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CLASSIFYING CORRUPTION

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Why is corruption wrong? This Article argues that there are two main approaches to conceptualizing the “wrong” of corruption: first, corruption as an abuse of power; and second, corruption as inequality. In addition, I claim that there is a conceptual convergence between these two approaches. As a result, many forms of corruption can be framed as either an abuse of power and/or as a violation of equality. I show that even quid pro quo corruption can be framed in equality terms—a surprising outcome given the Supreme Court’s acceptance of quid pro quo corruption and rejection of equality-based corruption.

This Article also considers Lawrence Lessig’s theory of dependence corruption, which does not seem to fit readily in the two approaches described above. I suggest, first, that dependence corruption is not fully consistent with an originalist understanding of corruption, and second, that the “wrong” at issue in dependence corruption is ultimately a concern about representation.

In addition to developing a conceptual map of corruption, this Article also focuses on the theoretical puzzles and challenges posed by corruption. For corruption as inequality, I identify seven forms that it could take, and I show how some of these forms have manifested in the Court’s campaign finance decisions. For corruption as the abuse of power, I consider three conceptual challenges: the distinction between acceptable and corrupt political gain; the distinction between the public interest and private interests; and the distinction between acceptable and corrupt legislative responsiveness. I argue these conceptual challenges make it difficult to distinguish corruption from ordinary democratic politics.

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discussion of the influence of that tradition on the Framers. This central understanding, shared by republican theorists including the Framers, is that corruption consists of the use of public power for private ends.⁵⁹ Second, and relatedly, it seems as though Lessig's use of the concept of "dependence," while overlapping with Teachout's use of dependency, also differs from it in a significant respect.

Teachout argues that the anti-corruption principle informs the theory, substance and structure of the Constitution.⁶⁰ The Framers were influenced by various thinkers, including Montesquieu and Machiavelli, who focused considerable attention on the dangers of corruption.⁶¹ Several features of the House and Senate were explicitly designed to act as a bulwark against corruption.⁶² The Framers were particularly concerned about the corrupting effects of the perks of office, which led to the adoption of the Ineligibility Clause, the Emoluments Clause, and the Foreign Gifts Clause.⁶³ The division of power within government, and the large size of the republic, were also thought to protect against corruption.⁶⁴

Teachout defines political corruption (as understood by the Framers) as the "self-serving use of public power for private ends."⁶⁵ She observes that for the Framers, an "individual is corrupt if he uses his public office primarily to serve his own ends."⁶⁶ Political corruption takes various forms. Teachout identifies four forms of political corruption: (1) bribery; (2) public decisions to serve private wealth made because of dependent relationships; (3) public decisions to serve executive power made because of dependent relationships; and (4) the use by public officials of their positions of power to become wealthy.⁶⁷ Teachout's description of corruption falls squarely within the republican tradition.⁶⁸

59. Teachout, *supra* note 7, at 373–74.

60. *Id.* at 342–43.

61. *Id.* at 351.

62. For example, it was considered to be more difficult to "buy, or create dependency, across a large body" which meant that the "sheer size and diversity of the House would present a formidable obstacle to someone attempting to buy its members." *Id.* at 356.

63. *Id.* at 359.

64. *Id.* at 369–71.

65. *Id.* at 373–74.

66. *Id.* at 374.

67. *Id.* at 373–74.

68. For a debate over the scope of the anti-corruption principle, see Seth Barrett Tillman, *Citizens United and the Scope of Professor Teachout's Anti-Corruption Principle*, 107 NW. U. L. REV. COLLOQUY 1 (2012); Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 NW. U. L. REV. COLLOQUY 30 (2012); Seth Barrett Tillman, *The Original Public Meaning of the Foreign*

The concept of dependency is important in Teachout's theory. The trouble with improper dependence, as I read Teachout's account, is that it gives rise to corruption. Teachout defines one kind of political corruption as "public decisions to serve private wealth *made because of dependent relationships*."⁶⁹ That is, corruption takes place when public officials make public decisions that serve the private ends of wealthy people. The corrupt act is the use of public power for private ends. These public officials serve the interests of the wealthy people because they are "dependent," i.e., they have received money from these wealthy people. The dependency of the public officials on the wealthy people is what gives rise to the corrupt act. The dependency, however, does not have to be financial because the benefit could be the offer of government offices and presidential appointments.⁷⁰

As an example of dependency, Teachout refers to the problem of a wealthy man buying off public officials. Although a wealthy man "might be tempted to create dependent Senators," it would be too difficult for that man "to buy off enough of [the] members" of the Senate, House, Judiciary and Presidency.⁷¹ To use this example as an illustration, the bought-off Senators would be "dependent" on the wealthy man. This dependency is worrisome because the Senators would likely engage in corrupt decision-making by serving the private interests of the wealthy man instead of serving the public interest. In another example, the Presidential Emoluments Clause was designed to "prevent the President from becoming overly dependent upon Congress (and thereby corrupted by them) or a particular state."⁷² Once again, it seems as though the dependency gives rise to the corruption—the President would be "thereby corrupted" as a result of the financial dependency on Congress. It could be that corruption (i.e. the use of public power for private ends) necessarily follows from improper dependence, but it is unclear to me why the improper dependence *is* corruption.

By contrast, Lessig seems to be saying that "corruption is the improper dependence."⁷³ Dependence corruption takes place when

Emoluments Clause: A Reply to Professor Zephyr Teachout, 107 NW. U. L. REV. COLLOQUY 180 (2012); Zephyr Teachout, Closing Statement, *Constitutional Purpose and the Anti-Corruption Principle*, 108 NW. U. L. REV. COLLOQUY 200 (2014).

69. Teachout, *supra* note 7, at 373–74 (emphasis added).

70. *Id.* at 364.

71. *Id.* at 381.

72. *Id.* at 365.

73. In an amicus brief for *McCutcheon v. FEC*, Lessig writes that the "Framers had a very