POLITICAL FINANCE AS THE CENTRAL ISSUE OF OUR TIME

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The organizers of ClassCrits VI pose a fundamentally important question: “What are the possibilities and alternatives for a genuinely progressive economic project in an age of resurgent neoliberal policies and politics?”¹ I submit that the answer depends on political finance, an area of law that encompasses the financing of political campaigns, political parties, pressure groups, and political speech in general.² Consider that neoliberalism is associated with a “radically free market . . . and . . . economic de-regulation.”³ By definition then, a progressive economic project runs counter to neoliberalism itself. Any such project would have to rely on political channels because it will not be implemented voluntarily within the neoliberal paradigm. Neither the economic interests intent on dominating the market economy, nor the policy makers intent on insulating the economy from democratic values and procedures have shown any interest. A progressive economic project would therefore require a progressive political program. The possibilities of the political, however, have been narrowed by those same economic interests and policy makers—

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² See, e.g., COMPARATIVE POLITICAL FINANCE IN THE 1980s 1 (Herbert E. Alexander ed., 1989) (defining political finance as “laws governing disclosure, transparency, expenditure and contribution limits, as well as direct forms of public subsidies to parties and candidates.”). The term “campaign finance” is more common in presidential systems, whereas parliamentary systems often employ the term “party finance.” See CAMPAIGN FINANCE AND PARTY FINANCE IN NORTH AMERICA AND WESTERN EUROPE, at vii (Arthur B. Gunlicks ed., 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.”).

³ Wendy Brown, Neo-liberalism and the End of Liberal Democracy, 7 Theory & Event 1 (2003). Brown emphasizes the importance of neoliberalism’s political program in achieving its economic program. Id.
neoliberalism’s agents—who insist that the state be “reengineer[ed]... in order to guarantee the success of the market and its most important participants, modern corporations.”

The ClassCrits conference description accounts for this insistence, referencing “nation states captured by elite interests—a trend only made worse in the United States by Citizens United.” Given government capture, how can the progressive movement “creatively leverag[e] national political and legal systems as instruments for progressive economic change” or “deleverag[e] social class divides”? Those two aspirations featured in the conference material are hopeless and circular—unless, that is, national political and legal systems are reformed to enable meaningful participation by (and accountability to) ordinary citizens. Those are, after all, the citizens who would most support a progressive economic project in the first place. Their power is limited by the role of money in politics—money, the most fashionable vehicle through which elite interests capture nation states. And so, the themes and questions at the heart of this year’s conference are empty absent attention to the area of law which determines whether campaigns, elections, parties, political speech, and the legislative process are controlled by the highest bidders or by something closer to the public writ large.

In this paper, I explore how market imperatives have gone a tremendous distance towards controlling political finance and how that control serves to neutralize democratic demands. I claim that political finance ranks above all other areas of law in order of urgency and importance, because it is home to an insidious trend powerful enough to unravel democracy and install a new political form: government by or in the interests of the wealthy, i.e., plutocracy. That form is generally hostile to specific progressive projects, but it is downright malevolent when it comes to the fundamental features that make such projects plausible. I refer to political equality, popular accountability, and, most generally speaking, democratic integrity. This claim about the importance of political finance arises from the broad, architectural function of this area of law. In

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sketching out that function, I attempt to demonstrate that political finance is important enough to defy the asphyxiating consensus (and powerful psychological restraint) which goes something like this: History’s major contests have already been decided, our time can be nothing other than a fragmented epoch of specialization and tunnel vision brought about by a lack of confrontation between larger forces, nothing of systematic, civilization-defining importance remains in play, and accordingly our intellectual energies are of no great consequence, for there is little left to do besides further cement and tinker around the edges of a hegemonic status quo. Political finance defies all of that, but its defiant power is visible only from a particular vantage point. That, happily enough, is the vantage point demanded by the conference’s themes, many of its participants, and the inherent nature of progressive causes.

By stipulating hope for a progressive economic project despite government capture by elite interests and a neoliberal resurgence, the conference brings us to the long, zigzagging border between market and government. On concerns ranging from discrimination to corporate law, most progressive thought parts from the same structural foundation: the state must act. Even when advocating voluntary measures, such as corporate social responsibility, progressives distinguish themselves by insisting that national governments and even international law ensure a robust minimum floor in matters of environmental protection, workers’ rights, and product safety. They would not leave this or any other matter of importance entirely to the market. This line of thought becomes more cogent if framed along these lines: interactions of all kinds—including those in politics, commerce, home and community life, and education—will be shaped by one authority or another, whether the market, the rule of force, a religious hierarchy, a royal bloodline, or a popularly elected government.

The mantra of free markets, repeated incessantly between the 1970s and the present day, summons a system of rule by the interests that most effectively collect and employ economic power. Common progressive causes—such as universal health care, excellent public education, independent media, programs to help the elderly and the unemployed, environmental protection, and restraints on predatory and destabilizing practices and products with markets—call for a higher degree of government control over matters that would otherwise be left to private ordering (as constituted by the command, laissez-faire). Campaign finance reform is no exception to this rule. All of these causes also require that

8. In past writings, I have explored how free market ideology has been the crucial force in declaring campaign finance reforms unconstitutional in the United States. See generally TIMOTHY K. KUHNER, CAPITALISM v. DEMOCRACY: MONEY IN POLITICS AND THE FREE
government control be exercised along progressive lines, but prior to that being possible, space for a government role must first be established and, therefore, the terrain afforded to markets must be limited.

Market imperatives of growth, competition, and protection cause market forces—such as boards of directors, CEOs, investors, and trade associations—to route resources into political channels. Those channels may be indirect, as in the case of funds given to lobbyists, old-fashioned pressure groups, superPACs, and dark money groups, or direct, as in the case of funds given to candidates, officeholders, and political parties. The goal, in any case, is to achieve favorable laws and policies at all levels of government, from local to international. What is far more significant than individual policy victories, however, is the overall meaning that arises across all these contexts over time: economic interests appropriate the means of political decisionmaking. (Making the most of the means of production would seem to require it.) Viewed in this light, political finance decides the extent to which financial power will be checked by democratic governance.

A laissez-faire stance on matters of political finance does not signal an end to government or the state, but rather an end to governance by and in the interests of the people in a broad sense—that is, an end to the sort of state that would check the power of the wealthy, uphold the rights of disadvantaged citizens, and ensure a minimum floor of social, economic, and political entitlements. When that sort of state has been engineered out of existence by the power of political finance, then the wealthy, corporations, and pressure groups will take their place alongside the religious hierarchies, royal families, dictators, and one-party monopolies that once dominated the political panorama. Whether we care to admit it or not, the law of political finance is presently deciding whether democracy will amount to anything more than a transition between past and future tyranny—a bridge between plutocracy and earlier forms of political oppression.


9. Beyond the structural premise mentioned above, progressives share a substantive premise as well. They require the state to act in order to guarantee conditions that tend to boil down to equality (e.g., in matters of sex, race, religion, political rights, sexual orientation, and sometimes even economic means), popular empowerment, human dignity, and the stability of systems (natural and economic alike), although this last purpose tends to serve the earlier ones.
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I. A BLUEPRINT FOR PLUTOCRACY (COURTESY OF ITS JUDICIAL ARCHITECTS)

Self-governance in a community of political equals stands as the systemic democratic promise. Take Rawls’ description of the “fair value of political liberties” as a popular formulation.\(^\text{10}\)

[The worth of the political liberties to all citizens, whatever their social or economic position, must be approximately equal, or at least sufficiently equal, in the sense that everyone has a fair opportunity to hold public office and to influence the outcome of political decisions.\(^\text{11}\)]

With the qualifier “whatever their social or economic position,” Rawls points to the civil rights struggles of the last two centuries, from the end of property requirements for white male suffrage through the anti-slavery movement and women’s rights. Even beyond race and sex, advanced democracies have deemed religion, ethnicity, and (one hopes) sexual orientation illicit bases for denying the exercise of political rights and freedoms. A focus on economic position is now most pressing, given that other means of political exclusion are fading from view.

Democracies are home to capitalist economies. The familiarity of the phrase “market expansion” suffices to connect the dots: while race, sex, and the like have been banned from the list of criteria for membership in that community of political equals, economic position is ascendant. In their comparative survey of political finance, Ewing and Issacharoff note the disjuncture between ideology and practice inherent in capitalist democracies:

All the undertaking necessary to bring democracy to life, certainly a most notable ambition of human society, turn indispensably on the most base of commodities: money . . . No matter how lofty the political ambition, democracy in mass societies requires resources.\(^\text{13}\)

This fact triggers a series of universal democratic dilemmas: Where and in what amounts do candidates, officeholders, parties, and interest groups collect their funds? How may they dispose of those funds?\(^\text{14}\) What avenues of political influence may private individuals and corporations

\(^{10}\) JOHN RAWLS, POLITICAL LIBERALISM 327 (1996).

\(^{11}\) Id.

\(^{12}\) Id.


\(^{14}\) See id. at 1 (identifying “two constant problems in all democratic societies[:] How are the central actors in the political arena supposed to gather the funds necessary to operate effectively on behalf of their chosen political ends? And, how may they spend money in furtherance of their political objectives?”).
pursue? What balance do regulations on these issues (if any) strike between liberal democracy’s core political values of accountability, integrity, equality, and freedom? And, crucially, will those who have the last say on regulation interpret these values in a civic or economic light?

The world’s democracies conspire to show that these questions can play out many different ways, but common patterns of political finance cede elections and lawmaking to the market sphere, making wealth the new means of political exclusion. This involves the insertion of just a few qualifiers into Rawls’ formulation above:

[T]he worth of the political liberties to all citizens of approximately equal economic position must be approximately equal, or at least sufficiently equal, in the sense that everyone has an effective, market-based opportunity to hold public office and to influence the outcome of political decisions.

The result is rule by or in the interests of the wealthy. Who would justify this perversion of democracy?

One is hard-pressed to find a jurisdiction in which such dynamics are best labeled de jure instead of merely de facto. Excessive traction for monied interests tends to occur in spite of the law, not because of the law. The United States defies that nearly universal rule by the bare margin of one Supreme Court Justice. It is only the Supreme Court that sustains the unprecedented level of money in politics found in the United States, declaring unconstitutional numerous federal and state campaign finance reforms. This earns the Court the unflattering designation, the primary ideological architect of plutocracy.

In cases such as Buckley, Bellotti, Randall, Davis, Citizens United, and Bennett, the U.S. Supreme Court has employed economic ideology to reinterpret the Constitution and disguise the power of wealthy donors and spenders as a democratic phenomenon. Those cases construe democracy as an open market, money as political speech (indeed, economic power as a sacred form of political freedom), corporations as citizens, the right to political speech as guaranteeing not just the absence of affirmative restraint

15. Because these values have been enshrined in human rights treaties, political finance ought to be understood as an issue of international law, not just domestic law. See 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, 45-48 (2013).

16. COMPARATIVE POLITICAL FINANCE IN THE 1980s, supra note 2; COMPARING DEMOCRACIES 3: ELECTIONS AND VOTING IN THE 21ST CENTURY (Lawrence LeDuc, Richard G. Niemi, & Pippa Norris eds., 2010); POLITICAL FINANCE AND CORRUPTION IN EASTERN EUROPE: THE TRANSITION PERIOD (Daniel Smilov & Jurij Toplak eds., 2007); PUBLIC FINANCE AND POST-COMMUNIST PARTY DEVELOPMENT (Steven D. Roper & Jānis Ikstens eds., 2008).

17. I develop this point at length in Kuhner, CAPITALISM V. DEMOCRACY, supra note 8.
but also the absence of public subsidies that would diminish the effectiveness of speech produced by private spending, and political equality, democratic integrity, and representative time protection as unconstitutional legislative purposes for limiting political spending.\textsuperscript{18} These constructions of political values have enabled the Court to strike down numerous political finance reforms, open the floodgates of money in politics, and considerably narrow the scope of future reforms. Recent controversies in the United States over wealthy financiers, superPACs, billion-dollar presidential election campaigns, and corporate political spending arise from the Court-protected market for political influence. The Supreme Court has facilitated the privatization of democracy, a common (but rarely defended) feature of globalization beginning in the late 20\textsuperscript{th} century.

II. FROM ABJECT CORRUPTION TO DEMOCRATIC CORRUPTION

Shortly after the fall of the Berlin Wall, corruption gained prominence as a major concern of democratization. “Until the early 1990s,” Secretary-General Kofi Annan observed, “corruption was hardly ever mentioned in official circles.”\textsuperscript{19} Then the institutions of international development, including the World Bank, the U.S. Agency for International Development (USAID), and the U.N. Development Programme, finally took notice of bribery, extortion, fraud, kickbacks, misuse of public services, and syphoning of development funds.\textsuperscript{20} These practices were common in democracies and non-democracies alike, but democratic norms of accountability and transparency made them impossible to ignore. Robert Klitgaard alleged in 1991 that “[c]orruption is one of the foremost problems of the developing world.”\textsuperscript{21} Subsequent volumes on democratization support his assessment.\textsuperscript{22}

Concerns over corruption only grew as democracy experienced a veritable tipping point, rising from the governmental form of just one third

\textsuperscript{18}. See id.
\textsuperscript{20}. ROBERT KLITGAARD, CONTROLLING CORRUPTION, at x (first paperback prtg. 1991).
\textsuperscript{21}. Id.
\textsuperscript{22}. See, e.g., Ingrid Van Biezen, Party and Campaign Finance, in COMPARING DEMOCRACIES 3: ELECTIONS AND VOTING IN THE 21ST CENTURY, supra note 16, at 65 (“Although money should be seen as a normal and necessary element of the democratic process, its relationship with politics is blemished by its frequent association with practices of fraud, bribery, and corruption.”).
of all states in the mid 1980s to two thirds of all states by 1999.\textsuperscript{23} Although the globalization of elections highlighted the existence of abject corruption in many States and has arguably helped to root it out, it spread a new, subtler type of corruption found only in democracies. A 2003 USAID global report reached a telling conclusion: “Payback of campaign debts in the form of political favors breeds a type of corruption that is commonly encountered around the world.”\textsuperscript{24} As Alexander and Rei stated in their volume on comparative political finance, “incredibly large monetary contributions... have permeated the world of politics in most continents.”\textsuperscript{25}

The USAID report noted that disclosure requirements were commonly lacking or unenforced, and characterized 65\% of the 118 democracies surveyed as having low or virtually no political transparency.\textsuperscript{26} The lack of transparency aims to hide (or at least make anonymous) the influx of private wealth into the political process, obscuring the particulars of who funds candidates, parties, political advertisements, and special interest groups. The tremendous incentives fueling private funds and their collection are only compounded by the lack of transparency. Consider, for example, K. D. Ewing and Samuel Isaacharoff’s observation about party finance:

> With a declining membership base and growing financial demands, political parties are easy prey for the rich and powerful for whom the political parties offer opportunities for greater wealth and power.\textsuperscript{27}

This suggests a trend towards the elitist political parties described long ago by Duverger: parties focused on “enlisting the support of notable individuals[,] prominent citizens... sought out either because of their prestige... or because of their wealth, which enables them to underwrite

\textsuperscript{23} 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 states. See Democracy Momentum Sustained As, FREEDOM HOUSE (Dec. 21, 1999), http://www.freedomhouse.org/template.cfm?page=70&release=75.


\textsuperscript{25} Herbert E. Alexander & Rei Shiratori, Intoduction, in COMPARATIVE POLITICAL FINANCE AMONG THE DEMOCRACIES 1, 3 (Herbert E. Alexander & Rei Shiratori eds., 1994).

\textsuperscript{26} MONEY IN POLITICS HANDBOOK, supra note 24, at 2 (“[M]ost nations do not hold their politicians accountable through disclosure requirements.”).

\textsuperscript{27} Ewing & Issacharoff, supra note 13, at 5.
the expenditures of election campaigns.”

Both of these dynamics—parties as easy prey for the powerful and parties devoted to capitalizing upon the resources of the powerful—recede from view alongside the lack of transparency.

These two sides to money in politics comprise a political market: rent-seeking (demand for favorable policies in exchange for funds) and the fundraising needs of candidates and parties (demand for funds in exchange for favorable platforms and policies). Rent-seeking leads to political expenditures whenever the payoffs are estimated to exceed the costs. Parties and politicians, on the other hand, eagerly gather those monies in order to fund their increasingly expensive campaigns and party operations. If the State does not provide ample public financing, and if it does not enforce limitations on the role of private wealth in funding independent political activities, then political actors can hardly avoid indebting themselves to private interests. Any candidate or party that takes the high road in these regards will be easy prey for the better-funded opposition.

These concerns have not declined in recent years. Ingrid van Biezen introduced her 2010 comparative survey of political finance with a disheartening description, one that indicates that, decade to decade, change is elusive at best: “parties and politicians are increasingly seen as . . . driven primarily by their material self-interests and . . . highly susceptible to corruption.” Van Biezen notes that money’s place “on, and often beyond, the edges of what is legally and morally permissible . . . undermines the legitimacy of political parties, politicians, and potentially the democratic process itself.”


29. To make matters worse (and to reveal another dynamic behind money in politics), principled private interests who refuse to be extorted by politicians may suffer retribution from politicians and may lose ground to their fellow citizens or economic competitors who are willing to play the money game. See generally PETER SCHWEIZER, EXTORTION: HOW POLITICIANS EXTRACT YOUR MONEY, BUY VOTES, AND LINE THEIR OWN POCKETS (2013). Schweizer insists on the power of a “Permanent Political Class” over and above the power of willing donors and spenders. See, e.g., id. at 19. Still, even if such a class were dominant over the power of the outside moneyed interests now cast in the role of victim, we would not step outside the bounds of government by or in the interests of the wealthy. The political class discussed by Schweizer uses the U.S. privatized system of parties and campaigns to enrich itself, and members of that class are wealthy on the whole. Id.


31. Id.
III. IMPLICATIONS FOR DEMOCRATIC VALUES

All governments, from theocracies to dictatorships, require funds from one source or another. Democratic governments are unique in having to reconcile their fundraising and spending practices with popular sovereignty, representation, political equality, and political freedoms of speech and association. For this reason, questions of political finance in democratic regimes invoke rudimentary questions of democratic integrity and legitimacy.

A series of common questions underscores the relationship between political finance and issues of accountability, equality, and freedom: Given the particular sources and amounts of election funds in play, can a particular officeholder or political party reasonably be expected to represent ordinary citizens as opposed to a moneyed elite? Can that officeholder or party reasonably be expected to consider public policy issues in good faith or are their deliberations and conclusions cast in a dubious light, given the realities of how they obtained the funds necessary to gain office or the realities of how they must obtain the funds necessary to remain in office?

Questions of accountability aim to discover who each officeholder and party actually represents, and, assuming some dissatisfaction on this front, whether ordinary citizens exert sufficient power within the system to produce and sustain a different set of parties and officeholders, one composed of those who would actually represent their interests. If ordinary citizens lack such power, it does not follow that each officeholder and party therefore derives their policy positions from insincere beliefs and that politics is mere show. The reigning beliefs and ideologies could be sincere or insincere. The only necessary condition is that they serve to produce the laws and policies favored by the donors and spenders who underwrite the privatized system of campaigns, parties, and political speech.

The significant role of private wealth, corporations, lobbyists, and expensive forms of political speech in most democracies has garnered strong criticism. Some observers have come to see the globalization of democracy as a Faustian bargain in which some measure of participation is gained via elections but true power is ceded via the dominance of wealth in the political process. Consider this description by the sociologist Charles Derber:

It’s true that globalization has helped bring free elections to many nations. But it comes with a price tag that ultimately subverts the people’s voice, especially that of the global poor, in the economic and social decisions
that matter... The commanding role of business has become the key element of the new system.  

Derber attributes this to the lack of sufficient restrictions on money in politics. He considers such limitations difficult to maintain because of the "astonishing new size and global reach of transnational corporations" that wish to influence domestic policies. The result, Derber maintains, is that the "firewall between big business and government is chipped away, flooding money into government and eroding popular control."  

Because the poor or even the middle class do not direct corporate power or influential political expenditures, the dynamics of money in politics tend to run counter to popular control. Lobbying firms, bribes, and large donations to political parties, campaigns, and third-party political organizations are not the political tools of the average citizen. They serve, rather, to undermine the rights and protections afforded to average citizens. Ronald Inglehart and Christian Welzel conclude their 2005 volume on modernization with the warning that "elite corruption can make the best democratic constitution meaningless, rendering people’s civil and political liberties ineffective." Law and globalization expert Amy Chua does not mince words in describing where this leaves us. Citing "impoveryished electorate[s] [without] a substantial political voice," "lack of access to information or decision-making networks," and "the wealthy['s] control [of] the political process through lobbying or corruption," she laments that "democracy in the developing world is so often a sham."  

Political equality also represents a formidable concern in matters of political finance, as is evident in the quotations above. When parties, candidates, elections, interest groups, or even political advertisements are financed in significant part by private donors and spenders (whether corporations or private citizens), citizens of average means are systematically disadvantaged in relation to a moneyed elite. Concerns over
unequal access to politicians, unequal influence over electoral and legislative outcomes, and untoward insertions of private groups into nominally public processes have long dogged democracies across the globe, exposing the considerable distance between the official ideology of political equality and the practical reality of clientelism.\footnote{37}

Equality concerns fit partly within the accountability problem described above—inequality as a lack of political accountability to the poor occasioned by disproportionate accountability to the rich. Studies of legislative behavior validate that concern with conclusions such as this about the U.S. Senate: “[T]he views of constituents in the bottom third of the income distribution received no weight at all in the voting decisions of their senators.”\footnote{38} Still, equality deserves separate mention because it transcends an instrumental concern over accountability. Equality is important not only because of its bearing upon the results that democracy brings, but also because of its bearing upon the experience of self-governance that democracy entails.

Take John Dewey’s explanation for why “democracy is more than a form of government[:]

[I]t is primarily a mode of associated living, of conjoint communicated experience. The extension in space of the number of individuals who participate in an interest so that each has to refer his own action to that of others, and to consider the action of others to give point and direction to his own, is equivalent to the breaking down of those barriers of class, race, and national territory which kept men from perceiving the full import of their activity. These . . . points of contact . . . secure a liberation of powers which remain suppressed . . . in a group which in its exclusiveness shuts out many interests.\footnote{39}

That liberation of powers cannot help but bear upon the results that democracy obtains. But it is not primarily an instrumental or consequentialist concern. It ought instead to be taken as a deontological concern about what is right and good in and of itself—that is, a concern over the experience of self-governance and its immediate implications for each citizen’s conceptions of self, others, and society.

When political finance is limited to further accountability and equality, questions of political freedoms arise. If citizens, interest groups, and

\footnote{37. See Samuel Issacharoff, On Political Corruption, 124 HARV. L. REV. 118, 127 (2010) (discussing clientelism, a “patron-client relationship in which political support . . . is exchanged for privileged access to public goods,” as a conception of corruption).}

\footnote{38. LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 254 (2008).}

\footnote{39. 9 JOHN DEWEY, THE MIDDLE WORKS, 1899-1924 93 (Jo Ann Boydston ed., 1980) (emphasis added).}
corporations are restrained in their ability to fully press their interests, or if wealthy candidates, officeholders, or political parties are prevented from using all their resources to maximize their electoral odds, then rights of expression and association may be implicated. Even relatively progressive bodies, such as the European Court of Human Rights and the Venice Commission, have so indicated.  

Such concerns over political accountability, equality, and freedom, common to most of the world’s democracies, help to distinguish between legal and illegal avenues of political finance. Virtually everyone agrees that political freedom is not compromised by prohibitions on the bribery of politicians, the embezzlement of state funds, or the extortion of unwilling constituents by politicians or parties. Indeed, legitimate forms of political freedom are diminished by such obvious forms of corruption. What good are rights of speech and peaceful assembly, after all, when legislative votes are bought and sold? Abject forms of corruption also compromise political accountability and political equality for obvious reasons. It is no coincidence that this area of easy agreement among democracy’s core political values delineates the nearly global consensus against corruption expressed in the United Nations Convention against Corruption.

A large area of disagreement remains, however. Leaving aside the sorts of bribery, extortion, and embezzlement associated with abject corruption, we return to a tremendous field of contested political finance practices. Are large campaign donations a form of bribery? When candidates, officeholders, and parties solicit campaign donations or friendly outside expenditures, have the private citizens, associations, and corporations receiving such requests been unduly pressured, even extorted? When officeholders and party officials accept gifts from lobbyists, including all-expense-paid invitations to lush conferences and swanky destinations, have they in effect accepted a bribe? Are rights of speech, association, and assembly not diminished when their collective exercise by thousands of people can be countered, indeed reversed, by a sole individual depositing a seven figure check in the account of a political advertising consultant, lobbyist, or interest group?

Even if bribery, extortion, and embezzlement suggest cruder scenarios than those described above, all ought to concede that the exercise of significant private economic power within political finance impugns the


values of accountability, equality, and freedom—at least insofar as those values could be useful to citizens of average economic means. In a functional sense, political finance concerns the ability of economic power to translate into political power. When political finance is liberalized and this process of translation becomes a systemic feature, the structural sense of political finance is revealed: capitalism has triumphed over democracy in the battle for control over the government. The market governs politics.

IV. THE REASON HISTORY HAS NOT ENDED

Those who did not live through the Cold War are hard-pressed to imagine the significance of the fall of the Berlin Wall. The threat of nuclear war, the air raid drills that forced school children under their desks, and the utterly realistic sense that one’s way of life and mode of governance could suffer a radical reversal surely impressed themselves on all but the overconfident, sheltered, and simple-minded. For such personal concerns, the end of the Cold War meant an end to fear. Nationally, it was practically as significant as winning the American Revolution. There, we would be a nation. Here, our nation had defeated its greatest opponent since King George III. And our victory over communism meant something greater than our victory over monarchy: not only would we be free to continue in the paradigm of self-authorship vindicated by the American Revolution, but additionally we would be virtually unopposed in spreading that paradigm (read capitalist democracy) elsewhere. We would be the most powerful of all nations, a lone superpower at the helm of political and economic globalization processes.

For those capable of seeing beyond personal and national meanings, and focusing in on the larger picture of social theory, there was a third and even greater meaning in play. Democracy had vanquished the greatest structural tyrannies of all time: theocracy, monarchy/aristocracy, dictatorship (never mind vigorous U.S. support for anti-communist dictatorships), and communism.  

42 Although there are numerous variations and questions of degree in play, these forms can be sketched as follows: In theocracy, organized religion controls the State and the people are thus subjected to the power of the religious sphere. In a monarchy, the people are subjected to the power of royalty, a power that emanates from noble birth—that is, the family sphere. Dictatorship, divorced from religious or
aristocratic validation, is simple tyranny, the rule of the strongman who controls the military, the power of force. In the economic sphere, the exercise of that power is robbery; in the family sphere, its exercise is called kidnapping, rape, child abuse or spousal abuse. This sort of power belongs nowhere. The power of religion and the family, in contrast, have a well-accepted place outside of the political sphere. Political power too occupies a well-accepted but limited place. For example, communism’s central economic planning is a form of structural injustice because it consists of political power unduly invading the economic sphere. When the state seeks to authoritatively determine economic matters, there comes a point at which it oversteps its bounds. Political power in communist states frequently oversteps other limits as well, dictating the terms of family and religious activities.

To call these governmental forms tyrannical is to assign a negative value judgment to a particular architecture. Tyranny, in its structural sense, means power exercised outside of its proper setting. This understanding has been best articulated by Michael Walzer, whose work describes injustice as the result of a dominant good from one sphere becoming dominant in another sphere. Walzer might as well be rehearsing the promise of 1989 when he locates justice in a pluralistic state of affairs in which the spheres of religion, the family, the state, and the economy remain intact and essentially separate.43 If justice is defined in this way, then domination has only a limited number of blueprints, all of which involve encroachments of a form of power from one sphere into other spheres. On most fronts, liberal democracy attempts to conform to this definition: the source of political power is popular consent and popular participation; this majoritarian power is counterbalanced by a bill of rights, including protection of private property; the state does not dominate religion or vice-versa; the private sphere of the family is respected but elections do not allow it to provide the criterion for political power as in monarchy or aristocracy; the rule of force is vanquished by the rule of law; and the economy is essentially free, regulated only to maintain competition, uphold workers’ rights, ensure rights of property and contract, force the internalization of externalities (i.e., pollution controls), and protect public

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43. See Michael Walzer, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983) (elaborating a theory of complex equality premised on a pluralistic society of relatively autonomous spheres—such as education, religion, politics, the market, and so on); Michael Walzer, THINKING POLITICALLY: ESSAYS IN POLITICAL THEORY 53-67 (David Miller ed., 2007) (describing the art of separation as integral to political liberalism). On separatism’s implications for constitutional law and money in politics, see Timothy K. Kuhner, The Separation of Business and State, 95 CALIF. L. REV. 2353 (2007) and Kuhner, CAPITALISM v. DEMOCRACY, supra note 8.
goods. Promising to respect the many spheres that compose society, liberal democracy was rightfully the object of high hopes and soaring predictions.

Francis Fukuyama famously deduced that history had come to its final resting place with the newfound supremacy of liberal democracy and Western-style capitalism. Macey and Miller clarify, pointing out that “when Fukuyama declares that we are at the end of history, what he really means is that the age of ideological struggle between competing historical visions of how best to order the world has come to an end.” The problem with this widely-held Western narrative does not lie in its inaccuracy with regard to the absence of competing visions. The fact that China and Russia have gained economic power despite their authoritarian political systems shows that there has yet to be an end to the sorts of economic and political injustices that Fukuyama believed would disappear. The same goes for some of Fareed Zakaria’s “illiberal democracies,” cases observed even beyond Russia in which elections have served as a vehicle for a return to political oppression reminiscent of earlier governmental forms. More troubling still for Fukuyama, Chinese communism and the resurgent Islamic blueprint (which provides a greater role for religious authority in law and governance than liberal democracy) are mounting two new ideological challenges to liberal democracy, albeit not yet of the magnitude achieved by the Soviet Union. Emerging signs of external threat are not, however, the main problem with the Western triumphalist narrative that became dominant after the fall of the Berlin Wall.

The main problem with the Western narrative lies in its internal contradictions, an ideological and material conflict within liberal democracy itself. Macey and Miller flesh this out almost entirely, leaving aside only the relevance of political finance, to which we will soon return. To begin with, they expertly diagnose liberal democracy as being composed of two potentially contradictory parts: “Liberalism is a rights-bound concept that recognizes that human beings, as autonomous creatures, are entitled to

47. See Fareed Zakaria, The Rise of Illiberal Democracy, 76 Foreign Affairs 22, 22 (1997) (“Democratically elected regimes, often ones that have been reelected or reaffirmed through referenda, are routinely ignoring constitutional limits on their power and depriving their citizens of basic rights and freedoms.”).
certain rights [and] within this sphere of rights, they are entitled to act as they choose and to be free from governmental interference. Macey and Miller inform us. They define democracy as “a system of government under which citizens may participate in governmental decision-making either directly or through representatives." One can hardly miss the potential for a clash between these distinct parts: (1) “the rights of individuals to own and control private property” and (2) “restrictions, which range from rent-control provisions to zoning ordinances, . . . tolerated in the name of democracy.” Macey and Miller conclude that Fukuyama “fails to recognize . . . that these differences are likely to provoke the ideological battles of the future.”

“[T]he [new] beginning of history may sound a bit mundane,” Macey and Miller warn us, “because it focuses on how to preserve markets.” The question is how to make democratic government a good adjunct to capitalism:

[Un]iversal acknowledgement that capitalism and private ordering are superior to socialism and state ownership of the means of production marks the beginning of a new phase of history because now the world must confront the more interesting and difficult question of what sort of constitutional framework provides the best vehicle for containing, promoting, and nurturing a capitalist market economy.

This description applies within liberal democracy, as constitutional arrangements, whether textual or interpretive are never unmovable; but ultimately Macey and Miller inquire more broadly into which type of nation-state, cultural system, and constitutional system will dominate global markets and best ensure human flourishing.

Still, the relationship between democracy and capitalism remains the central question. Whether these two systems are thrust together into the vehicle of liberal democracy, social democracy, Confucian capitalism, or something else depends not just on how democracy and capitalism are defined but also on how they interact—specifically, which system takes precedence in the various core areas within society. For instance, a major difference between laissez-faire democracies, such as the United States, and

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48. Macey & Miller, supra note 45, at 280.
49. Id. at 281.
50. Id.
51. Id. at 279-80.
52. Id. at 283.
53. Id. at 283-84. The focus point of conflict is no longer “how to organize the marketplace,” but rather “what sort of nation-state provides the most successful vehicle for fostering capitalism.” See id. at 285.
54. Id. at 285-86.
social democracies, including most Western European states, arises from differing judgments as to whether capitalism or democracy should control matters of health care and education.

A civil war within liberal democracy is well underway. Once capitalism and democracy had extinguished their external foes (communism and the like), these uneasy bedfellows trained their sights on each other: which of them would govern each area of activity within the societies they were now free to rule? Or if both systems were to play a role in many contexts, then which of them would enjoy a greater share of control?

V. POLITICAL FINANCE: THE GATEWAY TO 21ST CENTURY TYRANNY

The turf war between democracy and capitalism unfolds within three categories: (1) cases in which popular control would be unjust; (2) cases in which a mixture of democratic and market control are tolerable and, arguably, necessary; and (3) cases in which market control would be unjust. Cases in each category make up three separate territories, each comprised of things and activities upon which society depends.

As a general rule, agents of democracy do not contest the first territory. It is, by most accounts, acceptably within the market sphere, the state intervening merely to ensure free exchange and necessary rights. Consider the common thread uniting questions such as these: the jobs people may take or the careers they may pursue; decisions as to what and how much to produce, sell, trade, or give away; decisions as to what or whether to buy, trade or accept; the ability to set prices; determinations as to which individuals and entities get ahead in the economy and which fall behind; and the provisioning of ordinary goods and services. In all of these cases, market control applies as a general rule. The state ensures clear, predictable rights of private property and contract, and ought to crack down on anti-competitive behavior, unfair dealing and so on. But only in special cases, such as transactions involving sex, slaves, drugs, or organs, will the state forcefully intervene.55 (More on those “commodities” in the next categories.)

The second category contains territory that agents of democracy and agents of capitalism are both eager to possess, as there are communal and profit-driven reasons to control each of its features. These include the media, mass transportation, educational institutions, health care, working conditions, social security or retirement benefits, product safety, pollution

55. See generally MARGARET JANE RADIN, CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS (First Harvard Paperback ed. 2001).
levels, and other facets of environmental quality. Most European states retain entitlements along the lines of health, education, unemployment benefits, and retirement high enough to frustrate those who see all such matters as markets and all related entitlements as undue state intervention. President Obama, for instance, continues to be assailed by the insults “socialist” and “communist” in his effort to provide a minimum floor for health care. Despite significant pressure for privatization, these areas of human needs and activities have not been handed over completely to the market. Controversies center on where to set the borders between market and state, not whether to annex one sphere or the other. Margaret Jane Radin has thus described national maximum-hour limitations on the workweek and a national prohibition on child labor as “reflect[ing] an incompletely commodified understanding of work.”

Similarly, Walzer has called such governmental policies “restraint[s] of market liberty for the sake of some communal conception.” These are areas, then, in which state and market share power.

Power sharing in category two is so well established that states have created international obligations to reinforce and coordinate it. United Nations treaties establish rights for migrant workers, the illegality of all forms of slavery, the rights of all people to be free from forced prostitution, and social and economic rights in matters of health, education, and work. Consider the rule that migrant workers must be treated as favorably as the nationals of every state in matters of vacation time and working hours, and that even private employment contracts may not derogate from this principle of equality, or consider the international entitlements regarding the formation of trade unions, safe and healthy working conditions, reasonable limitation of working hours and periodic holidays with pay, education, and social insurance. These rules require a degree of state intervention across the community of nations into markets for labor, education, and health care.

56. Id. at 108.
57. SPHERES OF JUSTICE, supra note 43, at 102.
59. Migrant Workers Convention, supra note 58, at art. 25.
60. See, e.g., ICESCR, supra note 58, at arts. 7-9, 13.
The third category contains the territory that most clearly poses obstacles to commodification. Reactions to the prospect of market control of these aspects of society draw from an intuitive sense of political legitimacy, public goods, externalities, and deeply held values. Should the market decide whether or not a state goes to war? Should prisons, courts, or armies be supplied and run by private firms? Should sex, drugs, body parts (such as organs), rare animal and plant species, and nuclear weapons be exchanged on the market, and thus allocated on the bases of ability and willingness to pay? Market actors attempt numerous incursions: private defense contractors do an increasing amount of the business of war, many jails are now privately owned and operated, and, where possible, disputants funnel money to judges in hopes of obtaining more favorable rulings.61 Still, in cases besides drugs and sex, a tremendous consensus on these disparate cases insists on market inalienability.

Where in these categories does political finance belong? Should the market decide which candidates have sufficient funds to mount a successful campaign? Should it decide which political parties gain sufficient wealth to overshadow and marginalize their competitors in a privatized media market? Should wealthy citizens be allowed to bestow unlimited quantities of money upon their preferred candidates or parties, even “indirectly” through organizations that launch sympathetic ad campaigns? Should corporations be allowed to flood the political market with lobbyists who bundle funds, administer lavish perks and benefits to sympathetic officeholders, and bring tremendous and asymmetrical information to bear on public policy issues? These and other ways in which individuals and corporations “vote with their dollars” involve the transferal of democratic processes of election and lawmaking to the market sphere. Do these cases involving political markets belong to category one, two, or three above?

A distinction may help bring the issue into focus: configurations of market control within society that make democracy less meaningful versus configurations that make democracy inapplicable. Consider category two where some degree of delegation by the state to the market commonly occurs. Although worrisome at times, the partial privatization of health care, education, or even national defense does not ipso facto render the label

61. This has arisen in the United States with regard to the role of Blackwater Industries (now Xe Services LLC) in the ongoing wars in Afghanistan and Iraq, jails run in Germany and the US, and the private financing of judicial elections. See, e.g., P.W. Singer, Corporate Warriors: The Rise of the Privatized Military Industry (2d ed. 2007); Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009) (holding, 5-4, that the Due Process Clause of the Fourteenth Amendment required a state judge to recuse himself from a case in which one of the parties had provided that judge with the overwhelming majority of his election funds).
“democracy” inapplicable. High quality, accessible public education and decent health are essential in order for citizens to understand the complex events of their day, identify their own interests, and make informed decisions. But this has more to do with making democracy meaningful than with making a system of government democratic in the first place.

Money in politics differs from other fronts of this rivalry between democracy and capitalism. Let us imagine that the market comes to govern the financing of elections, political parties, political debate, and the underlying process through which public policy is decided and laws enacted. Would we once again say that this is only a question of whether a democracy is meaningful? Or would we concede that this is a question of whether a state is democratic in the first place?

Consider a second iteration of familiar conditions: elections and political parties are privately financed; those monies are provided in accordance with citizens’ willingness and ability to pay; corporations are understood to be citizens for purposes of political expenditures; the media is privatized and political speech is expensive and inaccessible to people of average means; political representatives meet regularly (often at fancy venues and retreats) with lobbyists but rarely with constituents of average means; many former representatives become lobbyists; a small number of political parties dominate politics, easily overshadowing and discrediting their poorly funded rivals; and those dominant parties decide in advance of the popular vote who the candidates will be, and go a great distance in shaping those candidates’ platforms.

These conditions represent a difference in kind, not degree. It is one thing for the market to control a slightly higher or lower share of the markets for health care, education, or incarceration. If those decisions have come about through fair, democratic procedures, and do not violate the minimum conditions specified by social and economic rights, then they should be considered legitimate. But it is another thing entirely if such decisions were made because lawmakers could not afford to alienate important financial donors, or because average citizens were left with only ineffective means of political participation. In that case, the resulting decisions are undemocratic. Even though the vote itself remains market inalienable, who one is able to vote for, the platforms that viable candidates will carry out, and the social construction of public policy issues—indeed, control of the news media itself—are commonly tied to the preferences of a monied elite. Brad Roth conveys this judgment in his treatment of democracy under international law: “The universal franchise may allow all sectors of the society to select once every four years from among pre-packaged candidates of parties controlled by social elites, but this scarcely
implies the rudiments of accountability, let alone genuine popular empowerment.”

Susan Marks stresses the difference between the “liberal preoccupation with rights and freedom from government control, and the democratic preoccupation with equal participation in, and accountability of, public power.” She considers the liberal preoccupation to be winning out over the democratic preoccupation, lamenting the “obvious failures of liberal democracy, its omissions with respect to the historic promise of self-rule on the basis of equality among citizens.” The implication is that the globalization of democracy could spread this failure globally. Marks concludes with a warning: “liberal democratic universalism” could end up subjecting democratic values, structures, and aspirations to “rule by the market.”

Here Marks would appear to meet Marx, as Marx’s social theories can be taken as a response to a hegemonic system of economic exploitation opposed to democracy’s historic promise of empowering ordinary citizens to decide their destiny. Still, a more contemporary figure than Marx provides a superior reference point in matters of the Cold War.

Charles Lindblom made a landmark observation in 1977, one which places him above Fukuyama. In his classic book on comparative politics, he 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. This was a common way to distinguish the forces at work during the Cold War. But Lindblom then transcended his particular historical moment and astutely described today’s socio-legal dilemma. “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.”

Political finance is unique among the conflicts between market and government because it concerns the meta-issue of how all contests between

64. Id. at 541.
65. Id. at 563.
66. 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 governments to support despotic governments that suppressed communist elements within their jurisdictions.
67. 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.
government and market are decided. If the market can control the means of political decision-making and the procedures of elections and policy-making, then it can control (or at least unduly influence) substantive decisions. This makes money in politics the determinative component of the rivalry between market and government. An absence of limits on money in politics, as described by the conditions above, represents a ceding of political authority to the market. 68 This, in reality, is a form of domination analogous to tyrannical governmental forms that democracy is credited with defeating.

If we assume that democracy and capitalism will remain the dominant, history-shaping forces, then there is a simple reason that history has not yet ended: the proper realms of authority afforded to the systems of capitalist markets and democratic governance are uncertain. The tendency, however, is clear. And if capitalism replaces government even within the government’s own most intimate setting of elections, parties, and lawmaking, then it extinguishes democracy and births plutocracy. In the era of financial power, it falls to the law of political finance to answer that age-old question: To whom shall government be accountable? If the centuries-long evolution away from domination and towards political inclusion is to continue, the importance of political finance must be recognized.

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68. Granted, so long as universal suffrage is maintained and votes remain market inalienable, then politics cannot be ceded completely to the market. Still, if political debate is privatized, access to media and extent of distribution determined by ability to pay, and if parties and candidates must raise millions of dollars from private sources, then it is no exaggeration to say that democracy is, to a large degree, a market. No market, after all, is entirely unregulated.