

**National University of Ireland, Maynooth**

---

**From the Selected Works of Seth Barrett Tillman**

---

October 23, 2013

# National Constitution Center Constitution Daily: Why Professor Lessig's "dependence corruption" is not a founding-era concept

Seth Barrett Tillman



Available at: [https://works.bepress.com/seth\\_barrett\\_tillman/427/](https://works.bepress.com/seth_barrett_tillman/427/)

**Why Professor Lessig's "dependence corruption" is not a founding-era concept**

The Supreme Court is again tasked with deciding the constitutionality of the statutory regime regulating federal elections. In 2010, in *Citizens United v. Federal Election Commission*, the Court, in a 5 to 4 vote, struck down key provisions of the Bipartisan Campaign Reform Act, i.e., the provisions regulating independent expenditures by corporations and labor unions. This term, in *McCutcheon v. Federal Election Commission*, the Court will decide whether aggregate contribution limits set by federal statute pass constitutional muster.

A recent line of highly original scholarship, first promoted by Professor Teachout in 2009, argued that the Constitution embodied a nontextual anti-corruption principle, inhering in the Constitution's structure, which (potentially) trumped First Amendment concerns in the elections context. Correct or not, Teachout's constitutional vision was, broadly speaking, an originalist one. By contrast, Professor Lessig argues that in deciding *McCutcheon*, the Court should be guided by its prior decision in *Buckley v. Valeo* (1976). In *Buckley*, the Court held that the government's interest in preventing actual corruption or the appearance of corruption outweighed competing First Amendment interests, and for that reason the *Buckley* Court upheld federal statutory campaign contribution limits. To be sure, *Buckley* was not an "originalist" opinion: the Court did not assert that its "corruption" rationale was part of the Framers' eighteenth century plan. Professor Lessig argues that when deciding the reach of *Buckley*'s corruption rationale, the Court should be guided by the Framers' understanding of "corruption," as opposed to the modern one announced in *Buckley*. Lessig's position has been criticized on theoretical grounds: it is neither wholly modern (per *Buckley*), nor wholly originalist (in any traditional sense). I will leave those abstract methodological concerns to others. Here, what is important to note is that both Lessig and Teachout agree that they have identified a stable, unified meaning as to how the Framers (and the public during the Framers' era) understood corruption in relation to the Constitution of 1787-1788: the Constitution of the Framers and Ratifiers.

I contest their position: no such unified concept existed in 1787-1788. (See Tillman, *Citizens United and the Scope of Professor Teachout's Anti-Corruption Principle* (2012).) And if it did exist, Lessig and Teachout have failed to excavate its details from our long lost past; they have failed to delineate the concept's contours; and they have failed to explain its precise implications for election law and, more importantly, for all the other areas of law which any such newly resurrected constitutional concept would necessarily impinge on.

**Corruption and the Constitution's Text**

Most theories of constitutional interpretation start with the text. And, of course, the Constitution's text speaks directly about corruption. The Impeachment Clause (U.S. Const. art. II, § 4) states that the President, Vice President and all civil officers

of the United States are subject to impeachment for “treason, bribery, or corruption.” You remember studying that in secondary school, right?

Actually, you probably do not remember it, and for good reason, it is not in the Constitution—at least, not anymore. “Corruption” appeared in a preliminary draft of the Constitution’s Impeachment Clause. But this language was dropped, and superseded by “treason, bribery, and maladministration,” but the “maladministration” language appeared too vague. (Meigs, *Growth* 233-34 (1899).) The Convention did not return to the earlier “corruption” language, and instead, it chose “treason, bribery, or other high crimes and misdemeanors.” We do not know precisely why the Framers dropped the original “corruption” language. Richard J. Ellis, a period historian, has suggested that “corruption” was dropped because “corruption” (like “maladministration”) was too vague. (Ellis, *Founding* 238-39 (1999).) If Ellis is correct, then Lessig’s position is not tenable. If the Framers did not think the corruption concept had sufficient clarity in 1787, then we cannot create that clarity today, at least, we cannot do so *in the Framers’ name*.

But even if Ellis is wrong, even if “corruption” was dropped for some other reason, it does not matter. What matters (that is, what should matter) is that the Framers put “corruption” in the Constitution’s text, but they then chose to take it out, and even failed to put it back in when they had a clear opportunity to do so. Thus, the history of the Constitution’s text poses a direct challenge to Lessig’s and Teachout’s position, but it is not a challenge either has ever meaningfully dealt with—although each has had repeated opportunities to do so. (Cf. Teachout, *The Anti-Corruption Principle* 367 & n.124 (2009).)

Let’s be clear. Lessig and Teachout are asking us to embrace corruption as the key concept espoused by the Framers of the Constitution (and of the Bill of Rights). But when the Framers had a chance (actually multiple chances) to give this concept prominence in the Constitution’s actual text, the Framers chose not to do so. It is not as if they forgot to use this term or, instead, used some close synonym; rather, they actively took this term out of the Constitution. So why should we today embrace the corruption concept as one having constitutional scope or dimension? And, more importantly, how can Lessig or Teachout ask us to do so as an exercise in originalism or in the name of the long-dead Framers?

### **Madison’s *Federalist No. 52*: “Dependent on the People Alone”**

In his *McCutcheon* brief, Professor Lessig argues that the Framers had “a very specific conception of the term corruption.” (Lessig Brief at 2-3.) In other words, the Framers sought to craft government institutions in which officials, in particular members of the House and the President, avoided “improper dependencies” and, instead, were “dependent on the people alone.” (*Id.* at 2 & 8 (quoting James Madison’s *Federalist No. 52*); Lessig, *What an ‘Originalist’ Would Understand ‘Corruption’ to Mean* (forthcoming 2014) (manuscript at 8).)

Turning to the Incompatibility Clause as an example, Professor Lessig explains: “the Framers blocked an improper dependence of the legislature upon the Executive, by banning legislators from serving [concurrently] as executive officers.” (Lessig,

*Reply to Hasen* 70 (2013); *cf.* Lessig Brief at 11 (citing the Ineligibility Clause).) I agree that the purpose of the Incompatibility Clause was to prevent members of Congress from being dependent on the President (at least in regard to holding concurrent federal office). But that limited purpose hardly establishes that the Incompatibility Clause was an exemplar of a higher level purpose to ensure that members were dependent “on the people alone.” If the latter really had been the Framers’ goal, then the Framers would have actively blocked many other dependencies, and this they did not do.

For example, nothing in the Constitution prevents members from concurrently holding state offices, even those within the appointment power of state governors (acting with or without a council). Indeed, in the First Congress, several members also held state legislative seats, and other members held state judicial and executive offices. These latter members of Congress were not dependent “on the people alone”—they were dependent on state government appointments, salaries, and sinecures.

Likewise, in terms of setting Congress’ initial salary in 1789 or any subsequent raise, each House was dependent on the other House, and both Houses were dependent (absent a veto-proof majority in both Houses) on the President. It is very difficult to square this salary-related dependence with the scrupulous care the Framers took to ensure member independence in regard to concurrent federal office-holding. Why the different treatment? If the Incompatibility Clause is rooted in maintaining members’ independence vis-à-vis the President, then why was the independence concern set aside when members’ very salaries were in play? Maybe this question has an answer, but it is not one Lessig or Teachout has shared with us. And without a good answer, we cannot simply assume that the Framers’ global purpose was to preserve members’ dependence “on the people alone.”

Finally, nothing in the Constitution prevents members of Congress (or, even, the President) from concurrently holding interests in private (domestic or foreign) commercial entities. Members of Congress are not constitutionally precluded from holding interests in private entities with litigation before the federal courts. Likewise, members are not precluded from personally acting as private attorneys for such entities in litigation before the federal courts. Indeed, members are not constitutionally precluded from holding interests in commercial entities doing business or seeking contracts with the federal government. In all these situations, the members are dependent on someone or some entity other than “the people alone.” In short, our Constitution, the Constitution of 1787, banned certain dependencies, but it left others permitted or, at least, strangely unresolved.

In these circumstances, it is difficult to see how Professor Lessig can tease out, from the very uneven constitutional text, his “very specific” Framing-era conception of corruption—demanding elected-official dependence “on the people alone.”

### **The Foreign Emoluments Clause**

[N]o Person holding any Office of Profit or Trust under the[] [United States], shall, without the Consent of the Congress, accept of any present,

Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

—Article I, Section 9, Clause 8

In regard to the Foreign Emoluments Clause, Professor Lessig writes: “And *most relevant* to the conception of ‘dependence corruption’ that I have advanced here: the Framers banned *members [of Congress]* from receiving ‘any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State’ without the consent of Congress.” (Lessig, *Reply to Hasen* 70 (2013) (emphasis added).) For the reasons I explain below, Professor Lessig’s direct and systematic reliance on the Foreign Emoluments Clause is problematic. (*Id.*; see Lessig, *Republic Lost* 18 (2011) (discussing the Foreign Emoluments Clause in conjunction with members of Congress); Lessig Brief at 12-14 (same).)

First, state offices are again a significant problem: the Foreign Emoluments Clause does not apply to state positions. Indeed, this clause had a predecessor in the Articles of Confederation, but the earlier confederation incarnation of this clause expressly applied to both state and federal positions. (*See* Articles of Confed. art. VI, cl. 1.) So the Constitution of 1787, our constitution, liberalized the foreign government gift-giving regime. Keep in mind that under the Constitution of 1787, state legislatures chose United States senators and also had the power to directly select presidential electors, a power they sometimes exercised. Likewise, state governors, then and now, had and have the power to fill vacancies in the Senate (at least in certain circumstances). Why did the Framers permit foreign governments to give gifts to state elected officials if, as Professor Lessig argues, they were trying to create a constitutional order in which improper foreign dependencies were minimized?

Second, Professor Lessig assumes that the Foreign Emoluments Clause (that is, its “office . . . under the United States” language) applies to members of Congress. He offers no support, argument, or evidence for his position. However, the text of the Constitution strongly suggests otherwise. For example, the Elector Incompatibility Clause states: “[N]o Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.” (U.S. Const. art. II, § 1, cl. 2.) Now it is possible that the language of the Elector Incompatibility Clause is redundant, and that the “Office . . . under the United States” language also includes senators and representatives. But the alternative reading is simpler: senator, representative, and “Office . . . under the United States” are three distinct categories. Indeed, the overwhelming consensus today among legal academics is that the Constitution embraces a hard distinction between, on the one hand, rank-and-file members of Congress, and, on the other hand, officers affiliated with the Executive and Judicial Branches. In other words, *members* are not *officers* as those terms are used in the Constitution of 1787. Professor Lessig needs to give us a reason to believe that members of Congress are subsumed under the Foreign Emoluments Clause’s “office” language. But he never does.

My own view (albeit, which is not widely shared) is that the Foreign Emoluments Clause’s “office . . . under the United States” language extends to all positions created, regularized, or defeasible by federal statute, i.e., subconstitutional,

non-elected, or statutory positions in any of the three branches of the federal government, and that this language does not extend to elected or constitutionally mandated positions in any branch. There is an abundance of early American materials supporting this view.

For example, in 1792, the Senate ordered Secretary of the Treasury Alexander Hamilton to draft a financial statement listing all persons holding “office . . . under the United States” and their salaries. Hamilton’s response, which was roughly ninety manuscript-sized pages, included personnel in each of the three branches of the federal government, including the Legislative Branch, but Hamilton did not include the President, Vice President, Senators, or Representatives. In other words, Hamilton did not include *any* elected positions in *any* branch. (See Tillman, *Citizens United and the Scope of Professor Teachout’s Anti-Corruption Principle* 410-15 (2012).) Similarly, in 1791, President George Washington received, accepted, and kept a gift from the French ambassador to the United States, but Washington never sought nor received congressional consent to keep this gift. (*Id.* at 415-17.) Washington received, accepted, and kept at least one other such gift during his presidency. (*Id.* at 415 n.46.) And, here too, he did not ask for or receive congressional consent. These gifts were not a secret; but, I have to yet discover even one anti-administration representative or senator or anyone in the press (or even anyone in private correspondence) who stated that Washington acted corruptly or wrongfully.

Professor Lessig called the Foreign Emoluments Clause the “most relevant” of all constitutional provisions in regard to his dependence corruption theory. But unless George Washington was corrupt (and the whole country silently complicit in his corruption), it seems to follow that the Foreign Emoluments Clause did not (originally) apply to any elected officials, state or federal. And if that is correct, then there is really nothing much left of Professor Lessig’s dependence corruption position to salvage.

[words 2326]

### **Preferred Citation Format**

Seth Barrett Tillman, *Why Professor Lessig’s “Dependence Corruption” is not a Founding-Era Concept*, 13 ELECTION L.J. (forthcoming circa June 2014) (peer reviewed), *available at* <http://ssrn.com/abstract=2342945>; *available at* [http://works.bepress.com/seth\\_barrett\\_tillman/428/](http://works.bepress.com/seth_barrett_tillman/428/).

Seth Barrett Tillman, *Why Professor Lessig’s “Dependence Corruption” Is Not A Founding-Era Concept?*, NATIONAL CONSTITUTION CENTER CONSTITUTION DAILY (Oct. 23, 2013, 7:00 AM), <http://blog.constitutioncenter.org/2013/10/why-lessigs-dependence-corruption-is-not-a-founding-era-concept/>, *also available at* <http://ssrn.com/abstract=2342945>, *also available at* [http://works.bepress.com/seth\\_barrett\\_tillman/427/](http://works.bepress.com/seth_barrett_tillman/427/).