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The Corruption of Liberal and Social Democracies

Timothy K. Kuhner

Georgia State University College of Law

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THE CORRUPTION OF LIBERAL AND SOCIAL DEMOCRACIES

Timothy K. Kuhner*

Thomas Piketty repeats throughout Capital in the Twenty-First Century that today's levels of inequality are not inevitable, much less natural, and has connected the state of democracy worldwide to rising economic inequality. Wealth transfers from the state to the private sector, wealth transfers from labor to capital, and tax laws favorable to the concentration of wealth require that the participatory and representative facets of democracy be kept in check. Beyond suitable material conditions, the growth and maintenance of inequality necessitates a justificatory ideology. This Article explores the possibility that the laws of political finance can help connect the dots. Legal patterns in the financing of campaigns and political parties point to two distinct forms of oligarchy in play: plutocracy, representing the decay of liberal democracy, and partyocracy, representing the decay of social democracy. Together, these legal forms of corruption appear to have co-opted democracy's values and outputs, paving the way for neoliberalism. This Article focuses on plutocracy, the form of corruption most affecting the United States at present.

INTRODUCTION.....	2453
I. INTRODUCTION TO NEOLIBERALISM AND POLITICAL FINANCE.....	2455
II. DEMOCRACIES AND CAPITALISMS.....	2457
III. CATEGORIES OF POLITICAL FINANCE.....	2464
IV. PLUTOCRACY.....	2467
CONCLUSION.....	2476

INTRODUCTION

Goldburn P. Maynard Jr. writes that “the federal estate tax remains the only levy that is meant specifically to combat the concentration of wealth in

* Associate Professor, Georgia State University College of Law. The author thanks Karen Lowell for excellent research assistance. This Article is part of a larger symposium entitled *We Are What We Tax* held at Fordham University School of Law. For an overview of the symposium, see Mary Louise Fellows, Grace Heinecke & Linda Sugin, *Foreword: We Are What We Tax*, 84 *FORDHAM L. REV.* 2413 (2016).

the hands of the few.”¹ He attributes the success of the movement to weaken this tax to more than just money in politics.² Beyond lobbyists and elite control of democracy, Professor Maynard adopts the view that “tax policy is more about ideology than facts”—the success of a narrative that values and celebrates wealth.³ This Article discusses components of money in politics that, with varying degrees of directness, shed light on the concentration of wealth, the weakening of the estate tax, and the ideological bases for both.

It is questionable whether the estate tax and other progressive government policies can endure for long when elections and outside political speech are financed by an increasingly small portion of wealthy Americans.⁴ As a result of Supreme Court decisions handed down on matters of campaign finance and outside spending,⁵ American democracy bears witness to the concentration of political power in the hands of the few—namely, the same demographic that would benefit from the repeal of the estate tax. The question then becomes: What connections exist between the concentration of wealth in the hands of the few and the concentration of political power in the same hands?

Possible causal connections have been the subject of a major tax exposé in the *New York Times*.⁶ The *Times* article begins by discussing how two notable “hedge fund magnates” have invested millions of dollars in political spending. It quickly reaches general conclusions, including this one:

[T]he very richest Americans have financed a sophisticated and astonishingly effective apparatus for shielding their fortunes [and] this apparatus has become one of the most powerful avenues of influence for wealthy Americans, [all of whom are] among a small group providing much of the early cash for the 2016 presidential campaign.⁷

The barely veiled allegation conveyed by the *Times* is that the wealthiest Americans have succeeded in using political spending to preserve—if not create—tax loopholes. As Jared Bernstein put it, “[T]he wealthy use their money to buy politicians; more accurately, it’s that they can buy policy, and specifically, tax policy.”⁸

Logically speaking, political power in the hands of the wealthy can be expected to lead to policy changes benefitting the wealthy. Beyond these

1. Goldburn P. Maynard Jr., *Perpetuating Inequality by Taxing Wealth*, 84 FORDHAM L. REV. 2429, 2429 (2016).

2. *Id.* at 2447 (discussing MICHAEL J. GRAETZ & IAN SHAPIRO, *DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITANCE* (2005) (recounting the political saga that was the repeal of the estate tax in 2001)).

3. *Id.*

4. *See infra* notes 115–19 and accompanying text.

5. *See infra* Part III.

6. Noam Scheiber & Patricia Cohen, *For the Wealthiest, a Private Tax System That Saves Them Billions*, N.Y. TIMES (Dec. 29, 2015), http://www.nytimes.com/2015/12/30/business/economy/for-the-wealthiest-private-tax-system-saves-them-billions.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&_r=0 [https://perma.cc/7Q6S-49WB].

7. *Id.*

8. *Id.* (quoting Jared Bernstein).

material similarities and connections between political and economic inequality, however, this Article sides with Professor Maynard's views on the importance of ideology.⁹ It suggests an underlying ideological affinity between political and economic inequalities. That affinity is well illustrated by an exploration of how liberal democracy and social democracy differ from each other and how the corruption of the former is accomplished by an extreme rejection of the latter. Any tax regime that disproportionately benefits the wealthy is tied up, after all, with a rejection of social democracy and an increasingly emaciated view of liberal democratic commitments.

I. INTRODUCTION TO NEOLIBERALISM AND POLITICAL FINANCE

Established democracies have long been home to debates over “social” versus “liberal” types of democracy and capitalism. The fall of the Soviet Union and subsequent globalization of democracy made this debate the defining issue of the last quarter century.¹⁰ From questions of freedom, privatization, and economic deregulation, to questions of equality, entitlements, and taxation, the fundamental structure of this debate is whether interests and ideologies of a capitalist or democratic character will govern society. As of 2016, that latest stage of history has ended, and the time has come to announce the winner: neither liberal democracy nor social democracy, but corrupt mutations of both, which have made easy prey for neoliberalism.

As of the 1970s, liberalism—the political philosophy and mode of government—was still broad enough to accommodate ethical concerns over market excesses, equality, the development of capacities, and meaningful political participation for ordinary citizens. Democratic governments took programmatic steps that reflected not just classical liberalism, but also ethical and social liberalism, to the happy effect that one could mention John Locke as well as the other Johns (Stuart Mill and Rawls) in the same sentence. The reach of the market was often circumscribed in the interest of community values and public goods, including the stability of the market itself. In sum, Keynesians and neoclassicists still enjoyed a healthy rivalry.¹¹

Sporadically in the 1980s and consistently thereafter, however, neoliberalism gained ground on liberalism. An economic and political rejection of social, ethical, and regulatory stances, neoliberalism brought

9. See *supra* notes 1–4 and accompanying text.

10. While just one-third of all states in the mid-1980s were democracies, by 1999 two-thirds of all states had converted to democracy. See James Crawford, *Democracy and the Body of International Law*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* 91, 95 (Gregory H. Fox & Brad R. Roth eds., 2000). In 1999, the number of democracies was reported as 120, or two-thirds of all states. See *Democracy Momentum Sustained As*, FREEDOM HOUSE (Dec. 21, 1999), <https://freedomhouse.org/article/democracy-momentum-sustained> [<https://perma.cc/DT8W-J9KL>].

11. See CHARLES DERBER & YALE R. MAGRASS, *CAPITALISM SHOULD YOU BUY IT?: AN INVITATION TO POLITICAL ECONOMY* 33–34, 51–52 (2014) (summarizing the principles of neoclassical economics and Keynesian economics).

about the “‘economization’ of political life”¹² for the purpose of “capital enhancement.”¹³ Finance capital, trade treaties, corporate lobbies, supranational institutions, and political parties succeeded in carrying out privatization and austerity measures on a global scale.¹⁴ As David Harvey notes, “There has everywhere been an emphatic turn . . . in political-economic practices and thinking since the 1970s[:] [d]eregulation, privatization, and withdrawal of the state from many areas of social provision have been all too common.”¹⁵

The implementation of this neoliberal program involved a complex set of factors and events, including a solid degree of government capture by elites and an equally solid degree of ideological drift toward economic conceptions of political values. This Article posits that some of that capture and drift occurred between 1970 and 2014 within a body of law called political finance. While the term “campaign finance” is more common in presidential systems and “party finance” in parliamentary systems,¹⁶ they are both included in political finance, which refers to “disclosure, transparency, expenditure and contribution limits, as well as direct forms of public subsidies to parties and candidates.”¹⁷

When contributions and expenditures are subject to few or no limits, and public subsidies are lacking, democracy morphs into a market for political power. When such conditions are present in a polity with significant economic inequality, and when the regulation (or lack of regulation) of industries or individuals has real monetary value, it is common for large donors and spenders to exercise disproportionate influence over political parties, candidates, officeholders, and lawmaking. As a 2003 USAID global report concluded, “Payback of campaign debts in the form of political favors breeds a type of corruption that is commonly encountered around the world.”¹⁸ Large expenditures by outside interests or by wealthy, self-financing candidates can achieve a similar result: political power on

12. WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM’S STEALTH REVOLUTION 17 (2015).

13. *Id.* at 22.

14. *See, e.g.*, MARK BLYTH, AUSTERITY: THE HISTORY OF A DANGEROUS IDEA (2015); DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (2007); KERRY ANNE MENDOZA, AUSTERITY: THE DEMOLITION OF THE WELFARE STATE AND THE RISE OF THE ZOMBIE ECONOMY (2014).

15. HARVEY, *supra* note 14, at 2–3.

16. *See* ARTHUR B. GUNLICKS, CAMPAIGN AND PARTY FINANCE IN NORTH AMERICA AND WESTERN EUROPE, at vii (2000) (noting that political finance “means campaign and candidate finance” in North America, whereas “[i]n Europe it is more likely to mean party finance”).

17. *See, e.g.*, HERBERT E. ALEXANDER & JOEL FEDERMAN, COMPARATIVE POLITICAL FINANCE IN THE 1980s, at 1 (1989).

18. BUREAU FOR DEMOCRACY, CONFLICT, AND HUMANITARIAN ASSISTANCE, U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, MONEY IN POLITICS HANDBOOK: A GUIDE TO INCREASING TRANSPARENCY IN EMERGING DEMOCRACIES 7 (2003). As Herbert E. Alexander and Rei Shiratori stated in their volume on comparative political finance, “[I]ncredibly large monetary contributions . . . have permeated the world of politics in most continents.” Herbert E. Alexander & Rei Shiratori, *Introduction*, in COMPARATIVE POLITICAL FINANCE AMONG THE DEMOCRACIES 1, 3 (Herbert E. Alexander & Rei Shiratori eds., 1994).

the basis of economic power, which, when consistent and widespread, translates to rule by or for the wealthy.

On the other hand, when public subsidies are high and donations and expenditures are limited, candidates and parties gain a measure of independence from moneyed interests. By drawing their own financing from the state, however, and controlling the amount, parties may gain a measure of independence not only from moneyed interests, but from their ordinary constituents as well. In this vein, Brad Roth remarked that “[t]he universal franchise may allow all sectors of the society to select . . . from among pre-packaged candidates of parties controlled by social elites, but this scarcely implies the rudiments of accountability, let alone genuine popular empowerment.”¹⁹ Despite tremendous unpopularity, major parties may collude in order to legislate increasing state funds for themselves, thus disadvantaging, if not excluding, their competitors. When consistent and widespread, such dynamics of cartelization, ossification, and exclusion translate into rule by and for the party.

Although plutocracy and partyocracy arise from distinct configurations of political finance laws, they both serve to concentrate political power in elites—large political donors and spenders in the case of plutocracy and party officials and key party allies in the case of partyocracy. The effect of distancing representatives from ordinary citizens places democratic representation in doubt, while an overpowering role for elites eclipses the possibility (or at least the value) of mass participation. Plutocracy and partyocracy achieve this identical result through diametrically opposed ideological principles and patterns of funding. These two forms of corruption prove something that is remarkable: both liberal and social democracy can be converted into oligarchic forms of power from within, through ostensibly faithful exercises of constitutional law. The subsequent hijacking of state power by market interests and ideologies is neither surprising nor all that difficult to accomplish. The arduous and unpredictable component of neoliberalism’s triumph consists in interpreting and implementing constitutional provisions on pluralism, free speech, equality, and the general will so as to distance campaigns, officeholders, and political parties from popular control. The de-democratization process requires co-opting the values of liberal democracy for illiberal ends and the values of social democracy for antisocial ends.

II. DEMOCRACIES AND CAPITALISMS

In 1977, Charles Lindblom described the primary difference between governments as despotic versus libertarian—that is, governments that were inherently oppressive versus those that sought to employ freedom as their organizing principle.²⁰ This was a common way to distinguish the forces at

19. Brad R. Roth, *Evaluating Democratic Progress*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW*, *supra* note 10, at 502.

20. CHARLES E. LINDBLOM, *POLITICS AND MARKETS*, at ix (1977). This characterization did of course ignore many complications and ironies, such as the willingness of libertarian

work during the Cold War. But Lindblom then perceived the central question that would determine the shape of social order after communism's collapse. "Aside from the difference between despotic and libertarian governments," he wrote, "the greatest distinction between one government and another is in the degree to which market replaces government or government replaces market."²¹ Also writing in 1977 and perceiving the same distinction, C.B. Macpherson noted that "liberal democracy" was associated with two very different types of societies: "the democracy of a capitalist market society . . . [or] a society striving to ensure that all its members are equally free to realize their capabilities."²² This radical ambiguity within liberal democracy derived from a rift within liberalism between two types of freedom: "freedom of the stronger to do down the weaker by following market rules [and] equal effective freedom of all to use and develop their capacities."²³

Writing one year before Lindblom and Macpherson, Andrew Levine characterized social democracy as "the left-wing of liberalism" and resting on a faith in "the development of productive capacities and the progressive and continuous evolution of political forms."²⁴ According to Macpherson, that left wing of liberalism was required in order to help the West to compete on two fronts during the Cold War: first, a competition with the East "for the esteem of the third world, the recently independent [] countries of Africa and Asia who have rejected liberal-democratic market values and institutions without embracing communist values and institutions,"²⁵ and second, a competition between political leaders in the West "for the support of their own people [who] demand a levelling up."²⁶ Levine described Macpherson's concern as "the spectre of proletarian revolution,"²⁷ not just the people's demand for more equality and less exploitation by capital. Although social democracy began as a working class movement opposed to capitalism, it came to serve as a defense against revolution within capitalist democracies, consisting in "reforms designed to mitigate capitalism's worst features."²⁸

In implementing such reforms, social democracy brings about a social form of capitalism. Claus Offe describes that type of capitalism, which has been meaningfully tempered by democracy, as "'organized,' 'embedded'

governments to support despotic governments that suppressed communist elements within their jurisdictions.

21. *Id.* Lindblom considered this to be the matter on which "[t]he operation of parliaments and legislative bodies, bureaucracies, parties, and interest groups depends." *Id.*

22. See generally C.B. MACPHERSON, *THE LIFE AND TIMES OF LIBERAL DEMOCRACY* 1 (2012).

23. *Id.*

24. Andrew Levine, *The Political Theory of Social Democracy*, 6 *CAN. J. PHIL.* 183, 192 (1976).

25. C.B. MACPHERSON, *DEMOCRATIC THEORY: ESSAYS IN RETRIEVAL* 22 (1973).

26. *Id.*

27. Levine, *supra* note 24, at 191.

28. *Id.* at 192.

and ‘regulated’ capitalism”²⁹ and as “(Continental) European capitalism.”³⁰ Informed by “the precepts of a ‘social’ market economy,”³¹ Offe contrasts it with the liberal or Anglo-American form of capitalism. While European versus Anglo-American is the “coarsest distinction” between different forms of capitalism,³² it is important to consider those broad contours, because the material and ideological battles of recent years have unfolded along them:

equality versus efficiency, collective bargaining versus individual contracting, cooperation versus conflict, rights versus resources, wage moderation versus distributive conflict, . . . social partnership versus class conflict, proportional representation versus majoritarianism, . . . associational collectivism versus individualism, social security versus competitiveness, [and] politics versus markets.³³

Offe explains that a defining feature of European capitalism and social order is its tendency toward the first choice in each pairing above. European capitalism acted for some time on this preference for equality, collective bargaining, and so on by implementing “state-defined and state-protected status categories.”³⁴ Those categories entail “bundle[s] of rights and duties, standards, licenses, mandates[,] . . . entitlements, subsidies, and privileges which are attached to virtually every participant in contractual economic transactions.”³⁵ Applying to banks, markets, unions, wage determinations, the tax system, and all manner of institutions and topics,³⁶ these status categories constrain voluntary transactions—i.e., “the individual pursuit of economic gain.”³⁷ Voluntary transactions are thus “‘embedded’ . . . in a set of formal . . . and informal . . . institutional patterns” that to one degree or another accomplish the task of “decommodification.”³⁸ For example, Margaret Jane Radin describes national maximum-hour limitations on the workweek and a national prohibition on child labor as “reflect[ing] an incompletely commodified understanding of work.”³⁹ Similarly, Michael Walzer has called such governmental policies “restraint[s] of market liberty for the sake of some communal conception.”⁴⁰

Prior to 1989, the establishment of such communal conceptions, market restraints, and social democracy was broad and popular enough that

29. Claus Offe, *The European Model of “Social” Capitalism: Can It Survive European Integration?*, 11 J. POL. PHIL. 437, 447 (2003).

30. *Id.* at 442.

31. *Id.* at 447.

32. *Id.* at 441.

33. *Id.*

34. *Id.* at 442.

35. *Id.*

36. *Id.*

37. *Id.* at 443.

38. *Id.*

39. MARGARET JANE RADIN, *CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS* 108 (2001).

40. MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 102 (1983).

economic integration through European Union policies had to be justified in terms of social democracy. Consider the remarks of Jacques Delors, former President of the European Commission, in 1988: “It would be unacceptable for Europe to become a source of social regression, while we are trying to rediscover together the road to prosperity and employment.”⁴¹ Delors proclaimed that “measures adopted to complete the large market should not diminish the level of social protection already achieved in the member states.”⁴² He further stated that “the internal market should be designed to benefit each and every citizen” and it would be “necessary to improve worker’s [sic] living and working conditions, and to provide better protection for health and safety at work.”⁴³ The measures taken by the European Commission to accomplish these goals would include “[t]he establishment of a platform of guaranteed social rights . . . such as every worker’s right to be covered by a collective agreement.”⁴⁴ Keith Ewing indicates that this is how Delors persuaded some trade unionists to support European integration.⁴⁵

In 2003, Offe offered two competing predictions for the effect of European integration on European capitalism. Perhaps, just as Delors promised, integration would cement, at the transnational level, the progress made by member states in ruling out “hostile economic rivalries” and “establishing [] through ‘positive’ integration . . . [a] political economy which serves the interests of all parties involved evenly.”⁴⁶ Or instead, European integration might be a “device that paves the way for the ultimate triumph of market liberalism on the European Continent by enforcing upon member states the adoption of regimes of privatization, deregulation, and fiscal austerity.”⁴⁷ This would spell an end to the ability of member states to “maintain the kind of protective arrangements and status order that each of them had built up in the course of their national history.”⁴⁸

Offe indicates that the latter course is more likely as a logical and operational matter:

It is much more likely that a European-style capitalism transforms itself into a liberal model than that the Anglo-Saxon model becomes “Europeanized” (in much the same way as . . . it is easier to make a fish soup out of an aquarium than the other way around). “Embeddedness” is a condition that is more easily lost than gained, due to its dependency upon supportive dispositions of a cognitive as well as moral kind.⁴⁹

41. K.D. Ewing, *The Death of Social Europe*, 26 KING’S L.J. 76, 77 (2015).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. Offe, *supra* note 29, at 447.

47. *Id.*

48. *Id.*

49. *Id.* at 446.

But ultimately, as of 2003, Offe wrote that it was “too early to pass definitive judgment on which of these diametrically opposed interpretations/predictions will come closer to the truth.”⁵⁰

The time to pass judgment came soon enough, however. Ewing notes that the European Commission’s social democratic promises were honored for approximately twenty years, from roughly the fall of the Berlin Wall until 2010. In 2015, Ewing declared “The Death of Social Europe.”⁵¹ “The contemporary focus,” Ewing wrote, “is on new economic governance arrangements[] and the subordination of labour rights generally.”⁵² He noted that European guidelines and treaties increasingly emphasize “international competitiveness,” rather than a social market or social justice.⁵³ European Commission guidelines evaluate “the right framework conditions for wage bargaining” in terms of “competitiveness,” a mode of evaluation that Ewing called “a prescription for collective bargaining deregulation by a technocratic process about which most citizens in most member states are largely unaware.”⁵⁴

Ewing documents a deregulatory trend in minimum wage and collective bargaining in a host of countries, including Romania, Greece, and Ireland,⁵⁵ with significant deregulatory pressure in Italy, Spain, Belgium, and Portugal.⁵⁶ His analysis culminates in substantial evidence of how the pursuit of “competitiveness,” “austerity,” and “free trade” have led to the destruction of Social Europe, an illustration of Offe’s proposition that it is much easier to move from social democracy to liberal democracy than the other way around.⁵⁷

Writing a year before Ewing, Thomas Piketty famously documented a thirty-year arc of rising economic inequality within capitalist states, including European and North American democracies. Ewing’s analysis is supported by Piketty’s book, *Capital in the Twenty-First Century*, which alerted the world that capitalism has produced a radical degree of inequality.⁵⁸ Before looking at the numbers, let us survey the causes of the various sources of inequality: “inequality in income from labor; inequality in the ownership of capital and the income to which it gives rise; and the interaction between these two terms.”⁵⁹ Two of the three factors⁶⁰ that Piketty deems responsible are overtly political and would not be possible

50. *Id.* at 447.

51. Ewing, *supra* note 41, at 86–87.

52. *Id.* at 87.

53. *Id.* at 88.

54. *Id.* (emphasis omitted).

55. *Id.* at 90.

56. *Id.* at 89.

57. *See generally id.*

58. *See generally* THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer trans., Harvard University Press 2014).

59. *Id.* at 238.

60. Piketty considers the other and “most important factor in the long run” to be “slower growth, especially demographic growth, which, together with a high rate of saving, automatically gives rise to a structural increase in the long-run capital/income ratio.” *Id.* at 173.

but for the sorts of laws and policies against which social democracy was supposed to guard:

[F]irst, the *gradual privatization and transfer of public wealth into private hands* in the 1970s and 1980s, and second, a long-term catch-up phenomenon affecting real estate and stock market prices, which also accelerated in the 1980s and 1990s in *a political context that was on the whole more favorable to private wealth* than that of the immediate postwar decades.⁶¹

Piketty notes that “the revival of private wealth is partly due to the privatization of national wealth,” and that “the proportion of public capital in national capital has dropped sharply in recent decades.”⁶² In France and Germany between 1950 and 1970, for example, “net public wealth represented as much as a quarter or even a third of total national wealth[,] . . . whereas today it represents just a few percent.”⁶³

Illustrating inequality of income from labor, Piketty sketches out the difference between the United States and Scandinavian countries:

[I]f the average wage is 2,000 euros a month, the egalitarian (Scandinavian) distribution corresponds to 4,000 euros a month for the top 10 percent of earners (and 10,000 for the top 1 percent), 2,250 a month for the 40 percent in the middle, and 1,400 a month for the bottom 50 percent, where the more inegalitarian (US) distribution corresponds to a markedly steeper hierarchy: 7,000 euros a month for the top 10 percent (and 24,000 for the top 1 percent), 2,000 for the middle 40 percent, and just 1,000 for the bottom 50 percent.⁶⁴

Moving to the distribution of capital ownership, Piketty finds even greater inequality:

In the societies where wealth is most equally distributed (once again, the Scandinavian countries in the 1970s and 1980s), the richest 10 percent own around 50 percent of national wealth or even a bit more, somewhere between 50 and 60 percent, if one properly accounts for the largest fortunes. Currently, in the early 2010s, the richest 10 percent own around 60 percent of national wealth in most European countries, and in particular in France, Germany, Britain, and Italy.

The most striking fact is no doubt that in all these societies, half of the population own virtually nothing: the poorest 50 percent invariably own less than 10 percent of national wealth, and generally less than 5 percent. In France, according to the latest available data (for 2010–2011), the richest 10 percent command 62 percent of total wealth, while the poorest 50 percent own only 4 percent.⁶⁵

The United States, famous for its *laissez-faire* stance, has outdone all other advanced democracies in this regard.⁶⁶ By 2010, the top 10 percent of U.S.

61. *Id.* (emphasis added).

62. *Id.* at 184.

63. *Id.*

64. *Id.* at 256.

65. *Id.* at 257.

66. *See id.*

wealth holders owned 72 percent of all national wealth.⁶⁷ Piketty's data expose the reality of 150 million Americans—the poorest 50 percent—owning just 2 percent of national wealth.⁶⁸ Beyond conditions favorable to returns on capital, Piketty also cites “an unprecedented explosion of very elevated incomes from labor, a veritable separation of the top managers of large firms from the rest of the population.”⁶⁹

Such remarkable concentrations of wealth stem from unequal outcomes in capital and labor independently, as well as capital over labor comparatively. Piketty says that inequalities with respect to capital “are always extreme” compared to inequalities with respect to labor,⁷⁰ but that “this regularity is by no means foreordained, and its existence tells us something important about the nature of the economic and social processes that shape the dynamics of capital accumulation and the distribution of wealth.”⁷¹ Thus, he suggests that rising inequality stems largely from victories for capital in the political processes of democracies and that those victories have provoked an extreme, unsustainable state of affairs.

Piketty speculates that capitalism's present distributive outcomes invite violent revolution.⁷² Noting that “such a high degree of concentration [of capital] is already a source of powerful political tensions, which are often difficult to reconcile with universal suffrage,”⁷³ he considers it “hard to imagine that those at the bottom will accept the situation permanently.”⁷⁴ Piketty states that the sustainability of today's extreme levels of inequality “depends not only on the effectiveness of the repressive apparatus but also, and perhaps primarily, on the effectiveness of the apparatus of justification.”⁷⁵ Ideology occupies Piketty's mind as he contemplates whether extreme inequality will last: “I want to insist on this point: the key issue is the justification of inequalities rather than their magnitude as such.”⁷⁶ We must remember, it is not merely the fact of high and rising inequality that must be justified, but rather that “institutional and political differences played a key role.”⁷⁷ In other words, such inequality is not inevitable. It is, rather, a political choice; and the political choice to institute policies that further enrich the wealthy would indeed require a strong ideological justification.

67. *Id.*

68. *Id.* See also generally EMMANUEL SAEZ, U.C. BERKELEY, STRIKING IT RICHER, THE EVOLUTION OF TOP INCOMES IN THE UNITED STATES (2013), <http://eml.berkeley.edu/~saez/saez-UStopincomes-2012.pdf> [<https://perma.cc/TYM4-BA3L>].

69. PIKETTY, *supra* note 58, at 24.

70. *Id.* at 244.

71. *Id.*

72. *Id.* at 439.

73. *Id.* at 263.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 237 (“[I]nequality began to rise sharply again since the 1970s and 1980s, albeit with significant variation between countries, again suggesting that institutional and political differences played a key role.”).

If we take the most unequal of the advanced democracies, the United States, stunning evidence of how such political choices are made emerged the same month as Piketty's study. From a statistical analysis of policy outcomes across nearly 2000 issue areas, Martin Gilens and Benjamin Page reached the striking conclusion that "[e]conomic elites and organized groups representing business interests have substantial independent impacts on US government policy, while mass-based interest groups and average citizens have little or no independent influence."⁷⁸ This confirms earlier findings by Gilens suggesting that patterns of government responsiveness "often corresponded more closely to a plutocracy than to a democracy."⁷⁹ Gilens's prior study also showed that "when preferences across income groups diverged, only the most affluent appeared to influence policy outcomes" and that such "representational inequality was spread widely across policy domains, with a strong tilt toward high-income Americans on economic issues."⁸⁰ Their conclusion could hardly be ignored: "America's claims to being a democratic society are seriously threatened . . . [because] policymaking is dominated by powerful business organizations and a small number of affluent Americans."⁸¹

Meanwhile, the social democratic model of large state subsidies for political parties appears to have backfired. In perhaps the leading work on the tyranny of political parties,⁸² Richard S. Katz and Peter Mair cite "a tendency in recent years toward[] an ever closer symbiosis between parties and the state[] and that this then sets the stage for the emergence of a new party type, which [they] identify as 'the cartel party.'"⁸³

III. CATEGORIES OF POLITICAL FINANCE

The ancient Greeks employed the word "oligarchy" to denote a system of rule by the few, whose purpose they commonly understood to be moneymaking.⁸⁴ Far from a bygone relic, oligarchy is ascendant in the Russian businessmen and party elites who captured the benefits of liberalization, Chinese officials administering capitalism to their benefit,

78. Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics*, 12 PERSPS. ON POL. 564 (2014).

79. MARTIN GILENS, AFFLUENCE & INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 234 (2012).

80. *Id.*

81. Daniel P. Smith, *Does Democracy Still Work?*, WEINBERG MAG. (Fall/Winter 2014), www.weinberg.northwestern.edu/discover/weinberg-magazine/fall-winter-2014/does-democracy-still-work.html [https://perma.cc/HSN5-B4QM].

82. Richard S. Katz & Peter Mair, *Changing Models of Party Organization and Party Democracy: The Emergence of the Cartel Party*, 1 PARTY POL. 5 (1995), <http://politicacomparata.files.wordpress.com/2011/03/katz-and-mair-1995-changing-models-of-party-organization.pdf> [https://perma.cc/HP8L-SK4G].

83. *Id.* at 6.

84. "[M]embers [of different political regimes] can be said to 'think' differently, depending on what they hold to be their regime's purpose: whether it be freedom, as in democracies, or moneymaking, as in oligarchies, or absolute security for a solitary ruler, as in tyrannies." David Edward Tabachnick & Toivo Koivukoski, *Preface: Understanding Oligarchy*, in ON OLIGARCHY: ANCIENT LESSONS FOR GLOBAL POLITICS, at ix (David Tabachnick & Toivo Koivukoski eds., 2011).

wealthy Americans who control super PACs and dominate campaign finance, European political parties that collude with each other to capture electoral subsidies and exclude minor parties that would challenge economic arrangements, and global financial elite that governs through debt.⁸⁵

Out of this great variety of oligarchic threats, only two have credibly justified their existence as a matter of democratic values, plutocracy and partyocracy. Those justifications have obtained the status of binding law through constitutional drafting and constitutional interpretation. American-style plutocracy and European-style partyocracy have distinguished themselves in these regards, proving that liberal democracy and social democracy can both be corrupted from within. The internal process through which corruption became *de jure*, instead of merely *de facto*, has unfolded within political finance. Plutocracy and partyocracy emerge from particular configurations of these laws and derive their justifications from the ideologies behind liberal democracy and social democracy.

The connection between political finance and the competition between liberal democracy and social democracy is immediately clear. There are “[t]hree basic options facing states” with regard to political finance: “[l]aissez-faire and self-regulation,” “transparency or ‘non-regulatory intervention,’” and “regulation.”⁸⁶ Choices between and within these categories surely depend on myriad factors, including history, geography, socioeconomic stratification, constitutional text, judicial review, ideology, electoral system, and politics.⁸⁷ But what moves such factors and what explains the importance of the choice between regulation and *laissez faire*?⁸⁸

To begin adding the necessary context, one must look to where each of the categories above draws its funds. Arthur Gunlicks offers a useful framework in his description of the “three types of party and campaign

85. See, e.g., MAURIZIO LAZZARATO, *GOVERNING BY DEBT* (2013); Azar Gat, *The Return of Authoritarian Great Powers*, *FOREIGN AFFAIRS*, July/Aug. 2007, at 59, 63–67; Tabachnick & Koivukoski, *supra* note 84, at ix (noting the “close relationship between corporate executives and American government” and “the formation of a global network of cosmopolitan, technocratic managers”); Fareed Zakaria, *The Rise of Illiberal Democracy*, *FOREIGN AFFAIRS*, Nov./Dec. 1997, at 22.

86. K.D. Ewing & Samuel Issacharoff, *Introduction to PARTY FUNDING AND CAMPAIGN FINANCING IN INTERNATIONAL PERSPECTIVE 2* (K.D. Ewing & Samuel Issacharoff eds., 2006). Within the latter two categories, more specific ones are to be found—such as, “gradualist,” “light touch,” and “saturated.” *Id.* at 6. And within each category, no matter how general or specific, lies the matter of oversight and enforcement.

87. *Id.* at 6–7.

88. Human beings care about participation, recognition, and, of course, the distribution of valuable resources. In the end, politics deal in power, legitimacy, and satisfaction. If politics has always boiled down to such things, then this is even more true for political finance, which lies at the heart of politics insofar as it determines how and in what quantities political actors will be financed, which among them will have a harder or easier time acquiring the funds necessary for political competition, and which interests in society will gain a firmer hold on this lever of power which is, ultimately, both antecedent to the formation of a government and a financial referendum on the performance of the prior government.

financing: plutocratic, grassroots, and public funding.”⁸⁹ These types of financing can be categorized as large donations from few sources, small donations from many sources, and half or more of all political funds coming from state subsidies. The first is common in parties on the Right, the second in parties on the Left, and the third as a general rule throughout Europe.⁹⁰

Each state thus categorized is commonly home to competing tendencies within their political finance regime.⁹¹ Within West German political finance, for example, Christine Landfried found both etatization and capitalization to be at work. Respectively, this signaled “the danger posed [from public subsidies] when parties become more dependent on the state than on membership dues” and “the process of increased ‘big’ donations to political parties in exchange for concessions and privileges.”⁹² With international, regional, national, and more localized levels of politics all subject to thousands of variables within each country, it is unusual for any one such tendency to completely eclipse the rest.

Still, whenever the reigning factors (history, economics, politics, ideology, judicial review, etc.) converge, or when one or several of them dominate the rest, “regulatory trajectories” surface.⁹³ Because of the tremendous complexity of political finance—including the many layers of politics from local to international, sources of money, interested parties, political institutions, modes of influence, and exogenous factors—it is difficult to isolate causal variables with precision. In regulatory trajectories, Ewing and Samuel Issacharoff locate the underlying theme of all such variables and issues.⁹⁴ Within each country, the question is whether the particular constellation of variables and issues is producing a move from laissez faire and self-regulation to regulation and state funding, or a move in the opposite direction.

In observing a divide between public financing and private financing in North American and Western European countries, Gunlicks complicates the analysis by adding additional explanatory factors, such as: federalism, single member district plurality electoral systems versus proportional representation, presidential versus parliamentary systems, and political culture.⁹⁵ In the end, however, Gunlicks attributes those competing regulatory trajectories to competing political cultures, the most important variable in his view. He describes two political cultures: first, “[a]ttitudes generally hostile to taxes and big government, or even to government at all” that were “tapped and further encouraged by . . . [Ronald] Reagan,” and

89. GUNLICKS, *supra* note 16, at 13.

90. *Id.*

91. See Christine Landfried, *Political Finance in West Germany*, in COMPARATIVE POLITICAL FINANCE AMONG THE DEMOCRACIES, *supra* note 18, at 133.

92. *Id.* She also found commercialization at work, defined as “the ‘principle of performance in exchange for money,’ which reduces party member participation and increases the influence of political consultants.” *Id.*

93. Ewing & Issacharoff, *supra* note 86, at 8.

94. *Id.*

95. GUNLICKS, *supra* note 16, at 7–8.

second, attitudes that favor “lessening the influence of wealthy individuals” and producing “fairer, more open and equal elections.”⁹⁶ Gunlicks notes that the second sort of political culture, clearly social democratic in nature, was linked to public funding by political leaders who saw subsidies as the means to achieving those preferences for less private wealth and greater equality.⁹⁷

This leads back to familiar sets of competing values—hostility to government and taxes (i.e., greater reliance on markets) versus fairness and equality concerns. These values go a tremendous distance toward describing the difference between liberal democracy and social democracy, as noted in the previous part. The overlap is programmatic and ideological. Therefore, one would also expect it to be historical. Indeed, “North European social democracies” pioneered state subsidies for political parties in the 1950s and 1960s.⁹⁸ Ewing and Issacharoff note that “[t]his was a period of the expanding State, in terms of budgets and functions, and the idea was widely adopted.”⁹⁹ Then, the antiregulatory stance integral to plutocracy was pioneered by the U.S. Supreme Court in the mid to late 1970s.¹⁰⁰ Far from the ideology of North European social democracies, the Burger Court relied on free-market theory and veered away from the Warren Court’s progressive jurisprudence.¹⁰¹ The Roberts Court has since put the finishing touches on the plutocratic model of campaign finance, illustrating, once again, the importance of ideology—to be sure, an ideology that would also justify weakening the estate tax.

IV. PLUTOCRACY

Karl-Heinz Nassmacher traces the label of a “plutocratic” regime of political finance back to 1983.¹⁰² He writes that “[w]hereas democracy is a political system based on equal participation by the multitude, plutocracy is a system dominated by the riches of an affluent minority.”¹⁰³ Contrasting it to grass-roots financing through small donations, Nassmacher calls plutocratic financing “the capitalist dimension of party funding.”¹⁰⁴ In this regard, Nassmacher’s definition of corruption is right on point: “the clandestine exchange between two markets, the political or administrative market and the economic or social market.”¹⁰⁵ The designation “plutocracy” simply removes the word “clandestine” from Nassmacher’s definition of corruption, giving us a legal market for political influence.

96. *Id.* at 8.

97. *See id.*

98. Ewing & Issacharoff, *supra* note 86, at 5.

99. *Id.*

100. *See* TIMOTHY K. KUHNER, *CAPITALISM V. DEMOCRACY: MONEY IN POLITICS AND THE FREE MARKET CONSTITUTION* 33–90 (2014).

101. *See id.*

102. KARL-HEINZ NASSMACHER, *THE FUNDING OF PARTY COMPETITION: POLITICAL FINANCE IN 25 DEMOCRACIES* 239 & n.1 (2009).

103. *Id.* at 239.

104. *Id.*

105. *Id.* at 21.

Plutocracy is distinct from kleptocracy and other forms of abject corruption that may amount to plutocracy in practice, but are not an *official system of rule*.

The difference amounts to that between what is merely practiced and that which is both practiced and honored. Consider, for example, this exchange between Socrates and Adeimantus:

Socrates: Surely, when wealth and the wealthy are honoured in the city, virtue and the good men are less honourable.

Adeimantus: Plainly.

Socrates: Surely, what happens to be honoured is practiced, and what is without honour is neglected.¹⁰⁶

As a response to Socrates, consider Justice Alito's majority opinion in the 2008 case *Davis v. FEC*.¹⁰⁷ Here, the Court struck down a provision of the McCain-Feingold Act that helped candidates who ran against wealthy, self-financing opponents. The problem was the provision's function of leveling the power of wealth.¹⁰⁸ "Leveling electoral opportunities," wrote Justice Alito for the majority, "means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election."¹⁰⁹ He went on to list candidates' strengths: "[s]ome are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name."¹¹⁰ That was Justice Alito's exhaustive list. There was no mention of democratic strengths, only those that relate to wealth, fame from the entertainment industry, and family privilege. The reform at issue was held unconstitutional in its attempt "to reduce *the natural advantage* that wealthy individuals possess in campaigns for federal office."¹¹¹

This and other Supreme Court decisions have created a plutocracy not just by striking down numerous campaign finance reforms, but also by providing justificatory claims that serve to legitimize and even honor a controlling role for wealth in democracy. Although those claims are often weak and even farcical, they fit with key components of Systems Justification Theory discussed by Professor Maynard: "an underlying human need to support and defend the social status quo . . . justifying and defending the existing dominance of the wealthy in society"¹¹² and the manifestation of that need in legal decisions that "reflect[] the notion that, contrary to our apparent commitment to equal opportunity, we value and encourage wealth accumulation."¹¹³ In the 2010 case *Citizens United v. FEC*,¹¹⁴ the Court struck down a prohibition on corporate general treasury

106. Tabachnick & Koivukoski, *supra* note 84, at ix.

107. 554 U.S. 724 (2008).

108. *See id.* at 744-45.

109. *Id.* at 742.

110. *Id.*

111. *Id.* at 741 (quoting Brief for Appellee at 33, *Davis*, 554 U.S. 724 (No. 03-9877)).

112. Maynard Jr., *supra* note 1, at 2448.

113. *Id.* at 2449.

114. 558 U.S. 310 (2010).

spending in the weeks leading up to an election. In his majority opinion, Justice Kennedy stated, “It is irrelevant for First Amendment purposes that corporate funds may ‘have little or no correlation to the public’s support for the corporation’s political ideas.’”¹¹⁵ “All speakers,” the Court announced, “use money amassed from the economic market-place”¹¹⁶ and “[m]any persons can trace their funds to corporations, if not in the form of donations, then in the form of dividends, interest, or salary.”¹¹⁷ Here, the Court admitted that its self-styled political marketplace operated through the economic marketplace, importing uneven outcomes in dividends, interests, and salaries into the political sphere. Discussing the effects of corporate expenditures, the Court claimed that “influence over or access to elected officials does not mean that these officials are corrupt.”¹¹⁸

The following year, the Court struck down perhaps the most effective public financing system in the fifty states, Arizona’s matching funds provision.¹¹⁹ The Court wrote that the matching funds system burdens the exercise of the “First Amendment right to make unlimited expenditures,” because it enables one’s opponents to raise more money.¹²⁰ From the perspective of a donor, spender, or privately financed candidate, that burden arises from his opponents’ ability to use matching funds “to finance speech that counteract[s] and thus diminishe[s] the effectiveness of [his] own speech.”¹²¹ To the contention that “[p]roviding additional funds to petitioners’ opponents does not make petitioners’ own speech any less effective,”¹²² the Court replied, “Of course it does. . . . All else being equal, an advertisement supporting the election of a candidate that goes without a response is often more effective than an advertisement that is directly controverted.”¹²³

In 2014, this line of cases culminated with *McCutcheon v. FEC*,¹²⁴ which laid out a blueprint for plutocracy:

[G]overnment regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford. “Ingratiation and access . . . are not corruption.” They embody a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns.¹²⁵

115. *Id.* at 351 (quoting *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990)).

116. *Id.*

117. *Id.* (quoting *Austin*, 494 U.S. at 707 (Kennedy, J., dissenting)).

118. *Id.* at 359.

119. See generally *Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011).

120. *Citizens United*, 558 U.S. at 351 (quoting *Austin*, 494 U.S. at 660).

121. *Bennett*, 131 S. Ct. at 2818 (quoting *Davis v. FEC*, 554 U.S. 724, 736 (2008)).

122. *Id.* at 2824 (alterations in original) (citations omitted).

123. *Id.*

124. 134 S. Ct. 1434 (2014).

125. *Id.* at 1441 (quoting *Citizens United*, 558 U.S. at 360).

With these words, the Court redefined representative democracy as attention by officeholders and candidates to the interests of their financial contributors.

To ensure that political representation on the basis of financial power would not be disturbed, the Court reminded its readers:

[W]e have made clear that Congress may not regulate contributions simply to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative influence of others.¹²⁶

...

No matter how desirable it may seem, it is not an acceptable governmental objective to “level the playing field,” or to “level electoral opportunities,” or to “equalize the financial resources of candidates.”¹²⁷

These remarks stand as the reasoning for the Court’s decision to strike down a \$123,200 limit on each individual’s campaign donations per two-year election cycle.¹²⁸ With that limit in place, each donor’s financial reach was meaningfully restricted. Each donor could only give the maximum amounts—\$2600 per candidate per cycle, \$32,400 per year to a national party committee, \$10,000 to a state or local party committee, and \$5000 to a political action committee—before running up against the aggregate two-year limits of \$48,600 to federal candidates and \$74,600 to other political committees.¹²⁹ Declaring these aggregate limits unconstitutional, the Court ushered in a new era of multimillion dollar donors, sums not seen since Watergate. As Justice Breyer’s dissenting opinion put it, “[W]ithout an aggregate limit, the law will permit a wealthy individual to write a check, over a two-year election cycle, for \$3.6 million—all to benefit his political party and its candidates.”¹³⁰

As though sensing that some normative justification was needed for ushering back in the era of the plutocrat donor, the majority ventured an equivalency between the likes of the Koch Brothers and a famous American patriot and revolutionary:

First Amendment rights are important regardless whether the individual is, on the one hand, a “lone pamphleteer[] or street corner orator[] in the Tom Paine mold,” or is, on the other, someone who spends “substantial amounts of money in order to communicate [his] political ideas through sophisticated” means.¹³¹

Anyone aware of Thomas Paine’s views on equality, however, would find this historical comparison objectionable. Beyond the American Revolution,

126. *Id.*

127. *Id.* at 1450.

128. *See id.*

129. *Id.* at 1442.

130. *Id.* at 1473 (Breyer, J., dissenting). Justice Breyer was joined by Justices Ginsburg, Sotomayor, and Kagan. *Id.* at 1465.

131. *Id.* at 1448 (majority opinion) (quoting *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 483, 493 (1985)).

Paine was also active in the French Revolution and a member of the French National Convention. “France has had the honor of adding to the word *Liberty* that of *Equality*,” he wrote.¹³² At a time when suffrage was premised on property ownership—which proved to be a powerful means of political exclusion in the United States—Paine opposed the property requirement and extensive property rights more generally, describing the landed monopoly as having “dispossessed more than half the inhabitants of every nation of their natural inheritance.”¹³³

That landed monopoly so reviled by Paine is not substantially different in principle than the financial monopoly of big donors and spenders that *Citizens United* and *McCutcheon* privilege. Let us consider the underlying state of democracy that the U.S. Supreme Court is causing and defending, beginning with outside expenditures. Take two of the largest super PACs that operated in the 2014 elections: the Senate Majority PAC (liberal) and American Crossroads (conservative). Two-thirds of the \$90 million that they raised came in donations of \$500,000 or more, meaning that less than 200 donors provided the great majority of funds.¹³⁴ The same can be said of the \$1.1 billion in outside spending during the 2012 elections: the top 200 donors to outside expenditure groups supplied approximately 80 percent of all the money.¹³⁵ Those 200 people represent 0.000084 percent of the adult population, meaning that the outside speech environment was shaped (if not controlled) by an unfathomably small portion of Americans.

Turning from outside advertisements to the funding of campaigns, one finds similar dynamics of concentrated influence and rising costs. While not as small as the percentage of Americans funding super PACs, the great majority of campaign donations since 1992 have been controlled by less than 1 percent of the U.S. population.¹³⁶ In the 2014 elections, just 0.3 percent of the adult population supplied 66 percent of the sum total of

132. THOMAS PAINE, *AGRARIAN JUSTICE* (1797), <http://www.ssa.gov/history/paine4.html> [<https://perma.cc/J6DJ-56FN>].

133. *Id.*

134. See Carrie Levine & David Levinthal, *Surprise! No. 1 Super PAC Backs Democrats*, CTR. PUB. INTEGRITY (Nov. 3, 2014), <http://www.publicintegrity.org/2014/11/03/16150/surprise-no-1-super-pac-backs-democrats> [<https://perma.cc/NBW7-H4JC>].

135. Meredith McGehee, *Only a Tiny Fraction of Americans Give Significantly to Campaigns* (Zocalo Public Square), CAMPAIGN LEGAL CTR. (Oct. 18, 2012), <http://www.campaignlegalcenter.org/news/publications-speeches/only-tiny-fraction-americans-give-significantly-campaigns-zocalo-public> [<https://perma.cc/847J-YSCV>].

136. See *Donor Demographics: Election Cycle 1992–2012*, OPENSECRETS.ORG, www.opensecrets.org/bigpicture/donordemographics.php?cycle=2012&filter=A (last visited Apr. 29, 2016) (for elections between 1990 and 2012) [<https://perma.cc/CE5S-2P8Y>]; see also Lawrence Lessig, *What an Originalist Would Understand “Corruption” to Mean*, 102 CAL. L. REV. 1, 5 (2014); Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL’Y REV. 273, 294 (1993); Lee Drutman, *On FIRE: How the Finance, Insurance and Real Estate Sector Drove the Growth of the Political One Percent of the One Percent*, SUNLIGHT FOUND. (Jan. 26, 2012, 12:01 AM), <http://sunlightfoundation.com/blog/2012/01/26/on-fire-how-the-finance-insurance-and-real-estate-sector-drove-the-growth-of-the-political-one-percent-of-the-one-percent/> [<https://perma.cc/6QZ7-9QRU>].

cash.¹³⁷ The rise in total campaign donations has been striking, albeit not as extreme as the rise in outside expenditures. Between 2000 and 2012, for example, the total amount raised by both presidential finalists rose from \$325 million (Bush versus Gore) to \$2 billion (Romney versus Obama), an increase of over 600 percent.¹³⁸ The direction of change is constant, with each presidential race significantly surpassing the cost of the one before it.

By 2012, the average price tag of political office had reached alarming levels: approximately \$1 billion for the presidency,¹³⁹ over \$10.4 million for a Senate seat, and \$1.6 million for a seat in the House of Representatives.¹⁴⁰ And again, even in the election years with the deepest donor base, less than 0.6 percent of all citizens of voting age supplied most of the money—that would be just 1.5 million out of 270 million American adults today. In the 2014 elections, however, at a rate of 0.3 percent, just over 500,000 citizens provided the great majority of funds. In total, these statistics convey the essential fact of political finance in the United States: privatization. All of this makes Gilens and Page’s findings¹⁴¹ entirely predictable and, apparently, entirely unobjectionable to the current Supreme Court majority.

As anti-plutocratic dimensions of political finance jurisprudence, consider these foreign court points of contrast with the U.S. Supreme Court. In political finance cases, the Supreme Court of Canada has long held that “the political equality of citizens [] is at the heart of a free and democratic society.”¹⁴² Similarly, the European Court of Human Rights (ECtHR) concluded in *Bowman v. United Kingdom*¹⁴³ that “securing equality between candidates” falls within “the legitimate aim of protecting the rights

137. See *Donor Demographics*, OPENSECRETS.ORG, <https://www.opensecrets.org/bigpicture/DonorDemographics.php> (last visited Apr. 29, 2016) [<https://perma.cc/VZ9B-648B>].

138. See Jonathan D. Salant, *Spending Doubled As Obama Led Billion-Dollar Campaign (Update 1)*, CAL. CLEAN MONEY CAMPAIGN (Dec. 26, 2008), http://www.caclean.org/problem/bloom_2008-12-26.php (republishing unarchived *Bloomberg News* article, and providing numbers for total spending and individual candidate spending in the 2008 election) [<https://perma.cc/5S9W-AYVV>]; see also CHARLES LEWIS, *THE BUYING OF THE PRESIDENT* 2004, at 4–5 (2004).

139. Cf. Jeremy Ashkenas, Matthew Ericson, Alicia Parlapiano & Derek Willis, *The 2012 Money Race: Compare the Candidates*, N.Y. TIMES, <http://elections.nytimes.com/2012/campaign-finance> (last visited Apr. 29, 2016) (showing total amounts raised and spent by both Barack Obama and Mitt Romney in the 2012 presidential election) [<https://perma.cc/XVR7-XXZF>].

140. Sarah Wheaton, *How Much Does a House Seat Cost?*, N.Y. TIMES: CAUCUS (July 9, 2013, 6:00 AM), http://thecaucus.blogs.nytimes.com/2013/07/09/how-much-does-a-house-seat-cost/?_r=0 [<https://perma.cc/2LQR-DXDL>].

141. Gilens and Page’s findings are essentially that “[e]conomic elites and organised groups representing business interests have substantial independent impacts on US government policy, while mass-based interest groups and average citizens have little or no independent influence.” Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics*, 12 PERSPS. ON POL. 564, 565 (2014).

142. See, e.g., *Harper v. Canada (Att’y Gen.)*, [2004] S.C.C. 33, para. 86 (Can.) (quoting *Libman v. Quebec (Att’y Gen.)* [1997] 3 S.C.R. 569 (Can.)).

143. 1998-I Eur. Ct. H.R. 175.

of others, namely the candidates for election and the electorate.”¹⁴⁴ Validating a prohibition on ads by social advocacy groups in *Animal Defenders International v. United Kingdom*,¹⁴⁵ decided three years after *Citizens United*, the ECtHR agreed that the ban “was necessary to prevent the distortion of crucial public-interest debates” by unequal access to influential media by financially powerful bodies.¹⁴⁶ The court accepted the argument that this function “protect[ed] effective pluralism and the democratic process.”¹⁴⁷ It worried that “powerful financial groups . . . could obtain competitive advantages in the area of paid advertising and thereby curtail a free and pluralist debate, of which the State remains the ultimate guarantor.”¹⁴⁸

Perhaps the starkest contrast came in September of 2015, when the Supreme Federal Tribunal of Brazil banned corporate donations to political parties.¹⁴⁹ The Brazilian context is similar to that of the United States in a number of ways—a large geographic area, a high population, candidate-centered elections, and a history of expensive campaigns.¹⁵⁰ And similar to the U.S. panorama of roughly half a percent of adult citizens supplying most of the funds relied upon by political parties and just 0.000084 percent of adult citizens supplying most of the funds relied upon by independent expenditure groups, Brazil has seen a clear plutocratic dimension in political finance, as noted by Maria D’Alva Gil Kinzo:

[T]he main method of funding campaigns in Brazil is through private firms—especially those in the civil construction and banking sectors. . . . In the [1994] presidential election, 93 per cent of private contributions to the eventual winner came from business donations. . . . The staggering role played by business in financing campaigns is not limited to parties on the right . . . even in the case of Lula—the Workers’ Party presidential candidate—private firms’ contributions amounted to 41 per cent of this party’s total expenditure.¹⁵¹

D’Alva goes on to list many elections where private sources provided 94 to 99 percent of total campaign funds. Writing thirteen years before D’Alva, Roberto Aguiar noted that “campaigns are funded mainly by bankers, industrialists, traders, and livestock breeders. . . . [T]he way in which power is structured in Brazil has led to its concentration in the hands of a few.”¹⁵²

144. *Id.* para. 38.

145. App no. 48876/08, Eur. Ct. H.R. (2013).

146. *Id.* para. 99.

147. *Id.*

148. *Id.* para. 112.

149. Bruce Douglas, *Brazil Bans Corporations from Political Donations Amid Corruption Scandal*, GUARDIAN (Sept. 18, 2015, 1:54 PM), <http://www.theguardian.com/world/2015/sep/18/brazilian-supreme-court-bans-corporate-donations-political-candidates-parties> [<https://perma.cc/3H32-468K>].

150. Maria D’Alva Gil Kinzo, *Funding Parties and Elections in Brazil*, in FUNDING DEMOCRATIZATION 116, 117–22 (Peter Burnell & Alan Ware eds., 2007).

151. *Id.* at 130.

152. Roberto Aguiar, *The Cost of Election Campaigns in Brazil*, in COMPARATIVE POLITICAL FINANCE AMONG THE DEMOCRACIES, *supra* note 18, at 77, 79.

Deciding the case in 2015, the Supreme Federal Tribunal faced up to an especially powerful political panorama. In the 2014 election campaigns for the presidency, Senate, and Congress, “[a]round 76% of the over R\$3bn (\$760m) donated . . . came from corporate entities” and that money was fairly equally distributed between “the ruling leftwing Partido dos Trabalhadores (PT) and the main opposition Partido da Social Democracia Brasileira (PSDB),” suggesting that corporations were hedging their bets.¹⁵³ A 2014 study by Taylor Boas, F. Daniel Hidalgo, and Neal P. Richardson found that corporate donors to the PT in the 2006 elections received between fourteen and thirty-nine times the value of their donations in government contracts.¹⁵⁴

The Brazilian ministers who voted 8-3 to strike down corporate donations perceived the problem not just as one of corruption, but of plutocracy. Their reasoning would have sent shockwaves through the U.S. Supreme Court. Noting the high percentage of corporate money behind campaigns, the President of the court, Minister Dias Toffoli, called corporate finance a “distortion of democracy.”¹⁵⁵ Minister Marco Aurélio elaborated, noting that “Brazil is experiencing a profound crisis of political representation marked by the increasing distance between social claims and concerns, on the one hand, and the concrete actions of political leaders on the other.”¹⁵⁶ He stated that “the value of political equality had been replaced by the wealth of large firms that give donations in order to control the electoral process.”¹⁵⁷ On this basis, he ventured that “we do not live in an authentic democracy, but rather a plutocracy—a political system in which power is exercised by the wealthiest group, leading to the exclusion of the less fortunate.”¹⁵⁸ Minister Aurélio’s conclusion affirmed that “we are living in a historic moment [in which] the private financing of electoral campaigns and political parties has not allowed democracy to be affirmed as a fundamental right.” “[I]f democracy is a fundamental right,” he concluded, “then plutocracy, now in force within our political-electoral system, is a violation of that right.”¹⁵⁹

Minister Luiz Fux, the reporter for the case, confirmed that “there truly exists a representative crisis in the country, juxtaposing citizens, ever more skeptical about their elected officials, with members of the political class

153. Douglas, *supra* note 149.

154. Taylor C. Boas, F. Daniel Hidalgo & Neal P. Richardson, *The Spoils of Victory: Campaign Donations and Government Contracts in Brazil*, 76 J. POL. 415, 415 (2014).

155. Tribunal Superior Eleitoral, *Presidente do TSE Fala Sobre Financiamento de Campanha Eleitoral em Evento na República Dominicana*, TRIBUNAL SUPERIOR ELEITORAL (Jan. 30, 2015), <http://www.tse.jus.br/imprensa/noticias-tse/2015/Janeiro/presidente-do-tse-fala-sobre-financiamento-de-campanha-eleitoral-em-evento-na-republica-dominicana> (translation by author) [<https://perma.cc/BUU8-UWQV>].

156. Relator: O Senhor Ministro Luiz Fux, DF, ADI 4650 (Sept. 17, 2015) (Braz.) (unpublished opinion) (opinion of O Senhor Ministro Marco Aurélio), <http://s.conjur.com.br/dl/voto-marco-aurelio-adi-4650-doacoes.pdf> [<https://perma.cc/R5PT-SZW7>].

157. *Id.*

158. *Id.*

159. *Id.* (citing Timothy K. Kuhner, *The Democracy to Which We Are Entitled: Human Rights and the Problem of Money in Politics*, 26 HARV. HUM. RTS. J. 39, 90 (2013)).

who often privilege their own particular interests to the detriment of the public interest.”¹⁶⁰ Finishing off the contrast between the Brazilian and U.S. high courts with a literary flare, Minister Rosa Weber remarked, “The influence of economic power culminates by turning the electoral process into a political game of marked cards, an odious pantomime that turns the voter into a puppet, crumbling in one blow citizenship and democracy.”¹⁶¹

These remarks from Brazilian high court judges, as well as those from their European and Canadian counterparts described above, illustrate how far toward a strange, parallel universe the U.S. Supreme Court has travelled. Construing equality concerns as “wholly foreign to the First Amendment,”¹⁶² restraints on general treasury fund spending as unconstitutional in “muffl[ing] the voices that best represent the most significant segments of the economy,”¹⁶³ and a concern over the undue influence of aggregated wealth as “interfer[ing] with the ‘open marketplace’ of ideas protected by the First Amendment,”¹⁶⁴ the U.S. Supreme Court has constructed a neoliberal constitutional world, distant from most other advanced democracies. As though to leave no doubt whatsoever, Chief Justice Roberts and Justice Alito wrote, “First Amendment rights could be confined to individuals, subverting the vibrant public discourse that is at the foundation of our democracy.”¹⁶⁵

This constitutional interpretation of freedom and constitutional destruction of equality perfectly exemplifies Piketty’s point that radical economic inequality is built upon a political foundation and Wendy Brown’s contentions that “inequality . . . is the medium and relation of competing capitals”¹⁶⁶ and that “neoliberal reason . . . in jurisprudence . . . is converting the distinctly *political* character, meaning and operation of democracy’s constituent elements into *economic* ones.”¹⁶⁷ Brown’s conclusion: “Liberal democratic institutions, practices, and habits may not survive this conversion.”¹⁶⁸

160. Relator: O Senhor Ministro Luiz Fux, DF, ADI 4650 (Nov. 12, 2013) (Braz.) (unpublished opinion) (opinion of O Senhor Luiz Fux), <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADI4650relator.pdf> (author’s translation) [<https://perma.cc/4SAG-Z47C>]. Minister Fux noted “an increasing influence of economic power over the political process in recent years” and stated that “increases in candidate and party expenditures could not be explained by inflation or the growth of GDP.” *Id.* (author’s translation).

161. Brad Brooks, *Brazil’s Top Court Bans Corporate Political Financing*, AP BIG STORY (Sept. 17, 2015, 8:38 PM), <http://bigstory.ap.org/article/d13f4042158e4c7ba5718194d4866eb9/brazils-top-court-bans-corporate-political-financing> [<https://perma.cc/4V8W-NZBK>].

162. *Buckley v. Valeo*, 424 U.S. 1, 49 (1976).

163. *Citizens United*, 558 U.S. 310, 354 (2010) (quoting *McConnell v. FEC*, 540 U.S. 93, 257–58 (2003) (Scalia, J., concurring in part and dissenting in part)).

164. *Id.* at 469 (citation omitted) (quoting *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008)).

165. *Id.* at 373 (Roberts, C.J., concurring). Chief Justice Roberts concludes that the government’s theory of the First Amendment would allow censorship of media corporations. He focuses on this possibility even though the law at issue exempts media corporations from its reach, and the First Amendment itself mentions “the freedom of the press” by name. *Id.*

166. BROWN, *supra* note 12, at 38.

167. *Id.* at 17.

168. *Id.*

CONCLUSION

Political finance regimes, such as plutocracy, that exclude the general public and empower elites should be on everyone's mind. They limit the ability of ordinary citizens to adjust the institutions, laws, and policies that have led to today's radical concentrations of wealth. Beyond the material constraint of elite control over democracy, plutocracy has also imposed ideological constraints, transforming the meaning of speech, citizenship, equality, and democracy under the guises of constitutional interpretation. The struggle for greater political equality must engage with both sets of causes—material and ideological alike. And if those material and ideological causes are common to the struggle for greater economic equality as well, as seen in the debates over the estate tax, then reformers from various camps would be wise to join forces. Because neoliberalism has been consolidated through capturing interwoven bodies of law and policy, the unstitching process ought to proceed along collective lines as well. This Article suggests that the first threads to be pulled should be the ideological justifications for political and economic inequality presently masquerading as constitutional law.