Western New England Law Review

Volume 39 *39 (2017)*
Issue 4 *SYMPOSIUM: CLASSCRITS IX*

Article 3

2017

THE NEXT AMERICAN REVOLUTION

Timothy K. Kuhner
Georgia State University College of Law, tkuhner@gsu.edu

Follow this and additional works at: https://digitalcommons.law.wne.edu/lawreview

Recommended Citation
Timothy K. Kuhner, *THE NEXT AMERICAN REVOLUTION*, 39 W. New Eng. L. Rev. 477 (2017),
https://digitalcommons.law.wne.edu/lawreview/vol39/iss4/3

This Symposium Article is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University. It has been accepted for inclusion in Western New England Law Review by an authorized editor of Digital Commons @ Western New England University.

THE NEXT AMERICAN REVOLUTION

*Timothy K. Kuhner**

On the whole, the scholarly literature does not go far enough in its understanding of money in politics and corporate political power—ultimately, the role of concentrated capital in democracy. The rising economic and political inequalities affecting the United States are not properly diagnosed as the excesses of a generally legitimate capitalist democracy in need, merely, of legal reforms. Rather, they are the symptoms of an overarching flaw in our political system that requires a revolution—a revolution of the non-violent, constitutional kind.

Action follows understanding. If the understanding of a problem is weak and superficial, the reform agenda will also be weak and superficial. It is true, as the call for papers states, that Supreme Court cases on money in politics "shift[] power to a new economic royalty."[1] Rather than an embellishment or exaggeration, however, this is actually the essential starting point for putting today's plutocracy into its proper historical context, that of despotism, tyranny, and oppression.

Highlighting the thoughts of key historical figures, this essay has two purposes: first, to explore how revolutionary understandings can bring modern-day problems of economic and political inequality into sharper focus; and, second, to reveal the essential thrust of an enduring solution, a constitutional amendment to separate business and state.

* Fulbright Senior Scholar 2017–2018, The University of Barcelona, and Associate Professor, Georgia State University College of Law. The views expressed in this article are those of the author and, where indicated, the sources he cites. They are not the views of the Fulbright Scholar Program or the U.S. Department of State. This essay is derived from the author's book, TIMOTHY K. KUHNER, CAPITALISM V. DEMOCRACY: MONEY IN POLITICS AND THE FREE MARKET CONSTITUTION (2014) [hereinafter CAPITALISM V. DEMOCRACY], and its sequel, THE SEPARATION OF BUSINESS AND STATE (in progress).

1. *ClassCrits IX: Call for Papers and Participation*, CLASSCRITS (Mar. 16, 2016), https://classcrits.wordpress.com/2016/03/16/classcrits-ix-call-for-papers-and-participation/ [https://perma.cc/6AZC-QBLX].

INTRODUCTION

The empire that possessed the American colonies practiced an injustice that traced back to Rome. When Roman rule in Britain gave way to Anglo-Saxon kingdoms, monarchs took over from emperors. Still, political domination by a select few over the masses continued. Powerful figures from Romulus up through Augustus and King George III were all accompanied by an exclusive political class, whether in the form of patrician families or the English peerage of Dukes, Marquesses, Earls, and the like. When it came time for the American colonists to assess the tyranny at hand, they focused on representation—not just taxation without representation, but the systemic incompatibility of a monarchical and aristocratic government with popular representation. Thomas Paine's *Common Sense*, the most-read revolutionary publication, summed up the underlying problem: "the WILL of the king is as much the law of the land . . . [but] instead of proceeding directly from his mouth, it is handed to the people under the more formidable shape of an act of parliament."[2] The unaccountable, self-interested forces of monarchy and aristocracy denied the people the right to determine their own destiny.

Now, two-hundred and forty years into its experiment with self-governance, America faces another existential crossroads.

The problem is most obvious in Donald Trump's election by a majority of the Electoral College. Despite his loss in the popular election by nearly three million votes, a group of 538 political-party insiders handed Trump the presidency.[3] Naturally, a large majority of citizens would prefer to determine their own destiny through a national popular vote.[4]

Still, the larger problem is not our antiquated electoral system, but rather our antiquated system for funding campaigns. That system permitted Trump to spend $65 million of his own money to ensure his campaign's viability, carrying it through numerous low points that would have sunk a candidate of average means. Only

2. THOMAS PAINE, COMMON SENSE 10 (TheCapitol.Net, 2009).

3. Sarah Begley, *Hillary Clinton Leads by 2.8 Million in Final Popular Vote Count*, TIME (Dec. 20, 2016), http://time.com/4608555/hillary-clinton-popular-vote-final/ [https://perma.cc/KS9J-RC36].

4. Surveys by National Popular Vote put that majority at 70% of adults nationwide. *See Polls Show More Than 70% Support for a Nationwide Vote for President*, NAT'L POPULAR VOTE, http://www.nationalpopularvote.com/polls [https://perma.cc/N6VQ-DAJH].

such a financially extraordinary figure as Trump could bring to the presidency countless conflicts of interest, a family business dynasty eager to leverage its newfound political power, and an inner circle of millionaire and billionaire advisors.[5] This king of real estate, branding, and reality television now leads the nation with the help of his loyalist peers from other industries—a "Gilded Age cabinet."[6] How the general public could ever be represented by such an administration is beyond mysterious. Political domination by a select few is the order of the day. But that order began well before Trump's reign.

Thomas Paine's observation about the king's will being carried out by a supposedly representative body applies to the enduring realm of American Plutocracy.[7] Karl-Heinz Nassmacher's comparative study of political finance defines it this way: "[w]hereas democracy is a political system based on equal participation by the multitude, plutocracy is a system dominated by the riches of an affluent minority." He calls plutocratic financing "the capitalist dimension of party funding."[8] And that is the key: a plutocracy is a nominally democratic political system governed by or for the wealthy, and generally administered in accordance with an economic ideology.[9]

Clues as to plutocracy's existence in the United States can be found in many places, such as the astronomical private wealth that bankrolls candidates and political parties; the super PACs, dark money groups, and wealthy individuals that dominate political debate; the thousands of model laws drafted by interest groups and introduced into state and federal legislatures; the speeches written by corporate lobbyists and given by members of Congress; the

5. *See* Julianna Goldman, *Donald Trump's Cabinet Richest in U.S. History, Historians Say*, CBS NEWS (Dec. 20, 2016, 7:06 PM), http://www.cbsnews.com/news/donald-trump-cabinet-richest-in-us-history-historians-say/ [https://perma.cc/FWR4-UJHA].

6. On the Gilded Age comparison, see Shawn Donnan, *Trump's Wealthy Cabinet Choices Hark Back to Gilded Age,* FINANCIAL TIMES (Dec, 2, 2016) https://www.ft.com/content/a0206f88-b8ab-11e6-ba85-95d1533d9a62; on Trump's cabinet's composition, see Russell Berman, *The Donald Trump Cabinet Tracker*, THE ATLANTIC (Apr. 27, 2017), https://www.theatlantic.com/politics/archive/2017/04/trump-cabinet-tracker/510527/ [https://perma.cc/9CMJ-39QJ].

7. *See* Timothy K. Kuhner, *American Plutocracy*, 26 KING'S L. J. 44 (2015).

8. KARL-HEINZ NASSMACHER, THE FUNDING OF PARTY COMPETITION: POLITICAL FINANCE IN 25 DEMOCRACIES 239 (Baden-Baden: Namos, 2009).

9. *See generally* CAPITALISM V. DEMOCRACY, *supra* biographical footnote, at 1–32, 189–236 (discussing government by and for the wealthy).

dominance of business interests in the sum total of lobbying; and the revolving door between public service and private industry. Trump's presidency only magnifies the systemic conflicts of interest and perverse incentives in play.

I. WAKE-UP CALLS

The parallel between American plutocracy and the tyrannical aristocracy of old became obvious during the period of April 2–15, 2014. Surveying nearly 2,000 issue areas, political scientists Martin Gilens and Benjamin Page concluded "that economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while average citizens and mass-based interest groups have little or no independent influence."[10] Political inequality on the basis of wealth has destroyed popular representation.

Published in English just six days later, Thomas Piketty's *Capital in the Twenty-First Century* reported that economic elites' control over government had paid off.[11] The United States has become the most unequal of all advanced democracies with the top 10% of the population holding 72% of national wealth and the bottom half of the population holding just 2% of that wealth.[12] Noting that capitalism has rarely produced such unequal outcomes before, Piketty attributed the dire situation to laws and policies that favor capital over labor and transfer wealth from the state to the private sector. Without political representation, the people are being impoverished. Surely the colonists would empathize.

Less than two weeks before the publication of these groundbreaking studies, the Supreme Court reaffirmed its devotion to the cause of the problems at hand—political inequality on the basis of wealth. *McCutcheon v. FEC* struck down the Watergate-era limit on the total amount of money each individual donor could

10. Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 564 (2014). Gilens's earlier work had said it plainly: patterns of government responsiveness "often correspond[] more closely to a plutocracy than to a democracy." MARTIN GILENS, AFFLUENCE & INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 234 (2012).

11. *See generally* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., Harvard Univ. Press 2014). The English version of Piketty's *Capital* was published on April 15, 2004. See AMAZON, www.amazon.com (search in search bar for "Piketty" and "Capital") (last visited April 6, 2017).

12. PIKETTY, *supra* note 11, at 257.

give to campaigns and political committees.[13] In *McCutcheon*'s wake, people can donate millions of dollars each to political campaigns and committees.[14] This remarkable interpretation of the First Amendment's free speech clause came on the heels of *Citizens United v. FEC*, which granted corporations a constitutional right to unlimited political expenditures from general treasury funds, even in the weeks immediately before an election.[15]

The resulting political environment feels so novel that history has become the last place people look for guidance. Our economic and political systems have entered a new stage, one in which they are increasingly unequal and increasingly difficult to tell apart. Donors at hedge funds, banks, insurance companies, and major corporations join other wealthy individuals and pressure groups in supplying unparalleled sums to campaigns, parties, party committees, superPACs, dark money groups, trade associations, and lobbyists.[16] Having been raised and socialized in today's commercialized, privatized capitalist society, however, it is hard for us to gain a critical understanding of political reality.

What is the meaning of the commercialization and commodification of elections, lawmaking, and political debate? If childcare, elder care, health care, retirement accounts, education, friendship, dating, sex, incarceration and rehabilitation, and security forces are all increasingly delegated to the market, and concentrated capital at that, why should not politics be as well? The privatization of democracy is nearly invisible to a society in which money holds the key to satisfying all desires and obtaining all things. The absence of public financing for campaigns and political parties seems normal, as does the absence of effective limits on private money. If citizens, candidates, and parties without access to large funds had a fair chance to participate and compete, then people might notice a glitch in the programming. The spectacular

13. *See generally* McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434 (2014) (striking down the aggregate limit on individual donations to campaigns, political parties, and party committees).

14. *Id.*; *see also* Sahil Kapur, *Scholar Behind Viral 'Oligarchy' Study Tells You What It Means*, TALKING POINTS MEMO (Apr. 22, 2014, 1:00 PM), http://talkingpointsmemo.com/dc/princeton-scholar-demise-of-democracy-america-tpm-interview [https://perma.cc/KBX5-TSLR].

15. *See generally* Citizens United v. FEC, 558 U.S. 310 (2010).

16. On dark money groups, see Trevor Potter and Bryson B. Morgan, *The History of Undisclosed Spending in U.S. Elections and How 2012 Became the "Dark Money" Election*, 27 NOTRE DAME J.L. ETHICS & PUB. POL'Y 383, 457–78 (2013) (discussing the re-emergence of dark money and its organizational vehicles).

inequalities in economic and political power documented by Gilens, Page, and Piketty (and protected by the Supreme Court) may trouble us deep down inside, but they appear inevitable, impossible to change. In such a state of indoctrination and passivity, we can hardly muster the thoughts to comprehend our misfortune. For the necessary clarity and appropriate arousal, we should look to the past.

II. HISTORICAL GUIDANCE

The primary drafter of the Declaration of Independence viewed economic power as the next source of tyranny after royal power. Two hundred years ago, Thomas Jefferson warned that the country was headed toward "a single and splendid government of an aristocracy, founded on banking institutions, and moneyed incorporations . . . ."[17] As a result, he predicted that the few will be "riding and ruling over the plundered ploughman and beggar[] . . . ."[18] To its supporters, Jefferson alleged that this aristocracy would be the "next best blessing to the monarchy of their first aim—and perhaps their surest stepping stone to it."[19]

Lincoln was just as clairvoyant toward the end of the Civil War, declaring that the "money power of the country will endeavor to prolong its reign by working upon the prejudices of the people until all wealth is aggregated in a few hands, and the Republic is destroyed."[20] To be sure, today's crisis of economic and political inequality is just the latest outbreak in our nation's long battle to contain the aristocracy of wealth, just the latest of a series of epidemics that included the Jacksonian era, the Gilded Age, and

17. Thomas Jefferson, *Letter from Thomas Jefferson to Tom Logan* (Nov. 12, 1816), *in* PAUL LEICESTER FORD, 10 THE WRITINGS OF THOMAS JEFFERSON 356 (New York, G. P. Putnam's Sons, 1892–1899).

18. *Id.*

19. Thomas Jefferson, *Letter from Thomas Jefferson to W.B. Giles* (Dec. 26, 1825), quoted in NILES' WEEKLY REGISTER 169 (Nov 8, 1828) at 169.

20. Abraham Lincoln, *Letter from Abraham Lincoln to William F. Elkins* (Nov. 21, 1864), *in* EMANUEL HERTZ, 2 ABRAHAM LINCOLN: A NEW PORTRAIT 954–55 (New York, Horace Liveright, Inc., 1931). This quotation is also featured in Senator R.F. Pettigrew's 1922 book, *Triumphant Plutocracy* and Macmillon's *The Lincoln Encyclopedia*. R.F. PETTIGREW, TRIUMPHANT PLUTOCRACY 119 (1921); ARTHUR HAYES SHAW, THE LINCOLN ENCYCLOPEDIA 40 (1950). It is, nevertheless, contested. *See* PAUL F. BOLLER & JOHN GEORGE JR., THEY NEVER SAID IT: A BOOK OF FAKE QUOTES, MISQUOTES, AND MISLEADING ATTRIBUTIONS 85 (1989). I tend to think these earlier sources, closer to Lincoln and his time, had superior access to his records and memory, but still the controversy stands.

the Great Depression. For example, Franklin D. Roosevelt ("FDR") framed his progressive platform in opposition to "economic royalists" and "new dynasties" whose "kingdoms were built upon concentration of control over material things."[21]

If FDR's economic royalists, Lincoln's aggregations of wealth, and Jefferson's corporate aristocracy have resurfaced, what enduring democratic vulnerability would be uncovered? Recall Piketty's point that today's extreme concentration of wealth is unnatural—the product of tilted policies on privatization, deregulation, entitlements, labor, and taxation.[22] Gilens and Page employ modern terms to explain the origins of the laws that have aggregated wealth into few hands. Wealthy citizens and interest groups are able to obtain such laws because they "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."[23] But Jefferson's term "aristocracy" is far more descriptive than today's discrete terms, "wealthy citizens" and "interest groups." The path to clarity lies as far back as 1776 in what Jefferson called the "best book extant" in political economy,[24] Adam Smith's *Wealth of Nations*. Smith, the patron saint of capitalism, observed that "dealers . . . in any particular branch of trade or manufactures" have "an interest to deceive and even to oppress the public, and . . . have, upon many occasions, both deceived and oppressed it," pursuing restraints upon competition and an increase in profits at the public's expense.[25]

Alexis de Tocqueville's 1831 *Democracy in America*, one of only several books to ever rival Smith's in insightfulness, was similarly forthright, warning of a "manufacturing aristocracy." "[I]f

21. Franklin D. Roosevelt, President, U.S., Speech Before the 1936 Democratic National Convention (June 27, 1936), http://www.austincc.edu/lpatrick/his2341/fdr36acceptancespeech.htm [https://perma.cc/8PHN-AQ9C].

22. See THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 173 (Arthur Goldhammer trans., Harvard University Press 2014) (discussing the causes of rising economic inequality, which include "a political context . . . more favorable to private wealth than that of the immediate postwar decades").

23. Gilens & Page, *supra* note 10, at 567.

24. Thomas Jefferson, *Letter from Thomas Jefferson to Thomas Mann Randolph, Jr.* (May 30, 1790), *in* PAUL LEICESTER FORD, 6 Thomas Jefferson, THE WORKS OF THOMAS JEFFERSON 56 (1904).

25. ADAM SMITH, THE WEALTH OF NATIONS 87–88, 231–32 (Everyman's Library 1991) (1776).

ever a permanent inequality of conditions and aristocracy again penetrates into the world," wrote de Tocqueville, "this is the gate by which they will enter."[26] How does this type of aristocracy operate? How would it cause a permanent inequality to arise? Adam Smith warned that those who "employ the largest capitals" use their wealth to "draw to themselves the greatest share of the public consideration."[27] In light of the ability of wealthy concerns to co-opt the public agenda, Smith counseled that proposed laws be "long and carefully examined, not only with the most scrupulous, but with the most suspicious attention."[28]

Just a dose of Smith's "suspicious attention" reveals the operation of today's aristocracy. In the 2016 presidential primaries, 158 families provided about half of the seed money for all campaigns—$176 million in total.[29] Because there is no meaningful public financing for federal campaigns, first-time candidates and officeholders running for re-election rely on private donors. That reliance is growing, and few Americans can afford to play much of a role. In the 2014 elections, for example, just 0.3% of the adult population supplied 66% of all campaign funds.[30] From 1992 on, in fact, the great majority of funds for national political campaigns has been provided by less than 1% of the population.[31] The public's exclusion has not caused the privatized political market to falter, however. To the contrary, investment has increased to unprecedented levels—on average, over $1 million is now required to win a seat in the House, $11 million in the Senate, and $1 billion for the presidency.[32]

If this burgeoning market for political access and influence seems exclusive, then consider the market for political advertising.

26. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 161 (Knopf Everyman's Library, 1994).

27. Smith *supra* note 25, at 231.

28. *Id.* at 232.

29. Nicholas Confessore, Sarah Cohen & Karen Yourish, *The Families Funding the 2016 Presidential Election*, N.Y. TIMES (Oct. 10, 2015), https://www.nytimes.com/interactive/2015/10/11/us/politics/2016-presidential-election-super-pac-donors.html?_r=0 [https://perma.cc/9TB5-K4DX].

30. *Donor Demographics*, OPENSECRETS.ORG (2017) www.opensecrets.org/overview/donordemographics.php [https://perma.cc/XG49-29C7].

31. *Id.*

32. *Id.* For elections between 1992 and 2012, see *Election Overview*, OPENSECRETS.ORG (2013) www.opensecrets.org/bigpicture/donordemographics.php?cycle=2012&filter=A [https://perma.cc/PU78-QRJT]. Lawrence Lessig, *What an Originalist Would Understand "Corruption" to Mean*, 102 CAL. L. REV. 1 (2014).

Two of the largest superPACs operating in the 2014 elections, the Senate Majority PAC and American Crossroads, collected $90 million total.[33] Two-thirds of that money came in donations of $500,000 or more, meaning that less than 200 donors provided the great majority of funds.[34] 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.[35] Those 200 people represent just 0.000084% of the adult population, and yet they have tremendous power over electoral outcomes. Just ask the four co-sponsors of campaign finance reform legislation who were unseated in the 2014 midterms amidst $13–$24 million of outside spending against each of them.[36] Even worse than traceable superPAC funds, $127 million in dark money stood behind the candidates who prevailed in the "eleven most competitive senate races" of 2014.[37] Anointed by financial power, a tiny subset of Americans determines the initial viability and staying power of campaigns (including re-election campaigns); shapes public perceptions of issues, candidates, and parties; tips close races one way or another; and infiltrates lawmaking through a network of lobbyists and pressure groups.

Jefferson's and Tocqueville's use of the word aristocracy applies today for more reasons still. Beyond being powerful and few in number, today's political financiers also represent an exclusive ruling class in being overwhelmingly white, male, college educated, and, of course, wealthy. Wealth is the best predictor of political spending, but what best defines this particular subset of the wealthy is its commitment to laws that fuel the concentration of wealth. As Clyde Wilcox concludes, "donors are significantly more

33. Carrie Levine & Dave Levinthal, *Surprise! No. 1 Super PAC Backs Democrats*, CTR. FOR PUB. INTEGRITY (Nov. 3, 2014, 5:00 AM), www.publicintegrity.org/2014/11/03/16150/surprise-no-1-super-pac-backs-democrats [https://perma.cc/8B42-2XCG].

34. *Id.*

35. Meredith McGehee, *Only a Tiny Fraction of Americans Give Significantly to Campaigns*, CAMPAIGN LEGAL CTR. (Oct. 18, 2012), http://www.campaignlegalcenter.org/news/publications-speeches/only-tiny-fraction-americans-give-significantly-campaigns-zocalo-public [https://perma.cc/7FW5-4R7P].

36. *Outside Spending, By Candidate*, OPENSECRETS.ORG (2014), www.opensecrets.org/outsidespending/summ.php?disp=C [https://perma.cc/P3V4-ASEU].

37. Ian Vandewalker, *Outside Spending and Dark Money in Toss-Up Senate Races: Post-Election Update*, BRENNAN CTR. FOR JUST. (Nov. 10, 2014), https://www.brennancenter.org/analysis/outside-spending-and-dark-money-toss-senate-races-post-election-update [https://perma.cc/ZY37-WQBQ].

conservative than other wealthy and well-educated citizens on economic issues."[38] That is saying a great deal, given that the wealthy are generally three times more concerned with budget deficits than education or unemployment.[39] While most Americans favor government assistance for those seeking employment and a minimum wage "high enough so that no family with a full-time worker falls below the official poverty line," only a minority of wealthy respondents agree.[40] Among big political donors and spenders, our aristocracy of wealth, an even smaller percentage can be expected to support government funding for social programs.

This takes us back to one of the main dilemmas of our period in history: Capitalism has not produced such unequal outcomes in all places at all times. The mystery lies in public policies favoring concentrated capital over small wealth holders; private wealth over public wealth; externalization of costs and risks to the public over internalization by responsible parties; capital over labor; and within the labor market, awarding superstars and super managers an ever-greater percentage of the pie. Given the policy preferences and political influence of today's donor-spender aristocracy, it is little wonder that economic inequality has reached the heights reported by Piketty and predicted by Jefferson, Lincoln, and Tocqueville. But that itself is the mystery: the mutually reinforcing relationship between economic and political inequalities has long been on display and yet this plutocratic dynamic persists and even worsens.

Consider that the drafter of our revolutionary manifesto against the British also wrote about the mutually reinforcing relationship between economic and political hierarchies in revolutionary terms, advocating that we "crush in it[s] birth the aristocracy of our monied corporations."[41] Why have we not done so? Noting that the levels of inequality that we experience today have always led to violent revolutions,[42] Piketty finds it "hard to imagine that those at the bottom will accept the situation

38. Clyde Wilcox, *Contributing as Political Participation*, *in* A USER'S GUIDE TO CAMPAIGN FINANCE REFORM 109, 117 (Gerald C. Lubenow ed., Rowman & Littlefield Publishers, 2001).

39. Benjamin I. Page, Larry M. Bartels & Jason Seawright, *Democracy and the Policy Preferences of Wealthy Americans*, 11 PERSP. ON POL. 51, 55 (2013).

40. *Id.* at 57.

41. Thomas Jefferson, *Letter from Thomas Jefferson to Samuel Kercheval* (July 12, 1816), *in* 10 THE WRITINGS OF THOMAS JEFFERSON 1816–1826, 37, 42 (1899).

42. PIKETTY, *supra* note 11, at 439.

permanently."[43] And yet, Americans continue to tolerate interlocking inequalities and the policies they generate, handing both our economy and our democracy over to an aristocracy.

The explanation lies in a historical haze that, time and time again, obscures the view of oppressors and the oppressed alike. The dominant national worldview still holds that we were subjected to tyranny only once in the form of the English monarchy and aristocracy. But clues for comprehending today's situation can be found even back in that distant moment. The American revolutionaries drew upon John Locke, whose natural rights to life and liberty were incorporated into the Declaration of Independence. Locke defined tyranny as "the exercise of power beyond [r]ight . . . not for the good of those who are under it, but for [one's] own private, separate advantage."[44] Certainly King George III qualified. But Locke also said this about tyranny: it is "a [m]istake to think this [f]ault is proper only to [m]onarchies[] other [f]orms of [g]overnment are liable to it, as well . . . ,"[45] Locke continued, "[f]or where-ever the [p]ower that is put in any hands for the [g]overnment of the [p]eople, and . . . is . . . made use of to impoverish, harass, or subdue them . . . : There it presently becomes *Tyranny*."[46] After royal tyranny, the new sovereigns promptly ignored Locke, continuing the tyranny of white, landowning males who exercised exclusive suffrage, enslaved African Americans, impoverished white males without property, and subdued women. The authors of that tyranny saw no injustice there, nor had King George seen any injustice in his. This telling shortsightedness re-emerged in the Jacksonians who gave the vote to property-less white males, but continued to subjugate blacks and women.

The reason for Americans' tolerance of gross inequality today lays buried in the century it took for slavery to be abolished and the additional century that lingered on until the passage of the Voting Rights and Civil Rights acts. Indeed, universal suffrage was not obtained *and broadly protected from interference* until the early 1970s. Why is tyranny so enduring? There is only one way to move from generations of political domination by a monarchy to

43. *Id.* at 263.

44. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 398 (Peter Laslett, ed., Cambridge Univ. Press 1988) (1690).

45. *Id.* at 400.

46. *Id.*

generations of political domination by property ownership, race, sex, and, finally, wealth. Of course there must be violent oppression, but, more importantly, there must also be indoctrination. Centuries of theocracy and dictatorship in other nations suggest the same answer. Tyranny is so enduring because its ideological component clouds the mind, making systematic injustice hard to detect in real time. Piketty confirms this idea, writing 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."[47]

This explains why Jefferson, Tocqueville, Lincoln, and FDR perceived concentrations of economic power so clearly, while we just keep muddling through. They had not been indoctrinated into the royal prerogative, religion, and supreme imperial authority of free-market capitalism. Jefferson's description of an "[*a*]*ristocracy*[] founded on banking institutions and moneyed in corporations[,]" suggested that elites had employed economic power to co-opt democracy.[48] To Jefferson, it mattered not whether a particular aristocracy was founded on royal and hereditary power, or upon the economic power afforded by capitalist entities.[49] Either way, an unaccountable and unrepresentative form of power governed the people. That same insight springs from Roosevelt's description, "economic *royalists*" with "*kingdoms . . .* built upon concentration of control over material things."[50] Like Jefferson, Roosevelt drew a parallel between those who supported the sovereignty of King George III and those who support the sovereignty of the wealthy. Both types of royalists stood in opposition to popular sovereignty and were therefore enemies of democracy.

Such clear thinking became rare as the New Deal and Great Society coalitions fell apart. Business overtook labor, slanted economic indicators reigned over national decision-making, and the country veered towards Reaganomics. Milton Friedman's "concern . . . about the danger to freedom and prosperity from the

47. PIKETTY, *supra* note 11, at 264.

48. Thomas Jefferson, *Letter from Thomas Jefferson to William B. Giles* (Dec. 26, 1825), *in* 10 THE WRITINGS OF THOMAS JEFFERSON 1816–1826, 354, 356 (1899) (emphasis added).

49. *Id.*

50. Roosevelt, *supra* note 21 (emphasis added).

growth of government"[51] and praise for "private voluntary arrangements" caught on.[52] The prior focus on regulation to correct not just injustice but also irrationality, bubbles, and speculation soon yielded to the "efficient-market hypothesis." Still, neither Congress nor the executive would produce the "apparatus of justification" referred to by Piketty.[53]

To the contrary: once political exclusion on the bases of race and sex had been ruled out by constitutional amendments and legislation, the political branches of government continued forward to address political exclusion on the basis of wealth. Passing a comprehensive package of campaign finance reform between 1971 and 1974, Congress aimed to "equalize the relative ability of all citizens to affect the outcome of elections" and slow "the skyrocketing cost of political campaigns[,] thereby . . . open[ing] the political system more widely to candidates without access to sources of large amounts of money."[54] Congress's methods included strict limits on political contributions, and campaign and candidate expenditures, all calculated to reduce the conversion of economic inequality into political inequality. For a brief moment, it appeared to be a viable plan.

III. PLUTOCRACY PURSUANT TO LAW

The justification for political inequality on the basis of wealth shot up abruptly within the judiciary, propelled by the seismic shift from the Warren Court to the Burger Court. On the historic date of the nation's bicentennial, just two years after Congress passed its reforms, the Supreme Court revealed its own capitalist indoctrination. Beyond overturning expenditure limits for individuals, candidates, and campaigns, *Buckley v. Valeo* rejected most of the thinking behind the movement for campaign finance reform.[55] First, the Court decided that political spending qualifies for the same First Amendment protections as political speech itself, infamously concluding that speech and spending had become indistinguishable in "mass society."[56] Second, the Court banished

51. MILTON FRIEDMAN WITH THE ASSISTANCE OF ROSE D. FREIDMAN, CAPITALISM AND FREEDOM vi (Univ. of Chi. Press 1982).

52. *Id.* at 5.

53. PIKETTY, *supra* note 11, at 264.

54. Buckley v. Valeo, 424 U.S. 1, 24–26 (1976).

55. *See generally id.*

56. *Id.* at 19 ("A restriction on the amount of money a person or group can spend

Congress' political equality concerns from the realm:

> [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 information from diverse and antagonistic sources, and to assure the unfettered interchange of ideas.[57]

Finally, as to Congress's interest in reducing the cost of campaigns and including in elections candidates without access to large funds, the Court announced that "[t]he First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise."[58] In the same year of Friedman's Nobel Prize in economics, *Buckley v. Valeo* applied the price system to elections: "In the free society ordained by our Constitution," declared the Court, "it is not the government, but the people . . . who must retain control over the quantity and range of debate on public issues in a political campaign."[59]

As we have seen, however, "the people" who dominate campaign finance and outside spending amount to less than 1% of the adult population and their exclusive political marketplace produces rising inequalities.[60] How does the Court respond to these facts? As supportive of today's aristocracy of wealth as it might seem, *Buckley*'s forty-year old reasoning dissolves in the face of that information. *Buckley* ascribed a democratic purpose to the "unfettered interchange of ideas"—namely, "bringing about [the] political and social changes desired by the people."[61] Forty years later, Justice Breyer's dissenting opinion in *McCutcheon* rightly construed precedent as tying "the opportunity for free political discussion to the end that government may be responsive to the will of the people."[62]

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.").

57. *Id.* at 48–49.

58. *Id.* at 57.

59. *Id.*

60. *See* Gilens & Page, *supra* note 7.

61. *Id.* at 14 (quoting Roth v. U.S., 354 U.S. 476, 484 (1957)).

62. McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1467 (Breyer, J., dissenting) (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)).

Unswayed, the *McCutcheon* majority refused "to define the boundaries of the First Amendment by reference to such a generalized conception of the public good."[63] It noted that "the will of the majority . . . can include laws that restrict free speech" and that the First Amendment "put[s] the decision as to what views shall be voiced into the hands of each of us."[64] The Court had made its command abundantly clear three years earlier in *Arizona Free Enterprise v. Bennett* stating, "[w]hen it comes to protected speech, the speaker is sovereign."[65] This is to say that *the spenders* are sovereign—the 1%—and their sovereignty extends to all of campaign finance, not just speech. Their concentrated economic power allows them to dominate the new First Amendment, which the Court has called "the right to use personal funds to finance campaign speech"[66] and the "First Amendment right to make unlimited expenditures."[67]

The sovereign power of today's aristocracy of wealth rests on this constitutional footing of individual speech rights repurposed for the economically powerful. But a viable apparatus of justification for plutocracy would have to go further—it would have to explain why the sovereignty of large donors and spenders over campaign finance and political speech does not amount to corruption or the end of representative governance. The Court accomplished this task in *Citizens United* and *McCutcheon*.

In order to institute political speech rights for corporations, *Citizens United* had to address the potential for corporate wealth to corrupt officeholders and distort representative democracy.[68] The Court's reasoning twisted and turned, beginning with the conclusory premise that "[i]t 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."[69] Then the Court approved of this distortion of popular will, writing that "a substantial and legitimate reason, if not the only reason . . . to make a contribution to one candidate over another is that the candidate will respond by producing those political outcomes the

63. *Id.* at 1449.

64. *Id.* at 1448–49.

65. Arizona Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 754 (2011).

66. *Id.* at 736 (quoting Davis v. Fed. Election Comm'n, 554 U.S. 724, 739 (2008).

67. *Id.*

68. *See generally* Citizens United v. FEC, 558 U.S. 310 (2010).

69. *Id.* at 313.

supporter favors."[70] As though attempting to outdo George Orwell himself, the Court explained why it is legitimate for financial power to lead to desired political outcomes: "Democracy is premised on responsiveness."[71] The Court noted, "[a]ll speakers . . . 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."[72] It does not matter that outcomes in dividends, interest, and salary are so unequal, even in the context of multi-million dollar campaign donations and unlimited corporate expenditures, because the Court considers that "influence over or access to elected officials does not mean that these officials are corrupt[.]"[73]

Four years later, in *McCutcheon*, the Court expanded on these lines, leaving no doubt as to their tremendous implications. The common-sense view of corruption now defines the constitutional meaning of free speech and political representation. Plutocracy is now embedded in constitutional law. Striking down a $123,000 limit on the total amount each individual can donate to political campaigns and committees and making way for multi-million dollar donations, the Court held that "government 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."[74] Its reasoning began with the conclusion that "[i]ngratiation and access [as a result of such large donations] are not corruption."[75] But it then proceeded in a far more profound direction, describing ingratiation and political access on the basis of large donations in this way: "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."[76]

Thus, in *McCutcheon,* the undue influence exerted by today's aristocracy of wealth became synonymous with representative governance. It was as though the Court had approvingly modified Thomas Paine's words from the opening paragraph of this essay:

70. *Id.* at 352.
71. *Id.* at 359 (citing McConnell v. FEC, 540 U.S. 93 (2003).
72. *Id.* at 314, 351 (quoting Austin, 494 U.S. 652, 707 (Kennedy, J., dissenting)).
73. *Id.* at 359.
74. McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1441 (2014).
75. *Id.* (quoting Citizens United v. FEC, 558 U.S. 310, 360 (2010)).
76. *Id.* at 1441.

the will of political donors and spenders is the law of the land in the United States but instead of proceeding directly from their mouths, it is handed to the people under the more formidable shape of an act of Congress. Corruption, the Court informed us, only means the "exchange of an official act for money."[77]

If ingratiation, access, and responsiveness on the basis of political donations and expenditures are central features of democracy, not corruption, then it would follow that the aristocracy of wealth ought to be praised and revered as the motor of government. Ironically enough, *McCutcheon* did so by placing big donors and spenders on the same level as Paine, the egalitarian revolutionary: "First Amendment rights are important regardless whether the individual is . . . a lone pamphleteer or street corner orator in the Tom Paine mold, or . . . someone who spends substantial amounts of money in order to communicate his political ideas through sophisticated means."[78]

Thomas Paine would have been outraged by the Court's equivalency between pamphleteers and plutocrats. The Court's decision to enlist his good name in the pursuit of unlimited freedom for the wealthy suggests a damning overconfidence in the historical haze engulfing the nation. Paine had been active in the French Revolution as well as the American one, even serving as a member of the French National Convention. "France has had the honor of adding to the word *Liberty* that of *Equality*[,]" Paine wrote.[79] Indeed, at a time in the United States when suffrage was premised on property ownership, Paine opposed the property requirement, describing the landed monopoly as having "dispossessed more than half the inhabitants of every nation of their natural inheritance . . . ."[80] What would Paine have said about premising political ingratiation, access, and responsiveness on wealth?

It is tempting to describe today's aristocratic monopoly on political power the same way Paine described the old aristocratic monopoly on land. The inhabitants of the United States do seem to have been *dispossessed of their rightful political inheritance*. But democracy cannot be inherited as easily as land. It is a movement, a struggle that is either continued or abandoned, won

77. *Id.*

78. *Id.* at 1448 (internal quotation marks omitted).

79. Thomas Paine, *Agrarian Justice* (1797), http://www.ssa.gov/history/paine4.html [http://perma.cc/N7T2-SXR9].

80. *Id.*

or lost by every generation. It cannot be acquired once and for all, and then conveyed to one's heirs, although the Bill of Rights and Civil Rights Amendments go a great distance in this direction. Still, even though formal political exclusion on the bases of property, race, and sex were defeated by our predecessors, political exclusion itself is perennial. Validated anew in constitutional law and ideology, political exclusion now operates on the basis of wealth. It is precisely the changing nature of aristocracy and the prospect of political struggle to defeat it that makes Thomas Paine one of the worst possible historical figures for the Supreme Court to enlist in the service of plutocracy.

IV. THE NEXT AMERICAN REVOLUTION

Paine's popular, revolutionary politics successfully targeted the "remains of aristocratical tyranny" and the "remains of monarchical tyranny"[81] in the American colonies, exposing hereditary rule and the "distinction of men into KINGS and SUBJECTS[]"[82] as an affront to equal rights and God. Setting out to convince the colonists to oppose British monarchy and aristocracy, Paine attempted one of the most radical breaks from tradition of all time. Aware that the first obstacle to revolution was cognitive, Paine began *Common Sense* by priming readers for a shift in awareness: "[A] long habit of not thinking a thing wrong, gives it a superficial appearance of being right, and raises a formidable outcry in defence [sic] of custom."[83] The same cognitive difficulty occurs with the power of wealth today, a power enthroned by our acquired subservience to markets, the supreme measure of economic profit and our modern-day religion of capitalism. A separate defense of custom may also arise in favor of the Supreme Court's free speech jurisprudence, parts of which have been iconic American achievements. But the Supreme Court's customary power does not rival the British Monarchy's or Aristocracy's in 1776, and the jaundiced crony capitalism and unrepresentative government that have prevailed through the privatization of democracy have no greater claim to legitimacy.

After the cognitive obstacle that obscures vision and clings to the status quo, the next obstacle to revolution is physical. In Paine's time, this was the bloody mechanics of extricating a

81. Paine, *supra* note 2, at 8.
82. *Id.* at 11.
83. *Id.* at 1.

landmass and a people from an unrelenting empire. In our time, it is only the grassroots marathon and procedural slog of amending the Constitution to set the Supreme Court straight and permanently reform campaign finance.

Once his readers had taken to the battlefields of independence, Paine motivated them to persevere. "Tyranny, like Hell, is not easily conquered[,]" he wrote.[84] "Heaven knows how to put a proper price upon its goods[,]" he continued, "and it would be strange indeed if so celestial an article as FREEDOM should not be highly rated."[85] Those who say it is too difficult to amend the Constitution should remember these words and the task that motivated them. Paine had faith in the ability of ordinary people to wake up to the reality of political oppression. He believed that seemingly impossible battles could be won (and were actually the most important of all sorts of battles to win). And he understood that the solution to tyranny must be final and unequivocal.

Paine and the other revolutionaries reacted to the undemocratic power of British monarchs and nobles with a categorical response: separation. As a practical matter, this was the physical separation of the colonies from Great Britain, allowing a new, sovereign nation to emerge. But our revolutionaries accomplished a more profound separation as well: the separation of royal and aristocratic power from the political sphere.

To prevent the likes of royal power from emerging internally after independence, the framers separated the powers of government into three branches. Not only was the President to be elected, he was also to be foreclosed by constitutional structure from usurping all powers of government and becoming a monarch by another name. James Madison also intended the separation of powers to guard against factions, "a number of citizens . . . united and actuated by some common impulse of passion, or of interest, adverse to the rights of the citizens, or to the permanent and aggregate interests of the community."[86] The notion of a few powerful, self-interested actors co-opting government and organizing against the public also recalls Adam Smith's description of the corporate interests of his time. The distinction between power exercised in self-interest versus public interest was also

84. THOMAS PAINE, THE AMERICAN CRISIS, *in Pamphlet 1* (1776).

85. *Id.*

86. THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961), https://usa.usembassy.de/etexts/democrac/7.htm [http://perma.cc/TSL3-SJG3].

central to John Locke's definition of tyranny—the exercise of political power not for the good of those subject to it but for private, separate advantage. Given that "men are ambitious, vindictive, and rapacious[,]" as Alexander Hamilton put it, divided power was required to prevent any person or group from dominating government.[87] "Ambition must be made to counteract ambition[,]" Madison concluded.[88]

The separation from Great Britain and the separation of powers were the best and most permanent solutions to monarchy imaginable. The same could be said of the framers' solution to theocracy, the First Amendment's separation of church and state. Thomas Jefferson believed that "the church should be walled off from the state in order to safeguard secular interests (public and private) 'against ecclesiastical depredations and incursions . . . .'"[89] He understood the constitutional prohibition on the establishment of a state religion as "a wall of separation."[90] The Supreme Court later elaborated on the purpose of this wall in terms that recall the separation of royal authority from the political sphere: "The [First] Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion . . . . It was to create a *complete and permanent separation of the spheres of religious activity and civil authority* . . . ."[91]

The sort of clarity, conviction, and commitment shown by these early patriots finds no parallel whatsoever in today's sleepy malaise, this collective unconsciousness and historical haze. If neither theocracy nor monarchy were tolerated here, why should plutocracy be allowed to flourish? Is it not intolerable for political power to be separated from religious hierarchy, divine favor, and royal authority, only to later be premised on wealth? The aristocracy of the past rested on family line, royal favor, title, land, and more generally, wealth. Today's aristocracy rests sometimes on inheritance, other times on the favor of capitalist entities, and always on wealth. How much has changed? Tyranny's stubborn

87. Alexander Hamilton, THE FEDERALIST NO. 6, at 54, http://avalon.law.yale.edu/18th_century/fed06.asp [https://perma.cc/E9QW-EWSP].

88. James Madison, THE FEDERALIST NO. 51, at 322, http://avalon.law.yale.edu/18th_century/fed51.asp [https://perma.cc/PZP3-BDU5].

89. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1158–59 (2d ed., 1988).

90. Thomas Jefferson, *Letter from Thomas Jefferson to the Danbury Baptist Association* (Jan. 1, 1802), *in* 5 THE FOUNDERS' CONSTITUTION 96 (1987).

91. Everson v. Bd. of Educ., 330 U.S. 1, 31–32 (1947) (emphasis added).

persistence owes to a simple fact. While we succeeded in enacting constitutional separations to defeat monarchy and theocracy, we have done no such thing in the case of rule by and for the wealthy.

The aristocracy of wealth rests its case on unlimited free speech rights, insisting that money is speech, corporations are citizens, and political equality is unlawful. The forces of slavery also rested their case on such unlimited and wrongheaded conceptions—unqualified property rights to own slaves, who were not citizens, contractual rights to buy and sell them, and equal dignity of human beings as unlawful. Absent unmistakable text and structure, constitutional law is always subject to such ideological manipulation. Theocracy and monarchy were forestalled and slavery ended only once a critical mass of people awoke to the injustices of those systems. Mass awareness is also the first step for a separation of business and state, that missing piece of constitutional architecture.

As always, we must choose between two enduring camps in the American landscape. First come the forces of political exclusion, the America of royalists, slavers, racists, misogynists, and plutocrats. In opposition arise the forces of political inclusion—the America that fought a revolutionary war to defeat monarchy, a civil war to end slavery, and achieved civil rights through numerous constitutional amendments and comprehensive laws. If we tolerate political exclusion on the basis of wealth and side with the Supreme Court, future generations will come to understand democracy as a bridge between the religious and royal despotisms of centuries past and the economic despotism that consolidated its power in our time.

Alternatively, we could separate financial power from civil authority, continuing the American tradition of overcoming each and every power center that threatens popular government. The outcome depends on whether we wake up to the reality of our modern-day aristocracy, the embarrassing truth of American democracy having been deregulated and privatized, of popular sovereignty having been replaced by the sovereignty of political donors, spenders, lobbyists, and other moneyed surrogates for lawmakers—in sum, plutocracy. The personal plutocracy of President Trump, perhaps better described as *kleptocracy*,[92] only

92. *See generally* Timothy K. Kuhner, *American Kleptocracy* (forthcoming, KING'S L. J.). On the definition of kleptocracy, see EMMANUEL ONYEMAGHANI OWAH, GOVERNMENT OF THE CROOKS, BY THE CROOKS, FOR THE CROOKS (2011)

adds to the reasons for the next American revolution.

(defining kleptocracy as "government by those who seek . . . personal gain at the expense of the governed" and including with its "typical characteristics" "concealment of illegal gains [and] instability of political or economic agenda"). This much was foreshadowed by Trump's and his family members' political maneuvering to suit their businesses during Trump's campaign and his status as President Elect and Trump's campaign payments of $12.5 million to his businesses and family members. *See* Richard C. Paddock et al., *Potential Conflicts of Interest around the Globe for Trump, the Businessman President*, N.Y. TIMES (Nov. 26 2016), http://www.nytimes.com/2016/11/26/us/politics/donald-trump-international-business.html [https://perma.cc/8H56-ZBB4]; Drew Griffin et al., *Trump Paid $12.5 Million to his own Businesses During Race*, CNN (Dec. 16 2016), http://money.cnn.com/2016/12/16/news/companies/donald-trump-campaign-fec/ [https://perma.cc/B82M-8FT4].