer on average a sharp twenty-four percent drop in revenue when that senator leaves office.⁵⁸ That is, once the main connection to the elected official disappears, the revolving-door lobbyist's value on the market drops.

If one measures their claims against the available social science evidence, Lessig and Abramoff have fairly described a system in which those who want to influence the shape of legislation (or block legislation) hire lobbyists to achieve their goals. Lobbyists, through campaign finance activity and personal connections, are more likely than others to be able to achieve access to members of Congress and their staff. Especially on low-salience issues, the access can well lead to positive legislative outcomes for the lobbyists' clients.

⁵⁴ See ROBERT G. KAISER, *SO DAMN MUCH MONEY* 297 (2009) (presenting lobbyist Gerry Cassidy's view that money is given to "reinforce established connections" and "because of long-term relationships and friendships" (internal quotation mark omitted)); Larry Makinson, *What Money Buys*, in *SHADES OF GRAY* 171, 181 (Candice J. Nelson et al. eds., 2002). The ABA Task Force Report on Lobbying refers to "a self-reinforcing cycle of mutual financial dependency." ABA TASK FORCE, *supra* note 30, at 20.

⁵⁵ See KAISER, *supra* note 54, at 80; see also *id.* at 105-06, 184, 272, 291. Senator Chuck Hagel described how both Democrats and Republicans looking to raise \$20 to \$25 million for House and Senate campaign committees "go to a committee of twenty-five lobbyists, a steering committee. And you say, Okay, you guys each have to come up with a million dollars." *Id.* at 291.

⁵⁶ The Center for Responsive Politics offers an online database to track this "revolving door." *Revolving Door*, CENTER FOR RESPONSIVE POL., <http://www.opensecrets.org/revolving/index.php> (last visited Oct. 27, 2012).

⁵⁷ KAISER, *supra* note 54, at 343-44; see also Christopher Lee, *Daschle Moving to K Street: Dole Played a Key Role in Recruiting Former Senator*, WASH. POST, Mar. 14, 2005, at A17.

⁵⁸ See generally Jordi Blanes i Vidal et al., *Revolving Door Lobbyists* (July 2010) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1641217.

C. Measuring the Influence of Money on Policy

Given the strength of this empirical case, it is curious that Lessig spends a great deal of his book defending his argument for reform of the role money plays in politics against charges that good political science does not support the view that money has great influence over the legislative process. He argues for citizen action now “rather than sitting around waiting for the political scientists to deliver their gold-standard proofs” (p. 170).⁵⁹ But Lessig has made the case harder than it needs to be. The problem with the studies that find little influence of money over policy is that they take too narrow a view of legislative influence. When one views legislative influence secured by lobbyists more broadly in the context of the relationship of reciprocity, the evidence of monetary influence is quite strong.

Lessig devotes a number of pages to refuting Professor (and former Federal Election Commission Chairman) Bradley Smith’s statement that “[t]he evidence is pretty overwhelming that the money does not play much of a role in what goes on in terms of legislative voting patterns and legislative behavior” (p. 125)⁶⁰ and the work of Professors Stephen Ansolabehere, John M. de Figueiredo, and James M. Snyder, Jr., showing a lack of correlation between campaign contribution and legislative roll call votes (p. 135).⁶¹

The Ansolabehere evidence is fine so far as it goes. But as Lessig illustrates with numerous examples, roll call votes are only a small part — and not necessarily the most important part — of the story of legislative influence. Lobbyists help set the agenda regarding which legislation gets taken up and which gets shelved (p. 150); skew legislative time priorities (as Lessig nicely illustrates with the inordinate amount of time Congress spent on debit card swipe fees) (pp. 164–66); decide how bills are drafted and rewritten; and take informal actions (such as pressuring executive agency regulators) short of voting on legislation.

That there is no clear correlation between campaign contributions and roll call votes is unsurprising, especially given the dual causal direction of contributions: sometimes actions follow contributions, and sometimes contributions follow actions (p. 136).⁶² Legislators have all kinds of ways of influencing public policy short of roll call votes, and

⁵⁹ Some additional statements by Lessig about the political science evidence include: “You can support the reform of Congress without denying the power of statistical regression” (p. 127). “The academic seeks a truth, but that truth is too often too obscure for citizens to grok” (p. xii).

⁶⁰ Lessig quotes Smith on *The Sound of Ideas: Campaign Finance Reform* (WCPN radio broadcast Mar. 29, 2011), available at <http://www.ideastream.org/soi/entry/39313>.

⁶¹ Lessig discusses Stephen Ansolabehere et al., *Why Is There So Little Money in U.S. Politics?*, J. ECON. PERSP., Winter 2003, at 105.

⁶² For Lessig’s broader defense, see pages 131–46.

lobbyists are adept at convincing legislators to act in subtle ways on their clients' behalf. As Lessig himself notes, "influence can be exercised — and hence a campaign contribution rewarded — in any of the stages of the potential life of a bill. If it is, it is invisible to the regressions" (p. 150). So while Smith may be right regarding the lack of a connection between money and "voting patterns," he is surely wrong regarding the connection between money and "legislative behavior."

The evidence shows a clear bias in legislative outcomes to the well-organized who employ lobbyists. As the pathbreaking study by Professor Frank Baumgartner and his coauthors shows, citizen groups that engage in lobbying have fewer resources than business groups and "are often spread thin"⁶³:

And when [citizen groups] do get involved in, say, an issue relating to consumer credit practices by banks, or an environmental dispute related to coal-mining practices, or automobile emissions standards, they often find themselves in a David and Goliath position, with a few staff members on their side facing sometimes hundreds of industry lobbyists or researchers who work on nothing but that one particular issue year-in and year-out.⁶⁴

Citizen groups use resources besides finances, such as mobilizing voters, to attempt to fight business lobbying interests,⁶⁵ but it is often a losing battle.⁶⁶

Business groups, thanks to their greater material resources (such as PAC contributions and the lobbyists they can afford to hire), have another significant advantage when it comes to lobbying:

Businesses are more likely to have a friend in a high place than are other types of groups. . . . [U]nions and citizen groups are quite successful in working with the rank and file but rarely get to take advantage of the highest level of government support. Businesses enjoy much greater access and cooperation at this level, more than twice the level of the citizen groups.⁶⁷

D. Money, Influence, and Public Confidence

Lessig is least persuasive in his extensive argument that the private system of campaign finance undermines public confidence in govern-

⁶³ BAUMGARTNER ET AL., *supra* note 42, at 11.

⁶⁴ *Id.* at 11–12; *see also* NOWNES, *supra* note 42, at 208–12. Baumgartner notes that "[m]aterial resources can sometimes be trumped by sheer numbers — organizations with many members may be heeded just as rapidly as organizations able to make large campaign contributions." BAUMGARTNER ET AL., *supra* note 42, at 194.

⁶⁵ BAUMGARTNER ET AL., *supra* note 42, at 12.

⁶⁶ *See id.* at 12–13 (noting that "citizen groups find themselves out-matched in terms of resources," *id.* at 13, and lack control over the agenda); *id.* at 28 ("[Lobbyist-led political mobilization is] skewed not just toward the wealthy, but more generally toward professional communities of corporations, professionals, and institutions and therefore away from average citizens.").

⁶⁷ *Id.* at 202; *see also id.* at 209.

ment and the electoral process. He spends a good early chunk of the book arguing that many individuals infer bias when there is a conflict of interest, such as when medical studies funded by the pharmaceutical industry yield different results than those studies that are not (pp. 21–36). In those cases, “[m]oney [is] in the wrong place” (p. 36). Then, in chapter after chapter, Lessig tells troubling stories of such conflicts, on issues ranging from carbon pollution and copyright protection (ch. 5) to school reform failures (blamed on teachers’ union money) (ch. 6) to the recent collapse of our financial system (ch. 7).

After each chapter Lessig is very careful to say that the question is not whether the campaign money *caused* policy to skew in a particular direction, only whether the money affects voters’ *confidence* in the fairness of the decision (pp. 52, 60). He cites statistical evidence that seventy-five percent of Americans believe campaign contributions buy results in Congress. “In a line: We don’t trust our government” (p. 88).

Later in the book, however, Lessig acknowledges a persuasive study by Professors Nathaniel Persily and Kelli Lammie showing that there is no good evidence of a correlation between campaign finance laws and public trust (p. 270).⁶⁸ The public may not trust politicians and may well believe they are corrupted by campaign spending, but it is a tough task to show that changing the campaign finance laws would restore public trust. Instead, public trust is driven by more complex forces, including voters’ views of the economic climate.⁶⁹ Persily and Lammie’s evidence appears to undercut strongly Lessig’s argument for public confidence as a reason for reform.

But here too Lessig has made his case harder than it needs to be. As Professor Daniel Lowenstein argued long ago, the question should not be whether certain campaign finance and legislative activities create an *appearance* of corruption; instead, the relevant question is whether the activities create an *actuality* of a conflict of interest.⁷⁰ Even without proof that the private financing of elections causes a decline in public trust, one can make a normative argument that legislators should not have to make decisions when facing such conflicts. Legislators should not face the temptation for corruption inherent in conflicts of interest.

⁶⁸ See generally Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119 (2004).

⁶⁹ See *id.* at 150.

⁷⁰ See Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 322–29 (1989).

IV. THE CURE

Lessig and Abramoff both support taking lobbyists out of the fundraising business. Lessig further supports the use of campaign finance vouchers, apparently to be coupled with limits on corporate independent expenditures to curb the explosion of outside money following *Citizens United*. Abramoff wants to ban former members of Congress and their staffers from ever working as lobbyists, repeal the Seventeenth Amendment, and impose term limits on members of Congress. In this Part, focusing on lobbyist fundraising limits and a ban on legislators' and staffers' future employment as lobbyists, I consider the constitutionality of the authors' reform proposals, the likelihood of their implementation, and the key question of whether these reforms, if implemented, would "fix" the problems of Washington.

A. Constitutionality

It is not clear that a ban on lobbyist contributions and fundraising activities or a lifetime ban on lobbyist employment for former members of Congress and their staffers would pass constitutional muster under current Supreme Court doctrine.⁷¹ However, some limits on lobbyist fundraising and employment might survive constitutional challenges under a national economic welfare argument that rent-seeking behavior impairs governmental efficiency.

Since the Supreme Court's key campaign finance decision in *Buckley v. Valeo*,⁷² the courts thus far have accepted the prevention of corruption and the appearance of corruption as the only government interests that justify limits on money in candidate campaigns.⁷³ In *Citizens United*, the Supreme Court greatly narrowed the definition of "corruption" to something close to quid pro quo bribery, stating that the sale of access and influence is not corruption,⁷⁴ thereby making it harder for courts to sustain challenged campaign finance restrictions. The Court also held that independent spending cannot corrupt or create the appearance of corruption.⁷⁵ Finally, in *Buckley*, *Citizens United*, and other cases, the Court rejected political equality as a permissible interest to justify monetary limits in campaigns.⁷⁶

⁷¹ Hasen, *supra* note 5, at 236–40.

⁷² 424 U.S. 1 (1976) (per curiam).

⁷³ See, e.g., *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496–97 (1985) (stating that these interests are "the only legitimate and compelling government interests thus far identified").

⁷⁴ See Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 583 (2011).

⁷⁵ *Citizens United v. FEC*, 130 S. Ct. 876, 909–10 (2010).

⁷⁶ See DANIEL HAYS LOWENSTEIN, RICHARD L. HASEN & DANIEL P. TOKAJI, *ELECTION LAW: CASES AND MATERIALS* 668, 745–47 (5th ed. 2012).

Following *Citizens United*, the U.S. Court of Appeals for the Second Circuit struck down Connecticut's ban on lobbyist contributions and bundling of campaign contributions as unsupported by the government's anticorruption interest.⁷⁷ Along similar lines, a federal district court threw out Ohio's anti-revolving-door law for legislators-turned-lobbyists on the ground that it was not justified by an anticorruption interest.⁷⁸ It remains to be seen if other courts will go along with the reasoning of these courts.

Given the anticorruption framework established by the Supreme Court, it is unsurprising that both Abramoff and Lessig describe the problem with Washington lobbyists as one of "corruption." Abramoff addresses what he means by "corruption" only briefly in his book. After discussing the favors DeLay did for Abramoff's Native American tribe clients and their grateful contributions made to support DeLay in return, Abramoff declares:

What I did not consider then, and never considered until I was sitting in prison, was that contributions from parties with an interest in legislation are really nothing but bribes. Sure, it's legal for the most part. Sure, everyone in Washington does it. Sure, it's the way the system works. It's one of Washington's dirty little secrets — but it's bribery just the same. (p. 90)

Similarly, he remarks that the "regularity with which my staff would return from congressional offices with requests for funds, on the heels of our asking for help should have disturbed me, but it didn't. It was illegal and wrong, but it didn't register as abnormal in any way" (p. 206).

Yet much of what Abramoff describes is not criminal at all, a point he seems to acknowledge in saying the "bribery" is "legal." Solicitations from within congressional offices are illegal,⁷⁹ but this practice is not Abramoff's concern. He is pointing to a system in which members of Congress who are lobbied by lobbyists turn around and ask those lobbyists and their clients to assist with fundraising. So long as the United States has a system of private campaign finance without limits on lobbyist fundraising activities, such requests are going to be inevitable, and if the giving of money is not tied to specific governmental action, it will count neither as a bribe nor as an illegal gratuity.⁸⁰

Lessig makes a more complex argument about corruption. He admits that the term "corruption" ordinarily means bribery (p. 226) — which he terms "type 1" corruption (p. 228). He notes that, despite

⁷⁷ *Green Party of Conn. v. Garfield*, 616 F.3d 189, 207 (2d Cir. 2010).

⁷⁸ *Brinkman v. Budish*, 692 F. Supp. 2d 855, 863–64 (S.D. Ohio 2010).

⁷⁹ See COMM. ON STANDARDS OF OFFICIAL CONDUCT, 110TH CONG., HOUSE ETHICS MANUAL 144–46 (2008), available at http://ethics.house.gov/sites/ethics.house.gov/files/documents/12008_House_Ethics_Manual.pdf.

⁸⁰ See *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 414 (1999).

Abramoff's exploits, venal bribery in this form is "rare" (p. 8). Lessig is more concerned with what he terms "type 2" corruption (p. 228): "dependence corruption" (pp. 17, 230). "In this second sense of corruption, it is not individuals who are corrupted within a well-functioning institution. It is instead an institution that has been corrupted, because the pattern of influence operating upon individuals within that institution draws them away from the influence intended" (p. 231).

Notice the passive voice in Lessig's definition: the "institution" of government "has been corrupted" — by whom, he does not say.⁸¹ It is a "corruption" not in that lobbyists or others give legislators gifts in exchange for official action, but one in that the system "distort[s]" outcomes (p. 232).⁸²

Although Lessig uses the term "dependence corruption," he is writing more about a *distortion* of policy outcomes, or *skew*, caused by the influence of money, channeled through lobbyists, on politics.⁸³ Lessig describes three buckets of campaign cash: the first bucket consists of small gifts that the campaign does not track; the second consists of "non-anonymous . . . large gifts from people or interests whose interests are fairly transparent"; and "the third bucket is most important for the dynamic"⁸⁴ he describes, namely, "that part for which a lobbyist can claim responsibility" (p. 120). This third category of contributions is "where the real risk to the system thrives" (p. 121). "Influence happens on the margin, and the most powerful are the contributors who stand there" (p. 121). Even if bucket three were small relative to the other buckets, "if it provided a reliable and substantial source of funds, then its potential to distort policy would be huge" (p. 121).

⁸¹ "It is this pattern that explains [dependence] corruption without assuming evil or criminal souls at the helm. It will help us, in other words, understand a pathology that all of us acknowledge (at the level of the institution) without assuming a pathology that few could fairly believe (at the level of the individual)" (p. 17).

⁸² If the people are not corrupt, how is the system corrupt? Lessig explains:

[Dependence corruption is] a corruption practiced by decent people, people we should respect, people working extremely hard to do what they believe is right, yet decent people working with a system that has evolved the most elaborate and costly bending of democratic government in our history. . . . This corruption has two elements The first element is bad governance, which means simply that our government doesn't track the expressed will of the people, whether on the Left or on the Right. . . . The second element is lost trust: when democracy seems a charade, we lose faith in its process. . . . Participation thus declines, especially among the sensible middle. Policy gets driven by the extremists at both ends. (pp. 8–9)

Lessig later elaborates:

Each side subsidizes the work of the other (lobbyists by securing funds to members; members by securing significant benefits to the clients of the lobbyists). But that subsidy can happen without anyone intending anything in exchange — directly. . . . People working within this system can thus believe — and do believe — that they're doing nothing wrong by going along with how things work. (p. 235)

⁸³ "My claim is not that campaign cash buys any result directly" (p. 119).

⁸⁴ Emphasis has been omitted.

Lessig's idea that campaign money distorts policy outcomes sounds very much like the language used by the Supreme Court in *Austin v. Michigan Chamber of Commerce*.⁸⁵ There, in upholding corporate campaign spending limits, the Court described "a different type of corruption in the political arena: 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."⁸⁶

As Chief Justice Roberts explained in his concurrence in the *Citizens United* case (which overruled *Austin*), this argument about a different type of corruption or distortion is really an argument about political equality: the problem is that money skews political outcomes in an unfair way.⁸⁷ Indeed, elsewhere in his book Lessig sounds very much like he is making a political equality argument for campaign finance. He explains that when money rather than voting power conveys influence, it leads to results inconsistent with principles of democracy (pp. 159–60). At these moments, Lessig appears to be much more Occupy than Tea Party in his populism.

Yet Lessig says that *Austin* was wrongly decided (pp. 240–41), and he further denies he is arguing to reform campaign financing on egalitarian grounds: "the corruption of representative democracy is distinct from inequality in speech or resources within a representative democracy" (p. 362 n.46). This is a smart position for an advocate of reform to take, given that the Roberts Court has been clear in rejecting egalitarian arguments for campaign finance regulation. But it is uncertain whether Lessig is being strategic in framing his constitutional arguments as something other than an equality rationale or if he is blind to their egalitarian cast.

If "dependence corruption" is not classic (or type 1) corruption and it is not (according to Lessig) a concern about political equality, what is it? Despite his denials, Lessig indeed appears concerned in part with inequality. In addition, he seems concerned with the possibility that the rent-seeking activity of lobbyists will undermine the national economic welfare.

This focus on rent-seeking is promising. As I have argued elsewhere in great detail,⁸⁸ the Supreme Court might uphold some reasonable limits on lobbyists' fundraising activities (as well as reasonable

⁸⁵ 494 U.S. 652 (1990).

⁸⁶ *Id.* at 660.

⁸⁷ *Citizens United v. FEC*, 130 S. Ct. 876, 922 (2010) (Roberts, C.J., concurring) ("*Austin*'s logic would authorize government prohibition of political speech by a category of speakers in the name of equality — a point that most scholars acknowledge (and many celebrate), but that the dissent denies.>").

⁸⁸ Hasen, *supra* note 5, at 216–26.

anti-revolving-door rules) under the government's compelling interest in minimizing rent-seeking and promoting national economic welfare. The national security of the United States could well turn on the ability of Congress to minimize rent-seeking, thereby placing the United States on firmer economic footing in the global economy. Efficient government in this sense is not a concern about sound administration; it is a national security imperative because those countries overrun with rent-seeking may face national decline compared to other nations.⁸⁹

Lessig's ideas on this point, though somewhat inchoate, are in line with this national economic welfare rationale. According to Lessig, today's lobbyist is ethical and well-educated but is more dangerous than the lobbyist of yesteryear: "The rent seeking that was hidden and careful before is now open and notorious" (p. 103). In the old days, lobbyists gave bribes to get legislative results they wanted. According to Lessig, when lobbying was illegal "its effect was . . . self-limiting" because lobbyists had to be "discreet" (p. 102).⁹⁰ Today, Washington is overrun with lobbyists pursuing policies that undermine the public fisc, and Congress's unending search for cash exacerbates the problem. "The single most salient feature [of the government] is that it discriminates against all sides to favor itself. We have created an engine of influence that seeks . . . simply to make those most connected rich" (p. 7).

Lessig's book is full of examples of this kind of rent-seeking activity, which can harm the national economic welfare. The influence of the pharmaceutical industry hobbled some aspects of health care reform (pp. 180–84), and the strength of the financial industry blocked key provisions of financial reform (pp. 185–90). Echoing Tea Party complaints, Lessig says that lobbying and fundraising lead to a larger government and tax complexity: "Getting a system of simpler taxes is difficult enough. Getting a system of simpler taxes when Congress has a direct financial interest in complexity might well be impossible" (p. 207). Lessig later elaborates: "What wins in the market is too often not what 'a free market' would choose, but what a market bent by tariffs and subsidies and endless incumbency protective regulation defaults to. Call that 'crony capitalism'" (p. 246).

Lessig further argues that "[c]hange on the Left gets stopped because strong, powerful private interests use their leverage to block changes in the status quo. Change on the Right gets stopped because strong, powerful public interests, Congress, work to block any change that would weaken their fund-raising machine" (p. 211). The system

⁸⁹ *Id.* at 241–42.

⁹⁰ I am dubious: Lessig offers no evidence that, as a percentage of GDP (a factor I introduce to control for the size of the economy), the social costs of lobbying were less in days when members of Congress's votes could be bought outright compared to current times.

of campaign funding “radically benefits the status quo — the status quo for private interests and the status quo of the Fund-raising Congress” (p. 212). The fundraising system “fuels the very rent seeking that all good conservatives should oppose” (p. 213).

Moreover, the personal financial interests of members of Congress and their staffers skew outcomes further. Members of Congress have limited salaries and so rely on devices like leadership PACs to supplement their lifestyles (pp. 218–19). Staffers do not get paid much, and they therefore count on going through the revolving door to become lobbyists after time on the Hill (pp. 221–24).

In short, the problem is not that lobbyists or members of Congress are corrupt. It is that the private system of campaign finance with lobbyist-arbitrageurs distorts politics and skews political outcomes. That distortion in turn leads public policy to be out of line with the public’s important interest in efficient government.

While limits on lobbyist fundraising and lobbying employment following membership in the legislature could well pass constitutional muster under the national economic welfare rationale — though a lifetime or very broad ban on employment as a lobbyist for former legislators or staffers seems too draconian — other proposals from Abramoff or Lessig indeed require constitutional amendments. Term limits for Congress and repeal of the Seventeenth Amendment could be secured only through constitutional amendment.

More importantly, a constitutional amendment appears necessary to enact Lessig’s tentative proposal to limit corporate independent expenditures as part of his campaign voucher system. Lessig wrote that the Supreme Court in *Citizens United* was wrong in not recognizing “dependence corruption” as a form of corruption that could justify campaign spending limits. According to Lessig, Justice Kennedy, who wrote the majority opinion in *Citizens United*, incorrectly believed that the Framers would have thought that it was permissible to make representatives so dependent upon campaign contributors or that large independent spending would not undermine trust in elected officials (pp. 240–45).

As much sympathy as I have for Lessig’s critique of *Citizens United* and its crabbed view of corruption, the current Supreme Court is exceedingly unlikely to reverse course and uphold corporate spending limits on anticorruption grounds.⁹¹ In any case, Lessig’s “depend-

⁹¹ As noted above in the discussion of the public confidence evidence, Lessig acknowledges the problems of finding a connection between campaign finance laws and public trust (p. 271), so it does not appear that an “appearance of corruption” argument would be more successful.

Lessig was alone among public intellectuals in speculating that the Supreme Court would hear a recent challenge to *Citizens United* out of Montana and reverse its *Citizens United* ruling in the Montana case. Corbin Hiar, *Lawrence Lessig on Campaign Finance Reform: Overturning*

ence corruption” does not even qualify as “corruption” under Supreme Court precedent. It is either “distortion,” rejected in *Citizens United* as an impermissible political equality justification for campaign finance regulation, or it is an anti-rent-seeking interest. Although Justice Stevens made noises in his *Citizens United* dissent about an anti-rent-seeking/national economic welfare justification for corporate spending limits, I am extremely skeptical that the current Supreme Court would uphold limits on independent spending even assuming it accepted the national economic welfare rationale as an important governmental interest justifying other campaign finance limits.⁹²

But things are even more dire for Lessig’s voucher plan. Under the Supreme Court’s recent decision in *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*,⁹³ Congress could not even implement a voluntary voucher public financing plan that increased the amount of public financing for candidates facing large independent spending against them.⁹⁴ Effective voucher fundraising, a key part of Lessig’s reform proposal, stands on very shaky constitutional ground. Lessig seems to acknowledge the point by devoting the last section of his book to getting constitutional reform programs enacted.

B. Implementation Woes

If one accepts the wisdom of some or all of Lessig’s and Abramoff’s proposed electoral reforms, how would one get from “here to there”?⁹⁵ Partisan politics and legislative self-interest provide compelling reasons why it is very difficult to enact comprehensive lobbying and campaign finance reform.⁹⁶ Of course, the chances of attaining constitutional

‘Citizens United’ *Isn’t Enough*, CENTER FOR PUB. INTEGRITY (Feb. 29, 2012, 1:57 PM), <http://www.publicintegrity.org/2012/02/29/8278/lawrence-lessig-campaign-finance-reform-overturning-citizens-united-isnt-enough> (“I think it’s quite likely Justice Kennedy is about to flip,” he said, referring to the Supreme Court justice who cast the deciding vote in the controversial 5-to-4 decision. Although Lessig cautioned that he had no inside information, he said Kennedy “is completely surprised by how much damage this decision has done — even Scalia doesn’t like the world where all the money in the world is on one side.”). In fact, the Court summarily reversed the Montana Supreme Court’s attempts to distinguish *Citizens United* and uphold the state’s ban on corporate campaign spending in candidate elections. *Am. Tradition P’ship v. Bullock*, 132 S. Ct. 2490, 2491 (2012).

⁹² See Hasen, *supra* note 5, at 249–51.

⁹³ 131 S. Ct. 2806 (2011).

⁹⁴ See *id.* at 2813 (holding Arizona’s public financing plan unconstitutional).

⁹⁵ Heather K. Gerken, *Getting from Here to There in Election Reform*, 34 OKLA. CITY U. L. REV. 33, 33 (2009). Professor Heather Gerken has emphasized a focus on strategies for adopting election reform. See generally *id.*

⁹⁶ I leave aside the question whether amendments establishing congressional term limits and repealing the Seventeenth Amendment, as Abramoff advocates, have a political chance of being adopted. These proposals are less developed in Abramoff’s book and seem to have even less of a chance of being adopted than lobbying or campaign finance reform.

change are many times smaller than achieving simple legislative reform because of the extremely high supermajority hurdles to passing constitutional amendments.⁹⁷

Both Abramoff (p. 275) and Lessig (pp. 273–75) recognize that entrenched interests have every incentive to block reform. Accordingly, both authors suggest mechanisms to overcome resistance. Abramoff proposes a new reform organization, modeled after Americans for Tax Reform: “Candidates seeking federal office should be asked to sign a pledge to clean up government — and that pledge should include a promise to resign their position should they fail to do their part” (pp. 275–76). The problem with such an approach is that there seems to be little public interest in such process reforms, and therefore politicians would have little to gain electorally by signing and highlighting such a pledge.

Lessig offers a broader menu of strategies, along with assessments of their likely success. First, he advocates primary challenges from three hundred “peaceful terrorists” whose sole purpose in running would be to enact a reform statute. He suggests that a single well-liked leading nonpolitician citizen (Oprah Winfrey? Warren Buffett?) could run in multiple districts to extract a promise to support a reform statute from incumbents. The candidates would promise to quit after enacting the reform. Acknowledging that his estimate is “wildly optimistic,” Lessig gives this strategy a five percent chance of success (pp. 277–79).

Along similar lines Lessig suggests an unconventional presidential candidate who credibly signals his exclusive focus will be on fixing corruption problems. The candidate, someone like former Louisiana Governor and now reformist Buddy Roemer, would pledge to hold government hostage until it passes the reform program and then would resign. Lessig gives this strategy a two percent chance (pp. 285–89).

Lessig’s final proposal, which he gives a ten percent chance of success, is a constitutional convention proposed to enact this kind of reform.⁹⁸ He further suggests holding shadow conventions by using deliberative polls and by having citizen representatives meet over the

⁹⁷ See U.S. CONST. art. V (specifying that the Constitution may be amended in two ways: first, by a two-thirds majority vote in both the House of Representatives and Senate followed by three-fourths approval by the states, or second, by a constitutional convention called by two-thirds of the states at which three-fourths of the states approve the amendment).

⁹⁸ With thirty-three states having already called at various times for a convention, and with such calls apparently not expiring, the United States could be closer to a convention than most people acknowledge. See Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 733–61 (1993); Michael Stokes Paulsen, *How to Count to Thirty-Four: The Constitutional Case for a Constitutional Convention*, 34 HARV. J.L. & PUB. POL’Y 837, 857–58 (2011). But this question is beyond the scope of this Review.

internet to foster the reform agenda (pp. 300–04). Whether lobbyists could be kept out of the convention process remains unclear — such a convention would be a natural place for lobbyists to gather and seek to extend influence.

Lessig admits that it may be irrational to advocate these strategies given their low chance of success but states that he is acting out of love for his country (p. 306). While Lessig's patriotism is admirable, his odds making is ridiculously optimistic. A ten percent chance of a constitutional convention called to enact fundamental changes to the role played by money in politics? To be called by a Congress that cannot even agree to pass adequate *disclosure* laws for campaign finance regulation?⁹⁹ To be forced by states that themselves are bitterly divided on partisan grounds, and to result in a convention with an uncertain power to reopen the Constitution to amendment?

Similarly, a two percent chance of a successful presidential candidate making reform his signature issue? Buddy Roemer (praised in Lessig's book and later all but endorsed by Lessig¹⁰⁰) ran as a Republican presidential candidate in 2012 on just such a platform, and he could not even get enough popular support in public opinion polls to get included in the Republican primary debates.¹⁰¹ After dropping out of the Republican race, he had a clear shot for the Americans Elect nomination, but his campaign got little support from the right or left and he dropped out of the race entirely.¹⁰² Whether it is justified or not, the public does not seem to get excited about process issues such as campaign finance reform or lobbying reform in deciding whom to support for office.

In Congress, the barrier to reform is not the lack of salience or understanding of the money-politics connection. Instead, the intense partisan environment that animates current congressional politics makes any proposal for widespread reform difficult to enact. Reforming lobbying and campaign finance is especially difficult because they involve legislative self-interest and because more recently, campaign finance

⁹⁹ Editorial, *Return of the DISCLOSE Act*, L.A. TIMES (Feb. 15, 2012), <http://articles.latimes.com/print/2012/feb/15/opinion/la-ed-disclose-20120215>.

¹⁰⁰ Lawrence Lessig, *The Last Best Chance for Campaign Finance Reform: Americans Elect*, ATLANTIC (Apr. 25, 2012, 4:23 PM), <http://www.theatlantic.com/politics/archive/2012/04/the-last-best-chance-for-campaign-finance-reform-americans-elect/256361/> ("Roemer is the clearest and most passionate advocate for ending the corrupting influence of money in politics since Teddy Roosevelt. He is literally the only candidate for president who has excited both Tea Partiers and members of the Occupy Wall Street movement.")

¹⁰¹ Jonathan Tilove, *Buddy Roemer Tweets His Discontent with Republican Debate*, TIMES-PICAYUNE (Feb. 23, 2012, 8:36 AM), http://www.nola.com/politics/index.ssf/2012/02/buddy_roemer_tweets_his_discon.html.

¹⁰² See Alicia M. Cohn, *Buddy Roemer Drops Third-Party Bid for White House*, THE HILL'S BLOG BRIEFING ROOM (May 31, 2012, 8:36 AM), <http://thehill.com/blogs/blog-briefing-room/news/230201-buddy-roemer-drops-third-party-bid-for-white-house>.

reform has become an issue with a partisan valence. Aside from two Republican House members, all Republicans voted against the major 2010 campaign finance bill,¹⁰³ the DISCLOSE Act.¹⁰⁴ No Republicans in the Senate supported it.¹⁰⁵

Even in this hyperpartisan atmosphere, it may be possible to enact moderate lobbying fundraising limits and potentially even a modest extension of the revolving-door limitations — so long as these changes are not accompanied by broader campaign finance reform. Most government reform legislation follows a scandal, such as Watergate (Federal Election Campaign Act Amendments of 1974¹⁰⁶), Enron (Bipartisan Campaign Reform Act of 2002,¹⁰⁷ or “McCain-Feingold”), or Abramoff (Honest Leadership and Open Government Act of 2007¹⁰⁸). Another scandal could come at any time. But even following scandal it is hard to see Republicans voting for public financing of congressional elections — by voucher or not — much less supporting a constitutional amendment reversing *Citizens United* and once again limiting independent spending in elections. So far, efforts to do so (again coming from Democrats) are gaining no traction within Congress.

Despite Lessig’s vision of campaign finance reform as transcending partisan politics, it has not played out that way, at least so far. There may be great public fomentation against *Citizens United* from the left,

¹⁰³ Sam Stein, *DISCLOSE Act: House Passes Major Campaign Finance Legislation*, HUFFINGTON POST (June 24, 2010, 5:47 PM), http://www.huffingtonpost.com/2010/06/24/disclose-act-house-passes_n_624698.html. Of the two House Republicans supporting the bill, one, Representative Mike Castle, ran for Delaware’s open U.S. Senate seat and lost in the Republican primary to Tea Party candidate Christine O’Donnell. Dan Balz, *Christine O’Donnell Beats Rep. Mike Castle in Delaware Republican Senate Primary*, WASH. POST (Sept. 15, 2010, 12:40 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/14/AR2010091407063.html>. O’Donnell then lost to Democrat Chris Coons in the general election. Peter Grier, *Lesson from Christine O’Donnell Defeat: Where Tea Party Overreached*, CHRISTIAN SCI. MONITOR (Nov. 2, 2010), <http://www.csmonitor.com/USA/Politics/The-Vote/2010/1102/Lesson-from-Christine-O-Donnell-defeat-where-tea-party-overreached>. The other, Louisiana Representative Joseph Cao, lost to a Democrat in 2010 after winning a fluke 2008 election against Democrat William Jefferson, who was indicted on bribery charges that stemmed in part from \$90,000 found by the FBI in his freezer. *GOP Rep. Cao Ousted from New Orleans-Area Seat*, WASH. POST (Nov. 3, 2010, 12:16 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/02/AR2010110208137.html> (“Cao won the district two years ago in an election often cast as a fluke. Few voters turned out, and the election was delayed by hurricanes in a year that incumbent William Jefferson was under indictment.”); see also Bruce Alpert, *William Jefferson Settles in to Federal Prison in Beaumont, Texas*, TIMES-PICAYUNE (May 5, 2012, 9:00 AM), http://www.nola.com/crime/index.ssf/2012/05/william_jefferson_settles_in_t_1.html (discussing the Jefferson indictment).

¹⁰⁴ H.R. 1575, 111th Cong. (2010).

¹⁰⁵ Jessica Rettig, *Senate Republicans Block DISCLOSE Act*, U.S. NEWS & WORLD REP. (July 27, 2010), <http://www.usnews.com/news/articles/2010/07/27/senate-republicans-block-disclose-act>.

¹⁰⁶ Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended in scattered sections of the U.S. Code).

¹⁰⁷ Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of the U.S. Code).

¹⁰⁸ Pub. L. No. 110-81, 121 Stat. 735 (codified in scattered sections of the U.S. Code).

but it is not also coming from the Tea Party,¹⁰⁹ and congressional Republicans seem quite happy with the new *Citizens United* regime. If anything, Republicans may see an advantage in the new Wild West of campaign funding, with super PACs and 501(c)(4) and (6) organizations¹¹⁰ enabling unlimited — and largely undisclosed — individual and corporate money to enter the political process.¹¹¹ With campaign finance reform becoming a partisan issue, Lessig's vision of the Tea Party and Occupy movements coming together for a package of reforms seems increasingly unrealistic.

C. Would These Reforms “Fix” Washington?

Put aside the question whether the changes in lobbying rules suggested by Abramoff and Lessig and the campaign finance changes suggested by Lessig actually could be adopted. If the changes were adopted, how would they change American politics? Unfortunately, the answer is likely to be “very little,” as they would do nothing to fix the toxic partisan dynamic that has broken Washington.

Recognizing this point is important because Lessig, in his attempt to appeal to left and right, oversells how much his proposed changes could affect politics: even after changing the rules, the left and right will not both see their key conflicting agenda items adopted (think: a single-payer health care system *and* repeal of President Obama's health care plan).

In two earlier articles, I made the case that taking lobbyists out of the fundraising business, extending anti-revolving-door laws,¹¹² and enacting a system of campaign finance vouchers (with no outside money)¹¹³ would create a political system with less rent-seeking, thereby

¹⁰⁹ I have been unable to locate Tea Party group criticisms of the *Citizens United* ruling. I do find praise, such as a post on the Gainesville Tea Party website quoting an article by David Bossie, president of Citizens United, about the group's “David and Goliath” victory: “One year ago today, on January 21, the Supreme Court released its landmark decision in *Citizens United v. FEC*. The decision corrected an anomaly in campaign finance law, and in doing so was a tremendous victory for the First Amendment and Americans who wish to participate in our political process.” *The One-Year Anniversary of Citizens United*, GAINESVILLE TEA PARTY (Jan. 22, 2011), <http://gainesvilleteaparty.org/national-info/the-one-year-anniversary-of-citizens-united> (excerpting David Bossie, *David v. Goliath: The One-Year Anniversary of Citizens United*, BREITBART (Jan. 21, 2011)) (internal quotation marks omitted).

¹¹⁰ For a discussion of these organizations, see Brendan Fischer, *The Super Nonprofits Influencing Elections, Under the Radar*, PRWATCH (Feb. 6, 2012, 3:32 PM), <http://www.prwatch.org/news/2012/02/11278/super-nonprofits-influencing-elections-under-radar>.

¹¹¹ Nicholas Confessore, *Campaign Aid Is Now Surging into 8 Figures*, N.Y. TIMES, June 14, 2012, at A1 (“Some of the leading Republican super PACs were established during the 2010 elections, raising tens of millions of dollars to counter labor unions and helping Republicans to win control of the House. Democrats have since sought to match Republicans' super PAC advantage, but with little success.”).

¹¹² Hasen, *supra* note 5, at 198.

¹¹³ Hasen, *supra* note 36, at 23.

promoting the national economic welfare.¹¹⁴ Lobbyists would retain their roles as information gatherers/disseminators and strategists.¹¹⁵ But they would lose their privileged positions in legislative chambers, positions that lobbyists gained not because of their possession of valuable information, but because of their fundraising prowess and personal connections.¹¹⁶ Lobbyists would also be less able to set the congressional agenda, which is currently distorted by moneyed interests.¹¹⁷

Campaign finance vouchers also would create a more egalitarian distribution of political influence, whereby legislative outcomes would be more likely to reflect majoritarian preferences than under the current system.¹¹⁸ (A voucher system allowing outside money — as Lessig initially proposed — would be far less likely to promote such egalitarian goals because voucher money would be just a part of the campaign money likely to influence legislative outcomes.) Further, under my proposal, in which voters could divide vouchers across candidates, parties, and groups, financial influence would be a good barometer of intensity of preference and public support.¹¹⁹

The core changes Abramoff and Lessig propose would at least marginally improve the state of the nation's politics and decrease the amount of inefficient rent-seeking. Some other steps could lessen the influence of money on politics as well: Congress could raise congressional salaries, for example, or the United States could enact a line-item veto so that a public-minded President could strike out special-interest deals.

But it is important not to oversell what these changes would do to American politics. Indeed, both books' accounts of the problems in Washington gloss over the role of partisan politics in Washington's dysfunction. For Abramoff, partisan dysfunction in Washington is something that a lobbyist manages to his advantage.¹²⁰ For Lessig, party politics and the realignment of the South with the Republican Party led to the modern fundraising practices of Democrats, in which they tied their fortunes to Wall Street (pp. 94, 96).¹²¹

Lessig does not have anything else to say in his book about the role of political parties, ignoring that much of what is wrong with Wash-

¹¹⁴ See *id.*, at 16; Hasen, *supra* note 5, at 197–98.

¹¹⁵ See Hasen, *supra* note 5, at 238.

¹¹⁶ See *id.* at 239.

¹¹⁷ See Hasen, *supra* note 36, at 33–34.

¹¹⁸ See *id.* at 28–31.

¹¹⁹ See *id.* at 35.

¹²⁰ See *supra* note 26 and accompanying text.

¹²¹ Lessig does make a fleeting reference to problems of gerrymandered congressional districts (pp. 95–96). In making his argument about the Wall Street–Democratic fundraising connection, Lessig relies heavily on JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS 194–252 (2010).

ington has to do with politics, not money. He says that money is responsible for the gap between public opinion and congressional action, which he terms a problem of “substantive distortion” (p. 151).¹²² Yet there are many other explanations for the gap between public preference and congressional action. While it is true that Congress spends an inordinate amount of time on credit card fees and that this distortion is likely due to lobbyists, some of Congress’s choices do not seem to reflect a desire to do the bidding of K Street. Consider the fact that the July 2006 House session was “spent mostly on flag burning, stem-cell research, gay marriage, the Pledge of Allegiance, religion and gun control.”¹²³ This list implies that it is partisan electoral politics and an appeal for votes of the party base, rather than a pure desire for more campaign money, driving the partisan agenda in Congress. The public is divided on major policy issues, especially at the extremes, and Congress’s stalemate reflects those divisions. Campaign finance vouchers would not bring an end to the culture wars or cause those members of Congress at the extremes of their respective parties suddenly to become moderate.

The story of how Congress became such a political body is beyond the scope of this Review. As told well by Professor Richard Pildes, part of the story is one of partisan realignment that followed the civil rights movement, a realignment that has made the parties become more ideologically coherent and extreme than in the past.¹²⁴ The creation of majority-minority districts under the Voting Rights Act contributed to the rise of stronger, ideological parties.¹²⁵

Part of the rise of polarization has to do with the evolution of House rules, which have tended (first under Democrats and then under Republicans) to favor the position of the majority and denigrate the role of the minority.¹²⁶ Arcane changes in committee structure jettisoned seniority as a basis for committee chairmanships and substituted party allegiance, imposing greater party discipline.¹²⁷ Intense partisanship makes cooperation on legislative issues much more difficult. Civility has declined markedly in the House, and bipartisan cooperation is exceedingly rare.¹²⁸

¹²² Emphasis has been omitted.

¹²³ Robert G. Kaiser, *House of Ill Repute*, WASH. POST, Aug. 13, 2006, at T7.

¹²⁴ Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 290 (2011).

¹²⁵ See *id.* at 292.

¹²⁶ See *id.* at 319.

¹²⁷ See *id.* at 320.

¹²⁸ JACOB S. HACKER & PAUL PIERSON, OFF CENTER 5–7 (2005); THOMAS E. MANN & NORMAN J. ORNSTEIN, THE BROKEN BRANCH 11–13 (2006); see also Pildes, *supra* note 124, at 320–21.

Legislative sclerosis today also is driven to a great extent by Senate rules. Under the Senate rules, a minority of senators can block legislation supported by the House, President, and a majority of the Senate.¹²⁹ The filibuster is stronger than ever. The partisanship of the House, and its lack of civility, has spilled over to partisanship in the Senate.¹³⁰ Of course some of this blockage is due to the role of money, lobbying, and influence. But the closest connection of money to partisanship is that the parties' abilities to raise funds help them to compete further for voters and move to the extremes. Intense ideological competition between the parties means that there is less cooperation on legislation that could be in the public interest, out of fear that passing the legislation will give one party or another an electoral advantage.

Further, especially since the economic downturn, members risk a backlash from more ideological constituents for voting for bills that the members believe are in the public interest. Consider Republican members who were attacked by the Tea Party because of their votes on the auto industry bailout or the Troubled Asset Relief Program (TARP). Today, Senate Republicans have tacked sharply right, as they face Tea Party challenges and do not want to face the possibility of an insurgent candidacy.¹³¹ For example, look at the record of Senator Orrin Hatch of Utah, who did not want to face the same end as his former U.S. Senate Republican colleague Robert Bennett, who lost to Tea Party candidate Mike Lee: "Mr. Hatch's voting record has shifted decidedly rightward. After receiving an 88 percent rating from the Club for Growth political action committee in 2009, he jumped to 100 percent in 2010 and then 99 percent in 2011, far surpassing his lifetime score of 78 percent."¹³² Senate moderates, such as Senators Olympia Snowe and Ben Nelson, have retired rather than tack to the extremes and face tough primaries.¹³³ Other moderate senators, such as Indiana's Senator Richard Lugar, have lost in primaries to Tea Party opponents.¹³⁴

Adding to the partisan flames is the newly emergent role of the partisan media. This transformation began with Fox News and then

¹²⁹ See Frances E. Lee, *Senate Deliberation and the Future of Congressional Power*, 43 POL. SCI. & POL. 227, 227 (2010); Gregory J. Wawro & Eric Schickler, *Legislative Obstructionism*, 2010 ANN. REV. POL. SCI. 297, 298.

¹³⁰ See MANN & ORNSTEIN, *supra* note 128, at 43, 88–94.

¹³¹ Jonathan Weisman, *Before Vote, Republicans Make Moves to the Right*, N.Y. TIMES, Feb. 25, 2012, at A12.

¹³² *Id.*

¹³³ Naftali Bendavid, *GOP's Snowe Is Retiring from Senate*, WALL ST. J. (Feb. 29, 2012), <http://online.wsj.com/article/SB10001424052970203833004577251893158327180.html>.

¹³⁴ Monica Davey, *Lugar Loses Primary Challenge in Indiana*, N.Y. TIMES (May 8, 2012), <http://www.nytimes.com/2012/05/09/us/politics/lugar-loses-primary-challenge-inindiana.html?page-wanted=all>.

MSNBC on television and with the rise of political blogs on the left and right; the latest arena for competition is social media. Twitter has become a fierce battleground for political ideas, and it may make partisan politics even more extreme in coming years.¹³⁵

There is no reason to believe that lobbying and campaign finance reform would change the fundamental hyperpolarized dynamic of politics in this country. True, under a voucher system politicians would be less beholden to narrow, concentrated interests and more likely to follow the wishes of their constituents. But constituents are divided, too, and voucher money would fuel the hard left and hard right — not just some compromising middle. Even with vouchers, the United States would still be the world of red and blue states, with a hyperpartisan media fanning political flames. Politicians would still target ideological donors for their voucher contributions.¹³⁶ It would not be political nirvana.

D. *The Party/Government Mismatch*

A more promising path toward a broader goal of “fixing Washington” would begin with a recognition of the fact that there is a mismatch between the new, strongly ideological nature of our political parties and the old constitutional structure, with its separation of powers and diffusion of authority. From 2010 to 2012, Democrats controlled the presidency and the U.S. Senate (subject to the filibuster power of Republicans), and Republicans controlled the House of Representatives. There was no one party to blame for policy failures: Democrats pointed to the obstructionism of Republicans while Republicans blamed the President and Democrats in the Senate. A single party could not enact a good part of its agenda, robbing voters of the opportunity either to ratify that agenda or to vote for a change in leadership at the next election.¹³⁷

The cleanest solution to the mismatch problem is to move to a parliamentary-style democracy, in which one party (or a coalition of

¹³⁵ See RICHARD L. HASEN, *THE VOTING WARS 183–201* (2012); Sarita Yardi & Danah Boyd, *Dynamic Debates: An Analysis of Group Polarization over Time on Twitter*, 30 BULL. SCI., TECH. & SOC'Y 316, 325 (2010), available at <http://bst.sagepub.com/content/30/5/316.full.pdf+html>; M.D. Conover et al., *Political Polarization on Twitter 1* (2011) (unpublished manuscript), available at http://truthy.indiana.edu/site_media/pdfs/conover_icwsm2011_polarization.pdf (noting that Twitter's “retweet network” shows highly polarized political activity and that its “mention network” shows more political integration).

¹³⁶ Raymond J. La Raja & David L. Wiltse, *Don't Blame Donors for Ideological Polarization of Political Parties: Ideological Change and Stability Among Political Contributors, 1972–2008*, 40 AM. POL. RES. 501, 504 (2012).

¹³⁷ Cf. THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS* 84–91 (2012) (discussing the proliferation of the use of holds and filibusters, even against measures that would have been considered uncontroversial by past Congresses).

parties) controls all of the political branches of government. But such a solution is off the table because it would radically remake American politics.¹³⁸

Political scientists Norman Ornstein and Thomas Mann consider, but ultimately reject, a number of other potential reform proposals that they call “bromides to avoid,” including waiting for the system to correct itself, introducing a third party, passing a constitutional amendment to balance the budget, imposing term limits, or providing full public financing of elections.¹³⁹ The last rejected proposal reads much like Lessig’s voucher program.

Instead, Mann and Ornstein advocate increasing the number of voters in both primary and general elections.¹⁴⁰ Mann and Ornstein expect these new voters to be more moderate and to choose, in turn, less ideological senators and representatives. These new members will then agree to pass legislation in the spirit of compromise. Of course, most of these reforms would never clear the hurdles of our hyperpartisan atmosphere. More importantly, although many (but not all) of these reforms are sensible and should be enacted, they hardly seem likely to fix Washington and end polarization.

The evidence suggests that these nonvoters-made-voters would not necessarily be more moderate than the current voters.¹⁴¹ Further, if parties did not have to worry about getting out the vote thanks to compulsory voting, they might do a lot more to get their base excited about their candidates, and politics could get even nastier.¹⁴²

¹³⁸ See *id.* at 102–03 (recognizing the mismatch problem as well as the extreme unlikelihood of reforming to a parliamentary system). The next few paragraphs draw from Richard L. Hasen, *Why Washington Can't Be Fixed*, SLATE (May 9, 2012, 2:19 PM), http://www.slate.com/articles/news_and_politics/politics/2012/05/thomas_mann_and_norman_ornstein_s_ideas_won_t_solve_washington_s_gridlock_.html.

¹³⁹ MANN & ORNSTEIN, *supra* note 137, at 107–30.

¹⁴⁰ See *id.* at 133–62. Specifically, they advocate voter registration modernization (making it easier for people to register to vote); compulsory voting (or at least efforts to end state restrictions on voting); moving election day from Tuesday to a weekend day; putting congressional redistricting into the hands of citizen commissions, as was recently done in California; allowing more open primaries whereby unaffiliated voters can vote for party nominees; the use of alternative voting systems (such as instant runoff voting), whereby people who vote for less popular candidates have their votes reallocated to higher vote-getters to produce majority winners; and (as also advocated by Lessig) revamped campaign finance laws to improve disclosure, take lobbyists out of the fund-raising business, and prevent candidates from coordinating with super PACs. *Id.*; see also generally Hasen, *supra* note 138.

¹⁴¹ John Sides, *Mandatory Voting Isn't a Solution to Polarization*, MONKEY CAGE (Nov. 8, 2011), <http://themonkeycage.org/blog/2011/11/08/mandatory-voting-isnt-a-solution-to-polarization/>.

¹⁴² See STEPHEN ANSOLABEHRE & SHANTO IYENGAR, *GOING NEGATIVE* 66 (1995) (“Exposure to advertising induces less-informed Democrats and Republicans to vote like their fellow partisans who are more knowledgeable about the candidates and public affairs.”).

Mann and Ornstein also offer a second set of reforms that are less voter oriented, including reforms making it harder to filibuster bills in the Senate, strengthening executive power (so that voters would hold the President more accountable), and having the media and others with clout in society shame extreme members of Congress into moderation.¹⁴³ Some of these proposals are nonstarters. Republican House members will wear excoriation by the *New York Times* editorial board — or nowadays almost any media outlet — as a badge of honor. Democrats would feel the same way about criticism by Fox News. While filibuster reform might be helpful to end gridlock, it would not solve the problems of polarized parties, divided government, and lack of accountability.

In short, the solutions to the major problems of Washington appear unattainable because they would require a radical restructuring of our government institutions. Potentially effective reform is unlikely to be achievable, and that which is achievable is unlikely to be effective.

V. CONCLUSION

Fixing Washington in a fundamental way may take more than the usual scandal. Change likely will not come until external or internal forces — war, natural disaster, the fragmentation of one of the two major political parties, or some other crisis — diminish partisan pressures and create an opening for national unity or one-party dominance. Until there is consensus not only that Washington is broken but also that the way to fix it is through process improvements, including lobbying and campaign finance reform, the country will continue to be stuck in its old ways.

When that moment for reform comes, the country will have much to learn from Lessig's and Abramoff's suggested diagnoses of the problems that plague the national government. But there is only so much work reforms reducing the role of money in politics can do. Alas, many of the problems with a broken Washington cannot be solved solely through the regulation of political money, and some may not be solvable at all.

¹⁴³ See MANN & ORNSTEIN, *supra* note 137, at 163–78.