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A Reply to Professors Cain and Charles

Lawrence Lessig*

I am grateful to Professor Cain and Professor Charles for their insightful and careful replies.¹ I am grateful as well to the *California Law Review* for giving me a chance to offer a brief reply.

I.

Professor Cain is skeptical of an “original-intent account” because he believes it “rests on too many contestable counterfactual assumptions regarding what the Founders would have thought.”²

So am I. There are plenty of cases in which the Court entertains just such a complicated inquiry—Second Amendment cases are just the most obvious—and I share the skepticism of political science (and many of my colleagues in the legal academy) about whether such inquiries actually identify anything about the understanding of the Framers, as opposed to the politics of the judges.

But my argument, based on the Jorde Symposium lecture, is not counterfactual. My argument is factual: What did the Framers mean by the word “corruption?” Drawing upon their words and their usage, my claim is that they used the term “corruption” in a wider range of contexts than we do today³—corruption predicated of institutions as well as individuals. And of all its different senses, quid pro quo corruption was likely the least significant case. I may or may not be right about that. But there’s nothing counterfactual in that argument: to the contrary, it is a claim about how they in fact used the term.

That original understanding is relevant to current doctrine because the Supreme Court has made “corruption” so central to determining the scope of the First Amendment. Thus my argument to the originalists at least is that if

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* This Reply follows the responses of Professor Bruce Cain and Professor Guy-Uriel Charles to Professor Lessig’s essay *What an Originalist Would Understand “Corruption” to Mean*, 102 CALIF. L. REV. 1 (2014).

1. See Bruce E. Cain, *Is “Dependence Corruption” the Solution to America’s Campaign Finance Problems?*, 102 CALIF. L. REV. 37 (2014); Guy-Uriel E. Charles, *Corruption Temptation*, 102 CALIF. L. REV. 25 (2014).

2. Cain, *supra* note 1, at 38.

3. See Lawrence Lessig, *What an Originalist Would Understand “Corruption” to Mean*, 102 CALIF. L. REV. 1, 5–11 (2014).

you use the Framers' conception of corruption, you cannot conclude that it reached quid pro quo corruption alone. Of course, a non-originalist could well insist that the relevant sense of "corruption" is the sense of the Court circa 1976 (when *Buckley v. Valeo* was decided). But I don't see how an originalist could find that argument persuasive.

Professor Cain has also mistaken my view of the Framers' affection for "direct democracy." As he writes, "the argument that the Constitution's intent was only direct popular sovereignty ignores the Electoral College and U.S. Senate elections, which are based on geography."⁴

But my claim is not that the Framers imagined the United States government as embracing the idea of direct democracy. That truly would be an ignorant reading of their work. Instead, in my view, the Framers intended a mixed government, with some bits dependent upon the people (the House, and possibly the President), some bits dependent upon the States (the Senate), and some bits dependent upon the law (the Courts). My use of Madison's phrase in *The Federalist* No. 52 ("dependent on the people alone") predicated of the House only. And the corruption I am describing is therefore a corruption of the House (and after the Seventeenth Amendment, also, I think fairly, the Senate). One might well quibble about whether a government with a corrupt legislature is also and necessarily properly denominated "corrupt." I wouldn't oppose such a usage. But I am not saying our government is corrupt because it doesn't overall perfectly embody a system of direct democracy. What a disaster it would be if it did!

Professor Cain is likewise skeptical of my account of why the Framers excluded non-property holders from the right to vote. He believes that such exclusion was motivated by "outright prejudice against women and minorities."⁵

So do I. But my claim was not about women and minorities. That exclusion grew out of the views of the Framers that we rightly call sexist and racist. The exclusion that I was speaking of was of the property-less (which women were not necessarily though blacks certainly were likely to be): the exclusion of white male citizens who did not own property was justified by the Framers, counterintuitively, as a protection against aristocracy. Again, skepticism about that view is certainly fair. But my claim was only that it could be understood as consistent with the desire to avoid aristocracy.

Finally, Professor Cain is surprised that my "reform ideas are surprisingly narrow." He writes that he "would expect much bolder solutions such as Rick Hasen's voucher proposal or Ackerman and Ayres's anonymous donor bank and patriot dollars design."⁶

4. Cain, *supra* note 1, at 38.

5. *Id.* at 39–40.

6. *Id.* at 43.

Good! Because I too am a voucher supporter, as chapter 16 of my book, *Republic, Lost*, describes.⁷ My objective in the Jorde Symposium lecture, however, was not to reprise that argument, but instead to advance a much more limited claim: that properly understood, an original understanding of the term “corruption” reaches beyond quid pro quo corruption, and that if it did, that understanding would justify a wider range of corruption-related regulation.

Professor Cain, however, is missing something significant if he discounts this additional reach. If indeed “corruption” includes “dependence corruption,” then Congress should have the authority not just to limit aggregate contributions to candidates, but also to limit contributions to (what are now called) “Super PACs.” Congress couldn’t, under this theory, limit what Super PACs spend. But it would be a huge difference if Congress could limit the amount that could be contributed. Let Soros or the Koch brothers spend their money directly. Such a liberty, the Court has held, is protected by the First Amendment. But people like Soros and the Koch brothers have had that liberty since 1976. It was only when it was extended to include the right not to expend, but to contribute unlimited amounts to Super PACs (and not by the Supreme Court but by the D.C. Circuit) that independent spending really took off.

If we could cabin contributions to Super PACs (as I argue that we can in the Jorde lecture) and enact a broad-based voucher program (as I describe in *Republic, Lost*), that would be reform unlike anything America has seen in a hundred years. Of course, that wouldn’t be all the reform that democracy in America needs. But it would be an incredible first step.

II.

By contrast, there is little in Professor Charles’s essay that I disagree with. It is true, I have “succumbed” to the “corruption temptation,” but only in the sense that I am engaging in a conversation the terms of which have been set, Charles rightly notes, by the Supreme Court to turn upon “corruption.” Charles, however, doesn’t want to engage in that conversation. He would rather talk about participation, as well as the other important values that are implicit in any well-functioning democracy.

But I don’t think there’s some grand either/or here. I agree with Professor Charles that the problem I am describing is a problem of representation. “The state,” as Professor Charles nicely puts it, “has created a barrier for political participation (wealth) that some citizens will never be able to overcome.”⁸

That indeed is a participation problem. But it is also a corruption problem, and there’s no reason it can’t be both. It is both, both because of the reasons Professor Charles advances, and because of the understanding of “corruption”

7. LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS POLITICS—AND A PLAN TO STOP IT* (2011).

8. Charles, *supra* note 1, at 34.

that the Framers had. Again, corruption for them predicated of institutions as well as individuals, and among “institutional corruptions,” “improper dependence” was the most common kind.

Professor Charles rejects my definition, however, because he believes I have not defined “dependence corruption” precisely. My mistake, though, is not in the definition. It is in failing explicitly to exclude from the definition the things not meant to be included.

For example, after precisely summarizing my primary definition of dependence corruption, Charles offers a second “definition” that he argues I also advance: “Under a second definition, ‘dependence corruption’ is the way that legislators bend their views to keep the funders happy.”⁹

But any “bending” is not part of the definition of “dependence corruption.” “Bending” is a consequence of dependence corruption. Just as liver failure is not alcoholism, even if it can be a consequence of alcoholism, “bending” is not “dependence corruption,” even if it can be a consequence of dependence corruption.

Likewise with Charles’s third characterization of my definition, that “Congress is dependent upon a minority of the people and not the whole people.” That’s accurate but incomplete. The problem isn’t that “the funders” are a minority. The problem is that they (1) are a minority that (2) couldn’t possibly be said to represent “the people”—and again for precisely the reason Charles describes: because of a “barrier . . . (wealth) that some citizens will never be able to overcome.”¹⁰ Some minorities, however, could be said to represent “the people.” That’s why I pointed to Jim Fishkin’s deliberative poll,¹¹ which would not, on this understanding, constitute dependence corruption because though constituted by a minority, that minority is representative in a way that “the funders” could not be.

In the end, however, I certainly share Professor Charles’s aspiration for a richer theory of participation than the Court now encourages. I too would build upon the powerful work of Spencer Overton and others to describe a rich understanding of what representation should mean. I agree with him, contra Rick Hasen, that such a theory is not an “equality theory,” but a theory about how representation within a democracy must live.

But as a legal scholar, we can’t afford the luxury of ignoring the debate as the Court has framed it. On their own terms, there is no justification for their restricting Congress’s power to address the corruption that I have described. I’m all for seeding a framework for the next generation of scholars and judges—but only after we’ve done as much as we possibly can for this generation, and this democracy.

9. *Id.* at 30.

10. *Id.* at 34.

11. *See* Lessig, *supra* note 3, at 18.