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The Third Coming of American Plutocracy: What Campaign Finance Reformers Are Up Against

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The United States is rightly famous for its political transformations. Everyone knows that we went from a backwater colony to a powerful self-governing nation, from a slave republic of propertied white men to a free land of universal suffrage, and from a pitiful stage of child labor and slums to a middle-class golden age. The trouble is that this democratic trajectory is so famous that Americans take it on faith. Our political independence, equal citizenship, and land of plenty occur to us today as foregone conclusions—we hardly need to consult reality to check their status. We tend to believe that those battles were fought and won, once and for all, and that self-government, equality, liberty, and opportunity for all could never be extinguished on our soil.

The United States is also famous for the many harvests of agitators behind its democratic trajectory. Who can forget the likes of Thomas Paine, Patrick Henry, Thomas Jefferson, Andrew Jackson, Frederick Douglass, Abraham Lincoln, Sojourner Truth, Susan B. Anthony, Franklin Delano Roosevelt, and Martin Luther King? Modern-day Americans have not forgotten their names or achievements, but many of us tell ourselves that the issues of our day are not so significant. History gives a concrete sense of right and wrong, while the present moment remains a place of doubt. That doubt, that inability to see our moment in history clearly, banishes conviction and collective action to the past.

In light of all this, ours is not a time of constitutional amendments or waves of progressive legislation. And that would be fine, if only self-government,

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equality, liberty, and opportunity for all were not being extinguished on our soil.

Advancing along its present course, the United States is becoming famous for the opposite sort of political transformation as before: from self-governance to governance by a financial elite; from political inclusion regardless of race, sex, religion, or heritage to political exclusion on the basis of wealth; and from a thriving middle class to a massive underclass.

This undemocratic trajectory reveals that our legal system is incomplete. Although our laws rule out government by a monarch, a religious authority, and by a few generals or a dictator, they fail miserably when it comes to government by and for the wealthy. Plutocracy, defined long ago as "a form of government in which the supreme power is lodged in the hands of the wealthy classes,"[1] was never prohibited or eliminated in the United States. Its endurance is not, on the whole, a symptom of criminal activity or legal defiance. Rather, it is ironclad proof that American democracy was never completed in the first place. Together in their entirety, the many legal means through which financial power can be converted into political power are America's Achilles heel.

To see democracy's exceptional vulnerability to financial power up close, one need only observe how political campaigns, political parties, interest groups, and lobbyists are financed. Longstanding trends in these areas reveal the woeful state of campaign finance law—its omissions, its weak terms, its dysfunctional administration and enforcement by the Federal Election Commission, and, perhaps worst of all, its hostile treatment by the Supreme Court. Because of this structural flaw in our political architecture, a form of government hostile to democracy is being consolidated and our nation's achievements in self-governance and social mobility are being reversed. The mechanism, simply enough, is the privatization of government.

Although the privatization of government is a defining aspect of modern life, it is also one of the oldest forms of corruption under the sun. Consider the situation Romans faced roughly 1,600 years ago:

> Bribery and abuses always occurred, of course. But by the fourth and fifth centuries they had become the norm: no longer abuses of a system, but an alternative system in itself. The cash nexus overrode all other ties. Everything was bought and sold: public office … access to authority on every level, and particularly the emperor. The traditional web of obligations became a

[1] Freeman Otis Willey, The Laborer and the Capitalist 35 (1896).

> marketplace of power, ruled only by naked self-interest. Government's operation was permanently, massively distorted.[2]

As a freed slave from the period put it, such "universal corruption … increased the influence of the rich, and aggravated the misfortunes of the poor."[3] Ultimately, the Roman Empire succumbed not just to overexpansion and invasions, but also to a market for political power.[4] Soon enough, the United States may also pay the price for privatizing government.

Still, past generations of Americans have improved upon ancient Rome. They made the President an elected figure, abolished slavery, redesigned the Senate as an elected body, and instituted a regime of universal suffrage. After economic and political inequality peaked again after abolition, Americans responded with antitrust laws, labor rights, and the New Deal. Were an ancient Roman to have our vantage point, he would see more than government in the private interest and the aggravation of the poor's misfortunes. He would see a cyclical process: universal corruption, response; universal corruption, response; universal corruption … (response pending). Each response entailed a quantum leap for American democracy and targeted some of the wealthy interests that had captured the government at the time. But no response successfully targeted democracy's systemic vulnerability to government capture by the wealthy, and so that vulnerability has endured. As a result, plutocracy has been reincarnated multiple times throughout U.S. history.

Of course progress has been made since that early *slave republic* of white, property-owning males; of course progress has been made since that *industrializing republic* of Robber Barons and corporate trusts. But the linear view of history ignores the fact that extreme levels of economic and political exclusion keep resurfacing. The nation overcame slavery and formal disenfranchisement only to arrive at monopoly power and Jim Crow. Then the nation overcame monopoly power and vindicated the civil rights movement only to arrive at our *neoliberal republic* of wealthy donors, interest groups, and lobbyists.

We need not go back to ancient Rome in order to grasp the present moment in history. An alternative regime has nearly defeated democracy three times in the last 150 years of U.S. history alone. Its signature traits include extreme levels of economic and political inequality; behind that injustice, a concrete

[2] Stephen Williams, *Corruption and the Decline of Rome*, History Today, www.historytoday.com/stephen-williams/corruption-and-decline-rome.

[3] 6 Edward Gibbon, The History of the Decline and Fall of the Roman Empire 60 (1788) (relaying the tearful lament of the freedman of Onegesius).

[4] Ramsay MacMullen, Corruption and the Decline of Rome 122–70 (1988) (describing how power was "for sale").

set of laws and policies; behind those laws and policies, a system of government co-opted by wealthy interests; and, legitimizing this *status quo* to a surprising extent, Supreme Court case law.

The recurrence of this pattern should remove our doubts and equivocations about the present. The country now labors under the third coming of American plutocracy. If most Americans could see this and realize that democracy's survival is no more certain today than it was during slavery or the Gilded Age, then perhaps conviction, collective action, and legal reforms would reach their peak once again.

I. THE SLAVERY PLUTOCRACY

A. *Economic and Political Inequality*

The American Revolution threw off monarchy, paving the way for citizens to enjoy unprecedented rights and powers. But, slavery and mass disenfranchisement endured. As Frederick Douglass pointed out, slavery exposed America's claim of liberty, equality, and self-governance as a "hollow mockery."[5] It branded American "republicanism as sham."[6] But what gave the institution of slavery—and the massive concentration of wealth it produced—its staying power?

Slavery rested on political foundations: first, the absence of personhood, citizenship, and rights for slaves and their descendants; and second, a combination of property and contractual rights that allowed slave traders and corporations to forcibly abduct people from their homelands, bring them to market as commodities, breed them in captivity, enslave them and their offspring in perpetuity, and build an entire economy on whips and chains.

Those first two foundations generated a great deal of wealth for slave traders and slave owners, and concentrated that wealth in the upper echelons of a land-owning, person-owning elite. For example, as of 1860, the top 20 percent of Southern households earned over 62 percent of their regions' total income, while the bottom 40 percent earned roughly 8 percent of it.[7] Meanwhile, in

[5] Frederick Douglass, *The Meaning of July Fourth for the Negro*, *in* 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS: PRE-CIVIL WAR DECADE, 1850–1860, at 192 (Philip S. Foner ed., 1950).

[6] *Id.* at 201.

[7] Peter H. Lindert & Jeffrey G. Williamson, American Incomes 1774–1860, at 36 tbl. 7 (Nat'l Bureau of Econ. Res., Working Paper No. 18396, 2012), www.nber.org/papers/w18396.pdf. These percentages are the average of the rates recorded for the South Atlantic, East South Central, and West South Central regions.

Northern states, the top 20 percent earned less than 50 percent of all income, while the bottom 40 percent earned roughly 15 percent.[8] The share of income obtained by the top 1 percent of Southern households was nearly twice as great as the share of income obtained by their counterparts in the North.[9] That inequality was partly a function of assets: in 1860, slaves, some 4 million in total, exceeded the value of all manufacturing and railroad companies.[10] It was also a reflection of the fact that this "human capital" was unevenly distributed. Approximately 30 percent of families in slave states held slaves,[11] but less than 1 percent of Southern whites owned over 50 slaves.[12] That inequality in ownership concentrated wealth in plantation owners and their associated industries, such as cotton, sugar, and tobacco.

Then came the third political foundation of slavery: the use of that concentrated wealth to obtain disproportionate influence over the government. Plutocracy was not just a symptom of slavery and the concentration of wealth that slavery produced. It was also a cause of slavery, or at least its endurance, and certainly a cause of the legal conditions that made slavery possible and profitable. James Ashley attributed slavery to a government "dominated over by the minority, and … administered by organized force and fraud, in the interest of a privileged class."[13] Senator Henry Wilson developed the same view at length, exposing the corruption of the United States by what he called "the slave power."[14] Beyond ownership over human beings, slavery entailed ownership of government; it voided popular sovereignty and political representation. It made the republican form of government impossible to achieve. Indeed, the government of the Confederacy, made up largely of slaveholders,[15] attempted to make its dominion permanent by seceding.

[8] *See id.* These percentages were obtained by comparing the average rates in South Atlantic, East South Central, and West South Central regions with the average rates in New England, East North Central, and West North Central regions.

[9] *Id.* This conclusion was reached by comparing the average rates in South Atlantic, East South Central, and West South Central regions with the average rates in New England, East North Central, and West North Central regions.

[10] *See* Ta-Nehisi Coates, *Slavery Made America*, The Atlantic (June 24, 2014), www.theatlantic.com/business/archive/2014/06/slavery-made-america/373288/ (quoting from David Blight's course, "The Civil War and Reconstruction").

[11] Robert E. Weir, Class in America: An Encyclopedia 780 (2007).

[12] *Id.*

[13] James M. Ashley, Closing Portion of Stump Speech Delivered in the Grove near Montpelier, Williams County, Ohio (Sept. 1856). This source was quoted in Rebecca E. Zietlow, *The Ideological Origins of the Thirteenth Amendment*, 49 Hous. L. Rev. 393, 435 (2012).

[14] *See* Lea VanderVelde, *Henry Wilson: Cobbler of the Frayed Constitution, Strategist of the Thirteenth Amendment*, 15 Geo. J.L. & Pub. Pol'y 173, 176 (2017) (internal quotations removed).

[15] Weir, *supra* note 11, at 780.

This brings to mind something written by the Reverend Henry Ward Beecher, who has gone down in history as "one of the most hated men in the Confederacy."[16] Beecher habitually objected to slavery on the grounds that it was incompatible with Christianity and American political ideals. But in 1863, Beecher objected to slavery for an additional reason: slavery concentrated wealth and power in a ruling class, which Beecher called a "plutocracy" and "the most dangerous kind of aristocracy."[17] Of those who held such "disproportioned political power," Beecher honed in on the men who "scorn the principle of universal liberty and … foam at the mouth and detestingly curse the conception of political equality."[18] Run by such men, Beecher labeled plutocracy "dangerous beyond anything that the mind can conceive."[19]

While that description readily singles out the usual suspects who controlled the South and ran the Confederacy, it also describes some unusual ones. If Supreme Court Justices are not commonly associated with the mouth foam and extreme danger that Beecher mentions, it is because we have forgotten *Dred Scott v. Sandford*.[20]

B. Justifying Slavery

In 1857, seven men validated slavery with the force of the Constitution. Chief Justice Roger Taney's majority opinion decided whether Dred Scott, a slave who had made it to free territory, had legal standing to sue his owner. But to decide that technical question, the Court had to resolve a profound one: whether "a negro, whose ancestors were imported into this country, and sold as slaves" could be considered a citizen.[21]

Chief Justice Taney acknowledged the scope of the inquiry, asking "whether the class of persons described in the plea … are constituent members of this sovereignty?"[22] "We think they are not," he continued, "and that they … were not intended to be included, under the word 'citizens' in the Constitution."[23] He claimed that when the Constitution was adopted they were "considered

[16] Debby Applegate, The Most Famous Man in America: The Biography of Henry Ward Beecher 5 (2007).
[17] Henry Ward Beecher, Freedom and War: Discourses on Topics Suggested by the Times 380–81 (1863).
[18] *Id.* at 381.
[19] *Id.*
[20] Dred Scott v. Sandford, 60 U.S. 393, 403 (1857).
[21] *Id.* at 403.
[22] *Id.* at 404.
[23] *Id.*

as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority."[24] Slaves and their descendants were "beings of an inferior order [who] might justly and lawfully be reduced to slavery for [their] benefit."[25] Naturally, such beings were "altogether unfit to associate with the white race, either in social or political relations."[26]

These remarks justified the exclusive sovereignty of white males, not wealthy white males in particular. But by denying Scott's claim, the Court justified plutocracy indirectly. It did so, simply enough, by preserving the *status quo*.

But then the leveling came.

By the time in 1863 that Beecher's book was published, the Emancipation Proclamation had already changed enslaved people's status and disrupted the rights of contract and property bound up in slavery. Abraham Lincoln and Union forces vindicated the fundamental American ideals of which Douglass and Beecher spoke, fighting and dying for political equality. Two years later, the Thirteenth Amendment was ratified, Confederate generals surrendered, and Jefferson Davis was captured. The Civil Rights Act of 1866 and the Fourteenth and Fifteenth Amendments eviscerated the *Dred Scott* opinion, responding directly to outstanding matters of citizenship, legal standing, and suffrage. Slavery was over, but the use of wealth to influence government remained.

II. THE INDUSTRIAL PLUTOCRACY

A. *Economic and Political Inequality*

Slavery reduced labor costs and put free laborers, small employers, and small farmers at a competitive disadvantage. Emancipation removed an enormous sum of *private capital* from portfolios and sent Southern plantations and their crops to "commodity hell."[27] Still, child labor and sharecropping aided recovery.[28] And that was the bottom line: once the slaves were freed, old crops and new industries depended on cheap labor. Although mass production

[24] *Id.* at 404–5.
[25] *Id.* at 407.
[26] *Id.*
[27] Richard Follett, Sven Beckert, Peter Coclanis & Barbara M. Hahn, Plantation Kingdom: The American South and Its Global Commodities 5–6 (2016) (discussing the effect of emancipation on slave-dependent business interests).
[28] *See id.* at 59 (noting that in 1905 "23 percent of all workers in Southern cotton mills were younger than 16").

methods were the innovation of the day, it was corporate consolidation and "government by campaign contributions" that tilted law and policy toward the interests of large employers and the rest of the industrial elite.[29] Both factors increased the bargaining power of wealthy interests over labor and government; both became definitive of a new era.

Describing that era, Congressman Milford W. Howard's 1895 book, *The American Plutocracy*,[30] pointed first to grossly unequal wealth distribution. Out of a population of nearly 70 million people, "[t]hirty thousand men, or fewer, own half of the wealth of this country," he noted. Scaling up to the wealthiest 250,000 men, amounting to just 0.35 percent of the population, Howard reported that they owned "almost or quite eighty percent of our total wealth."[31] Other estimates from the 1890s are not as extreme, but the data still suggest something remarkable: the antebellum era was not the high point of economic inequality in the United States.[32]

One might imagine that wealth creation arose from neutral conditions in the industrial era, such as technological change, plentiful natural resources, a large labor force, and unconquered terrains. But, as was the case with the slavery era, certain laws and policies were required in order for wealth to accumulate so severely in the hands of the few. The legal conditions behind wealth aggregation in the industrial era included corporate consolidation (or "trusts"), inhumane labor conditions with bare minimum pay, child labor, low tax burdens, the lack of an economic and social safety net, means in law and law enforcement for controlling unions and breaking up strikes, and a strong police power focused on keeping the poor in check. The "laws are such," wrote Congressman Howard, that a "vast army of people … are compelled to labor and toil in poverty in order that the few … may lead lives of idleness and luxury."[33]

Were such laws fairly produced? Were the people who made them fairly elected?

Once again, it was not that the political community had decided of its own accord to enact laws and policies favorable to the wealthy. Rather, the wealthy

[29] Jack Beatty, The Age of Betrayal: The Triumph of Money in America 1865–1900, at 218 (2008).

[30] M. W. Howard, The American Plutocracy (Holland Pub. Co., 1895).

[31] *Id.* at 12.

[32] *See* Robert E. Gallman, *Trends in the Size Distribution Trends in the Nineteenth Century: Some Speculations*, *in* Six Papers on the Size Distribution of Wealth and Income 15 (National Bureau of Economic Research, Lee Soltow ed., 1969) (noting that the data "do suggest that the share of wealth held by the very rich was substantially higher in 1890 than in the few decades before the Civil War").

[33] *Id.* at 3.

had captured the government. Congressman Howard's analysis hit the mark, moving from the conditions required for unconscionable wealth concentration to their underlying cause:

> [B]oth of the old parties are the friends of plutocracy. The leaders—a great many of them—are under plutocratic influence. Both of the old parties go to the money power for campaign funds, and put themselves under obligation to plutocracy at the very outset.[34]

But this was not a one-way street of party leaders and candidates appealing to wealthy industrialists for political funds. As an analysis of the Gilded Age that was published in 1934 put it:

> The Masters of Industry who sat in the upper chamber of congress … or their close associates who became Representatives or governors of states, make up a long and distinguished role … [E]very industrial group and every great monopoly was almost directly represented in the political councils of the nation.[35]

By enriching themselves at the expense of competitive capitalism, representative democracy, and the general public, these captains of industry earned the title "robber barons."[36]

By 1921, Senator Richard Pettigrew enjoyed a privileged vantage point on the period, one informed by his eleven years in the Senate:

> Within the past fifty years the wealth of the United States … has been accumulated in the hands of a few, so that five per cent of the people own three-quarters of the nation's wealth, while two-thirds of the citizens—the workers—are practically without property … [T]he few men who own nearly all the wealth have gained control of the machinery of public life. They have usurped the functions of government and established a plutocracy.[37]

These were among the dramatic economic and political components of plutocracy's second incarnation.

[34] Howard, *supra* note 30, at 103.

[35] Matthew Josephson, The Robber Barons 347–48 (Houghton Mifflin, 2011) (1934).

[36] *See id.* at 315–423 (chronicling the people, conditions, and anecdotes that characterize this era of history).

[37] R. F. Pettigrew, Triumphant Plutocracy 370–71 (1922). Several other notable works also gave a vivid account of the economic and political conditions of the time. *See, e.g.*, Edgar Howard Farrar, The Legal Remedy for Plutocracy (1902); Leslie Chase, Plutocracy (1910); Eli Beers, The Dangers of Plutocracy (1919); Scott Nearing, The New Slavery: Or, the World Made Safe for Plutocracy (1920); and Scott Nearing, The Course of American Empire 74–119 (1921) (discussing plutocracy).

But little by little, the leveling came.

The trusts and their monopoly power came under fire from Congress and the President in 1890 and again in 1914. The Sherman Antitrust Act addressed monopolies and other restraints on trade and competition. The Clayton Antitrust Act added specificity and additional coverage, targeting certain types of holding companies, certain mergers and acquisitions, interlocking directorates, and price discrimination. The Federal Trade Commission Act added a bipartisan federal agency dedicated to protecting consumers and promoting competition.[38]

Theodore Roosevelt's presidency also stands as an example of progressive opposition to the Gilded Age. Roosevelt prosecuted antitrust violations and broke up trusts, regulated the meat industry, urged inheritance and graduated income taxes, advocated fewer injunctions against labor unions, and empowered the Interstate Commerce Commission to control the railroads. Roosevelt also promoted democratic integrity directly, targeting the political source of corporate power. In 1905, he implored Congress to "forbid any officer of a corporation from using the money of the corporation in or about any election [and] also forbid such use of money in connection with any legislation."[39] Congress agreed in part, prohibiting contributions from corporations and national banks to federal candidates in the 1907 Tillman Act.[40] In 1910 and 1911, President William Howard Taft and Congress added disclosure requirements and spending limits for House and Senate campaigns.[41] Still, the Tillman Act, the 1910 Publicity Act, and their related amendments were hobbled by loopholes. Economic and political power continued to accrue sharply and rather exclusively in a privileged class of citizens.

The Great Depression and Franklin Delano Roosevelt's presidency catalyzed a stronger regulatory response to the Industrial Plutocracy, which continued beyond the 1920s. Indeed, in 1936, the younger Roosevelt alleged that "economic royalists" had "carved new dynasties."[42] Citing corporations and banks, he alleged that "the privileged princes of these new economic dynasties, thirsting for power, reached out for control over Government itself."[43] Roosevelt described the undemocratic control of government visible in his

[38] *What We Do*, U.S. Federal Trade Commission, www.ftc.gov/about-ftc/what-we-do.

[39] Theodore Roosevelt, *Fifth Annual Message* (Dec. 5, 1905), www.presidency.ucsb.edu/ws/?pid=29546.

[40] *See* Campaign Finance Reform: A Sourcebook 36 (Anthony Corrado et al. eds., 1997).

[41] *Id.* at 37–41.

[42] Franklin D. Roosevelt, *Acceptance Speech for the Renomination of the Presidency* (June 27, 1936), www.presidency.ucsb.edu/ws/?pid=15314.

[43] *Id.*

day as "economic tyranny" and "a new despotism."[44] He labeled "Government by organized money … just as dangerous as Government by organized mob."[45] As a step toward reducing those dangers, the 1940 Amendments to the Hatch Act limited individual contributions and party committee expenditures.[46]

Franklin Delano Roosevelt also highlighted a parallel between the Industrial Plutocracy and the Slavery Plutocracy, describing the giants of industry as having "concentrated into their own hands an almost complete control over other people's property, other people's money, other people's labor—other people's lives."[47] He believed that the "collapse of 1929 [had] showed up the despotism for what it was [. . .] economic slavery."[48] He welcomed industrialists' support for the right to vote, but considered that "the political equality we once had won was meaningless in the face of economic inequality."[49]

Where progressives saw political inequality and domination, however, others saw market-based equality and freedom. And, as fate would have it, the others possessed the power of constitutional interpretation and judicial review.

B. *Justifying Gilded Age Capitalism*

Like the Slavery Plutocracy, the Industrial Plutocracy was kept in place for a time by the Supreme Court. The vehicle, once more, was the Fifth Amendment and, ironically enough, the parallel terms of the Fourteenth Amendment. A few steps past enslaved persons and massive profits from coerced labor, one found workers without bargaining power and massive profits from cheap labor. The Court frequently protected that *status quo* from regulation between 1895 and 1937, a period referred to as the Lochner era.

The *Lochner* Court did not always hand down anti-regulatory decisions,[50] but it operated from a worldview that tended to produce them. In the 1905 case,

[44] *Id.*

[45] Franklin D. Roosevelt, *Address at Madison Square Garden, New York City* (Oct. 31, 1936), www.presidency.ucsb.edu/ws/?pid=15219.

[46] 1940 Amendments to the Hatch Act, 54 Stat. 767 (July 19, 1940). *See* Campaign Finance Reform: a Sourcebook, *supra* note 40, at 47 (describing the Amendments as "impos[ing] the first yearly limit on individual contributions to federal candidates or national party committees" and limiting "the total amount a political party committee operating in two or more states could receive or spend in a year").

[47] Roosevelt, *Acceptance Speech for the Renomination of the Presidency*, *supra* note 42.

[48] *Id.*

[49] *Id.*

[50] *See* David E. Bernstein, *Lochner's Legacy's Legacy*, 82 Tex. L. Rev. 1, 63 (2003) (noting that "[t]he Court also upheld a wide range of redistributive laws, ranging from antitrust laws intended to help small proprietors at the expense of large corporations to estate taxes to various ameliorative labor laws").

Lochner v. New York,[51] the Court invalidated a state law that prevented bakers from working over 60 hours per week. The law sought to protect the health of bakers and prevent bakeries from exploiting them. The Court struck down the law, deeming it an unconstitutional limitation of a right essential to the free market order. "The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment," wrote the Court.[52] The Fourteenth Amendment, in relevant part, does not allow the state to "deprive any person of life, liberty, or property, without due process of law." Substituting unregulated economic freedom for "liberty" was the Court's idea in 1897, not the Constitution's in 1791 (when the Fifth Amendment was ratified) or 1868 (when the Fourteenth Amendment was ratified).[53]

The Lochnerian view of economic power and economic inequality is well illustrated by the 1915 case of *Coppage v. Kansas*.[54] *Coppage* gave the Court the opportunity to weigh in on a key part of the progressive movement. The State of Kansas had made it unlawful for employers to coerce, require, or influence employees to forego union membership.[55] The Kansas Supreme Court approved of the law, noting that employees were at an economic disadvantage and could be easily compelled to accept employers' "unreasonable and unjust demands."[56] The Kansas Supreme Court concluded that "such a condition … tends to reduce employees to mere serfdom"[57] and that "the state has the right to protect the freedom and independence of employees."[58]

The U.S. Supreme Court agreed that there was considerable inequality in bargaining power between employees and employers, but it reached the opposite conclusion as the Kansas Supreme Court: in order to uphold contractual and property rights, the legal order must "recogniz[e] as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights."[59] The Court reasoned that prohibitions on union membership posed no constitutional problem because all men were "free to decline the employment on those terms … for 'it takes two to make a bargain.'"[60] Slaves did not possess that elementary freedom of Gilded Age employees to decline an offer

[51] Lochner v. New York, 198 U.S. 45 (1905).
[52] *Id.* at 53.
[53] *See* Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897) (making contractual freedom a constitutional right).
[54] Coppage v. Kansas, 236 U.S. 1 (1915).
[55] *Id.* at 6.
[56] State v. Coppage, 125 P. 8 (Kan. 1912).
[57] *Id.* at 10.
[58] *Id.* at 11.
[59] *Coppage*, 236 U.S. at 17.
[60] *Id.* at 21.

or quit. In the shift from a free market for slaves to a free market for labor, the Supreme Court found a new natural order to defend from regulation.

The Court bent over backwards to reconcile this unequal natural order with equality concerns. Regarding the freedoms to offer, terminate, accept, and reject employment, the Court reasoned in *Adair v. United States* that "the employer and the employee have equality of right."[61] Building on this version of equality in *Coppage*, the Court described the right to make contracts that prohibited union membership as just "as essential to the laborer as to the capitalist, to the poor as to the rich."[62] *Coppage* considered the Kansas law "so disturbing to [this] equality of right."[63] The Court could have validated union membership and fair wages as starting points for equality and freedom. But *Adkins v. Children's Hospital* summed up the choice made by the Court throughout the Lochner era. The Court grounded the nation's constitutional order in citizens' "equal right to obtain from each other the best terms they can as the result of private bargaining."[64]

The Court's aversion to regulation was one-sided, ignoring state-sponsored advantages for the rich, such as corporate legal personhood and directors' legal duty to maximize profits for shareholders.[65] The Court's phrase, private bargaining, described a regime of contractual freedoms unfettered by public-minded regulation.

But, in 1937, the Court reversed *Adkins* and sunk a dagger into *Lochner's* heart. "The Constitution does not speak of freedom of contract," stated the 5-4 majority in *West Coast Hotel v. Parrish*. Instead of an equal right to private bargaining and legitimate inequalities of fortune, the Court now spoke of the "exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage."[66] It framed government inaction and cheap labor as "a subsidy for unconscionable employers" and insisted that the "community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest."[67]

[61] Adair v. United States, 208 U.S. 161, 175 (1908).
[62] *Coppage*, 236 U.S. at 14.
[63] *Id.*
[64] Adkins v. Children's Hosp., 261 U.S. 525, 545 (1923).
[65] On corporate legal personhood, see generally Santa Clara County v. S. Pac. R.R. Co., 118 U.S. 394 (1886). *See also* James D. Cox et al., Corporations 2–6 (2d ed. 2002). On the primary duty of corporate directors to maximize profits for shareholders, see Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919).
[66] West Coast Hotel v. Parrish, 300 U.S. 379, 399 (1937) (upholding a Washington State minimum wage law).
[67] *Id.* at 399–400.

So motivated, the Court reinterpreted the liberty protected by the Fifth and Fourteenth amendments as "liberty in a social organization,"[68] not "an absolute and uncontrollable liberty."[69] The implication was simple: "freedom of contract is a qualified, and not an absolute, right" and so the law could protect more fully "against the evils which menace the health, safety, morals, and welfare of the people."[70] Arbitrary restraint remained unconstitutional but "reasonable regulations and prohibitions imposed in the interests of the community" came back into the Court's good graces.[71] Finally, the Kansas Supreme Court's concerns over serfdom received the answer they deserved: "the Legislature has necessarily a wide field of discretion … to insure … freedom from oppression."[72]

The New Deal then took its full shape and was followed by gains in education, labor, and infrastructure in the post-World War II era, and by a host of measures in Lyndon B. Johnson's Great Society. Together, these policies reduced economic inequality well below the levels that empowered the Slavery Plutocracy and the Industrial Plutocracy. Slums shrunk, palaces and mansions shrunk a bit too, and the vast American landscape known as the middle class arose and filled the gap. Today's reports on economic inequality marvel at how things played out between the 1930s and 1970s—particularly, the "long historical decline in the concentration of wealth" and the fact that "incomes across the [spectrum] grew at nearly the same pace."[73]

Still, wide-open legal channels for economic power to translate into political power remained. Seizing on that enduring vulnerability, plutocracy has come to the United States for the third time.

III. THE GLOBAL PLUTOCRACY

A. *Economic and Political Inequality*

Recall Senator Pettigrew's 1921 assessment: the richest 5 percent of the population owned 75 percent of the nation's wealth, while the bottom two-thirds of the population owned practically nothing. He laid the blame for this on the

[68] *Id.* at 391.
[69] *Id.* at 400.
[70] *Id.* at 391.
[71] *Id.* at 392.
[72] *Id.* at 393.
[73] Chad Stone, Danilo Trisi, Arloc Sherman & Emily Horton, *A Guide to Statistics on Historical Trends in Income Inequality* 15 (Center on Policy and Budget Priorities, Nov. 7, 2016), www.cbpp.org/sites/default/files/atoms/files/11-28-11pov_1.pdf.

plutocracy: the few men who owned nearly all the wealth, controlled public life, and usurped the functions of government.[74] Now, nearly a century after Senator Pettigrew's exposé, Americans suffer from extreme levels of economic inequality and government capture once more.

As for inequality, the richest 10 percent of the population owned 72 percent of all national wealth in 2010.[75] Meanwhile, the poorest 50 percent owned just 2 percent of national wealth.[76] And by 2013, the top 10 percent had increased their share, owning a full *three-quarters* of national wealth.[77] This brings the United States dangerously close to Pettigrew's figures from the Industrial Plutocracy. The same goes for the distribution of income from labor. The portion of total income received by the top 10 percent of earners rose to 50 percent in 2007, the highest point reached since the eve of disaster, 1928.[78] By 2002 the top 0.01 percent of income earners made more than 300 times the amount made by the average worker, the greatest degree of income inequality since 1915.[79]

As of 2010, at least 46 million Americans were living in poverty, the highest level ever recorded by the Census Bureau in the 52 years it had been keeping track.[80] To make matters worse, another 51 million Americans were near poverty, meaning that about one in three Americans were poor or in serious risk of becoming poor.[81] Yet, as of 2011, some billionaires paid a lower percentage of total income in taxes than bus drivers.[82]

Thomas Piketty describes rising inequality in the United States in a way that speaks to the undoing of the New Deal.[83] But his data from 1970 to 2010 have broader implications. They show rising inequality in a wide sample of capitalist democracies, most of which appear to be undergoing similar changes in

74 Pettigrew, *supra* note 37, at 370–71.

75 Thomas Piketty, Capital in the Twenty-First Century 257 (Arthur Goldhammer trans., 2014).

76 *Id. See also* Emmanuel Saez, *Striking It Richer, The Evolution of Top Incomes in the United States* (Sept. 3, 2013), http://eml.berkeley.edu/~saez/saez-UStopincomes-2012.pdf.

77 Stone et al., *supra* note 73, at 14.

78 Thomas Piketty & Emmanuel Saez, *Income and Wage Inequality in the United States, 1913–2002*, *in* Top Incomes Over the Twentieth Century 147 (A. B. Atkinson et al. eds., 2006). *See also* Stone et al., *Guide to Statistics on Historical Trends*, *supra* note 73, at 12 ("[T]he share of before-tax income that the richest 1 percent of households receive has been rising since the late 1970s, and in the past decade has climbed to levels not seen since the 1920s.").

79 Piketty & Saez, *supra* note 78, at 148.

80 *See* Mark R. Reiff, *The Difference Principle, Rising Inequality, and Supply-Side Economics: How Rawls Got Hijacked by the Right*, 13 Rev. Phil. Économique 119, 124 (2012).

81 *Id.*

82 *Id.* at 128.

83 Piketty, *supra* note 75, at 173 (citing "the gradual privatization and transfer of public wealth into private hands in the 1970s and 1980s" and "a political context that was on the whole more favorable to private wealth than that of the immediate postwar decades").

law and policy. In short, the New Gilded Age is not confined to the United States. Rather, it is part of the international phenomenon of neoliberalism that has swept the globe over the last 48 years.

An economic and political rejection of social, ethical, and regulatory commitments, neoliberalism has brought about what Wendy Brown calls the "economization of political life" for the purpose of "capital enhancement."[84] In short, the state is repurposed by (and for) concentrated capital. David Harvey notes the new paradigm that has become increasingly dominant since the 1970s: "[d]eregulation, privatization, and withdrawal of the state from many areas of social provision."[85] Finance capital, corporate lobbies, supranational institutions, and political parties have carried out such austere measures on a global scale.[86]

There is a simple reason for such international and foreign pressure. Many sectors of the economy have been globalized—or been acquired by an exclusive class of foreign investors. The laws and policies required for maximum profit are now advanced in a coordinated fashion across the globe. It is no coincidence, as Chrystia Freeland puts it, that today's plutocrats are different from yesterday's insofar as they comprise a "transglobal community of peers who have more in common with one another than with their countrymen back home."[87] She describes today's super-rich as "increasingly a nation unto themselves."[88]

Plutocracy also had a global side at the start of U.S. imperialism in the 1890s. Maximum profits for sugar, tobacco, coffee, and shipping industries depended on annexations and policies hostile to the needs of foreign populations.[89] Now that the spread of capitalist democracy has advanced, profits do not tend to depend so heavily on imperialist violence. For exceptions, one can look to today's fossil fuels, weapons, and private military industries, true holdovers from the past. But, as a general rule, today's global industries require subtler policies for profit maximization.

Consider, for example, the law and policies favored by agribusiness, banking and finance, pharmaceuticals, private healthcare providers, automobile

[84] Wendy Brown, Undoing the Demos: Neoliberalism's Stealth Revolution 17, 22 (2015).

[85] David Harvey, A Brief History of Neoliberalism 2–3 (2007).

[86] *See, e.g.*, Mark Blyth, Austerity: The History of a Dangerous Idea (2015); Kerry Anne Mendoza, The Demolition of the Welfare State and the Rise of the Zombie Economy (2014).

[87] Chrystia Freeland, Plutocrats: The Rise of the New Global Super-Rich 5 (2012).

[88] *Id.*

[89] *See* Pettigrew, *supra* note 37, at 310–37 (discussing the causal role of plutocracy in imperialism).

manufacturers, real estate and construction companies, and telecommunications. As a general rule, the members of today's plutocracy pursue privatization, reductions in social spending, tax reform, tort reform, industry deregulation, the defeat of environmental protections, and the weakening of organized labor. Laws and policies to these effects expand the boundaries and profitability of capital, not those of nations or empires. But, as was the case with imperialism, a majority of voters, politicians, bureaucrats, and judges cannot be counted on to support, produce, and maintain these policies independently. Consequently, corporations, wealthy individuals, and economic interest groups devote tremendous resources to acquiring and maintaining political power.

One can hardly imagine a world in which some wealthy citizens and organized economic interests did not make such efforts. But democracy can be more or less resistant. That is a causal variable underlying each plutocracy, whether foreign or domestic, historical or present tense: insufficient resistance to government capture by wealth, open pathways even. And the evidence about the United States today warrants no doubt.

"Careful studies reveal that elected U.S. politicians, themselves often very wealthy, are much more responsive to the preferences of the rich than to the needs and hopes of middle-class or poor citizens"[90]—that was Theda Skocpol and Alexander Hertel-Fernandez's assessment in 2016. But even that word choice, "much more responsive," is mild in comparison to Martin Gilens and Benjamin Page's conclusion in 2014. On the topic of U.S. government policy, they found that "mass-based interest groups and average citizens have little or no independent influence."[91]

Gilens and Page explain the powerlessness of the general public in terms of the political dominance of economic elites and business interest groups.

> [I]t is well established that organized groups regularly lobby and fraternize with public officials, move through revolving doors between public and private employment, provide self-serving information to officials, draft legislation, and spend a great deal of money on election campaigns.[92]

[90] Theda Skocpol & Alexander Hertel-Fernandez, The Koch Effect: The Impact of a Cadre-Led Network on American Politics 1–2 (Conference Paper, Jan. 16, 2016), www.scholarsstrategynetwork.org/sites/default/files/the_koch_effect_for_spsa_w_apps_skocpol_and_hertel-fernandez-corrected_1-4-16_1.pdf.

[91] Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics*, 12 Persp. on Pol. 564 (2014).

[92] *Id.* at 567.

Money in politics is a particularly extreme factor in that equation and it is not just organized groups that have cornered the market for political finance. Today, less than 1 percent of the population supplies the great majority of those election funds. In fact, between 1990 and 2016, an average of just 0.36 percent of the adult population stood behind the great majority of federal campaign donations.[93] An even smaller percentage of Americans stands behind independent political spending. For example, data on Super PAC spending in 2012 and 2014 suggest that fewer than 200 Americans provided roughly 80 percent of the billions of dollars that these groups spent, which would mean that a mere 0.0001 percent or less of the adult population was primarily responsible for the messages of independent expenditure groups.[94]

If this elite group of donors and spenders were representative of the general population, then money in politics would be a poor explanation for the general public's lack of influence over law and policy. But it turns out that this elite class of donors and spenders is highly unrepresentative of the general public. Beyond being overwhelmingly white and wealthy, and mostly male,[95] the donor class does not want the same things from government as average citizens do. Indeed, studies suggest that conservative economic views are what most distinguish campaign donors from the rest of the population and even from other wealthy citizens.[96] Donors' conservative views on economic matters coincide with the legal and policy environment driving economic inequality. Of course there are a host of causes, but this is the environment and the outcome that monied interests have conspired to produce.[97]

That combination of extreme inequality in influence and a large divergence in preferences between donors and average citizens recalls Congressman Howard's 1895 explanation of the problem: "Both of the old parties go to the

[93] *See Donor Demographics*, Center for Responsive Politics, www.opensecrets.org/overview/donordemographics.php?cycle=1990&filter=A (listing the percentage of U.S. adults who donated $200 or more in each election since 1990 and the total amount of campaign contributions provided by such donations).

[94] On 2012 Super PAC spending, see Meredith McGehee, *Only a Tiny Fraction of Americans Give Significantly to Campaigns*, Campaign Legal Center (Oct. 18, 2012), www.clcblog.org/index.php?option=com_content&view=article&id=482:only-a-tiny-fraction-of-americans-give-significantly-to-campaigns. On 2014 Super PAC spending, see Carrie Levine, *Surprise! No. 1 Super PAC Backs Democrats*, Center for Public Integrity (Nov. 3, 2014), www.publicintegrity.org/2014/11/03/16150/surprise-no-1-super-pac-backs-democrats.

[95] Clyde Wilcox, *Contributing as Political Participation*, *in* A User's Guide to Campaign Finance Reform 116–19 (2001).

[96] *Id. See also* Benjamin Page, Larry Bartels & Jason Seawright, *Democracy and the Policy Preferences of Wealthy Americans*, 11 Persp. on Pol. 51–73 (2013).

[97] *See, e.g.*, Jeffrey A. Winters, Oligarchy 251–54 (2011) (discussing other means, besides campaign finance, through which oligarchic power is expressed).

money power for campaign funds, and put themselves under obligation to plutocracy at the very outset."[98] Martin Gilens reached the same conclusion about candidates in 2012: "Affluent contributors … serve as a political filter mechanism; without the support of a sufficient core of well-off contributors, a prospective candidate has little chance of mounting a competitive campaign."[99] The news is no better for political parties. Skocpol and Hertel-Fernandez's 2016 analysis finds that "donor consortia," which they define as "well-organized sets of super-wealthy donors who work together over time," exercise a great deal of influence over political parties.[100] Indeed, their analysis of the Koch network suggests that the power of organized donors has advanced to the point, essentially, of forming a private political party.[101]

Next, we come to a more conventional means of legislative capture by wealthy interests: lobbying. Between 1998 and 2010, payments to lobbying firms rose 140 percent (from $1.44 billion to $3.47 billion).[102] That expanding market for political influence benefits the rich, because interest groups and lobbyists disproportionately represent business concerns. Faulting the decline of organized labor, Gilens and Page noted that "[r]elatively few [of such actors] represent the poor or even the economic interests of ordinary workers."[103] Indeed, Lee Drutman found that business interests controlled 95 of the top 100 lobbying organizations in 2012.[104] A more poetic way to put it is that the "lobbying section of the heavenly chorus … sings with an upper-crust accent."[105]

The same can be said for Congress itself. The need for vast campaign funds, the revolving door, and the increasing social ties between the political and economic elite help to explain why over half of the members of the House and Senate were millionaires as of 2013.[106] Being wealthy and having a network of

[98] Howard, *supra* note 30, at 103.
[99] Martin Gilens, Affluence & Influence: Economic Inequality and Political Power in America 244 (2012).
[100] Skocpol & Hertel-Fernandez, *supra* note 90, at 6–7.
[101] *Id.* at 8.
[102] Kay Lehman Schlozman, Sidney Verba & Henry E. Brady, The Unheavenly Chorus: Unequal Political Voice and the Broken Promise of American Democracy 593 (2012).
[103] Gilens & Page, *supra* note 91, at 567.
[104] Lee Drutman, The Business of America is Lobbying: How Corporations Became Politicized and Politics Became More Corporate 12–13 (2015).
[105] Schlozman, Verba & Brady, *supra* note 102, at 593–94.
[106] Russ Choma, *One Member of Congress = 18 American Households: Lawmakers' Personal Finances Far from Average*, Center for Responsive Politics (Jan. 12, 2015), www.opensecrets.org/news/2015/01/one-member-of-congress-18-american-households-lawmakers-personal-finances-far-from-average/.

wealthy contacts certainly facilitates the task of mounting a viable campaign. It also heightens the incentives to obtain political office—a station offering considerable opportunities for personal enrichment. While the average American household experienced a 36 percent decline in net worth (even adjusted for inflation) between 2003 and 2013,[107] members of Congress gained substantial wealth.[108]

The existence of a gilded legislature constitutes an independent explanation for laws and policies favoring concentrated capital. Wealthy donors, spenders, and lobbyists may have a sympathetic audience to begin with, at least on economic issues and entitlements. All other things equal, millionaires are unlikely to raise taxes on themselves and unlikely to benefit personally from government programs—or less likely than middle- and lower-class Americans, at least. In sum, the considerable and increasing wealth of members of Congress explain part of the overlap between their policy preferences and those of donors, spenders, and interest groups, such as the U.S. Chamber of Commerce.[109]

All of this suggests government *by and for* the wealthy. But this time around, the leveling has not come. Or, more accurately, it came, but the Supreme Court fought it off.

B. *Justifying Plutocracy*

It is not surprising that extreme levels of economic and political inequality repeat themselves. As Hamilton asked rhetorically in *The Federalist Papers*, "Has it not … invariably been found that momentary passions, and immediate interests, have a more active and imperious control over human conduct than general or remote considerations of policy, utility, or justice?"[110] In the competitive, impersonal contexts of politics and the economy, where fortune and power are won and lost, it is axiomatic that participants tend to pursue their own interests above those of others and the public at large. Unequal cumulative results predictably recur. But if Hamilton was right to posit a difference between the conduct justified by passion and interest, on the one hand, and

[107] Anna Bernasek, *The Typical Household, Now Worth a Third Less*, N.Y. Times (July 26, 2014), www.nytimes.com/2014/07/27/business/the-typical-household-now-worth-a-third-less.html.

[108] Choma, *supra* note 106.

[109] The Chamber has defined itself by coordinated opposition to taxes and regulations. *See* Skocpol & Hertel-Fernandez, *supra* note 90, at 3–4.

[110] The Federalist No. 6 (Alexander Hamilton).

the conduct justified by considerations of justice on the other, then it would be unexpected for the Court to keep transforming the means to economic and political domination into constitutional rights. Surely the versions of liberty, equality, and sovereignty behind *Dred Scott* and *Lochner* have been safely confined to history …

Handed down on the nation's bicentennial, the Burger Court's per curiam opinion in *Buckley v. Valeo* responded to Congress's efforts to begin a new stage in American democracy. For nearly 200 years, no comprehensive set of campaign finance regulations could be found in the United States.[111] The Watergate scandal, which included million dollar campaign contributions,[112] was the latest of many scandals that had afflicted the country since its beginnings. But Watergate's magnitude and timing successfully brought into question the longstanding *status quo* of piecemeal regulations and privatized political finance. Passed in 1971 and expanded in 1974, the Federal Election Campaign Act (FECA) implemented the first comprehensive approach to campaign finance—including limits on how much money individuals and political action committees could give to campaigns (referred to as contributions), limits on how much money candidates and campaigns could spend (referred to as expenditures), public disclosure requirements, provisions for the voluntary public financing of presidential campaigns, and an administrative agency to enforce election law (the Federal Election Commission).[113]

The Constitution contains no provision on the financing of campaigns or elections. When the Court was asked to strike down FECA's provisions, it conducted its analysis on a blank canvass. And yet, this was not just any case of first impression on a matter untouched by the framers. *Buckley* presented the largest of all questions for a liberal democracy that had just consolidated basic civil rights. How far would political equality, public participation, and popular representation advance? What further sources of power and privilege might democracy unseat? In a nation that had finally secured universal suffrage without blatant obstacles, was there any acceptable way for elites to retain a systematic advantage in elections and policymaking?

Rather than deciding the case on narrow grounds or deferring to Congress, the Court filled the blank canvas with its own political worldview, a general approach to democracy that would orient the entire opinion. Two worldviews

[111] *See* Anthony Corrado, *Money and Politics: A History of Federal Campaign Finance Law*, *in* The New Campaign Finance Sourcebook 7–47 (Corrado et al. eds., 2005).

[112] Richard L. Hasen, *The Nine Lives of* Buckley v. Valeo, *in* Election Law Stories 292 (Joshua A. Douglas & Eugene D. Mazo eds., 2016).

[113] FECA's various measures are detailed in the appendix to the *per curiam* opinion. *See* Buckley v. Valeo, 424 U.S. 1, 187–99 (1976).

were especially prominent at the time *Buckley* was drafted, two approaches to liberalism that no person of any intellectual sophistication, much less a Supreme Court Justice, could avoid contemplating.

The first approach sought liberty, political participation, and self-governance for all, and was informed by equality concerns. It was well expressed by John Rawls's *A Theory of Justice*, published in 1971 (the same year that FECA was adopted). At the time of the enforcement of the Civil Rights Act and Voting Rights Act, the country stood at the cusp of ending all categorical grounds for political exclusion. With battles over race, ethnicity, religion, and sex all fought and seemingly won, only socioeconomic status remained to be addressed. Rawls wrote:

> The constitution must take steps to enhance the value of equal rights of participation for all members of society … those similarly endowed and motivated should have roughly the same chance of attaining positions of political authority irrespective of their economic and social class … The liberties protected by the principle of participation lose much of their value whenever those who have greater private means are permitted to use their advantages to control the course of public debate. For eventually these inequalities will enable those better situated to exercise a larger influence over the development of legislation.[114]

Congress seemed to adopt Rawls's goals and values as legislative purposes in the 1974 installment of FECA. Besides preventing corruption, contribution and expenditure limits aimed to "[e]qualize the relative ability of all citizens to affect the outcome of elections" and slow "the skyrocketing cost of political campaigns, thereby … open[ing] the political system more widely to candidates without access to sources of large amounts of money."[115]

In contrast to Rawls and FECA's goals, the second prominent approach to democracy sought to establish an efficient marketplace free from government intervention. As a matter of social ethos, it was hardly coincidental that Milton Friedman received the Nobel Prize and Eugene Fama published his *Foundations of Finance* in the same year that *Buckley* was handed down. The "efficient market hypothesis" associated with Friedman, Fama, and F. A. Hayek became prominent in the 1970s. As Paul Krugman explains, that was a time in which "[d]iscussion of investor irrationality, of bubbles, or destructive speculation had virtually disappeared from academic discourse."[116] Friedman

[114] John Rawls, A Theory of Justice 224–25 (1991). *See also* John Rawls, Political Liberalism 327 (1996) (elaborating a "fair value of political liberties").

[115] *Buckley*, 424 U.S. at 24–26.

[116] Paul Krugman, *How Did Economists Get It So Wrong?* N.Y. Times Mag. (Sept. 6, 2009), www.nytimes.com/2009/09/06/magazine/06Economic-t.html. *See generally* Eugene Fama,

described his work as a response to the "readiness to rely primarily on the state rather than on private voluntary arrangements to achieve objectives regarded as desirable."[117] He was inspired by what he called Adam Smith's "flash of genius," the realization that "the prices that emerged from voluntary transactions between buyers and sellers … could coordinate the activity of millions of people … in such a way as to make everyone better off."[118] This viewpoint opposed movements for economic and social justice. It emphasized that freedom, efficiency, and overall gains are best secured by free markets—and that state intervention compromises freedom.

Contribution and expenditure limits brought these two approaches into conflict. Should democracy be an inclusive community in which all, even the poor, could achieve access and influence, or should it be a free market? FECA advanced the first possibility. The *Buckley* plaintiffs advanced the second one. As the Court summarized their argument, limiting the use of money for political purposes "constitutes a restriction on communication violative of the First Amendment."[119] Agreeing with this framing of the issue, the Supreme Court focused its general approach to democracy in campaign finance cases on free speech. It found no countervailing constitutional rights implicated. That left out representative governance, equal protection, and popular participation, alternative framings of the case that could have vindicated FECA as balancing constitutional rights, not abridging them. Still, in spite of its myopic focus on free speech, *Buckley* seemed to reach a compromise between Rawls and Friedman by choosing the 1957 theory of the First Amendment given by *Roth v. United States*.[120]

1. A Democratic Rule Applied in a Gilded Fashion

Quoting *Roth* verbatim, *Buckley's* first categorical statement about the First Amendment reads: "The First Amendment affords the broadest protection to such political expression in order 'to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[121] *Roth* notes that "[t]his objective was made explicit as early as 1774

The Foundations of Finance (1976); F. A. Hayek, The Road to Serfdom: Fiftieth Anniversary Edition (1994) (featuring an introduction by Milton Friedman).

[117] Milton Friedman, Capitalism and Freedom 5 (2009).

[118] *See* Pierre Rosanvallon, Democracy Past and Future 151 (2006) (quoting Milton Friedman).

[119] *Buckley*, 424 U.S. at 11.

[120] Roth v. United States, 354 U.S. 476 (1957).

[121] *Buckley*, 424 U.S. at 14.

in a letter of the Continental Congress,"[122] and yet, in *Buckley*, it made for a modern-day synthesis of Friedman's economic recipe with Rawls's concern over popular participation and inequalities in political power. Friedman triumphed in the means (the free market), while Rawls prevailed on the ends (democratic responsiveness), or nearly so.

Thirty-five pages after this first reference to democratic responsiveness through an open exchange of ideas, *Buckley* again quoted *Roth*. This time, the purpose of the quotation was not to introduce readers to the overall formula of market-based means producing popular ends; rather, it was to strike down expenditure limits and destroy political equality as a rationale for campaign finance limits.

Referencing the "governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections"[123] that stood behind expenditure limits, the Court penned one of the most influential lines of constitutional law ever:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.[124]

The Court's support for this proposition consisted of *Roth's* First Amendment purpose of "unfettered interchange" and a complementary First Amendment purpose featured in *New York Times v. Sullivan*: the First Amendment "was designed to secure 'the widest possible dissemination of information from diverse and antagonistic sources.' "[125]

Buckley quoted *Sullivan*, but *Sullivan* itself quoted from *Associated Press v. United States*. Conspicuously, both *Buckley* and *Sullivan* omitted *Associated Press*'s full articulation of its open marketplace design.[126] That passage from 1945 gives pause:

> Th[e First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.[127]

[122] *Roth*, 354 U.S. at 484.
[123] *Buckley*, 424 U.S. at 48.
[124] *Id.* at 48–49.
[125] *Id.* at 49.
[126] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) ("The effect would be to shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources' "). This quotation from *Associated Press* truncates the sentence that explains why the widest possible dissemination is desirable.
[127] Assoc. Press v. United States, 326 U.S. 1, 20 (1945).

To *Roth*'s democratic responsiveness, *Associated Press* added public welfare as another instrumental purpose of the free speech principle. But *Buckley* ignored these popular purposes in analyzing the constitutionality of expenditure limits.

Having quoted the open marketplace portions of *Roth* and *Associated Press* and excluded the vital public functions of the marketplace identified in those opinions, *Buckley* made short work of expenditure limits and the political equality rationale behind them. Expenditure limits were difficult to reconcile with *Roth*'s "unfettered interchange." Limits were fetters on the strong, after all, and if "unfettered" were all we had to go by, that would seem to conclude the analysis.

Just one small opening remained: one could argue that restraints on the strong were invitations to the weak, invitations to participate alongside the wealthy on a more level playing field. Viewed in this light, expenditure limits might promote *Associated Press*'s free market formulation of "the widest possible dissemination of information from diverse and antagonistic sources."[128] Was it really so inconceivable to the Burger Court that some of society's diverse and antagonistic interests would be found on opposite ends of the economic hierarchy?

The Canadian Supreme Court's "egalitarian model of elections" rests partly on this assumption.[129] "[W]ealth is the main obstacle to equal participation,"[130] the Canadian Supreme Court wrote in *Harper v. Canada*, reasoning that it was constitutional for "the wealthy [to be] prevented from controlling the electoral process to the detriment of others with less economic power."[131] The Canadian Supreme Court's opinion in *Libman v. Quebec* also kept with *Associated Press*'s interest in information from diverse and antagonistic sources. In the words of the Canadian Supreme Court, "Spending limits are necessary to prevent the most affluent from monopolizing election discourse and consequently depriving their opponents of a reasonable opportunity to speak and be heard."[132]

Even though *Buckley* excluded *Roth*'s and *Associated Press*'s democratic purposes for the open speech marketplace, it still could have justified expenditure limits in terms of maximizing the dissemination of information from diverse and antagonistic sources. But had democratic responsiveness and the public welfare played their rightful role in expenditure limit analysis, there would have been even more powerful reasons against deeming a more level playing field wholly foreign to the First Amendment.

[128] *Id.* at 49.
[129] Harper v. Canada (Attorney General), [2004] 1 S.C.R. 827, 868, 2004 SCC 33 (Can.).
[130] *Id.* at para. 62.
[131] *Id.*
[132] Libman v. Quebec, [1997] 3 S.C.R. 569, 598–99 (Can.) (citations omitted).

First of all, the "governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections"[133] spoke directly to producing the social and political changes desired by the people. Next came the state interest in slowing "the skyrocketing cost of political campaigns, thereby … open[ing] the political system more widely to candidates without access to sources of large amounts of money."[134] Democratic responsiveness and the public welfare might conceivably depend on greater socioeconomic diversity in the elected branches of government, or at least the inclusion on the ballot of candidates who appeal to the poor and middle class, not just to large donors and spenders. Those state interests in equality and greater ease (or accessibility) of mounting a campaign were connected to the full First Amendment formulations upon which the Court relied. But, instead of making that connection, the Court decided that limiting *quid pro quo* corruption and the appearance of corruption were the only sufficiently important state interests in play.[135]

Having found campaign expenditures, candidate expenditures, and independent expenditures not to raise any serious threat of *quid pro quo* corruption or its appearance, the Court struck them down. By focusing its analysis around the means (the open marketplace) and omitting any dutiful attention to the ends (democratic responsiveness and public welfare), *Buckley* was unfaithful to precedent. The open marketplace for speech trumped democracy only because democracy had been read out of constitutional law.

Still, a later portion of *Buckley* suggests that the Court attempted to reconcile the political marketplace with democratic responsiveness after all. Paralleling *Roth*'s stipulation that the unfettered interchange of ideas would bring about the changes desired by the people, *Buckley* assumed that "given the limitation on the size of outside contributions, the financial resources available to a candidate's campaign … will normally vary with the size and intensity of the candidate's support."[136] On the naïve assumption that poor and middle-class Americans would be able or willing to donate thousands of dollars each to political candidates and committees every election cycle, *Buckley* concluded that "[t]here is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate."[137]

[133] Buckley v. Valeo, 424 U.S. 1, 48 (1976).
[134] *See id.* at 26 (announcing this state interest). *See also id.* at 57 (finding it insufficient to justify campaign expenditure ceilings).
[135] *Id.* at 26–27.
[136] *Id.* at 56.
[137] *Id.*

In this hypothetical world of economic equality, campaign funds closely correlated with popular support, and a robust marketplace of diverse and antagonistic sources producing "a well-informed electorate,"[138] the unfettered interchange of ideas might actually protect the public welfare and produce the social and political changes desired by the people. On the basis of those assumptions, the Court struck down limits on expenditures by campaigns and candidates. Having registered those naïve assumptions as facts, the Court celebrated "the free society ordained by our Constitution," a legal order in which "it is not the government, but the people … who must retain control over the quantity and range of debate on public issues in a political campaign."[139] Recorded on the face of the opinion itself, that reasoning suggests that *Buckley*'s use of the market metaphor was not intended as a recipe for plutocracy.

But why was the Court engaged in such a theoretical discussion about the kind of society and free speech system the Constitution protects? That discussion came in response to the government interests behind campaign finance reform. The Court was scrutinizing those interests so closely because it had already found that limits on money in politics infringed on the First Amendment right to free political speech. And that determination did entail a recipe for plutocracy: political expenditures were political speech; indeed, money was speech itself.

Buckley approached that equivalency as if it were a matter of necessity, an inevitable concession to the times: "virtually every means of communicating ideas in today's mass society requires the expenditure of money."[140] Accordingly, the Court reasoned that congressional limits on monetary expenditures reduced the "number of issues discussed, the depth of their exploration, and the size of the audience reached."[141] Forestalling discussion about civic versus economic means for spreading ideas, and denying the distinctions between conduct and property, on the one hand, and speech on the other, the Court revealed its unwillingness to confront the inequities of the emerging neoliberal era. "[T]his Court has never suggested that the dependence of a communication on the expenditure of money … reduce[s] the exacting scrutiny required by the First Amendment,"[142] it wrote.

Political spending became First Amendment free speech, just as freedom of contract had become Fifth and Fourteenth Amendment liberty in the

[138] *Id.* at 45 n. 55.
[139] *Id.* at 57.
[140] *Id.* at 19.
[141] *Id.*
[142] *Id.* at 16 (emphasis removed).

Lochner era. Both transformations triggered rigorous scrutiny. But where was the modern-day equivalent of *West Coast Hotel*? Were all citizens in our democracy really free and equal, to paraphrase *Adkins*, on account of their right to obtain from candidates, parties, and officeholders the best terms they can as the result of private bargaining?[143] Or, to paraphrase *West Coast Hotel*, was FECA better understood as a recognition of the domination of citizens in an unequal position with respect to political bargaining power, and therefore relatively powerless to secure participation, candidates, laws, and policies that would pursue their interests?[144] *Buckley* could have interpreted political spending as a qualified right, not a nearly absolute one (subject only to concerns over *quid pro quo* corruption). The Court could have declared that the large economic transactions fueling speech were property, conduct, or liberty in social organization, all of which would be properly subject to reasonable regulations and prohibitions in the public interest. But instead, *Buckley* resurrected *Lochner* in even more dangerous terrain: the political system itself.

A number of notable scholars, including John Rawls, observed the parallel between *Lochner* and *Buckley*,[145] but nobody writing prior to the Roberts Court had seen the half of it.

2. Well beyond *Lochner*: Plutocracy Itself

In 2014, part of *Buckley* was finally overruled and its paradigm was explicitly corrected. In *McCutcheon v. Federal Election Commission*,[146] the Roberts Court struck down FECA's aggregate contribution limits, which had been preserved by *Buckley*. As of 2014, each individual campaign donor could contribute no more than $123,200 to candidates and committees per two-year election cycle.[147] Even adhering to the other limits binding upon individual donors, each individual could only give the maximum amounts for so long before running up against the aggregate two-year limits of $48,600 to federal candidates and $74,600 to other political committees.[148] On its way

[143] *See* Adkins v. Children's Hosp., 261 U.S. 525, 545 (1923).

[144] *See* West Coast Hotel v. Parrish, 300 U.S. 379, 399 (1937).

[145] *See, e.g.*, Rawls, Political Liberalism, *supra* note 113, at 362; Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 Colum. L. Rev. 1390, 1398 (1994); Kathleen M. Sullivan, *Discrimination, Distribution and Free Speech*, 37 Ariz. L. Rev. 439, 440 (1995); James E. Fleming, *Securing Deliberative Democracy*, 72 Fordham L. Rev. 1435, 1455 (2004).

[146] McCutcheon v. FEC, 134 S. Ct. 1434 (2014).

[147] *See id.*

[148] *Id.* at 1442. As of 2014, those individual limits were $2,600 per candidate per cycle, $32,400 per year to a national party committee, $10,000 to a state or local party committee, and $5,000 to a political action committee. *Id.*

to declaring aggregate limits unconstitutional, the Court removed *Buckley*'s stipulation about democratic responsiveness.

Recall that *Buckley* and *Roth* posited that the unfettered exchange of ideas served to produce the political and social changes desired by the people.[149] The *McCutcheon* dissenters, led by Justice Stephen Breyer, reminded the majority of precedent to this effect. Quoting a 1931 case, the dissenters tied "the opportunity for free political discussion to the end that government may be responsive to the will of the people."[150] In their view, "the First Amendment advances not only the individual's right…but also the public's interest in preserving a democratic order in which collective speech matters."[151]

The majority condemned the dissenting opinion's promotion of democratic responsiveness and the public interest. Framing the dissenters' goal as "a government where laws reflect the very thoughts, views, ideas, and sentiments [of the people]," [152] the majority concluded 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."[153] Those reasons included that "the will of the majority…can include laws that restrict free speech" and that the "whole point of the First Amendment is to afford individuals protection against such infringements."[154] The Court ascribed to the First Amendment the purpose of "putting the decision as to what views shall be voiced into the hands of each of us."[155]

Buckley had applauded a similar notion—that our "free society" required individuals and associations, not the government, to determine the course of the debate.[156] But *Buckley* had stipulated that political spending would be correlated with public opinion. Therefore, a free market for speech (or spending) could still be justified in terms of responsive government and the public good. Even prior to eliminating those justifications in *McCutcheon*, the Roberts Court had disagreed with *Buckley* on the relevance of a correlation between money raised or spent and popular support.

In the 2010 case *Citizens United v. Federal Election Commission*,[157] the Court struck down a prohibition on corporate general treasury spending in the weeks leading up to an election. Justice Anthony Kennedy's majority opinion

[149] *See supra* note 120 and accompanying text.
[150] *Id.* at 1467 (Breyer, J., dissenting) (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)).
[151] *Id.*
[152] *Id.* at 1449.
[153] *Id.*
[154] *Id.*
[155] *Id.* at 1448.
[156] *See supra* note 139 and accompanying text.
[157] Citizens United v. FEC, 558 U.S. 310 (2010).

declared: "It is irrelevant for First Amendment purposes that corporate funds may 'have little or no correlation to the public's support for the corporation's political ideas.'"[158] "All speakers," the Court announced, "use money amassed from the economic market-place"[159] and "[m]any persons can trace their funds to corporations, if not in the form of donations, then in the form of dividends, interest, or salary."[160] With these words, the Court admitted that its self-styled political marketplace operated through the economic marketplace, importing uneven outcomes in dividends, interests, and salaries into the political sphere. *McCutcheon's* elimination of the democratic purposes behind the market metaphor dovetails with this portion of *Citizens United*.

A profound question arises in light of these parts of *Citizens United* and *McCutcheon*. As a matter of constitutional law, the free market for aggregate donations and expenditures is no longer justified in terms of producing the social and political changes desired by the people. Relatedly, any lack of correlation between political spending and public support is now irrelevant. What, then, is the Court's—and therefore the Constitution's—theory of democracy? How does it conceive of the intersection between money in politics, on the one hand, and political responsiveness and the public interest on the other?

Ever since Plato, representative government has been justified on the basis of civic virtue and dedication to the public interest.[161] Classical theory holds that when those crucial features are corrupted by wealth, oligarchy arises—government in the private interest, specifically the interests of the wealthy.[162] Oligarchy has been defined in different ways over time, but once the central role of concentrated wealth is made clear, oligarchy becomes synonymous with plutocracy.[163] The portions of the Roberts Court's reasoning examined thus far merely expose the country to the risk of plutocracy. They do not enshrine plutocracy within the Constitution. But if the Court were to go further and interpret the Constitution as protecting government responsiveness

[158] *Id.* at 351 (quoting Austin v. Mich. Chamber of Comm., 494 U.S. 652, 660 (1990)).

[159] *Id.*

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

[161] *See* William Doyle, Aristocracy: A Very Short Introduction 1 (2010).

[162] *Id.* (discussing Aristotle's view of oligarchy). *See also* Jeffrey A. Winters, Oligarchy 3–7 (2011) (defining oligarchy not just in terms of "a tiny subset of people exercising influence grossly out of proportion to their numbers," but also in terms of massive concentrations of personal wealth and the politics of "wealth defense"). The ancient Greeks understood oligarchy as a system of rule by the few, whose purpose was moneymaking. *See* David Edward Tabachnick & Toivo Koivukoski, *Preface: Understanding Oligarchy*, *in* On Oligarchy: Ancient Lessons for Global Politics ix (David Tabachnick & Toivo Koivukoski eds., 2011).

[163] Winters, *supra* note 162, at 1–26 (examining the conceptual confusion surrounding oligarchy).

to wealth, then systemic corruption would exist *de facto* and *de jure*. If plutocracy ruled the nation pursuant to law, rather than as a form of corruption or a constitutional gray area, it would be an official system of government, one ordained by the Constitution via its lawful interpreter.

The question is: What was the Roberts Court doing when it erased *Buckley*'s stipulations about democratic responsiveness and money in politics being correlated with public support? One possibility is that the Court was merely being honest and transparent about how *Buckley*'s stipulations were applied in practice. After all, those stipulations were mere formalities in *Buckley*, where expenditure limits fell and contribution limits were sustained only out of concern for *quid pro quo* corruption and its appearance. The other possibility is that the Court was gearing up for regime change, an ideological coup d'état to discredit democracy and justify plutocracy. The Roberts Court's reaction to the Rehnquist Court's expanded definition of corruption revealed the truth.

In the 1990 case *Austin v. Michigan Chamber of Commerce*,[164] the Rehnquist Court upheld the Michigan Campaign Finance Act, despite its prohibition on expenditures from corporate general treasury funds.[165] Justice Thurgood Marshall's majority opinion conceded that "the use of funds to support a political candidate is 'speech'" and that corporate status "does not remove … speech from the ambit of the First Amendment."[166] But then, the majority opinion validated a new compelling state interest, one quite separate from preventing *quid pro quo* corruption. It described the Michigan law as targeting a "different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[167] Here, in *Austin*, *Buckley*'s conclusory statement about the correlation between political spending and popular support became part of a compelling state interest—something to be ensured, not merely assumed. *Austin* did the same for *Buckley*'s cursory mention of "bringing about of political and social changes desired by the people."[168] Because of its lack of correlation with public support, corporate political spending promised to bring about the political and social changes desired by corporations and the wealthy, not those desired by the people. That is what made political expenditures from corporate general treasury funds "corrosive and distorting" of democracy.

[164] 494 U.S. 652 (1990).
[165] *See id.* at 655 (defining those expenditures).
[166] *Id.* at 657.
[167] *Id.* at 660.
[168] *See supra* note 120 and accompanying text.

This new type of corruption centered on the entanglement between the economic marketplace and the political marketplace in a nation where money is so unevenly distributed. In Justice Marshall's words, corporations may "use 'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'"[169] The Rehnquist Court expanded on this reasoning 13 years after *Austin* in *McConnell v. Federal Election Commission*. There the Court gave its blessing to Congress's interest in curbing "undue influence on an officeholder's judgment, and the appearance of such influence."[170] These cases bring to mind Reverend Beecher's description of plutocracy: "disproportioned political power" that "gives into the hands of a few the power of a whole state."[171] *Austin* and *McConnell* construed the new concentration of wealth that began in the 1970s as posing a mortal danger to democracy.

The Roberts Court's reason for striking down *Austin* and the related portion of *McConnell* was as elegant as it was mind-blowing: "*Austin* interferes with the 'open marketplace' of ideas protected by the First Amendment."[172] Unlike the Burger Court and the Rehnquist Court, the Roberts Court refused to tie the open marketplace to democratic responsiveness. But that was not all. In a series of interrelated statements, *Citizens United* consecrated a plutocratic version of political responsiveness. First, "The fact that speakers [employing corporate general treasury funds] may have influence over or access to elected officials does not mean that these officials are corrupt."[173] That narrowed the definition of corruption, ruling out *Austin*'s and *McConnell*'s historically grounded view to the contrary. Second, "Favoritism and influence are not … avoidable in representative politics."[174] Beyond normal and unavoidable, the Court construed political responsiveness to wealth as natural. "It is in *the nature* of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters *and contributors* who support those policies,"[175] opined the Court.

Justice Kennedy's majority opinion then converted these sad reflections on political life, indeed some of the very reasons for campaign finance reform in the first place, into a necessary *status quo*, a formal redefinition of democracy:

[169] *Id.* at 658–59 (quoting FEC v. Mass. Citizens for Life, 479 U.S. 238, 257 (1986)).
[170] 540 U.S. 93, 150 (2003).
[171] Beecher, *supra* note 17, at 381. Beecher's work provided some of the intellectual foundations for the abolition of slavery. Thurgood Marshall, meanwhile, was partly responsible for desegregation, having argued *Brown v. Board of Education*. It is hardly coincidental that both men offered meaningful opposition to the plutocracies of their respective eras.
[172] Citizens United v. FEC, 558 U.S. 310, 354 (2010).
[173] *Id.* at 359.
[174] *Id.*
[175] *Id.* (emphasis added).

> It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, *or 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.[176]

That was the third and final step. Democracy is now premised on responsiveness to the large donors and spenders, the sort who bring constitutional challenges to campaign finance regulations, that is.

After *Citizens United*'s constitutional protection of corporate general treasury expenditures, *McCutcheon v. Federal Election Commission* was the other paradigmatic case on big money.[177] Freeing individual donors to give millions of dollars in the aggregate, the majority opinion confirmed the official conversion of democracy into plutocracy:

> [G]overnment regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford. 'Ingratiation and access … are not corruption.' They embody a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns.[178]

In the context of *McCutcheon*'s facts, this passage refers to financial allies, financial constituents, and economic support. As such, it makes the Roberts Court's view perfectly clear: responsive governance now means responsiveness by officeholders and candidates to their financial contributors.

To ensure that this plutocratic design would not be disturbed, the Court insisted that corruption is only the "exchange of an official act for money."[179] The Court also reminded state and federal governments that equality objectives would not be tolerated:

> No matter how desirable it may seem, it is not an acceptable governmental objective to 'level the playing field,' or to 'level electoral opportunities,' or to 'equalize the financial resources of candidates.'[180]

This suggests that the *status quo*—this market-determined, inheritance-determined hierarchy of political influence according to wealth—has been constitutionally enshrined.

[176] *Id.* (emphasis added).
[177] 134 S. Ct. 1434 (2014).
[178] *Id.* at 1441 (quoting *Citizens United*, 558 U.S. at 360).
[179] *Id.* at 1441.
[180] *Id.* at 1450.

Additional proof of wealth's officially sanctioned role came in Justice Samuel Alito's majority opinion in the 2008 case *Davis v. Federal Election Commission*.[181] There, the Court struck down the Millionaires' Amendment, a provision of the Bipartisan Campaign Reform Act that helped candidates who ran against wealthy, self-financing opponents. The problem was the provision's function of leveling the power of wealth.[182] "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."[183] He went on to list candidates' strengths: "[s]ome are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name."[184] That was Justice Alito's exhaustive list. There was no mention of democratic strengths, only those that relate to wealth, fame from the entertainment industry, and family privilege. The amendment was held unconstitutional in its attempt "to reduce the natural advantage that wealthy individuals possess in campaigns for federal office."[185]

The following year, the Court struck down a powerful public financing system, Arizona's matching funds provision. In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, the Court reasoned that the system burdens the exercise of the "First Amendment right to make unlimited expenditures," because it enables one's opponents to raise more money.[186] From the perspective of a donor, spender, or privately financed candidate, that burden arises from his opponents' ability to use matching funds "to finance speech that counteract[s] and thus diminishe[s] the effectiveness of [his] own speech."[187] The resulting principle of constitutional law can be called optimal speech effectiveness, meaning that the government must not disrupt the natural, market-determined level of political power sanctified by *Davis*.[188] Access to lawmakers and elected office itself, plus influence over candidates and officeholders, now officially parallels pre-existing inequalities in wealth. In response to the matching funds law enacted by popular referendum, the

[181] 554 U.S. 724 (2008).
[182] *See id.* at 744–45.
[183] *Id.* at 742.
[184] *Id.*
[185] *Id.* at 741 (quoting Brief for Appellee at 33, Davis v. FEC, 554 U.S. 724 (2008)).
[186] Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 736 (2011).
[187] *Id.* (quoting Davis v. FEC, 554 U.S. 724, 736 (2008)).
[188] *See* Timothy K. Kuhner, *Consumer Sovereignty Trumps Popular Sovereignty: The Economic Explanation for Arizona Free Enterprise v. Bennett*, 46 Ind. L. Rev 603, 612–32 (2013) (elaborating a theory of optimal, market-determined speech effectiveness within *Arizona Free Enterprise*).

Supreme Court chastised the people of Arizona: "the whole point of the First Amendment is to protect speakers against unjustified government restrictions on speech, even when those restrictions reflect the will of the majority. When it comes to protected speech, the speaker is sovereign."[189]

Sovereignty is ultimate power and control: the King possesses it in a monarchy, the dictator in a dictatorship, God and the high religious authority in a theocracy, the people in a democracy, and the wealthy in a plutocracy. *Buckley*, *McCutcheon*, *Citizens United*, *Davis*, and *Arizona Free Enterprise* all enthrone well-financed candidates, wealthy candidates, big donors, big spenders, and corporations. Justice Elena Kagan, for instance, rightly described the law at issue in *Arizona Free Enterprise* as "designed to sever political candidates' dependence on large contributors … [and] ensure that their representatives serve the public, and not just the wealthy donors who helped put them in office."[190] In other words, the law sought to reinstate popular sovereignty. When the Supreme Court responds that the will of the majority is unconstitutional and speakers are sovereign it means—quite plainly on the facts of the case—that large donors and spenders and wealthy candidates are sovereign, and the public may not abolish that scheme.

That brings us back to the 1896 definition of plutocracy with which we began: "a form of government in which the supreme power is lodged in the hands of the wealthy classes."[191] The natural advantage and sovereignty of the wealthy adds the final touches to a political system in which money is considered speech, democracy is construed as an open market, corruption is limited to specific instances of bribery, and ingratiation, access, and influence on the basis of wealth have obtained constitutional protection and ideological justification from the highest court in the land.

IV. THE POTENTIAL OF THE PRESENT MOMENT

Plutocracy has come again to America. This time around, in its third incarnation, it features some important innovations, beginning with its scope. First, unlike the Slavery Plutocracy or the Industrial Plutocracy, the Global Plutocracy knows no boundaries. Neoliberalism, at base, is the subjugation of all republics—all governmental forms even—to global capital. While the slave trade was international and some other American economic interests waged an international struggle for increased profits in the nineteenth and twentieth

[189] *Ariz. Free Enter.*, 564 U.S. at 754.
[190] *Id.* at 784 (Kagan, J., dissenting).
[191] Willey, *supra* note 1, at 35.

centuries, today's plutocracy has a broader reach and a more coordinated, more sophisticated set of policy demands. And where standard global capitalism and international economic institutions have a harder time taking hold, as in Chinese state capitalism, Russian oligarchy, and the least developed parts of Africa and Asia, government by or for the wealthy nonetheless surfaces, albeit in more authoritarian and kleptocratic varieties.[192] U.S. campaign finance reformers may not acknowledge it, but they are engaged in a major front of the global struggle for democracy's survival.

Second, on that home front, plutocracy has won an unprecedented victory. The *Dred Scott* opinion validated slavery and the sovereignty of the white race. The Lochner era validated some essential components of the Gilded Age. Both cases legitimized domination and exploitation, but neither explicitly defended the plutocracy that demanded and sustained those injustices. Our era represents the first time in American history that the Supreme Court has made plutocracy the official system of government. Never before has constitutional law defined money as speech, corporations as political speakers entitled to full First Amendment protection, democracy as political responsiveness to a natural order of wealthy sovereigns, and corruption as limited to the exchange of an official act for money.

Third, the fundamentally misguided case law of our era has lasted longer than its historical counterparts. *Dred Scott* was good law for less than a decade. The Lochner era lasted for 40 years. The Court's current plutocratic era has already lasted longer. Thirty-eight years passed between *Buckley* (1976) and *McCutcheon* (2014), and now, four years later, there is no sign that the Supreme Court will have a change of heart. Americans must not only confront the Court's stance; we must also act on the assumption that it will not change anytime soon.

Still, the commonalities between our three homegrown plutocracies outweigh their differences. None of these three moments in history has really been democratic or even republican. Consider what has happened each time: Popular participation has been officially restricted or unofficially neutralized by allowing elites disproportionate political influence. Economic and political inequalities have skyrocketed. Officeholders have indeed been responsive, but mainly to their own interests and those of their most powerful constituents. Representation has been repurposed. Government itself has been repurposed, becoming a private institution for the realization of the private interest.

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

In light of these crushing differences and similarities, some hopelessness is inevitable. The entire progression of abolition, universal suffrage, and the civil rights movement came and went without making campaign finance reform a top priority. The New Deal, post-World War II era, and the Great Society also came and went without making campaign finance reform a top priority. The historical lesson can be easily misinterpreted in this way: the people insist on universal suffrage, bare bones civil rights, and a modest, minimum floor of economic regulations and social entitlements, but they will demand nothing more. In fact, they will sit back while regulations and entitlements are reversed and voting rights are gradually hollowed out.[193] Americans will remain content to exercise their freedoms within a political system that has been comprehensively tilted away from liberty, equality, self-government, and representation for all.

But an alternative interpretation is more faithful to history. Slavery and Gilded Age capitalism were more oppressive regimes than American plutocracy is today, and yet Americans defeated those tyrannical regimes. When progressive elements banded together, they tapped into massive popular energy. And because those movements succeeded each time, history suggests that popular energy is more powerful than any economic or political disfiguration. At the outset, progress depends on the people awakening to their own predicament and the political tradition to which they belong. That tradition is not one of domination, but one of overcoming domination—a tradition of political transcendence.

It took nearly two centuries to achieve universal suffrage without state-sponsored obstacles. That is the time that unfolded between the Revolutionary War and the enforcement of the Voting Rights Act and Civil Rights Act in the early 1970s. That long trajectory began by overthrowing a colonial government to arrive at self-governance by our own crop of property-owning white men. The American political trajectory then progressed through many stages, including the abolition of the property requirement, the abolition of slavery, African American suffrage, female suffrage, civil rights and voting rights legislation in the mid-1960s, and the enforcement of that legislation in the following decade. Of course each progressive struggle left something undone for subsequent generations of Americans, but most generations embraced the tasks that fell to them. That collaboration across time—that intergenerational struggle to vindicate the same fundamental values across changing circumstances—is the finest, most virtuous part of American history.

[193] *See, e.g.*, Jesse H. Rhodes, Ballot Blocked: The Political Erosion of the Voting Rights Act (2017).

It is not difficult to locate what the past has left undone for the present. The political deformation that smiled upon slavery, child labor, mass poverty, and political exclusion—the systematic corruption driving these injustices—has never been singled out for elimination. Plutocracy's recurrence shows that a crucial piece of the democratic architecture has yet to be completed. This categorical, structural flaw has prevented gains in equality and self-governance from taking root, century after century.

Worse still, new and improved systems of domination will keep arising until Americans finally rule out plutocracy as a matter of law and public values. What could be worse than the Global Plutocracy? Surely, a global kleptocracy backed by authoritarian populists and dictators.[194] But even the comparatively gentle, neoliberal plutocracy could be consolidated, and public values more deeply altered, to the point at which submission and revolution would become the only viable options.

We cannot blame those who won the Revolutionary War, won the Civil War, redesigned the Senate, and achieved universal suffrage for failing to complete an effective regulatory structure for money in politics. Nor can we blame those who recovered from the Great Depression, created entitlements and restructured the economic system, defeated global fascism, and mounted a civil rights movement against disenfranchisement, segregation, and discrimination. They completed the biggest and costliest steps of the American journey.

Besides watching over and protecting the gains they made, those two and a half centuries' worth of committed Americans left us a monumental task. If we could only identify with them, see the world through the values we claim to share with them, and merge our public lives with theirs, then we might become protagonists in that one great American trajectory and guide self-governance to its next stage. That would prove the historical rule in full: that it is not just plutocracy, but also a triumphant progressive movement that is reborn time and time again.

In this third plutocratic cycle, progressive reformers are in a unique position. The momentous defeats suffered by the Slave Plutocracy and the Industrial Plutocracy stripped away the crude tools and value systems bound up with slavery, wholesale political exclusion, the unregulated workplace, and the unregulated economy. Reformers in the United States today do not have to penetrate the armor of slavery, partial suffrage, child labor, sweatshops, and corporate trusts in order to draw plutocracy's blood. Those institutions have been cast off and their racist, sexist, and classist justifications are finally wearing

[194] *See* Timothy K. Kuhner, *American Kleptocracy*, 28 King's L.J. 201 (2017); Chayes, *supra* note 192.

thin.[195] Government by and for the wealthy now steps naked into the light, out in the open at last. Plutocracy is especially vulnerable—in fact, for the first time in American history, the people are in a position to abolish it. That is the ultimate potential of campaign finance reform today: to fix democracy's greatest remaining structural flaw and end the vicious cycle of government in the private interest.

[195] Naturally, political inclusion requires more than just campaign finance reform. A partial list of other necessary measures would include: ending partisan redistricting, securing voting rights against retrenchment, facilitating voter registration, establishing a national holiday for voting in federal elections, abolishing (or reforming) the Electoral College, reforming sentencing laws to eliminate racial and class biases, and abolishing (or severely curtailing) felon disenfranchisement.