A REPLY TO PROFESSOR HASEN

Lawrence Lessig[*]

I am grateful for this review by one of America's foremost election law scholars. There is much in it that I admire. But there are at least three points at the core of *Republic, Lost*[1] that feel, well, lost. To recover those three points, I offer this response.

I. ON THE MEANING OF "CORRUPTION"

"Corruption" plays an important role in First Amendment law. For it is only to avoid "corruption" or the "appearance of corruption" that Congress has the power to restrict otherwise protected political speech.

Yet that formulation leaves a fundamental question unresolved: What does "corruption" mean?

Everyone agrees it means at least quid pro quo bribery, or influence peddling. On this conception, corruption is influence exchanged for reward; public office traded for private gain. To the modern American mind, no crime could be clearer. To the modern cynical American mind, no crime could be more common.

But does the term "corruption" mean anything beyond quid pro quo corruption?

This Supreme Court has made it clear that it does not mean the odd innovation of *Austin v. Michigan Chamber of Commerce*,[2] which I will call, "inequality corruption." As Professor Richard Hasen explains it in his review:

> [I]n upholding corporate campaign spending limits, the Court [in *Austin*] 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."[3]

Austin's definition is actually quite complex,[4] but most (including Hasen, and as he claims, Chief Justice Roberts) simplify it to be "an

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[1] LAWRENCE LESSIG, REPUBLIC, LOST (2011).

[2] 494 U.S. 652 (1990).

[3] Richard L. Hasen, *Fixing Washington*, 126 HARV. L. REV. 550, 572 (2012) (reviewing LESSIG, *supra* note 1; JACK ABRAMOFF, CAPITOL PUNISHMENT (2011)) (quoting *Austin*, 494 U.S. at 660).

[4] The *Austin* theory is not that every inequality in the effectiveness of speech justifies state intervention. The standard is instead much narrower. As the Court described it, with bracketed numbers inserted to emphasize the separate conditions: the corruption is "the corrosive and dis-

argument about political equality: the problem [when] money skews political outcomes in an unfair way."[5] And because *Citizens United v. FEC*[6] overruled *Austin*, Hasen and others believe that any conception of "corruption" that even resonates with concerns about "political equality" must also have been rejected by the Court in *Citizens United*.

This moves too quickly. For the conception of corruption that I advance — what I call "type 2" or "dependence corruption"[7] — is not, as Hasen says of it, "really an argument about political equality."[8] It is instead an argument about "corruption," or the meaning of "corruption," even if remedying that corruption might affect equality. And as this is the key to the legal argument that my book was meant to advance, it is important here to make that distinction more clear.

No doubt recent decisions by the Supreme Court have attached some stigma to any argument that has even a whiff of "equality" talk running beside it. But we must be careful not to overweight the significance of that stigma. The Court cannot mean to run from "equality" talk generally, unless it intends a much more radical remake of our Constitution than anyone now expects.

For example, if "money is speech," then certainly "votes are speech" too. Yet when the Court invalidated hundreds of years of election law governing the drawing of legislative districts, it was for the explicit purpose of equalizing that speech — a.k.a. the vote. As the Court wrote, "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing — one person, one vote."[9]

There were plenty of powerful arguments against that decision, mustered in fury by Justice Harlan (in *Reynolds v. Sims*[10]) and Justice Frankfurter (in *Baker v. Carr*[11]). But neither Justice thought it useful to raise the argument that those decisions were wrong because they violated the First Amendment's ban on any measures designed to

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torting effects of [1] immense aggregations of wealth that are [2] accumulated with the help of the corporate form and that have [3] little or no correlation to the public's support for the corporation's political ideas." *Austin*, 494 U.S. at 660. Thus, presumably (1) small differences would not justify regulation, nor would (2) differences accumulated without the help of the state, nor would (3) differences that did correlate to the public's support for the entity's ideas.

5 Hasen, *supra* note 3, at 572.

6 130 S. Ct. 876 (2010).

7 *See* LESSIG, *supra* note 1, at 17–20.

8 Hasen, *supra* note 3, at 572.

9 Gray v. Sanders, 372 U.S. 368, 381 (1963).

10 377 U.S. 533 (1964).

11 369 U.S. 186 (1962).

achieve speech equality. And that, I suggest, is because whatever the contours of this recently discovered anti-egalitarian free speech principle are, the principle does not reign über alles.

Instead, to understand the Court's actual anti-egalitarian principle, we should stick close to the Court's language. The Court did not demonize "equality" in general, or banish as a compelling interest any interest that might also happen to correlate, in part at least, with equality. The Court instead — most clearly and recently in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*[12] — simply rejected the notion that "leveling the playing field" alone could be a "compelling state interest."[13] That was how the Court understood the purpose of the law at issue in *Bennett*. As the Court wrote, "[t]here is ample support for the argument that the matching funds provision seeks to 'level the playing field' in terms of candidate resources."[14] And thus, because "leveling the playing field" is not a compelling interest, the Arizona law — so understood — could not stand.

Justice Kagan, in dissent, pushed back against that argument in two ways. One seems absolutely compelling to me; the other seems incomplete.

Her compelling argument was that First Amendment "compelling interest" analysis is limited to regulations that actually restricted speech.[15] This law did no such thing. The effect of this law was to increase speech, by funding more speech, not by regulating existing speech. Certainly, one could wonder about the effectiveness of the private speech that triggers more government-funded speech in response. One might even say that the effect of that government-funded speech was to weaken the effectiveness of the private speech. But as Professor Charles Fried argued in his amicus brief in that case, the Court has never — and for very good reasons — tried to police the effect of government speech on private speech.[16] If Exxon-Mobil runs a television ad claiming climate change science is fraudulent, is it a "restriction" on speech if the President holds a press conference to reject Exxon-Mobil's claims? Does the First Amendment require that there be no government response to private speech? For if it does, that would indeed be a radical change in doctrine, devastating to much of what the government (properly, in my view) does.

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[12] 131 S. Ct. 2806 (2011).

[13] *Id.* at 2825 ("We have repeatedly rejected the argument that the government has a compelling state interest in 'leveling the playing field' that can justify undue burdens on political speech.")

[14] *Id.*

[15] *Id.* at 2841–43 (Kagan, J., dissenting).

[16] Brief of Amici Curiae Former Elected Officials in Support of Respondents, *Bennett,* 131 S. Ct. 2806 (No. 10-238).

But that argument Justice Kagan lost — again, surprisingly to me. Less surprising was the loss on her second argument. For Justice Kagan denied that Arizona was trying to "level the playing field," its repeated assertion notwithstanding. Instead, she asserted that Arizona was trying to remedy "corruption."[17]

Yet here, the argument runs thin. For what is the conception of corruption that Arizona is attacking, if it is not the one conception that the Court has endorsed — namely, quid pro quo corruption?

Justice Kagan offered no distinct theory of corruption that might complement the quid pro quo account. Instead, she invited the Court to see the influence of money in campaigns as quid-pro-quo-like, or maybe quid-pro-quo-lite. But the Court in *Citizens United* had already insulated "quid pro quo corruption" from any such slide. And that barricade was only reinforced in *Bennett*. Arizona had included independent expenditures within the mechanism that triggered further governmental support. That design exposed the law to the clearest analytical move in *Citizens United*, which rejects the notion that "independent expenditures" could have anything to do with quid pro quo corruption. As the Court wrote:

> "By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate." The candidate-funding circuit is broken. The separation between candidates and independent expenditure groups negates the possibility that independent expenditures will result in the sort of *quid pro quo* corruption with which our case law is concerned.[18]

What Kagan needed instead was an account of "corruption" that is distinct from quid pro quo corruption, and distinct from *Austin*, yet available for at least some on the political right to embrace, consistent with their commitment to the original understanding of the Constitution. That is precisely the work that "dependence corruption" can do.

How, however, is not exactly clear from Hasen's review. Though Hasen is generally careful, in this case he skips quickly over my own definition of (my own) term "dependence corruption," to insist that I am really "writing more about a distortion of policy outcomes, or skew, caused by the influence of money, channeled through lobbyists, on politics."[19]

But I am not "writing more about a distortion," even if "a distortion" is the consequence of what I am writing about — just as a book about alcoholism is not "writing about liver failure," even if liver failure is an effect of alcoholism. Hasen has confused a consequence with the pathology. My aim is to describe the pathology, so that with Pro-

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[17] 131 S. Ct. at 2843–45 (Kagan, J., dissenting).

[18] *Id.* at 2826–27 (citation omitted) (internal quotation mark omitted).

[19] Hasen, *supra* note 3, at 571 (emphasis omitted).

fessor Zephyr Teachout,[20] I can establish it too as a kind of "corruption" that the Supreme Court should permit Congress to address.

To make the point more clearly, however, let's start with a definition:

> de·pen·dence cor·rup·tion \di-'pen-dəns kə-'rəp-shən\ noun: the state of an institution or an individual that has developed a dependence different from a, or the, dependence intended or desired.

It follows from this definition that to predicate the term "dependence corruption" of an institution, one must first identify a "dependence" for that institution that was intended or is desired. And indeed, as I stated repeatedly throughout my book, I do believe that the Framers had a "dependence" that they intended for each branch of government, the legislature included. As *The Federalist No. 52* puts it, ours was to be a government with a branch that would be "dependent on the people alone."[21]

This condition has two elements — first, it identifies a proper dependency ("on the people"); second, it describes that dependency as exclusive ("alone"). Thus the charge that our government suffers from "dependence corruption" is the claim that it either, strictly speaking, has become "dependent" upon an influence other than "the people," or, less strictly, that it has become dependent upon an influence that is inconsistent with a dependence upon "the people." *The Federalist No. 52* sounds to my ears like the stricter of these two alternatives — "on the people alone" — but even under the less restrictive test, our government plainly suffers from "dependence corruption."

The reason is the way campaign funding has evolved. Politicians in our system have become dependent upon their funders. Their "funders" are not "the people." Members of Congress estimate that they spend a significant portion of their time raising money,[22] and politicians recognize the need to satisfy those funders as a condition to being able to successfully wage their campaigns.

That need is a dependence. Without that support, candidates could not fund their campaigns. With that support they can. Thus is it undeniable that our system triggers the first step of the "dependence corruption" analysis.

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[20] *See* Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 395–97 (2009).

[21] THE FEDERALIST No. 52, at 323 (James Madison) (Clinton Rossiter ed., 2003). *The Federalist No. 52* was referring to the House of Representatives, as the Senate at the time was not "dependent on the people" but was instead dependent on the states. Since the Seventeenth Amendment, however, it is fair to extend their theory of legislative dependence to both legislative bodies.

[22] LESSIG, *supra* note 1, at 347–48 n.43.

But for the system to be guilty of the charge that it suffers "dependence corruption," we must also establish the second element — that the dependence conflicts with a dependence "upon the people alone."

This condition too is easily met. The dependence that our system betrays is not a dependence "upon the people alone" or an entity in any sense representative of "the people." To the contrary: it is a tiny slice of the 1% that funds political campaigns: .26% of Americans give more than $200 in any congressional campaign; .05% give the maximum amount to any congressional candidate; .01% give more than $10,000 in any election cycle. Congress is thus plainly "dependent" upon that tiny slice of the 1%, and that dependence plainly conflicts with a dependence "on the people alone."

Against this background, it should now be clear why the aim to remedy "dependence corruption" is distinct from the aim to "level the playing field" (the more precise statement of the "equality" sin identified by the Court in *Bennett*). For it is neither necessary nor sufficient to "level the playing field" in order to address the problem of "dependence corruption": first, "dependence corruption" can be remedied without leveling the playing field; second, not all reforms that "level the playing field" could be justified by "dependence corruption"; and third, "dependence corruption" could exist even with a perfectly level playing field. Speaking precisely, then, these concepts are distinct. To reject the one ("leveling the playing field") is not to reject the other.

Consider, for example, one remedy that I propose for addressing the problem of "dependence corruption" — what I call the "Grant and Franklin Project." Imagine that Congress gave every voter a $50 "democracy voucher,"[23] and imagine further that voters could give those vouchers to any candidate who agreed to fund her campaign with vouchers only plus contributions limited to $100 a citizen. Assume participation in the system is voluntary. So what interest might justify this intervention into the speech market?

First, "leveling the playing field" would not justify the intervention, because the system would not necessarily equalize anything. Indeed, critics of vouchers fear (wrongly, in my view) that the vouchers would simply reflect the popularity of existing candidates. The result would not be equality of candidate funding. It would be government-funded inequality. Yet as it would be funds coming from all the people, such a scheme could remedy any "dependence corruption" that had crept into the system.

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[23] I describe this idea in Chapter 16 of my book. Hasen had described a related idea earlier in Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CALIF. L. REV. 1 (1996).

Likewise, an interest in "leveling the playing field" does not necessarily overlap with an interest in reducing "dependence corruption." Indeed, in some cases, those interests actually conflict.

Imagine, for example, that Michigan passed a law banning unions from turning out the vote, and imagine it justified that restriction on the grounds that unions have an "unfair" advantage over others, because of laws that make it easier for unions to organize, and that the legislature thus wanted to "level the playing field" of voting influence.

That restriction on speech-related activity could well be defended on "political equality" grounds — unions do have more political power relative to ordinary citizens; like the benefits of the corporate form, that advantage comes in part from state and federal laws.

But that restriction on speech-related activity could not be defended on "dependence corruption" grounds. The inequality attacked by this hypothetical law does not conflict with the dependence that (at least I believe) the Framers intended. Instead, that "inequality" is the product of precisely the "dependence" that they intended the system to adjudicate — voting power. Thus, whatever else "dependence corruption" is, if it could not justify the restrictions that "political equality" arguments justify, it cannot "really" be, as Hasen insists, "a political equality argument."[24]

Thus of course such a dependence might distort what Congress does.[25] That it might is presumably the reason it exists. But the corruption is the improper dependence, not the distortion.[26] And while there are plenty of cases in which the reforms justified by a political equality theory might overlap with the reforms justified by a desire to eliminate "dependence corruption," overlap is not equivalence. FDR and Stalin allied to fight Hitler. That didn't make FDR a Stalinist.

"Dependence corruption" is thus not the inequality corruption in *Austin*.[27] Neither is it the more general corruption that runs under the moniker "political equality." Instead, "dependence corruption" is a distinct conception of corruption that points to the relationship between a dependence intended and the dependence realized. One could reject that conception by denying that there was any dependence intended. Or one could reject that conception by rejecting the claim that the de-

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[24] Hasen, *supra* note 3, at 572.

[25] This is the conclusion, for example, of Martin Gilens, cited in my book, LESSIG, *supra* note 1, at 152–60, and in his new book, MARTIN GILENS, AFFLUENCE AND INFLUENCE (2012).

[26] And again, the *improper* dependence, not any dependence one might imagine. As I've described it, the impropriety arises from the system of influence produced by the way campaigns are funded. Its systemic character makes it possible to predicate the impropriety of the institution of Congress as a whole.

[27] It is also not the more complicated definition of corruption actually relied upon by the Court in *Austin*, *see supra* note 4, nor the CliffsNotes version of that conception of corruption relied upon by Hasen — namely, "political equality" corruption.

pendence actually realized is different from the dependence that was intended. But it is missing the point to reject the conception by arguing that it is really "distortion of policy outcomes, or skew."[28]

But beyond a reference in the *Federalist Papers*, what reason would there be to recognize "dependence corruption," and allow Congress the power to remedy it? The same reason the Court has allowed Congress the power to address quid pro quo corruption and the appearance of quid pro quo corruption. Any reasonable person who recognized the dependence this system has evolved would also have reason to lose "confidence in the system of representative Government," as the Court said in *Buckley v. Valeo*.[29] That's because even though "the people have the ultimate influence over elected officials," as the Court wrote in *Citizens United*,[30] they have that influence only after the funders of campaigns have exercised their influence first. To be able to run, candidates must first secure the support of the funders. Only then do they have the chance to appeal to the people. But in that search for primary support, a reasonable citizen could reasonably believe that the candidates have become distracted. The reasons for an ordinary citizen (who is not also a large funder) to engage with his government have been weakened. The influence of the ordinary citizen has diminished. The dynamic of representative government — in which representatives are responsive to all citizens — has been undermined by a system that makes representatives responsive to funders first, and only then to citizens. That is a plain corruption of the system of influence the Framers intended. It should be a plainly constitutional target for congressional reform.

Because "dependence corruption" is distinct from the corruption rejected in *Citizens United*, nothing would require that the Court "reverse course" in order to recognize it.[31] "Dependence corruption" would not, for example, justify the regulations struck down by the Court in *Citizens United*. A nonprofit filmmaker spending its corporate funds to promote its own film is neither an instance of quid pro quo corruption nor an example of "dependence corruption." It is instead — and should be, in my view — an instance of protected speech. Nor would it require the Court to reverse itself in *Bennett*, as again, the question addressed in that case was whether the law was remedying quid pro quo corruption. Indeed, the Court has not yet addressed a law defended on the basis of "dependence corruption," and thus has

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[28] Hasen, *supra* note 3, at 571 (emphasis omitted).

[29] 424 U.S. 1, 27 (1976) (quoting United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers AFL-CIO, 413 U.S. 548, 565 (1973)).

[30] 130 S. Ct. 876, 910 (2010).

[31] Hasen, *supra* note 3, at 574.

not yet had the chance to address whether such a conception might serve as a compelling or even significant governmental interest.

There are, however, examples of regulations that (1) would not be justified by a conception of quid pro quo corruption, and (2) need not rely upon inequality corruption to be justified but that (3) could well be justified by a conception of "dependence corruption."

Here's just one such example: Representative John Dingell's Restoring Confidence in Our Democracy Act. Among other things that it does, the Restoring Confidence Act limits the contributions that might be made to "independent political action committees," or so-called "super PACs." Those limits are equal to the limits imposed on contributions to other PACs. Thus, if I can give only $5000 to my company's PAC, under Representative Dingell's legislation, I could give only $5000 to a super PAC.[32]

To justify this limit, Representative Dingell's legislation need not allege any quid pro quo corruption. Instead, the law could be justified as a response to the obvious systemic "dependence corruption" that has been revealed after *Citizens United*. If the last three years have demonstrated anything, it is that the removal of limits on contributions to political action committees, whether independent or not, only increases the gap between "the people" and "the funders." That gap is the "dependence corruption" within this system, so that efforts to close it could be justified by the conception of "dependence corruption" — at least if the efforts are the least restrictive way to remedy the corruption identified.[33]

Does that mean that any independent expenditure would also be corruption? It would not. The existence of "dependence corruption" turns upon a pattern of behavior by candidates. Independent expenditures, or contributions to independent political action committees, may be a necessary condition for inducing that pattern of behavior, but they are not sufficient. The random or sporadic appearance of a super spender would not be enough to induce the pattern of dependence that is at the core of "dependence corruption."

Yet I would maintain that the 2012 election has plainly established that such a pattern currently exists within our political system. Candidates today are clearly acting to induce such contributions — even if

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[32] These limits were originally the law, but were struck down by the D.C. Circuit in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), *cert. denied sub nom. Keating v. FEC*, 131 S. Ct. 553 (2010).

[33] This is a significant qualification that I have not tried to work through. Even if "dependence corruption" is a compelling interest, the First Amendment would require that Congress embrace the least restrictive means of advancing its interest. It is possible that the Court would view public funding as a less restrictive means of eliminating "dependence corruption." I don't consider that question here.

without a quid pro quo — because they understand themselves to be dependent upon them. Representative Dingell would need only to establish that pattern of behavior to distinguish his legislation from an attack on independent expenditures generally. That would in turn distinguish his bill from the issue decided in *Citizens United*, as well as in *Buckley v. Valeo*.

But would the Court actually uphold such a law grounded upon such a conception of corruption?

I've learned not to predict what particular Justices might or might not do. But I do believe that for an originalist at least, such a conception of corruption should be second nature. The classical conception of corruption that animated the Framers was not an obsession with the Rod Blagojevichs of the age. It was instead, as Teachout's work demonstrates well,[34] a focus on what I have called "dependence corruption." One clear aim of the system of checks and balances that they crafted was to assure that the institutions of government would be properly dependent. One clear means to that end was to block improper dependence.

So, for example, the Framers blocked an improper dependence of the legislature upon the Executive, by banning legislators from serving as executive officers.[35] They blocked an improper dependence of the courts upon the legislature, by giving judges life tenure with compensation that cannot be reduced.[36] They blocked an improper dependence of the executive upon the legislature, by an even more restrictive limitation on salaries and by securing to the President a power to veto any legislation.[37] And most relevant to the conception of "dependence corruption" that I have advanced here: the Framers banned members from receiving "any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State"[38] without the consent of Congress. And why would the Framers have banned these offerings? To assure not only that there would be no quid pro quo corruption, but also that there would not develop a practice of rewarding loyal disloyals with rich foreign rewards. To adapt a bit the quip of Congressman Jim Cooper ("Capitol Hill has become a farm league for K Street"), the Framers didn't want a Congress that was a farm league for the French Riviera.

The Framers saw the many ways in which government officials might be misled. They worked hard to avoid those misleadings. Against that background, it should be obvious that they would have

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[34] *See* Teachout, *supra* note 20.
[35] U.S. CONST. art. I, § 6, cl. 2.
[36] *Id.* art. III, § 1.
[37] *Id.* art. II, § 1, cl. 7; Art. I, § 7.
[38] *Id.* art. I, § 9, cl. 8.

recognized the corruption in a system in which elected representatives must first secure the support of a tiny fraction of domestic princes before even having a chance to achieve the support "of the people." They would certainly have called such a system "corrupt," and nothing in their Constitution — including their First Amendment — would have blocked Congress from addressing it.

II. ON THE ROLE OF "TRUST"

A second core argument in my book is about the role of "trust" within the system. My claim was that the people don't trust this government, in the sense that they don't believe their participation would be efficacious in controlling or directing it. As I wrote:

> If one believes "money buys results in Congress," one is likely to believe that participation will be ineffective. And as Rosenstone and Hansen found, voters' feelings of "political efficacy" and "government responsiveness" have a large effect on voter participation.[39]

Indeed, relying on work done with colleagues at Harvard's Department of Psychology, I described the way in which the mere presence of money in the wrong place leads people to mistrust institutions like Congress. It is this insight that sharpens the focus on just why the current system for funding campaigns undermines trust in this government.

Hasen rejects this relationship between money and trust by pointing to the work of Professors Nate Persily and Kelli Lammie. Their work, as he puts it, "show[s] that there is no good evidence of a correlation between campaign finance laws and public trust."[40] As Hasen continues:

> 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. . . . Persily and Lammie's evidence appears to undercut strongly Lessig's argument for public confidence as a reason for reform.[41]

Persily and Lammie's work is important. But its implications here are underspecified. As a recent poll by the Clarus Research Group found, eighty percent of Americans believe that "when Congress passes laws that affect the way political campaigns are financed," they believe those "laws have been designed more to help current members of Congress get re-elected [than] to improve the system."[42] If that finding is

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[39] LESSIG, *supra* note 1, at 168 (quoting STEVEN J. ROSENSTONE & JOHN MARK HANSEN, MOBILIZATION, PARTICIPATION, AND DEMOCRACY IN AMERICA 144 (1993)).

[40] Hasen, *supra* note 3, at 568.

[41] *Id.*

[42] CLARUS RESEARCH GRP., COMMON GOOD NATIONAL VOTER POLL ON JUSTICE AND DEMOCRACY (June 22–25, 2012) (on file with the Harvard Law School Library).

correct, then of course there is no "correlation between campaign finance laws and public trust."[43] But that doesn't mean that a more trustworthy system wouldn't increase the public's trust. No doubt the problem of how such a distrusted institution could credibly reform itself is difficult. That was precisely the point of my recent testimony to Congress about responding to *Citizens United*.[44] But it is a big and unfounded leap to go from "the people don't trust the existing campaign finance reforms" to "the people don't want new reforms" or "no reform would change perceptions of trust." Put more directly, if (and I concede, that is a big "if") the people could be convinced that a reform would produce a trustworthy institution, nothing in Persily and Lammie's work shows the people wouldn't trust the reform. I may well not trust the drug addict when he tells me (for the fiftieth time) that he is reformed. That doesn't mean I don't want him to reform, or that he shouldn't, or that if he did so in a credible way, I wouldn't trust him. In that case too there would be a low correlation between his reforms and my trust. In that case too, that correlation would be meaningless.

III. ON THE NATURE OF A ROOT

Finally, though Hasen acknowledges the significance of the harm caused by the corruption in the current system of campaign funding — indeed, his own work demonstrates that harm quite powerfully — much of his review tries to minimize the significance of that corruption by pointing to the many other flaws that wreck this government — in particular, polarization and the resulting gridlock that polarization produces.

But my claim in *Republic, Lost* was not that corruption is the most important problem facing our government today. Nor did I deny the significance of polarization. My claim instead was that the corruption may be exacerbating polarization, and that it had to be addressed first if we were ever to be able to address these more important problems later.

Hasen says I elide over how "much of what is wrong with Washington has to do with politics, not money."[45] But in fact my claim is that the money helps us understand the politics. He points for example to "the July 2006 House session [that] was 'spent mostly on flag

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[43] Hasen, *supra* note 3, at 568.

[44] *See Taking Back Our Democracy: Responding to* Citizens United *and the Rise of Super PACs: Hearing Before the Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. (2012) (statement of Lawrence Lessig, Professor, Harvard Law School).

[45] Hasen, *supra* note 3, at 580–81.

burning, stem-cell research, gay marriage, the Pledge of Allegiance, religion and gun control.'"[46]

But if it is true — as I quoted Professors Morris Fiorina and Samuel Abrams to say — that "the natural place to look for campaign money is in the ranks of the single-issue groups, and a natural strategy to motivate their members is to exaggerate the threats their enemies pose,"[47] then this list of issues is perfectly consistent with the theory that it is money that is driving (in part at least) the craziness in today's politics.

Indeed, the real puzzle in American politics is not the ideological polarization of the (politically active) left and right — if that's all there were, that would indeed be explained by shifting population demographics. The puzzle is the inconsistency in polarization: American politics is polarized on some issues, yet unified on others. On single-issue social issues, we see strong left/right polarization. But on issues that appeal to corporate America (think: the deregulation of Wall Street), we see extraordinary left/right unity. So what would explain that ideological inconsistency?

Again, I work hard in the book not to overclaim, and I don't believe I have the data to support any causal link. But it is clear that this pattern of polarization is perfectly consistent with a strategy to maximize campaign funding: speak to the extremes where it pays; speak to a common middle where it pays. This was the pattern that I flagged in my book, yet which Hasen's questions still leave unanswered.

Hasen does make a strong point about the relationship between the remedy I propose and this problem of polarization. As he writes, "[c]ampaign finance vouchers would not bring an end to the culture wars or cause those members of Congress at the extremes of their respective parties to suddenly become moderate."[48] That's certainly true. The only way to bring about "sudden" moderation is an election. And no doubt, regardless of how campaigns are funded, there are many who would continue to push the culture wars.

Indeed, the point could be made more strongly: in the voucher system that I propose, it may well be that handing $50 credits to every voter simply increases the incentive of parties to play to the extremes. But that depends in part upon whether Fiorina and Abrams are correct about their more fundamental claim: that it is not America that is

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[46] *Id.* at 581 (quoting Robert G. Kaiser, *House of Ill Repute*, WASH. POST, Aug. 13, 2006, at T7).

[47] LESSIG, supra note 1, at 98 (quoting MORRIS P. FIORINA & SAMUEL J. ABRAMS, DISCONNECT: THE BREAKDOWN OF REPRESENTATION IN AMERICAN POLITICS 168 (2009)) (internal quotation marks omitted).

[48] Hasen, *supra* note 3, at 581.

polarized, but rather the politically active class of America that is polarized.[49] That politically active class, however, is tiny. And the assumption I make about the voucher program is that it would increase substantially the number of citizens participating in politics. The extremists already exist. So on the margin, the appeal could well tend to the middle.

Could, not necessarily would. Arming every citizen with a voucher might well increase the average return from extremism. That depends on just how lost the middle in America is: it may well be that nothing could bring them back. If that is so, then indeed is this Republic lost. But we should discover that by trying to fix it and failing to fix it. Not by assuming that nothing could be done.

[49] *See* LESSIG, *supra* note 1, at 97–98.