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Is "Dependence Corruption" Distinct from a Political Equality Argument for Campaign Finance Laws? A Reply to Professor Lessig

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ABSTRACT
This essay responds to Professor Lawrence Lessig's argument that "dependence corruption," the government interest he advances to support the constitutionality of his proposed campaign finance reforms, is analytically distinct from an interest in promoting political equality. It argues that Lessig's dependence corruption argument encourages fuzzy thinking about the political equality rationale. By being more precise about what is at stake with campaign finance regulation, and the potential costs to free expression, supporters of reasonable regulation will be better positioned to defend a new set of laws. In the end, the debate over dependence corruption helps elucidate the best and worst types of political equality arguments to advance to a future Supreme Court and American public.
Court rejected in *Citizens United*\(^{69}\) and it does not appear to be an argument which can do the kind of heavy jurisprudential lifting Lessig needs to get past *Citizens United's* narrow view of corruption.

### IV. POLITICAL EQUALITY, CAMPAIGN FINANCE, AND THE NEXT SUPREME COURT

Suppose I am correct that Lessig's dependence corruption argument is really a political equality argument in disguise. Why does it matter?

To begin with, recognizing dependence corruption as a political equality argument should put to bed the notion that the current Supreme Court can be persuaded to reverse its *Citizens United* course and impose some limitations on independent spending (or contributions funding such spending) in candidate elections.

Last year, the Montana Supreme Court tried to buck the U.S. Supreme Court's decision in *Citizens United* by holding that the state of Montana provided enough evidence that independent corporate political spending could corrupt the state's political process to justify corporate spending limits.\(^{50}\) While the case was pending before the Supreme Court, Lessig was alone in predicting that the Supreme Court would take the case and affirm the lower court, with his betting on Justice Kennedy switching sides from his *Citizens United* vote.\(^{71}\) The rest of us in the field predicted what actually happened: in *American Tradition Partnership (ATP) v. Bullock*,\(^{72}\) the U.S. Supreme Court smackdown the Montana Supreme Court in a 5–4 summary reversal in which all the Justices in the *Citizens United* majority reaffirmed the soundness of that precedent.

But Lessig was undeterred by the ATP smackdown. As late as January 2013, months after the Montana case, he was predicting that an "originalist" Justice (but not Justice Scalia, for whom he pledged) could well reverse course on *Citizens United* in a future case.\(^{74}\) Lessig believes, following the work of Professor Zephyr Teachout,\(^{75}\) that "dependence corruption" is a form of corruption that would have been recognizable and accepted by the Framers as a legitimate basis to limit spending in elections.\(^{76}\)

I leave to others the question whether or not the Lessig/Teachout interpretation of "corruption" to include concepts of political equality is consistent with originalist thinking.\(^{77}\) I will note however that in *Federalist No. 52*, the phrase "dependent upon the people alone" appears in a passage explaining why the Constitution set the qualifications for suffrage pertaining to voting for members of the U.S. House the same as the qualifications for voting for the state legislature. Publius states that allowing the state legislature the discretion to

\(^{69}\) Lessig's response on the trust argument is weak. I had pointed to the work of Persily and Lammie demonstrating that there is no good correlation between campaign finance regulation and the public's trust. Lessig concedes the point, Lessig, supra note 2, at 72, "that doesn't mean that a more trustworthy system wouldn't increase the public's trust." Id.


After the speech, Lessig, who worked as a clerk for conservative Justice Antonin Scalia before becoming an academic, added that he was confident that *Citizens United* will soon be reversed by the high court.

"I think it's quite likely Justice Kennedy is about to flip," he said, referring to the Supreme Court justice who cast the deciding vote in the controversial 5-4 decision. Although Lessig cautioned that he had no inside information, he said Kennedy "is completely surprised by how much damage this decision has done—even Scalia doesn't like the world where all the money in the world is on one side."

\(^{72}\) See, e.g., Rick Hasen, Montana Citizens United Sequel on Supreme Court Docket for June 14: What's Next?, ELECTION LAW BLOG (May 29, 2012), <http://electionlawblog.org/?p=34871> (calling summary reversal a "potentially likely outcome").

\(^{73}\) 132 S.Ct. 2490 (2012).

\(^{74}\) Lessig Video, supra note 3.


\(^{76}\) Lessig, supra note 2, at 65, 70.