Corruption Temptation

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In response to Professor Lawrence Lessig's Jorde Lecture, I suggest that corruption is not the proper conceptual vehicle for thinking about the problems that Professor Lessig wants us to think about. I argue that Professor Lessig's real concern is that, for the vast majority of citizens, wealth presents a significant barrier to political participation in the funding of campaigns. Professor Lessig ought to discuss the wealth problem directly. I conclude with three reasons why the corruption temptation ought to be resisted.

INTRODUCTION

When Congress passed the Federal Election Campaign Act ("FECA") of 1974, which amended the FECA of 1971, it had a number of objectives in mind.[1] First, it wanted to create a strong public financing model.[2] FECA 1971 did not provide much in terms of public financing, and Congress was of the view that a comprehensive public finance scheme was necessary to solve the problem of campaign financing. Second, Congress also wanted to regulate both the supply and demand of money.[3] Congress thought it necessary to address both the entry and exit of money directed toward federal political campaigns. Third, Congress wanted to return the individual citizen to the center of the political process and understood that the democratic citizen needed to regain

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1. *See, e.g.*, JAMES A. GARDNER & GUY-URIEL E. CHARLES, ELECTION LAW IN THE AMERICAN POLITICAL SYSTEM 643–49 (2012).
2. *Id.* at 643.
3. *Id.* at 643–49.

control of the democratic process.[4] Congress was animated by a strong and distinctive understanding of democratic participation. Thus, Congress articulated a vision of political equality in which political participation was a normative good and the birthright of the citizen.

Congress's multipronged approach to campaign financing was pushed to the side following the Supreme Court's decision in *Buckley v. Valeo*,[5] which altered the way that we think and talk about the regulation of money as a form of political participation. As a consequence of *Buckley* and its progeny, we think about the harm that needs reforming primarily in terms of corruption and the appearance of corruption.[6] Relatedly, because we think about the problem of campaign finance reform as corruption and its ghostly apparition, we also think of the solution to the problem as the absence of corruption and its appearance.

Buckley's intervention (and that of the cases it spawned) has been detrimental to the cause of campaign finance reform, and not simply for the obvious reason that the Court dismembered Congress's coherent reform effort. *Buckley* has been detrimental in two ways:

First, by framing the issue of campaign financing in speech terms, as opposed to, for example, political participation terms, *Buckley* has caused us to think about campaign financing as a special problem of democratic politics divorced from other challenges of democratic politics such as voting, redistricting, voter identification requirements, voter registration requirements, and so forth.

Second, by recognizing corruption and its pale shadow, the appearance of corruption, as the only doctrinal justifications for reform, *Buckley* has caused us to narrow the range of our discourse on campaign finance reform. We no longer talk about the gamut of values that we would like to see reflected in a system of campaign financing. To be taken seriously in this doctrinal debate, all of our discourse must be articulated within the corruption framework, which causes us to ignore other concerns that ought to be of interest when considering a system of campaign financing. *Buckley* has created a corruption temptation that many in the reform community have found irresistible.

Campaign finance reformers are thus beset by two related fundamental challenges, both of which are largely a function of the way that the Supreme Court has caused us all to think about these issues. The first challenge is that reformers have a hard time identifying the problem they want fixed. Reformers are hard-pressed to answer what ought to be a fairly simple question: What is the problem with the private financing of campaigns that demands a regulatory

4. *Id.* at 644–45.

5. *See* 424 U.S. 1 (1976).

6. *See, e.g.*, Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385, 1388 (2013) ("The constitutional permissibility of most campaign finance cases has turned on how the Court understands corruption.").

solution? Second, reformers have a hard time figuring out a solution. This is not surprising, as it is difficult to devise a solution when one is unsure of the problem.

Professor Lawrence Lessig's essay on this issue, *What an Originalist Would Understand "Corruption" to Mean*,[7] is the latest to succumb to this corruption temptation. His central thesis is that the way we fund elections today is corrupt. Our campaign financing is corrupt, Lessig argues, because it "has created a dependency that conflicts with the dependency intended by the Constitution."[8] Working within the corruption framework, he aims to articulate a conception of corruption that he calls "dependence corruption," which he intends to be distinct from quid pro quo corruption[9] that the Court sketched out in *Buckley* and refined in *Citizens United v. FEC*.[10] His project is also intended to be distinct from the equality concerns that the Court rejected most recently in *Citizens United v. FEC*.[11] Moreover, and perhaps most significantly, he aims to articulate a conception of corruption that is rooted in originalism. This conception of corruption is meant to appeal to the conservatives on the Supreme Court because the conservatives are the crucial voting bloc on campaign finance issues and are either committed originalists or sympathetic to originalism.

In this Essay, I will use Lessig's essay to suggest three reasons why the corruption temptation ought to be resisted. First, we have surprisingly little agreement on what corruption means.[12] Corruption, as it turns out, is a very slippery concept. (And switching from corruption to the appearance of corruption does not provide greater clarity or guidance.) Outside of the narrow quid pro quo context, corruption is, fundamentally, an unproductive way for us to think about the problem of campaign finance. But we seem to be unable to have a discussion about campaign finance that is not tethered to corruption.

Second, because we feel compelled by campaign finance doctrine to reconfigure non-corruption justifications for regulating campaign financing within the corruption framework, our arguments are strained, less persuasive, and less coherent than they would otherwise be if we simply focused on the issues that we really want to talk about. When reformers make strained

7. Lawrence Lessig, *What an Originalist Would Understand "Corruption" to Mean*, 102 CALIF. L. REV. 1 (2014).

8. *Id.* at 5.

9. *Id.* at 7 ("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.").

10. Citizens United v. FEC, 558 U.S. 310 (2010).

11. As first expressed in *Buckley v. Valeo*, 424 U.S. 1 (1975), the Court has rejected the idea that the government can "mute the voices of affluent persons and groups in the election process and thereby to equalize the relative ability of all citizens to affect the outcome of elections." *Id.* at 25–26.

12. *See, e.g.*, Hellman, *supra* note 6, at 1391–1402 (articulating multiple definitions of corruption).

corruption arguments they are not only arguing on alien turf but they are also unlikely to address fundamental conceptual challenges, which takes away from the persuasiveness of their arguments.

Third, by giving in to the corruption temptation, reformers have failed to develop robust theories of harm in campaign finance. In particular, reformers have failed to articulate an alternative framework that both challenges the fundamental conceptual underpinnings of the Court's deregulatory agenda and advances an attractive alternative to that agenda. *Buckley* has placed reformers into a bind from which they are having a hard time escaping.

There are two ways forward for the reform agenda. One is that the political composition of the Court changes and the doctrinal straightjacket loosens. This possibility would require reformers to pay attention assiduously to campaign finance doctrine so as to limit the deregulatory impulse or agenda of the current Court.[13] Consistent with that possibility, the goal of the reform community could be to attempt to minimize its losses and bide its time in the hope and anticipation that more liberal Justices will replace those more conservative on campaign finance reform.

A second possibility is to attempt to change the terms of the debate altogether. This option would require reformers to think outside of the *Buckley* straightjacket. For example, instead of thinking about the role of money in politics strictly in First Amendment terms and making equality-based countervailing arguments within the language of the First Amendment, reformers might reframe campaign finance issues in political participation terms more broadly. Instead of thinking about corruption as the problem, reformers might begin to think about more structural solutions to the problem, such as strengthening the role of political parties, or focusing more concretely on the way that the never-ending quest to raise more money affects the fiduciary relationship between the representative and the voter.

Unfortunately, Lessig's project is neither fish nor fowl. It is not a doctrinal project nor is it a project that attempts to change the terms of the debate in language different from the doctrinal framework. As I understand it, it is a project that attempts to change the terms of the debate within the current doctrinal framework.

Admittedly, there is much to like about Lessig's overall project. It is engaging, accessible, and important. In particular, his book *Republic, Lost* is magisterial.[14] Lessig has brought widespread attention to the problem of campaign finance in a way that no other legal academic has. For that alone he is to be commended.

13. *See infra* text accompanying notes 46–49.

14. *See* LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT (2011).

But the project also suffers from some flaws. In particular, it lacks conceptual precision. As I will show, though Lessig purports to provide us with a singular definition of "dependence corruption," he has in fact provided us with at least three. And as I argue, none of the three definitions is really about corruption, dependence or otherwise. Moreover, Lessig's project is not at its best when it tries to fit within the narrow doctrinal space that the Court has left us to talk about campaign financing. Rather, it is at its best when it rejects the Court's framework altogether and gets us to imagine different starting premises, different paths, and alternative endings. Professor Lessig's project would be more compelling if he exercised these options more often than he has.

This Essay makes the point that corruption is not the proper conceptual vehicle for thinking about the problems that Lessig wants us to think about. Part I discusses Lessig's concept of "dependence corruption" and critiques a specific type of "dependence corruption." Part II argues that Lessig's real concern is that the private financing of campaigns makes wealth a prerequisite to political participation. Because few citizens are wealthy enough to be able to make political contributions and expenditures, private financing of campaigns is tantamount to the government passing a law that allows only certain citizens to make political contributions and expenditures. I argue here that Lessig's real target is not so much corruption as it is private financing itself, which presents an overwhelming barrier for the vast majority of citizens to political participation in the funding of campaigns.

I.
WHAT IS "DEPENDENCE CORRUPTION"?

The central conceptual innovation of Lessig's work in the area of campaign finance is the concept of "dependence corruption." Lessig argues that Congress is corrupt because it is more dependent upon a small group of funders than it is on "the people alone."[15] Professor Lessig uses the allegory of Lesterland to explain this concept of "dependence corruption." Lesterland has two kinds of citizens: a small group of people called Lesters and everyone else. Lesterland also has two elections: a qualifying election, similar to a primary, in which only the Lesters are allowed to vote, and a regular election in which everyone else participates. In order for a candidate to participate in the general election, she must first do well in the Lester election.

For Lessig, Lesterland is obviously the United States. Lessig maintains that like Lesterland, the United States in effect holds two elections: a qualifying election, or money election, in which a very small group of funders participate, and then a general election or voting election in which the people get to vote.[16] The money election "produces a subtle, perhaps camouflaged bending to keep

15. Lessig, *supra* note 7, at 7.
16. *Id.* at 2–3.

the funders in the money election[] happy."[17] This "bending" creates a "conflict" because the Framers intended Congress to be "dependent on the people alone."[18] Instead of being dependent on the people alone, Congress has become dependent on the plutocrats. This dependence creates the "corruption" of "dependence corruption."[19]

Lessig purports to offer only one definition of "dependence corruption," but he actually articulates three different conceptions of "dependence corruption." Under the first articulation, "dependence corruption" is the failure of Congress to be dependent on the people alone. Here the problem is that Congress is dependent upon a group of individuals that are not "the people." Under a second definition, "dependence corruption" is the way that legislators bend their views to keep the funders happy. Legislators "learn to talk about the issues the funders care about; they spend very little time talking about the issues most Americans care about."[20] Here the problem is not the lack of dependence upon the people but the bending. Under the third articulation, the corruption problem is the fact that Congress is dependent upon a minority of the people and not the whole people.

In this Part, I will examine the first articulation of "dependence corruption": the failure of legislators to be dependent on the people alone.[21] I will suggest that under this understanding of "dependence corruption," "dependence corruption" is not a problem in the United States today. The question raised by this conception of "dependence corruption" is who the "people" are. Or, put differently, are the Lesters also "the people"? If the Lesters are also "the people" then there is no such thing as this form of "dependence corruption."

Because "dependence corruption" is only understood as a stylized definition—the type of corruption that is of concern to Professor Lessig is, as a matter of definition, the absence of exclusive dependence on the people[22]—it is critical that we understand who the people are and who the people are not. Without an understanding of the people, we cannot understand what "dependence corruption" is. On this point, Professor Lessig's expositions are less than helpful.

In Lesterland it is very clear who are the "people" and who are the plutocrats. Professor Lessig writes that in Lesterland "only Lesters get to vote"

17. *Id.* at 4.
18. *See id.* Part II.
19. *Id.* at 9 (To avoid corruption, "an institution must avoid an improper dependence.").
20. *Id.* at 4.
21. I address the other two articulations in the remainder of the Essay.
22. Lessig, *supra* note 7, at 14 n.50 ("'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.").

in the Lester election.[23] Though Professor Lessig is not crystal clear on this point, he seems to imply rather strongly that as a matter of law, only Lesters have a right to participate in the Lester election. Lesterland appears to have a clear understanding of who "the people" are—everyone not named Lester—and the people are by law prohibited from participating in an important qualifying election.

In certain periods of American history, the United States very much resembled Lesterland. Certainly at the Founding, and at least until the ratification of the Fourteenth, Fifteenth, and Nineteenth Amendments (and arguably until the passage of the Voting Rights Act), it was very clear that "the people" did not include black people or women, who were formally denied the right to vote. The Lesters were white men and sometimes only propertied white men. The United States was, during those periods, ruled by Lesters.[24]

But this is not the case in the United States today, and it is certainly not the case with campaign financing. Whereas in Lesterland everyone but Lesters are prohibited from participating in the Lester election, as a matter of law no individual citizen is denied the right to contribute to a candidate in the United States.

Lessig elides this distinction by noting that the United States is like Lesterland because "it, too, effectively has two elections."[25] That adverb, "effectively," is carrying a lot of conceptual weight, too much perhaps.[26] As Lessig knows, there is a significant difference between state action that restricts political participation to a subset of citizens (or Lesters) and state action that permits all citizens to participate though only a subset of them do in fact participate.

This is why Lessig's reliance on the "White Primary Cases" to support his point is unavailing. The White Primary Cases, in particular *Terry v. Adams*,[27] rely upon some notion of state action, public function, or common carrier rationale. Justice Black's plurality opinion in *Terry* seemed to rely on the

23. *Id.* at 3.

24. As Bruce Cain notes, election law, especially the area of political participation, is an odd place to anchor originalist claims. *See* Bruce E. Cain, *Is "Dependence Corruption" the Solution to America's Campaign Finance Problems?*, 102 CALIF. L. REV. 37 (2014). As Cain remarks:

> It is unclear, to begin with, how sincere and prominent the Founders' concerns about aristocratic dominance actually were. Their decision to restrict the vote is just as easily explained by outright prejudice against women and minorities, the desire to retain power, fear of differing interests, or any number of other common reasons for political discrimination.

Id. at 40.

25. Lessig, *supra* note 7, at 3.

26. The noun "elections" is also doing a lot of conceptual work. Are political contributions like elections? Perhaps they are. *See* BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE (2002). But we might be served with an explicit defense of the analogy.

27. Terry v. Adams, 345 U.S. 461 (1953).

theory that the state has delegated to a private entity an essential public function, the running of elections, as a justification for finding state action.[28]

As a matter of law, everyone is entitled to contribute to the financing of elections. And politicians welcome almost all legal political contributions, big or small. Everyone is potentially a Lester. In the United States, the funders are potentially coterminous with the people.[29] If this point is correct, it also means that the Lesters are included in "the people."[30] When we rely on the Lesters (or the funders), we are not relying upon a foreign electorate such as Canadians or Mexicans, (or even more basically a fictional entity such as a corporation); we are relying upon a subset of the American electorate—perhaps a small subset, but a subset nonetheless. Thus, the problem of campaign financing cannot be that Congress is not ultimately dependent on the people alone; the problem must be that Congress is dependent on some of the people (the small group of people who choose to participate or find it easier to participate) more than it is dependent on some of the other people (the large group who do not). And if Lesters are people too, then "dependence corruption," because it is a stylized definitional project, is no longer corruption, at least under this articulation.

II.
WEALTH AND POLITICAL PARTICIPATION

Consider here the other two articulations of "dependence corruption." Sometimes Professor Lessig defines "dependence corruption" as the failure of Congress to be dependent on the people alone, which I have suggested above is not really about corruption at all since legislators, except when they self-finance, are always dependent at least upon some of the people for financing their campaigns. Sometimes Lessig is concerned with the "subtle, understated, perhaps camouflaged bending [by the legislators] to keep the Lesters happy."[31] Lessig recounts a story from former Senator Evan Bayh who described how this "corruption" works. In anticipation of support or attack from super PACs, elected officials "conform[] [their] behavior to the standards set by the super PAC."[32] As Bayh described it, "without even spending a dollar, the super PAC achieves its objective: bending congressmen to its program."[33]

28. *Id.* at 469 ("For a state to permit such a duplication of its election processes is to permit a flagrant abuse of those processes to defeat the very purposes of the Fifteenth Amendment. . . . It violates the Fifteenth Amendment for a state, by such circumvention, to permit within its borders the use of any device that produces an equivalent of the prohibited election.").

29. *See also* Cain, *supra* note 24, at 41–42 (making a similar point).

30. *See also* 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.

31. Lessig, *supra* note 7, at 3.

32. *Id.* at 22 (quoting LAWRENCE LESSIG, ONE WAY FORWARD 67–68 (2012)).

33. *Id.*

Here Lessig is talking about the responsiveness of public officials to their constituents. The point seems to be that legislators will adopt ideological positions in order to attract or keep contributors. This bending will make legislators differentially responsive, and thus dependent upon large contributors. As Rick Hasen has argued however, the Court has precluded the government from regulating campaign financing on the basis that legislators will respond differentially to large contributors.[34] This articulation is the closest Lessig comes, in my view, to making an equality argument, an argument that all voters ought to have equal impact on the political process or that political actors ought to respond equally to all voters. Because Lessig is uninterested in equality-based arguments, this cannot be what he means by "dependence corruption."

At other times Lessig defines "dependence corruption" as Congress's dependence upon some of the people as opposed to the whole people. Lessig writes that the "focus of the corruption that I am describing in this Essay [is] a system in which a tiny proportion of citizens are 'the funders' within the money election."[35] Elsewhere, Lessig writes, "a dependence upon 'the funders,' when those funders constitute such a tiny slice of a concentrated interest, is also 'dependence corruption.'"[36] "Dependence corruption" here means corruption as a function of dependence upon some of the people and not all of the people.

As I will suggest in the remainder of this Part, this articulation of "dependence corruption" is really best articulated as a problem of political participation and not a problem of corruption. The crucial problem is not that legislators are dependent upon a minority of the people—that is the symptom. The problem is that not enough of the people participate as funders in democratic politics.

Before pursuing this further, consider an illustrative analogy. One might say that an individual, who routinely cannot fall asleep without the assistance of a sleep aid, is dependent upon the sleep aid. If asked to identify this individual's problem one could focus on the sleep aid. One could get rid of the sleep aid, but that would not get at the root of the problem, as the dependence upon the sleep aid is simply the evident manifestation of an underlying problem. The root cause is not the sleep aid but the fact that the individual has some problem that is preventing her from sleeping properly. Or to put it differently, to cure improper dependence on the sleep aid, one must first deal with the underlying problem that is preventing this individual from falling asleep.

By focusing on dependence, Lessig has identified the evident manifestation of the underlying problem. But he has not identified the root

34. *See* Hasen, *supra* note 30, at 15.
35. Lessig, *supra* note 7, at 18.
36. *Id.*

cause or causes of the problem. The root causes of the problem are the structural and economic barriers that preclude a vast majority of citizens from participating in politics or from financing elections.[37] From this perspective, the question then is how to get more people to participate in funding democratic politics.

I agree with Lessig that this issue need not be stated as an equality problem. To the extent that Lessig is not concerned with assuring that citizens have equal influence as funders, then Lessig is not open to the equality charge. But I also think it is odd for Lessig to think about this as a corruption problem. Lessig's apparent concern is that the state has designed a system of campaign financing that is open only to a certain group of people. The state has predetermined that only a certain group of people can participate in the funding of campaigns. This is a political participation problem that raises similar speech issues as were raised by, for example, *Citizens United*, where the state excluded corporations from participating in the financing of campaigns.

Viewed in this way, Lessig's analogy of a system of private funding to the white primary makes sense. Lessig writes: "the exclusion of blacks from the primary could plainly be said to be a corruption of 'dependence on the people alone.'"[38] This is because the white primary created a "regime that filters choices on the basis of whether someone is white or black" and "not every citizen could be a member of the filtering class. . . . [B]lacks cannot be white."[39] Lessig is concerned that the state has created a barrier for political participation (wealth) that some citizens will never be able to overcome. In the same way that blacks cannot be white, a significant number of non-funders cannot be funders. Non-funders cannot be funders not because non-funders do not wish to be funders or are uninterested in being funders, but because they do not have the financial resources that would enable them to participate as funders. Lessig explains that in a private system of campaign financing "[o]nly a tiny proportion of 'the people' could afford the funding necessary to become 'a funder.'"[40] Consequently, a system of private financing is a wealth classification that makes wealth a prerequisite to political participation. As Lessig writes later in his essay:

> 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

37. Spencer Overton has written very eloquently and, in my view, quite persuasively about this problem. *See* Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73 (2004). He also argues that reformers need to focus much less on corruption and more on participation.

38. Lessig, *supra* note 7, at 17.

39. *Id.* at 17–18.

40. *Id.* at 18.

> requires a commitment of resources significantly beyond the reach of the vast majority of electors.[41]

Conceptually, Professor Lessig could use the White Primary Cases in one of two ways. First, Lessig might argue that given insuperable wealth inequalities, allowing private financing to remain as essentially the only way to finance campaigns is tantamount to a state law restricting political participation to the wealthy. If he followed this line of logic, Lessig would eschew arguments about corruption and focus more directly on the importance of campaign financing and why that system should not be left to the wealthy. Alternatively, Professor Lessig might be interested in arguing that the financing of elections is a non-delegable state function. In what ways is campaign financing like an election? To what extent is campaign financing an inherent state function? Is this a function that is delegable to private parties? Does allowing the wealthy to finance campaigns equal a poll tax in violation of the Twenty-Fourth Amendment?[42]

If Lessig's real concern is that financing elections is a non-delegable state function, which seems to me the articulation that most powerfully and coherently presents his project, it is certainly not an argument about equality. It is much more profound and interesting than the distracting debates about equality. Lessig is inviting us to think about campaign financing as implicating basic rights of political participation. Put in different terms, campaign financing is not like the one-person, one-vote reapportionment cases that raised issues of vote dilution and voting equality. Campaign financing is like the participation cases, cases in which the state denied a class of people the right to participate. These include cases such as *Harper v. Virginia State Board of Elections*,[43] which struck down Virginia's poll tax on the ground that wealth was not relevant to a citizen's ability to participate in the political process; *Gomillion v. Lightfoot*,[44] which held unconstitutional Tuskegee's racial gerrymandering ordinance that removed almost all of the black citizens from the city; and *Kramer v. Union Free School District No. 15*,[45] which invalidated a New York ordinance that limited voting in school board elections to residents who own property in the district or have children in the local schools.

CONCLUSION

Professor Lessig's project is much more interesting than distracting debates about corruption and dependence. The problem is not dependence;

41. *Id.* at 20.

42. For a project consistent with this approach, see Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. 63 (2009); *see also* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (concluding that "wealth or fee paying has . . . no relation to voting qualifications").

43. 383 U.S. 663.

44. 364 U.S. 339 (1960).

45. 395 U.S. 621 (1969).

dependence is the symptom. The problem is private financing itself—or wealth as a prerequisite, an insuperable barrier, to political participation. To put the point in Lessig's terms, to cure improper dependence one must alter, if not eliminate, the system of private financing.

Lessig's project seems to be caught between an attempt to fit his concerns with the current doctrinal framework and an attempt to upend the *Buckley* paradigm. I am not optimistic that any campaign finance reform project can be successful within the current doctrinal framework. The current Court is in the process of dismantling each element of the Federal Election Campaign Act of 1974. Expenditure limitations are completely gone.[46] Public financing has been severely undermined both as a matter of case law and as matter of politics.[47] *SpeechNow* has struck a blow against contribution limits to expenditure-only PACs.[48] The Court is about to hear a case challenging aggregate contribution limits.[49] The political battle is now about disclosure, and we have not seen the last of the litigation over the constitutionality of corporate contribution bans. The reform project is decisively on the defensive. Reformers cannot hope to reverse the tide if they are battling within the terms of the current doctrinal framework.

Lessig's project can present a different paradigm for reformers. Once understood in participation terms, Lessig's project is much more subversive than even he is perhaps willing to admit. Lessig presents the doctrinal implications of his project as exceedingly modest, a reversal of *SpeechNow* and a justification for statutory bans on aggregate contribution limits.[50]

But at the very least, Lessig could and does present an important public policy case for the public financing of campaigns. His work could help us better understand why the financing of campaigns is a public good and why we should be wary of entrusting that public good to the oligarchs. Lessig can call this "dependence corruption," but the Republic might be less lost if he made a full-throated case for a system of political participation that is not limited by wealth.

46. *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Buckley v. Valeo, 424 U.S. 1 (1975).

47. *See, e.g.*, Arizona Free Enter. Clubs' Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011).

48. *See* SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010).

49. *See* McCutcheon v. FEC, 133 S. Ct. 1242 (2013) (mem.) (noting probable jurisdiction).

50. Lessig, *supra* note 7, at 20–21.