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CORRUPT AND UNEQUAL, BOTH

*Lawrence Lessig**

Rick Hasen has presented the issue of money in politics as if we have to make a choice¹: it is either a problem of equality or it is a problem of corruption. Hasen's long and influential career in this field has been a long and patient struggle to convince those on the corruption side of the fight (we liberals, at least, and, in an important sense, we egalitarians too) to resist the temptation to try to pass—by rendering equality arguments as corruption arguments, and to just come out of the closet. Hasen had famously declared that the corruption argument supporting *Austin v. Michigan Chamber of Commerce*² was a fake³ and that the only basis for justifying the ban on corporate spending in *Austin* was equality, not corruption.⁴ And the U.S. Supreme Court famously (in our circles at least) agreed,⁵ in the process of striking down the ban on corporate spending in *Austin* and everywhere else.⁶ Thus, Hasen argues, it is a fool's errand to fake the corruption argument. We need instead, Hasen has constantly counseled, a bit of egalitarian pride. Be true to ourselves, Hasen tells us, and give up the pretense of corruption talk.

But as much as I admire Hasen's persistence and increasing passion—and I have a privileged perspective in this because I have had the pleasure of reading his forthcoming *Plutocrats United*,⁷ a book that will certainly mark him as the dean of this field—I think that he has presented us with a false dichotomy. It is not either corruption or equality. It is both. Our current system for funding campaigns is corrupt, but it is corrupt precisely

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1. See generally Richard L. Hasen, *Is "Dependence Corruption" Distinct from a Political Equality Argument for Campaign Finance Laws? A Reply to Professor Lessig*, 12 *ELECTION L.J.* 305 (2013).

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

3. See RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 112–14 (2003).

4. *Id.*

5. See *Citizens United v. FEC*, 558 U.S. 310, 381 (2010) (Roberts, C.J., concurring).

6. See *id.* at 365 (majority opinion).

7. RICHARD L. HASEN, *PLUTOCRATS UNITED* (forthcoming 2016).

because it violates a certain kind of equality. The violation is not an equality of speech, but an equality of citizenship.

Let me begin in familiar territory: Is it corrupt?

To get the sense in which the argument that I have made—and that Zephyr Teachout's brilliant book, *Corruption in America*,⁸ does the real work to defend—is an argument about “corruption,” we need to start with a key, analytical point.

There is a difference between predicating corruption of an individual and predicating corruption of an entity—not a difference in degree, but a difference in kind. To say that an entity is corrupt is not to say that it is filled with corrupt individuals—it may or may not be. It is perfectly conceivable—conceptually—to imagine a corrupt institution filled with noncorrupt individuals. And it is perfectly conceivable—conceptually—to imagine a noncorrupt institution filled with many corrupt individuals.

The reason for this is that the word “corruption” is describing different things when predicated of an institution, rather than of an individual—not necessarily, but conceivably. An institution is a system. To say that a system has been corrupted is to say that it is not functioning as designed; something has interfered with its ability to function as designed. That interference is the corruption.

Take a very practical example: the heat in an apartment building. Imagine each apartment has a thermostat. The thermostat reads the temperature in the apartment and then directs heat to the apartment based on that temperature. We could say, in this sense, the system was designed to create a certain dependence. The amount of heat delivered to an apartment is to depend on the reading of the thermostat, and it is to depend *exclusively* on the reading of the thermostat in that apartment. Or in Madison-speak, we could say, the heat is to “depend on the reading of the thermostat in each apartment alone.”⁹

But imagine the wires get crossed, so that the calls for heat from apartment 104 are being influenced by the need for heat in apartment 105. The old woman in 104 likes a moderate temperature. The crazy Alaskan in 105 likes it cold. So the Alaskan opens his window, the temperature in his apartment falls, the system records a falling temperature in what it understands to be 104 and 105, and thus, the system pumps up heat to 104 (because the Alaskan—being an Alaskan—is environmentally aware enough to turn his thermostat down).

It is a perfectly correct usage of the word “corruption” to say that this heating of apartment 104 has been “corrupted.” The heat depends not upon the readings from the thermostat in 104 alone; the heat depends as well upon the reading from the thermostat in 105. The dependence is thus not

8. See generally ZEPHYR TEACHOUT, *CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED* (2014).

9. Cf. THE FEDERALIST NO. 52, at 326 (James Madison) (Clinton Rossiter ed., 1961) (explaining that to have left open the right of suffrage to the regulation of the states “would have rendered too dependent on the State governments that branch of the federal government which ought to be dependent on the people alone”).

exclusive, as it should be by design, but has instead become jointly dependent on the reading from both thermostats. And that joint dependence will produce conflicting results. Our old lady will not get the amount of heat she wants because the system for heating in her apartment has been “corrupted.”

Teachout and I have argued that the Framers spoke in precisely this way. They certainly spoke of “corruption” as predicated of individuals—such that for them, the statement “Randolph is corrupt” means Randolph took money to bend American policy in ways the funder desired.

But they spoke as well of “corruption” predicated of an institution. Thus, the statement “The British Parliament is corrupt” is not necessarily a statement about the willingness of members of the British Parliament to take bribes. It is instead more often meant as a statement about the improper dependence of the British Parliament. Through a series of corruptions, the King had an influence within the House of Commons that the theory of the House of Commons rejected: the Commons was to be dependent on the People. But the presence of the influence of the King, through his placement, corrupted that exclusive dependence.¹⁰

My claim is that the Framers spoke in both ways, and I have tried to calculate just how frequently. In a study of the usage of the word “corruption” by the Framers,¹¹ of 325 uses of the word that were found, just six were used to mean *quid pro quo*.¹² This use of “corruption” accounted for only 1.8 percent of the overall usage and always spoke of an individual’s corruption.¹³ But in the balance of the cases, talk of individual corruption was relatively rare—just 43 percent.¹⁴ Much more common was talk of the corruption of institutions. Fifty-seven percent of the instances of the word being used were cases in which corruption was being predicated of an institution.¹⁵ And by far, the most common of those was what I have called dependence corruption—that an institution is corrupt because it has the wrong dependence within it.¹⁶

That is the state of our Congress today. It is corrupt not in an individual sense (I agree with Hasen and Dennis Thompson¹⁷ that ours is the least corrupt Congress in the history of Congress in this individual sense of corruption). But it is corrupt in an institutional sense. The Framers meant for the House, at least (and I will gloss the Senate for now, and let me

10. See TEACHOUT, *supra* note 8, at 35 (explaining that “[t]he king used wealth and patronage to gain influence over British parliamentarians, undermining constitutional government”).

11. See Brief for Professor Lawrence Lessig as Amicus Curiae Supporting Appellee at 9–10, *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) (No. 12-536).

12. *Id.* at 9.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 7–8.

17. See DENNIS F. THOMPSON, *ETHICS IN CONGRESS: FROM INDIVIDUAL TO INSTITUTIONAL CORRUPTION* 3 (1995); Richard L. Hasen, *Why Isn't Congress More Corrupt?: A Preliminary Inquiry*, 84 *FORDHAM L. REV.* 429 (2015).

therefore refer to Congress generally), to have a certain kind of dependence—a “dependence,” as Madison put it, “on the people alone.”¹⁸ Instead, Congress today has a dependence on the people and also a dependence on a tiny number of campaign funders. That additional dependence—like the dependence of Parliament on the King—is a corrupting dependence, because it undermines the exclusivity that the system was intended to have.

All that is familiar to anyone following this debate.¹⁹ But here is the additional part that loops back to the claim I made at the start: this is a corrupt system precisely because it denies a certain kind of equality.

Think about Texas in 1924. In the year before, the Texas Legislature had restricted the Democratic primary to whites only.²⁰ While all (in theory, at least) could vote in the general election, only whites could vote in the Democratic primary. Texas justified its restriction on the basis of an otherwise perfectly valid First Amendment interest—the right of citizens to associate as they wish. Yet we all now intuitively understand why, in 1924, that system of association denied blacks equal standing in the Republic. Whites had a procedural advantage over blacks in that system, and that procedural advantage denied blacks equality.

This is so, even though (again, just in principle) whites and blacks both could vote in the general election. This point highlights a confusion in the Supreme Court’s *Citizens United v. FEC*²¹ opinion. While arguing that any “appearance of influence or access . . . will not cause the electorate to lose faith in our democracy,” the Court invoked what seems, in the context, to be a correct principle of logic.²² As the Court wrote,

The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials. This is inconsistent with any suggestion that the electorate will refuse “to take part in democratic governance” because of additional political speech made by a corporation or any other speaker.²³

The suggestion of this argument is that because a group has “ultimate influence,” that group has no reason to doubt its influence within an electoral system. The White Primary demonstrates the logical flaw in that argument. Even if blacks had the right to participate equally in the general

18. THE FEDERALIST NO. 52, *supra* note 9, at 326 (James Madison).

19. See Hasen, *supra* note 1, at 305 (“I recently discussed my concerns about the dependence corruption argument in a *Harvard Law Review* book review of Lessig’s new book, *Republic, Lost*, and Lessig has responded with a defense in a *Harvard Law Review Forum* Reply and in his public presentations.”).

20. See 1925 Tex. Rev. Civ. Stat. 3107 (repealed 1985) (“In no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas, and should a negro vote in a Democratic primary election, such ballot shall be void and election officials shall not count the same.”).

21. 558 U.S. 310 (2010).

22. *Id.* at 360.

23. *Id.* (quoting *McCormell v. FEC*, 540 U.S. 93, 144 (2003) (quoting *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 390 (2000))).

election—which of course they did not,²⁴ but assume for the purposes of this argument that they did—that they were excluded from the nominating process means that their influence within the system was radically diminished. As Boss Tweed famously quipped, “I don’t care who does the electing, as long as I get to do the nominating.”²⁵ Tweed understood that “ultimate influence” was quite meaningless if a faction had controlling influence at an earlier stage of the electoral process.

The system we have for funding campaigns today is functionally equivalent to the White Primary. Call it the Green Primary.²⁶ The Green Primary is the contest to raise the money that candidates need to compete in an election. Winning that primary—or at least doing very well—is a condition to being a “credible” candidate in either the voting primary or general election. In 2012, Buddy Roemer was easily the most qualified candidate in the Republican primary for President: he was a three-term Congressman, he had been Governor of Louisiana, and he had built a successful community bank. Yet because he refused to take contributions greater than \$100, his campaign was not viewed as “viable,” and he was not permitted to join even a single national debate. His lack of campaign funding meant he was not a “credible” candidate.²⁷

Likewise in the 2014 New York Democratic primary for Governor, Zephyr Teachout was a politically attractive and strong candidate, advancing a critically important anticorruption platform in a context in which corruption reform had become a central issue in the gubernatorial campaign.²⁸ Yet the Governor refused to debate Teachout,²⁹ and that refusal was generally accepted by the press because her campaign was not viewed as “credible.” But here again, credibility was a function of the money. Teachout eventually raised close to \$600,000.³⁰ Cuomo had raised over \$30,000,000.³¹ So despite her eventually winning close to 35 percent

24. See generally I HANES WALTON, JR. ET AL., *THE AFRICAN AMERICAN ELECTORATE: A STATISTICAL HISTORY* (2012).

25. SUSAN WELCH ET AL., *UNDERSTANDING AMERICAN GOVERNMENT* 223 (13th ed. 2011).

26. Cf. Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 *YALE L. & POL’Y REV.* 273, 273–74 (1993).

27. See Lawrence Lessig, *The Last Best Chance for Campaign Finance Reform: Americans Elect*, *ATLANTIC* (Apr. 25, 2012), <http://www.theatlantic.com/politics/archive/2012/04/the-last-best-chance-for-campaign-finance-reform-americans-elect/256361/> [<http://perma.cc/R6FY-LANF>].

28. See Susanne Craig et al., *Cuomo’s Office Hobbled Ethics Inquiries by Moreland Commission*, *N.Y. TIMES* (July 23, 2014), <http://www.nytimes.com/2014/07/23/nyregion/governor-andrew-cuomo-and-the-short-life-of-the-moreland-commission.html> [<http://perma.cc/34S3-MMZK>].

29. See Thomas Kaplan, *Cuomo Is Running but Isn’t One to Talk About It*, *N.Y. TIMES* (Sept. 2, 2014), <http://www.nytimes.com/2014/09/03/nyregion/cuomo-is-running-but-isnt-one-to-talk-about-it.html> [<http://perma.cc/3876-DJ3D>].

30. Philip Bump, *Andrew Cuomo Spent Almost 40 Times As Much for His Votes As Zephyr Teachout*, *WASH. POST* (Sept. 10, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/09/10/andrew-cuomo-spent-almost-40-times-as-much-for-his-votes-as-zephyr-teachout/> [<http://perma.cc/TV7A-FS4S>].

31. *Id.*

of the vote,³² it was uncontroversial for the Governor to treat her failure in the Green Primary as a justification to refuse even the minimal engagement of a debate.

Yet we do not all participate equally in the Green Primary. Participation instead is quite selective. In 2014, 5.4 million Americans contributed something to a federal campaign.³³ That is less than 2 percent of America.³⁴ But among that 2 percent, the significance of those contributors was quite varied. The top 100 contributors gave almost as much as the bottom 4.75 million.³⁵ The top 1 percent of donors accounted for about 70 percent of the Super PAC money spent in the election cycle.³⁶ Less than 125,000 gave at least the maximum amount permitted in a cycle (\$2600).³⁷ Less than 30,000 gave in aggregate \$10,000 or more.³⁸ The significant (and hence, relevant) funders of American politics are very few. Yet when one recognizes that candidates for Congress and members of Congress spend anywhere between 30 percent and 70 percent of their time courting those very few contributors,³⁹ the significance of their influence becomes obvious. We have evolved a system for funding campaigns that makes candidates dependent upon a tiny fraction of the 1 percent to secure an essential step in the process of election.

The Green Primary violates equality for the same reason that the White Primary did. This is not a violation of speech equality, but of equality of citizens. An essential step in the process of elections excludes citizens unjustifiably. In the White Primary, that exclusion was based on race. Under the Fourteenth and Fifteenth Amendments, it was unconstitutional. In the Green Primary, that exclusion is based on wealth. Against the background of a fundamental commitment to a representative democracy “dependent on the People alone,”⁴⁰—where “the People” means “[n]ot the rich, more than the poor,”⁴¹—that exclusion is unjustifiable. The corruption that I described at the start of this Article produces the inequality that we

32. See *New York State Primary Election Results*, N.Y. TIMES, <http://elections.nytimes.com/2014/results/primaries/new-york-state> (last visited Oct. 21, 2015) [<http://perma.cc/9MNN-NQ2C>].

33. OPENSECRETS.ORG, <https://www.opensecrets.org> (last visited Oct. 21, 2015) [<http://perma.cc/VYT3-NHJ3>].

34. *Id.*

35. Kenneth P. Vogel, *Big Money Breaks Out*, POLITICO (Dec. 29, 2014, 5:32 AM), <http://www.politico.com/story/2014/12/top-political-donors-113833.html> [<http://perma.cc/N2FZ-WUBQ>].

36. *2014 Super PACs: How Many Donors Give?*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/donor_stats.php (last visited Oct. 21, 2015) [<http://perma.cc/YY68-BGH7>].

37. *Donor Demographics*, OPENSECRETS.ORG, <https://www.opensecrets.org/overview/donordemographics.php> (last visited Oct. 21, 2015) [<http://perma.cc/ZPB8-PVJS>]; *2014 Campaign Contribution Limits*, OPENSECRETS.ORG, <https://www.opensecrets.org/overview/limits.php> (last visited Oct. 21, 2015) [<http://perma.cc/SS5W-G64C>].

38. *Donor Demographics*, *supra* note 37.

39. Lawrence Lessig, Opinion, *More Money Can Beat Big Money*, N.Y. TIMES (Nov. 17, 2011), <http://www.nytimes.com/2011/11/17/opinion/in-campaign-financing-more-money-can-beat-big-money.html> [<http://perma.cc/5A93-685K>].

40. THE FEDERALIST NO. 52, *supra* note 9, at 326 (James Madison).

41. THE FEDERALIST NO. 57, *supra* note 9, at 351 (James Madison).

must remedy. The two are not in conflict; rather, the two complement each other.

Critically, my argument is not (necessarily) a constitutional one. While the White Primary violated the Constitution, I am not claiming the Green Primary also violates the Constitution. That was the argument of Jamin Raskin and John Bonifaz,⁴² and it may or may not be correct as a matter of constitutional law.

My claim instead is one part political and one part constitutional. I continue to believe that under the Court's jurisprudence, the kind of "corruption" that I and Teachout have described should justify at least some prophylactic campaign finance reforms. Not all reforms—I do not believe the regulation that *Citizens United* struck down could be justified with even this conception of corruption. But I do believe that this conception shows why *SpeechNow.org v. FEC*⁴³ was wrongly decided, and possibly *McCutcheon v. FEC*⁴⁴ too.

But whether the Green Primary violates the Constitution, it certainly violates a political commitment of our tradition of equal representation—at least in the democratic branch of our representative democracy, which after the Seventeenth Amendment, should include the Senate. That violation should at least motivate representatives to adopt reforms that might mitigate this inequality. And it is here, ultimately, that Hasen, Teachout, and I firmly agree: the single most important reform of our political system would be to change the way elections are funded. Hasen and I have pressed for vouchers as the way to do that.⁴⁵ Teachout has argued for public funding more generally.⁴⁶ Either way, this is the real and important fight that should unite us. Whether strategically it makes sense to continue to describe our system as "corrupt" is a small point. That "corruption" is inequality is the more important and fundamental agreement.

There is one further implication of this argument that is useful to note, at least for jurists who care about the continued fidelity of our system to founding values. It is perfectly clear that the equalities that are most salient today constitutionally were not part of the framing conception. The nation that protected slavery was not committed to racial equality. A nation that denied women the right to vote until the beginning of the twentieth century was not committed to sex equality. And no nation in the eighteenth century would have even recognized the question of sexual orientation equality.

42. Raskin & Bonifaz, *supra* note 26.

43. 599 F.3d 686 (D.C. Cir. 2010).

44. 134 S. Ct. 1434 (2014).

45. See generally Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1 (1996); Dylan Matthews, *Can Vouchers Fix Campaign Finance?*, WASH. POST: WONKBLOG (July 22, 2012), <http://www.washingtonpost.com/news/wonkblog/wp/2012/07/22/can-vouchers-fix-campaign-finance/> [<http://perma.cc/E79N-DLFM>].

46. See Zephyr Teachout, Opinion, *Legalized Bribery: Zephyr Teachout on Sheldon Silver, Corruption and New York Politics*, N.Y. TIMES (Jan. 26, 2015), http://www.nytimes.com/2015/01/26/opinion/zephyr-teachout-on-sheldon-silver-corruption-and-new-york-politics.html?_r=0 [<http://perma.cc/NCW6-CKR7>].

These are the equalities that dominate equal protection analysis for us today, but these equalities were nowhere present in the political conception of equality of our Framers.

Yet as Madison's description of the people evinces—"[n]ot the rich, more than the poor"⁴⁷—the fight against the aristocracy was a critical dimension of equality that was central to the Framers. The means of that fight are obscure to us—we read the property requirement for voting as a preference for wealth; the Framers understood it as a way to avoid the ability for the rich to buy the votes of the poor.⁴⁸ But regardless, the Framers clearly expressed an ideal that citizens should be equal with respect to wealth, whether or not they were equal with respect to race or sex.

Yet the Court has fixated on a related, but distinct, idea, which has now practically disabled Congress from pursuing this founding ideal of equality. As the Court wrote in *Buckley v. Valeo*,⁴⁹ "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"⁵⁰ But whether the Constitution forbids state action to achieve speech equality, it certainly does not forbid (indeed, I believe it mandates) state action to achieve citizen or political equality. And the mere fact that regulation might be justified by reference to political equality cannot be used to invalidate that regulation simply because it might also be used to justify speech equality. The conflation of the two is a logical error: a perfectly equal speech market (imagine every candidate gets exactly the same amount of public funding to run her campaign) does not entail political equality (imagine that public funding in the context of a white primary system), and a system with perfectly equal citizens does not entail speech equality (if every voter had a voucher to use to fund political campaigns, some campaigns would have more money than others). The Court could be perfectly correct about the First Amendment principle. But it is perfectly fallacious to extend that principle into every sphere of the Constitution.

We should not, as scholars, be fighting about which flaw our Republic reveals—inequality or corruption. We should be united—let us say, not citizens or plutocrats, but scholars, united—in the view that our Republic is both unequal and corrupt. And that it is time we find a way to fix it.

47. THE FEDERALIST NO. 57, *supra* note 9, at 351 (James Madison).

48. *See generally* Brief for Professor Lawrence Lessig, *supra* note 11.

49. 424 U.S. 1 (1976).

50. *Id.* at 48.