Plutocracy and Partyocracy: Oligarchies Born of Constitutional Interpretation

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Economic and political inequality could not endure and continue to grow at present-day levels if popular governance were not kept in check. A comparative view of the financing of political parties and campaigns exposes two main options for doing so: allow economic elites to control democracy or allow elites from within major political parties to do so. Whether a product of the undue influence of wealthy donors and spenders or the power of major parties to increase their own public financing and exclude minor parties, many advanced democracies have broken their core promises of equality, popular participation, representation, and accountability. Unpopular laws and public disenchantment abound. This article suggests that enduring patterns within political finance have led to the consolidation of two forms of oligarchy: plutocracy, or government of, by, and for the wealthy, which represents the decay of liberal democracy; and partyocracy, government by party elites who have appropriated state power, which represents the decay of social democracy. Together, these legal forms of corruption co-opt democracy's values and outputs. The law of political finance must account for these pathological forms of democracy that produce unfair elections, unrepresentative governance, and unpopular laws and policies.

L'inégalité économique et politique n'aurait pas pu durer et grandir comme elle l'a fait si les aspects participatif, égalitaire et représentatif de la démocratie n'étaient pas contenus. Un aperçu comparatif du financement des partis et des campagnes politiques révèle deux options principales pour ce faire : permettre à l'élite économique de contrôler la démocratie ou permettre aux élites à l'intérieur des grands partis politiques de le faire. Que cela soit un produit de l'influence indue des donateurs fortunés et des gens dépensiers ou le pouvoir des grands partis à augmenter leur propre financement public et exclure les petits partis, de nombreuses démocraties avancées ont rompu leurs promesses fondamentales d'égalité, de participation populaire, de représentation et d'obligation de rendre compte. Les lois impopulaires et le désenchantement public abondent. Selon l'auteur de cet article, des tendances tenaces à l'intérieur de la finance politique ont entraîné la consolidation de deux formes d'oligarchie : la ploutocratie, ou le gouvernement des riches pour les riches, qui représente le déclin de la démocratie libérale; et la gouvernance par les partis, un gouvernement par les élites du parti qui se sont appropriés le pouvoir étatique, qui représente de déclin de la social-démocratie. Ensemble, ces formes légales de corruption récupèrent les valeurs et les résultats de la démocratie. La loi de la finance politique doit prendre en compte ces formes pathologiques de démocratie qui produisent des élections inéquitables, une gouvernance non représentative et des lois et des politiques impopulaires.

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As of the 1970s, liberalism — the political philosophy and mode of government — was still broad enough to accommodate ethical concerns over market excesses, equality, the development of capacities, and meaningful political participation for ordinary citizens. Democratic governments took programmatic steps that reflected not just classical liberalism, but also ethical and social liberalism, to the happy effect that one could mention John Locke as well as the other Johns (Stuart Mill and Rawls) in the same sentence. The reach of the market was often circumscribed in the interest of community values and public goods, including the stability of the market itself. In sum, Keynesians and neoclassicists still enjoyed a healthy rivalry.[1]

Sporadically in the 1980s and consistently thereafter, however, neoliberalism gained ground on liberalism. An economic and political rejection of social, ethical, and regulatory stances, neoliberalism brought about the "'economization' of political life"[2] for the purpose of "capital enhancement."[3] Finance capital, trade treaties, corporate lobbies, supranational institutions, and political parties succeeded in carrying out privatization and austerity measures on a global scale.[4] As David Harvey notes, "[t]here has everywhere been an emphatic turn in political-economic practices and thinking since the 1970s[:] Deregulation, privatization, and withdrawal of the state from many areas of social provision have been all too common."[5]

The implementation of this neoliberal program involved a complex set of factors and events, but it certainly included a solid degree of government capture by elites and an equally solid degree of ideological drift towards economic conceptions of political values. This article posits that some of that capture and drift occurred between 1970 and 2014 within a body of law called political finance. While the term "campaign finance" is more common in presidential systems and "party finance" in parliamentary systems,[6] both terms are included in "political finance," which refers to "disclosure, transparency, expenditure

1 Charles Derber & Yale R Magrass, *Capitalism: Should You Buy It? An invitation to Political Economy* (Boulder: Paradigm, 2014) at 33-34, 51-52.

2 Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (New York: Zone Books, 2015) at 17.

3 *Ibid* at 22.

4 See e.g. Mark Blyth, *Austerity: The History of a Dangerous Idea* (Oxford: Oxford University Press, 2015); David Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2007) [Harvey]; Kerry Anne Mendoza, *The Demolition of the Welfare State and the Rise of the Zombie Economy* (Oxford: New Internationalist, 2014).

5 Harvey, *supra* note 4 at 2-3.

6 Arthur B Gunlicks, ed, *Campaign and Party Finance in North American and Western Europe* (Bloomington, Ind: iUniverse Publishing, 2000) at vii [Gunlicks].

and contribution limits, as well as direct forms of public subsidies to parties and candidates."[7]

Martin Gilens and Benjamin Page point to the dominance of large donors and spenders as an explanation for the remarkable findings of their 2014 study, *Testing Theories of American Politics*. From a statistical analysis of policy outcomes across nearly 2,000 issue areas in the United States at the federal level, Gilens and Page reached a striking conclusion: "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."[8] Their conclusion could hardly be ignored: "America's claims to being a democratic society are seriously threatened" because "policymaking is dominated by powerful business organizations and a small number of affluent Americans."[9] Indeed, an earlier study by Gilens suggested that patterns of government responsiveness "often corresponded more closely to a plutocracy than to a democracy."[10]

Meanwhile, high state subsidies designed partly to increase political equality and pluralism appear to backfire frequently. In perhaps the leading work on the tyranny of political parties, Katz and Mair cite "a tendency in recent years towards an ever closer symbiosis between parties and the state, and that this then sets the stage for the emergence of a new party type, which we identify as 'the cartel party.'"[11] High courts and leading scholars in European states have echoed this finding, suggesting that political parties have systematically insulated themselves from popular demands and outside competitors by gaining power over state subsidies for their electoral and ordinary expenses.

7 See e.g. Herbert E Alexander & Joel Federman, *Comparative political finance in the 1980s* (New York: Cambridge University Press, 1989) at 1.

8 Martin Gilens & Benjamin I Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens* (2014) 12:3 Perspectives on Politics 564 at 564 [Gilens & Page].

9 *Ibid* at 577.

10 Martin Gilens, *Affluence & Influence: Economic Inequality and Political Power in America* (Princeton: Princeton University Press, 2012) at 234.

11 Richard S Katz & Peter Mair, "Changing Models of Party Organization and Party Democracy: The Emergence of the Cartel Party" (1995) 1:1 Party Politics 5, online at 6: <https://perma.cc/HP8L-SK4G> [Katz & Mair].

Competing forms of democracy, competing forms of political finance

The ancient Greeks employed the word "oligarchy" to denote a system of rule by the few, whose purpose they commonly understood to be moneymaking.[12] Far from a bygone relic, oligarchy is ascendant in the Russian businessmen and party elites who captured the benefits of liberalization; Chinese officials administering capitalism to their benefit; the wealthy Americans who control superPACs and dominate campaign finance; European political parties that collude with each other to capture electoral subsidies and exclude minor parties that would challenge economic arrangements; and the global financial elite that governs through debt.[13] Out of this great variety of oligarchic threats, only two have credibly justified their existence as a matter of democratic values. Those justifications have obtained the status of binding law through constitutional drafting and constitutional interpretation. American style plutocracy and European style partyocracy have distinguished themselves in these regards, relying, respectively, on notions from liberal democracy and social democracy.

The structural and ideological arrangements in play have long been clear. In 1977, Charles Lindblom described the primary difference between governments as despotic versus libertarian — that is, governments that were inherently oppressive versus those that sought to employ freedom as their organizing principle.[14] This was a common way to distinguish the forces at work during the Cold War. However, Lindblom then perceived the central question that would determine the shape of social order after communism's collapse: "Aside from the difference between despotic and libertarian governments," he wrote, "the greatest distinction between one government and another is in the degree to which market replaces government or government replaces market."[15] Also writing in 1977 and perceiving the same distinction, C. B. Macpherson noted

12 David Tabachnick & Toivo Koivukoski, eds, *On Oligarchy: Ancients Lessons for Global Politics* (Toronto: University of Toronto Press, 2011) at ix [Tabachnick & Koivukoski].

13 See e.g. Azar Gat, "The Return of Authoritarian Great Powers" (July/August 2007) 86:4 Foreign Affairs, online: <www.foreignaffairs.com/articles/china/2007-07-01/return-authoritarian-great-powers>; Fareed Zakaria, "The Rise of Illiberal Democracy" (November/December 1997) 76:6 *Foreign Affairs*, online: <www.foreignaffairs.com/articles/1997-11-01/rise-illiberal-democracy>; Maurizio Lazzarato, *Governing by Debt*, translated by Joshua David Jordan (Los Angeles: Semiotext(e), 2013); Tabachnick & Koivukoski, *supra* note 12 at ix (noting the "close relationship between corporate executives and American government" and "the formation of a global network of cosmopolitan, technocratic managers").

14 Charles E Lindblom, *Politics and Markets* (New York: Basic Books, 1977) at ix.

15 *Ibid.* Lindblom considered this to be the matter on which "[t]he operation of parliaments and legislative bodies, bureaucracies, parties, and interest groups depends.": *Ibid.*

that "liberal democracy" was associated with two very different types of societies: "the democracy of a capitalist market society" or "a society striving to ensure that all its members are equally free to realize their capabilities."[16]

In pursuing the latter course, social democracy brings about a social form of capitalism. Clauss Offe describes that type of capitalism, which has been meaningfully tempered by democracy, as "'organized,' 'embedded' and 'regulated' capitalism,"[17] and as (Continental) European capitalism.[18] Informed by "the precepts of a 'social' market economy, Offe contrasts it with the liberal or Anglo-American form of capitalism. While European versus Anglo-American is the "coarsest distinction" between different forms of capitalism,[19] it is important to consider their broad contours, as the material and ideological battles of recent years have unfolded along them:

> [E]quality versus efficiency, collective bargaining versus individual contracting, cooperation versus conflict, rights versus resources, wage moderation versus distributive conflict, ... social partnership versus class conflict, proportional representation versus majoritarianism, associational collectivism versus individualism, social security versus competitiveness, [and] politics versus markets [20]

Offe explains that a defining feature of European capitalism and social order is its tendency towards the first choice in each pairing above.

The connection between political finance and the competition between liberal democracy and social democracy is immediately clear. There are three basic options facing states with regard to political finance: "[l]aissez-faire and self-regulation," "transparency or 'non-regulatory intervention,'" and "regulation."[21] Choices between and within these categories surely depend on myriad factors, including history, geography, socioeconomic stratification, constitutional text, judicial review, ideology, electoral system, and politics,[22] but what moves such factors and what explains the importance of the choice between regulation and laissez faire?

16 See CB Macpherson, *The Life and Times of Liberal Democracy* (Oxford: Oxford University Press 2012).

17 Claus Offe, "The European Model of 'Social' Captialism: Can it Survive European integration?" (2003) 11:4 Journal of Political Philosophy 437 at 447.

18 *Ibid* at 441.

19 *Ibid.*

20 *Ibid.*

21 KD Ewing & Samuel Issacharoff, eds, *Introduction to Party Funding and Campaign Financing in International Perspective* (Oxford: Hart Publishing, 2006) at 2-3.

22 *Ibid* at 6-7.

To begin adding the necessary context, one must look to where each of the categories above draws its funds. Arthur Gunlicks offers a useful framework in his description of the "three types of party and campaign financing: plutocratic, grassroots, and public funding."[23] These types of financing can be categorized as large donations from few sources, small donations from many sources, and half or more of all political funds coming from state subsidies. The first is common in parties on the Right, the second in parties on the Left, and the third is a general rule throughout Europe.[24]

Each state thus categorized is commonly home to competing tendencies within its political finance regime.[25] Within West German political finance, for example, Christine Landfried found both "etatization" and capitalization to be at work. Respectively, these terms signal "the danger posed [from public subsidies] when parties become more dependent on the state than on membership dues" and "the process of increased 'big' donations to political parties in exchange for concessions and privileges."[26] With international, regional, national, and more localized levels of politics all subject to many variables within each country, it is unusual for any one such tendency to completely eclipse the rest.

Still, whenever the reigning factors (history, economics, politics, ideology, judicial review, etc.) converge, or when one or several of them dominate the rest, "regulatory trajectories" surface.[27] In regulatory trajectories, Ewing and Samuel Issacharoff locate the underlying theme of all such variables and issues.[28] Within each country, the question is whether the particular constellation of variables and issues is producing a move from laissez faire and self-regulation to regulation and state funding, or a move in the opposite direction.

In observing a divide between public financing and private financing in North American and Western European countries, Gunlicks complicates the analysis by adding additional explanatory factors, such as: federalism, single member district plurality electoral systems versus proportional representation, presidential versus parliamentary systems, and political culture.[29] In the end, however, Gunlicks attributes those competing regulatory trajectories to com-

23 Gunlicks, *supra* note 6 at 13.

24 *Ibid.*

25 See Christine Landfried, "Political Finance in West Germany" in Herbert E Alexander & Rei Shiratori, eds, *Comparative Political Finance Among the Democracies* (Boulder, CO: Westview Press, 1994) at 133 [Alexander & Shiratori].

26 *Ibid.*

27 Ewing & Issacharoff, *supra* note 21 at 8.

28 *Ibid.*

29 Gunlicks, *supra* note 6 at 7-8.

peting political cultures, the most important variable in his view. He describes two political cultures: first, "[a]ttitudes generally hostile to taxes and big government, or even to government at all" that were "tapped and further encouraged by … [Ronald] Reagan," and second, attitudes that favor "lessening the influence of wealthy individuals" and producing "fairer, more open and equal elections."[30] Gunlicks notes that the second sort of political culture, clearly social democratic in nature, was linked to public funding by political leaders who saw subsidies as the means to achieving those preferences for less private wealth and greater equality.[31]

This leads back to familiar sets of competing values — hostility to government and taxes (i.e., greater reliance on markets) versus fairness and equality concerns. These values go a tremendous distance toward describing the difference between liberal democracy and social democracy, as noted above. The overlap is programmatic and ideological. Therefore, one would also expect it to be historical. Indeed, "North European social democracies" pioneered state subsidies for political parties in the 1950s and 1960s.[32] Ewing and Issacharoff note that "[t]his was a period of the expanding State, in terms of budgets and functions, and the idea was widely adopted."[33] Then, in the mid to late 1970s, the U.S. Supreme Court pioneered the antiregulatory stance integral to plutocracy.[34] Far from the ideology of North European social democracies, the Burger Court relied on free-market theory and veered away from the Warren Court's progressive jurisprudence.[35]

What remains to be fleshed out, then, are the constitutional and ideological underpinnings of these distinct regulatory trajectories (one towards private funding and laissez-faire, the other towards state funding and regulation), and the sense in which both can lead to the deformation and corruption of their respective social orders: liberal democracy and social democracy. Those who benefit from the prevalence of market arrangements in liberal democracy are those who benefit from plutocracy. Those who benefit from the comparatively statist features of social democracy are those who benefit from partyocracy: political parties.

30 *Ibid* at 8.

31 See *ibid*.

32 Ewing & Issacharoff, *supra* note 21 at 5.

33 *Ibid*.

34 See Timothy K Kuhner, *Capitalism v. Democracy: Money in Politics and the Free Market Constitution* (Redwood City, CA: Stanford University Press, 2014) ch 2-4.

35 See *ibid*.

The distinction between plutocracy and partyocracy is not the presence or absence of oligarchy. Referencing the "elitist model of American society," Darcy Leach notes that "it is certainly plausible that a powerful elite could constitute an oligarchy, without necessarily serving as elected officials in the political apparatus."[36] Furthermore, her definition of oligarchy would accommodate both control by big donors and spenders and control by party elites: "a concentration of entrenched illegitimate authority and/or influence in the hands of a minority, such that de facto what the minority wants is generally what comes to pass, even when it goes against the wishes (whether actively or passively expressed) of the majority."[37] For purposes of differentiating between plutocracy and partyocracy, the questions are simply, *which* minority? And *which* illegitimate mode of authority and/or influence?

Plutocracy

Karl-Heinz Nassmacher traces the label of a "plutocratic" regime of political finance back to 1983. He writes that "[w]hereas democracy is a political system based on equal participation by the multitude, plutocracy is a system dominated by the riches of an affluent minority." Contrasting it to grassroots financing through small donations, Nassmacher calls plutocratic financing "the capitalist dimension of party funding."[38] In this regard, Nassmacher's definition of corruption is right on point: "the clandestine exchange between two markets, the political or administrative market and the economic or social market."[39] The designation "plutocracy" simply removes the word "clandestine" from Nassmacher's definition of corruption, giving us a legal market for political influence. Plutocracy, as an official system of rule, is distinct from kleptocracy and other forms of abject corruption that may amount to plutocracy in practice, but are not *official systems of rule.*

The difference lies between that which is merely practiced and that which is both practiced and honored. Consider, for example, this exchange between Socrates and Adeimantus: "Socrates: Surely, when wealth and the wealthy are honoured in the city, virtue and the good men are less honourable. Adeimantus: Plainly. Socrates: Surely, what happens to be honoured is practiced, and what

36 Darcy Leach, "The Iron Law of What Again? Conceptualizing Oligarchy Across Organizational Forms" (2005) 23:3 Sociological Theory 312 at 317 [Leach].

37 *Ibid* at 329.

38 Karl-Heinz Nassmacher, *The Funding of Party Competition: Political Finance in 25 Democracies* (Baden-Baden: Nomos, 2009) at 239.

39 *Ibid* at 21.

is without honour is neglected."[40] Supreme Court decisions have created a plutocracy not just by striking down numerous campaign finance reforms, but also by providing justificatory claims that serve to legitimize and even honor a controlling role for wealth in democracy.

As a response to Socrates, consider Justice Alito's majority opinion in the 2008 case *Davis v FEC*. The Court struck down a provision of McCain-Feingold that helped candidates who ran against wealthy, self-financing opponents 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."[41] 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."[42] These four strengths comprise Justice Alito's exhaustive list. He did not mention 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."[43]

In the 2010 case *Citizens United v FEC* the Court struck down a prohibition on corporate general treasury spending in the weeks leading up to an election. Justice Kennedy's majority opinion states, "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."[44] 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. Discussing the effects of corporate expenditures, the Court claimed that "influence over or access to elected officials does not mean that those officials are corrupt."[45]

40 Tabachnick & Koivukoski, *supra* note 12 at ix.

41 *Davis v Fed Election Comm'n*, 554 US 724, 742 (2008).

42 *Ibid* at 742.

43 *Ibid* at 741 [emphasis added].

44 *Citizens United v Fed Election Comm'n*, 558 US 310, 351 (2010), quoting *Austin v Michigan Chamber of Commerce*, 494 US 652, 707 (Kennedy J. dissenting) [*Citizens United*].

45 *Ibid* at 359.

This line of cases culminated in 2014 in *McCutcheon v FEC*,[46] which laid out a blueprint for plutocracy:

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

Thus, the Court redefined representative democracy as attention by officeholders and candidates to the interests of their financial contributors.

To ensure that this representative dynamic would not be disturbed, the Court reminded its readers:

> 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.'

These remarks stand as the reasoning for the Court's decision to strike down a $123,200 limit on each individual's campaign donations per two-year election cycle.[47] 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 a short amount of time before running up against the aggregate two-year limits of $48,600 to federal candidates and $74,600 to other political committees.[48] Declaring aggregate limits unconstitutional, the Court ushered in a new era of multi-million dollar donors giving 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."[49]

46 *McCutcheon* v *FEC*, 134 S Ct 1434 (2014).

47 *Ibid.*

48 *Ibid* at 1442-43.

49 *Ibid* at 1442-43, 1473 (Breyer J. dissenting). Justice Breyer was joined by Justices Ginsburg, Sotomayor and Kagan. See *Ibid* at 1442-43.

In the end, *Citizens United* and *McCutcheon* strengthen an aristocracy of wealth. Let us begin with 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.[50] 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 money.[51] Those 200 people represent .000084% of the U.S. 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.[52] In the 2014 elections, just .3% of the adult population supplied 66% of the sum total of cash.[53] The rise in total campaign donations has been striking, although it has not been as extreme as the rise in outside expenditures. Between 2000 and 2012, for example, the total amount raised by both major party general election presidential candidates rose from $325 million (Bush versus Gore) to $2 billion (Romney versus Obama), an increase of over 600%.[54] The direction of change was constant, with each presidential race significantly surpassing the cost of the one before it.

50 Carrie Levine & David Levinthal, *Surprise! No. 1 super PAC backs Democrats* (3 November 2014), online: The Center for Public Integrity <www.publicintegrity.org/2014/11/03/16150/surprise-no-1-super-pac-backs-democrats>.

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

52 Center for Responsive Politics, *Donor Demographics: Election Cycle 1992-2012*, online: Open Secrets.org <www.opensecrets.org/bigpicture/donordemographics.php?cycle=2012&filter=A> (for elections between 1992 and 2012); see also Lawrence Lessig, "What an Originalist Would Understand 'Corruption' to Mean" (2014) 102:1 Cal L Rev 1 at 5; Jamin Raskin & John Bonifaz, "Equal Protection and the Wealth Primary" (1993) 11:2 Yale L & Pol'y Rev 273 at 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* (26 January 2012), online: Sunlight Foundation <www.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/>.

53 See Center for Responsive Politics, *Donor Demographics*, online: Opensecrets.org <www.opensecrets.org/overview/donordemographics.php>.

54 See Jonathan D Salant, "Spending Doubled as Obama Led Billion-Dollar Campaign (Update 1)", *Bloomberg News* (27 December 2008), (providing numbers for total spending and individual

By 2012, the average price tags of political offices 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.[55] Even in the election years with the deepest donor base, less than .6% of all citizens of voting age supply most of the money — that would be just 1.5 million out of 270 million American adults today. In the 2014 elections, however, just over 800,000 citizens, .3% of the voting-age population, provided the great majority of funds. In total, these statistics convey the essential fact of political finance in the United States: privatization. All of this information makes Gilens and Page's findings ("average citizens have little or no independent influence"[56]) entirely predictable.

As anti-plutocratic forces in political finance jurisprudence, we can consider several points of contrast to the U.S. Supreme Court. 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."[57] Similarly, 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."[58] 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."[59] The Court accepted the argument that this function "protect[ed] effective pluralism and the democratic process."[60] 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."[61]

candidate spending in the 2008 election); Charles Lewis, *The Buying of the President* (New York: Avon Books, 1996) at 4.

55 Sarah Wheaton, *How Much Does a House Seat Cost?* (9 July 2013), online: The Caucus: Pol. and Gov't Blog of the New York Times <www.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" *The Huffington Post* (6 December 2012), online: The Huffington Post <www.huffingtonpost.com/2012/12/06/2012-presidential-election-cost_n_2254138.html>.

56 Gilens & Page, *supra* note 8.

57 *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, 151 DLR (4th) 385.

58 *Bowman v United Kingdom*, 1998-I ECHR 175, para 38.

59 *Animal Defenders International v United Kingdom* [GC], No 48876/08 (22 April 2013) at para 99, 57 EHRR 21.

60 *Ibid.*

61 *Ibid* at para 112.

Perhaps the starkest contrast came in September of 2015, when the Supreme Federal Tribunal of Brazil struck down the legal provision that allowed corporate donations to political parties.[62] The Brazilian electoral system is similar to that of the United States in a number of ways: a large geographic area, numerous population, candidate-centered elections, and a history of expensive campaigns.[63] And similar to the U.S. panorama of roughly half a percent of adult citizens supplying most of the funds relied upon by political parties and just .000084% of adult citizens supplying most of the funds relied upon by independent expenditure groups, Brazil has seen a clear plutocratic dimension in their political finances, as noted by Maria D'Alva Gil Kinzo:

> [T]he main method of funding campaigns in Brazil is through private firms … especially those in the civil construction and banking sectors… In the [1994] presidential election, 93 per cent of private contributions to the eventual winner came from business donations…The staggering role played by business in financing campaigns is not limited to parties on the right… even in the case of Lula — the Workers' Party presidential candidate — private firms' contributions amounted to 41 per cent of this party's total expenditure.[64]

D'Alva goes on to list many elections where private sources provided 94-99% of total campaign funds. Writing thirteen years before D'Alva, Roberto noted that "[c]ampaigns are funded mainly by bankers, industrialists, traders, and livestock breeders [and that] the way in which power is structured in Brazil has led to its concentration in the hands of a few."[65]

Deciding the case in 2015, the Supreme Federal Tribunal faced up to an especially powerful political panorama. In the 2014 election campaigns for the presidency, senate and congress, "[a]round 76% of the over R$3bn ([US]$760m) donated … came from corporate entities" and that money was fairly equally distributed between "the ruling leftwing Partido dos Trabalhadores (PT) and the main opposition Partido da Social Democracia Brasileira (PSDB)," suggest-

62 Ação Direta de Inconstitucionalidade 4650, discussed in English here: Bruce Douglas, "Brazil bans corporations from political donations amid corruption scandal" *The Guardian* (18 September 2015), online: The Guardian <www.theguardian.com/world/2015/sep/18/brazilian-supreme-court-bans-corporate-donations-political-candidates-parties>.

63 Maria D'Alva Gil Kinzo, "Funding Parties and Elections in Brazil" in Peter Burnell & Alan Ware, eds, *Funding Democratization*, 2nd ed (New Brunswick, NJ: Transaction Publishers, 2007) 116 at 117-22 [Burnell & Ware].

64 *Ibid* at 130.

65 Roberto Aguiar, "The Cost of Election Campaigns in Brazil" in Alexander & Shiratori, *supra* note 25 at 79.

ing that corporations were hedging their bets.[66] A 2014 study by Boas, Hidalgo, and Richardon found that corporate donors to the PT in the 2006 elections received between 14 to 39 times the value of their donations in government contracts.[67]

The Brazilian Ministers who voted 8-3 to strike down corporate donations perceived the problem not just as one of corruption, but of plutocracy. Their reasoning would have sent shockwaves through the U.S. Supreme Court. Minister Marco Aurélio stated that "the value of political equality had been replaced by the wealth of large firms that give donations in order to control the electoral process"[68] and ventured that "we do not live in an authentic democracy, but rather a plutocracy — a political system in which power is exercised by the wealthiest group, leading to the exclusion of the less fortunate."[69] Minister Aurélio's conclusion affirmed that "we are living in a historic moment [in which] the private financing of electoral campaigns and political parties has not allowed democracy to be affirmed as a fundamental right." He further argued that "if democracy is a fundamental right, then plutocracy, now in force within our political-electoral system, is a violation of that right."[70] Minister Luiz Fux, the reporter for the case, began this string of opinions in 2013 by alleging that "there truly exists a representative crisis in the country, juxtaposing citizens ... with members of the political class who often privilege their own particular interests to the detriment of the public interest."[71]

As though offering an Orwellian response to the Brazilian decision, Chief Justice Roberts and Justice Alito wrote in *Citizens United* that "First Amendment rights could be confined to individuals, subverting the vibrant public discourse that is at the foundation of our democracy."[72] Indeed, the

66 Bruce Douglas, "Brazil Bans Corporations from Political Donations Amid Corruption Scandal", *The Guardian* (18 September 2015), online: The Guardian <www.theguardian.com/world/2015/sep/18/brazilian-supreme-court-bans-corporate-donations-political-candidates-parties>.

67 Taylor C. Boas, F. Daniel Hidalgo & Neal P Richardson, "The Spoils of Victory: Campaign Donations and Government Contracts in Brazil" (2014) 76:2 Journal of Politics 415 at 415, online: <www.mit.edu/~dhidalgo/papers/political_investment_2014.pdf>.

68 Online: <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADI4650relator.pdf>.

69 Online: <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADI4650relator.pdf>.

70 *Ibid* citing Timothy K Kuhner, "The Democracy to which We Are Entitled: Human Rights and the Problem of Money in Politics" (2013) 26:1 Harv Hum Rts J 39, online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2211299>.

71 Online: <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADI4650relator.pdf>. Minister Fux noted "an increasing influence of economic power over the political process in recent years" and stated that increases in candidate and party expenditures could not be explained by inflation or the growth of GDP."

72 *Citizens United*, *supra* note 44 at 917 (Roberts CJ concurring).

European, Canadian, and Brazilian cases illustrate the profound choice the US Supreme Court has made by construing equality concerns as "wholly foreign to the First Amendment,"[73] restraints on general treasury fund spending as unconstitutional in "'muffl[ing] the voices that best represent the most significant segments of the economy,'"[74] and a concern over the undue influence of aggregated wealth as "interfer[ing] with the 'open marketplace' of ideas protected by the First Amendment."[75]

The plutocratic US approach opposes government intervention and redescribes the dominance of wealth over politics in the positive language of individual speech rights. The competing judicial approaches from Brazil, the Council of Europe, and Canada start from different premises — namely, that concentrated financial power is dangerous in politics, that fairness and equality are important grounds for government intervention, and that all of these concerns hold high enough rank to carry the day in constitutional analysis. It mattered little that these various high courts were deciding the fates of different laws on the basis of different constitutional (and treaty) provisions. A superseding value conflict — indeed, a resurgence of the ideological competition between liberal and social democracies — controlled the legal exercise.

Partyocracy

Partyocracy in theory

In 1965, the Italian political theorist Giovanni Sartori made a powerful observation about political parties. He argued that they have become "such an essential element in the political process that in many instances we might legitimately call democracy not simply a party system but a 'partyocracy' (partitocrazia)."[76] Over twenty years later, Sartori repeated the same point and ventured this definition: "a party tyranny in which the actual locus of power is shifted and concentrated from government and parliament to party directorates."[77] The German sociologist Robert Michels considered it a "sociological law" that the organizational form of political parties "is the mother of the rule of the elected over the electors."[78] By this phrase, Michels did not mean representative de-

73 *Buckley v Valeo*, 424 US 1, 48-49 (1976).
74 *Citizens United*, *supra* note 44 at 907 (Roberts C.J. concurring).
75 *Ibid* at 906.
76 Giovanni Sartori, *Democratic Theory* (New York: Praeger, 1965) at 120.
77 Giovanni Sartori, *The Theory of Democracy Revisited* (Chatham, NJ: Chatham House Publishers, 1987) at 148.
78 *Ibid* at 175, n 48.

mocracy. He meant oligarchy.[79] His thesis, "democracy leads to oligarchy,"[80] was echoed many times throughout the years, including, for example, by Henry Kariel who traced the decline of pluralism to "oligarchically governed hierarchies" that began as "voluntary organizations or associations."[81]

Recall our definition of oligarchy as "a concentration of entrenched illegitimate authority and/or influence in the hands of a minority, such that de facto what the minority wants is generally what comes to pass, even when it goes against the wishes (whether actively or passively expressed) of the majority."[82] If we are to distinguish partyocracy from plutocracy, we must answer the questions, *which* minority? And *which* illegitimate mode of authority and/or influence? This returns us to the "party directorates" referenced by Sartori.

Recall Katz and Mair's key observation: "a tendency in recent years towards an ever closer symbiosis between parties and the state, and that this then sets the stage for the emergence of a new party type, which we identify as 'the cartel party.'" [83] The modus operandi and claim to legitimacy of the cartel party are in direct conflict with "the socialist/mass-party model [which] provide[d] for prospective popular control over policy, in that the voters are supporting one or other party and its well-defined programme, and the party (or coalition of parties) with a majority of the votes gets to rule."[84] From this conception of parties, a powerful justificatory claim has arisen: parties "provide the (not an) essential linkage between citizens and the state."[85]

Katz and Mair state that this justificatory claim soon became inapplicable and was replaced by a new one. In that past world of mass parties legitimacy was a function of "direct popular involvement in the formulation of the party programme [which required] an extensive membership organization of branches or cells in order to provide avenues for mass input into the party's policy-making process."[86] With the success of the welfare state,[87] the weakening of separate social identities, and the rise of the mass media, the catch-all

79 R Michels, *First lectures in political sociology*, translated by Alfred de Grazia (Minneapolis: University of Minnesota Press, 1949) at 149. Michels wrote that "[h]e who says organization, says tendency to oligarchy.": *Ibid.*

80 *Ibid.*

81 Henry S Kariel, *The Decline of American Pluralism* (Redwood City, CA: Stanford University Press, 1961) at 2.

82 Leach, *supra* note 36 at 329.

83 Katz & Mair, *supra* note 11 at 6.

84 *Ibid* at 7.

85 *Ibid.*

86 *Ibid.*

87 *Ibid* at 12.

party came to predominate. Under its mode of operation, the "formation of … policies or programmes became the prerogative of the party leadership rather than of the party membership." Claims to legitimacy remained not on the basis of prospective popular control and accountability, a choice between "clearly defined alternatives," but rather retrospectively, "on the basis of experience and record."[88]

Still, even the catch-all party sought "to influence the state from outside, seeking temporary custody of public policy in order to satisfy the short-term demands of its pragmatic consumers."[89] As regards their relationship to the state, parties went from "delegates" of their supporters to "entrepreneurs."[90] The corruption of political parties and social democracy through the emergence of partyocracy comes about only in the next step, one from "entrepreneurs" to "semi-state agencies."[91] Katz and Mair describe a "movement of parties from civil society towards the state [to] such an extent that parties become part of the state apparatus itself"[92] and contend that "this is precisely the direction in which the political parties in modern democracies have been heading over the past two decades,"[93] 1975-1995.

As with "plutocracy," Katz and Mair's party typologies (mass, catch-all, and cartel) are "heuristically convenient polar types,"[94] meaning that any particular party need not entirely correspond to just one category.[95] Quite consistently with the descriptive findings of the comparative political finance literature cited above, Katz and Mair clearly describe cartel parties in terms of *a trajectory* over those two decades culminating in certain dominant and worrisome tendencies. Those tendencies include: (1) collusion between parties to produce rising state subsidies; (2) criteria for the awarding of those subsidies that disadvantage minor parties and other challengers; (3) all major parties remaining "in" rather than "out," hence losing their incentive to be responsive to the citizenry, and hence authoritatively re-defining democracy as "a means by which the rulers control the ruled, rather than the other way around;" (4) a

88 *Ibid* at 8.
89 *Ibid.*
90 *Ibid* at 16.
91 *Ibid.*
92 *Ibid* at 14.
93 *Ibid* at 14-15.
94 *Ibid* at 19.
95 Indeed, even the plutocratic United States has an important feature of partyocracy in that "the structure of federal public financing law actually enhances the majoritarian bias of public opinion formation during campaigns by providing an extra boost to candidacies supported by political majorities." James A Gardner, "The Incompatible Treatment of Majorities in Election Law and Deliberative Democracy" (2013) 12:4 Election LJ 468 at 479.

decline in public support for parties and participation in elections; and, (5) "a revision of the normative model of democracy."[96] Significant within that revision is that democracy consists "in the currying of public favor by elites, rather than public involvement in policy-making."[97]

In the end, Katz and Mair conclude that "[d]emocracy becomes a means of achieving social stability rather than social change" and elections in particular cease to provide civil society a way to control the state. Instead, elections are "a service provided by the state for civil society," which at most provide "feedback" to rulers about the acceptability of their choices.[98] Despite claims that parties have declined or been weakened, Katz and Mair conclude that they enjoy increased financial resources due to their control of state subsidies and that this offsets the decrease they have experienced in intensity of loyalty and volume of membership.[99]

With this, we can return to the second question posed by our definition of oligarchy: What is the illegitimate mode of authority and/or influence employed by political parties? What is the source of party directorates' "domination ... of parliamentary democracy?"[100] There are, of course, many causal variables, such as electoral systems — consider, for example, how a closed list system of proportional representation allows parties to choose the order of candidates and limit citizen choice. In order to rise to power, however, parties require funds for electoral expenses and general operational expenses. We must therefore return to the elementary observation that "[a]ll the undertakings necessary to bring democracy to life ... turn indispensably on the most base of commodities: money."[101] And to that observation, Katz and Mair add the observation that parties have taken over the state and colluded in order to increase state subsidies and exclude minor parties.

Partyocracy in practice

As of 2012, French political parties received approximately "70 million euros per year plus 50 per cent reimbursement of electoral campaign spending (about

96 Katz & Mair, *supra* note 11 at 21.

97 *Ibid* at 22.

98 *Ibid.*

99 *Ibid* at 25.

100 Peter Russell, "McGuinty Acting Like Absolute Monarch of Old", *Ontario News Watch* (9 September 2013), online: Ontario News Watch <http://ontarionewswatch.com/onw-news.html?id=427>.

101 Ewing & Issacharoff, *supra* note 21 at 1.

80 million per year)."[102] German political parties, meanwhile, received "about 130 million euros per year, and the *stiftungen* (think-tanks directly linked to parties) receive more than 300 million."[103] Public subsidies in Italy and Spain came to approximately 200 and 130 million euros per year, respectively.[104] While not close to the astronomical figures seen in the United States and Brazil, these numbers nevertheless represent a high degree of public financing, a massive contrast to the plutocratic foundation of a high degree of private financing.

What, then, is partyocracy's parallel to plutocracy? The negation of democratic integrity and responsiveness. Just as the constitutional values of liberal democracy can be interpreted as guaranteeing a constitutional order of corporate speakers, multi-million dollar donors and spenders, superPACs, and dark money groups competing in an open market for political power, the constitutional values of social democracy can be interpreted as guaranteeing an ossified regime of cartel parties that have appropriated the power of the state. The ambiguity is nothing less than social democracy's inherent vulnerability to partyocracy.

Let us take Spain and Germany as examples. The Spanish and German constitutions both define their political orders as social democracies and explicitly provide for popular sovereignty.[105] Section 20 of the German Basic Law states:

> (1) The Federal Republic of Germany is a democratic and social federal state.
>
> (2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.

Sections 1 and 2 of the Spanish Constitution state:

102 Valentino Larcinese, "The UK should embrace the European model for public financing for political parties", (19 April 2012), *The London School of Economic and Political Science* (blog), online: London School of Economics Blog <http://blogs.lse.ac.uk/europpblog/2012/04/19/europe-political-party-funding/>.

103 *Ibid.*

104 *Ibid.*

105 All translations of the German Basic Law are taken from an official English version: Saarbrücken, *Basic Law for the Federal Republic of Germany*, translated by Christian Tomuschat & David P Currie, online: Federal Ministry of Justice <www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_150653.pdf>; All translations of the Spanish Constitution are taken from the official English version: *Spanish Constitution of 1978* (6 December 1978), online: Congress <www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf>.

> 1. Spain is hereby established as a social and democratic State, subject to the rule of law, which advocates freedom, justice, equality and political pluralism as highest values of its legal system.
>
> 2. National sovereignty belongs to the Spanish people, from whom all State powers emanate.

Next, both documents contain essentially the same provision on political parties, establishing their constitutional function of helping to cultivate and express the will of the people.[106] In one relevant respect, the two Constitutions differ. Article 38 of the German Basic Law states:

> Members of the German Bundestag ... shall be representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience.

This provision gives rise to an inference, not found in Spain, that elected legislators should not be subject to an overweaning measure of party discipline.

On the bases of the essentially identical provisions found in the two Constitutions, Germany and Spain arrived at radically different postures as regards the threat of partyocracy.

Spain. Spain's latest legislation on party finance, effective as of March 2015, counteracts certain threats that had run rampant in prior decades. It begins by affirming that "political parties are essential actors in political, economic, and social life [as] the channel for participation by citizens in public affairs."[107] The affirmation continues: "Political parties ... give voice to political pluralism and participate in the formation and manifestation of the popular will."[108] Such ideas contextualize the major changes introduced by this legislation, especially the limits and prohibitions contained in the revision to article 5 of the prior legislation: "Political parties cannot accept or receive directly or indirectly anonymous donations, donations from natural persons in excess of

106 Article 21 (1) of the German Basic Law provides:

> Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organization must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds.

Section 6 of the Spanish Constitution reads:

> Political parties are the expression of political pluralism, they contribute to the formation and expression of the will of the people and are an essential instrument for political participation. Their creation and the exercise of their activities are free in so far as they respect the Constitution and the law. Their internal structure and their functioning must be democratic.

107 Ley Orgánica 3/2015, 77 Boletín Oficial del Estado at 27186 (31 March 2015).

108 *Ibid* at 27187.

50,000 euros per year, or donations [in any quantity] from legal persons."[109] Relating to the prohibition on corporate donations, the new law also prohibits the forgiving of debt by credit agencies, meaning that a major source of undue influence has been closed — a longstanding practice by which banks issue loans to political parties to cover their operational expenses and then forgave those loans, offering in essence a large political contribution.

These new measures appear to intend to address the corruption scandals that have recently horrified the electorate[110] as well as some systematic forms of corruption relating to banks and corporate donations. It is unlikely, however, that they will affect other dimensions of Spanish political finance that have long added up to partyocracy. The first such dimension is "the absolutely predominant role of public financing, perhaps the most notable feature of our entire [political finance] regime."[111] In this regime of predominantly public financing, parties have served as both judge and jury in their own case, succeeding in approving their own funding and substantial increases therein.[112] Indeed, under the 2007 party finance law, there are no limits placed on public funds and, on the other side of the spectrum, the law's provisions on party debt and the renegotiation of that debt with private creditors amount to unlimited private donations.[113] Surely this combination of unlimited public financing and (effectively) unlimited private financing is not what was intended by the 1987 Law on the Financing of Political Parties that established public financing and private financing as the two legitimate pillars of the system.[114] That regime was intended to satisfy the constitutional nature of political parties as private associations that exercise public functions.[115]

109 *Ibid* at 27191.

110 See e.g. Agence France-Presse, "Spain's ruling party ran secret fund for 18 years, investigating judge finds", *The Guardian* (23 March 2015), online: The Guardian <www.theguardian.com/world/2015/mar/23/spain-ruling-peoples-party-secret-fund-18-years-investigating-judge> (discussing the "Barcenas case"); "A Lot of Bad Apples: a wave of arrests upends the political establishment", *The Economist* (8 November 2014), online: The Economist <http://www.economist.com/news/europe/21631126-wave-arrests-upends-political-establishment-lot-bad-apples> (detailing corruption scandals that year).

111 Gaspar Ariño Ortiz, La Financiación de los Partidos Políticos (Madrid Ediciones Cinca, SA, Foro de la Sociedad Civil, 2009) at 20.

112 María Holgado González, La Financiación de los Partidos Políticos en España (Tirant Lo Blanch: Valencia 2003) at 19.

113 Gaspar Ariño Ortiz, La Financiación de los Partidos Políticos (Madrid Ediciones Cinca, SA, Foro de la Sociedad Civil, 2009) at 25-26.

114 See María Holgado González, La Financiación de los Partidos Políticos en España (Tirant Lo Blanch: Valencia 2003) at 31-35.

115 See generally *ibid* at 131-48.

María Holgado González notes that "the scarce role of party members in the party's own financial upkeep has done nothing but increase the directorate's autonomy and, accordingly, the oligarchic functioning of the organization itself."[116] She identifies parties' lack of any need to raise funds from their base and sympathizers as the reason that parties have become dependent on economically powerful groups and hence altered the representative function of democracy.[117] The combination of high public finance, few donations from grass roots party sympathizers, and large donations from banks and corporations has led to the distancing of political parties from society and an accompanying unrepresentativeness.

Spanish scholars report an additional source of unrepresentativeness: the major parties have acted as a cartel in order to exclude minor parties from public subsidies. The oligarchic function mentioned above is not simply that political parties in general have cornered the market for political power; just a few parties have succeeded in doing so and they have colluded to maintain their power. Óscar Sánchez Muñoz notes the irony:

> The public financing of political parties is demanded by the principle of equality of opportunity [but] instead of configuring a system destined to equalize gaps between parties and make visible different political options for the electorate to choose from, Spanish legislation on the requirements for access to public financing and the criteria for its dispersal achieves the opposite effect ... . [T]he rules in force disproportionately benefit large parties, which have the greatest access to private sources of political finance, and penalize smaller parties. This serves to increase the petrification of the party system, making it nearly impossible for new options to emerge and challenge the status quo.[118]

As Sánchez Muñoz suggests, the main issue is access to public financing. Public subsidies for election-related expenses are awarded based on votes and parliamentary seats obtained. Holgado remarks that this formula discriminates against extraparliamentary parties.[119] She recommends a new rule, taking into account only the number of votes obtained independently of whether parliamentary representation was obtained,[120] citing France and Germany as two examples in which parliamentary representation has been abolished as a criterion

116 *Ibid.*

117 *Ibid.*

118 Óscar Sánchez Muñoz, La Igualdad de Oportunidades en las Competiciones Electorales 364 (Madrid 2007, Centro de Estudios Políticos y Constitucionales).

119 María Holgado González, La Financiación de los Partidos Políticos en España (Tirant Lo Blanch: Valencia 2003) at 65-68.

120 *Ibid* at 260.

for the receipt of public funds. Holgado concludes that "there is no justification for the discrimination in effect today between parliamentary parties and extra-parliamentary parties, which contributes to the freezing of the system and the erosion of political pluralism."[121]

Perhaps what Holgado means to say is that there is no *satisfactory* justification for the discriminatory system in effect. As she herself notes, the Spanish Constitutional Court has justified the exclusion of minor parties on the basis of what it identified as two compelling state interests.[122] Consider this remarkable quote from the Constitutional Court:

> [T]he electoral process, as a whole, is not just a channel for the exercise of individual rights (whether personal or associational) that are recognized in article 23 of the Constitution. It is also a means to bestow expressive capacity upon the institutions of the democratic state and to provide effective centers of political decision that ensure that the state's actions are publicly oriented. Experience ... shows ... that the atomization of political representation poses a risk for these objectives.

To that concern over stability, the Court added a stipulation about representation:

> Those rights [to annual public subsidies] are not recognized on the basis of the fact of political parties' simple existence, but rather as a function of participation in the manifestation of popular will. In order to claim these rights, it is necessary to [first] take part in elections.[123]

It was on this basis of these twin objectives, governability and preserving broad scale stability of political representation, that the Court upheld the constitutionality of a discriminatory formula for awarding public subsidies.

Holgado González concludes that "the historic concern over governmental stability prevail[ed] over the concern over representation."[124] In her estimation, "the Spanish system is one of the most effective of all western electoral systems in reducing the number of political parties with a presence in parliament. Sánchez Muñoz concurs, noting that "political stability is a legitimate objective, one compatible with the constitutional order, but the search for stability taken to the extreme leads to a dangerous ossification of the democratic system."[125]

121 *Ibid.*
122 *Ibid* at 69.
123 STC 3/1981, February 2, FJ. 2nd. quoted in *ibid.*
124 STC 75/1985, 21 June, quoted in *ibid* at 70.
125 Sánchez Muñoz, La Igualdad de Oportunidades en Las Competiciones Electorales at 364.

Although Spain's well-intentioned system of generous public financing was intended to prevent plutocracy, it failed for decades to close the gaps that allowed for the insertion of large private funds and it failed to provide for equality between political parties. It achieved a partyocracy with strong plutocratic elements.

Germany. The German system, specifically the German Constitutional Court, has taken decisive measures to curb partyocracy. In the *Party Finance II Case*,[126] the Constitutional Court struck down public financing for the ordinary expenses of parties represented in the Bundestag out of a concern over partyocracy:

> In creating a free, democratic basic order, the framers of the Basic Law chose to advance a free and open process of forming public opinion and the will of the state. It is incompatible with this choice for the state to finance all political party activities ... In a democratic system the formation of the people's will must take place in a free, open, and unregimented manner ... The process culminates in a parliamentary election where a distinction must be made between forming the people's will and forming the will of the state.[127]

Indeed, the problem with partyocracy is that parties take over the state and appropriate its funds. The Court noted that the state's will and the people's will are intertwined but that, in a democracy, the formation of the popular will "must start with the people, and not with the organs of the state."[128] In a position that looks superficially like that of the US Supreme Court, the Constitutional Court wrote that the formation of the people's will and opinion "must, as a matter of principle, remain 'free of state control.'"[129]

The meaning of freedom from state control here, however, is not located in a free market, but rather in a mix of state and private financing intended to make political parties accountable to the people. This is accomplished both by protecting political parties from the state and by protecting the state from political parties. Observe the two functions noted by the Court in 1966:

> The constitutional requirement that the formation of public opinion and the will of the state remain fundamentally free of state control [1] insulates party activity

126 20 BverfGE 56 (1966), excerpted in Donald P Kommers & Russell A Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 3rd ed (Durham, NC: Duke University Press, 2012) [Kommers & Miller].

127 *Ibid* at 275.

128 *Ibid.*

129 *Ibid.*

> against the overarching influence of government and [2] prohibits the incorporation of political parties into the state's apparatus.[130]

The Court further elaborated upon its concern over parties appropriating the state and distancing themselves from their supporters in the *Party Finance VI Case* (1992). Kommers describes the policy judgment the Court sought to enact in these words: "the established parties were becoming too entrenched, building and reinforcing their internal bureaucracies at the state's expense and thus widening the distance between themselves and their voters." Therefore, "the Court sought to … require the parties to depend on their own resources and fund-raising capabilities to a greater extent than in the past."[131]

Although the Court did allow the provision of state subsidies for "general political activities," not just electoral expenses, a major reversal to be sure, the Court hastened to require that public funding be counterbalanced by the party's social embeddedness. "The principle of party autonomy," it wrote, "is violated when state financial subsidies discourage political parties from taking the steps needed to raise funds voluntarily from their own members and electoral supporters."[132] From this reasoning, it derived a relative upper limit: "The total amount of state subsidies provided to a political party must not exceed the sum it receives from its own fund-raising efforts."[133] To incentivize a robust degree of private monetary support for parties, German law provides that "up to 50 per cent of membership fees and donations ('contributions') paid, *inter alia*, to political parties are tax deductible up to the amount of 825 Euro (or 1,650 Euro for jointly assessed spouses)."[134]

In addition to that relative upper limit, the Court further derived an absolute upper limit: "The amount of financial support provided to the political parties from public funds during the years 1989-1992 must be considered sufficient…"[135] In 2011, that objective limit stood at 141.9 million Euros; and

130 *Ibid* at 276.

131 *Ibid* at 283.

132 *Ibid* at 282.

133 *Ibid.* For an articulation of this rule today, see German Bundestag, *State funding of political parties in Germany* (1 November 2012), online at 3-4: <www.bundestag.de/htdocs_e/bundestag/function/party_funding/index.html> [German Bundestag, *State funding*]. Regardless of the objective limit on total party funds, each individual party must provide at least half of their funds. See also Hans Herbert von Arnim, "Campaign and Party Finance in Germany" in Gunlicks, *supra* note 6 at 209.

134 Group of States Against Corruption, *Third Evaluation Round: Evaluation Report on Germany on Transparency of Party Funding* (4 December 2009), online at 11: Council of Europe <https://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3(2009)3_Germany_Two_EN.pdf>.

135 *Supra* note 126.

in 2012, the objective limit was 150.8 million Euros.[136] Again, the purpose of these provisions was to avoid "direct dependence on the state" and to implement what Gunlicks called "the idea that the parties should be free of the state" in order to deepen their roots in society.[137]

Moving from concerns over state-capture and independence from society, the Court addressed the exclusionary effect of partyocracy in the *Party Finance II Case* (1966):

> [T]he principle of strict formal equality of opportunity requires that the legislature consider all parties that have participated in the campaign when distributing funds. It is inconsistent with the principle of equal opportunity for [the legislature] to provide state funds only to parties already represented in Parliament or to those that ... win seats in Parliament.[138]

The Court even went so far as to prevent the condition that a party must obtain 5 percent of the votes cast in order to receive public finances. Although this was a valid criterion for parliamentary presence, the Court alleged that this criterion in public subsidies would function to "prevent a new party from being seated in Parliament."[139] The Court "nullified a provision of the Political Parties Act that limited funding eligibility only to parties securing at least 2.5 percent of the total list or second-ballot vote." The Court deemed this baseline impermissibly high, holding that "that any party receiving 0.5 percent of the vote should be eligible for public funding."[140]

These differing interpretations of similar constitutional provisions in Spain and Germany suggest another superseding value conflict that controls the legal exercise. The Spanish Constitutional Court and Spanish electoral law do not recognize large parties' dominion over public financing or the exclusion of minor parties as serious dangers. Instead, they re-describe the dominance of large parties in the positive language of the general will and political stability. In contrast, the German Constitutional Court has recognized the dangers of political parties taking over the state, excluding competitors, and distancing themselves from society. Rather than resting on individualistic or anti-regulatory assumptions, its antidote to partyocracy defends equality and representation, and seeks to prevent political parties from co-opting the state.

136 German Bundestag, *State funding*, *supra* note 133 at 3-4.
137 Kommers & Miller, *supra* note 126 at 283.
138 *Ibid* at 277.
139 *Ibid.*
140 *Ibid* at 280.

Conclusion

Whether we speak of the entrenched authority of private wealth or major political parties, constitutional interpretation turns on competing views of oligarchy: elite control is described either as a systemic form of corruption to be avoided and usurpation of others' rights, or as the culmination of rightful authority and an expression of sacred constitutional values. Never has *constitutional law* been more faithful to the ordinary meaning of the phrase: the law that determines the structure and make-up of a country. The distribution of sovereign power cannot help but determine such things.

Plutocracy designates a state of affairs in which the market has taken over politics. It functions as a means of political exclusion based on wealth, which represents the corruption of the values of freedom and competition in their political applications. Partyocracy, on the other hand, corrupts the egalitarian, collective, and associational aims of social democracy. Social democracy becomes organized to the point of being exclusive, and regulated to such an extent as to bind the state together with certain political parties. It functions as a means of political exclusion based on power within, or influence over, the major political parties.

Despite their basis in opposing ideological principles, as exemplified by the US and Spanish sources described above, plutocracy and partyocracy achieve the same results: the distortion of representative democracy (with small, elite groups being represented far more significantly than the general public) and the simultaneous destruction of popular sovereignty (with the general public playing no appreciable role other than to vote for a pre-established menu of market dominant and party dominant actors). Given their unaccountable and opaque natures, such systems create openings for privatization, austerity, and inequality. The prevalance of those trends suggests that the German, Brazilian, Canadian, and European Court of Human Rights' approach to political finance has been less influential than its plutocratic and partyocratic rivals.

Why would political elites under plutocracy or partyocracy support neoliberalism, given that it seems to leave them with an increasingly limited range of action? Consider that Ewing and Issacharoff cite "the strategies of privatisation and deregulation pursued by all countries in an increasingly globalised world"[141] as the reasons that today's "national political systems ... in many cases have less control over national policy than perhaps at any time since the

141 Ewing and Ischaroff, *supra* note 21 at 1-3.

industrial revolution."[142] Burnell and Ware concur, noting that "[t]he dominant neo-liberal agenda recommends initiatives to 'downsize' or at least restrain the size of the public sector, and to reduce social welfare provision."[143] Those changes make it harder to "shape public policy and public spending in ways intended to mobilize electoral support."[144] However, perhaps national control and the need for popular support are the obstacles, not the goals, and plutocracy and partyocracy have served to remove them.

Indeed, governance has remained a valuable commodity all along. While creating limitations for progressive actors, the implementation of the neoliberal agenda has created opportunities "for *enterprising* actors to make substantial gains from the processes by which countries' economies are being reformed, as well as the greater market orientation that results."[145] Burnell and Ware list as examples of such opportunities "contracting out of economic activities formerly in the state sector and the privatization of public assets and associated income streams," and the subsequent "windfall financial gains [that] will then be channeled to those political forces ... which ... provide a secure policy environment and ... guarantee the arrangements that made the gains possible."[146] It stands to reason that this agenda has been the motivating factor behind plutocracy's and partyocracy's development over the past four decades. For anyone concerned by the dominant trends sweeping the globe, these systems' normative claims and practical results both merit the closest possible scrutiny.

142 *Ibid* at 2-3.
143 Burnell & Ware, *supra* note 63 at 13.
144 *Ibid.*
145 *Ibid.*
146 *Ibid* at 14.