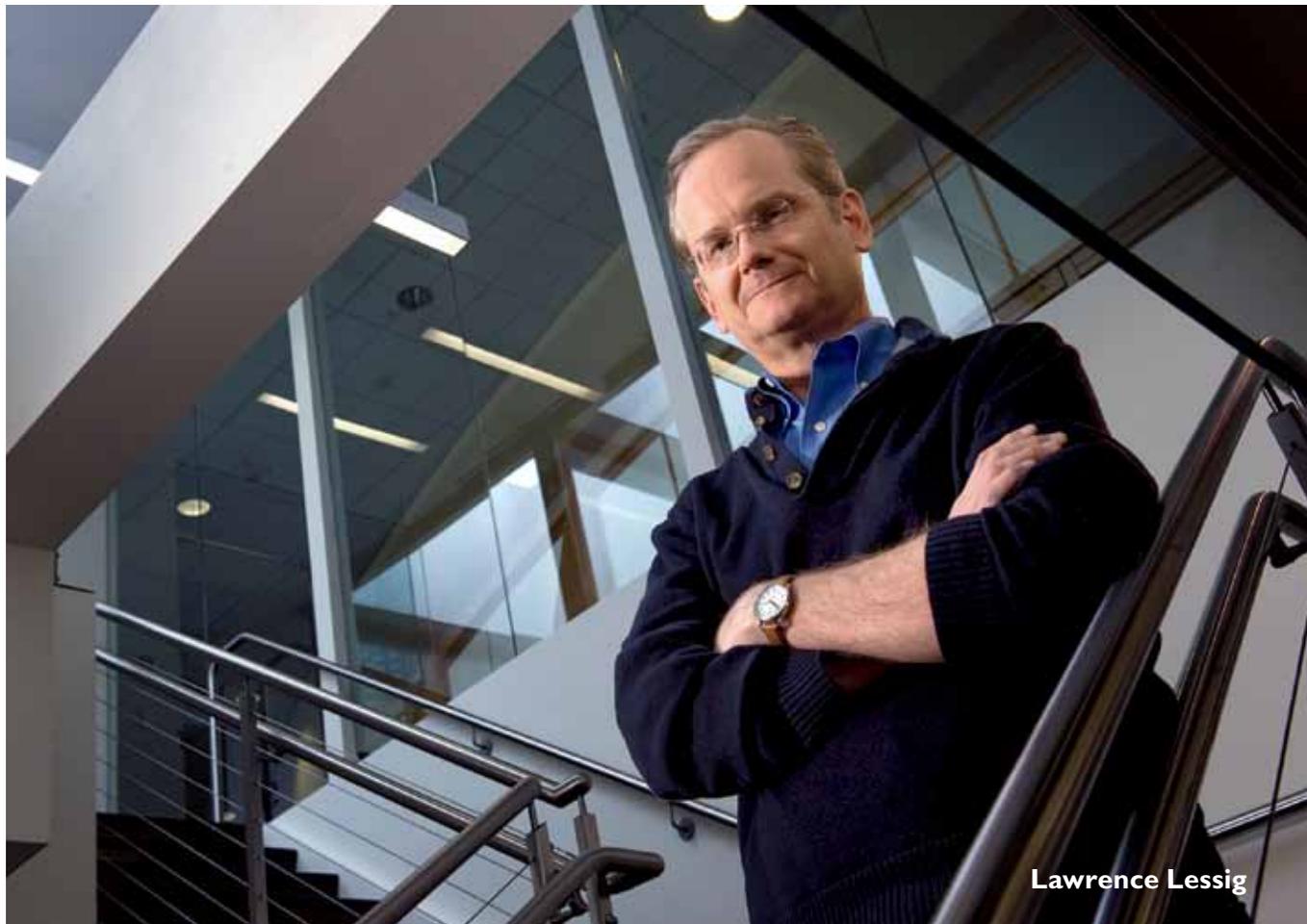


# A Radical Fix for the Republic



Lawrence Lessig

**F**OR A DECADE, Lawrence Lessig, a mild-seeming legal scholar, pursued the intricacies of updating American copyright law to reflect the rise of the digital era, the Internet, and new means of producing and disseminating texts, music, images, and software. Based first at Harvard, then Stanford, he co-founded organizations such as Creative Commons, a nonprofit that gives people legal tools to control use of their creative output, and argued that mashups (of songs or YouTube videos, for example) are culturally important products that (in some circumstances) can be legal under the principle of fair use.

He felt he was making progress: “The public was getting it.

Lawrence Lessig thinks American democracy requires a constitutional overhaul to counter the “economy of influence.”

by JONATHAN SHAW

Businesses were getting it. Universities. Everybody had come to the recognition that ‘There is something wrong with the existing system,’ and that it needed to be updated—but we were making no progress in the context of *polymakers*.” At first, he was puzzled. But gradually he realized the problem lay in the sclerotic, gridlocked policymaking system itself—particularly in Congress. “We weren’t making any progress because money was so inherent and tied to decisions,” he says now. “The public domain had no lobbyists. The ideas of the public domain weren’t even *on the table* because there was no infrastructure for putting them there.”

As long as Congress remains in the thrall of “the economy of

influence”—its members dependent on money to fund reelection campaigns—“no progress would be made on copyright or *any other* public-policy question,” he explains. “It wasn’t just esoteric areas like copyright, it was also fundamental issues like global warming, healthcare, or any number of others.”

That set Lessig off in a new direction—including an exploratory, aborted run for Congress and, ultimately, in 2008, a return to Harvard. He now directs the Safra Center for Ethics, serves as Furman professor of law and leadership at Harvard Law School, and investigates the American government and what ails it. His findings, recently published in *Republic, Lost: How Money Corrupts Congress—and a Plan to Stop It*, have led him to conclude that nothing less than overhauling the way elections are funded—involving a tool never before invoked in American democracy—is required.

## “A Republic, if You Can Keep It”

LESSIG comes to his conviction that American democracy is dysfunctional as a lawyer and citizen who has migrated from Reagan Republican to concerned liberal. His apprehensions about Congress transcend partisanship. He has worked with Tea Party leaders and Occupiers alike because he sees grass-roots intervention as the only way to fix a system that is broken. A host of issues threatens the nation, he points out, and every informed citizen knows it, yet Congress can’t achieve much. Elected representatives deadlock on key points such as reform of the financial system—after its failures nearly cause a global meltdown—even when solutions seem obvious and attainable.

When Lessig contemplates this impasse, he sees political polarization as merely a symptom of a much deeper sickness: Congress has been “corrupted” by its members’ dependence on money from lobbyists—and from the special interests hiring those lobbyists—to fund their reelection campaigns.

This “dependence corruption,” described in *Republic, Lost*, does not mean venal corruption: bribery or bags of cash for personal use. The Framers of the Constitution, he points out, sought to guard against that by explicitly outlawing the corrupting potential of gifts from foreign nations in Article 1.

A portrait set in diamonds (a gift to Benjamin Franklin) and other expensive gifts had been lavished on representatives of the emerging nation by European rulers, and “raised a reasonable concern,” Lessig writes. “Would agents of the republic keep their loyalties clear if in the background they had in view these expected gifts from foreign kings?” Likewise, “the Framers wanted to avoid...Parliament’s loss of independence from the Crown” resulting from royal gifts of “offices and perks” that pulled members “away from the view of the people they were intended to represent.” The Founders were aware of the fragility of the system they had fledged: when Franklin walked from Independence Hall as the Constitutional Convention ended, Lessig writes, a woman asked what he had wrought. “A republic, madam,” he replied, “if you can keep it.”

The Framers, Lessig says, had *just one* kind of dependence in mind for members of Congress: a dependence on the people. He quotes *The Federalist* (the then-anonymous essays by Alexander Hamilton, James Madison, and John Jay that are often used as a contemporary account of the Framers’ intentions) to make this point: number 52 describes the House of Representatives as that “branch of the federal government which ought to be

dependent on the *people alone*” (emphasis added).

But in the last two decades, Lessig writes, members of Congress have developed a fearsome dependency: campaign cash. The total amount spent on campaigns by all candidates for Congress in 2010 was \$1.8 billion. Fundraising has become a way of life, and extravagant giving has been institutionalized; only the diamonds are missing.

Lessig cites the example of Senator Max Baucus (D-Montana), chairman of the Senate Committee on Finance, whose position gave him a critical role in the debate over President Obama’s healthcare proposal. Between 2003 and 2008, Baucus received \$5 million in campaign contributions from the financial, insurance, and health industries. But Lessig also cites similar examples from both sides of the aisle, blaming neither political party in particular. The corruption, he says, is *systemic* and *systematic*: in 2009 alone, lobbyists spent \$3.5 billion, or about \$6.5 million per each elected member in Congress.

Do gifts of money really change recipients’ behavior? Studies have suggested that, on any particular issue, there is no apparent link between a legislator’s vote and lobbyist money—the data don’t show a pattern that can be discerned. “But certainly,” Lessig says in an interview, “money can affect what goes *into* the bills” before Congress on issue after issue. “Let’s say we are talking about healthcare: money guaranteed that single-payer health insurance was not on the table. There could be nothing more fundamental to that bill than that.”

Furthermore, Americans don’t believe all that money has no effect—and that is a problem in itself. If the 99.9 percent of Americans who don’t have enough money to buy access to Congress believe their participation in their democracy doesn’t count for much, he says, they will choose to do something else, such as make a rational choice to play with their children instead.

And the need for campaign cash does have one clear and important effect, Lessig argues. Members of Congress now spend between 30 and 70 percent of their time raising money rather than deliberating as they were elected to do. For example, even as fundraising has increased exponentially since 1994—the moment when control of Congress began shifting back and forth between Democrats and Republicans, intensifying the need for campaign funds to secure a majority—so the amount of time members of Congress spend in committee meetings has dropped dramatically. “I don’t have enough data to say money is the driver,” Lessig admits, “but it is consistent with that proposition.”

When Lessig makes this case in speeches, he reports, reactions range from disbelief to rationalization. “Some say, ‘It can’t possibly be true.’ Others say, ‘They’re raising money; they are spending time connecting to people.’ That ignores the fact that they are connecting to 0.1 percent of the people, which is *not* ‘connecting to people.’” But “the vast majority” is stunned into recognizing “There is something really wrong here.” Lessig likens this dependency on money to cocaine addiction, in which users spend “70 percent of their time feeding their habit.”

The corrupting influence of money manifests itself in Washington culture in other ways as well. When Lessig interviewed convicted lobbyist Jack Abramoff as part of a series hosted by the Center for Ethics last December, for example, Abramoff described how offering a member of Congress or congressional staffer a high-paying job on K Street (home to big lobbying firms)

is, in effect, a way of hiring them on the spot. They may be two years from the end of their terms, Abramoff said, but from that moment—with no money down—they are, in the back of their minds, working for their future employer. Lessig therefore suggests extending the ban on moving from Congress to a lobbying job from the current one year for House members and two years for staffers and Senators to seven years.

## In the Hands of the People

**T**HE PROBLEM OF MONEY in politics runs deep, with effects that are difficult to untangle, but Lessig cites a particularly dramatic instance to illustrate his point. Between 1995 and 2009, he reports, the government spent more than \$70 billion subsidizing corn production. As a result, “Every \$1 of profits earned by [food conglomerate Archer Daniels Midland’s] corn-sweetener operation costs consumers \$10,” says Lessig, quoting from a Cato Institute study.

Some of the support was intended to aid family farms, but the benefits have accrued mainly to large companies. Meanwhile, the subsidies have made high-fructose corn syrup cheap and raw corn so inexpensive that some farmers feed it to their cattle. Now the corn sweetener—present in 40 percent of the food on grocery shelves—has been implicated in the obesity and diabetes epidemics. And cattle—which don’t digest corn properly—develop gastrointestinal bacteria that must be treated with antibiotics, in turn facilitating the evolution of drug-resistant “super bugs” that can infect humans. “You begin to poison people through the food-production system,” Lessig says. “There’s *nobody* on the right who can say this is a good thing. And people on the left who might have supported this system originally, because it was going to support family farms—they don’t like this either. Yet think about the political will that would be necessary to turn this spigot off! I don’t think we have that political capacity.”

That conviction and the Supreme Court decision *Citizens United v. Federal Election Commission* (which allows corporations and unions unlimited spending on independent political communications) have led him to call for a constitutional convention—something that hasn’t happened since the Constitution was written—to propose amendments that would *ensure* Congress is truly dependent on the people alone. It seems an extreme approach, but Lessig discusses many other possible remedies and strategies for achieving them in his book, such as donor anonymity (to break the clear link between contributions and political favors) or one-issue candidates who vow to quit Congress once reformed. He follows those remedies down forking paths, seemingly to every possible outcome, and concludes that a convention has the best, albeit slight, chance of success.

The Constitution describes a mechanism for triggering such a gathering (two-thirds of state legislatures must call on Congress to convene a convention, and three-quarters of the states, 38 in all, must ratify any proposed change for it to be adopted), but every time the country has faced the prospect, Congress has acted first, “most famously in the context of the Seventeenth Amendment” mandating direct election of U.S. senators by popular vote, Lessig

reports. “The states came within one vote of calling for a convention” and Congress responded to this reformist pressure.

Lessig does not say what, exactly, such a convention should propose. Elsewhere in *Republic, Lost*, he advances the idea of democracy vouchers, a publicly funded campaign-finance system that would give every citizen \$50 to support his or her candidate of choice, and would limit total contributions from any single person to \$100. But this system would apply only to candidates who “opt-in,” says the libertarian Lessig, leaving other candidates to take money from super PACs, corporations, or industry lobbyists.

A constitutional convention could make limiting that kind of contribution clearly legal, as he clearly hopes that it would, while leaving the specifics to the delegates themselves, who he believes should be ordinary citizens from across the country, “a random selection drawn from the voter rolls.” In fact, he writes: “I recognize that of all the insanity strewn throughout this book, this will strike readers as the most extreme. Ordinary citizens? Are you crazy? Proposing amendments to our Constitution? When two-thirds of Americans can’t even identify what the Bill of Rights is?”

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Yet it is a solution characteristic of Lessig, this former chairman of the Pennsylvania Teen Age Republicans who turned liberal while studying philosophy at the University of Cambridge in England—an unconventional, innovative, and radical thinker. His proposal in a single stroke does away with experts, politicians, and activists.

It also highlights Lessig’s idealism: a commitment to American democracy bordering on faith. In *One Way Forward: The Outsider’s Guide to Fixing the Republic*, an ebook he published in February as a follow-up to *Republic, Lost*, he describes the principles that ordinary citizens—perhaps including those named to a constitutional convention—might pledge to uphold: “To provide that public elections are publicly funded; to limit, and make transparent, contributions and independent political expenditures; and to reaffirm that when the Declaration of Independence spoke of entities ‘endowed by their Creator with certain unalienable Rights’ it was speaking of natural persons only.”

As principles go, simple. And in his e-book, Lessig concludes that, measured against problems such as fascism, institutionalized racism, and sexism that “our nation tackled throughout the course of the twentieth century,” this “narrow but profound flaw at the core of our Constitution...that has allowed our government to become captured” by moneyed special interests is “tiny by comparison.” What it will take to fix things, he says, is for Americans to recognize that “the corrupting influence of money is the *first* problem facing this nation. That unless we solve this problem, we won’t solve anything else.” ◊

Jonathan Shaw ’89 is managing editor of this magazine.