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Timothy K Kuhner

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# American Kleptocracy: How to Categorise Trump and His Government

Timothy K Kuhner<sup>\*</sup>

## I. GENUS: TYRANT, SPECIES: TRUMP

The world seems to have settled into the new normal of a Trump presidency. Even at this early stage, most observers would surely fall from their seats if the unrelenting current of strategically, morally, legally and democratically questionable actions were to cease. It seems only natural for the president of the United States to be vindictive, chronically untruthful, mired by lawsuits (one by 196 members of Congress no less),<sup>1</sup> consumed by an official investigation (despite firing the FBI director who first headed it),<sup>2</sup> and engaged *incessantly and brazenly* in Orwellian reality-control.<sup>3</sup>

The question is: is there any method to the madness? Is there any constant—any unifying logic—beneath the president's electoral triumph, mode of politics and the type of government that he, his advisers, his cabinet and their agenda embody? Today's topsy-turvy political landscape occurs as a chaotic series of objectionable

<sup>\*</sup> Fulbright Senior Scholar, University of Barcelona, and Associate Professor, Georgia State University College of Law. The views expressed in this article are mine and those of the sources I cite. Nobody from the Fulbright Program nor the US Department of State has read this article or funded my research on Trump. For comments, I thank KD Ewing, Joo-Cheong Tham and Fletcher Lokey. Email: [tkuhner@gsu.edu](mailto:tkuhner@gsu.edu).

<sup>1</sup> Michele Gorman, 'Conflict of Interest: Nearly 200 Democrats Sue Trump over Business Deals' *Newsweek* (15 June 2017) <[www.newsweek.com/conflict-interest-nearly-200-democrats-sue-trump-over-business-deals-626217](http://www.newsweek.com/conflict-interest-nearly-200-democrats-sue-trump-over-business-deals-626217)>. All websites accessed 1 August 2017.

<sup>2</sup> As of today, the latest news is here: Ashley Parker and others, 'Trump Dictated Son's Misleading Statement on Meeting with Russian Lawyer' *The Washington Post* (31 July 2017) <[www.washingtonpost.com/politics/trump-dictated-sons-misleading-statement-on-meeting-with-russian-lawyer/2017/07/31/04c94f96-73ae-11e7-8f39-eeb7d3a2d304\\_story.html?utm\\_term=.0d18a6a5972b](http://www.washingtonpost.com/politics/trump-dictated-sons-misleading-statement-on-meeting-with-russian-lawyer/2017/07/31/04c94f96-73ae-11e7-8f39-eeb7d3a2d304_story.html?utm_term=.0d18a6a5972b)>.

<sup>3</sup> For a long list of Trump's lies, see David Leonhardt and Stuart A Thompson, 'Trump's Lies' *The New York Times* (23 June 2017) <[www.nytimes.com/interactive/2017/06/23/opinion/trumps-lies.html?\\_r=0](http://www.nytimes.com/interactive/2017/06/23/opinion/trumps-lies.html?_r=0)>. But the fact that Trump has successfully branded as fake news every media outlet except fake news has considerably reduced the fallout. The contrast is to Watergate, which came at a pre-modern time when facts were, for the most part, agreed upon, and news organisations could not be opposed effectively on the basis that the stories they published were politically inconvenient. See Jim Rutenberg, 'In Watergate, One Set of Facts. In Trump Era, Take Your Pick' *The New York Times* (11 June 2017) <[www.nytimes.com/2017/06/11/business/media/comey-trump-watergate.html](http://www.nytimes.com/2017/06/11/business/media/comey-trump-watergate.html)>.

actions, but perhaps it all means something. The quest is for a Rosetta Stone to decipher these Trumpian hieroglyphs once and for all.

Trump himself offered a clue from the campaign trail:

My whole life I've been greedy, greedy, greedy. I've grabbed all the money I could get. I'm so greedy. But now I want to be greedy for the United States. I want to grab all that money. I'm going to be greedy for the United States. [Applause] It's true.<sup>4</sup>

Greed does indeed seem to define President Trump but is it really possible to be greedy for others, the public interest or the nation as a whole? Greed means an 'intense and selfish desire for something, especially wealth [or] power'.<sup>5</sup> It refers to an 'overwhelming urge',<sup>6</sup> an 'excessive desire to acquire or possess more than what one needs or deserves',<sup>7</sup> which raises the question of whether it can be controlled or refocused. And so it is important to ask: is Trump's excessive, rapacious desire really being enlisted in the service of the United States? Or are others, the public interest and the nation being enlisted in the service of Trump himself?

It is possible that Trump, his family members, advisers, cabinet members and other appointees are motivated only by the noble calling of public service. But for citizens, public interest organisations and scholars of the law of democracy, it is fundamentally important to consider the possibility that they are also motivated by self-interest, especially economic self-interest. This article explores that possibility and contemplates its implications for democracy and the legal frameworks that sustain democracy.

In the beginning, greed seemed to be the least of the country's concerns about Trump. Trump's campaign saturated and overwhelmed the public discourse with outrageous and distracting actions. He bullied and intimidated his opponents,<sup>8</sup> insulted women, judges, Mexicans, Muslims, protesters and the media,<sup>9</sup> and invigorated hate groups and fake news organisations.<sup>10</sup> Leading up to his 'election' by the Electoral

4 Ezra Klein, "Trump: "My Whole Life I've Been Greedy ... Now I Want to Be Greedy for the United States"" (*Vox.com*, 29 January 2016) <[www.vox.com/2016/1/29/10866388/donald-trump-greedy](http://www.vox.com/2016/1/29/10866388/donald-trump-greedy)>.

5 'Greed' (*Oxford Living Dictionaries*) <<https://en.oxforddictionaries.com/definition/greed>> (emphasis added).

6 'Greed' (*Vocabulary.com*) <[www.vocabulary.com/dictionary/greed](http://www.vocabulary.com/dictionary/greed)>.

7 'Greed' (*The Free Dictionary.com*) <[www.thefreedictionary.com/greed](http://www.thefreedictionary.com/greed)>.

8 See eg Ben Kamisar, "Trump Tweets Stir Debate about Intimidation" *The Hill* (10 December 2016) <<http://thehill.com/homenews/campaign/309695-trump-tweets-stir-debate-about-intimidation>>.

9 See eg Jonah Goldberg, "Just Because Trump Is "Anti-PC" Doesn't Mean We Should Celebrate His Vulgarity" *The National Review* (30 January 2016) <[www.nationalreview.com/article/430530/donald-trump-vulgarity-pc-excuse](http://www.nationalreview.com/article/430530/donald-trump-vulgarity-pc-excuse)>; David M Halbfinger, "Profanity, Vitriol, Slurs: Why The Times Published Unfiltered Trump Rally Video" *The New York Times* (5 August 2016) <[www.nytimes.com/2016/08/05/insider/profanity-vitriol-slurs-why-the-times-published-unfiltered-trump-rally-video.html?\\_r=0](http://www.nytimes.com/2016/08/05/insider/profanity-vitriol-slurs-why-the-times-published-unfiltered-trump-rally-video.html?_r=0)>.

10 See eg Terry Collins, "Alt-right's Spencer Is Back on Twitter. Is Hate Speech Too?" (*CNET*, 13 December 2016) <[www.cnet.com/news/richard-spencer-twitter-alt-right-hate-speech/](http://www.cnet.com/news/richard-spencer-twitter-alt-right-hate-speech/)>; TA Frank, "How the Alt-Right Became the Party of Hate" *Vanity Fair* (31 August 2016) <[www.vanityfair.com/news/2016/08/how-the-alt-right-became-the-party-of-hate](http://www.vanityfair.com/news/2016/08/how-the-alt-right-became-the-party-of-hate)>.

College and against the popular vote, Trump received considerable assistance from Russia,<sup>11</sup> internet trolls,<sup>12</sup> and foreign and domestic fake news entrepreneurs.<sup>13</sup> Under these chaotic conditions, the electorate could be forgiven for not focusing on Trump's massive expenditures of personal wealth to fuel his campaign, his campaign's payments to his own businesses,<sup>14</sup> or on the countless conflicts of interest between his business empire and his potential exercise of executive power.<sup>15</sup>

Since assuming office, Trump has continued to paint honest journalism, full-blown scandals and even evidence provided by his own family members as fake news, and to distract and infuriate his opponents through outrageous lies and petty insults broadcast over Twitter. He has appointed a conspiracy theorist with white nationalist leanings as chief strategist,<sup>16</sup> begun a massive investigation into voter fraud on false pretences, repeatedly undermined an investigation into his campaign's collusion with Russia's illegal efforts to get him elected, unilaterally removed the United States from international collaboration on climate change, banned immigrants and refugees from primarily Muslim countries, and considered 'breaking up' the US Court of Appeals for the Ninth Circuit because of his personal disagreement with its rulings.<sup>17</sup> Again, the citizenry could be forgiven for not focusing on how Trump's conflicts of interest are playing out, or on the remarkable wealth and business entanglements of his cabinet choices.

11 See eg Eric Lipton, David E Sanger and Scott Shane, 'The Perfect Weapon: How Russian Cyberpower Invaded the U.S.' *The New York Times* (13 December 2016) <[www.nytimes.com/2016/12/13/us/politics/russia-hack-election-dnc.html](http://www.nytimes.com/2016/12/13/us/politics/russia-hack-election-dnc.html)>; Eric Lipton and Scott Shane, 'Democratic House Candidates Were Also Targets of Russian Hacking' *The New York Times* (13 December 2016) <[www.nytimes.com/2016/12/13/us/politics/house-democrats-hacking-dccc.html](http://www.nytimes.com/2016/12/13/us/politics/house-democrats-hacking-dccc.html)>.

12 See eg David French, 'The Price I've Paid for Opposing Donald Trump' *The National Review* (21 October 2016) <[www.nationalreview.com/article/441319/donald-trump-alt-right-internet-abuse-never-trump-movement](http://www.nationalreview.com/article/441319/donald-trump-alt-right-internet-abuse-never-trump-movement)>; Craig Timberg, 'Russian Propaganda Effort Helped Spread "Fake News" During Election, Experts Say' *The Washington Post* (24 November 2016) <[www.washingtonpost.com/business/economy/russian-propaganda-effort-helped-spread-fake-news-during-election-experts-say/2016/11/24/793903b6-8a40-4ca9-b712-716af66098fe\\_story.html?utm\\_term=.4d660a576d1a](http://www.washingtonpost.com/business/economy/russian-propaganda-effort-helped-spread-fake-news-during-election-experts-say/2016/11/24/793903b6-8a40-4ca9-b712-716af66098fe_story.html?utm_term=.4d660a576d1a)>.

13 See eg Andrew Higgins, Mike McIntire and Gabriel JX Dance, 'Inside a Fake News Sausage Factory: "This Is All About Income"' *The New York Times* (25 November 2016) <[www.nytimes.com/2016/11/25/world/europe/fake-news-donald-trump-hillary-clinton-georgia.html](http://www.nytimes.com/2016/11/25/world/europe/fake-news-donald-trump-hillary-clinton-georgia.html)>; Elizabeth Williamson, 'Fake News Brings a Gunman to Washington' *The New York Times* (5 December 2016) <[www.nytimes.com/2016/12/05/opinion/fake-news-brings-a-gunman-to-washington.html?action=click&pgtype=Homepage&clickSource=story-heading&module=opinion-c-col-left-region&region=opinion-c-col-left-region&WT.nav=opinion-c-col-left-region&r=0](http://www.nytimes.com/2016/12/05/opinion/fake-news-brings-a-gunman-to-washington.html?action=click&pgtype=Homepage&clickSource=story-heading&module=opinion-c-col-left-region&region=opinion-c-col-left-region&WT.nav=opinion-c-col-left-region&r=0)>.

14 See Drew Griffin, Marshall Cohen and Scott Zamost, 'Trump Paid \$12.5 Million to His Own Businesses During Race' *CNN*, 16 December 2016) <<http://money.cnn.com/2016/12/16/news/companies/donald-trump-campaign-fec/>>.

15 As of November 2016, many conflicts were already visible: Richard C Paddock and others, 'Potential Conflicts around the Globe for Trump, the Businessman President' *The New York Times* (26 November 2016) <[www.nytimes.com/2016/11/26/us/politics/donald-trump-international-business.html](http://www.nytimes.com/2016/11/26/us/politics/donald-trump-international-business.html)>.

16 See BBC News, 'Steve Bannon: Who Was Trump's Key Adviser?' (*BBC News*, 5 July 2017) <[www.bbc.com/news/election-us-2016-37971742](http://www.bbc.com/news/election-us-2016-37971742)>.

17 Eric Levitz, 'All the Terrifying Things That Donald Trump Did Lately' (*N.Y.Mag.com*, 9 June 2017) <<http://nymag.com/daily/intelligencer/2017/06/every-terrifying-thing-that-donald-trump-has-done.html>>.

Uncharacteristically, Trump has replied to conflict of interest allegations directly: ‘The law’s totally on my side, meaning, the president can’t have a conflict of interest.’<sup>18</sup> Accordingly, he has not divested himself from his businesses, placed his assets in a blind trust or released his tax returns. Past presidents went to a great deal of trouble in these regards,<sup>19</sup> but what Jimmy Carter did with his peanut farm, Trump will not even consider doing with his multibillion dollar empire.<sup>20</sup> Trump’s reply to suspicions about his cabinet choices is similarly illustrative: ‘I want people that made a fortune!’<sup>21</sup> Trump once even tied campaigning to profit: I ‘could be the first presidential candidate to run and make money on it’ he boasted in 2000.<sup>22</sup>

Admittedly, the law is terribly undeveloped on the president’s and the cabinet’s conflicts of interest, but that does not explain Trump’s position. He can, for now, outmanoeuvre all restraints and capitalise on his political power, but that does not explain why he believes this to be the right thing to do. Trump’s remark on the absence of legal restraint seems to reveal more about him than it does about the law. It may reveal that, to his mind, legal restraint would be the only reason *not* to exercise state power for personal enrichment. It may reveal the belief that there is no such thing as a conflict between political success and economic success—each can be used to obtain and maximise the other. Rather than conflict, Trump sees synergy. To borrow from the titles of Trump’s own books, the presidency is the best way yet to *Think Big and Kick Ass*, the ultimate *Way to the Top*. Set to apply *The Art of the Deal* from his new station, Trump is poised to show the world, once and for all, *How to Get Rich*.<sup>23</sup> His book titles reinforce the point: the law on conflicts of interest is undeveloped partly because past presidents have not thought in these terms. Trump is the first president with no experience in politics or the military, and such varied, international involvement in business.

The presidency may be Trump’s final stage of success, not just economic success, but a hybrid version with totalitarian potential: the leveraging of political success for exponential economic success, and vice versa. This type of success entails a symbiosis of

18 Glenn Kessler and Michelle Ye Hee Lee, ‘Trump’s Claim that the President “Can’t Have a Conflict of Interest”’ *The Washington Post* (23 November 2016) <[www.washingtonpost.com/news/fact-checker/wp/2016/11/23/trumps-claim-that-the-president-cant-have-a-conflict-of-interest/?utm\\_term=.26ade684433f](http://www.washingtonpost.com/news/fact-checker/wp/2016/11/23/trumps-claim-that-the-president-cant-have-a-conflict-of-interest/?utm_term=.26ade684433f)>.

19 Jennifer Wang, ‘Why Trump Won’t Use a Blind Trust and What His Predecessors Did with Their Assets’ (*Forbes.com*, 15 November 2016) <[www.forbes.com/sites/jenniferwang/2016/11/15/why-trump-wont-use-a-blind-trust-and-what-his-predecessors-did-with-their-assets/](http://www.forbes.com/sites/jenniferwang/2016/11/15/why-trump-wont-use-a-blind-trust-and-what-his-predecessors-did-with-their-assets/)>.

20 The Editorial Board, ‘Donald Trump’s Tangled Web’ *The New York Times* (16 November 2016) <[www.nytimes.com/2016/11/17/opinion/what-trump-can-do-to-eliminate-his-conflicts-of-interest.html?\\_r=0](http://www.nytimes.com/2016/11/17/opinion/what-trump-can-do-to-eliminate-his-conflicts-of-interest.html?_r=0)>.

21 Chase Peterson-Withorn, ‘Here’s What Each Member of Trump’s \$4.5 Billion Cabinet Is Worth’ (*Forbes*, 22 December 2016) <[www.forbes.com/sites/chasewithorn/2016/12/22/heres-how-much-trumps-cabinet-is-really-worth/#1f772b776f02](http://www.forbes.com/sites/chasewithorn/2016/12/22/heres-how-much-trumps-cabinet-is-really-worth/#1f772b776f02)>.

22 See Tina Nguyen, ‘Donald Trump Reportedly Used Campaign Donations to Pay Himself \$8.2 Million’ *Vanity Fair* (22 September 2016) <[www.vanityfair.com/news/2016/09/donald-trump-campaign-donations-report](http://www.vanityfair.com/news/2016/09/donald-trump-campaign-donations-report)>.

23 See ‘Author Page, Donald J. Trump’ (Amazon.com) <[www.amazon.com/Donald-J.-Trump/e/B001H6O8M2/ref=sr\\_ntt\\_srch\\_lnk\\_19?qid=1498293837&sr=1-19](http://www.amazon.com/Donald-J.-Trump/e/B001H6O8M2/ref=sr_ntt_srch_lnk_19?qid=1498293837&sr=1-19)>.

economic and political power, which supposes the disappearances of lines, boundaries and frontiers. The state can be run by capitalists for purposes of their own capital enhancement; and therefore, the economy can be run through political power-plays and rent seeking.

To understand the implications of a greedy president for democracy, capitalism and the overall thrust of US state power, one must think in terms of forms, functions and, ultimately, types of government—tyrannical types of government, that is.

### The Trump Monarchy?

Trump is often compared to a monarch,<sup>24</sup> but that is not quite right. He did not inherit the presidency by virtue of royal birth, nor did he acquire the presidency by leading an army to conquer a kingdom. Plus, the Constitution provides 'No Title of Nobility shall be granted by the United States'.<sup>25</sup> But, as president, Trump has bestowed political titles (and principalities and fiefdoms in a sense) upon his daughter, sons and son-in-law in a raw, nepotistic display. They will not be able to retain their privileges by right unless Trump wins another election—and even then 2024 would be an absolute limit. They could, however, leverage their political privileges—including connections, inside knowledge and name recognition—through some hard work of their own over time. That much is all too feasible in US politics, as the Kennedys, Bushes and Clintons have demonstrated.

There can be no denying that Trump is a powerful, jealous figure who, like a monarch, demands loyalty and inflicts harsh punishments. In the midst of the investigation into his campaign's collusion with Russia, Trump fired FBI Director James Comey and has repeatedly shamed Attorney General Jeff Sessions for recusing himself instead of remaining loyal. Also relating to the Russia investigation, Trump has reportedly expressed interest in 'his power to pardon aides, family members and even himself'.<sup>26</sup> This revealing interest in pardoning himself goes to sovereign immunity in the old sense—the doctrine that 'the king can do no wrong'.<sup>27</sup> As Blackstone put it,

<sup>24</sup> See eg Stephan Richter, 'American Royals: The Dangerous Rise of the Trump Monarchy' (Salon.com, 22 April 2017) <[www.salon.com/2017/04/22/american-royals-the-dangerous-rise-of-the-trump-monarchy\\_partner/](http://www.salon.com/2017/04/22/american-royals-the-dangerous-rise-of-the-trump-monarchy_partner/)>; Thomas L Friedman, 'Trump's United American Emirate' *The New York Times* (31 May 2017) <[www.nytimes.com/2017/05/31/opinion/trumps-united-american-emirate.html?\\_r=0](http://www.nytimes.com/2017/05/31/opinion/trumps-united-american-emirate.html?_r=0)>; and Kathleen Parker, 'Republicans Would Rather Have a King than a President' *The Washington Post* (28 March 2017) <[www.washingtonpost.com/opinions/republicans-would-rather-have-a-king-than-a-president/2017/03/28/a6b8dd9a-13ef-11e7-9e4f-09aa75d3ec57\\_story.html?utm\\_term=.1be9c624fe2e](http://www.washingtonpost.com/opinions/republicans-would-rather-have-a-king-than-a-president/2017/03/28/a6b8dd9a-13ef-11e7-9e4f-09aa75d3ec57_story.html?utm_term=.1be9c624fe2e)>.

<sup>25</sup> US Const, Art I, § 9, cl 8.

<sup>26</sup> See Carol D Leonnig and others, 'Trump Team Seeks to Control, Block Mueller's Russia Investigation' *The Washington Post* (21 July 2017) <[www.washingtonpost.com/politics/trumps-lawyers-seek-to-undercut-muellers-russia-investigation/2017/07/20/232ebf2c-6d71-11e7-b9e2-2056e768a7e5\\_story.html?utm\\_term=.28e01c218ac8](http://www.washingtonpost.com/politics/trumps-lawyers-seek-to-undercut-muellers-russia-investigation/2017/07/20/232ebf2c-6d71-11e7-b9e2-2056e768a7e5_story.html?utm_term=.28e01c218ac8)>.

<sup>27</sup> See George W Pugh, 'Historical Approach to the Doctrine of Sovereign Immunity' (1953) 13 *Louisiana Law Review* 476.

Besides the attribute of sovereignty, the law also ascribes to the king in his political capacity absolute perfection ... [He] is not only incapable of *doing wrong*, but even of *thinking wrong*: he can never mean to do an improper thing: in him is no folly or weakness.<sup>28</sup>

Blackstone's words bring to mind the televised cabinet meeting in June 2017, in which the major players in Trump's administration were prodded to pay Trump obsequious compliments. 'The greatest privilege of my life is to serve as vice president to the president who's keeping his word to the American people,' proclaimed Mike Pence. 'It was a great honor traveling with you around the country for the last year and an even greater honor to be here serving on your Cabinet,' piped Treasury Secretary Steve Mnuchin. 'We thank you for the opportunity and the blessing to serve your agenda,' offered Reince Priebus.<sup>29</sup> This was the first 'feudal ceremony by which [each cabinet member] acknowledge[d] himself the vassal of a lord'.<sup>30</sup>

But Priebus had once implied that the king *could* think and do wrong. During the campaign, a tape emerged of Trump bragging about his power with 'beautiful women':

I just start kissing them. It's like a magnet. Just kiss. I don't even wait ... And when you're a star they let you do it. You can do anything ... Grab them by the pu\*\*y. You can do anything.<sup>31</sup>

After the tape's release, Priebus urged Trump to drop out of the race, a recognition of folly and a piece of advice that reportedly offended Trump to no end.<sup>32</sup> Then, to make matters worse, Priebus had been accused of being a weak chief of staff and a leaker. Finally, he was cursed out by Wall Street financier-cum-communications director Anthony Scaramucci as a 'co\*\*-block[er]' and 'a fu\*\*\*\*\* paranoid schizophrenic'.<sup>33</sup> Trump replaced Priebus with a reluctant four-star Marine general who had finally learned that the King does not take 'no' for an answer.<sup>34</sup> General Kelly then fired Scaramucci. At such times, it seems as though *The Apprentice* is now set within the White House.

<sup>28</sup> William Blackstone, *Commentaries on the Laws of England*, vol 1, 246 (1765).

<sup>29</sup> Rex Huppke, 'Trump's Cabinet Meeting Praise-Fest Needs Work' *The Chicago Tribune* (14 June 2017) <[www.chicagotribune.com/news/opinion/huppke/ct-trump-cabinet-praise-huppke-20170614-story.html](http://www.chicagotribune.com/news/opinion/huppke/ct-trump-cabinet-praise-huppke-20170614-story.html)>.

<sup>30</sup> Adapted from 'Homage' (Merriam-Webster.com) <[www.merriam-webster.com/dictionary/pay%20homage%20to](http://www.merriam-webster.com/dictionary/pay%20homage%20to)>.

<sup>31</sup> Molly Redden, 'Trump Backers Claim Grabbing Women's Genitals Is Not Sexual Assault' *The Guardian* (London, 10 October 2016) <[www.theguardian.com/us-news/2016/oct/10/sexual-assault-definition-trump-comments](http://www.theguardian.com/us-news/2016/oct/10/sexual-assault-definition-trump-comments)>.

<sup>32</sup> David A Graham, 'Can John Kelly Stop the Chaos Inside Trump's West Wing?' *The Atlantic* (28 July 2017) <[www.theatlantic.com/politics/archive/2017/07/priebus-kelly/535338/](http://www.theatlantic.com/politics/archive/2017/07/priebus-kelly/535338/)>.

<sup>33</sup> Ryan Lizza, 'Anthony Scaramucci Called Me to Unload about White House Leakers, Reince Priebus, and Steve Bannon' *The New Yorker* (27 July 2017) <[www.newyorker.com/news/ryan-lizza/anthony-scaramucci-called-me-to-unload-about-white-house-leakers-reince-priebus-and-steve-bannon](http://www.newyorker.com/news/ryan-lizza/anthony-scaramucci-called-me-to-unload-about-white-house-leakers-reince-priebus-and-steve-bannon)>.

<sup>34</sup> *Ibid.*

In light of this and many other episodes of infighting that Trump has inspired, one could argue that Trump is best considered not a literal king, but a 'King of Chaos'. An article in *Psychology Today* employed that phrase to describe people who suffer from borderline personality disorder. 'Borderlines are interpersonal tornadoes [and] often become hostile to their helpers', the article states.<sup>35</sup>

Emotional dysregulation and impulsivity are at the disorder's core. Sufferers swing from happiness to despair to fury, often in minutes, and each feeling is vastly disproportionate to its trigger.

Other traits of Kings of Chaos mentioned by the article include 'interpersonal intensity—emotional outbursts, heated middle-of-the-night exchanges [including Tweets perhaps]', 'hypersensitivity to rejection', 'an inner sense of emptiness that can be haunting', '[u]ncertainty about who they are [that] often keeps them from following a clear path in life', a 'fear of abandonment [that] commonly drives borderlines to seek confirmation that they truly matter', a tendency to 'assess other people and situations in all-or-nothing terms [ . . . ] a tendency to operate in extremes—black or white, right or wrong' and a tendency to 'court chaos'.<sup>36</sup> Not a bad description of the Court of Chaos that the White House has become. The reason for this behaviour, many sources suggest, is that '[c]haos and crises . . . bring comfort to borderlines [who] feel safer in chaotic environments and relationships'. And chaos 'distracts them from their emotional turmoil'.<sup>37</sup>

Narcissistic personality disorder is also a worthy diagnosis for Trump, one which also sums up the stereotypical monarch: a 'pervasive pattern of grandiosity . . . , need for admiration, and lack of empathy', often including 'a grandiose sense of self-importance', the need for 'excessive admiration', 'interpersonally exploitative' behaviour and 'arrogant, haughty behaviors or attitudes'.<sup>38</sup> Another source, summarising the criteria from the *Diagnostic and Statistical Manual of Mental Disorders*, notes that '[p]ersistent fantasies about attaining success and power, [e]xploiting other people for personal gain, [a] sense of entitlement and expectation of special treatment, [a] preoccupation with power or success', are also key symptoms of this disorder.<sup>39</sup> Indeed, a person may suffer from both narcissistic personality disorder and borderline personality disorder.<sup>40</sup>

Let us return (via Trump's likely monarchical personality disorders) to the comparison to an actual monarch. The occasion for Trump's cabinet's public exercise in

35 Elizabeth Svoboda, 'Kings and Queens of Chaos' *Psychology Today* (2 September 2013) <[www.psychologytoday.com/articles/201309/kings-and-queens-chaos](http://www.psychologytoday.com/articles/201309/kings-and-queens-chaos)>.

36 *Ibid.*

37 *Ibid.*

38 See Alex Morris, 'Why Trump Is Not Mentally Fit to Be President' *Rolling Stone* (5 April 2017) <[www.rollingstone.com/politics/features/trump-and-the-pathology-of-narcissism-w474896](http://www.rollingstone.com/politics/features/trump-and-the-pathology-of-narcissism-w474896)>.

39 Clearview Women's Center, 'Borderline Personality Disorder vs. Narcissistic Personality Disorder: How Are They Different?' <[www.clearviewwomenscenter.com/borderline-narcissistic-personality-disorder-differences.html](http://www.clearviewwomenscenter.com/borderline-narcissistic-personality-disorder-differences.html)>.

40 See *ibid.*

homage-paying was an obvious low point. Trump's legislative agenda was at a near standstill and he had just fired FBI Director James Comey, apparently to obstruct an investigation into his campaign's collusion with Russia. Trump capped off his team's words of worship with a gross misstatement of fact: 'I will say that never has there been a president, with few exceptions—in the case of F.D.R. he had a major Depression to handle—who's passed more legislation, who's done more things than what we've done.'<sup>41</sup> The message—that Trump is incapable of doing wrong or even thinking wrong, that in him there is no weakness—came at a time when the opposite was clearer than ever.

Other evidence that Trump considers himself a sovereign overlord comes on a lighter note. Consider his decision to name his youngest son Barron. With one 'r' at least, that title meant 'a person who held land or property' from the supreme sovereign authority.<sup>42</sup> The name is as illustrative as they come, referring to 'a lord of the realm', someone 'holding his rights and title ... from a feudal superior (such as a king)'.<sup>43</sup> The Trump family's coat of arms further supports the point. But since the ascendance of corporations over royalty and even over government in general, 'baron' also means 'an extremely powerful person in a particular area of business'.<sup>44</sup> That is what Trump has been for a long time and what his children will inherit as their birthright. Technically speaking, Trump's election does not mark a return to 'monarchical tyranny', as Thomas Paine put it in *Common Sense*.<sup>45</sup> His royal tendencies relate to another mode of politics and type of government instead.

### The Trump Dictatorship?

Trump is also commonly compared to a dictator,<sup>46</sup> an authoritarian leader with totalitarian intentions. There is no all-encompassing case for totalitarianism yet—no 'single mass party, led by one man, which forms the hardcore of the regime', no 'system of terror by the police and secret police ... directed against real and imagined enemies of the regime', no (new) 'monopolistic control of the mass media', little (but growing) 'central control of the economy', and certainly no 'elaborate ideology which covers all aspects of man's existence'.<sup>47</sup> But that *truly totalitarian* kind of totalitarianism is just a summary of many years of rule—the gist of things. Totalitarian regimes may consolidate

41 Julie Hirschfeld Davis, 'Trump's Cabinet, with a Prod, Extols the "Blessing" of Serving Him' *The New York Times* (12 June 2017) <[www.nytimes.com/2017/06/12/us/politics/trump-boasts-of-record-setting-pace-of-activity.html?\\_r=0](http://www.nytimes.com/2017/06/12/us/politics/trump-boasts-of-record-setting-pace-of-activity.html?_r=0)>.

42 See 'baron definition' (google.com, 25 July 2017).

43 'Baron' (Merriam-Webster.com) <[www.merriam-webster.com/dictionary/baron](http://www.merriam-webster.com/dictionary/baron)>.

44 'Baron' (Cambridge Dictionary) <<http://dictionary.cambridge.org/us/dictionary/english/baron>>.

45 Thomas Paine, *Common Sense* (TheCapitol.Net 2009) 10.

46 See eg Robert Reich, 'How to Tell Whether Trump Is a Dictator' *Newsweek* (1 May 2017) <[www.newsweek.com/robert-reich-how-tell-whether-trump-dictator-592238](http://www.newsweek.com/robert-reich-how-tell-whether-trump-dictator-592238)>.

47 CJ Friedrich's definition of totalitarianism, quoted in Kevin Passmore, *Fascism: A Very Short Introduction* (Oxford University Press 2014) 12.

such absolute, top-down control at their peak, but research has shown that 'Nazi and Fascist (and Communist) regimes were chaotic' on the whole.<sup>48</sup> That makes it all the more important not to dismiss concerns over totalitarianism.

Trump's authoritarian tendencies—such as personally criticising judges who rule against him, demonising the media, attempting to broaden libel laws in order to sue those who oppose him, assailing congressional procedures that frustrate his agenda, networking with foreign authoritarian leaders, and seemingly advocating police brutality—must be monitored and opposed in their own right, lest they bear fruit.<sup>49</sup> The same should be said about the paramilitary groups that have popped up since Trump's campaign: although the 'alt-right' militias threatening liberal protesters with violence could presently be crushed by a high school football team or two, that may change.<sup>50</sup>

At present, however, it bears repeating that Trump won an election through pre-established means (not a coup), his political opponents have not been killed, tortured or even imprisoned,<sup>51</sup> other political parties and the media remain as free as they were before, and the other branches of government—though Republican-controlled and subservient thus far—remain free to act as they wish. There are certainly emerging parallels to modern-day Russian and Chinese authoritarianism; and Trump and his inner circle would have much to gain from interlacing US law and policy with the transnational networks that unite crony capitalist regimes (which tend to be authoritarian in nature).<sup>52</sup> But at present at least, Trump's election does not necessarily signal the resurrection of Stalin, Mussolini, Franco or Hitler on US soil. For now, the question is how Trump's dictatorial and authoritarian tendencies serve the mode of politics and the type of government he has actually established.

### The Trump Theocracy?

Trump has also been accused of ushering in theocracy.<sup>53</sup> The allegation is not that he is the head of a religious hierarchy that exercises formal control over the government, but rather that he would realign state policy to favour Christians. From the mundane elements of a 'Muslim ban' and the strategic omission of 'Jews' from an official statement on Holocaust Remembrance Day to the profound elements of a capitalist theology

<sup>48</sup> *Ibid*, 13.

<sup>49</sup> Robert Reich, 'How to Tell Whether Trump Is a Dictator' *Newsweek* (1 May 2017) <[www.newsweek.com/robert-reich-how-tell-whether-trump-dictator-592238](http://www.newsweek.com/robert-reich-how-tell-whether-trump-dictator-592238)>; Ryan J Reilly, 'Donald Trump Endorses Police Brutality in Speech to Cops' (*Huffington Post*, 28 July 2017) <[www.huffingtonpost.com/entry/trump-police-brutality\\_us\\_597b840fe4b02a8434b6575a](http://www.huffingtonpost.com/entry/trump-police-brutality_us_597b840fe4b02a8434b6575a)>.

<sup>50</sup> On pro-Trump, right-wing militias, see Alan Feuer and Jeremy W Peters, 'Fringe Groups Revel as Protests Turn Violent' *The New York Times* (2 June 2017) <[www.nytimes.com/2017/06/02/us/politics/white-nationalists-alt-knights-protests-colleges.html?\\_r=0](http://www.nytimes.com/2017/06/02/us/politics/white-nationalists-alt-knights-protests-colleges.html?_r=0)>.

<sup>51</sup> But see Ryan J Reilly, 'A Woman Is on Trial for Laughing During a Congressional Hearing' (*Huffington Post*, 2 May 2017) <[www.huffingtonpost.com/entry/laughing-congressional-hearing-jeff-sessions-code-pink\\_us\\_59076a93e4b05c3976810a3a?ncid=engmodushpimg00000004](http://www.huffingtonpost.com/entry/laughing-congressional-hearing-jeff-sessions-code-pink_us_59076a93e4b05c3976810a3a?ncid=engmodushpimg00000004)>.

<sup>52</sup> See generally Christia Freeland, *Plutocrats: The Rise of the New Global Super-Rich* (Penguin 2012).

<sup>53</sup> See David Leonhardt, 'Trump Flirts with Theocracy' *The New York Times* (30 January 2017) <[www.nytimes.com/2017/01/30/opinion/trump-flirts-with-theocracy.html](http://www.nytimes.com/2017/01/30/opinion/trump-flirts-with-theocracy.html)>.

and business gospel of Trump, this comparison is intriguing. But, again, it is technically inaccurate. There are no bishops, priests, prophets or revelations in play, no religious hierarchy or organisation, no holy book, no official beliefs, no comprehensive religious laws in force and no punishments for non-believers. Trump's election has not made US law or leadership formally subservient to religious law or leadership. We are not much more similar to Saudi Arabian, Iranian or Nigerian forms of religious control as a result of Trump's election.

### Trump's Tyranny

If Trump has not technically established a monarchy, dictatorship or theocracy, does that mean that his politics and mode of government are democratically legitimate? No, democracy rules out other tyrannies besides the usual suspects. Besides political power on the basis of royal birth or conquest, control of the military or status in a religious hierarchy, democracy also prohibits other architectures of power, such as slavery and male-only suffrage—every single *political design*, actually, that entails political exclusion or domination. John Locke defined tyranny as 'the exercise of power beyond right [,] not for the good of those who are under it, but for [one's] own private, separate advantage'.<sup>54</sup> After categorising monarchies as tyrannical, Locke added:

[O]ther forms of government are liable to [tyranny], as well ... [f]or wherever the power is put in any hands for the government of the people, and ... is ... made use of to impoverish, harass or subdue them ... There it presently becomes *Tyranny*.<sup>55</sup>

In order to be tyrants, in order to take power from the people and use it to enrich themselves, a ruler and his closest associates need not be royals, members of a military junta, high priests or plantation owners.

The key to Trump's essential meaning, to his mode of politics and type of government, lies in the obvious elements of his crony capitalist worldview, business dynasty and close cadre of advisers and cabinet members drawn from his family and his financial peers. Perhaps the tyranny at hand is too obvious: what would you expect to happen if one of the world's crudest, most unapologetic icons of conspicuous wealth became president of the United States? Perhaps business and politics would become excessively entangled. Maybe—*just maybe*—state power would be structured and exercised to ensure personal financial gain.

Trump is not Mussolini, but Mussolini famously defined fascism as corporatism, 'a merger of State and corporate power'.<sup>56</sup> While Mussolini probably thought of

<sup>54</sup> John Locke, *Two Treatises of Government* (Peter Laslett ed, Cambridge University Press 1988) 400.

<sup>55</sup> *Ibid.*

<sup>56</sup> Quoted in Karen Anijar and David Gabbard, 'The American Privatization Campaign' in Dave Hill (ed), *The Rich World and the Impoverishment of Education: Diminishing Democracy, Equity and Workers' Rights* (Routledge 2010) 44.

corporations in terms of 'collectivist guild[s] and co-op[s]',<sup>57</sup> Trump surely does not. What form of government results from the merger of state power with corporate power as corporations stand today?

Trump is no King George III, but Trump does reign over a business empire, which he no doubt hopes to expand through his presidency. He and his children surely intend to keep profiting from their old political titles and the opportunities they provided well past his political tenure. Those profits could accrue in politics, business or, more likely, in both. Nepotism, conquest and riches are as important to Trump's mode of politics and type of government as they were to any monarchy, but the source of his power is not monarchic. It has always been financial. Trump inherited financial power, not political power, from his father. Political power cannot be directly inherited in our system of government, but our tax and estate laws ensure that capital can be, and rather smoothly at that. Trump and his House form a business empire, 'a large commercial organization owned or controlled by one person or group'.<sup>58</sup> And the word 'dynasty' also fits the bill in that one sees 'a succession of rulers of the same line of descent'.<sup>59</sup>

Dynasty's political connotation, 'a line of hereditary rulers of a country',<sup>60</sup> is ruled out by elections. But empire's political connotation is not ruled out, thanks to the tremendous political and economic might of the United States.<sup>61</sup> And members of a business empire can employ their wealth to acquire political power in a host of ways, thanks to the United States' weak campaign finance laws and weak ethics rules. What we are beginning to witness in Trump's presidency is the union between a business empire and a political empire. Again, what form of government is that?

Trump does not intend something akin to the role of Islamic law in Iran, Nigeria or Saudi Arabia, never mind something akin to the Savonarola reign in Florence or the Anabaptist Kingdom of Munster (pure theocracies).<sup>62</sup> But he is enlisting state power in the service of a higher law (free market theology) and outside authority (his corporations and those of other crony capitalists). What faithful government worships at mammon's altar?<sup>63</sup>

The time has come for the law of democracy to account for government by and for the wealthy, and, in particular, the use of the presidency for personal enrichment.

57 See Stuart K Hayashi, *Hunting Down Social Darwinism: Will This Canard Go Extinct?* (Lexington Books 2015) 154.

58 'Empire' (*Oxford Living Dictionaries*) <<https://en.oxforddictionaries.com/definition/empire>>.

59 'Dynasty' (Merriam-Webster.com) <[www.merriam-webster.com/dictionary/dynasty](http://www.merriam-webster.com/dictionary/dynasty)>.

60 'Dynasty' (*Oxford Living Dictionaries*) <<https://en.oxforddictionaries.com/definition/dynasty>>.

61 'Empire' (Dictionary.com) <[www.dictionary.com/browse/empire?s=t](http://www.dictionary.com/browse/empire?s=t)>.

62 Ran Hirschl, *Constitutional Theocracy* (Harvard University Press 2010) 22.

63 I do not mean to suggest that Trump proposes that theology himself, for it goes far beyond his apparently rudimentary philosophy of material success, greed and individual gains. Indeed, it reorients and enlists such elements in service of a worldview that purports to explain life's ultimate questions and respond to the collective requirements of social ordering. See eg Robert H Nelson, *Reaching for Heaven on Earth: The Theological Meaning of Economics* (Rowman & Littlefield 1991); Philip Goodchild, *Theology of Money* (Duke University Press 2009); Timothy K Kuhner, 'The Market Metaphor, Radicalized: How a Capitalist Theology Trumped Democracy' (2017) 16 *Election Law Journal* 96, 122–31.

Besides the increasing probability that the Trump campaign colluded with Russia to rig the election and that Trump obstructed justice by firing FBI Director James Comey, there is just one way in which Trump, his advisers and his cabinet are per se disqualified to rule America: they form a kleptocracy.

## II. KLEPTOCRACY: SOME EVIDENCE FROM TRUMP'S FIRST MONTHS IN POWER

Trump's most notable antics as a candidate and as president pursue the elementary goals of obtaining and keeping political power. The ultimate question is what Trump is doing with that power—ie, why he desired to obtain it in the first place. Personal attacks, the obstruction of justice, nepotism and widespread and systematic falsehoods—or in a general sense, the destruction of the rule of law and constitutionalism—are not ends in and of themselves. They are means to an end.

Therefore, it is of prime importance to evaluate the substantive side of Trump's presidency, which points back to greed. Viewed in light of his actions as president, does Trump's assertion that his greed operates to the benefit of the people and the United States pass the laugh test? Core actions by Trump's administration thus far suggest that the greed in play is of the conventional, selfish variety.

As part of what Stephen Bannon calls 'the deconstruction of the administrative state', Congress and federal agencies under Trump 'delayed, suspended or reversed' over 90 regulations in his first one and a half months in office.<sup>64</sup> These actions have benefited Wall Street banks, gun sellers, telecommunications companies and polluters.<sup>65</sup> Also less than two months into his first term, Trump signed a bill to repeal a rule under Dodd-Frank that 'required energy companies to disclose their payments to foreign governments'.<sup>66</sup> The rule quite plainly provided transparency in order to curb a particularly disdainful form of corruption: the transfer of consumers' and investors' money by multinationals to foreign oligarchs, and the corruption of foreign governments. Perhaps it is no coincidence that this pro-oil company, pro-global corruption policy change occurred in an administration whose secretary of state is former Exxon Mobil CEO Rex Tillerson. Tillerson was a major opponent of the rule and his (former) company will be a major beneficiary of the change.

The same pattern of major policy changes benefiting members of the cabinet has played out in the area of education. Trump's proposed budget would cut more than

<sup>64</sup> Eric Lipton and Binyamin Appelbaum, 'Leashes Come off Wall Street, Gun Sellers, Polluters and More' *The New York Times* (5 March 2017) <[www.nytimes.com/2017/03/05/us/politics/trump-deregulation-guns-wall-st-climate.html](http://www.nytimes.com/2017/03/05/us/politics/trump-deregulation-guns-wall-st-climate.html)>.

<sup>65</sup> *Ibid.*

<sup>66</sup> See Timothy Cama, 'Trump Signs Repeal of Transparency Rule for Oil Companies' *The Hill* (14 February 2017) <<http://thehill.com/policy/energy-environment/319488-trump-signs-repeal-of-transparency-rule-for-oil-companies>>.

\$9 billion from education spending.<sup>67</sup> That overlaps with the interests of Education Secretary Betsy DeVos. DeVos' family has funded right-wing think tanks that seek to fully privatise education—including the Mackinac Center for Public Policy, the Heartland Institute and the Acton Institute. Part of their goal is to route people's money for education not through the government but into a 'marketplace of freely competing private providers',<sup>68</sup> which provides a larger arena for private profit.

Continuing the pattern, one comes to Gary Cohn, the president and CEO of Goldman Sachs, whom Trump made chief economic adviser and director of the National Economic Council. On the campaign trail, Trump took a stance against the financial regulations passed after the 2008–09 crisis. In the first month after his election, Goldman's stock rose 34 per cent. Cohn owned roughly \$210 million in Goldman stock at the time.<sup>69</sup> Since Cohn's appointment, Goldman Sachs has benefited from a rule change regarding insuring against some high-risk trades.<sup>70</sup>

Payments to Trump's \$107 million inauguration suggest a pattern of quid pro quo. The event itself raised twice as much money as any past presidential inauguration and Federal Election Commission filings show that '48 people or corporations gave \$1 million or more'.<sup>71</sup> The fossil fuels industry and related companies provided a disproportionate share of those funds. They now benefit from Trump's 'aggressive efforts to weaken federal rules aimed at limiting pollution in streams and wetlands, cutting back on greenhouse gases and closing coal-burning power plants'.<sup>72</sup> They also benefit from Trump's decision to withdraw from the Paris climate change agreement.

Changes in the Environmental Protection Agency (EPA) follow the broader pattern. Trump has appointed Scott Pruitt, a climate change denier, to head the Agency. Official records show that while attorney general for the state of Oklahoma, Pruitt 'acted in close concert with oil and gas companies to challenge environmental regulations, even putting his letterhead to a complaint filed by one firm, Devon Energy'.<sup>73</sup> Immediately upon assuming control of the EPA, Pruitt acted to the benefit of Dow Chemical. Dow's chairman and CEO, Andrew Liveris, contributed \$1 million to Trump's inaugural and was

67 See Katherine Stewart, 'What the "Government Schools" Critics Really Mean' *The New York Times* (31 July 2017) <[www.nytimes.com/2017/07/31/opinion/donald-trump-school-choice-criticism.html](http://www.nytimes.com/2017/07/31/opinion/donald-trump-school-choice-criticism.html)>.

68 *Ibid.*

69 See Nathaniel Popper, Michael J de la Merced and Maggie Haberman, 'Goldman Sachs to Extend Its Reach in Trump Administration' *The New York Times* (9 December 2016) <[www.nytimes.com/2016/12/09/business/dealbook/goldman-sachs-no-2-seen-as-a-top-economic-adviser-to-trump.html](http://www.nytimes.com/2016/12/09/business/dealbook/goldman-sachs-no-2-seen-as-a-top-economic-adviser-to-trump.html)>.

70 Eric Lipton and Binyamin Appelbaum, 'Leashes Come Off Wall Street, Gun Sellers, Polluters and More' *The New York Times* (5 March 2017) <[www.nytimes.com/2017/03/05/us/politics/trump-deregulation-guns-wall-st-climate.html](http://www.nytimes.com/2017/03/05/us/politics/trump-deregulation-guns-wall-st-climate.html)>.

71 Nicholas Confessore, Nicholas Fandos and Rachel Shorey, 'Trump Inaugural Drew Big Dollars from Donors with Vested Interests' *The New York Times* (19 April 2017) <[www.nytimes.com/2017/04/19/us/politics/trump-inauguration-sheldon-adelson-fundraising.html](http://www.nytimes.com/2017/04/19/us/politics/trump-inauguration-sheldon-adelson-fundraising.html)>.

72 *Ibid.*

73 Oliver Milman and Dominic Rushe, 'New EPA Head Scott Pruitt's Emails Reveal Close Ties with Fossil Fuel Interests' *The Guardian* (London, 22 February 2017) <[www.theguardian.com/environment/2017/feb/22/scott-pruitt-emails-oklahoma-fossil-fuels-koch-brothers](http://www.theguardian.com/environment/2017/feb/22/scott-pruitt-emails-oklahoma-fossil-fuels-koch-brothers)>.

then tapped by Trump to lead his Manufacturing Jobs Initiative. Taking control of the EPA, Pruitt ‘reject[ed] scientists’ findings that chlorpyrifos, sold by Dow and banned from homes because of its dangers to the brains of children, should be banned from use on farms’.<sup>74</sup> Pruitt has taken similar actions regarding other toxins, but his pro-industry, anti-scientific stance may become less and less relevant as the EPA itself is defunded by Trump.<sup>75</sup>

Large cable and wireless companies also contributed millions to Trump’s inaugural and since then the Federal Communications Commission has begun to ‘nullify or curtail consumer protection measures, such as “net neutrality” rules, that were established under President Obama over the industry’s objections’.<sup>76</sup> The same quid pro quo arrangement appears to have occurred between private prison operators and the Trump administration. Having given \$250,000 each to Trump’s inaugural, the Corrections Corporation of America (or CoreCivic) and the GEO Group have seen tangible gains: ‘Attorney General Jeff Sessions rescinded an Obama-era order that would have phased out the use of such prisons by the Justice Department.’ But these companies surely have growth in mind. Beyond maintaining the status quo, ‘Trump directed his administration to prioritize the detention and deportation of unauthorized immigrants, proposing hundreds of millions of dollars for a vast new network of detention facilities like the ones the companies already operate for Immigration and Customs Enforcement.’<sup>77</sup>

Many other examples could be listed. But in all the chaos, a few novel features of the Trump administration obviously stand out when it comes to organised greed. While many of the examples above relate back to the interest-group plutocracy that has long consumed the United States,<sup>78</sup> the potential for Cohn and DeVos to profit directly from within the government suggests a novel direction.

First in that vein come Trump’s numerous conflicts of interest at home and abroad, possible only in the case of a president who is a wealthy businessman. These conflicts would be diminished if Trump placed his investments into a blind trust, sold his companies, or at least released his tax returns, but he has done none of the above. Instead, Trump relies on a revocable trust managed by his older sons, and credible reports suggest that his sons keep him apprised of his companies’ affairs and that he may still secretly withdraw funds from the trust at will.<sup>79</sup> Even if Trump does not benefit from

<sup>74</sup> The New York Times Editorial Board, ‘Money Talked the Loudest at Donald Trump’s Inauguration’ *The New York Times* (24 April 2017) <[www.nytimes.com/2017/04/24/opinion/money-talked-loudest-at-trumps-inaugural.html](http://www.nytimes.com/2017/04/24/opinion/money-talked-loudest-at-trumps-inaugural.html)>.

<sup>75</sup> Glenn Thrush and Coral Davenport, ‘Donald Trump Budget Slashes Funds for E.P.A. and State Department’ *The New York Times* (15 March 2017) <[www.nytimes.com/2017/03/15/us/politics/budget-epa-state-department-cuts.html](http://www.nytimes.com/2017/03/15/us/politics/budget-epa-state-department-cuts.html)>.

<sup>76</sup> Nicholas Confessore, Nicholas Fandos and Rachel Shorey, ‘Trump Inaugural Drew Big Dollars from Donors with Vested Interests’ *The New York Times* (19 April 2017) <[www.nytimes.com/2017/04/19/us/politics/trump-inauguration-sheldon-adelson-fundraising.html](http://www.nytimes.com/2017/04/19/us/politics/trump-inauguration-sheldon-adelson-fundraising.html)>.

<sup>77</sup> *Ibid.*

<sup>78</sup> See eg Timothy K Kuhner, ‘American Plutocracy’ (2015) 26 *King’s Law Journal* 44.

<sup>79</sup> See BBC News, ‘Donald Trump: A List of Potential Conflicts of Interest’ (*BBC News*, 18 April 2017) <[www.bbc.com/news/world-us-canada-38069298](http://www.bbc.com/news/world-us-canada-38069298)>.

the trust while in office, it will be his to claim when his presidential term ends. The incentives for self-dealing could not possibly be stronger.

Perhaps the easiest way to maximise one's already considerable wealth is through changes to the tax code. Trump has already proposed a tax plan that would produce obscene benefits for him, his businesses, his advisers and his cabinet members.<sup>80</sup> It is impossible to say whether the benefits to him and everyone he cares about are merely incidental to his principled view of what is in the country's best interest or not. There is much less room for doubt, however, in the case of Trump's use of a State Department website to advertise Mar-a-Lago and his choice to conduct official government business at his resorts.<sup>81</sup>

Trump's conflicts are far too numerous to list, much less discuss, in their entirety, but they have been capably summarised by many reputable sources, including the BBC, the *New York Times*, the *Washington Post* and *The Atlantic*.<sup>82</sup> The following examples suffice to provide a tiny illustration of the variety and nature of these conflicts: the Trump International Hotel in Washington, DC (which hosts diplomats and leases space from the US Government), the Dakota Access Pipeline (Trump signed an executive order providing for the pipeline's construction, invested between \$500,000 and \$1 million in the parent company, reportedly sold that stock before signing the order, but retained an interest in another company with a share in the project), Deutsche Bank (Trump's major lender for real estate projects already settled a case with the Justice Department during Trump's tenure as president) and foreign holdings (Trump's foreign corporations and foreign investments span a minimum of 20 countries, providing foreign governments, economic entities and interest groups ample opportunities for offering gifts, favourable treatment or benefits).

The practical implications of Trump's conflicts are astoundingly disorienting in their gravity, scope and raw number. When Trump hosts an event, influences the Justice Department (even short of directive authority),<sup>83</sup> or meets with corporate or government leaders, whether domestic, foreign or transnational, one never knows what side

<sup>80</sup> Neil Irwin, 'Winners and Losers in the Trump Tax Plan' *The New York Times* (26 April 2017) <[www.nytimes.com/2017/04/26/upshot/winners-and-losers-in-the-trump-tax-plan.html](http://www.nytimes.com/2017/04/26/upshot/winners-and-losers-in-the-trump-tax-plan.html)>.

<sup>81</sup> Eric Levitz, 'All the Terrifying Things that Donald Trump Did Lately' (N.Y.Mag.com, 9 June 2017) <<http://nymag.com/daily/intelligencer/2017/06/every-terrifying-thing-that-donald-trump-has-done.html>>.

<sup>82</sup> See BBC News, 'Donald Trump: A List of Potential Conflicts of Interest' (*BBC News*, 18 April 2017) <[www.bbc.com/news/world-us-canada-38069298](http://www.bbc.com/news/world-us-canada-38069298)>; Richard C Paddock and others, 'Potential Conflicts around the Globe for Trump, the Businessman President' *The New York Times* (26 November 2016) <[www.nytimes.com/2016/11/26/us/politics/donald-trump-international-business.html](http://www.nytimes.com/2016/11/26/us/politics/donald-trump-international-business.html)>; Philip Bump, 'A Running List of How Donald Trump's New Position May Be Helping His Business Interests' *The Washington Post* (3 January 2017) <[www.washingtonpost.com/news/the-fix/wp/2016/11/21/a-running-list-of-how-donald-trumps-new-position-is-helping-his-business-interests/?utm\\_term=.d38f36cb1eba](http://www.washingtonpost.com/news/the-fix/wp/2016/11/21/a-running-list-of-how-donald-trumps-new-position-is-helping-his-business-interests/?utm_term=.d38f36cb1eba)>; Jeremy Venook, 'Trump's Interests vs. America's, Dubai Edition' *The Atlantic* (9 August 2017) <[www.theatlantic.com/business/archive/2017/07/donald-trump-conflicts-of-interests/508382/](http://www.theatlantic.com/business/archive/2017/07/donald-trump-conflicts-of-interests/508382/)>.

<sup>83</sup> For an argument in favour of executive power, see Steven G Calabresi and Christopher S Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (Yale University Press 2008).

deals or personal incentives may be shaping the decisions he makes for the United States. If any of his businesses were ever in dire straits, it is certain that the business actors or foreign or domestic government employees with the power to determine outcomes could benefit, in one way or another, from Trump's powers as president. And when such leaders interact with any of Trump's hundreds of companies, one never knows whether Trump's family members and employees are leveraging political power to extract better terms. Clearly Trump's family members have his ear in commercial situations that are impossible to monitor and unlikely to be reported.

To make matters more problematic, Trump has placed his children and son-in-law in key positions of influence within the White House. Jared Kushner has become senior adviser and Ivanka Trump has become assistant to the president.<sup>84</sup> The 1967 anti-nepotism statute cannot keep up, having been construed by Kushner, his lawyers and two judges on the US Court of Appeals for the District of Columbia Circuit as inapplicable to White House staff jobs.<sup>85</sup> Then, just hours after Trump's inauguration, the US Department of Justice issued a memorandum opinion, finding that US law 'exempts positions in the White House Office from the prohibition on nepotism in 5 U.S.C. § 3110'.<sup>86</sup> This is not the first time that presidents' family members have served in the White House, but one would be hard pressed to find a remotely similar scenario in terms of those family members' outside commercial interests.

Trump's nepotism heightens the opportunity for self-dealing, in that domestic and foreign business interests have a host of family conduits available to consider their proposals. Or, on the flip side, Trump's family conduits—being as immersed as they are in state affairs—could reasonably be perceived by businesses, foreign governments, and even domestic local and state governments as having the power to extort them. Plus, unbeknownst to Trump himself, Kushner and Ivanka Trump could exercise their newfound political power to further their own business interests, whether through bribery, extortion or mere insinuations of political consequences. Kushner, for example, has worked with state-owned enterprises in China and currently works with some of China's top leaders.<sup>87</sup> And Donald Trump, Jr, has already demonstrated that the

<sup>84</sup> David Jackson, 'Ivanka Trump Gets New White House Title' *USA Today* (29 March 2017) <[www.usatoday.com/story/news/politics/2017/03/29/donald-trump-ivanka-trump/99795232/](http://www.usatoday.com/story/news/politics/2017/03/29/donald-trump-ivanka-trump/99795232/)>.

<sup>85</sup> 5 US Code § 3110, Pub L 90–206, title II, § 221(a), 16 Dec 1967, 81 Stat 640; amended Pub L 95 454, title IX, § 906(a)(2), 13 Oct 1978, 92 Stat 1224; *Association of American Physicians and Surgeons v Clinton*, 997 F 2d 898 (1993). For arguments on both sides of this issue, see Rachel Stockman, 'Some Legal Experts Say It's Illegal for Son-in-Law Jared Kushner to Get White House Job' (*Law Newz*, 9 January 2017) <<http://lawnewz.com/uncategorized/some-legal-experts-still-say-it-is-illegal-for-son-in-law-jared-kushner-to-get-white-house-job/>>.

<sup>86</sup> US Department of Justice, 'Application of the Anti-Nepotism Statute to a Presidential Appointment in the White House Office' (Memorandum Opinion for the Counsel to the President, 20 January 2017), 1 <[www.justice.gov/sites/default/files/olc/opinions/attachments/2017/01/20/2017-01-20-anti-nepo-stat-who\\_0.pdf](http://www.justice.gov/sites/default/files/olc/opinions/attachments/2017/01/20/2017-01-20-anti-nepo-stat-who_0.pdf)>.

<sup>87</sup> Jeffrey Sonnenfeld, 'Trump's White House Is a Family Business. That's Not a Bad Thing' *Politico Magazine* (8 April 2017) <[www.politico.com/magazine/story/2017/04/trump-white-house-family-business-215002](http://www.politico.com/magazine/story/2017/04/trump-white-house-family-business-215002)>.

opportunities for self-dealing can involve accepting political favours from foreign governments that undermine US elections and, one would think, lead towards treason.<sup>88</sup> The entanglements are so thick and varied as to be impenetrable. And, on the whole, they are much less likely to see the light of day when administered through blood ties.

To make matters even more problematic still, Office of Governmental Ethics Director Walter Schaub resigned his post after 'urging ... Trump to divest from his businesses' in vain.<sup>89</sup> Taking advantage of his power to name the new Director, Trump chose David J Apol who was known, during his prior stints at the Office, for arguing 'that the agency is often too rigid in interpreting conflict-of-interest laws'.<sup>90</sup> Former Director Schaub has since granted numerous interviews, confessing to being 'embarrassed' by Trump's conflicts, which he cited as fuelling increasing allegations that the United States is becoming a 'kleptocracy'.<sup>91</sup>

One hundred and ninety-six members of Congress have sued Trump, alleging a violation of the Emoluments Clause on the basis that the Trump Organization's foreign business activities serve as a conduit for bestowing gifts and benefits upon the president.<sup>92</sup> It is as of yet uncertain whether this and other related lawsuits will receive full consideration on the merits in federal court and, if they do, how the Clause will be interpreted.<sup>93</sup>

While Trump's own conflicts of interest are the most important aspect of his presidency, kleptocracy does not operate through one man. It operates through one man, sometimes his family, and almost always through an inner circle of trusted associates—advisers and cabinet members or cronies. Naturally, concentrated economic interests, such as Koch Industries, lobbied for Trump's cabinet picks.<sup>94</sup> But again, the novel

88 Jo Becker, Matt Apuzzo and Adam Goldman, 'Trump's Son Met with Russian Lawyer after Being Promised Damaging Information on Clinton' *The New York Times* (9 July 2017) <[www.nytimes.com/2017/07/09/us/politics/trump-russia-kushner-manafort.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=span-ab-top-region&region=top-news&WT.nav=top-news](http://www.nytimes.com/2017/07/09/us/politics/trump-russia-kushner-manafort.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=span-ab-top-region&region=top-news&WT.nav=top-news)>.

89 Emily Shugerman, 'Trump's Federal Ethics Chief Resigns after Clashing with President' *The Independent* (London, 6 July 2017) <[www.independent.co.uk/news/world-0/us-politics/walter-schaub-trump-ethics-chief-resigns-letter-statement-us-president-clash-latest-new-messages-a7827811.html](http://www.independent.co.uk/news/world-0/us-politics/walter-schaub-trump-ethics-chief-resigns-letter-statement-us-president-clash-latest-new-messages-a7827811.html)>.

90 See Eric Lipton, 'New Ethics Chief Has Fought to Roll Back Restrictions' *The New York Times* (26 July 2017) <[www.nytimes.com/2017/07/26/us/politics/david-apol-office-of-government-ethics-trump.html](http://www.nytimes.com/2017/07/26/us/politics/david-apol-office-of-government-ethics-trump.html)>.

91 Rachael Revesz, 'Donald Trump's Conflicts of Interest Are Making the US Government Seem a "Kleptocracy"', Says Former White House Ethics Chief *The Independent* (London, 31 July 2017) <[www.independent.co.uk/news/world/americas/donald-trump-conflicts-interest-us-government-president-kleptocracy-white-house-ethics-chief-walter-a7868611.html](http://www.independent.co.uk/news/world/americas/donald-trump-conflicts-interest-us-government-president-kleptocracy-white-house-ethics-chief-walter-a7868611.html)>.

92 Brooke Seipel, 'Nearly 200 Democrats Sue Trump Citing Emoluments Clause Violation' *The Hill* (14 June 2017) <<http://thehill.com/blogs/blog-briefing-room/news/337710-nearly-200-democrats-file-emoluments-lawsuit-against-trump>>.

93 Compare the views of Teachout with those of Tillman, at Zephyr Teachout and Seth Barrett Tillman, 'The Foreign Emoluments Clause' (*The National Constitution Center*) <<https://constitutioncenter.org/interactive-constitution/articles/article-i/the-foreign-emoluments-clause-article-i-section-9-clause-8/clause/34>>; Tillman suggests that the Clause does not reach elected officeholders, only appointed ones.

94 Lee Fang and Nick Surgy, 'Koch Industries and Other Corporations Lobbied for Donald Trump's Cabinet Picks, Filings Show' (*The Intercept*, 25 April 2017) <<https://theintercept.com/2017/04/25/koch-industries-and-other-corporations-lobbied-for-donald-trumps-cabinet-picks-filings-show/>>.

question is what cabinet members might have to gain personally. That question is by nature opaque, but the greater their wealth and the vaster their stocks and business relationships, the larger their potential for personal gain through the exercise of political power.

That potential has peaked in Trump's administration. Education Secretary DeVos runs a private investment firm with her husband. Her family's net worth stands at an estimated \$5.1 billion. Commerce Secretary Wilbur Ross is a major campaign donor and investor worth an estimated \$2.5 billion. Treasury Secretary Steve Mnuchin was a second generation Goldman Sachs partner. Transportation Secretary Elaine Chao is married to Senate Majority Leader Mitch McConnell, perhaps the most powerful opponent of campaign finance reform, and is the daughter of James Si-Cheng Chao, a shipping magnate.<sup>95</sup> Health and Human Services Secretary Tom Price illustrated the type of problem that one can expect from these cabinet choices prior to assuming his new post. CNN reported that while Price was serving as a Georgia congressman he 'purchased shares in a medical device manufacturer days before introducing legislation that would have directly benefited the company'.<sup>96</sup>

Cabinet members do not introduce legislation; rather, they shape domestic and foreign policy within the purview of their departments and influence the president's choices when it comes to their areas of expertise. This can be from the ground up, promoting new initiatives, or from the top down, influencing the fate of existing initiatives. Some analyses of cabinet-White House relations posit an either-or choice between a 'strong cabinet model' (delegating significant power to 'former Governors and other political figures' within the cabinet) and a 'strong White House model' (selecting 'weak cabinet members to permit the White House ... to call most of the shots').<sup>97</sup> But the relative strengths of the White House and the cabinet are not simple to determine in Trump's administration. Trump lacks political experience, but so do some of his cabinet members. Their common strength is wealth. Trump has formed a new model: 'I want people that made a fortune!'<sup>98</sup> he remarked when questioned about his cabinet choices. That, together with his campaign pledge to be greedy for the United States, sums it up. Government by the wealthy and most certainly for the wealthy as well.

While government for the wealthy is a longstanding feature of American history, government by the wealthy, or at least *the super wealthy*, is not. Plutocracy tends to produce the laws and policies desired by the very rich, offering representation on the basis of constituents' effective market demand (ie, bribes, campaign contributions, outside expenditures and lobbying expenditures). Kleptocracy, in contrast, cuts out

95 See Shawn Donnan, 'Trump's Wealthy Cabinet Choices Hark Back to Gilded Age' *Financial Times* (London, 2 December 2016) <[www.ft.com/content/a0206f88-b8ab-11e6-ba85-95d1533d9a62](http://www.ft.com/content/a0206f88-b8ab-11e6-ba85-95d1533d9a62)>.

96 Manu Raju, 'Trump's Cabinet Pick Invested in Company, Then Introduced a Bill to Help It' (CNN, 17 January 2017) <[www.cnn.com/2017/01/16/politics/tom-price-bill-aiding-company/index.html](http://www.cnn.com/2017/01/16/politics/tom-price-bill-aiding-company/index.html)>.

97 See eg Henry E Mattox, *A Conversation with Ambassador Richard T. McCormack* (Xlibris 2013) 142.

98 Peterson-Withorn (n 21).

the middle men, the politicians, allowing the wealthy to govern directly. Like many other important business innovations, it represents a net gain in efficiency. Trump and many members of his new inner political circle were major campaign donors, but now they have taken political influence to the next level: the United States has gone from a system of 'pay to play' to a system of 'pay to govern'.

### III. ELECTION LAW(LESSNESS)

Kleptocracy in America is not as easy to nail down as the old-fashioned tyrannies discussed in Part I. Monarchy has been ruled out since the beginning by Article I, Section 9 of the Constitution and by regular elections by universal suffrage.<sup>99</sup> Military dictatorship is ruled out by civilian control of the military and civilian dictatorship is ruled out by regular elections under conditions of universal suffrage.<sup>100</sup> And theocracy is ruled out by the separation of church and state.<sup>101</sup> Accordingly, we understand those tyrannies as primitive, pre-constitutional nonsense. But kleptocracy presents a mystery because it is compatible with universal suffrage—a tyranny that neither secularism, popular choice, nor even the Emoluments Clause seems to rule out.<sup>102</sup> Kleptocracy is 'government by those who seek ... personal gain at the expense of the governed'.<sup>103</sup> But why would any voter opt for that? Why would people support a kleptocratic regime, one defined by the 'concealment of illegal gains [and the] instability of [its] political [and] economic agenda'?<sup>104</sup>

People do not consciously support kleptocracy, nor does any leader ever admit to being a kleptocrat. American kleptocracy began not with profits for political authorities and their allies, but with methods of boosting what might otherwise be an unpopular candidacy. Collusion with Russian authorities to hack the Democratic National Committee servers would be an unusual example of a controlled effort. The FBI's strangely timed (and recurring) investigation of Hillary Clinton during the campaign is an

<sup>99</sup> US Const Art I, § 9, cl 8. ('No Title of Nobility shall be granted by the United States').

<sup>100</sup> The US Constitution provides 'The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States.' Article II, Section 2.

<sup>101</sup> But see Kevin Phillips, *American Theocracy: The Peril and Politics of Radical Religion, Oil, and Borrowed Money in the 21st Century* (Viking Adult 2006).

<sup>102</sup> The Emoluments Clause comes directly after Article I, Section 9's prohibition on titles of nobility, but its text is directed at benefits awarded to US officeholders by foreign authorities. That could be interpreted to rule out certain aspects of kleptocracy, but not its basic, domestic dimension of a leader who fashions law and policy to suit his own financial interest or that of his family members and inner circle. See US Const Art I, § 9, cl 8 ('no person holding any office of profit or trust under [the United States], shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state'). See also the Foreign Gifts and Decorations Act, 5 USC § 7342 (1966).

<sup>103</sup> See eg Emmanuel Onyemaghani Owah, *Government Of the Crooks, By the Crooks, For the Crooks* (Xlibris 2011) (defining kleptocracy).

<sup>104</sup> *Ibid.*

unusual example of a method outside Trump's control.<sup>105</sup> But besides such unusual factors, two systemic sets of conditions worked to Trump's favour: voting rights restrictions and the lack of any campaign finance limit on candidates' expenditures of personal funds.

Even marginal restrictions and marginal financial advantages are supremely important in a country where 40–64 per cent of the electorate fails to vote in national elections.<sup>106</sup> Estimates of turnout in 2016 range from 55 per cent (a 20-year low for a presidential election) to 60.2 per cent, a good turnout for federal elections in the United States.<sup>107</sup> Overall, however, US voter turnout ranks towards the bottom quarter of developed nations.<sup>108</sup> Trump was supported by a significant number of voters, 62,984,825 in total, which suggests the importance of another line of analysis besides the one pursued here.<sup>109</sup> But there are 218,959,000 registered voters in the United States, meaning that Trump's support amounted to less than 30 per cent of the electorate.<sup>110</sup> And, notably, he lost the popular vote by a sizeable margin—almost three million votes.

Without the Electoral College, Trump would have lost. And even in this regime, he narrowly won a number of vital states. For example, he secured victories in Michigan, Wisconsin, Pennsylvania and Florida by margins of just 0.2 per cent to 1.2 per cent. In North Carolina and Arizona, his margin was less than 4 per cent. Even so, almost every state grants the winner the entirety of its electoral votes, regardless of margin of victory. Thus, Trump lost the popular vote, won a series of key states by less than 1.5 per cent, and still won the Electoral College by 74 votes, an electoral victory by a 14

<sup>105</sup> Matt Apuzzo, Michael S Schmidt and Adam Goldman, 'Emails Warrant No New Action Against Hillary Clinton, F.B.I. Director Says' *The New York Times* (6 November 2016) <[www.nytimes.com/2016/11/07/us/politics/hillary-clinton-male-voters-donald-trump.html?\\_r=0](http://www.nytimes.com/2016/11/07/us/politics/hillary-clinton-male-voters-donald-trump.html?_r=0)>.

<sup>106</sup> Just 36.4% of eligible voters cast their ballots in the 2014. See Domenico Montanaro, Rachel Wellford and Simone Pathe, '2014 Midterm Election Turnout Lowest in 70 Years' (*PBS.org*, 10 November 2014) <[www.pbs.org/newshour/updates/2014-midterm-election-turnout-lowest-in-70-years/](http://www.pbs.org/newshour/updates/2014-midterm-election-turnout-lowest-in-70-years/)>.

<sup>107</sup> On 55%, see Gregory Wallace, 'Voter Turnout at 20-Year Low in 2016' (*CNN.com*, 30 November 2016) <[www.cnn.com/2016/11/11/politics/popular-vote-turnout-2016/index.html](http://www.cnn.com/2016/11/11/politics/popular-vote-turnout-2016/index.html)>. On 60.2% see Reid Wilson, 'New Report Finds that Voter Turnout in 2016 Topped 2012' *The Hill* (16 March 2017) <<http://thehill.com/homenews/state-watch/324206-new-report-finds-that-voter-turnout-in-2016-topped-2012>>.

<sup>108</sup> See Drew Desilver, 'U.S. Trails Most Developed Countries in Voter Turnout' (*Pew Research Center*, 15 May 2017) <[www.pewresearch.org/fact-tank/2017/05/15/u-s-voter-turnout-trails-most-developed-countries/](http://www.pewresearch.org/fact-tank/2017/05/15/u-s-voter-turnout-trails-most-developed-countries/)>.

<sup>109</sup> The reasons for Trump's robust popular support are also important for understanding kleptocracy—in particular recent psychological findings on 'system justification', which suggest that people commonly react to political and economic problems by justifying the very systems (and people) responsible. The latest findings show that *greater* powerlessness within a system causes *greater* acceptance and justification of that system, despite the damage inflicted by that system on people's personal well-being and group memberships. See eg Jojanneke van der Toorn and others, 'A Sense of Powerlessness Fosters System Justification: Implications for the Legitimation of Authority, Hierarchy, and Government' (2015) 36 *Political Psychology* 93. This provides a promising explanation for why many voters affected by economic decline would nonetheless elect a billionaire who has benefited from wealth concentration. Trump's populist message appeals to many people's conscious minds (as the blame for national decline falls on elites and minorities), while Trump's incredible economic success within a failing system appeals to people's unconscious system justification needs.

<sup>110</sup> See Statistic Brain, 'Voting Turnout Statistics' (20 November 2016) <[www.statisticbrain.com/voting-statistics/](http://www.statisticbrain.com/voting-statistics/)>.

per cent margin.<sup>111</sup> This longstanding distortion of the popular will ought to be considered a voting rights restriction in and of itself.

A similar argument could be made about the presidential primary system, which excludes some voters and counts some votes more than others.<sup>112</sup> Still, the Electoral College and the presidential primary elections prior to the general election are constants. The conditions that can swing such close races are highly variable, however. In 2016, those conditions included a high point in voting restrictions (to Trump's benefit) and a high point in candidate self-financing (also to Trump's benefit).

### Voting Rights Restrictions

In tight races, small changes to voting rules can make all the difference, not just to winning that state, but to winning the electoral vote altogether. For example, had Clinton won 10,705 more votes in Michigan and 113,000 more votes in Florida she would have won the electoral vote, 271 to 267.<sup>113</sup> She lost Wisconsin by just 22,177 votes and Pennsylvania by just 70,637 votes. Wisconsin and Florida were among the states that had enacted voting restrictions certain to disproportionately affect Clinton voters in the lead-up to the election.<sup>114</sup>

Minorities formed Clinton's most solid electoral base. She won 88 per cent of black votes and 65 per cent of Latino votes nationwide, which was predictable on the basis of the Democratic Party's performance in countless elections. It should have come as little surprise that since 2010, 20 other states, in addition to Wisconsin and Florida, changed their voting rules in ways calculated to reduce minorities' electoral participation.<sup>115</sup>

These changes included purging voting rolls, implementing new voter ID requirements, restricting or abolishing early voting, ending same-day registration, moving polling places further away from minority neighbourhoods or shutting down such polling places altogether, and making it harder for people with criminal convictions

<sup>111</sup> For the raw data, see Andy Kiersz, 'Here's the Final 2016 Electoral College Map' (*Business Insider*, 28 November 2016) <[www.businessinsider.com/final-electoral-college-map-trump-clinton-2016-11](http://www.businessinsider.com/final-electoral-college-map-trump-clinton-2016-11)>.

<sup>112</sup> Richard L Hasen, 'Kill the Caucuses!' (*Slate*, 15 February 2012) <[www.slate.com/articles/news\\_and\\_politics/jurisprudence/2012/02/congress\\_should\\_kill\\_the\\_republican\\_and\\_democratic\\_state\\_caucuses\\_and\\_mandate\\_primaries\\_instead\\_.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2012/02/congress_should_kill_the_republican_and_democratic_state_caucuses_and_mandate_primaries_instead_.html)>.

<sup>113</sup> For an electoral map and the number of votes afforded each state, see Rebecca Harrington, 'Millions Are Petitioning the Electoral College to Make Hillary Clinton President—Here's Why That Probably Won't Happen' (*Business Insider*, 19 December 2016) <[www.businessinsider.com/can-the-electoral-college-make-hillary-clinton-president-instead-trump-how-2016-11](http://www.businessinsider.com/can-the-electoral-college-make-hillary-clinton-president-instead-trump-how-2016-11)>. For the election results and margins, see '2016 Election Results' (*CNN.com*) <<http://edition.cnn.com/election/results>>.

<sup>114</sup> The Brennan Center for Justice, 'Election 2016: Restrictive Voting Laws by the Numbers' (28 September 2016) <[www.brennancenter.org/analysis/election-2016-restrictive-voting-laws-numbers#section5](http://www.brennancenter.org/analysis/election-2016-restrictive-voting-laws-numbers#section5)>.

<sup>115</sup> Wendy R Weiser and Erik Opsal, 'The State of Voting in 2014' (*The Brennan Center for Justice*, 17 June 2014) <[www.brennancenter.org/analysis/state-voting-2014](http://www.brennancenter.org/analysis/state-voting-2014)>.

to restore their voting rights.<sup>116</sup> These restrictions were added to already parched democratic soil—a nation without a national voting holiday, without even a rule that the vote be held on a weekend, a nation of millions of voters without health insurance, a nation chronically segregated by race and income and often burdensome, if not impossible, to navigate through public transportation.<sup>117</sup>

The partisan intentions, partisan effects and racial animus tied up with these restrictions could not be any clearer. Of the 15 states monitored closely under the Voting Rights Act because of a history of racial discrimination in elections, nine passed new restrictions after the Supreme Court struck down a federal pre-clearance requirement in 2013.<sup>118</sup> Of the 11 states with the highest African American turnout in 2008, seven passed laws making it harder to vote. Of the 12 states with the largest Hispanic population growth in the 2010 Census, nine had new restrictions in place.<sup>119</sup> Eighteen of the 22 states passing restrictive measures did so through law-making bodies controlled by Republicans.<sup>120</sup>

In short, Trump won the Electoral College under a set of conditions that harkened back to the late 1960s, before the enforcement of the Voting Rights Act. Intentional, legally sanctioned acts of political exclusion on the basis of race and ethnicity have returned to the United States. But, in an act of sheer Orwellian brilliance, Trump levelled the opposite accusation instead: that he had actually won the popular vote and that Clinton's apparent victory was a reflection of millions of fraudulent votes.<sup>121</sup> All available evidence suggests that fraudulent votes are rare, but that restrictions such as those adopted by 22 states disenfranchise lawful voters.

Still, Trump's Presidential Advisory Commission on Election Integrity now searches for evidence of voter fraud. Shortly after the 2016 election, Trump tweeted 'in addition to winning the Electoral College in a landslide, I won the popular vote if you deduct the millions of people who voted illegally'. He has since 'claimed multiple times that between 3 and 5 million "illegals" voted for ... Clinton', a claim that even Fox News qualifies as unverified.<sup>122</sup> The Commission on Election Integrity now investigates Trump's fanciful claim, while the gains from the civil rights movement are being eagerly reversed in a coordinated fashion, with no federal investigation whatsoever.

<sup>116</sup> See *ibid* and Wendy R Weiser, 'Voter Suppression: How Bad? (Pretty Bad)' *American Prospect* (1 October 2014) <<http://prospect.org/article/22-states-wave-new-voting-restrictions-threatens-shift-outcomes-tight-races>>.

<sup>117</sup> These facts dovetail with the top reasons Americans give to explain why they were unable to vote. See Michael Keller and Yvette Romero, 'The Definitely Messy, Probably Solvable Reasons Americans Don't Vote' (*Bloomberg*, 4 April 2016) <[www.bloomberg.com/politics/graphics/2016-non-voters/](http://www.bloomberg.com/politics/graphics/2016-non-voters/)>.

<sup>118</sup> *Shelby County v Holder*, 570 US 2 (2013); Wendy R Weiser, 'Voter Suppression: How Bad? (Pretty Bad)' *American Prospect* (1 October 2014) <<http://prospect.org/article/22-states-wave-new-voting-restrictions-threatens-shift-outcomes-tight-races>>.

<sup>119</sup> Wendy R Weiser, 'Voter Suppression: How Bad? (Pretty Bad)' *American Prospect* (1 October 2014) <<http://prospect.org/article/22-states-wave-new-voting-restrictions-threatens-shift-outcomes-tight-races>>.

<sup>120</sup> *Ibid*.

<sup>121</sup> Kaitlyn Schallhorn, 'Trump Voter Fraud Commission: Here's What to Know' (*Fox News*, 19 July 2017) <[www.foxnews.com/politics/2017/07/19/trump-voter-fraud-commission-heres-what-to-know.html](http://www.foxnews.com/politics/2017/07/19/trump-voter-fraud-commission-heres-what-to-know.html)>.

<sup>122</sup> *Ibid*.

Meanwhile, neither Trump nor Republicans in Congress have shown any interest in responding to the well-established voting problems caused by their allies in state government. That goes not only for the affirmative measures that disproportionately serve to exclude minority voters, but also for the passive measures that accomplish the same objective. Studies have shown, for instance, that: 'voting districts with more minorities have fewer poll workers to assist voters and guide them through the process and have fewer voting machines on hand to process voters in a timely manner'; 'African-Americans are six times more likely than members of [other] demographic groups to spend more than an hour in line in order to vote'; and 'on average, black voters wait twice as long as white people to cast a ballot'.<sup>123</sup> And as Trump and his congressional allies on the far right work feverishly (and ineffectively) to repeal the Affordable Care Act, it is important to bear in mind the fact that 'disability or illness' is the most common reason given by poor non-voters to explain their abstention from the polls. The lack of free or widely accessible health care in the United States is also a voting rights problem.

In sum, we might marvel at the emergence of kleptocracy through universal suffrage, but American suffrage is, in reality, far from universal and Trump's least friendly demographic was systematically frustrated at the polls.

### Campaign Finance

Some voting rights restrictions were made possible by the Supreme Court's 2013 *Shelby County* decision, but it is only here, in the realm of campaign finance, that Trump owes everything to the Supreme Court. Trump's victories in the Republican primaries and the general election both depended on a mode of campaign finance that the Supreme Court protected from regulation in 1976.

Trump spent \$66 million of his own money on his campaign,<sup>124</sup> the most money ever spent by a winning candidate in US history.<sup>125</sup> Although, in the end, Trump's presidential bid was supported by over \$850 million of other people's money, his personal

<sup>123</sup> Nico Lang, 'The Real Reason Black Voters Didn't Turn Out for Hillary Clinton—and How to Fix It' (*Salon.com*, 10 November 2016) <[www.salon.com/2016/11/10/the-real-reason-black-voters-didnt-turn-out-for-hillary-clinton-and-how-to-fix-it/](http://www.salon.com/2016/11/10/the-real-reason-black-voters-didnt-turn-out-for-hillary-clinton-and-how-to-fix-it/)>. See Michael Keller and Yvette Romero, 'The Definitely Messy, Probably Solvable Reasons Americans Don't Vote' (*Bloomberg*, 4 April 2016) <[www.bloomberg.com/politics/graphics/2016-non-voters/](http://www.bloomberg.com/politics/graphics/2016-non-voters/)>. For Americans in the next economic rung (making \$20–50k per year), the most common reason was being 'too busy', a fact likely related to working multiple jobs or long hours simply to make ends meet. In this regard, one might also consider the \$7.25 minimum wage a voting rights restriction as well. While being 'too busy' to vote was also the number one excuse given by non-voters who made \$100–150k per year, that surely relates to ambition and priorities, not to making ends meet. See Keller and Romero above, this note.

<sup>124</sup> See *Buckley v Valeo*, 424 US 1 (1976).

<sup>125</sup> Adjusted for inflation, Ross Perot's \$64 million in personal expenditures in 1992 topped Trump's, and Steve Forbes' \$37.4 million in 1996 came close. Romney's \$44.7 million in 2008 also deserves mention, as does Hillary Clinton's own \$13.2 million in 2008. See Melissa Yeager, 'The Trump Question: How Do Self-Financing Candidates Fare in Elections?' (*The Sunlight Foundation*, 28 August 2015) <<http://sunlightfoundation.com/2015/08/28/the-trump-question-how-do-self-financed-candidates-fair-in-elections/>>.

expenditures allowed his campaign to survive several financial droughts.<sup>126</sup> He had an uphill battle for most of the primary and most of the general election, thanks to the vast fundraising leads enjoyed by his Republican challengers and Hillary Clinton. In both stages of the election, Trump's personal expenditures kept his campaign alive until his opponents faltered, his triumph became reasonably foreseeable and outside support rolled in. Without that curious American right to spend unlimited sums of money on one's own campaign, it is virtually certain that Trump would not be president today.

### *Plutocrats as the new sovereigns*

As part of the post-Watergate reforms, Congress limited presidential self-financing to \$50,000 in 1974, or \$261,290 in today's dollars. In 1976, the Supreme Court struck down that expenditure limit in *Buckley v Valeo*.<sup>127</sup> Ignoring the potential for a wealthy self-funder to use elected office to enhance his or her business activities or investments, the Court extolled self-financing because it 'reduces ... dependence on outside contributions and ... counteracts the coercive pressures and attendant risk of abuse'.<sup>128</sup> Forty years later, Trump applied this reasoning to himself on Twitter: 'By self-funding my campaign, I am not controlled by my donors, special interests or lobbyists. I am only working for the people of the U.S.'<sup>129</sup>

*Buckley* struck down most types of expenditure limits, not just limits on candidate expenditures. Together with many other judicial opinions handed down since, the Court's campaign finance jurisprudence has made Trump's claim especially believable. The Court's decisions construe the Constitution as protecting the outsized role of outside donors, spenders and interest groups in elections. As a result, politics in the United States has become notoriously plutocratic, with campaign spending and outside spending rising exponentially decade after decade. And the 2016 election season was the worst thus far.

Before the primaries, soon-to-be candidates delayed officially entering the race in order to coordinate with super PACs (political action committees). The *New York Times* described the resulting private infrastructure as 'shadow campaigns' that provided the soon-to-be leading candidates 'with tens of millions of dollars in chartered planes, luxury hotel suites, opposition research, [and] high-priced lawyers'.<sup>130</sup> Then, once

<sup>126</sup> For a breakdown of Trump's campaign financing, see *The Washington Post*, 'Money Raised as of December 31' *The Washington Post* <[www.washingtonpost.com/graphics/politics/2016-election/campaign-finance/](http://www.washingtonpost.com/graphics/politics/2016-election/campaign-finance/)>.

<sup>127</sup> *Buckley v Valeo*, 424 US 1 (1976).

<sup>128</sup> *Ibid*, 51–54.

<sup>129</sup> Quoted in David A Graham, 'The Lie of Trump's "Self-Funding" Campaign' *The Atlantic* (13 May 2016) <[www.theatlantic.com/politics/archive/2016/05/trumps-self-funding-lie/482691/](http://www.theatlantic.com/politics/archive/2016/05/trumps-self-funding-lie/482691/)>.

<sup>130</sup> Eric Lichtblau, "'Super PACs' Spent Millions Before Candidates Announced, Filings Show' *The New York Times* (31 July 2015) <[www.nytimes.com/2015/08/01/us/politics/super-pacs-spent-millions-before-candidates-announced-filings-show.html](http://www.nytimes.com/2015/08/01/us/politics/super-pacs-spent-millions-before-candidates-announced-filings-show.html)>.

they officially declared their candidacy, presidential hopefuls proceeded to audition for cash. For example, an event organised by the Koch Brothers and 450 of their wealthy allies 'granted five [Republican] candidates a hearing' to make their case for a share of 'the whopping \$889 million pledged by these donors for the presidential race'.<sup>131</sup> The problem was not limited to Republicans, however. Giving more than \$250,000 each on average, just 158 families provided nearly half of the seed money for all nascent presidential campaigns. Another group of 100 families gave over \$100,000 each.<sup>132</sup> In the laughably corrupt landscape of American elections, a self-financing plutocrat can make a respectable claim to democratic integrity.

Forced to choose between big money candidates, American voters adopted Trump's and the Supreme Court's thinking. The campaign season made it painfully clear that Clinton was a Washington insider who benefited from tens of millions of dollars from Wall Street speeches (mostly to trade groups, financial services groups and government contractors)<sup>133</sup> and shady ties to the Clinton Foundation.<sup>134</sup> And it was also clear that her campaign was exploiting unpopular Supreme Court opinions more effectively than Trump's campaign. Seeking to capitalise on *McCutcheon v FEC*,<sup>135</sup> a 2014 decision that struck down a 40-year-old federal limit on individual 'aggregate donations', Clinton asked her wealthiest supporters to give \$300,000 or more *each* to the Hillary Victory Fund.<sup>136</sup> Taking advantage of *Citizens United v FEC*,<sup>137</sup> a 2010 case striking down an over 100-year-old rule against corporate general treasury fund spending, pro-Clinton super PACs nearly tripled the amount raised by pro-Trump super PACs.<sup>138</sup> In the end, Clinton's \$1.4 billion war chest did not bode well for accountability to average Americans.<sup>139</sup> It suggested government *for* the wealthy. Surely the FBI investigation

131 The Editorial Board, 'Republicans Audition for Big Money' *The New York Times* (31 July 2015) <[www.nytimes.com/2015/08/01/opinion/republicans-audition-for-big-money.html?action=click&contentCollection=Politics&module=RelatedCoverage&region=Marginalia&pgtype=article](http://www.nytimes.com/2015/08/01/opinion/republicans-audition-for-big-money.html?action=click&contentCollection=Politics&module=RelatedCoverage&region=Marginalia&pgtype=article)>.

132 Nicholas Confessore, Sarah Cohen and Karen Yourish, 'The Families Funding the 2016 Presidential Election' *The New York Times* (10 October 2015) <[www.nytimes.com/interactive/2015/10/11/us/politics/2016-presidential-election-super-pac-donors.html](http://www.nytimes.com/interactive/2015/10/11/us/politics/2016-presidential-election-super-pac-donors.html)>.

133 Since resigning as Secretary of State, Clinton herself received \$21.7 million in speaking fees from vested interests actively engaged in lobbying the federal government. Lindsey Cook, 'Here's Who Paid Hillary Clinton \$22 Million in Speaking Fees' *U.S. News* (22 April 2016) <[www.usnews.com/news/articles/2016-04-22/heres-who-paid-hillary-clinton-22-million-in-speaking-fees](http://www.usnews.com/news/articles/2016-04-22/heres-who-paid-hillary-clinton-22-million-in-speaking-fees)>. As a couple, the Clintons raised far more. Robert Yoon, '\$153 Million in Bill and Hillary Clinton Speaking Fees, Documented' (CNN, 6 February 2016) <<http://edition.cnn.com/2016/02/05/politics/hillary-clinton-bill-clinton-paid-speeches/>>.

134 For a biased but nonetheless astute analysis, see Matt Rhoades, 'How the Clinton Foundation Brought Down Hillary's Campaign' *New York Post* (17 November 2016) <<http://nypost.com/2016/11/17/how-mitt-romneys-campaign-manager-took-down-hillary/>>.

135 *McCutcheon v Fed Election Comm'n* 134 S Ct 1434 (2014).

136 Nicholas Confessore and Rachel Shorey, 'Democrats Rake in Money, Thanks to Suit by Republicans' *The New York Times* (30 September 2016) <<http://mobile.nytimes.com/2016/10/01/us/politics/democrat-fund-raising-money.html?smid=nytcore-iphone-share&smprod=nytcore-iphone&r=0&referer=>>>.

137 *Citizens United v Fed Election Comm'n* 558 US 310 (2010).

138 Anu Narayanswamy, Darla Cameron and Matea Gold, 'Money Raised as of Dec. 31' *The Washington Post* <[www.washingtonpost.com/graphics/politics/2016-election/campaign-finance/](http://www.washingtonpost.com/graphics/politics/2016-election/campaign-finance/)>.

139 For a breakdown of both candidates' war chests, see *ibid*.

played a role as well, but the results of exit polls reeked of Clinton's subservience to a wealthy elite. While 57 per cent of white voters said Trump was untrustworthy, 70 per cent said the same of Clinton.<sup>140</sup>

Still, at the end of the day, Trump raised nearly as much money as Clinton and spent far more of his own. And as the owner of countless businesses, he is uniquely positioned to capitalise on his own campaign investments through the use of executive power. Why would the law allow a billionaire candidate, such as Trump, an unlimited right to leverage his wealth to ensure the survival of his campaign? It is true that self-financing reduces the need to rely on outside contributions, which could have a corrupting effect. But what about a wealthy candidate's own incentive, once in office, to recuperate and capitalise on his investment?

By limiting campaign expenditures and candidate expenditures in 1974, Congress hoped to reduce corruption, equalise citizens' relative influence over elections, and slow rising campaign costs in order to 'open[] the political system more widely to candidates without access to sources of large amounts of money'.<sup>141</sup> But in *Buckley*, the Court downplayed the risk of corruption from expenditures (as opposed to contributions directly to campaigns), equated spending money with free speech, and considered equality an impermissible reason to limit speech.

Regarding candidates' own personal expenditures in particular, the Court wrote:

[I]t is of particular importance that candidates have the *unfettered* opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues.<sup>142</sup>

The Court employed 'unfettered' as a term of art. Its meaning comes from the Court's first explanation for why the First Amendment affords such broad protection to political expenditures: 'to assure (the) *unfettered* interchange of ideas for the bringing about of political and social changes desired by the people'.<sup>143</sup>

The Court was correct up to a point: without a certain minimum level of spending on campaigns and advertisements (or sufficient public financing for the same), there would not be enough information available to the electorate. But as every lobbyist, campaign manager, chamber of commerce, interest group, large donor, super PAC strategist, political scientist and (honestly) any citizen of any country on earth knows today, concentrated capital is injected into campaigns and political ads in order to secure the political and social changes desired by donors, spenders or the organisations that collected those funds. The Court's fantasy of unlimited spending being a vehicle for popular sovereignty and political responsiveness to all Americans made more sense in 1976,

<sup>140</sup> Stanley Feldman and Melissa Herrmann, 'CBS News Exit Polls: How Donald Trump Won the U.S. Presidency' (*CBS News*, 9 November 2016) <[www.cbsnews.com/news/cbs-news-exit-polls-how-donald-trump-won-the-us-presidency/](http://www.cbsnews.com/news/cbs-news-exit-polls-how-donald-trump-won-the-us-presidency/)>.

<sup>141</sup> *Buckley*, 424 US at 24–26.

<sup>142</sup> *Ibid*, 52–53.

<sup>143</sup> *Ibid*, 14.

when wealth was more equally distributed than it is today. But even as of then, the process had begun: the United States was on its way to becoming the most unequal advanced democracy on earth.<sup>144</sup>

As corporate power came back on the radar screen in the 1980s and 1990s, the Supreme Court began taking democratic responsiveness and popular sovereignty more seriously. For example, in 1990, it validated a restriction on corporate general treasury spending on the ground that '[c]orporate wealth can unfairly influence elections'.<sup>145</sup> The Court located that unfairness, which it described as a form of corruption, in 'the corrosive and distorting effects of immense aggregations of wealth'. The distortion of democracy arose from the fact that corporate wealth had 'little or no correlation to the public's support for the corporation's political ideas'.<sup>146</sup>

The same holds true for Trump's wealth, which was also accumulated through the corporate form. So why would Trump's personal campaign expenditures not constitute a form of unfairness—an inherently corrupt distortion of democracy? Indeed, since the Court finally came to understand that wealth distorts political outcomes, tilting political control and responsiveness away from ordinary citizens, why has it not revisited unlimited expenditures? Why has the Court failed to reconsider *Buckley's* quaint, naïve and empirically false idea about an open market for political spending being a vehicle for popular choice and democratic responsiveness?

The answer is a revolutionary change in the Court's membership. Since the beginning of Chief Justice Roberts' and Justice Alito's era, the Court has been revising its thinking about the unfettered political marketplace—but in the opposite way from what one would hope. Instead of taking self-governance and democratic responsiveness seriously, the Court dropped those considerations entirely. Donations and expenditures (even corporate general treasury expenditures) no longer face any test relating to the social and political changes desired by the people; and public financing mechanisms and limits on donations and expenditures cannot be justified as attempts to maintain political responsiveness or popular sovereignty.

For example, when the Roberts Court struck down the 40-year-old \$123,200 aggregate limit on donations in 2014, it stated that 'there are compelling reasons not to define the boundaries of the First Amendment by reference to such a generalized conception of the public good'.<sup>147</sup> That was the majority opinion's response to Justice Breyer's reminder, in dissent, that earlier cases had tied 'the opportunity for free political discussion to the end that government may be responsive to the will of the people'.<sup>148</sup> Chief Justice Roberts' majority opinion retorted that 'the will of the majority ... can include laws that restrict free speech' and ascribed to the First Amendment the purpose of 'putting the

144 See generally, Thomas Piketty, *Capital in the Twenty-First Century* (Harvard University Press 2014).

145 *Austin v Mich Chamber of Commerce* 494 US 652, 660 (1990).

146 *Ibid.* A similar stance had been taken by the Court in *FEC v Nat'l Right to Work Comm'n* 459 US 197 (1982).

147 *McCutcheon v Fed Election Comm'n* 134 S Ct 1434, 1448 (2014).

148 *Ibid.*, 1448 (2014). 1467 (Breyer J dissenting) (quoting *Stromberg v California* 283 US 359, 369 (1931)).

decision as to what views shall be voiced into the hands of each of us'.<sup>149</sup> Meaning, the balance of campaign funds, advertisements, information and political alternatives available to the electorate will rightly be determined by each person's, each association's, each campaign's and each candidate's wealth and their incentives to deploy that wealth.

Remarkably, the Court has recognised that this changes the form of sovereignty in effect in the United States. When the Court struck down Arizona's public matching funds system in 2011,<sup>150</sup> Justice Kagan rightly noted that 'the prior system of private fundraising had ... favored a small number of wealthy special interests over the vast majority of Arizona citizens'.<sup>151</sup> She called the law an attempt to 'ensure that ... representatives serve the public, and not just the wealthy donors who helped put them in office'.<sup>152</sup> 'Arizonans', she concluded, 'wanted their government to work on behalf of all the State's people'<sup>153</sup>—just as *Buckley* determined that the unfettered marketplace should work. And she lamented the fact that the Court had struck down 'Arizonans' efforts to ensure that in their State, '[t]he people ... possess the absolute sovereignty'.<sup>154</sup> Chief Justice Roberts' majority opinion corrected Justice Kagan and chastised the state of Arizona: 'When it comes to protected speech, the speaker is sovereign.'<sup>155</sup>

That would be a beautiful thing if only the Court meant someone who speaks, not someone who donates and spends large quantities of money—if only, by 'protected speech', the Court meant *speech*, instead of vast quantities of capital. Because campaign finance and political ads are almost entirely privatised in the United States, 'speakers' means 'donors and spenders'. And that is a minuscule group of people. On average, between 1990 and 2016, just 0.36 per cent of the adult population stood behind the great majority of federal campaign donations.<sup>156</sup> In the 2016 elections, 0.66 per cent of the adult population supplied 70 per cent of the funds.<sup>157</sup> And so the year Trump won the presidency, just 1.6 million people (out of 245 million American adults)—less than 1 out of every 120 adults—held the power to decide which candidacies were viable and competitive.<sup>158</sup>

<sup>149</sup> *Ibid*, 1448.

<sup>150</sup> *Ariz Free Enter v Bennett* 131 S Ct 2806 (2011), consolidated with *McComish v Bennett* 611 F 3d 510 (9th Cir 2010).

<sup>151</sup> *Ibid*, 2842.

<sup>152</sup> *Ibid*, 2845 (Kagan J dissenting).

<sup>153</sup> *Ibid*.

<sup>154</sup> *Ibid*, 2486 (Kagan J dissenting).

<sup>155</sup> *Ibid*, 2828.

<sup>156</sup> See Center for Responsive Politics, 'Donor Demographics' (OpenSecrets.org) <[www.opensecrets.org/overview/donordemographics.php?cycle=1990&filter=A](http://www.opensecrets.org/overview/donordemographics.php?cycle=1990&filter=A)> (listing the percentage of US adults who donated \$200 or more in each election since 1990 and the total amount of campaign contributions provided by such \$200+ donations).

<sup>157</sup> Center for Responsive Politics, 'Donor Demographics' (Opensecrets.org) <[www.opensecrets.org/overview/donordemographics.php](http://www.opensecrets.org/overview/donordemographics.php)>.

<sup>158</sup> Total adult population and donor percentages available at Center for Responsive Politics, 'Donor Demographics' (Opensecrets.org) <[www.opensecrets.org/overview/donordemographics.php?cycle=2016&filter=A](http://www.opensecrets.org/overview/donordemographics.php?cycle=2016&filter=A)>.

Financial influence over law-making is similarly exclusive. Corporations and business interests spent 34 times more money on lobbyists than 'diffuse interest groups and unions' in 2012.<sup>159</sup> That same year, business interests controlled 95 of the top 100 lobbying organisations.<sup>160</sup> The corporate lobbying budget in 2015 exceeded government funding for Congress by \$600 million.<sup>161</sup> Business interests control the balance of information and the financial incentives facing officeholders. And outside expenditures—super PACs and the like—are even more the province of elites. Evidence from the 2014 and 2012 elections suggests that around 200 people—just 0.00008 per cent of American adults—tend to control the great majority of that spending. Candidates know that adopting the wrong position on the issues leads to multimillion dollar ad campaigns designed to destroy them.

### *Plutocracy is the foundation for kleptocracy*

In allowing unlimited candidate self-financing, even in an era of tremendously unequal wealth distribution, and in protecting the sovereignty of donors and spenders, the Court has justified the politics and type of government that have peaked under Trump's rule.

Remember that the Rehnquist Court validated legislators' concerns over corporate wealth 'unfairly influenc[ing] elections' and 'the corrosive and distorting effects of immense aggregations of wealth' in *Austin*.<sup>162</sup> The Roberts Court responded to concerns over donor and spender sovereignty by striking *Austin* down in *Citizens United*:

It is irrelevant for purposes of the First Amendment that corporate funds may have little or no correlation to the public's support for the corporation's political ideas. All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech ... Many persons can trace their funds to corporations, if not in the form of donations, then in the form of dividends, interest, or salary.<sup>163</sup>

*Citizens United* stated that the Rehnquist Court's sensitivity to money in politics 'interferes with the open marketplace of ideas protected by the First Amendment'.<sup>164</sup>

Lending constitutional protection to unlimited political expenditures from corporate general treasury funds, the Court wrote that 'influence over or access to elected officials does not mean that these officials are corrupt'.<sup>165</sup> 'Favoritism and influence are not ... avoidable in representative politics,' the Court continued. And finally, the Court

<sup>159</sup> Lee Drutman, *The Business of America Is Lobbying: How Corporations Became Politicized and Politics Became More Corporate* (Oxford University Press 2015) 13.

<sup>160</sup> *Ibid*, 12.

<sup>161</sup> See eg Lee Drutman, 'How Corporate Lobbyists Conquered American Democracy' *The Atlantic* (20 April 2015) <[www.theatlantic.com/business/archive/2015/04/how-corporate-lobbyists-conquered-american-democracy/390822/](http://www.theatlantic.com/business/archive/2015/04/how-corporate-lobbyists-conquered-american-democracy/390822/)>.

<sup>162</sup> *Austin* 494 US 652, 660.

<sup>163</sup> *Citizens* 558 US 310, 351 (quoting *Austin* 494 US 652, 707 (Kennedy J dissenting)).

<sup>164</sup> *Ibid*, 354 (emphasis added) (citation omitted).

<sup>165</sup> *Ibid*, 359.

explained what representative politics means today: '[A] substantial and legitimate reason, if not the only reason ... to make a contribution to one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.'<sup>166</sup> Again, the Court's message seemed to be that people (or corporations) who desire greater political influence ought simply to spend more money.

The Court confirmed that plutocratic view when it struck down aggregate donation limits in *McCutcheon*, freeing campaign donors to dedicate millions of dollars to their favourite campaigns and committees. The reasoning built on *Citizens United*:

[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.<sup>167</sup>

But if political responsiveness to wealthy donors and spenders is not a form of corruption, indeed, if that dynamic is rightly considered 'a central feature of democracy', then why not allow wealthy donors and spenders—special interests writ large—to govern directly?

If donors and spenders—'speakers'—are sovereign and democracy no longer intends to produce the social and political changes desired by the people, then what need is there for professional politicians? Why not cut out the 'middle man'?

The Supreme Court came close to this line of thinking in *Davis v FEC*, the 2008 case that decided the fate of the 'Millionaire's Amendment'. That federal rule aided federal candidates facing off against wealthy opponents. Once a candidate spent more than \$350,000 of their personal wealth on their own campaign, the rule kicked in, allowing their opponents to accept unlimited coordinated party expenditures and individual donations of over twice the regular legal limit.<sup>168</sup> In *Davis*, the Court struck down the Amendment on the basis that it levelled the power of wealth. '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.'<sup>169</sup> He went on to list those strengths: 'Different candidates have different strengths. Some 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.'<sup>170</sup> That was Justice Alito's exhaustive list. There was no mention of democratic strengths, only those that relate to wealth, fame from the

<sup>166</sup> *Ibid.*

<sup>167</sup> *McCutcheon*, 134 S Ct 1441.

<sup>168</sup> *McCormell* 540 US 93, 108 (2003) overruled by *Citizens United v Fed Election Comm'n* 558 US 310 (2010).

<sup>169</sup> *Davis v Fed Election Comm'n* 554 US 724, 742 (2008).

<sup>170</sup> *Ibid.*, 742.

entertainment industry and family privilege. The Amendment was unconstitutional in its attempt 'to reduce *the natural advantage* that wealthy individuals possess in campaigns for federal office'.<sup>171</sup>

This remark changes *Buckley's* framing of candidate self-financing. The Court's jurisprudence no longer supports the idea that the benefit of candidate self-financing is that of reducing candidates' dependence on outside contributions and counteracting those coercive pressures and risks of abuse. The Court has recently defined candidates' and officeholders' responsiveness to donors and spenders as 'a central feature of democracy'.<sup>172</sup> And it has considered unproblematic the lack of correlation between corporate wealth deployed in politics and public support for the corporation's political objectives. The Court's approving remark that all speakers use money amassed from the economic marketplace to fund their speech signifies that the economic and political marketplaces are no longer distinct as a matter of constitutional law. Together with *Davis's* notion that wealth provides a natural (and proper) advantage for political candidates, all of these notions support the kleptocracy's fundamental function of fusing economic and political power and enlisting them directly in the service of the wealthy.

The freedom associated with political speech and elections has become freedom for capital and freedom from democracy—ie, the freedom to acquire a role in government on the basis of one's capital and then to employ government institutions, procedures and powers for the maximisation of one's capital.

#### IV. POLITICAL TYRANNIES OF THE ECONOMIC SORT: TYPOLOGY AND REFLECTION

The ancient Greeks employed the word 'oligarchy' to denote a system of rule by the few, whose purpose they commonly understood to be moneymaking.<sup>173</sup> Another early (but not *that* early) formulation complementary to kleptocracy is that of aristocracy. For example, Thomas Paine's *Common Sense* summed up the underlying problem with colonial rule: 'the WILL of the king is as much the law of the land ... [but] instead of proceeding directly from his mouth, it is handed to the people under the more formidable shape of an act of parliament'.<sup>174</sup> The unaccountable, self-interested forces of monarchy and aristocracy denied the people the right to determine their own destiny. But, like today's kleptocracy, they dressed their self-interest in the forms, titles and procedures of government.

<sup>171</sup> *Ibid*, 741 (emphasis added).

<sup>172</sup> McCutcheon (n 163).

<sup>173</sup> '[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 Tabachnick and Toivo Koivukoski (eds), *On Oligarchy* (University of Toronto Press 2011) ix.

<sup>174</sup> Thomas Paine, *Common Sense* (TheCapitol.Net 2009) 10.

Adam Smith's eighteenth-century articulation of crony capitalism (or a manufacturing aristocracy) also fits the bill. The patron saint of capitalism observed that 'dealers ... in any particular branch of trade or manufactures' have 'an interest to deceive and even to oppress the public, and ... have, upon many occasions, both deceived and oppressed it', pursuing restraints upon competition and an increase in profits at the public's expense.<sup>175</sup> Smith warned that those who 'employ the largest capitals' use their wealth to 'draw to themselves the greatest share of the public consideration'.<sup>176</sup> In light of the ability of wealthy concerns to co-opt the public agenda, Smith counselled that proposed laws be 'long and carefully examined, not only with the most scrupulous, but with the most suspicious attention'.<sup>177</sup> Kleptocracy merely brings those who employ the largest capitals into government, where they can more effectively increase profits at the public's expense. But of course, kleptocracy may also be defined by ordinary people, economically speaking, who once in power within the government acquire a taste for extorting wealthy citizens and corporations and stealing from the public purse. That brings to mind 'underdeveloped and developing' nations.

Plutocracy, in contrast, is more common in nations with modern capitalist economies and sophisticated electoral and law-making procedures that can be influenced—short of bribery—by wealthy interests. It is First-World Corruption, not Third-World Corruption. Karl-Heinz Nassmacher traces the label of a 'plutocratic' regime of political finance back to 1983. He writes, '[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'. Contrasting it to grassroots financing through small donations, Nassmacher calls plutocratic financing 'the capitalist dimension of party funding'.<sup>178</sup> And that is the key: plutocracy often includes a nominally democratic political system in which elections, and to a lesser extent law-making, are administered through private wealth and understood through the lens of economic ideology.<sup>179</sup> 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'.<sup>180</sup> The designation 'plutocracy' simply removes the word 'clandestine', giving us a legal market for political influence. Plutocracy, as an official system of rule in the United States, has been distinct from kleptocracy and other forms of abject corruption that may amount to plutocracy in practice, because it has been construed as an *official system of rule* by the Supreme Court.<sup>181</sup>

175 Adam Smith, *The Wealth of Nations* (first published 1776, Everyman's Library 1991) 87–88, 231–32.

176 *Ibid.*, 231.

177 *Ibid.*, 232.

178 Karl-Heinz Nassmacher, *The Funding of Party Competition: Political Finance in 25 Democracies* (Namos 2009) 239.

179 See generally Timothy K Kuhner, *Capitalism v. Democracy: Money in Politics and the Free Market Constitution* (Stanford Law Books 2014) 1–32, 189–236 (discussing government by and for the wealthy).

180 Karl-Heinz Nassmacher, *The Funding of Party Competition: Political Finance in 25 Democracies* (Namos 2009) 21.

181 Timothy K Kuhner, 'American Plutocracy' (2015) 26 *King's Law Journal* 44.

The Supreme Federal Tribunal of Brazil is the latest high court to disavow plutocracy, thus distancing itself from the US Supreme Court's jurisprudence. In a landmark case striking down corporate donations to political parties, Justice Marco Aurélio observed 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'.<sup>182</sup> 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'.<sup>183</sup> Justice Luiz Fux, the reporter for the case, confirmed that 'there truly exists a representative crisis in the country, juxtaposing citizens, ever more sceptical about their elected officials, with members of the political class who often privilege their own particular interests to the detriment of the public interest'.<sup>184</sup>

Having announced the polar opposite of these principles in its own jurisprudence, the US Supreme Court is certainly the most likely court in any advanced democracy to justify and legitimise kleptocracy. In order to do so, it would simply need to employ its reasoning in campaign finance cases to the Emoluments Clause, the anti-nepotism statute or federal ethics rules. Until kleptocracy in America is formally validated, however, the Trump regime stands as the United States' own clumsy reception of the form of government common to the world's most corrupt regimes.

It would be wrong, however, to limit our understanding of kleptocracy to the stereotypical scenario of strongmen governing banana republics at a profit. That is just a starting point, as indicated by Andrew Wedeman's definition of kleptocracy, which can be divided into two parts. First:

Kleptocracy denotes a state ruled by thieves in which corrupt officials transform the state into an instrument of private plunder ... Not satisfied with enjoying the trappings of power, kleptocracy begins to emerge when the ruler, not just his minions and henchmen, turns to corruption as a means of personal enrichment and uses his authority to divert resources away from the state and into his own pockets.<sup>185</sup>

The US model of kleptocracy is less likely to include stealing from the treasury or other state funds, and more likely to centre on orienting law and policy for personal gain. It is unlikely to be a zero-sum game of the state having \$x and the ruler desiring to syphon off some percentage thereof. Rather, it is likely to be a creative, non-zero sum game in which

<sup>182</sup> Relator: O Senhor Ministro Luiz Fux, DF, ADI 4650 (17 Sept 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>>] (author's translation).

<sup>183</sup> *Ibid.*

<sup>184</sup> Relator: O Senhor Ministro Luiz Fux, DF, ADI 4650 (12 Nov 2013) (Braz) (unpublished opinion) (opinion of O Senhor Luiz Fux) <[www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADI4650relator.pdf](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'. *Ibid.* (author's translation).

<sup>185</sup> Andrew Wedeman, *Double Paradox: Rapid Growth and Rising Corruption in China* (Cornell University Press 2012) 61.

the ruler generates personal gains from the exercise (or the withholding) of state power across numerous cases and contexts.<sup>186</sup>

That too is included within the established definition of kleptocracy. Trump may never end up behaving like Mobutu in Zaire or Margai, Momoh or Conteh in Sierra Leone, but as Wedeman points out, thievery is not the only form of kleptocracy.

Overt plunder represents only one form ... [O]ther infamous instances of kleptocracy ... involve not only outright looting but a pervasive effort to transform the state and the economy into personal prebends for the ruler, his family, and his inner circle of cronies.<sup>187</sup>

This is where Sarah Chayes' insights on kleptocracy come in—in isolating the essential trends and features of kleptocracy so that they can be understood in the context of advanced democracies.

Chayes qualifies some 60–70 nations as 'systematically corrupt', but by corruption, she does not mean 'cash in the proverbial envelope, or opportunistic self-dealing by some public officials, or cracks in the system'.<sup>188</sup> Rather, her long study of kleptocracy has unearthed the centrality of 'sophisticated networks, structured to a greater or lesser degree, which can be remarkably successful'. By success, she refers not to 'governing in the interests of their people', but rather 'making money'. Kleptocracy's networks are horizontally integrated, meaning that the distinction between the public and private sector is 'rubbed out'. Living in Afghanistan, for example, Chayes noted that the president's brother owned part of the largest private bank and the largest cement factory. In Azerbaijan, she marvelled at how the 'ruling Aliyev family owns no fewer than 11 banks and consortiums that straddle energy, real estate, infrastructure contracting and tourism'. As though the similarities to the Trump family were not already evident enough, Chayes writes that 'family members serve as ligaments binding the intertwined systems together'—that, in her view, is the common trend.<sup>189</sup>

Applying Chayes' model, Trump's family, advisers and cabinet members would serve a key function: 'The role of the members of these integrated networks who hold public office is to retool government agencies and institutions to serve network purposes. This is often done with devilish creativity.' Hence, commerce, education, transportation, justice, environmental protection and other departments and energies are aligned with the network's needs. Chayes notes that when 'kleptocratic networks can't actively weaponize state agencies, they disable or cannibalize them'. The current status of the US EPA runs parallel to Honduras, where 'Environment ministries ... see their

<sup>186</sup> This is not to say that the general public will benefit. It is only to say that the quantity of money in play is not fixed.

<sup>187</sup> Andrew Wedeman, *Double Paradox: Rapid Growth and Rising Corruption in China* (Cornell University Press 2012) 62.

<sup>188</sup> Sarah Chayes, 'Trump and the Path Toward Kleptocracy' (*Bloomberg*, 22 May 2017) <[www.bloomberg.com/view/articles/2017-05-22/trump-and-the-path-toward-kleptocracy](http://www.bloomberg.com/view/articles/2017-05-22/trump-and-the-path-toward-kleptocracy)>.

<sup>189</sup> *Ibid.*

staffs and budgets slashed to prevent them from interfering with network operations'. This is because the 'most attractive revenue streams are often connected to land use and natural resources'.

Chayes' general points also serve to raise economic suspicions about the Trump campaign's and administration's alleged ties to Russia,<sup>190</sup> Trump's high-level meetings with Saudi Arabia, China and again Russia (especially Trump and Putin's undisclosed private conversation at the G20),<sup>191</sup> and Jared Kushner's and Ivanka Trump's inside knowledge and handling of international contacts and affairs. Chayes notes that kleptocratic networks, 'like the globalized business conglomerates or drug cartels ... are transnational'.<sup>192</sup> Chrystia Freeland's work on plutocrats centres on that same feature. Today's plutocrats are different from yesterday's plutocrats, she observes, insofar as they comprise a 'transglobal community of peers who have more in common with one another than with their countrymen back home'. She describes today's super-rich as 'increasingly a nation unto themselves'.<sup>193</sup> Freeland stresses the increasing national and international power of Chinese and Russian oligarchs in particular, whose wealth and entanglement with state power make for a most worrisome phenomenon.<sup>194</sup>

In sum, what we perceive as conflicts of interest could be better described as points of insertion for sophisticated transnational networks that have fused economics with politics. Indeed this understanding helps put into proper perspective the domestic networks we now know to be shaping campaign finance and political leadership in the United States. Theda Skocpol and Alexander Hertel-Fernandez's work on this matter sheds disturbing light on the increasing political sophistication of economic interest groups.<sup>195</sup>

Next, Chayes' basic formula for kleptocracy casts the spotlight on Trump's interest in ensuring his vast power to pardon wrongdoers.<sup>196</sup> Chayes notes that kleptocratic networks 'are held together by a bargain[:] Subordinate members funnel a part of their take upward to their seniors ... In return, those at the top guarantee impunity down the

<sup>190</sup> See Jack Holmes, 'All of the Trump Administration's Ties to Russia (That We Know About)' *Esquire* (10 July 2017) <[www.esquire.com/news-politics/news/a53134/trump-administration-russia-ties/](http://www.esquire.com/news-politics/news/a53134/trump-administration-russia-ties/)>.

<sup>191</sup> Julie Hirschfeld Davis, 'Trump and Putin Held a Second, Undisclosed, Private Conversation' *The New York Times* (18 July 2017) <[www.nytimes.com/2017/07/18/world/europe/trump-putin-undisclosed-meeting.html?\\_r=0](http://www.nytimes.com/2017/07/18/world/europe/trump-putin-undisclosed-meeting.html?_r=0)>.

<sup>192</sup> Sarah Chayes, 'Trump and the Path Toward Kleptocracy' (*Bloomberg*, 22 May 2017) <[www.bloomberg.com/view/articles/2017-05-22/trump-and-the-path-toward-kleptocracy](http://www.bloomberg.com/view/articles/2017-05-22/trump-and-the-path-toward-kleptocracy)>.

<sup>193</sup> Chrystia Freeland, *Plutocrats: The Rise of the New Global Super-Rich* (Penguin 2012), 5.

<sup>194</sup> *Ibid*, 191–94, 207–08 and 223–25.

<sup>195</sup> See Theda Skocpol and Alexander Hertel-Fernandez, 'The Koch Network and Republican Party Extremism' (2016) 14 *Perspectives on Politics* 681.

<sup>196</sup> Carol D Leonnig and others, 'Trump Team Seeks to Control, Block Mueller's Russia Investigation' *The Washington Post* (21 July 2017) ('Trump has asked his advisers about his power to pardon aides, family members and even himself in connection with the [Russia] probe ...') <[www.washingtonpost.com/politics/trumps-lawyers-seek-to-undercut-muellers-russia-investigation/2017/07/20/232ebf2c-6d71-11e7-b9e2-2056e768a7e5\\_story.html?utm\\_term=.28e01c218ac8](http://www.washingtonpost.com/politics/trumps-lawyers-seek-to-undercut-muellers-russia-investigation/2017/07/20/232ebf2c-6d71-11e7-b9e2-2056e768a7e5_story.html?utm_term=.28e01c218ac8)>.

line'.<sup>197</sup> Article II, Section 2, of the US Constitution is unforgivably broad in this respect: 'The President ... shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.'<sup>198</sup>

A complement to that most blatant sort of impunity could arise from a kleptocratic bias in the selection of US Attorneys and federal judges—the very actors responsible for prosecuting and deciding the fate of subordinate members of the kleptocracy. Two months after assuming office, Trump fired nearly half of the 93 US Attorneys and he is currently nominating candidates for the federal bench 'at a breakneck pace'.<sup>199</sup>

Chayes points us back towards the importance of the Justice Department's and federal judiciary's eventual stance on corruption and conflicts of interest, as well as the potential for a Supreme Court ruling down the line. She writes:

Of all government functions, though, the institution that kleptocratic networks absolutely must capture in order to survive is the justice system ... In Brazil, Guatemala and South Korea, where corrupt leaders have recently been ousted, independent justice professionals were central to the events.

Chayes' conclusion, however, suggests that even progressive, unexpected action by the federal judiciary would be insufficient to dissolve American kleptocracy. 'The lesson for Americans is this', she writes: '[t]hese [kleptocratic] networks are like weeds, and it takes far more than the punishment of a few crimes, even spectacular ones, or the removal of a few people to fully uproot their tendrils from the economic and political institutions we hold dear.'<sup>200</sup>

Trump and his network may presently be digging in—their roots, branches and vines interlacing with federal institutions, procedures, laws and policies, and connecting up with other networks at local, state, foreign and international levels. If this is indeed the case, the law of democracy has now inherited part of a grave and essential task: that of weeding kleptocracy out from the state and enacting safeguards to prevent it from sinking its roots in again.

Indeed, the law of democracy must be reoriented in light of such systematic forms of corruption as plutocracy and kleptocracy. As Burt Neuborne observed early on in the life of the discipline, 'the functional reality of democracy in the United States is, and has been, held hostage to the law governing its components'.<sup>201</sup> This meant that 'First

<sup>197</sup> Sarah Chayes, 'Trump and the Path Toward Kleptocracy' (*Bloomberg*, 22 May 2017) <[www.bloomberg.com/view/articles/2017-05-22/trump-and-the-path-toward-kleptocracy](http://www.bloomberg.com/view/articles/2017-05-22/trump-and-the-path-toward-kleptocracy)>.

<sup>198</sup> US Constitution, Article II, Section 2.

<sup>199</sup> Allan Smith, 'Trump Is Quietly Moving at a Furious Pace to Secure "the Single Most Important Legacy" of His Administration' (*Business Insider*, 27 July 2017) <[www.businessinsider.com/trump-judges-attorneys-nominations-2017-7?utm\\_source=referral&utm\\_medium=aol](http://www.businessinsider.com/trump-judges-attorneys-nominations-2017-7?utm_source=referral&utm_medium=aol)>.

<sup>200</sup> Sarah Chayes, 'Trump and the Path Toward Kleptocracy' (*Bloomberg*, 22 May 2017) <[www.bloomberg.com/view/articles/2017-05-22/trump-and-the-path-toward-kleptocracy](http://www.bloomberg.com/view/articles/2017-05-22/trump-and-the-path-toward-kleptocracy)>.

<sup>201</sup> Burt Neuborne, 'Making the Law Safe for Democracy: A Review of "The Law of Democracy"' (1999) 97 *Michigan Law Review* 1578, 1579.

Amendment analysis dictate[d] the ground rules governing campaign financing without any real attention to what kind of democracy comes out the other end.' It also meant that equal protection in voting rights law 'dictate[d] what kind of representational patterns we can have without much, if any, thought about what the effect will be on democracy'.<sup>202</sup> Neuborne predicted that 'American democracy will remain hostage to the law governing its components' unless many interrelated areas of law are brought together 'to serve a normative ideal'.<sup>203</sup> Worse than remaining hostage to an uncoordinated, myopic body of law, however, American democracy has been all but extinguished by a coordinated attack. The normative ideal necessary today would essentially be self-defence, a democracy that wishes to remain a democracy.

The question of what type of democracy we ought to have is among the hardest and most-debated matters of American (and modern) history. Still, I submit that most citizens, business leaders, academic experts and officeholders agree on certain first principles, including self-governance and popular sovereignty—the principles that drove democracy's global emergence in the eighteenth to twentieth centuries and distinguished it from monarchy, aristocracy, dictatorship and, in less obvious ways, communism. To be sure, those principles contain such tricky components as representation, popular participation (including rights to speech, association, passive suffrage and active suffrage), political responsiveness, government accountability, transparency and, perhaps hardest of all, equality. Many distinct normative ideals thrive amidst competing interpretations of these principles and their component parts. But government in the private interest is not one of them. The systematic entanglement of business and state to the detriment of responsive politics, competitive capitalism and the public interest would seem to be a clear affront to every defensible normative ideal—every democratic one, at least.

Can the laws governing voting rights, elections, campaign finance, political parties, petitioning (or lobbying), anti-corruption efforts and conflicts of interest respond to the clear and present danger of plutocracy and kleptocracy? To do so would require a widely shared awareness among the general public and decision-makers, a comprehensive normative consensus against the excessive entanglement of business and state. At base, this awareness and consensus would simply be that the United States should be a democracy, not a plutocracy or a kleptocracy. Overarching changes to the law of democracy would have to flow from—and continually refer back to—that premise.

For the time being, the news is terrible. It turns out that plutocracy was not the final stage of the United States' democratic decline. And yet there is a certain air of inevitability about kleptocracy's emergence. Where did we expect the longstanding downward trend in the economic and political situations of most Americans to take us? Where did we expect the increasing authority of economic elites over the economy, elections,

<sup>202</sup> *Ibid.*

<sup>203</sup> *Ibid.*

law-making and the manufacturing of public opinion to lead? If it is indeed the case that things sometimes have to get worse before they can get better, that is because of the realisations, focus and political will for systematic reforms that crises can produce. The United States now has its crisis and, with it, an unparalleled opportunity for legal and political transformation.