

National University of Ireland, Maynooth

From the Selected Works of Seth Barrett Tillman

June 9, 2013

Extract from Memorandum from Lawrence Lessig to Colleagues, Harvard Faculty Workshop (Cambridge, Mass., June 9, 2013), citing Teachout-Tillman Exchange

Seth Barrett Tillman

MEMORANDUM

June 9, 2013

TO: Colleagues
FROM: Lawrence Lessig
RE: Faculty Workshop

Over the past few years, I have been developing a conception of corruption that I have referred to as “dependence corruption.” Dependence corruption predicates of an institution, not an individual. It describes an influence, or influences, that produce a dependence within an institution that is different from a dependence that was intended. I first described the notion in my book, *Republic, Lost* (2011), and at a faculty workshop that fall. But recently I have been exploring more completely the way this idea might relate to conceptions of corruption at the Founding.

The motivation for this work has been the strange and confused “corruption” jurisprudence of the Supreme Court — strange, because seemingly unmoored from any founding conception of corruption, and confused, because grounded in a notion of “*quid pro quo*” corruption that, as many have noted, bears little weight.

The source of the Court’s conception is a per curiam decision by the Burger Court, *Buckley v. Valeo* (1976). *Buckley* held, *inter alia*, that Congress may “abridge” speech to regulate *quid pro quo* corruption, or the appearance of *quid pro quo* corruption. But by *quid pro quo*, the Court was not referring simply to a *quid pro quo* for personal gain (such as bribery). Instead, the Court held that as well as *quid pro quo*’s that benefit a government official personally, Congress could also regulate *quid pro quo*’s that benefit a government official politically.

This conception has long raised questions. David Strauss, for example, famously argued that it could only be a conception of equality that could ground such a conception of corruption. For as he argued, there are two types of *quid pro quo*’s that might constitute the corruption — one to benefit a member personally, and one to benefit a member politically. The former we call bribery.

someone giving at least the maximum amount to at least one campaign.

So at a maximum, about 150,000 Americans, or 0.05% of us, are the “relevant funders” of America’s elections. Or again, there are just as few relevant “Funders” in the US as there are people named “Lester” in Lesterland (and the US). In this sense, “the Funders” in USA-land are the “Lesters” in Lesterland.

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.¹¹

¹¹ Throughout this essay, I draw especially upon both the work of Zachary Brugman and Zephyr Teachout. See Zachary Brugman, *The Bipartisan Promise of 1776: The Republican Form and Its Manner of Election* 31 n.140 (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2192705, and Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell Law Rev. 341 (2009). Teachout maps a rich understanding of the Framers’ conception of 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, e.g., 558 U.S. 310, 424 n.51 (2010) (Stevens, J., dissenting). It has also been criticized by Seth Barrett Tillman, Closing Statement, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 Nw. U. L. Rev. Colloquy 180 (2013), available at <http://ssrn.com/abstract=2012803>, also available at <http://www.law.northwestern.edu/lawreview/colloquy/2013/18/>. 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 weakens, Tillman asserts, 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 181. 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.