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Response

Lawrence Lessig

*This article is part of **[Democracy After Citizens United](#)**, a forum on the Supreme Court's decision to strike down McCain-Feingold and what it means for our democracy.*

There's much that I agree with in these responses, some that I don't, and some that I am uncertain about.

I wouldn't change a word in **[David Donnelly's precisely focused comment](#)**. It is the challenge of reformers to move the conversation beyond the essentially failed policies of the last three decades (what he calls "regulation") to policies that might not only pass Supreme Court review, but work.

Nor would I change a word in **[Marvin Ammori's contribution](#)**. Indeed, I have long wondered why libertarians and (at least some) conservatives are not naturally attracted to his type of criticism. The longstanding complaint of organizations such as the Cato Institute has been the problem of "rent-seeking"—private actors using government to get a benefit they couldn't get in the market. Ammori's response makes palpable the link between the "corruption economy" (as he nicely puts it) and the explosion of rent-seeking. It is this connection that has attracted libertarians less tied to the politics of Washington (such as the legal scholar Richard Epstein) to the idea of citizen-funded elections.

Ammori extends this general attack on rent-seeking to a more important point about economic growth. In any corruption economy, the more the corruption grows (institutional as well as personal), the less innovation the economy will support. **[Ciara Torres-Spelliscy's comment](#)** perfectly complements this point: to the extent that we encourage the corruption economy, there is no doubt that it will drive corporations to their own form of institutional corruption. The short-term profits from rent-seeking certainly could drive corporations to weaken their traditional mechanisms for technical and business innovation (the kind coming from engineers and scientists) in order to strengthen a new mechanism for policy innovation (the kind coming from lawyers and lobbyists). We all suffer if that happens.

Likewise, I have no disagreement with **[Nancy Rosenblum's insightful critique](#)** of the weirdly emaciated status of political parties in current American election law. I like the messiness of (political) parties, and I don't hope to purify or sterilize politics. My only aim is to remove the bad parts that reflect not the errors of the people, but the distortions engendered by funders.

I'm less certain, however, about **[Torres-Spelliscy's confidence in the reform of corporate law](#)**. No doubt there are many corporations that would be wise to resist the siren of rent-seeking. But not all corporations. Was Disney wrong to push to extend the terms of copyright? Of course not—if viewed from the perspective of its shareholders alone. From the perspective of the public, however, the conclusion definitely is otherwise. Thus I think we should focus on strengthening the role of the public interest in policymaking, rather than hoping that private actors might reflect the public interest in their own lobbying agendas.

[Allison Hayward](#), **[David Bossie](#)**, and **[Will Wilkinson](#)** make an important mistake, which, because they all make it, suggests that the source of the error is my own explication.

My essay is an effort to identify an important governmental interest that *Citizens United* seems to

deny—the interest in avoiding dependency corruption. My claim is that dependency corruption is just like venal corruption in that both demonstrate a policy process gone wrong. The government has an interest in avoiding both kinds of corruption. Or more precisely, if there’s an interest in avoiding the one, there’s an interest in avoiding the other.

However, nothing in my essay says that this interest necessarily would justify, as **Hayward suggests**, “enact[ing] restrictions on who may be a part of the [democratic] debate.” Indeed, nowhere in my piece do I endorse restricting anyone (or anything) from saying whatever they want. Were I a justice on the Supreme Court, I may well have concurred in the judgment that Citizens United should be allowed to promote its video with corporate funds. That is because I don’t see the nonprofit corporation of Citizens United as remotely raising an issue of dependency corruption.

But I wouldn’t have concurred in an opinion that suggested that Citizens United’s video could be promoted because Congress has no power to address the problem of dependency corruption. The protection of Citizens United’s free-speech rights need not come at the expense of judicial sanction for dependency corruption, yet Justice Kennedy’s opinion seems to accomplish just that.

My complaint is not that special interests participate in Congress. It is that members are dependent on them.

As with every regulation triggering First Amendment review, the state interest in question must be promoted in the least-restrictive way. In this respect, I agree with **Hayward, Wilkinson, and Bossie’s** larger concerns about censorship. And in the case of avoiding dependency corruption, it may well be that speech restrictions are unnecessary and citizen-funded elections sufficient to promote that end. I do not resolve that question in my essay.

While I take the blame for some reader confusion, I don’t accept responsibility for all of **Hayward’s mistakes**. I don’t “fret” about an “influence” that “um, exercises influence!” I “fret,” as the second paragraph of my essay states, about a kind of influence that “weakens the effectiveness of an institution, especially by weakening public trust in that institution.”

Neither do I reason that “the participation of special interests in campaigns corrupts Congress.” My complaint is not that special interests participate. It is that members are dependent upon them. Not every system in which special interests participate creates improper dependency. As I point out in my essay, the Supreme Court is littered with briefs from special interests arguing one side or another in important cases. In this sense, special interests participate in the proceedings of the Court, but no one credible would suggest that the Supreme Court is therefore dependent upon those interests rather than the law. Thus Congress, like the Court, has its own proper dependency. But while the Court has been keen to protect its own integrity [e.g., *Caperton v. Massey* (2009), which concerns a judge’s duty to recusal in cases of conflict of interest] it has been less generous to Congress (e.g., *Citizens United*).

Wilkinson’s thoughtful essay misses a qualification in my own, though again, the fault may be mine for structuring the point poorly. Wilkinson accuses me of violating my own demand that the Court be more empirical. He points out that I have not offered my own evidence to support the claim that the presence of significant special-interest funding is responsible (at least in part) for the loss of confidence in Congress.

But my complaint is not that Kennedy got the facts wrong. It is that he has foreclosed us from even considering the facts. My essay is quite explicit about the tentativeness of my own conclusions: “I have my intuitions,” I write. “Maybe they are wrong.” The work to test those conclusions is underway.

In a related vein, **Wilkinson** makes a point hinted at by **Hayward**: “Studies that control for party, ideology, and constituency,” he writes, “show little if any relation between campaign contributions and roll-call votes by members of Congress.”

This statement is true, but a common implication is false. For instance, in **a 2002 study**, researchers Stephen Ansolabehere, John de Figueiredo, and James Snyder found no connection between contributions and roll call votes, but it would be incorrect to infer that they have shown that money doesn't affect results. That is not their claim. Indeed the authors expressly describe how, despite their finding, it is “still possible that campaign contributions have significant effects on economic and social policies.” Their claim, instead, is about what the numbers can show. Compare: if you had flown a reconnaissance plane over the campuses of every church whose clergy have been charged with sex abuse, I doubt you would have captured images of sex abuse anywhere. But it would be idiotic to state that that lack of evidence proves there was no sex abuse.

That fact doesn't show (except in the minds of conspiracy nuts) that money *does* have an influence on Congress. But there are endless studies relying on methods other than statistics to bear out what most Americans already believe—that money affects results in Congress. Consider ***Speaking Freely***, a two-volume collection sponsored by the Center for Responsive Politics, filled with stories by former members of Congress describing precisely how money affects results in D. C. Or have a look at “The Cash Committee,” a fantastic **December 2009 story by Ryan Grim and Arthur Delaney in *The Huffington Post***, describing why frontline Democrats on the House Financial Services Committee parted with their more senior Democratic colleagues and voted to exempt car dealers from the regulations of the Consumer Financial Protection Agency Act: money, the prospect of contributions to their campaigns. These former members of Congress may not be able to interpret statistics, and the authors of the *Huffington Post* story may not have a regression to demonstrate what their reporting shows. But we should remember that humankind understood lots before R. A. Fisher applied the “t-distribution” to regressions. If we're to understand much of the world today, we can't hide behind the claims of what statistics can't see.

Finally let me address the issue I am most conflicted about: the call for a constitutional amendment.

I agree with **Representative Edwards** that “we must not be afraid to take bold action.” And I agree with her, **John Bonifaz, and Jeffrey Clements** that the independence bought with citizen-funded elections could well be swamped by the funding that *Citizens United* has unleashed. But I don't agree with their particular remedy, and I don't believe that merely introducing a resolution in this Congress to amend the Constitution is “bold.”

I don't think we should want Congress to have the power to “regulate the expenditure of funds for political speech by any corporation, limited liability company, or other corporate entity.” We have seen enough to know the danger in giving this government the ability to silence the American Civil Liberties Union or the Environmental Defense Fund. Why would we want that power constitutionally sanctioned? Instead, we should encourage the widest range of speech, whether by corporations or aliens or dolphins. The problem in our democracy is not corporate speech. The problem is improper dependency.

I also don't believe that we should be spending reform cycles pushing this Congress to pass its own constitutional reform. It's hard enough to count to 60 in the Senate. It's impossible to count to 67. So while resolutions to amend the Constitution may well be good rallying points, and certainly help to raise money, I don't think rallies or fundraising are bold.

Let's start by changing the constitution of Congress—filling it with members who can stand

independent of their funders, dependent upon the people alone. Once we have that, then we can see what other changes our Constitution needs.

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