American Plutocracy

Timothy K Kuhner[1]

Wealth has always been a powerful force in American politics, but in the last decade its influence over democracy has been consolidated. Even as economic inequality rises to extremes not seen since the Industrial Revolution and the reach of money in politics harkens back to the Watergate Affair, the central ingredient of consolidation remains obscure: official, legal validation. It is one thing for wealth to control democracy as a matter of fact and quite another thing for it to achieve such power by right. The first, *de facto* sort of control is assailable on grounds of corruption, the violation of others' rights and the maintenance of democratic society. The second, *de jure* sort of control is invulnerable to such attacks and even commands the law as a weapon against its opponents. That successful assertion of legal claims and defenses converts would-be scandals into good faith exercises of rights, avoids public notice in some cases, and weakens public opposition in others. Society's most fundamental values take on new meanings as legal justifications for the new form of government take root. The protagonist in this transformational process turns out to be the US Supreme Court. Judicial legitimisation enables the rise of American plutocracy today and, accordingly, must be exposed.

The blooming of economic power within the political sphere is familiar, if not perennial. The natural enemy of concentrated wealth has long been seen as the power of ordinary people, as institutionalised by democracy itself. Defenders of economic privilege consistently seek legal restraints on popular influence over elections and lawmaking. Historically, those restraints were as tangible as the vote being confined to propertied, white males. Since the establishment of universal suffrage and the abolition of other tangible restraints, such as poll taxes, literacy tests and white only primaries, economic power has set its sights on subtler means of influencing elections and lawmaking. Avoiding obvious, coercive forms of political exclusion, these new means are proving subtle enough to avoid mass resistance but powerful enough to accomplish a similar degree of political exclusion. Foremost among these new means stands the financing of political campaigns, political parties, interest groups and outside political speech—'political finance' for short. For the last four decades, this has been the battlefield for control over democracy, and it is here that the Supreme Court has legitimised the political power of wealth.

Laying out the components of *government by and in the interests of the wealthy*, this essay reveals an ongoing process of regime change in the United States. Part I highlights the warning signs within political finance. Part II discusses groundbreaking studies that help demonstrate the relationship between political finance and plutocracy. Part III isolates plutocracy's constitutional blueprint and legal justifications. Part IV reflects on the growing constitutional divergence between the United States, Canada, and Europe.

---

[1] Associate Professor, Georgia State University College of Law; author of *Capitalism v. Democracy: Money in Politics and the Free Market Constitution* (Stanford Law Books, 2014). For capable editing and research assistance, the author thanks William Rooks and Mary Alice Jasperse. All websites accessed 8 March 2015.

I. THE PRIVATISATION OF DEMOCRACY AND OTHER SIGNS OF REGIME CHANGE

The general election of 2012 and midterm elections of 2014 smashed previous records for outside expenditures. This is due mostly to the rise of Super PACs and dark money groups, nominally independent political entities that collect unlimited donations from individuals and corporations, even from corporations' general treasury funds.[2] Dark money groups are not obligated to disclose their donors, whereas Super PACs are obligated to disclose but can generally delay disclosure until after elections have been decided.[3] No law prevents these opaque outside expenditure groups from flooding media markets in the final weeks or days of elections with advertisements targeting candidates by name, tipping the balance of information one way or another and leaving all but the best funded candidates without a chance to compete.

The rise of private investment in such advertisements during midterm elections has been brisk: $28 million in 2002, $70 million in 2006, $310 million in 2010 and $565 million in 2014.[4] That represents a 180% increase over the last four years, and a 2,017% increase in twelve years. Still, $565 million is only a record for midterm elections. Money in politics soars the highest during presidential election years. In 2012, outside spending towered at over $1 billion.[5]

Besides setting the agenda for which issues are to be debated and deciding how those issues are constructed and portrayed, outside spending targets particular candidates to influence electoral outcomes. A disproportionate amount of outside expenditures targets proponents of campaign finance reform. Those who would restrain private economic power are, naturally, thrashed by the very interests they desire to restrain. Take, for example, the outside spending against the co-sponsors of the DISCLOSE ACT[6] in the 2014 election cycle: $24 million against Senator Mark Udall, $20 million against Senator Kay Hagan, $19 million against Representative Bruce Braley and $13 million against Senator Mark Begich.[7] Not one of these members continues to serve in the US Congress.[8] These numbers recall the fate of Russ Feingold, a co-sponsor of the landmark Bipartisan Campaign Reform Act of 2001. After the Supreme Court struck down the part of the Act that restrained outside corporate expenditures, Feingold lost his Senate seat in an election in which 92% of the outside spending favored his opponent, a Republican businessman.[9]

---

[2] Kim Barker, 'Two Dark Money Groups Outspending All Super PACs Combined' (*Pro Publica*, 13 August 2012) <www.propublica.org/article/two-dark-money-groups-outspending-all-super-pacs-combined>.

[3] Lisa Rosenberg, '2014 Midterms: Transparency of Money in Politics Means Trust in Government, Trust in Citizens' (*Brookings*, 22 October 2014) <www.brookings.edu/blogs/fixgov/posts/2014/10/22-2014-midterms-transparency-money-in-politics-rosenberg>.

[4] Center for Responsive Politics, 'Total Outside Spending by Election Cycle, Excluding Party Committees' (*Opensecrets.org*) <www.opensecrets.org/outsidespending/cycle_tots.php>.

[5] *Ibid*.

[6] DISCLOSE Act, S 2516, HR 148, 113th Cong (2014).

[7] Center for Responsive Politics, '2014 Outside Spending, By Candidate' (*Opensecrets.org*) <www.opensecrets.org/outsidespending/summ.php?disp=C>.

[8] Library of Congress <www.congress.gov/members>.

[9] Robert Barnes, 'In Wis., Feingold Feels Impact of Court Ruling' *Washington Post* (Washington, 1 November 2010) <www.washingtonpost.com/wp-

A tiny group of wealthy donors fuels outside expenditures. Take two of the largest Super PACs operating in the 2014 elections: the Senate Majority PAC (liberal) and American Crossroads (conservative). Two-thirds of the $90 million that they raised came in donations of $500,000 or more, meaning that less than 200 donors provided the great majority of funds.[10] The same can be said of the $1.1 billion in outside spending during the 2012 elections: the top 200 donors to outside expenditure groups supplied approximately 80% of all the money.[11] Those 200 people represent .000084% of the adult population, meaning that the outside speech environment was shaped (if not controlled) by an unfathomably small portion of Americans.

Turning from outside advertisements to the funding of campaigns, one finds similar dynamics of concentrated influence and rising costs. While not as small as the percentage of Americans funding Super PACs, the great majority of campaign donations since 1992 have been controlled by less than one percent of the US population.[12] In the 2014 elections, just .3% of the adult population supplied 66% of the sum total of cash.[13] The rise in total campaign donations has been striking, albeit not as extreme as the rise in outside expenditures. Between 2000 and 2012, for example, the total amount raised by both presidential finalists rose from $325 million (Bush versus Gore) to $2 billion (Romney versus Obama), an increase of over 600%.[14] The direction of change was constant, with each presidential race significantly surpassing the cost of the one before it.

By 2012, the average price tags of political office had reached alarming levels: $1 billion for the presidency, over $10.4 million for a senate seat and $1.6 million for a seat in the House of Representatives.[15] And again, even in the election years with the deepest

---

dyn/content/article/2010/10/31/AR2010103104314_pf.html>; Washington Post Staff, 'Wisconsin Election Results 2010' *Washington Post* (Washington, 2 Nov. 2010) < http://www.washingtonpost.com/wp-dyn/content/article/2010/11/02/AR2010110207859.html>.

[10] Carrie Levine, 'Surprise! No. 1 super PAC backs Democrats' (*The Center for Public Integrity*, 3 November 2014) <www.publicintegrity.org/2014/11/03/16150/surprise-no-1-super-pac-backs-democrats>.

[11] Meredith McGehee, 'Only a Tiny Fraction of Americans Give Significantly to Campaigns' (*The Campaign Legal Center*, 18 October 2012) <www.clcblog.org/index .php?option=com_content&view=article&id=482:only-a-tiny-fraction-of-americans-give -significantly-to-campaigns>.

[12] On 2014, Center for Responsive Politics, 'Donor Demographics' (*Opensecrets.org*) <www.opensecrets.org/overview/donordemographics.php> For elections between 1992 and 2012, <www.opensecrets.org/bigpicture/donordemographics.php?cycle=2012&filter=A>. See also Lawrence Lessig, 'What an Originalist Would Understand "Corruption" to Mean' (2014) 102 *California Law Rev* 1, 5; Jamin Raskin & John Bonifaz, 'Equal Protection and the Wealth Primary' (1993) 11 *Yale Law & Policy Review* 273, 294; Lee Drutman, 'On FIRE: How the Finance, Insurance and Real Estate Sector Drove the Growth of the Political One Percent of the One Percent' (*Sunlight Foundation* 26 January 2012) <http://sunlightfoundation.com/blog/2012/01/26/on-fire-how-the-finance-insurance-and-real-estate-sector-drove-the-growth-of-the-political-one-percent-of-the-one-percent/>.

[13] See Center for Responsive Politics, 'Donor Demographics' (*Opensecrets.org*) <www.opensecrets.org/overview/donordemographics.php>.

[14] See Jonathan D Salant, 'Spending Doubled as Obama Led Billion-Dollar Campaign (Update 1),' (*Bloomberg.com*, 27 December 2008) <www.bloomberg.com/apps/news?pid=newsarchi ve&sid=anLDS9WWPQW8> (providing numbers for total spending and individual candidate spending in the 2008 election); Charles Lewis, *The Buying of the President* (Avon Books, 1996) 4

[15] Sarah Wheaton, 'How Much Does a House Seat Cost?' (*The Caucus: Pol. and Gov't Blog of the New York Times*, 9 July 2013) <http://thecaucus.blogs.nytimes.com/2013/07/09/how-much-does-a-house-seat-cost/?_r=0>; Stephen Braun and Jack Gillum, '2012 Presidential Election Cost Hits $2 Billion Mark' (*Huffington Post Politics*, 6 December 2012)

donor base, less than .6% of all citizens of voting age supplies most of the money—that would be just 1.5 million out of 270 million American adults today. In the 2014 elections, however, at a rate of .3%, just over 500,000 citizens provided the great majority of funds.

In total, these statistics convey the essential fact of political finance in the United States: privatisation. Public financing for campaigns and parties is rare and insufficient. There are no overall limits on outside expenditures or campaign expenditures, and the existing limits on campaign contributions have proved incapable of preventing an arms race that empowers wealthy candidates, donors and spenders. The predictable consequences of a privatised system of political finance play out in colorful anecdotes, election after election. Compare, for example, the over two to one ratio of fundraisers to civic rallies in Obama's re-election campaign (221 to 101).[16] Or consider that after Obama's 2008 campaign, '[n]early 80 percent of those who collected more than $500,000 for Obama took 'key administration posts,' as defined by the White House.'[17] Such rewards reflect the importance of political cash to electoral success, a fact also reflected in a leaked memo from Senate Candidate Michelle Nunn's campaign. It advised her to spend 2,201 of the available 2,500 campaign hours in 2014 raising money.[18] That anecdote is accompanied by many others, suggesting an overall figure of roughly 50% of total federal officeholder time being spent on fundraising, not legislative, deliberative, or overall constituent-based activities.[19] Starved for campaign funds, officeholders enter into situations they might otherwise avoid, such as giving speeches ghostwritten by lobbyists and passing bills drafted by corporate CEOs.[20]

Scandals and the systemic design of privatisation have all impressed themselves upon the American public. According to an often-cited survey, 77% of Americans say that 'elected officials in Washington are mostly influenced by the pressure they receive on issues from major campaign contributors'; 76% believe that 'Congress is largely owned by special-interest groups'; 71% agree that '[m]oney makes elected officials not care what average citizens think'; and only 19% agree that officials are most influenced by the 'best interests of the country.'[21] These percentages were confirmed again in

---

<www.huffingtonpost.com/2012/12/06/2012-presidential-election-cost_n_2254138.html>.

[16] 221 fundraisers as compared to 101 rallies.

[17] Jake Tapper and Kirit Radia, 'Report: Nearly 80% of Obama's Top Bundlers Given 'Key Administration Posts,'' (*ABC News*, 15 June 2011) <http://abcnews.go.com/blogs/ politics/2011/06/report-nearly-80–of-obamas-top-bundlers-given-key-administration-posts/>.

[18] Paul Blumenthal, 'Leaked Memo Tells Senate Candidate To Spend 80 Percent Of Her Time Raising Money' (*Huff Post Pol.*, 28 July 2014) <www.huffingtonpost.com/2014/07/28/michelle-nunn-fundraising_n_5628018.html>.

[19] Jonathan Shaw, 'A Radical Fix for the Republic' (*Harv. Mag.,* July–August 2012) <http://harvardmagazine.com/2012/07/a-radical-fix-for-the-republic> ('Members of Congress now spend between 30 and 70% of their time raising money rather than deliberating as they were elected to do.').

[20] See Editorial, 'The Big Money Behind State Laws' (*The New York Times*, 12 February 2012) discussing ALEC's political agenda. The killing of Trayvon Martin has recently brought ALEC's model legislation on deadly force to light. That legislation was adopted almost word for word in Florida. Paul Krugman, 'Lobbyists, Guns, and Money' (*The New York Times*, 26 March 2012), <www.nytimes.com/2012/03/26/opinion/krugman-lobbyists -guns-and-money.html?partner=rssnyt&emc=rss>. On ghostwritten speeches, see Robert Pear, 'In House Many Spoke with One Voice: Lobbyists' (*The New York Times*, 15 November 2009) <www.nytimes.com/2009/11/15/us/politics/15health.html>.

[21] Clyde Wilcox, *Contributing as Political Participation*, *in* Gerald C Lubenow, *A User's Guide to Campaign Finance Reform* (Rowman & Littlefield Publishers, 2001) 116–119, 115.

2013.[22]

Corporate political spending also garners widespread opposition: 85% of Democrats, 76% of Republicans and 81% of independents polled oppose corporate political expenditures from general treasury funds.[23] Public Citizen, Common Cause, Free Speech for People and other groups brought 3.2 million signatures to Congress, proposing a constitutional amendment to eliminate corporate election spending.[24] By January of 2013, approximately 350 municipalities, 11 states, numerous members of Congress and even the president had joined the call for an amendment in one form or another.[25] Millions of voters registered their agreement on ballot questions to the same effect. Attempting to gauge overall popular support, a small nationwide poll found that 87% of Democrats, 82% of Independents and 68% of Republicans favor an amendment to limit corporate electioneering.[26]

Despite their widespread rejection of money in politics, Americans do not generally make it a priority, much less take to the streets to force a response to the problem. Campaign finance reform generally ranks among the least salient of the top twenty issues on the public agenda, behind taxes, healthcare, the environment, and the economy.[27] That low saliency clashes with the public's overwhelming conviction that Congress is owned by special interest groups. How do Americans expect to get their way on the issues they care about most if elected officials are mostly influenced by campaign donors? The latest studies on inequality may cause that question to crystallise.

II. BREAKING NEWS FROM 2014: THERE OUGHT TO BE A REVOLUTION

Thomas Piketty's *Capital in the 21st Century* has alerted the world that the United States is the most economically unequal of all advanced democracies.[28] Piketty's native France and most other capitalist democracies have also abandoned *égalité*, but the United States has done so with the greatest enthusiasm.[29] The rate of return on capital has

---

[22] See Michael Beckel, 'Don't Support "Campaign Finance Reform?" Try Combating "Corruption"' (*The Center for Public Integrity*, 3 December 2013) <www.publicintegrity.org/2013/12/03/13943/don-t-support-campaign-finance-reform-try-combating-corruption> ('vast majorities of poll respondents thought many groups wield too much influence over the country's government, including "labor unions" (61.4 percent), "special interests" (76.5 percent), "super PACs" (77 percent), "the wealthiest 1 percent" (77.2 percent), "Wall Street and corporations" (81.2 percent), "lobbyists" (82.9 percent) and "Big Money" (88.3 percent).').

[23] Dan Eggen, 'Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing' (*Washington Post*, 17 February 2010) <www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151_pf.html>.

[24] John Nichols, 'The Senate Tried to Overturn 'Citizens United' Today. Guess What Stopped Them?' (*The Nation*, 11 September 2014) <www.thenation.com/blog/181590/senate-tried-overturn-citizens-united-today-guess-what-stopped-them>.

[25] Pearl Korn, 'A Key Issue President Obama Should Include in the S.O.T.U.' (*Huff Post Pol.*, 18 March 2013) <www.huffingtonpost.com/pearl-korn/obama-state-of-union_b_2481740.html>.

[26] Press Release, 'Support for Amending the Constitution to Overturn Citizens United is Now One-Third of the Way There' (*US PIRG*, 25 September 2013) <www.uspirg.org/news/usp/support-amending-constitution-overturn-citizens-united-now-one-third-way-there>.

[27] See eg David W Moore, 'Widespread Public Support for Campaign Finance Reform' (*Gallup News Service*, 20 March 2001) <www.gallup.com/poll/1885/widespread-public-support-campaign-finance-reform.aspx>.

[28] Thomas Piketty, *Capital in the Twenty-First Century* (Belknap Press, 2014), Kindle Edition.

[29] See *Capital* at Kindle Location 4422–32.

outpaced overall economic growth (including income from labor) to such an extent that, by 2010, the top 10% of US wealth holders owned 70% of all national wealth.[30] If the bottom half of the nation had succeeded in claiming for itself a good part of the remaining 30% of national wealth, things would not be quite so lopsided. But instead, Piketty's data expose the reality of 150 million Americans—the poorest 50%—owning just 2% of national wealth.[31] Beyond conditions favorable to returns on capital, Piketty also cites 'an unprecedented explosion of very elevated incomes from labor, a veritable separation of the top managers of large firms from the rest of the population.'[32] Rising inequality in US wages is on course to set a worldwide record around 2030 when the 'top decile would then claim about 60 percent of national income, while the bottom half would get barely 15 percent.'[33] Such remarkable concentrations of wealth stem from unequal outcomes in capital and labor independently, as well as capital over labor comparatively. Searching for parallels between today's remarkable level of economic inequality and that of past eras, Piketty speculates that capitalism's present distributive outcomes invite violent revolution.[34] For a picture of more egalitarian times, one can look back to feudalism.

The second landmark study suggests a present-day parallel to that precise era when kings and nobles controlled politics and ordinary people were powerless. From a statistical analysis of policy outcomes across nearly 2,000 issue areas, Martin Gilens and Benjamin Page conclude that *the kings and nobles of our capitalist age* control politics and ordinary people are powerless: 'Economic elites and organised groups representing business interests have substantial independent impacts on US government policy, while mass-based interest groups and average citizens have little or no independent influence.'[35] This confirms earlier findings by Gilens suggesting that patterns of government responsiveness 'often corresponded more closely to a plutocracy than to a democracy.'[36] Gilens' prior study also showed that 'when preferences across income groups diverged, only the most affluent appeared to influence policy outcomes' and that such 'representational inequality was spread widely across policy domains, with a strong tilt toward high-income Americans on economic issues.'[37] An equally remarkable study by Larry Bartels reached a similarly stark conclusion.[38] The take-away is clear: political inequality is becoming severe, perhaps as severe as economic inequality. As Gilens and

---

[30] *Ibid*, Kindle Location 4422–32.
[31] *Ibid*, Kindle Location 555–60;. See also Emmanuel Saez, 'Striking it Richer, The Evolution of Top Incomes in the United States (Updated with 2012 Preliminary Estimates)' 3 September 2013 <http://eml.berkeley.edu/~saez/saez-UStopincomes-2012.pdf>.
[32] *Ibid*, Kindle Location 522–26.
[33] *Ibid*, Kindle Location 4552–58.
[34] *Ibid*, Kindle Loction 4536–58.
[35] Martin Gilens and Benjamin I Page, 'Testing Theories of American Politics' (2014) 12(3) *Perspectives on Politics* 564 <http://scholar.princeton.edu/sites/default/files/mgilens/files/gilens_and_page_2014_-testing_theories_of_american_politics.doc.pdf>.
[36] Martin Gilens, *Affluence & Influence: Economic Inequality and Political Power in America* (Princeton University Press, 2012) 234.
[37] *Ibid*, 234.
[38] Larry M Bartels, *Unequal Democracy* (Princeton University Press, 2008) 254 (From a longitudinal analysis of senators' votes on legislation on the minimum wage, civil rights, government spending and abortion, Bartels concluded that 'the views of constituents in the bottom third of the income distribution received no weight at all in the voting decisions of their senators.').

Page put it, 'America's claims to being a democratic society are seriously threatened' because 'policymaking is dominated by powerful business organisations and a small number of affluent Americans.'[39]

Reading Piketty together with Gilens and Page, one wonders, How have economic elites and business interest groups achieved conditions so favorable to their interests? Piketty notes that the tremendous inequality seen throughout capitalist democracies (especially the United States) is neither natural nor inevitable. Capitalism has not produced such unequal outcomes in all places at all times. He insists that such extreme and unsustainable levels of inequality as seen in the United States are the product of laws and policies that favor capital over labor and, within the labor market, that create a steeper pyramid with the superstars and super-managers on top earning a greater and greater percentage of the total pie. One need only examine contested outcomes on policy issues involving unions, minimum wages and benefits, CEO pay, bail outs, financial instruments, taxation, rent control, corporate consolidation, entitlements, health care, workplace and product safety, tort law, public education, intellectual property and environmental protection to get a picture of the ways in which the rules of the game could be more favorable to average Americans, communities and small businesses.

Gilens and Page cite studies explaining how and why such issues would be resolved in favor of the wealthy:

> [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. . . . [T]he evidence clearly indicates that most interest groups and lobbyists represent business firms or professionals. Relatively few represent the poor or even the economic interests of ordinary workers, particularly now that the US labor movement has become so weak.[40]

These methods mesh with the data discussed in Part I, above. They are among the inevitable features of a privatised, largely unregulated regime of political finance. Gilens and Page's singular contribution comes in proving that these features actually influence policy.[41]

All of the above has devastating implications. Piketty's findings reveal a record-setting level of economic inequality, which makes Gilens and Page's findings more worrisome than they would otherwise be. One thing is political inequality on the basis of wealth in a relatively equal society. Another thing is what we in fact have: political inequality on the basis of wealth in a vastly unequal society. In the former, hypothetical

---

[39] Daniel P Smith, 'Does Democracy Still Work?' (*Weinberg Magazine*, Winter 2014) <www.weinberg.northwestern.edu/discover/weinberg-magazine/fall-winter-2014/does-democracy-still-work.html>.

[40] Martin Gilens and Benjamin I Page, 'Testing Theories of American Politics' (2014) 12(3) *Perspectives on Politics*, 567.

[41] *Ibid*, 568:

> Prior to the availability of the data set that we analyze here, no one we are aware of has succeeded at assessing interest-group influence over a comprehensive set of issues, while taking into account the impact of either the public at large or economic elites—let alone analyzing all three types of potential influences simultaneously.

scenario, a variety of interest groups representing different segments of the population could compete for law and policy in a relatively pluralistic, quasi-representative fashion. A great percentage of the population could afford to pay for such political influence. In the latter, real life scenario, political influence on the basis of wealth allows a tiny minority to hijack national policy for their own benefit and against the interests of the vast majority of the population. That vast majority cannot afford to compete in the privatised realm of political influence.

But this static reading of how the studies interact only touches the surface. The results do not suggest merely that great levels of economic inequality have been intentionally procured through the disproportionate political influence of the very rich, or merely that, in light of high economic inequality, political influence on the basis of wealth has become a more unequal proposition than it was in the preceding decades. The results also suggest an ever-growing synergy. The privatisation of democracy enables the wealthy to procure favorable laws and policies. This increases their income from labor and capital. As their relative share of national wealth increases, their grip over democracy tightens. That brings additional favorable laws and policies, which further increase their economic holdings. Together, economic inequality and political inequality on the basis of wealth form a feedback loop. There is no logical endpoint to the repetition of this cycle other than the breakdown of capitalism, the breakdown of democracy, or both.

This 'end of days' scenario is what most interests Piketty. For him, the ultimate question short of reform is that of revolution versus indoctrination: Will the public acquiesce to current political and economic arrangements, sitting back while inequality continues to rise, or will the public rise up against those arrangements? Noting that 'such a high degree of concentration [of capital] is already a source of powerful political tensions, which are often difficult to reconcile with universal suffrage,'[42] Piketty considers it 'hard to imagine that those at the bottom will accept the situation permanently.'[43] He states that the sustainability of today's extreme levels of inequality 'depends not only on the effectiveness of the repressive apparatus but also, and perhaps primarily, on the effectiveness of the apparatus of justification.'[44]

But what, exactly, requires justification? Piketty posits that today's high levels of inequality would be impossible without laws and policies favoring the rich. Gilens, Page and Bartels show that such laws and policies emerge as a function of government accountability to wealthy elites over and above average citizens. Therefore, Piketty's analysis speaks to the need to justify political inequality on the basis of wealth. If that cannot be justified, then today's levels of economic inequality cannot be justified either. Whether Piketty intends it or not, this is how we must read his dogged emphasis: 'I want to insist on this point: the key issue is the justification of inequalities rather than their magnitude as such.'[45]

III. INDOCTRINATION, NOT REVOLUTION

Remarkably enough, the latest wave of official justifications for political power on the basis of wealth emerged over almost exactly the same time period as Piketty's data

[42] Piketty, *Capital*, Kindle Location 4536–47.
[43] *Ibid*, Kindle Location 4536–47.
[44] *Ibid*, Kindle Location 4552–58.
[45] *Ibid*, Kindle Location 4558–62.

set (1970–2010). Between 1976 and 2014, the United States Supreme Court struck down a host of campaign finance reforms, thus removing obstacles to the conversion of economic power into political power. Economic inequality rose at a spectacular rate over the same time period. In that line of case law, the justifications sought by Piketty shine through, as does the mechanism through which government becomes primarily accountable to wealthy elites.

A. The Concentration of Political Power in a Wealthy Elite. The temporal unison was almost too great to bear when three documents were published in the same two-week period of 2014. April 2: the US Supreme Court's opinion in *McCutcheon v FEC*;[46] April 9: the advance copy of Gilens and Page's study;[47] and April 15: the English version of Piketty's *Capital*.[48] Anyone contemplating Piketty's inquiry into the justification for inequality, or Gilens and Page's evidence that America had become an oligarchy ruled by wealth could turn in real time to gauge the Supreme Court's role.

The following quotations were taken from the majority opinion in *McCutcheon*:

[1] '[T]he First Amendment safeguards an individual's right to participate in the public debate through political expression and political association. When an individual contributes money to a candidate, he exercises both of those rights.

. . .

[2] [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.

. . .

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

This reorientation of representative government to suit the donor-candidate relationship stands as the culmination of prior case law. Similarly, Piketty, Gilens and Page describe the culmination of many years of data. The direction of change on all fronts is consistent: rising economic inequality, rising political inequality on the basis of wealth, and increasingly audacious judicial opinions that protect that form of political inequality from

[46] As shown on the first page of the opinion itself. *McCutcheon v Fed. Election Comm'n*, ___ US ___, 134 S Ct 1434 (2014) <www.supremecourt.gov/opinions/13pdf/12-536_e1pf.pdf>.

[47] Sahil Kapur, 'Scholar Behind Viral 'Oligarchy' Study Tells You What It Means' (*Talking Points Memo*, 22 April 2014) <http://talkingpointsmemo.com/dc/princeton-scholar-demise-of-democracy-america-tpm-interview>.

[48] See <*www.amazon.com*> (query 'Piketty' and 'capital') (reflecting publication date of 15 April 2014).

regulation. And somehow, the results of these interconnected groundswells were made known almost simultaneously.

Of these three contemporaneous phenomena, the Court's work is unique in consciously adjusting the levers of power. Through judicial review, the Court has protected and expanded openings for wealth into the political sphere, pathways through which economic advantages can reliably obtain political advantages. The gradual expansion of those pathways helps to explain how wealthy elites secure for themselves greater political influence and an ever-greater margin of prosperity. *McCutcheon* illustrates the point. The Court's remarks (quoted above) were given as the reasoning for its decision to strike down a $123,200 limit on each individual's campaign donations per two-year election cycle.[49] With that limit in place, each individual donor's financial reach was meaningfully restricted. Each donor could only give the maximum amounts—$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—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.[50] Declaring aggregate limits unconstitutional, the Court ushered in a new era of multi-million dollar donors, sums of the sort not seen since Watergate. As Justice Breyer's dissenting opinion put it, 'without an aggregate limit, the law will permit a wealthy individual to write a check, over a two–year election cycle, for $3.6 million—all to benefit his political party and its candidates.'[51]

The effect of this holding, quite plainly, will be to increase political inequality on the basis of wealth by allowing the wealthiest of citizens to employ a greater portion of their economic power within the political sphere. In all elections between 1992 and 2014, an average of just .34% of the total adult population gave donations of $200 or more.[52] Those $200-plus donations accounted for approximately two thirds of all money donated to candidates, parties, or party committees, nation-wide in the 2010, 2012 and 2014 elections.[53] In sum, less than .5% of the adult population has long controlled most of the money upon which candidates and political parties depend.

McCutcheon gives wealthy individuals the ability to increase an already remarkable degree of inequality in political finance. The fact that just .34% of the US adult population provided donations of $200 or more in all elections from 1992 to 2014 proves that candidates and parties have long been dependent on a miniscule portion of the electorate for the majority of their funds. While two-thirds is already a tremendous portion of overall funds, *McCutcheon* would enable that percentage to rise steeply if super-rich donors felt it worth their while to invest greater sums—up to twenty-nine times more than the previous aggregate limit to be precise, an additional $3.47 million allowed per individual donor over a two-year period.

[49] *McCutcheon*, 134 S Ct 1434, 1442 (2013).
[50] *Ibid*, 1442–43.
[51] *Ibid*, 1442–43, 1473 (Breyer, J., dissenting). Justice Breyer was joined by Justices Ginsburg, Sotomayor and Kagan. *Ibid*, 1442–43.
[52] In 2012, 63% of total funds came from such donations; 62% in 2010. On 2014, see <www.opensecrets.org/overview/donordemographics.php>. For elections between 1992 and 2012, see <www.opensecrets.org/bigpicture/donordemographics.php?cycle=2012&filter=A>.
[53] *Ibid*.

Having established that the great majority of the sum total of political donations comes from a tiny 'donor class' and that its power may increase post *McCutcheon*, the question becomes, To what extent are the members of that class representative of the overall population? Although the data on this point are sporadic and sometimes dated, it is virtually certain that donors are unrepresentative of the overall population. A major study reports that donors are 99% white, mostly male, and generally over 46 years of age.[54] They are also more highly educated than the average American. Even among occasional donors, 80% went to college, and 64% of the most active donors completed at least some postgraduate education.[55]

More interestingly for questions of plutocracy, donors have much higher incomes than most Americans. Clyde Wilcox reports that it is actually the wealthiest of the wealthy—those in the top 5% of the total population—who give drastically more and drastically more often to candidates and political parties. This group gives seven times more frequently than the bottom two-thirds of the population combined.[56] Income level has been called 'the best single predictor of giving in politics.' In the 1998 congressional elections, for example, contributions of $200 or more accounted for 66% of all contributions made. Three-quarters of these contributions came from people who made at least $100,000 per year, and a majority of those characterised as the 'most active donors' made at least $500,000 per year.[57]

Analyzing American National Election Studies data, Wilcox has found that donors are not even representative of this small cross section of the population. They are not typical wealthy, college-educated white males of middling or advancing years. Donors' defining characteristic, striking even among the wealthy as a whole, appears to be their especially conservative views on economic issues. Wilcox concludes that 'donors are significantly more conservative than other wealthy and well-educated citizens on economic issues—guaranteed jobs, spending on social programs, affirmative action—but not on social issues.'[58]

The effects of *McCutcheon* must be understood in light of these findings. Election after election, just .34% of the voting-age population supplies the great majority of the donations in play. And this .34% of Americans is essentially a wealthy, ideologically unrepresentative group of white males who desire economic conditions favorable to their wealth. The Court held that the aggregate donation limit of $123,200 denied the plaintiff the 'ability to exercise his expressive and associational rights by contributing to someone who will advocate for his policy preferences.'[59] Those, on average, would be the policy preferences of that .34% of the population, a wealthy elite, which would naturally desire the sorts of laws and policies noted by Piketty. Meanwhile, that dynamic of government accountability to a wealthy elite is the precise phenomenon documented by Gilens and Page. By striking down a $123,200 donation limit in favor of one of approximately $3.6

[54] Clyde Wilcox, *Contributing as Political Participation*, *in* Gerald C Lubenow, *A User's Guide to Campaign Finance Reform* (Rowman & Littlefield Publishers, 2001) 116–119.
[55] *Ibid*.
[56] *Ibid*, 117–118.
[57] *Ibid*.
[58] *Ibid*, 116–19.
[59] *McCutcheon v Fed. Election Comm'n* ___ US ___, 134 S Ct 1434, 1448 (2014).

million, the Court has shown its willingness to aggravate the plutocratic trends exposed by these authors.

Four years earlier, the Court carried out the same policy within the area of outside political spending. *Citizens United v FEC* granted corporations a First Amendment right to unlimited political expenditures from their general treasury funds. [60] The scope of that right is so wide as to lend constitutional protection even to expenditures made in the days immediately prior to an election and even to fund political advertisements that mention candidates by name.[61] The rule challenged in *Citizens United* left corporations many means to make their views known.[62] Foreshadowing its aggressive stance in *McCutcheon*, the Court considered even this permissive regulatory scheme to be an infringement on the plaintiff corporation's First Amendment right to freedom of speech. This broad reading of the First Amendment has since allowed corporate spenders unlimited leeway to absorb (for some candidates) and increase (for others) one of the most expensive aspects of political campaigns: advertising. While *McCutcheon* permits million dollar checks to be written directly to candidates and parties (in the aggregate), *Citizens United* permits million dollar checks to be written from general treasury funds to support superPACs and dark money groups, or simply to pay for a particular set of advertisements directly.

Like *McCutcheon*, *Citizens United* functions to concentrate political power within a small financial elite. Recall that the top 200 donors to outside expenditure groups supplied approximately 80% of the $1.1 billion in outside spending during the 2012 elections. Compared to the .34% of American adults controlling the majority of campaign donations, the .000084% controlling outside expenditures represents a far higher concentration of political power in a financial elite.

Given that these two judicial opinions accomplish the same task and were written by the same narrow conservative majority (Justice Kennedy, joined by Chief Justice Roberts and Justices Scalia, Thomas and Alito), it is not surprising that they feature the same peculiar reasoning. Here is *Citizens United's* articulation:

> That [corporate] speakers may have influence over or access to elected officials does not mean that these officials are corrupt . . . Favoritism and influence are not . . . avoidable in representative politics . . . [A] substantial and legitimate reason, if not the only reason . . . to make a contribution to one candidate over another is that the

[60] See generally *Citizens United v Fed. Election Comm'n* 558 US 310 (2010).

[61] This holding struck down § 203 of the McCain-Feingold reforms. These facts are, as is to be expected, downplayed by the majority, and emphasized by the dissent. Compare *Citizens*, 558 US at 392, 414–19 (Stevens, J., dissenting), with *ibid*, 897–98 (majority opinion).

[62] Section 203 only prohibited the use of corporate general treasury funds for 'express advocacy' and 'electioneering communications,' the sorts of ads that bear specifically on a given candidate for election, in the immediate period of time (30 or 60 days) preceding elections. The law did not constrain ads that only addressed political issues. Nor did it prevent corporations from forming political action committees (PACs) to transmit their views. Corporations could fund advertisements about candidates most of the time (just not right before elections) and about issues, without mentioning candidates by name, all of the time.

candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.[63]

B. Consumer Sovereignty. Within the Court's reasoning in *McCutcheon* and *Citizens United*, one can isolate the motor of accountability that drives the behavior of officeholders as individuals and officeholders collectively in a plutocracy. This mechanism deserves a simple name, one that distinguishes it from the conventional theory of democratic government. I have proposed 'consumer sovereignty,'[64] in contrast to popular sovereignty.

Popular sovereignty refers to a state of affairs in which government authority and legitimacy are derived from the consent of the governed, and government actors are ultimately accountable to the people. Before exploring how *McCutcheon* and *Citizens United* disrupt that consent and accountability, consider at the outset that within popular sovereignty the motor of accountability cannot primarily be the vote itself. Rather, it is the incentives that the vote provides to politicians while they remain in office and can still make law and policy. A pattern of laws and policies enacted against the public interest interspersed with regular electoral turnovers would do the public no good. Even the best-administered election proceedings are meaningless unless two conditions are met: First, there must be a meaningful choice over which lawmakers come and which lawmakers go. If the identity and platforms of candidates vying for election are shaped by factors that are independent of (or even opposed to) voters' preferences, then the vote is an illusory choice and popular consent is a mere technicality. Second, even if candidates endeavor to represent their geographic constituents at the outset, incentives for accountability to voters must be in place for the duration of their term in office. Do the financial requirements for mounting a viable candidacy shape policy platforms independently of the popular will and weed out all but a certain type of candidate and party? Does a strong incentive structure for respecting the popular will remain in force once candidates assume office or is it demolished by a competing incentive structure?

McCutcheon and *Citizens United's* plutocratic principles render those inquiries legally suspect. Campaign contributions and outside expenditures qualify for First Amendment protection. Political access and ingratiation, wrought from financial support, are essential features of democracy, not forms of corruption that would justify regulation. Officeholders advocate the policy preferences of those who support them. Government accountability to political donors and spenders cannot be limited by law, except to prevent outright bribery. The two cases build upon this blueprint in distinct areas of political finance.

McCutcheon legitimises and protects one portion of the incentives that produce consumer sovereignty: the extraordinary and permanent need for campaign donations in a privatised regime of political finance. That need, as mentioned in Part I, begins early with the task of mounting a viable campaign, getting or retaining the backing of a major political party, and running a high profile campaign to completion in an expensive, media-saturated environment. The need for donations continues even once one is elected,

[63] *Citizens United v Fed. Election Comm'n* 558 US 310, 359 (2010).
[64] Timothy K Kuhner, *Capitalism v. Democracy* 50–51, 90–136 (Stanford Law Books, 2014).

because one's next election is four years away at most and astronomical sums are required for success; hence, the incentive to represent the interests of the donor class.

Citizens United legitimises and protects another part of the incentive structure that produces consumer sovereignty: the need for favorable outside expenditures. Former general counsel to the Federal Election Commission Lawrence Noble describes a post *Citizens-United* scenario. 'Lobbyist to representative or candidate: "We have got a million [dollars] we can spend advertising for you or against you—whichever one you want."'[65] Maintaining a political platform contrary to the interests of this lobbyist's client costs roughly a million dollars, the money necessary to mount an opposing ad campaign. Hewing to the client's position, on the other hand, buys the politician a million dollars' worth of favorable ads. Even short of this scenario, which ought to be considered criminal, only the most naïve candidate or officeholder would fail to account for the unlimited expenditure groups operating within particular elections or issue areas. Even without explicit threats by lobbyists, politicians ignore those groups at the peril of awakening to a media environment in which their names and platforms are powerfully maligned (whether fairly or unfairly). And even without explicit promises, politicians know they must cultivate Super PAC support.

Through *Citizens United*, corporations have partaken alongside wealthy individuals in the right to spend unlimited funds to affect the national political consciousness. This is true on at least the following fronts: (1) the saliency of some political issues over others, plus the portrayal and construction of those issues; (2) the saliency and portrayal of all legislative proposals and policies in effect; (3) the saliency and portrayal of each candidate, officeholder and political party. This control over the political climate affects the availability of candidates and parties who seek to honor the popular will (as distinguished from the preferences of donors and spenders), and the ability of candidates and parties to do so in practice once they are in office without fatally compromising their re-election campaigns or their standing in their party. The three fronts mentioned above also influence an embryonic component of popular sovereignty: the formation of the popular will as a function of citizens' perceptions of the issues, assessments of their interests and conclusions about how to best achieve those interests.

From these aspects of *McCutcheon* and *Citizens United*, the nature of consumer sovereignty can be comprehended. It does not refer to the power of those who watch political ads or participate in politics as voters or activists. Such people have not consumed anything in the economic sense. Consumer sovereignty is a mechanism borrowed from the economic sphere, a dynamic within the relationship between supply and demand through which those who pay for goods and services derive a modicum of control over the system. Those who offer goods and services have an incentive to heed consumer preferences, since producers' ultimate goal is to maximise profits. Consumer behavior, including purchasing decisions and product feedback, provides vital information about which goods and services are desired, which improvements are needed, and what new goods or services might satisfy untapped demand. A consumer pays to acquire a good or service and then uses it to a greater or lesser degree of satisfaction. The amount of utility thus derived influences whether the consumer will be a repeat customer or whether they might seek out a rival producer or provider for their

[65] David D Kirkpatrick, 'Lobbyists Get Potent Weapon in Campaigning Ruling' (*The New York Times*, 21 January 2010) <www.nytimes.com/2010/01/22/us/politics/22donate.html?_r=0>.

subsequent needs. Consumer sovereignty refers to the mechanism of feedback and accountability that operates between consumers and manufacturers, retailers, service providers and so on.

It is disturbingly simple to implement a regime of consumer sovereignty within the political sphere. First, ensure that candidates, officeholders and parties derive little to none of their election-related funds from public subsidies. This includes not only the absence of public financing of campaigns, but also the absence of substantial free media time and postage and printing expenses. Lawmakers and parties then find themselves in the position of a private firm that must derive its funds from consumers and investors. (Granted, officeholders receive a salary from the state, but that salary does not support their electoral expenses.) Second, eliminate contribution limits or set them high enough to ensure that candidate and party funding is derived mostly from an economic elite. Third, eliminate expenditure limits so that wealthy candidates, well-funded campaigns, well-funded parties, wealthy citizens and even corporations can spend as much money as they wish, or at least enough to gain a substantial advantage over their counterparts of low to average economic means. These first three conditions make officeholders and parties obscenely sensitive to the preferences of political donors and spenders, as money becomes the lifeblood of politics.

The fourth condition seeks to match up supply and demand: allow a great deal of latitude to lobbyists, outside expenditure groups and other enterprising intermediaries who make known the interests of donors and spenders, and may even bring them together with political leadership.[66] Accompanied by a revolving door between (a) officeholders, their staff and party officials, and (b) lobbying firms and outside expenditure groups, this latitude ensures an efficient exchange of information between participants in the market.

These four conditions together ensure a relatively open market for political power, a veritable arms race in matters of contributions and expenditures, which entails political competition, accountability and stratification on the basis of financial power. The wealthy and business interests invest in particular policy outcomes by supporting the candidates, parties and outside groups most likely to produce those outcomes. Indeed, once a certain threshold of donations or expenditures is met, candidates and parties will understand that they must pursue those outcomes if they wish to maintain their funding base. Once those policies are enacted, or disfavored policies are dismantled or avoided altogether, donors and spenders derive the utility they had sought all along, profiting from their investments (or if you wish, consuming those policy outcomes for which they paid). Those who cannot afford to enter the market for political goods and services or who command an insignificant quantity of resources within that market are thus rendered powerless along the lines observed by Gilens and Page. Politics, quite literally, becomes 'none of their business.'

The same goes for would-be candidates and minor parties that do not appeal to the interests of political investors and consumers, that .000084%—.34% of the general public that provides the bulk of the funds. Such aspiring candidates and parties are destined for obscurity since the viewpoints and policies they would supply are not in demand (again, just economically speaking, as there may be tremendous popular or civic demand for their platforms). The absence of economic support for their platforms signifies that their

[66] On intermediaries, see Nicholas Confessore, 'The Secret World of a Well-Paid 'Donor Adviser' in Politics' (*The New York Times*, 5 February 2015).

own demand for campaign funds and favorable outside spending will not be met, and their political enterprises will not get off the ground.[67] Any popular demand for their platforms will not fully register, since those platforms will either be poorly disseminated or outgunned and maligned in the mass media.

C. Constructing and Justifying Consumer Sovereignty. Given these incentives, power relationships, and patterns, it appears that consumer sovereignty explains a good portion of the tremendous political inequality documented by Gilens and Page, which, in turn, explains a good portion of the tremendous economic inequality documented by Piketty. Piketty's observation that such radical inequality is neither natural nor normal, much less inevitable, sparks his interest in an *apparatus of justification*—'the key issue' in his words.[68] It is finally time to ask, How was consumer sovereignty constructed and how is it justified?

The Supreme Court began constructing the legal basis for consumer sovereignty in a 1976 case called *Buckley v Valeo*. *Buckley* provided the Court with an opportunity to decide the constitutionality of the nation's first comprehensive campaign finance regulation, the Federal Election Campaign Act of 1971 (FECA). FECA limited campaign donations, as well as expenditures by individuals, candidates and campaigns.[69] The Supreme Court summarised Congress' purposes as: (1) 'the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and . . . actions'; (2) 'mut[ing] the voices of affluent persons and groups in the election process and thereby equaliz[ing] the relative ability of all citizens to affect the outcome of elections'; and (3) slowing 'the skyrocketing cost of political campaigns and thereby . . . open[ing] the political system more widely to candidates without access to sources of large amounts of money.'[70]

Fresh off the Watergate Affair and the recent successes of the civil rights movement, these purposes resonated with the times. Poll taxes had recently been abolished by constitutional amendment, and the Civil Rights Act of 1964 and Voting Rights Act of 1965 were finally being enforced. What practical effect would the banning of literacy tests, poll taxes and voter intimidation have if candidates were beholden to monied interests, and government were inaccessible to all but the best funded candidates

---

[67] See Nicholas Confessore and Jonathan Martin, 'GOP Race Starts in Lavish Haunts of Rich Donors' (*The New York Times*, 28 February 2015) <www.nytimes.com/2015/03/01/us/politics/gop-race-starts-in-lavish-haunts-of-rich-donors.html?ref=topics&_r=0>; The Editorial Board, 'The Money Primary: Our View' (*USA Today*, 21 January 2015) <www.usatoday.com/story/opinion/2015/01/21/mitt-romney-jeb-bush-presidential-republican-campaign-finance-editorials-debates/22128749/>:

> Money alone isn't sufficient . . . but it's necessary to be competitive. Which is why a year before the Iowa caucuses, and two years before the next inauguration, the presidential wannabes are scurrying around the country, courting the biggest donors and those who "bundle" donations from friends and associates.

[68] *Capital*, Kindle Location 4558–62.

[69] See Federal Election Campaign Act of 1971 (FECA) 2 USC § 608 (1972) (establishing expenditure limits of $1,000 for individuals, expenditure limits from personal funds in the amounts of $25,000 for house candidates, $35,000 for senatorial candidates, $50,000 for presidential or vice presidential candidates for candidates, and overall campaign expenditure limits in the amounts of $10 million for presidential nominations, $20 million for presidential general election campaigns, and particular formulas based on state populations for senate and house campaigns.).

[70] *Buckley*, 424 US 1, 24–26.

and unaccountable to all but the wealthy? Political equality and popular sovereignty would remain elusive.

The Supreme Court's voting rights jurisprudence busily pursued those values. Consider, for example, the rationale behind *Kramer v. Union Free School District*,[71] a 1969 case in which the Court struck down a restriction on voting in school district elections: 'Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.'[72] That popular sovereignty rationale contextualised the Court's equal protection analysis. The Court had held three years earlier in *Harper v. Virginia* that 'a State violates the Equal Protection Clause . . . whenever it makes the affluence of the voter or payment of any fee an electoral standard.'[73] Only through equal protection in matters of wealth could the political process guarantee popular representation. FECA imported these concerns into the realm of campaign finance, just one step away from the realm of voting rights.

Published in the same year as the first installment of FECA, John Rawls' *Theory of Justice* urged that extension of constitutional principle: '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.'[74] Seeing his way into the future, Rawls added, '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.'[75] Rawls' pursuit of popular sovereignty and political equality fit with the 1960s and early 1970s, but soon lost traction.

When the time came to judge FECA's constitutionality, the Court gravitated towards a different epoch-making figure, one whose Nobel Prize was awarded the same year that the Court published its opinion in *Buckley*. Although Milton Friedman's views were complex, it is fair to say that he was a leading proponent of the view that markets are 'better, and far more accommodating of human liberty, than government.'[76] He was, in his own words, 'deeply concerned about the danger to freedom and prosperity from the growth of government.'[77] Friedman understood his own 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.'[78] He labeled as a 'flash of genius' Adam Smith's discovery 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.'[79] 'The price system,' concluded Friedman, 'is the mechanism that fulfills this task without central direction.'[80]

---

[71] 395 US 621 (1969).
[72] *Ibid*, 626.
[73] *Harper v Virginia State Bd. of Elections* 383 US 663, 666 (1966).
[74] John Rawls, *A Theory of Justice* 224–225 (Belknap Press, 30 October 1999).
[75] *Ibid*.
[76] Justin Fox, 'Milton Friedman on the Efficient Market Hypothesis' (By Justin Fox, 21 November 2006) <www.byjustinfox.com/2006/11/milton_friedman.html>.
[77] Milton Friedman, *Capitalism and Freedom*, vi, 5 (University of Chicago Press, 1982).
[78] *Ibid*.
[79] Milton Friedman, quoted in Pierre Rosanvallon, *Democracy Past and Future* 151 (Columbia University

This viewpoint justified consumer sovereignty as incidental to rule by the market, and rule by the market as justified by efficiency and freedom. Indeed, Friedman's *efficient-market hypothesis* 'held that as more stocks, bonds, options, futures, and other financial instruments were created and traded, they would inevitably bring more rationality to economic activity.'[81] The market would produce the right goods for the right people at the right prices, allocating resources without wasting them. In this sense, 'markets possessed a wisdom that individuals, companies, and governments did not.'[82]

Addressing FECA's goal of limiting the costs of campaigns, the Court reacted against government regulation and praised the price system. After acknowledging that spending on federal campaigns had increased nearly 300% in just two decades, the Court noted that this was 'no basis for government restrictions on . . . campaign spending.'[83] As though channeling Friedman, the Court wrote:

The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the *free society* ordained by our Constitution it is not the government, but the people individually as citizens and candidates and collectively as associations and political committees who must retain control over the quantity and range of debate on public issues in a political campaign.[84]

Indeed, *Buckley* protected political spending as political speech itself, infamously concluding that the two had become indistinguishable in 'mass society'.[85] No doubt, FECA amounted to government regulation of the price signals that emerged from voluntary transactions between donors, spenders, and candidates. With prices reduced and signals suppressed by government, political markets could no longer efficiently coordinate activity and maximise overall gains by producing the right goods and services for those who valued them most. FECA interfered with consumer sovereignty.

The same could be said for Congress' interest in political equality, another motivation behind expenditure limits.[86] Coming to the market's defense, the Court set equality aside, construing it as an inappropriate and constitutionally offensive goal:

[T]he concept that government may restrict the speech of some elements in society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of

---

Press, 2006).
[80] *Ibid*.
[81] Justin Fox, 'The Myth of the Rational Market: A History of Risk, Reward, and Delusion on Wall Street' (New York: HarperCollins, 2009), xiii.
[82] *Ibid*.
[83] *Buckley*, 424 US 1, 57.
[84] *Ibid*.
[85] *Ibid*, 19 ('A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.').
[86] As Cass Sunstein observed, Congress' goal of political equality was 'related to the project of distinguishing between the appropriate spheres of economic markets and politics.' Cass Sunstein, 'Political Equality and Unintended Consequences' (1994) 1392 *Columbia Law Review* 1390.

information from diverse and antagonistic sources, and to assure the unfettered interchange of ideas.[87]

While the Court's acceptance of the rising costs of campaigns, protection of money as speech and rejection of political equality grounded political finance within the sphere of economic markets, the Court did not yet perceive an 'either or' choice between markets and politics. Rather, it believed markets were the pathway to democracy. Herein lies the paradox and the reason why, initially at least, consumer sovereignty was unintentional.

Buckley celebrated the political market, but it did so for civic purposes. Why, for example, did the Court equate money with speech? Ironically enough, it did so to defend popular sovereignty. Step 1: 'In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.'[88] Step 2: 'Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.'[89] Step 3: '[V]irtually every means of communicating ideas in today's mass society requires the expenditure of money.'[90] Step 4: Expenditure limits reduce the 'number of issues discussed, the depth of their exploration, and the size of the audience reached.'[91] Conclusion: Popular sovereignty requires a regime of unregulated expenditures.

As additional proof that the initial move towards consumer sovereignty was unintentional, take the Court's justification for the 'unfettered interchange of ideas,' cited above as grounds for dispensing with political equality. Why would the Constitution require such an unfettered interchange? '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*.'[92] Once again, the Court claimed that an open market for political spending would assure popular sovereignty.

The Court's reasoning on this score relied on a mistaken premise. In striking down campaign expenditure limits, the Court evinced a belief in a representative function of money in politics. 'Given the limitation on the size of outside contributions, the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support.'[93] From this premise, it 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.'[94] The point about intensity is dubious in that a $1,000 contribution saved up by a poor family over several years entails far greater intensity of support than a $1,000 contribution drawn from a millionaire's petty cash. But the alleged correlation between the amount of campaign resources and popular support is clearly mistaken, as the data in

[87] *Buckley*, 424 US 1, 48–49.
[88] *Ibid*, 14–15.
[89] *Ibid*, 14–15.
[90] *Ibid*, 18, n 17.
[91] *Ibid*, 19.
[92] *Ibid*, 14.
[93] *Ibid*, 56.
[94] *Ibid*, 56.

Part I show. As an example of the conditions under which its assumption would hold, the Court cited a scenario in which senatorial candidates would raise just $1 from each voter.[95] Had the Court known that $1 contributions would be useless and that far less than 1% of voting-age Americans would end up providing the great majority of all contributions and expenditures, it could not have rested its defense of unlimited expenditures on the goal of bringing about the 'political and social changes desired by the people' or protecting 'a republic where the people are sovereign.'[96]

This was the Burger Court, the unwitting architect of consumer sovereignty. Initially, the Rehnquist Court repeated the same mistake. In its 1986 decision in *Massachusetts Citizens for Life (MCFL)* the Court deemed unconstitutional an independent expenditure limit as applied to a non-profit corporation that held bake sales to pay for its pro-life newsletters. Writing for the majority, Justice Brennan echoed *Buckley* by assuming that money in politics had a vaguely representative function: 'Political 'free trade' does not necessarily require that all who participate in the political marketplace do so with exactly equal resources . . . Relative availability of funds is after all a rough barometer of public support.'[97] This assumption might indeed hold true for political funds raised through bake sales, an easy comparison to *Buckley's* reference to $1 contributions. As though bake sales and $1 contributions accurately characterised the system, this model posits that public support determines the availability of not only votes, but funds as well—a two-step mechanism for actualising popular sovereignty.

Four years later, however, the Rehnquist Court rejected that assumption in the context of corporate expenditures. Justice Marshall's six to three majority opinion in *Austin v Michigan Chamber of Commerce*[98] alleged that '[c]orporate wealth can unfairly influence elections' whether such wealth is channeled into expenditures or contributions.[99] The Court went on to describe a new type of corruption that provided 'a sufficiently compelling rationale' for restrictions on corporate independent expenditures: '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.'[100] The absence of any correlation between public support and corporate political expenditures signifies a distortion in the political market, a tilt away from representative government. Only a positive correlation between the money spent on political finance and the interests of the voting populace, or a reduction of that money to diminish its power, would be consistent with popular sovereignty.

The Court also doubted the equivalency of money and popular support in the context of expenditures coordinated between political parties (or party committees) and candidates. Justice Souter's majority opinion in the *Colorado II* case upheld limits on such expenditures partly on the basis that party election funds do not represent overall voter support for their platforms.[101] Justice Souter wrote that parties 'act as agents for

[95] *Ibid*, 57, n 64.
[96] *Ibid*, 14.
[97] *Fed. Election Comm. v Mass. Citizens for Life* 479 US 238, 257 (1986).
[98] *Austin v Mich. Chamber of Commerce* 494 US 652 (1990).
[99] *Ibid*, 660.
[100] *Ibid*. A similar stance had been taken by the Court in *FEC v Nat'l Right to Work Comm'n* 459 US 197 (1982).
[101] *FEC v Colo. Republican Fed. Campaign Comm. (Colorado II)* 533 US 431 (2001).

spending on behalf of those who seek to produce obligated officeholders.'[102] Pages later, he re-emphasised the point: '[d]espite decades of limitation on [their] spending . . . parties continue to . . . function for the benefit of donors whose object it is to place candidates under obligation.'[103] These statements countered the Respondent's theory that '[p]arties exist precisely to elect candidates that share the goals of their party.'[104] Justice Souter deemed this view a 'refusal to see how the power of money actually works in the political structure.'[105] Citing examples of strategic behavior by donors and political action committees, he wrote,

> Parties are thus necessarily the instruments of some contributors whose object is not to support the party's message or to elect party candidates across the board, but rather to support a specific candidate for the sake of a position on one narrow issue, or even to support any candidate who will be obliged to the contributors.[106]

A majority of the Court signed onto this pointed rejection of consumer sovereignty.

The Court's clearest condemnation of consumer sovereignty came two years later in *McConnell v FEC*.[107] From an extensive record, the Court concluded that 'lobbyists, CEOs, and wealthy individuals alike all have candidly admitted donating substantial sums of soft money to national committees not on ideological grounds, but for the express purpose of securing influence over federal officials.'[108] It described national politics as a system in which donors seek to 'create debt on the part of officeholders, with the national parties serving as willing intermediaries.'[109] The Court placed such dynamics into the larger context of 'great aggregations of wealth' using their money 'to elect legislators who would vote for their protection and the advancement of their interests as against those of the public.'[110] Having exposed the workings of consumer sovereignty, the Court moved to destroy it. It upheld the most important pieces of the Bipartisan Campaign Finance Reform Act of 2002, including a loophole-closing measure regarding donations at the state level that had undermined federal limits, a prohibition on corporate and union expenditures from general treasury funds, and a provision that allowed candidates to accept larger contributions when they faced off against a wealthy, self-financing candidates. All of these measures could not be justified on the basis of eliminating bribery. Extending *Austin's* reasoning to broader terrain, the Court credited a state interest in 'curbing undue influence on an officeholder's judgment.'[111]

These moments in 1976, 1990, 2001 and 2003 prove that the Supreme Court had not yet intentionally justified consumer sovereignty. Granted, it had drawn the initial blueprint for consumer sovereignty by striking down most forms of expenditure limits in *Buckley*. Also in *Buckley*, the Court dealt a deathblow to political equality and popular

---

[102] *Ibid*, 452.
[103] *Ibid*, 456.
[104] *Ibid*, 450.
[105] *Ibid*, 450.
[106] *Ibid*, 451–52.
[107] *McConnell v FEC* 540 US 93 (2003).
[108] *Ibid*, 147.
[109] *Ibid*, 146.
[110] *Ibid*, 115 (citing *United States v Int'l Union Auto. Workers* 352 US 567, 571 (1957)).
[111] *Ibid*, 95.

sovereignty by deciding that money is a form of constitutionally protected speech, democracy is an open market for competing funds and that the legislative purposes of limiting the rising costs of campaigns and equalising funds are illegitimate. But *Buckley* claimed to do all of this in the interest of popular sovereignty, and the Rehnquist Court subsequently rejected consumer sovereignty explicitly. Not until John Roberts replaced William Rehnquist as Chief Justice and Samuel Alito replaced Sandra O'Connor did the ideological justification and full blueprint for consumer sovereignty emerge.

In 2006, just one year into its reign, the Roberts Court summarily deemed the goal of Vermont's campaign finance rules 'unpersuasive.'[112] *Randall v Sorrell* disqualified the state interest in 'protect[ing] candidates from spending too much time raising money rather than devoting that time to campaigning among ordinary voters.'[113] Vermont's donation and expenditure limits were so low that the Court could have simply deemed them disproportionate or over-inclusive, in short, not narrowly tailored enough.[114] Instead, the Court went so far as to reject the goals of 'reduc[ing] the amount of time candidates must spend raising money'[115] and allowing candidates the luxury of 'meeting the voters and engaging in public debate.'[116] By freeing candidates from the financial arms race, Vermont enabled them to meet more often with voters and consider policy issues in good faith. This diminution of the disparate access and influence enjoyed by donors and spenders constituted a full frontal attack on consumer sovereignty, and the Court decisively struck it down.

The Roberts Court also wasted no time in eliminating the threat to consumer sovereignty posed by *Austin* and *McConnell's* concern over the 'undue influence on officeholders' judgment,' this assessment of aggregated wealth as 'corrosive and distorting,' this belief that it is problematic for money in politics to have 'little or no correlation to public support.' In *Citizens United*, the Court replied, 'It is irrelevant for purposes of the First Amendment that corporate funds may 'have little or no correlation to the public's support for the corporation's political ideas.' 'All speakers,' the Court announced, 'use money amassed from the economic marketplace' and '[m]any persons can trace their funds to corporations, if not in the form of donations, then in the form of dividends, interest, or salary.'[117] Here, the Court admitted that its self-styled political marketplace operated through the economic marketplace, importing uneven outcomes in dividends, interests and salaries into the political sphere. By striking down *Austin* and *McConnell's* barriers, the Court enabled corporate resources, and hence the full breadth of economic inequality, to determine the contours of political speech.

---

[112] *Randall v Sorrell* 548 US 230, 243 (2006). See also *ibid*, 243–244 (discussing why Vermont's goals were incongruous with *Buckley*).

[113] *Ibid*, 243.

[114] *Ibid*, 237:

> [T]he statute at issue here…imposes mandatory expenditure limits on the total amount a candidate for state office can spend during a "two-year general election cycle," *i.e.,* the primary plus the general election, in approximately the following amounts: governor, $300,000; lieutenant governor, $100,000; other statewide offices, $45,000; state senator, $4,000 (plus an additional $2,500 for each additional seat in the district); state representative (two-member district), $3,000; and state representative (single member district), $2,000.

[115] *Ibid*, 245.

[116] *Ibid*.

[117] *Citizens* 558 US 310, 351 (quoting *Austin* 494 US 652, 707 (Kennedy, J., dissenting)).

Indeed, *Citizens United* cast that translation of economic inequality into political inequality as a constitutional guarantee. Observe its ultimate rationales for overruling past case law and allowing that .000084% of the adult population to utilise its consolidated power. First, '*Austin* interferes with the open marketplace of ideas protected by the First Amendment.'[118] Second, 'influence over or access to elected officials does not mean that these officials are corrupt.'[119] We thus return to *Citizens United* and *McCutcheon's* blueprint for plutocracy, a system in which favoritism and influence are unavoidable and democracy is premised on responsiveness to donors and spenders.[120]

The consolidation of plutocracy rests on several additional constitutional principles and justifications. *McConnell* had upheld a provision of McCain-Feingold that helped candidates who ran against wealthy, self-financing opponents. Once a candidate spent more than $350,000 of their personal wealth on their own campaign, the so-called 'Millionaire's Amendment' kicked in, allowing their opponents to accept unlimited coordinated party expenditures and individual donations of over twice the regular legal limit.[121] In the 2008 case *Davis v FEC*, the Court struck down the Amendment on the basis that it leveled the power of wealth. 'Leveling electoral opportunities,' wrote Justice Alito for the majority, 'means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election.'[122] He went on to list those strengths: 'Different candidates have different strengths. Some are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name.'[123] 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 unconstitutional in its attempt 'to reduce *the natural advantage* that wealthy individuals possess in campaigns for federal office.'[124] Having specified a limited universe of strengths that properly contribute to the outcome of an election, Justice Alito wrote that the 'Constitution . . . confers upon voters, not Congress, the power to choose.'[125]

Lest the people's power to choose grow to include the enactment of campaign finance reform and an eventual choice between candidates whose main strengths were not financial, the Court needed to perfect its formulation. Despite its protection of that *natural* financial advantage, *Davis* contained a certain popular weakness. True, *Davis* considered it 'dangerous business for Congress to use the elections laws to influence the voters' choices' and struck down the Millionaires Amendment. But in the following sentence, it explained the danger of government intervention as that of 'the people los[ing] the ability to govern themselves.'[126] Recall that *Buckley* had construed the goal of the First Amendment as 'bringing about [the] political and social changes desired by

[118] *Ibid*, 354 (emphasis added) (citation omitted).
[119] *Citizens* 558 US 310, 359.
[120] *Ibid* (quoting *McConnell v FEC* 540 US 93, 297 (opinion of Kennedy, J.) (alteration in original)).
[121] *McConnell* 540 US 93, 108 (2003) *overruled by Citizens United v Fed. Election Comm'n* 558 US 310 (2010).
[122] *Davis v Fed. Election Comm'n* 554 US 724, 742 (2008).
[123] *Ibid*, 742.
[124] *Ibid*, 741 (emphasis added).
[125] *Davis*, 554 US 724, 742.
[126] *Ibid*, 742.

the people'[127] and had posited that the 'financial resources available to a candidate's campaign . . . will normally vary with the size and intensity of the candidate's support.'[128] In light of the evidence supplied by Gilens and Page that the people have lost the power to govern themselves, as well as the evidence that financial resources do not reflect popular support, *Davis* and *Buckley's* concern over popular sovereignty could justify campaign finance reform.[129]

The Roberts Court eliminated that risk in two subsequent cases. Striking down a leading state public financing system just three years after *Davis*, *Arizona Free Enterprise v Bennett* dropped the Court's prior concern over popular choice and self-government. Chief Justice Roberts' majority opinion stated that '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*.'[130] Passed by popular referendum, Arizona's Clean Elections Act contained a public financing scheme in which publicly financed candidates received matching funds pegged to spending by privately-financed candidates and their supporters. How could the Act, imposing no limit on candidates, donors, or spenders, be construed as violating the First Amendment's prohibition on '*abridging* the freedom of speech?'[131]

The Court relied on an argument made by the plaintiff in *Davis*: the matching funds system burdens the exercise of the 'First Amendment right to make unlimited expenditures' because it enables one's opponents to raise more money. From the perspective of a donor, spender, or privately financed candidate, that burden arises 'from his opponents' ability to use [their matching funds] to finance speech that counteracts and thus diminishes the effectiveness of [his] own speech.'[132] To the contention that '[p]roviding additional funds to petitioners' opponents does not make petitioners' own speech any less effective,' the Court replied, 'Of course it does.' Surely, the Court is correct in its assessment that '[a]ll else being equal, an advertisement supporting the election of a candidate that goes without a response is often more effective than an advertisement that is directly controverted.'[133] The Court was forthcoming about the object of its protection: 'the vigorous exercise of the right to use personal funds to finance campaign speech'[134] and the 'First Amendment right to make unlimited expenditures.'[135]

The Court's analysis describes the unconstitutionality of matching funds as a function of their opposition to those personal funds and expenditures, that is, as a function of providing a response to speech that might otherwise go unopposed. If a private donor or spender wished to produce opposing speech, however, he would be free to do so. Because the government provided the funding for that response under the

---

[127] *Buckley*, 424 US 1, 14.
[128] *Ibid*, 56.
[129] *Citizens United v Fed. Election Comm'n* 558 US 310, 339, 344 (2010) (referring to popular sovereignty).
[130] *Ariz. Free Enter. v Bennett* 131 S Ct 2806 (2011), consolidated with *McComish v Bennett* 611 F 3d 510 (9th Cir 2010).
[131] US CONST. amend. I.
[132] *Ibid*.
[133] *Bennett*, 131 S Ct 2806, 2825.
[134] *Ibid*, 2818.
[135] *Ibid*.

Arizona law, the Court rightly sensed that the market-determined level of speech effectiveness had been disrupted. This was another throwback to Milton Friedman's efficient market hypothesis and the supremacy of price signals, or, in *Davis'* terminology, 'the natural advantage of wealth,' which must not be disturbed.

The matching funds system constituted just that sort of disturbance not only in fact, but in theory as well. The system's goals included a level playing field and officeholder accountability to the people—in essence, popular sovereignty. In dissent, Justice Kagan noted that 'the prior system of private fundraising had . . . favored a small number of wealthy special interests over the vast majority of Arizona citizens.'[136] She called the Arizona law an attempt to 'sever political candidates' dependence on large contributors' and to 'ensure that their representatives serve the public, and not just the wealthy donors who helped put them in office.'[137] 'Arizonans,' she concluded, 'wanted their government to work on behalf of all the State's people.'[138] Following up its statement that the First Amendment guarded against the will of the majority, the Court corrected Justice Kagan and chastised the state of Arizona: 'When it comes to protected speech, the speaker is sovereign.'[139] These were not just any speakers, however. Those harmed by the Arizona law were candidates, donors and spenders engaged in that 'vigorous exercise of the right to use personal funds.'[140] Therefore, one can appropriately substitute 'donors and spenders' for 'speaker' in the Court's formulation. Donors and spenders are sovereign. By preventing a reduction in the effectiveness of their speech, the Court protected the optimal, market-determined level of speech effectiveness.

The last vestige of popular sovereignty stood in *Buckley's* view that the purpose of the unfettered exchange of ideas was that of 'bringing about [the] political and social changes desired by the people.' Besides reversing *Buckley's* holding on aggregate donation limits, *McCutcheon* dropped *Buckley's* insistence on a connection between speech and popular sovereignty. The *McCutcheon* dissenters, led by Justice Breyer, seem to have forced the majority to reach the issue. They approvingly quoted one of the Court's early formulations, tying 'the opportunity for free political discussion to the end that government may be responsive to the will of the people.'[141] The dissenting opinion went on to conclude that '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.'[142] It described the influence of large donors as breaking 'the constitutionally necessary "chain of communication" between the people and their representatives.'[143]

The majority questioned the dissent's promotion of 'a government where laws reflect the very thoughts, views, ideas, and sentiments [of the people],'[144] concluding that 'there are compelling reasons not to define the boundaries of the First Amendment by

---

[136] *Ibid*, 2842.
[137] *Ibid*, 2845 (Kagan, J., dissenting).
[138] *Ibid*.
[139] *Ibid*, 2828.
[140] *Ibid*, 2818.
[141] *McCutcheon v Fed. Election Comm'n* 134 S. Ct. 1434, 1467 (2014).
(Breyer, J., dissenting) (quoting *Stromberg v California* 283 US 359, 369 (1931)).
[142] *McCutcheon* 134 S Ct 1434, 1467 (Breyer, J., dissenting).
[143] *Ibid*.
[144] *Ibid*, 1449 (majority opinion).

reference to such a generalized conception of the public good.' 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.' The Court decried 'legislative or judicial determination[s] that particular speech is useful to the democratic process'[145] and 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.'[146]

Like *Bennett*, however, *McCutcheon's* reference to individual speakers pertains to monied speakers—specifically, those individuals who wish to donate more than $123,200 to candidates and parties. The Court was finally entirely forthcoming about that intended meaning, laying out its plutocratic philosophy for all to see: 'First Amendment rights are important regardless of whether the individual is, on the one hand, a lone pamphleteer or street corner orator in the Tom Paine mold or is, on the other, someone who spends substantial amounts of money in order to communicate his political ideas through sophisticated means.'[147] This farcical equivalency sums up our present station in which political consumers have become the new sovereigns, supplanting civic strengths and cornering the market—*an actual market*—for political power.

IV. ACCEPTANCE OR REVOLUTION

In functional terms, the Supreme Court has enabled the privatisation of democracy by striking down reforms that would limit candidates', officeholders' and parties' demands for private funds or that would offset too severely the supply of funds from large donors or spenders. The resulting power of (and accountability to) large donors and spenders constitutes plutocracy's motor or mechanism, which produces the effects shown by Gilens and Page: political exclusion of all but the wealthy and those who appeal to the wealthy. The Court has thus given us the nature of plutocracy (a privatised political sphere), the mechanism of plutocracy (consumer sovereignty) and the effect of plutocracy (political exclusion of the poor and middle classes). The casualties are popular sovereignty and political equality, the conditions and values upon which democratic society and the rights of most citizens depend.

In legal terms, the US Supreme Court has effectively erased the limitations on rights common in newer constitutions and human rights treaties. For example, Section 1 of the Canadian Charter subjects individual rights to reasonable limits prescribed by law that are 'demonstrably justified in a free and democratic society.'[148] In political finance cases, the Supreme Court of Canada has long held that 'the political equality of citizens . . . is at the heart of a free and democratic society.'[149]

The European Convention on Human Rights contains a specific limitations clause within Article 10 on free expression, specifying that 'these freedoms may be subject to

---

[145] *Ibid*.
[146] *Ibid*, 1448.
[147] *Ibid*.
[148] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, § 1, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (UK).
[149] See eg *Harper v Canada* (Attorney General), 2004 SCC 33 at para. 86, [2004] 1 SCR 827 (quoting *Libman v Quebec* (Attorney General) [1997] 3 SCR 569 (Can.), 151 DLR (4th) 385.

such . . . conditions, restrictions or penalties as are . . . necessary in a democratic society . . . for the protection of the reputation or rights of others.'[150] The European Court of Human Rights (ECtHR) concluded in *Bowman v UK* that 'securing equality between candidates' falls within 'the legitimate aim of protecting the rights of others, namely the candidates for election and the electorate.'[151] Validating a prohibition on ads by social advocacy groups in the *Animal Defenders* case, decided three years after *Citizens United*, the ECtHR agreed that the ban 'was necessary to avoid the distortion of debates on matters of public interest by unequal access to influential media by financially powerful bodies.'[152] The Court accepted the argument that this function 'protect[ed] effective pluralism and the democratic process.'[153] It worried that 'powerful financial groups . . . could obtain competitive advantages in the area of paid advertising and thereby curtail a free and pluralist debate, of which the State remains the ultimate guarantor.'[154]

Still, *Bowman* struck down a low expenditure limit as disproportionate to the legitimate aim pursued and *Animal Defenders* upheld an advertising ban by only a nine to eight margin within the Grand Chamber. And the Canadian Supreme Court has had to reverse a lower court's analysis in order to sustain outside expenditure limits on appeal.[155] The point is not that limitations clauses always save political finance reforms, but rather that they offer a textual hook on which arguments about political equality, the speech of others, and democratic integrity can be hung.

The US Supreme Court's doctrine of tiered scrutiny has built varying limitations clauses into constitutional review, requiring a compelling state interest under strict scrutiny, a sufficiently important state interest under intermediate scrutiny, and a legitimate state interest under rational basis review. Folding political spending into political speech, the Court has closely scrutinised the government purposes behind campaign finance reforms. But even under such searching review and even without a limitations clause on the face of the Constitution, the Court has numerous times credited state interests beyond just the prevention of corruption or its appearance. This is what makes cases such as *Austin* and *McConnell* so important. *Austin's* six to three majority validated a state interest in curbing the corrosive and distorting influence of wealth on democracy, only to be reversed two decades later by *Citizens United's* five to four majority, which informed the nation that political access and influence on the basis of wealth are not corruption. Moreover, the Court's view of democracy as an open marketplace for the unfettered exchange of ideas suggests that the limitations clauses of the European Convention and the Canadian Charter would make no difference. Limitations on the role of wealth would have to be added explicitly.

The Supreme Court seemed to be on that path shortly before *Buckley*. For example, in *Harper v Virginia*, the Court struck down a $1.50 poll tax, noting that '[w]ealth, like race, creed, or color, is not germane to one's ability to participate

---

[150] Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10 § 2, Nov. 4, 1950, EuropTS No. 5, 213 UNTS 221.
[151] *Bowman v United Kingdom* 1998-I ECHR 175, para 38.
[152] *Animal Defenders International v United Kingdom* App no 48876/08 (ECHR, 22 April 2013) at para 99.
[153] *Ibid*.
[154] *Ibid*, para 112.
[155] See eg *Harper v Canada* (Attorney General) [2004] SCC 33.

intelligently in the electoral process.'[156] It added that '[l]ines drawn on the basis of wealth or property, like those of race, are traditionally disfavored.'[157] The Court could have extended this analysis to campaign finance reform in 1976 by validating Congress' interests in political equality and reducing the costs of elections to facilitate participation by candidates without access to large funds. As of 1966 the Court indicated that such an extension would be possible, noting that 'we have never been confined to historic notions of equality . . . Notions of what constitutes equal treatment . . . do change.'[158] But that was the Warren Court. *Buckley* announced the Burger Court's rejection of political equality in questions of campaign finance.

The International Covenant on Civil and Political Rights (ICCPR) took the step that the Burger Court rejected, extending equal protection reasoning to political finance. Coincidentally enough, the ICCPR opened for signature in 1966, the same year *Harper v Virginia* was decided, and went into effect in 1976, the same year *Buckley* was decided. Article 25 grants '[e]very citizen . . . the right and the opportunity . . . [t]o take part in the conduct of public affairs[,] vote and to be elected at genuine periodic elections [, and to] have access, on general terms of equality, to public service.'[159] Article 2 requires states to 'respect *and to ensure*' the Covenant's rights 'without distinction of any kind,' explicitly mentioning race and property as illicit grounds for distinction.[160] French and Spanish translations construe 'property' as 'fortune' and 'socio-economic status' respectively.[161] In 1996, the Human Rights Committee elaborated on this aspect of Article 25 in terms that bear a striking resemblance to *Austin*: 'Reasonable limitations on campaign expenditure may be justified where this is necessary to ensure that the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party.'[162]

This consensus in Canadian, European and international law illustrates the profound importance of the US Supreme Court's political finance case law. Rather than ensuring popular sovereignty and democratic integrity, the Court has construed them as unconstitutional motivations. Comparative legal analyses have noted 'laissez faire' and 'plutocratic' categories of political finance regimes,[163] but the United States breaks new

---

[156] *Harper v Virginia State Bd. of Elections* 383 US 663, 668 (1966).
[157] *Ibid*.
[158] *Ibid*, 669.
[159] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171, 6 ILM 368.
[160] ICCPR at. art. 2 (emphasis added).
[161] Déclaration universelle des droits de l'homme, G.A. Res. 217 (III) A, UN Doc A/RES/217(III) (Dec. 10, 1948) <www.un.org/fr/documents/udhr/index2.shtml> (accessed 9 September 2012) and Declaración universal de derechos humanos, G.A. Res. 217 (III) A, UN Doc A/RES/217(III) (Dec. 10, 1948) <www.un.org/es/documents/udhr/> (accessed 29 September 2012).
[162] General Comment 25: The Right to Participate, in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25), UN Doc CCPR/C/21/Rev.1/Add.7 (12 July 1996) para 1.
[163] See eg Arthur B Gunlicks, *Campaign Finance and Party Finance in North America and Western Europe* (Arthur B Gunlicks ed., iUniverse, 2000) vii; Karl-Heinz Nassmacher, *The Funding of Party Competition: Political Finance in 25 Democracies* (Nomos Publishers, 2009) 239 ('[P]lutocracy is a system dominated by the riches of an affluent minority…plutocratic financing can be called the capitalist dimension of party funding.') Nassmacher traces the category of 'plutocratic' financing back to Gidlund in 1983. *Ibid*, 239 n 1.

ground by establishing plutocracy as a form of government backed by law. Those legal principles and justifications could globalise under the pressures of privatisation, increasing economic inequality and the cultural shift toward market-based society.[164]

Together with the patterns of political finance that they have preserved and caused, the Court's constitutional principles amount to regime change. The transition from democracy to plutocracy has required no violent coup or oppressive apparatus, only an ideological coup within constitutional law and a resultant legal apparatus. If it is true, as Piketty alleges, that the key issue is the justification of inequalities rather than their magnitude, then the Court's neoliberal jurisprudence ought to be a focal point for all concerned. Only popular exposure to that apparatus of justification will reveal whether plutocracy is likely to endure, to endure and spread, or to be unseated by a constitutional revolution. A violent revolution, as intimated by Piketty and as required by past forms of government oppression, would not be necessary. Although the US Constitution is famously difficult to amend, nothing more would be required and nothing less would suffice.

---

[164] See KD Ewing and Samuel Issacharoff, 'Introduction' in *Party Funding and Campaign Finance in International Perspective* (KD Ewing and Samuel Issacharoff eds., Hart Publishing, 2006) 2–3 (Citing 'the strategies of privatisation and deregulation pursued by all countries in an increasingly globalised world' as as the reason why today's 'national political systems . . . in many cases have less control over national policy than perhaps at any time since the industrial revolution.').