



# What an Originalist Would Understand "Corruption" to Mean

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## What an Originalist Would Understand “Corruption” to Mean

Lawrence Lessig\*

*As important as “that” is “how.” It is commonplace to say of the United States Congress that it is “corrupt.” But it is critical, if we are to reform that corrupt institution, to say how it is corrupt. In what sense? According to what meaning? For what reasons?*

*For the United States Congress is not corrupt in any traditional (albeit modern) sense of the term. Congress is not filled with criminals. Its members are not seeking bribes or using their official influence for private gain. In this sense, as Dennis Thompson offers, our Congress is likely the least corrupt Congress in the history of that institution.<sup>1</sup> These are not bad souls bending the public weal to private ends. The institution is not corrupt because it is filled with a bunch of corrupt individuals.*

*Instead Congress is corrupt at the level of the institution. We can presume the individuals within the institution are innocent; the economy of influence that they have allowed to evolve is not.*

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1. See DENNIS F. THOMPSON, ETHICS IN CONGRESS: FROM INDIVIDUAL TO INSTITUTIONAL CORRUPTION 3 (1995).

*Members of Congress, of course, are ultimately responsible for the influence they have allowed to evolve. But there is a distinction between being responsible and being corrupt: the bartender may well be responsible for the alcoholic's accident; that doesn't make her a drunk.*

*And that is the objective of this short Essay: to see how an institution can be corrupt even if its members are not. I base the argument on the Brennan Center's Jorde Symposium lecture that I had the honor of presenting at Berkeley Law in January of 2013. But lectures are not (or should not be) essays. So while this Essay draws from that lecture, it reaches beyond it. In particular, it is enriched by the generous and careful criticism of election law maven Rick Hasen. I take the opportunity in this Essay to also reply to him more carefully.<sup>2</sup>*

*It is my claim that this "corruption"—what I call "dependence corruption"—should be easy for an originalist to see. Indeed, as this Essay will insist, only a non-originalist could reject it. That fact, if correct, makes the views of the originalists on the Supreme Court about the scope of the term "corruption" all the more puzzling, even as it also makes traditional reformers uncomfortable.*

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## I.

### LESTERLAND

The way to see how our Congress is corrupt is through an allegory. This is the allegory of Lesterland.<sup>3</sup>

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2. Rick Hasen first reviewed my book in the *Harvard Law Review*. Richard L. Hasen, *Fixing Washington*, 126 HARV. L. REV. 550 (2012) (reviewing LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011)). I replied to that piece in the *Harvard Law Review Forum*. Lawrence Lessig, *A Reply to Professor Hasen*, 126 HARV. L. REV. F. 61 (2012). Hasen then replied in a working paper that will be published in the respected *Election Law Journal*. Richard L. Hasen, *Is 'Dependence Corruption' Distinct from a Political Equality Argument for Campaign Finance Laws? A Reply to Professor Lessig* (U.C. Irvine Law Sch., Research Paper No. 2013-94), available at <http://ssrn.com/abstract=2220851>. But as that journal does not embrace open access practices, I have channeled my response here.

3. I introduced this idea in a TED talk and in an accompanying book. Lawrence Lessig, *We the People, and the Republic We Must Reclaim*, Address at TED Conference (Feb. 27, 2013) (video available at <http://bit.ly/Lesterland>); LAWRENCE LESSIG, *LESTERLAND* (2013).

Imagine Lesterland as a nation much like the United States. It has a population as large as the United States (in 2010). And among its citizens, imagine there are just as many people named Lester as there are “Lesters” in the United States—about 144,000 out of 311 million, or about 0.05 percent named “Lester.”

“Lesters” in Lesterland have a very special power. In every Lesterland election cycle, there are two elections. One is a general election, in which all citizens get to vote. The other is a “Lester election,” in which only Lesters get to vote.

But here’s the catch: To be allowed to run in the general election, you must do extremely well in the Lester election. You don’t necessarily have to win. But you must do extremely well.

Democracy in Lesterland is thus a two-step process. Candidates must first clear the Lester-linked hurdle before they can clear the people-linked hurdle. Candidates are thus dependent upon the Lesters even though they are also dependent upon “the People.”

So conceived, there are two obvious facts to remark about the democracy of Lesterland. First, as the Supreme Court said in *Citizens United v. FEC*, the “people [of Lesterland] have the ultimate influence over elected officials.”<sup>4</sup> The influence is ultimate even if not exclusive, for there is a general election, and the people get to vote in that general election.

Second, despite that ultimate influence, it’s clear that this dependence upon the Lester election will produce a subtle, understated, perhaps camouflaged bending to keep the Lesters happy. That bending is how this alternative influence manifests itself. Present, but not too obvious; salient, but not exclusive.

Lesterland draws into focus the corruption of America’s Congress today. Because in a structurally, and hence constitutionally, significant way, the United States is Lesterland. The United States is Lesterland, first, in that it, too, effectively has two distinct elections. One election is discrete—call it the “voting election.” It happens on a particular day (or a small range of dates), twice in an election cycle. All “voters” are permitted to participate in that election. And “voters” include any citizen eighteen and older who has properly registered to vote.

The other election is continuous—call it the “money election.” It happens throughout an election cycle. Any citizen (regardless of age) is permitted to participate in that money election. If contributions are below \$200, that participation can be anonymous. If contributions are \$200 and above (capped at \$2,600 per election per candidate), that participation must be public.

Thus the first link to Lesterland is that we effectively have two elections. The second link is the nature of the connection between those two elections: as

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4. 558 U.S. 310, 360 (2010).

in Lesterland, to be allowed to run in the voting election (like the general election in Lesterland) one has to do extremely well in the money election (like the Lester election in Lesterland). A candidate doesn't necessarily have to win the money election, but she must do extremely well. In the 2012 election cycle, 84 percent of the House candidates and 67 percent of the Senate candidates with more money than their opponents won. On average, winning Senate candidates raised \$10.4 million; losing candidates raised only \$7.7 million. On average, winning House candidates raised \$1.6 million; losing candidates raised just \$0.774 million.<sup>5</sup>

Thus in effect, the money election is a qualifying election in the United States, similar to the way the Lester election is a qualifying election in Lesterland. And as in Lesterland, that qualifying election thus qualifies the democracy in USA-land in two similar ways: First, as in Lesterland, we can say that citizens in USA-land, as the Supreme Court promised in *Citizens United v. FEC*, “have the ultimate influence over elected officials.”<sup>6</sup> Ultimate influence, even if not primary or exclusive influence. Second, as in Lesterland, that ultimate influence notwithstanding, the immediate influence of the money election produces a subtle, perhaps camouflaged bending to keep the funders in the money elections happy.<sup>7</sup> Candidates for Congress spend anywhere between 30 percent and 70 percent of their time raising money in the money election.<sup>8</sup> For hours every day, members live within a kind of “funders box,” analogous to a “Skinner box,” the device B.F. Skinner used to condition rats and pigeons. Living life in that funders box teaches members which buttons to push in order to trigger the funding that they need. Over time, no doubt, members get good at speaking in a way that inspires that essential funding. They learn to talk about the issues the funders care about; they spend very little time talking about the issues most Americans care about. That learning is consistent with the pattern of legislation that many scholars have described.<sup>9</sup>

Finally—and the whole reason I have used “Lester” as the moniker for my allegory—the United States is Lesterland in the sense that the relevant number

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5. BLAIR BOWIE, U.S. PIRG EDUC. FUND & ADAM LIOZ, DEMOS, BILLION-DOLLAR DEMOCRACY: THE UNPRECEDENTED ROLE OF MONEY IN THE 2012 ELECTIONS 18 (2013), available at <http://www.demos.org/publication/billion-dollar-democracy-unprecedented-role-money-2012-elections>.

6. 558 U.S. at 360.

7. Assuming the “affluent” are “the funders,” the best documentation of this bending is the work of Martin Gilens, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA (2012), and Benjamin I. Page, Larry M. Bartels & Jason Seawright, *Democracy and the Policy Preferences of Wealthy Americans*, 11 PERSP. ON POL. 51 (2013).

8. LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT 138 n.43 (2011).

9. See GILENS, *supra* note 7; JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER AND TURNED ITS BACK ON THE MIDDLE CLASS (2010).

of funders is just as few (indeed, likely fewer) as the number of Lesters in Lesterland.

Here are the statistics for 2010:<sup>10</sup> In the two years that comprised the 2010 election cycle, 0.26 percent of Americans gave \$200 or more to any congressional candidate. That’s 809,229 Americans—one-quarter of one percent of us. 0.05 percent of Americans gave the maximum amount to any congressional candidate—that’s one-twentieth of one percent, or one person in 2,000, or about 144,000 Americans. 0.01 percent—the one percent of the one percent—gave \$10,000 or more to any combination of federal candidates. 0.00024 percent—roughly 750 Americans—gave \$100,000 or more to any combination of federal candidates. And though my focus in this Essay is Congress, in the 2012 presidential election 0.000032 percent—or 99 Americans—provided 60 percent of the individual Super PAC money spent throughout that cycle.<sup>11</sup>

So along this range—\$200+ (0.26 percent), \$2,400 (0.05 percent), \$10,000 (0.01 percent) or \$100,000 (0.00024 percent)—it’s hard to believe that someone giving just \$200 is a “relevant funder.” It’s easy to believe that someone giving \$100,000 is a “relevant funder.” But, conservatively, it is certainly fair to believe that a “relevant funder” is someone giving at least the maximum amount to at least one campaign.

So, at most, about 150,000 Americans, or 0.05 percent of us, are the “relevant funders” of America’s elections. Or again, there are just as few relevant “funders” in the United States as there are people named “Lester” in Lesterland. “The funders” in the United States are the “Lesters” in Lesterland.

## II.

### IN EIGHTEENTH-CENTURY AMERICA, “LESTERLAND” WOULD BE A “CORRUPTION”

The allegory of Lesterland is entertaining, but I mean it to be instructive. Through it we can see just why the way we fund elections today is “corruption.” Not “corruption” in a metaphorical sense, but in a sense the Framers of our Constitution would have understood precisely. In a single line: the way we fund elections has created a dependency that conflicts with the dependency intended by the Constitution. That conflict is a corruption.<sup>12</sup>

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10. I am relying upon 2010 because that is the last congressional cycle we have data for. The Center for Responsive Politics has similar statistics for 2012, but it is not possible to isolate precisely the presidential from congressional funder influence, at least when counting PAC contributions.

11. In the TED talk, I was relying upon older data. The updated number—99 Americans—is calculated in BOWIE & LIOZ, *supra* note 5, at 10.

12. Throughout this Essay, I draw especially upon both the works of Zachary Brugman and Zephyr Teachout. See Zachary Seth Brugman, *The Bipartisan Promise of 1776: The Republican Form and Its Manner of Election* 31 n.140 (2012) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2192705](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2192705); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009). Teachout maps a rich understanding of the Framers’ conception of

To modern ears, “conflicting dependencies” doesn’t sound like “corruption.” But that’s because we moderns typically predicate the term “corruption” on individuals. The Framers, by contrast, had a richer understanding of this condemnatory term. As Lisa Hill describes,

Until the end of the eighteenth century, “corruption” had a much broader meaning than it does today; it referred “less to the actions of individuals” than to the general moral health of the body politic judged according to “distributions of wealth and power, relationships between leaders and followers, the source of power and the moral right of rulers to rule.”<sup>13</sup>

Thus, in the Framers’ language, whole peoples, or societies could be corrupt—Rome, for example. Or institutions could be corrupt—Parliament, for example, corrupted by the king. Or individuals could be corrupt—as several Founders saw many throughout Britain to be.<sup>14</sup> The point is not that “corruption” didn’t include our modern sense of individual corruption—the “abuse of public office for private gain.”<sup>15</sup> It did. But it also included a collective sense—the corruption of an institution, or a people, and not just a person.

This is the sense of “corruption” to which I refer in this Essay. At the level of the institution, the structure of incentives that we have allowed to evolve has corrupted our Congress. The problem, as Adam Smith remarked of corruption in Britain, is “more of a systemic problem.”<sup>16</sup> It is seen by “focusing almost exclusively on its legalized and normal forms.”<sup>17</sup> This isn’t properly described as a “broader” sense of corruption than the modern sense. It’s simply a different

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corruption. Brugman has tied that understanding explicitly to the notion of conflicting dependency. Teachout’s work has been enormously influential in a very short time, cited extensively by the dissent in *Citizens United*. See *Citizens United v. FEC*, 558 U.S. 310, 424 n.51 (2010) (Stevens, J., dissenting). It has also been criticized by Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U. L. REV. COLLOQUY 180 (2013). Tillman’s primary criticism of Teachout is that she reads “Person holding any Office of Profit or Trust” in the Foreign Emoluments Clause to include elected representatives. Tillman does not. That, Tillman asserts, weakens Teachout’s argument for the existence of such an “anti-corruption principle.” Even if so weakened, however, Tillman agrees that the Constitution “embodies a structural anti-corruption principle.” *Id.* at 180. And even if so weakened, Tillman’s carefully argued point would not weaken the argument for which I have offered it here: My claim is simply that this structural principle “embodied” in the Constitution should give Congress the grounds upon which to further protect that principle. However weak or strong, the anti-corruption principle should at least rebuff judicial efforts to negate its salience.

13. Lisa Hill, *Adam Smith and the Theme of Corruption*, 68 REV. OF POL. 636, 636–37 (2006).

14. Patrick Henry, Speech on the Expediency of Adopting the Federal Constitution (June 7, 1788), in 1 ELOQUENCE OF THE UNITED STATES 178, 223 (E.B. Williston ed., 1827) (“Look at Britain; see there the bolts and bars of power; see bribery and corruption defiling the fairest fabric that ever human nature reared.”) (cited in Teachout, *supra* note 12, at 349).

15. Hill, *supra* note 13, at 639.

16. *Id.* at 637.

17. *Id.* at 650.



sense. It isn't produced by stretching a “narrow” sense to fit something more. It instead identifies a different dynamic, operating at a different level.

These levels may be linked, but not necessarily. An institution can be corrupt even if every individual within it is not. Thus, to say that Congress is corrupt is not necessarily to say that any member of Congress is also corrupt. They may be, or they may not be; the two concepts are distinct. The proof of one does not entail the proof of the other.

The particular flavor of this original sense of corruption that I allege here is constituted by an improper dependence. As I will establish below, Congress was intended to be “dependent on the people alone.” It has become dependent upon an additional dependence, “the funders” of campaigns. Because of who “the funders” are, this additional dependence is a conflicting dependence, and that conflict constitutes the “corruption.”

This sense of corruption, as constituted by “improper dependence,” was perfectly familiar to the Framers. In their view, for example, the British Parliament was corrupt. Not (just) in the sense that there were members of Parliament who were on the take—no doubt there were—but rather, in the sense that the institution of Parliament was “corrupt.” It was corrupt not because of those individuals, but instead because many within it were dependent upon the king. The king could appoint members of Parliament to offices; the king also could effectively select the members from “rotten boroughs” (districts with tiny populations that the king could control).<sup>18</sup> Those “placemen,” as Alexander Hamilton described, were “the true source of the corruption which has so long excited the severe animadversion of zealous politicians and patriots.”<sup>19</sup> Their presence rendered the institution “corrupt,” even though not every member of Parliament was so influenced.

The Framers displayed the same understanding of the meaning of “corruption” in their deliberations about the manner by which the President would be selected. The President was to be dependent “on the people,” though indirectly through the Electoral College. Obviously, and as the election of 1800 would soon demonstrate, the Electoral College could tie. The Senate was initially proposed as the institution to resolve any tie in the College. But that idea was quickly rejected because of the fear that it would “corrupt” the President. As Zachery Brugman nicely summarizes,

“Referring the appointment to the Senate lays a certain foundation for corruption & aristocracy,” noted Hu Williamson from North Carolina. “The aristocratic complexion proceeds from the change in the mode of appointing the President which makes him dependent on the Senate.” George Mason similarly asserted that this dependence on the Senate—while there was simultaneous (indirect) dependence on the People—

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18. Teachout, *supra* note 12, at 346–72.

19. Alexander Hamilton, Debate in New York Ratifying Convention (June 21, 1788) (cited in Brugman, *supra* note 12, at 31 n.140).

would “subvert the Constitution.” He would, “prefer the Government of Prussia to one which will put all power into the hands of seven or eight men, and fix an Aristocracy worse than absolute monarchy.” James Wilson agreed, because of his “dependence on them,” the Senate, “the President will not be the man of the people as he ought to be,” he would be a “Minion of the Senate.” The dependent relationship posed, “a dangerous tendency to aristocracy.” Alexander Hamilton and Edmond Randolph shared similar sentiments.<sup>20</sup>

Once again, the concern was that a conflicting dependence of the President—upon the Senate, which since selected by the state legislature, was an influence different from “the people,” and the College, more directly representative of “the people”—would “corrupt” him. Even though such dependence was contingent and unlikely (there have been few ties in the Electoral College in the 225 years of the Republic), it still was deemed a corruption. That corruption was constituted by a conflicting dependence. The mere possibility that the Senate would break a tie meant “the President will not be the man of the people.”<sup>21</sup>

It is with this conception of “corruption” in mind that we can see why our current Congress is “corrupt.” For the Framers, Congress was also to have an intended dependence.<sup>22</sup> That dependence was to be, as James Madison wrote in *The Federalist* No. 52, “on the people.” The House, Madison wrote,

should have an immediate dependence on, and an intimate sympathy with, the people. Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured.<sup>23</sup>

“[D]ue dependence on the people,” as Hamilton wrote, produces “the requisites to safety, in a republican sense.”<sup>24</sup> That “due dependence” was to be secured through elections “FREELY by the WHOLE BODY of the people, every SECOND YEAR.”<sup>25</sup> Through such elections, the House would be “dependent on the people.”

But Madison’s condition was even stricter: the House, he wrote, was to be dependent “on the people alone.”<sup>26</sup> The “alone” bit was to insist that the House, unlike the Senate, was not also to be dependent upon the States. The States already had their interests secured through the Senate; the House was to secure the interests of “the People.” Not, as Madison wrote in *The Federalist* No. 57, “some people[,]” but instead “the great body of the people in the United

20. Brugman, *supra* note 12, at 33.

21. *Id.* (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 524 (Max Farrand ed., 1911)).

22. Technically, Madison was speaking of the House. The Senate was differently dependent, since senators were selected by state legislatures. But after the 17th Amendment, I am assuming the principles that did apply before to the House alone now apply generally to both the House and Senate.

23. THE FEDERALIST NO. 52, at 327 (James Madison) (Clinton Rossiter ed., 1961).

24. THE FEDERALIST NO. 77, *supra* note 23, at 463–64 (Alexander Hamilton).

25. THE FEDERALIST NO. 41, *supra* note 23, at 260 (James Madison).

26. THE FEDERALIST NO. 52, *supra* note 23, at 326 (James Madison).

States.” And critically, as Madison wrote, “Not the rich more than the poor.”<sup>27</sup> As Zach Brugman summarizes their views, “an additional relationship of dependence by a representative to attain office, beyond the dependence on the People, epitomizes corruption—and results in aristocracy.”<sup>28</sup>

In the Framers’ view, then, an institution must avoid an improper dependence to avoid corruption. And as the story about the President becoming dependent upon the Senate shows, even the mere possibility of a systemic dependence upon an influence that is inconsistent with the intended dependence was enough to characterize that institution as “corrupt.” Independent of the moral virtues of the people occupying the relevant office, in other words, the office itself would be “corrupt” if the influences on that office were inconsistent with dependence intended by the Constitution. The Framers were Newtonians. They were building a machine that would be pulled by a clear balance of gravities. Allowing the wrong body to interfere with those intended gravities was, in their view, “corruption.”

From this perspective, the anti-corruption challenge was not how to ensure that criminals stayed away from Congress; the challenge was how to secure the influences most likely to align the institution to its proper ends by protecting it from improper dependence. The “most likely” qualification is unavoidable. Again, we are talking about tendencies, not deductive logic. Like a parent raising a child, or a tourist packing for a trip, we look ahead to the likely influences to be encountered, and protect against them.

Sometimes that protection is enough to prevent corruption. Sometimes it is not. Thinking in this way, the spouse of an alcoholic might keep alcohol out of the house. The purpose of that exclusion is to avoid the distraction of that dependence from drawing the alcoholic away from her purpose. So protected, she is more likely to get up in the morning, get dressed, and go off to work than she would be if the temptation of alcohol were easily available. She is more likely to do those things, but it is not certain. Many things can take her astray. The concern about the conditions under which she lives is thus distinct from how she in fact lives. They are related, but not determinative.

Central to this conception of “corruption” is the notion of “the People,” for unless we have a clear sense of “the People,” we have no way to know whether a conflicting dependency has developed.

But for us, the Framers’ conception of “the People” is not helpful. It is hard for us to view those who held political power at the framing—white, male, property owners—as “the People.” If anything, that design seems to support the notion that it was to be the rich alone who would exercise political power in America—much like Lesterland.

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27. THE FEDERALIST NO. 57, *supra* note 23, at 351 (James Madison).

28. Brugman, *supra* note 12, at 33.

Yet such a view of the Framers' design is both crude and anachronistic. The Framers limited the franchise to property owners. But 90 percent of white male Americans were property owners at the founding.<sup>29</sup> And those who were not were excluded from the franchise, not to reinforce aristocracy, but to resist it. The Framers feared that if the non-propertied could vote, the rich would have a simple way to buy more influence. To protect against that form of corruption, the franchise was secured to those who were not dependent upon others—property owners.<sup>30</sup>

Likewise, with the exclusion of those who were not “white” and “male.” No doubt the Framers excluded people who we rightly believe should have been included as citizens and granted the franchise. They excluded slaves (they *had* slaves!) and except in a few cases, Africans generally. They excluded women. The first exclusion was simple (and tragic) racism; the second, sexism. Both are moral stains on a tradition that we continue to honor. None should belittle the significance of those stains.

But though we rightly “deprecate[e] the closed-mindedness of our forebears,”<sup>31</sup> we should at least see the nature of that second exclusion, and recognize the structural similarity with an exclusion of our own. The Framers, like us, believed in “virtual representation.” They believed then that males would virtually represent females and children. We believe now that males and females will virtually represent children. We today believe that they were wrong to cast the net of virtual representation as broadly as they did. There are some today who believe we are wrong to cast the net of virtual representation as broadly as we do. But the weakness of the justifications for the scope of their net for virtual representation has nothing to do with supporting aristocracy.

Indeed, to the contrary. The Framers were no doubt oblivious to race equality and sex equality, but they certainly understood class. As Brugman quite nicely frames it, “we separated from an aristocracy as well as a monarchy.”<sup>32</sup> That explains the Constitution's explicit ban on nobility. It also shows why it was “essential,” as Madison described it, “to such a [Republic] that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it.”<sup>33</sup>

They had a conception of “the People.” It was distinct from “the States,” or “the Law,” or the French king for that matter. They intended the House to be exclusively dependent upon “the People.” And they crafted their Constitution to achieve that exclusive dependence.

Within the Republic they crafted, it is certainly possible there would still be corrupt individuals: people using their power to trade influence for personal

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29. *See, e.g., id.* at 40.

30. *See id.* at 41 and sources cited thereon.

31. *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting).

32. Brugman, *supra* note 12, at 7.

33. THE FEDERALIST NO. 39, *supra* note 23, at 241 (James Madison).

wealth. Such souls were not their constitutional concern. Instead, within the Republic they were crafting, their overwhelming objective was to avoid a corruption of a different order. God would deal with the likes of Randy “Duke” Cunningham;<sup>34</sup> they were concerned with avoiding the corruption of the institutions that they designed.

Put more directly, their primary sense of “corruption” would have been the “corruption of improper dependence.” Next to that corruption, anything else was a distant second.<sup>35</sup>

It is this fact that makes the current Supreme Court’s jurisprudence about “corruption” so weird. I don’t believe the Court has yet closed the door to this more historically accurate understanding of the Framers’ purpose. But relative to that original understanding, the Court’s rhetoric is quite clumsy. No doubt, there is no problem with recognizing quid pro quo corruption as the sort Congress has a legitimate and compelling reason to remedy.<sup>36</sup> But language throughout the Court’s opinions makes it seem that the Court believes quid pro quo “corruption” is the only constitutionally relevant sense of the word.<sup>37</sup>

Only a non-originalist could embrace that position. The Framers of our Constitution may well have been worried about quid pro quo corruption. But they were unquestionably and primarily worried about “dependence corruption.” If Congress has the power to remedy the former, it certainly has the power to address the latter.

### III.

#### WHAT “DEPENDENCE CORRUPTION” IS NOT

Professor Rick Hasen rejects the idea that “dependence corruption” is a constitutionally cognizable kind of “corruption.”<sup>38</sup> Instead, in his view, “dependence corruption” is just an equality argument in “corruption” drag.

Hasen’s a pretty good authority for that kind of disrobing: the Supreme Court recognized his claim about the “different type of corruption” (as the Supreme Court had described it) in *Austin v. Michigan Chamber of*

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34. The government charged that Congressman Cunningham took over \$2.4 million in exchange for securing contracts from the Department of Defense. In 2005, he pleaded guilty, and was sentenced to eight years and four months in prison. See LESSIG, *supra* note 8, at 226.

35. See Teachout, *supra* note 12, at 348–49.

36. The quid pro quo could be for a personal benefit or a political benefit. The former is ordinarily the domain of bribery regulation, and scholars such as David Strauss see this distinction as fundamental. In Strauss’s view, a quid pro quo for a political benefit is a problem only because of inequality, and concern for the functioning of the political system. David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1373 (1994). But as the Court does not distinguish between the personal and the political, I collapse the distinction here as well.

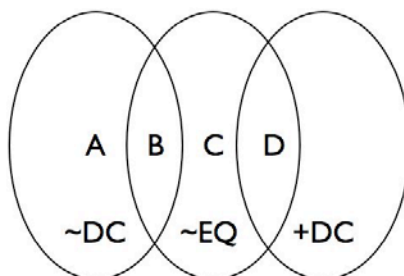
37. *Citizens United v. FEC*, 558 U.S. 310, 447 (2010) (Stevens, J., dissenting) (challenging the majority’s narrow, quid pro quo view of corruption).

38. See Hasen, *Is ‘Dependence Corruption’ Distinct*, *supra* note 2, at 10–16.

*Commerce*.<sup>39</sup> Hasen had argued that *Austin*'s "corruption" was in fact not "corruption" at all.<sup>40</sup> In *Citizens United*, the Supreme Court expressly agreed with him: As the Court said, the desire to address "the corrosive and distorting effects of immense aggregations of wealth . . . accumulated with the help of the corporate form [and with] little or no correlation to the public's support for the corporation's political ideas" was not a desire to end "corruption."<sup>41</sup> It was instead a desire to level the playing field. That desire, the Court held, following Hasen, was not a constitutionally permissible basis for restricting political speech.

Hasen and the Court were right to see *Austin*'s "corruption" as an argument grounded in equality. And the Court, following Robert Post,<sup>42</sup> was right to reject equality as a compelling interest sufficient to justify the suppression of political speech. But it is just a confusion to equate the equality idea in *Austin* with "dependence corruption." "Dependence corruption" is distinct from equality, as I will show here. It is instead, as the last Part established, precisely the sort of "corruption" the Framers were concerned to avoid.

In an earlier essay,<sup>43</sup> I argued that "dependence corruption" was distinct from equality as a matter of logic. The point can be seen in a simple Venn diagram:




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39. 494 U.S. 652, 660 (1990). In *Austin*, the Court upheld a prohibition on corporations using treasury money to make independent expenditures to support or oppose candidates in elections. The Court considered such expenditures a "different type of corruption." *Id.* at 660. Hasen describes his argument in *Is 'Dependence Corruption' Distinct*, *supra* note 2, at 10–16.

40. RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW* 114 (2003).

41. *Austin*, 494 U.S. at 660.

42. See Robert C. Post, Dean and Sol & Lillian Goldman Prof. of Law, Yale L. Sch., *Representative Democracy: The Constitutional Theory of Campaign Finance Reform*, Lecture Series at the Harvard Law Tanner Lectures on Human Values (May 1–3, 2013) (video available at <http://mahindrahumanities.fas.harvard.edu/content/representative-democracy>).

43. Lessig, *A Reply to Professor Hasen*, *supra* note 2.

While some measures to address “dependence corruption” might also address inequality (region B), some measures to address “dependence corruption” would not address inequality (region A); and some measures to address inequality would not address “dependence corruption” (region C).

But the point can be made even stronger by extending the analysis: some efforts at addressing inequality could actually create “dependence corruption” (region D).

To see this point, think about the Senate as it was originally constituted. Senators were selected by state legislatures. They were, in the sense of dependence I described above, to be “dependent upon the States.” Now imagine—as some states did—that some in the states decide that they want “the People” to choose the senators, not the state legislature. To that end, they successfully pass a referendum, forcing the legislature to vote as the people do in a popular election for Senate. That reform would plainly advance equality. But in the sense I’ve described, it would create “dependence corruption”—for now the dependence of the Senate is no longer the dependence intended by the Constitution. The Seventeenth Amendment changed that intended dependence. Before it did, popularly elected senators would have betrayed a kind of dependence corruption.

But it is not just logic that distinguishes “dependence corruption” from equality. The distinction also flows from constitutional analysis.

To see this point, distinguish between the influence of speech on a government official and the influence of speech on a citizen. When the state regulates the crime of bribery, its target is the influence of speech upon an official of the government (e.g., “If you get the earmark, I’ll give you \$100,000.”). But when Michigan regulated corporate speech, its target was the influence of such speech upon the citizens of Michigan (e.g., “Unions kill jobs.”).

If there is one clear First Amendment principle that emerges from the Supreme Court’s campaign finance jurisprudence, it is that the government has no role in regulating the influence of speech on its citizens. It can’t “equalize” the effect of speech on citizens.<sup>44</sup> It can’t sanitize the effect of speech on citizens.<sup>45</sup> It can’t take sides.<sup>46</sup> The government, the Court in effect has held, can’t intervene to protect the public from the effects of speech the government thinks the public needs to be protected from. The public must protect itself if, indeed, it needs to be protected.

Just as clear is the principle that the government does have a role in regulating speech to protect the legitimate processes of the government. The government can protect secrets to assure the integrity of the government’s

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44. *Citizens United v. FEC*, 558 U.S. 310, 349 (2010).

45. *See Cohen v. California*, 403 U.S. 15 (1971) (overturning state’s conviction of protester wearing “Fuck the Draft” shirt for disturbing the peace).

46. *See R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (limiting regulation of “hate speech”).

work.<sup>47</sup> The government can regulate non-public forums to protect legitimate state interests.<sup>48</sup> It can even regulate public forums.<sup>49</sup> And it can regulate “corruption” to protect the integrity of the government policy-making process. The government can ban, in other words, the symbolic “speech” of paying a government official for a private favor, so as to . . .

What? What is the reason the government has the power to restrict such symbolic speech? Though the Court has never explained it completely, the justification must tie to a conception of appropriate legislative behavior. Whatever else “representation” might mean, it cannot mean trading government favors either for private gain or directly for political gain. That trade is illegal.<sup>50</sup> And even the speech to propose that trade is illegal. However much else might be contested about theories of representation, this much is not: the offer to exchange public good for private gain can be banned.

Importantly for our purposes, it can be banned even if its effect is to level the playing field within politics. In a kleptocracy, the rich have more power than the poor. The effect of banning bribery or quid pro quo corruption within a kleptocracy would be to reduce the power of the rich relative to the poor. Its effect, in other words, would be to level the playing field. But at least within our constitutional tradition, the mere fact that one effect of corruption regulation is to level the playing field obviously cannot therefore render that regulation unconstitutional. For if it did, quid pro quo corruption could not be a crime.<sup>51</sup>

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47. See, for example, the interest recognized in *Landmark Communications v. Virginia*, 435 U.S. 829 (1978).

48. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 49 (1983).

49. See, e.g., *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985).

50. Though the reasons why are not fully explained. David Strauss has famously separated this disjunct between a quid pro quo for private benefit and a quid pro quo for a political benefit on the way to deconstructing the “only” reasons why a quid pro quo for a political benefit could be problematic. Such corruption is derivative, Strauss’s elegant argument holds, upon either a conception of equality, or a conception of the deliberative process. Strauss, *supra* note 36, at 1373. But even if Strauss’s argument is effective against quid pro quo corruption, it is not effective against “dependence corruption.” “Dependence corruption” is “corruption” because it reflects an improper, as in unintended, dependence. The impropriety is the corruption. The harm that corruption causes is the reason we might want to remedy it. But the harm—either to equality norms, or to deliberation—is not the corruption.

51. Hasen acknowledges that “a campaign finance law justified on traditional anti-corruption grounds should not become unconstitutional if the law incidentally promotes political equality.” Hasen, *Is ‘Dependent Corruption’ Distinct*, *supra* note 2, at 6 (citation omitted). But he chides me for making the point by relying upon the notion that “votes are speech.” As he writes, “[Lessig seems unaware that] the Supreme Court has rejected the idea that voting has expressive value protected by the First Amendment, although it recently seemed to back off from a strict statement of this point.” *Id.* (citation omitted). But Hasen has confused First Amendment “coverage,” to follow Fred Schauer, and First Amendment “protection.” Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 267 (1981). There’s no doubt the First Amendment “covers” the “expressive value” of voting. The question the Court has addressed is whether that covered speech gets the strongest First Amendment “protection.”



Thus, between these two paradigms—regulating speech that corrupts government officials (constitutional) and regulating speech said to corrupt citizens (unconstitutional)—where does concern about “dependence corruption” stand? Is it, as Hasen has argued, just another “political equality argument”?<sup>52</sup> Or is it instead a “corruption argument?”

Between (a) laws meant to regulate the influence of speech on government officials, and (b) laws meant to regulate the influence of speech on citizens, “dependence corruption” is plainly in category (a). Its target is not the effect of speech on citizens. Its target is the effect of certain practices of fundraising on representatives. And whether regulating to eliminate “dependence corruption” is justified or not, it is not unjustified because it is the sort of speech that *Austin* said could be regulated.

So while the Court may or may not choose to recognize the interest in eliminating “dependence corruption” as a compelling interest, if it did not, it should not be because “dependence corruption” is really “a political equality argument.”

So should the Court recognize the interest in eliminating “dependence corruption” as a compelling interest, just as it recognizes the interest in eliminating quid pro quo corruption, or the appearance of quid pro quo corruption, as a compelling interest?

In principle, yes, though it is important that the principle be properly cabined so that it is actually targeting “dependence corruption” within our constitutional tradition: “Dependence corruption” identifies improper dependence. But a “dependence” is only improper because of a conception of proper dependence. Within our constitutional tradition, that proper dependence is a “dependence on the people alone.” What kind of “dependence” then would conflict with a “dependence on the people alone”?

Begin with one clear example: Imagine a state that wanted to assure that its members of Congress were sufficiently sensitive to federalism interests. So imagine it changed the way it selected the “Electors of the most numerous Branch of [its] State Legislature.”<sup>53</sup> Rather than the way every state does it today—a primary and a general election in which the electors are citizens eighteen and older—imagine a state instituted a “Federalism Primary” to select the candidates that were permitted to run in the general election for its state legislature. The electors in that “Federalism Primary” were the members of the state senate. The state senate, in other words, was the primary election that chose the candidates that could run in the general election.

Under our Constitution, this change would also change the way that members of Congress from those states would be selected. Article I, Section 2 specifies that “the Electors in each State shall have the Qualifications requisite

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52. Hasen, *Is ‘Dependence Corruption’ Distinct*, *supra* note 2, at 11.

53. U.S. CONST. art. I, § 2.

for Electors of the most numerous Branch of the State Legislature.” Those “Electors,” in this state, would not be citizens eighteen and older. They would instead be members of the state senate at one stage, and citizens eighteen and older at the other.

That change may or may not be deemed unconstitutional. But if it were unconstitutional, one way to understand its unconstitutionality would be through the notion of “dependence corruption.” The Framers intended the House to be “dependent on the people alone.” They thought they would assure that dependence by tying the electors of members of Congress to the electors of the state legislature. But if a state narrowed those electors to ones who would advance the interests of the state first, then the state would have corrupted that intended dependence. We may or may not be stuck with that corruption; the Court may or may not believe the issue justiciable. But if it did reach the merits in such a case, this corruption would certainly justify the Court’s invalidating the state scheme. If anything is clear from *The Federalist No. 52*, it is that such a dependence would violate the purpose of a dependence “on the people alone.” The whole focus of Madison’s argument in *The Federalist No. 52* is to distinguish the House from the Senate. A state that essentially filtered congressmen in the way the (original) Constitution permitted them to select senators would plainly violate the sense of “dependence on the people alone.”

Would anything else violate that principle? Consider the “White Primary Cases” decided by the Supreme Court in the first half of the last century. In a “white primary” state, the primary election for the Democratic Party was limited to white Democrats only. At first the state did this directly.<sup>54</sup> When that was invalidated, the state did it indirectly, by delegating to private entities the right to conduct these primaries. That too was invalidated—even though the primary was not in any formal way a barrier to an individual running in the general election.<sup>55</sup> As in *Lesterland*, an aspiring representative didn’t necessarily need to win the white primary to win an election. But practically nobody who lost that primary ever won the general election.

These cases were largely driven by the values of racial equality within the Fourteenth and Fifteenth Amendments. But the most interesting of these cases, *United States v. Classic*, is not grounded in race.<sup>56</sup> The issue in that case was whether the right of citizens to participate in the election of Congress could be limited to a general election only, or whether that right would include the right to participate in a primary as well—so that actions that interfered with the right

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54. *See Nixon v. Herndon*, 273 U.S. 536 (1927) (invalidating law banning blacks from voting in Texas Democratic primary).

55. *Terry v. Adams*, 345 U.S. 461 (1953) (invalidating the fully private club as primary); *United States v. Classic*, 313 U.S. 299 (1941) (establishing Congress’s authority to regulate such private elections, even though victory in such primaries was neither necessary nor sufficient—formally—to winning a general election).

56. *Classic*, 313 U.S. at 307.

to have votes properly counted in a primary election could be said to violate a criminal statute that protected the integrity of the vote.

To decide that question, the Court first described the interpretive process that it would follow:

We may assume that the framers of the Constitution in adopting that section [Article I, section 2], did not have specifically in mind the selection and elimination of candidates for Congress by the direct primary any more than they contemplated the application of the commerce clause to interstate telephone, telegraph and wireless communication, which are concededly within it. But in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government.<sup>57</sup>

That “great purpose” then allowed the Court to conclude that the “first step” of this “two step” process would be subject to constitutional regulation too.

Nor can we say that that choice which the Constitution protects is restricted to the second step because Section 4 of Article I, as a means of securing a free choice of representatives by the people, has authorized Congress to regulate the manner of elections, without making any mention of primary elections. For we think that the authority of Congress, given by Section 4, includes the authority to regulate primary elections when, as in this case, they are a step in the exercise by the people of their choice of representatives in Congress.<sup>58</sup>

Thus these elections—the “white primaries” that were effectively ended by *Terry v. Adams*<sup>59</sup>—present a similar question to the issue raised by *Lesterland*: How does restricting the first step of a two-step election process to a subset of “citizens” corrupt the election system? And independently of the rights secured by the Fourteenth and Fifteenth Amendments, the exclusion of blacks from the primary could plainly be said to be a corruption of a “dependence on the people alone.”

In both cases—my hypothetical “Federalism Primary” and the decidedly not hypothetical “white primaries”—the improper dependence is improper because not every citizen could be a member of the filtering class. Maybe

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57. *Id.* at 315–16.

58. *Id.* at 317.

59. *Terry*, 345 U.S. 461.

anyone could be a member of the state senate, but at the time they make their decisions, only a small portion of the state is a member of the state senate. The dependence upon them means there is not a “dependence on the people alone.” That exclusion is clearer in the race-based cases: blacks cannot be white. So a regime that filters choices on the basis of whether someone is white or black is not a regime that creates a dependence “on the people alone.”

Both cases point to the focus of the corruption that I am describing in this Essay: a system in which a tiny proportion of citizens are “the funders” within the money election. As with legislators, or with white primary voters, this too is “dependence corruption,” because this too is a dependence upon an influence that is not “the people alone.” Only a tiny proportion of “the people” could afford the funding necessary to become “a funder.” That means, of necessity, that “the funders” cannot stand for “the people.” A dependence upon them thus violates the exclusivity requirement (“alone”) in “dependence on the people alone.” A dependence upon them is thus “corruption.”

To say this, however, is not to say that any system that filters candidates is of necessity “corruption.” Obviously, primaries filter candidates. They are not corruption, however, because any citizen could qualify to participate in the primary process.

And we could even imagine a more extreme pre-filtering process that would also not, on this analysis, constitute corruption. Imagine, following the work on “deliberative polling” by Professor James Fishkin,<sup>60</sup> that a state were to select a random and representative selection of citizens, and charge them with selecting among the candidates those who could run in a general election. In this case, there would be a dependence, as in Lesterland, upon a tiny slice of citizens. But by design, there would in that case be a plausible basis upon which to conclude that the filtering electors represent “the People.” Anyone could have been selected; the body that is in fact selected is selected to assure it represents everyone. And though a filter of legislators might also be seen to be similarly representative (if “the People” selected them), legislators once in office have an interest that is distinct from the interests represented by “the People.” The Fishkin jury, by contrast, does not sit within an office.

To summarize: the essence of “dependence corruption” is a competing dependence that conflicts with an intended dependence. A competing dependence upon legislators, or upon white voters, would be such a corruption. A competing dependence upon a representative sample of citizens, by contrast, need not be such a corruption. It follows, as I’ve already described, that a dependence upon “the funders,” when those funders constitute such a tiny slice of a concentrated interest, is also “dependence corruption.”

From that originalist perspective, then, the Court could well recognize a compelling interest in remedying “dependence corruption,” as it has recognized

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60. JAMES S. FISHKIN, *THE VOICE OF THE PEOPLE* (1995) (describing “deliberative polling”).

a compelling interest in remedying quid pro quo corruption. As I will describe more below, that compelling interest would obviously support public funding systems that would eliminate that “dependence corruption.” It would plainly justify aggregate contribution limits.<sup>61</sup> It might also support restrictions on speech that could not otherwise be justified by reference to quid pro quo corruption.

#### IV.

#### BUT SHOULD ORIGINAL VIEWS MATTER?

It is a fact about campaign finance reformers that many are politically liberal. It is an unfortunate fact about liberals that most reject arguments grounded in “originalism.”<sup>62</sup> Thus for many of my liberal friends, when I say that the Framers would have understood “dependence corruption” as “corruption” the response is “eeew.” And when I say that only a non-originalist could insist that “corruption” means quid pro quo corruption only, many of my liberal friends say, “see, that’s why we need to appeal to equality.” Their assumption, like the non-originalist, is that “corruption” here can’t help.

But I am, and have always been, an originalist, even if my flavor of originalism isn’t immediately obvious to all within that school of interpretive theory.<sup>63</sup> So I advance the argument that I have here not just because there is a majority on the Supreme Court which calls itself “originalist.” I advance it because I believe it is right to affirm the essential premise of originalism: that the authority to negate what Congress does must be grounded either in clear text, or in a proper and clear understanding of the original meaning of that text.

Nothing is clear about history, of course, but an originalism of integrity works with integrity to understand the framework of the (relevant) Framers, and, in my view, to render it today in a way that preserves its original meaning. If the Framers were focused on anything, it was upon how best to craft a republic that was properly dependent upon the people. Properly dependent means not a direct democracy. A republic, for the Framers, had to be a representative democracy. And not every institution within our Republic must be “dependent on the people.” The courts, for example, were dependent on the law. But for some institutions within our Republic, a proper dependence meant a “dependence on the people alone.”

There is a lot of room for debate about what a proper dependence in that sense would mean. But there are also cases which should present no real debate. If the state of Rhode Island gave the queen of England the right to

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61. This is the issue raised in *McCutcheon v. FEC*, 893 F. Supp. 2d 133 (D.D.C. 2012), *prob. juris. noted*, 133 S. Ct. 1242 (2013).

62. Most, though not all. See Jack Balkin’s masterful book, *Living Originalism*. JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

63. See, e.g., Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

choose the candidates among whom we the People could select,<sup>64</sup> that would be an improper dependence—not because she’s not smart, or wise, but because whatever “the People” means, it cannot mean the queen of England.

And likewise it cannot mean “the Lesters”—or more precisely, “the Funders”—of campaigns as our campaigns are now funded. That dependence too is improper because, as with the queen of England, the vast majority of the people could not possibly be “funders.” We all could be Democrats, or Republicans. There’s nothing logical or practical that bars us from a Democratic or Republican primary. But we could not all be the relevant “funders,” for to qualify for that status requires a commitment of resources significantly beyond the reach of the vast majority of electors. So, adapting the Court’s reasoning in *Classic*, we might say,

We may assume that the framers of the Constitution in adopting that section, did not have specifically in mind the selection and elimination of candidates for Congress by the [money] primary any more than they contemplated the application of the commerce clause to interstate telephone, telegraph and wireless communication which are concededly within it. But in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar.<sup>65</sup>

The Framers were not focused on “the Lesters.” For dependence upon “the Lesters” had not manifested itself because at the Framing there were not yet what we would see as campaigns. But they were focused upon other dependencies that might similarly draw the attention of Congress from a “dependence on the people alone.” And nothing they were focused upon is remotely as significant as the corruption that “the Funders” today have effected upon the exclusive dependence our Republic was to have “on the people alone.”

## V.

### HOW “DEPENDENCE CORRUPTION” WOULD MATTER JURISPRUDENTIALLY

If the Court recognized “dependence corruption” as the sort of corruption that the state would have a compelling interest to remedy, little in the Supreme Court’s jurisprudence (as opposed to cases applying Supreme Court jurisprudence) would change.

“Dependence corruption” would not revive *Austin v. Michigan Chamber of Commerce*. As Hasen rightly argued, the real interest advanced in that case was equality; the aim of the law justified by that concern for equality was to protect the citizens of Michigan from the so-called “corrupting” influence of

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64. The hypothetical requires some careful engineering, as the Constitution ties the mode of selecting Congress to the way the state selects members to its largest house in the state legislature.

65. *United States v. Classic*, 313 U.S. 299, 315–16 (1941) (substituting here the word “money” for “direct” in the original).

unequal speech. “Dependence corruption” has nothing to do with protecting the people from allegedly “corrupting” speech. Its aim is instead to protect a legislative process from a corrupting dependency.

“Dependence corruption” would also not reverse *Citizens United v. FEC*. The issue in that case was a ban on independent expenditures by corporations. Expenditures affect how people view political contests. The First Amendment does not permit the government to regulate how people view political contests. And “dependence corruption” is likewise not concerned about how people view political contests.

“Dependence corruption” would, however, be critically relevant to whether aggregate limits on total contributions to candidates and parties are constitutional.<sup>66</sup> It is hard to see those limits as related to “corruption” in the quid pro quo sense. But it is easy to see those limits related to “dependence corruption.” As evidence relied upon by the Supreme Court of Montana demonstrates, removing limits reduces the number of contributors.<sup>67</sup> A reduction in the number of contributors would only increase the “dependence corruption” within this system.

And perhaps most significantly, “dependence corruption” would matter to a decision by the D.C. Circuit, unreviewed by the Supreme Court: *SpeechNow.org v. FEC*.<sup>68</sup>

The issue in *SpeechNow* was not, as in *Citizens United*, expenditures. The issue was contributions. Federal law limited the maximum contribution to an independent political action committee to the limit for traditional political action committees. That limit was challenged. The reasoning in that challenge is superficially compelling: if *Citizens United* says independent expenditures can’t be limited, then so too, the reasoning of the D.C. Circuit goes, must there be no limits on contributions to independent political action committees.

But that conclusion does not follow. As the Court said in *Citizens United*, “an independent expenditure is political speech presented to the electorate.”<sup>69</sup> A contribution is not “speech presented to the electorate.” A contribution is money given to a coordinating body. And while the Court did not find credible evidence in the *Citizens United* record of “any direct examples of votes being exchanged for . . . expenditures,” which “confirm[ed] *Buckley*’s reasoning that independent expenditures do not lead to, or create the appearance of, quid pro quo corruption,”<sup>70</sup> there was no evidence presented about the effects of contributions to political action committees upon the behavior of candidates.

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66. See *McCutcheon*, 893 F. Supp. 2d at 139–41.

67. See *W. Tradition P’ship v. Attorney Gen. of Mont.*, 271 P.3d 1, 10 (2011), *rev’d on other grounds sub nom. Am. Tradition P’ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012).

68. *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010), *cert. denied sub nom. Keating v. FEC*, 131 S. Ct. 553 (2010).

69. *Citizens United v. FEC*, 558 U.S. 310, 360 (2010).

70. *Id.*

My claim is not that such contributions necessarily demonstrate corruption—either quid pro quo or “dependence corruption.” It is instead simply that the factual basis for concluding that there is no corruption has not been established. *Citizens United* (inconsistently, perhaps) was explicit that it was in theory open to the evidence about the relationship between expenditures and quid pro quo corruption. As the Court wrote,

When Congress finds that a problem exists, we must give that finding due deference. If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences.<sup>71</sup>

That openness in turn must require a court to at least examine whether there would be evidence of corruption flowing from contributions to a Super PAC. And the experience of the last election provides ample evidence of “dependence corruption,” and maybe even quid pro quo corruption.

I described in my book, *One Way Forward* (2012), the most compelling testimony I had heard about this kind of corruption. Former Senator Evan Bayh (D-Ind.) had been challenged during a television show to demonstrate exactly how *Citizens United* had affected the political process. Bayh rolled his eyes in response to the question, and as I described his answer:

The single most frightening prospect that an incumbent now faces is that, thirty days before an election, some anonymously funded super PAC will drop \$500,000 to \$1,000,000 in attack ads in the district. When that happens, the incumbent needs a way to respond. He can’t turn to his largest contributors—by definition, they have all maxed out and can’t, under the law, give any more. So the only protection he can buy is from super PACs on his own side.

That protection, however, must be secured in advance—a kind of insurance, the premium for which must be paid before a claim gets filed. And so how do you pay your premium to a super PAC on your side in advance? By conforming your behavior to the standards set by the super PAC. “We’d love to be there for you, Senator, but our charter requires that we only support people who have achieved an 80 percent or better grade on our Congressional Report Card.” And so the rational senator has a clear goal—80 percent or better—that he works to meet long before he actually needs anyone’s money. And thus, without even spending a dollar, the super PAC achieves its objective: bending congressmen to its program. It is a dynamic that would be obvious to Tony Soprano or Michael Corleone but that is sometimes obscure to political scientists.<sup>72</sup>

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71. *Id.* at 361.

72. LAWRENCE LESSIG, *ONE WAY FORWARD* 67–68 (2012).



Bayh is describing a dynamic. That description alone doesn’t establish that the dynamic is significant, or significant enough to justify regulation. But the point is that the dynamic shows precisely how unlimited contributions to a Super PAC might indeed facilitate “dependence corruption.” For if Super PACs become dominant within the political system, then candidates become dependent upon them. And even if they can’t coordinate directly with their expenditures, there are plenty of ways they can coordinate and encourage their fundraising. That fundraising in turn is not \$100-a-person fundraising. That fundraising is, instead, from the Lesters.

With the proper showing, then, “dependence corruption” gives us a way to see why *Citizens United* might be correct—to the extent it nullifies regulations that limit the ability of “people” to speak to citizens—but why the implications that many have drawn from *Citizens United* are not necessarily correct. *Citizens United* might mean there is nothing Congress can do to silence George Soros or the Koch brothers. But there may be something Congress could do to limit the contributions made to Super PACs. Contributions trigger a corruption analysis (since they could evince the wrong kind of dependence), even if expenditures would not. Under a corruption analysis, limits on contributions designed to reduce a competing, and hence improper, dependence could be upheld, even if limitations on expenditures would not.

#### CONCLUSION

The Framers gave us, as Ben Franklin quipped, “a Republic, if [we] can keep it.”<sup>73</sup> If a republic is a representative democracy, and if that representative democracy is to be “dependent on the people alone,” then we have not kept it. We have lost it. And with it, we have also lost the capacity to govern.

The First Amendment makes it difficult to restore that intended dependence. But it does not make it impossible. An originalist understanding of “corruption” shows just how limits on contributions to political action committees, whether independent or not, can be sustained, even if regulations of expenditures by those political action committees cannot. An originalist understanding of “corruption” also supports the idea of aggregate contribution limits—so as to increase the number of “funders.” Finally, an originalist understanding of “corruption” offers the clearest legitimate state interest for systems of public funding. Those systems are not necessarily intended to level the playing field. They are instead intended to avoid candidates developing an improper dependence.

Though in my view the biggest concern is with Congress, the nature of this improper dependence is illuminated well with a single contrast from the most recent presidential campaign: In his 2012 reelection campaign, Barack

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73. RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS REQUESTED FROM THE CONGRESSIONAL RESEARCH SERVICE 299 (Suzy Platt ed., 1989).

Obama attended 222 fundraisers. By contrast, in 1984, Ronald Reagan held not a single fundraiser.<sup>74</sup> The reason for the difference was public funding. Reagan benefited more from public funding than any other president in U.S. history, financing three national elections on the public fisc; Obama had withdrawn from public funding in 2008, making him the first President since Nixon to be elected with private money only.<sup>75</sup>

But for our purposes, the salient difference between these two candidates is just the practical experience of that fundraising. What does it do to a candidate to spend so much time trying to persuade such a tiny fraction of America? Indeed, in the Republican primary in 2012, many Republicans were frustrated by the amount of time candidates spent in “blue states.” But as Willie Sutton is said to have put it, that’s where the money was, so that’s where their attention remained.<sup>76</sup>

That attention reveals a dependence. When predicated of Congress, that dependence conflicts with the dependence intended by our Framers. There is nothing in the history of the First Amendment that suggests that it was meant to block Congress’s ability to secure its proper dependence. There is likewise nothing in the logic of *Buckley* or *Citizens United* that should disable the Court from recognizing Congress’s power to secure that dependence.

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74. BRENDAN DOHERTY, THE RISE OF THE PRESIDENT’S PERMANENT CAMPAIGN (2012) (Reagan had zero fundraisers); Devin Dwyer, *Obama Attends ‘Final’ Campaign Fundraiser*, ABC NEWS (Oct. 11, 2012), available at <http://abcnews.go.com/blogs/politics/2012/10/obama-attends-final-campaign-fundraiser/> (Obama had 222 fundraisers).

75. Dwyer, *supra* note 74.

76. This phrase has been attributed to Willie Sutton though he has denied saying it. See *Willie Sutton*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Willie\\_Sutton](http://en.wikipedia.org/wiki/Willie_Sutton) (last modified Nov. 11, 2013).