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Title

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Journal

New York University Law Review Online

Author

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Publication Date

2014

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SCHOOL OF LAW

UNIVERSITY of CALIFORNIA • IRVINE

Legal Studies Research Paper Series No. 2014-39

***"ELECTORAL INTEGRITY," "DEPENDENCE
CORRUPTION," AND WHAT'S NEW UNDER THE SUN***

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ESSAY

“ELECTORAL INTEGRITY,” “DEPENDENCE CORRUPTION,” AND WHAT’S NEW UNDER THE SUN

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“What has been is what will be, and what has been done is what will be done, and there is nothing new under the sun.” –Ecclesiastes 1:9

Justice Breyer’s dissent in *McCutcheon v. Federal Election Commission*,¹ the Supreme Court case striking down some federal contribution limits and making it harder to uphold others, valiantly offers a variety of theories supporting the constitutionality of campaign finance limits. Especially intriguing was Justice Breyer’s citation to Dean Robert Post’s “electoral integrity” argument from his *Citizens Divided* book based on Post’s Tanner lectures.²

Justice Breyer’s citation to Dean Post’s argument was so intriguing because the book was not yet publicly available.³ How Justice Breyer got a copy to cite has not been revealed,⁴ but it made me all the more curious to see what Dean Post had come up with to justify Justice Breyer’s deviation from the Justices’ ordinary practice of citing only publicly available materials or making available in the Clerk of Court’s file any materials that are not easily available.

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¹ 134 S. Ct. 1434, 1468 (2014) (Breyer, J., dissenting).

² ROBERT POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* 87–88 (2014).

³ Rick Hasen, *Perhaps for the First Time, Justice Breyer’s McCutcheon Dissent Cites Unavailable Forthcoming Scholarship*, ELECTION L. BLOG (Apr. 19, 2014), <http://electionlawblog.org/?p=60645>.

⁴ Dean Post said the question should be directed to Justice Breyer. He explained that Justice Breyer was present when Dean Post presented a version of his lectures and the text of the lectures was available online. “Justice Breyer evidently liked the thesis of the lectures, and, knowing that the book was about to be published in late spring 2014 by Harvard University Press, must have requested (and received) an advance copy of the published version. Cite checkers at the Court evidently determined the correct page numbers.” Ronald Collins, *Ask the Author: Robert Post—Citizens Divided*, SCOTUSBLOG, Aug. 11, 2014, <http://www.scotusblog.com/2014/08/ask-the-author-robert-post-citizens-divided/#more-216555>.

Alas, as Professor Justin Levitt's exceptionally polite but trenchant critique of Dean Post's "electoral integrity" argument convincingly demonstrates,⁵ Dean Post's "electoral integrity" argument is simply a variation on a theme which has been around since at least the 1976 case of *Buckley v. Valeo*: a public confidence argument for campaign finance limitations. In *Buckley*, the Court couched this interest as an "appearance of corruption" argument: "Congress could legitimately conclude that the avoidance of the appearance of improper influence is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent."⁶ The Court in *McCutcheon* explicitly held that the appearance of corruption interest could not justify the aggregate contribution limits challenged in the case (and in so doing it appeared to narrow the scope of the appearance of corruption argument).⁷

What's worse, as both Professor Levitt⁸ and Professor Pam Karlan (in her response to Dean Post in the *Citizens Divided* book⁹) amply demonstrate, social science has not found a convincing link between public confidence and the state of campaign finance laws. That is, while the public likes campaign finance limits and while it has a low opinion of Congress, the two views are not necessarily causally related: Stricter campaign finance laws are not correlated with higher public confidence in government.¹⁰

That is not to say that there could never be a link. Dean Post may be wrong empirically today but right in predicting the future: It might be that public

⁵ Justin Levitt, *Electoral Integrity: The Confidence Game*, 89 N.Y.U. L. REV. ONLINE____ (forthcoming 2014).

⁶ *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (internal quotations omitted).

⁷ Richard L. Hasen, *Opening the Political Money Chutes*, REUTERS, (Apr. 7, 2014), <http://blogs.reuters.com/great-debate/2014/04/07/opening-the-political-money-chutes/>; RICHARD L. HASEN, LEGISLATION, STATUTORY INTERPRETATION, AND ELECTION LAW: EXAMPLES AND EXPLANATIONS 479 (2014).

⁸ Levitt, *supra* note 5, at ____.

⁹ Pamela S. Karlan, *Citizens Deflected: Electoral Integrity and Political Reform*, in POST, *supra* note 3, at 141–51.

¹⁰ See, e.g., Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119 (2004) (finding no link between public confidence and the presence or absence of campaign finance laws; Megan Thee-Brenan, *Polls Show Broad Support for Campaign Spending Caps*, N.Y. TIMES, Apr. 2, 2014, <http://www.nytimes.com/2014/04/03/us/politics/polls-show-broad-support-for-campaign-spending-caps.html>; (describing results of public opinion poll showing broad support for campaign spending limits Rebecca Shabad, *Public Lacks Confidence in Government, Poll Shows*, THE HILL BRIEFING ROOM (Jan. 2, 2014), <http://thehill.com/blogs/blog-briefing-room/news/194230-poll-public-lacks-confidence-in-government> (describing results of public opinion poll showing lack of public confidence in Congress).

confidence in government will decline further because of the explosion of outside money wrought by the Roberts Court's campaign finance cases.

Dean Post is one of the sharpest constitutional minds in the country. His book is beautifully written and tells a compelling historical tale of campaigns and speech in the United States. So why would he offer in the prestigious Tanner Lectures as his grand solution to the campaign finance problem a government interest justifying reform that the Court has already rejected and that is largely unsupported by social science evidence? And why would Justice Breyer so eagerly latch on to this interest, viewing it as important enough to cite before Dean Post's book was even available?

My sense is that Dean Post was looking to offer a different label or doctrinal hook to allow the Court (or more likely, a progressive Court, which could well come after the Roberts Court) to reverse the *Citizens United* line of cases consistent with an appearance of fidelity to First Amendment doctrine.¹¹ Upholding a "new" interest in "electoral integrity" would not require the Court to outright reject the reasoning in earlier cases, making it perhaps more palatable for a Court that would not want to be criticized (as the Roberts Court sometimes is¹²) for overruling precedent.

I see a parallel approach to campaign finance reform offered by Professor Lawrence Lessig of Harvard. Like Dean Post, Professor Lessig has one of the sharpest constitutional minds in the country. Like Dean Post, Professor Lessig has offered what he claims is a novel constitutional theory to justify campaign finance limits: "dependence corruption." And like Dean Post, Professor Lessig appears to have repackaged an old interest under a new label. In Professor Lessig's case, the "dependence corruption" interest is one in promoting political equality, an interest the Supreme Court has repeatedly (and in my view) wrongly rejected since the *Buckley* case. Professor Lessig denies the two interests are the same, even though Dean Post, I, and others have pressed the point.¹³ His audience, at least at first,

¹¹ Dean Post made a similar point in a recent interview: "The book offers the liberal wing of the Court a way to translate its commitment to representative integrity into terms that are compatible with the discursive democracy established by the First Amendment. The value of electoral integrity captures much of what attracts liberal Justices to the importance of maintaining the integrity of our electoral system." Collins, *supra* note 4.

¹² See, e.g., Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011) (criticizing the Roberts Court for reversing earlier campaign finance precedent).

¹³ Richard L. Hasen, *Fixing Washington*, 126 HARV. L. REV. 552 (2012) (reviewing LAWRENCE LESSIG, *REPUBLIC, LOST* (2011) and JACK ABRAMOFF, *CAPITOL PUNISHMENT* (2011)); Lawrence Lessig, *A Reply to Professor Hasen*, 126 HARV. L. REV. ONLINE 61 (2012); Richard L. Hasen, *Is "Dependence Corruption" Distinct from a Political Equality Rationale for Campaign Finance Regulation? A Reply to Professor Lessig*, 12 ELECTION L.J. 315 (2013); ; Lawrence Lessig, *What an Originalist Would Understand "Corruption" to Mean*, 102 CALIF. L. REV. 1 (2014); POST, *supra* note 3, at 52–53.

seemed not a future progressive Supreme Court majority but a conservative Justice interested in originalism—Professor Lessig has spent much time trying to show that “dependence corruption” was a concern of the Founders. In *McCutcheon*, however, the Court ignored the originalist arguments Professor Lessig put forward in an amicus brief.¹⁴

When it comes down to it, there are really only three major arguments which have been advanced in the last 40 years to justify limits on money in politics against a charge that such limits violate First Amendment rights of speech and association: an anti-corruption interest, a political equality interest, and a public confidence interest. To be sure, there has been great fighting over what “corruption” means, and as Professor Levitt shows,¹⁵ the Supreme Court majority has simply closed off the presentation of evidence of corruption to justify campaign finance limits. Further, there are a variety of types of corruption, political equality, and public confidence arguments. But it is really just these three interests debated by the Court and commentators: nothing new under the sun.¹⁶

It may well be that if and when the Supreme Court reverses *Citizens United* and the rest of its deregulatory jurisprudence, the Justices will latch onto something like “electoral integrity” or “dependence corruption” to explain the latest reversal. Maybe even some Justices will actually believe that these interests represent new arguments not before considered by the Court. But it would be far better from the point of view of coherent doctrine and sound policy for the Court to transparently and forthrightly relate these new arguments to the old, and to explain where the Court went wrong before and what path it should take going forward.

¹⁴ Brief Amicus Curiae of Professor Lawrence Lessig in Support of Appellee, *McCutcheon v. FEC*, 2013 WL 3874388 (West 2013); Lawrence Lessig, *Originalists Making It Up Again: McCutcheon and ‘Corruption,’* DAILY BEAST (Apr. 2, 2014), <http://www.thedailybeast.com/articles/2014/04/02/originalists-making-it-up-again-mccutcheon-and-corruption.html>.

¹⁵ Levitt, *supra* note 5, at ____.

¹⁶ A fourth interest, preserving the time of elected officials) would appear to support raising or eliminating contribution limits, not restricting them. Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281 (1994). Professor Nicholas Stephanopoulos is proposing a new interest, “alignment,” to justify limits, and it is unclear if and how courts and commentators will view the relationship of this interest to the three existing interests. Nicholas Stephanopoulos, *Aligning Campaign Finance Law* (unpublished draft dated 2014 on file with the author).