

The Democracy to Which We Are Entitled: Human Rights and the Problem of Money in Politics

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I. A HUMAN RIGHT TO DEMOCRACY OR PLUTOCRACY?

Democracy has increasingly benefitted from international legal support since the end of the Cold War. International organizations have made elections a staple of post-conflict transitions,² elections and basic political rights have become a strong factor in the recognition of States and governments,³ and many organizations—including the Council of Europe, the European Union, and the Organization of American States—treat democratic governance as a condition for membership and good international standing.⁴ These and other pragmatic measures facilitated the globalization of democracy in the years following the collapse of the Berlin Wall. Between

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2. See Gregory H. Fox & Brad R. Roth, *Introduction: The Spread of Liberal Democracy and Its Implications for International Law*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* 5 (Gregory H. Fox & Brad R. Roth eds. 2000) (“[I]t has become almost a given that international organizations will culminate their efforts at national reconciliation with the holding of democratic elections. Not once has the international community proposed that a new, post-conflict government be chosen in any other way.”).

3. See Sean D. Murphy, *Democratic Legitimacy and the Recognition of States and Governments*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW*, *supra* note 2, at 123–54 (describing criteria for the recognition of new states and governments under international law).

4. Freedom House, *Press Release: Democracy Momentum Sustained As*, Dec. 21, 1999, available at <http://www.freedomhouse.org/template.cfm?page=70&release=75> (last visited July 21, 2007) (“From the Council of Europe, which demands adherence to democratic norms for admission, to the Organization of American States, which has sharply rebuked Cuba’s repressive regime, to the Commonwealth, which has suspended from membership countries where democracy has been overthrown, regional organizations have increasingly come to insist that member countries adhere to the democracy standard.”); Christopher Harding, *Democratic Rights in European Law: Taking Stock at the Close of the 20th Century*, 2 *OR. REV. INT’L L.* 64, 67 (2000) (discussing democratic governance as a criterion for EU membership); Desmond Dinan, *Fifty Years of European Integration: A Remarkable Achievement*, 31 *FORDHAM INT’L L.J.* 1118, 1139 (2007–2008) (“The impossibility of enjoying the economic benefits of EU membership without being democratic and respecting fundamental rights strengthened progressive forces in Greece, Portugal, and Spain, as those countries emerged from dictatorial rule in the mid-1970s, and subsequently in Eastern Europe following the end of the Cold War and the collapse of the Soviet Union.”).

the mid-1980s and the turn of the century, the proportion of democracies relative to all forms of government soared from one-third to almost two-thirds.⁵

At face value, this worldwide transformation appears to make good on one of international law's earliest promises: a human right to democratic governance. In 1948, the Universal Declaration of Human Rights declared: "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage"⁶ Several decades later, the International Covenant on Civil and Political Rights ("ICCPR"), a treaty ratified by 166 States, affirmed these and other provisions on democracy.⁷ When the relevant articles of these documents are viewed together with the resolutions of human rights bodies, a demanding set of rights emerges, a "democratic entitlement."⁸ This entitlement is so demanding, however, as to raise questions about whether the sort of democracy commonly seen in the world today is consistent with human rights law. Consider that the democratic entitlement requires "access, on general terms of equality, to public service in [one's] country,"⁹ protects "the right and the opportunity without . . . distinctions [as to property, fortune, or economic status] . . . [t]o take part in the conduct of public affairs . . . ,"¹⁰ and requires all States to provide "[t]ransparent and accountable government institutions."¹¹

Encompassing much more than elections by universal suffrage, the democratic entitlement may not have such a harmonious relationship with the globalization of democracy after all—to wit, the striking role of private financial power in democratic politics worldwide. A 2003 United States Agency for International Development ("USAID") global report on democracy concludes: "[p]ayback of campaign debts in the form of political favors

5. J. Crawford, *Democracy and the Body of International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 2, at 95 (discussing democracy in the mid-1980s); Freedom House, *Press Release: Democracy Momentum Sustained As*, *supra* note 4 (reporting the number of democracies in 1999 as 120, or nearly two-thirds of states).

6. Universal Declaration of Human Rights, G.A. Res. 217(III)A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) art. 21(3) [hereinafter Universal Declaration].

7. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368, art. 25(b) [hereinafter ICCPR], available at <http://www2.ohchr.org/english/law/ccpr.htm>. Article 25(b), for example, guarantees the right "[t]o vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot" *Id.*

8. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 50 (1992) [hereinafter "The Emerging Right"].

9. ICCPR, *supra* note 7, art. 25(c).

10. *Id.* art. 25. Article 25 incorporates Article 2's anti-discrimination clause, *id.*, which includes property and is translated as "fortune" in the French version and "economic position" in the Spanish version, see Déclaration universelle des droits de l'homme, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at <http://www.un.org/fr/documents/udhr/index2.shtml> (last visited Sept. 9, 2012); Declaración universal de derechos humanos, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at <http://www.un.org/es/documents/udhr/> (last visited Sept. 29, 2012).

11. "Promotion of the Right to Democracy," Commission on Human Rights Resolution 1999/57, U.N. Doc. E/CN.4/RES/1999/57, art. 2(f) (Apr. 27, 1999) [hereinafter Resolution 1999/57].

breeds a type of corruption that is commonly encountered around the world.”¹² The report further notes that disclosure requirements are commonly lacking or unenforced, and characterizes 65 percent of the 118 democracies surveyed as having low or virtually no political transparency.¹³ Herbert E. Alexander and Rei Shiratori suggest that these problems are not confined to new or developing democracies: “whatever their stage of democratization . . . [eight of the world’s major democratic] countries have witnessed the proliferation of scandals stemming from monetary contributions to gain political favors.”¹⁴ Read together, these observations suggest the globalization of democracy has brought the globalization of democratic corruption in tow.

Can the democratic entitlement’s provisions on popular sovereignty and political equality be squared with evidence that private wealth obtains political favors and avoids disclosure in many democracies? If not, the international system faces a most troubling puzzle. What should international law make of States that do not implement disclosure rules or maintain at least minimal restrictions on donations to parties and campaigns, corporate political activity, and lobbyists? Should such States be understood as violating their citizens’ human rights? Should international law, particularly human rights law, take steps to encourage democratic integrity?

Although international law addresses bribery, influence trading, and other essentially criminal forms of corruption, it does not address the financing of political parties or electoral campaigns, corporate electioneering, interest groups, or lobbyists.¹⁵ These neglected issues go to subtle (or advanced) forms of corruption arising from the disproportionate power of the wealthy, including corporations and interest groups, in the political process. The dominant view holds that these matters of political finance should not be subject to international scrutiny.¹⁶ They are, in this view and under

12. OFFICE OF DEMOCRACY AND GOVERNANCE, U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, *MONEY IN POLITICS HANDBOOK: A GUIDE TO INCREASING TRANSPARENCY IN EMERGING DEMOCRACIES* 7 (2003), Document No. PN-ACR-223, available at <http://quest.usaid.gov/node/2105> (last visited Sept. 29, 2012) [hereinafter *MONEY IN POLITICS HANDBOOK*].

13. *Id.* at 2 (“[M]ost nations do not hold their politicians accountable through disclosure requirements.”). Of the twenty-seven African countries surveyed, only 44% required public disclosure reports. *Id.* at 27. In the Caribbean, only 27 percent (eleven countries surveyed); in Central America 29 percent (seven countries surveyed); in South America, 58 percent (twelve countries surveyed); in Europe, 86 percent (thirty-five countries surveyed). *Id.* at 27–29.

14. Herbert E. Alexander & Rei Shiratori, *Introduction*, in *COMPARATIVE POLITICAL FINANCE AMONG THE DEMOCRACIES* 3 (Herbert E. Alexander & Rei Shiratori eds., 1994) [hereinafter *COMPARATIVE POLITICAL FINANCE*].

15. See *infra* Part II.

16. This view is so dominant, so entirely supported by the status quo, that it hardly needs to be articulated. As aspects of political authority and the internal functioning of governments, the financing of political parties and political campaigns clearly lies within the core of state sovereignty, traditionally understood. See STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 4, 20 (1999) (discussing traditional notions of sovereignty, including domestic sovereignty, “the formal organization of *political authority within the state* and the ability of public authorities to exercise effective control within the borders of their own polity,” at 4; and Westphalian sovereignty, “the exclusion of external actors from

the reign of the status quo, domestic matters beyond the reach of international law.

This Article is the first to offer an alternative perspective, an international approach to money in politics.¹⁷ Part I describes widespread concern over money in politics and shows that the literature on the democratic entitlement has yet to subject political finance practices to the scrutiny of international law. Part II describes the exclusion of political finance issues from the scope of global anti-corruption norms. This demonstrates that international action on anything besides extreme forms of corruption is unlikely to emanate from this body of law. Part III proposes that human rights law is the most appropriate body of international law to do this work. It asks whether the dynamics of money in politics are consistent with key global human rights instruments. Part IV isolates the interpretive controversies upon which the answer depends and describes a sample of approaches taken by notable high courts. Part V concludes this inquiry by outlining an interpretive approach that would be appropriate for the particular textual and normative commitments of the democratic entitlement.

A. *Democratic Corruption*

Scholars have long expressed concern over the corrupting effects of political spending in democracies. In the introduction to their book on comparative political finance, K. D. Ewing and Samuel Issacharoff explain one danger of unregulated political spending:

domestic authority structures," at 20) (emphasis added). The other reason that the dominant view is rarely articulated is that it has yet to be challenged. As scholars have not proposed an international human rights approach to political finance, the defenders of the status quo have hardly had the occasion to assert their position. Evidence of the dominance of that position, however, can be found within the drafting process of the U.N. Convention Against Corruption, in particular the fate of draft Article 10. A small minority of States attempted to bring political finance within the scope of international corruption norms, and was handily defeated. See *infra* Part II.

17. As outlined above, I use the phrase "money in politics" to refer to the financing of political speech, political parties, and political campaigns. Questions of lobbyists, corporate political expenditures, and large individual contributions to parties and campaigns are distinct from issues of abject corruption, principally bribery, nepotism, and misappropriation of public funds. Unlike issues of political finance and money in politics, abject corruption has been examined from the perspective of human rights law. See, e.g., INT'L COUNCIL ON HUMAN RIGHTS, CORRUPTION AND HUMAN RIGHTS: MAKING THE CONNECTION (2009), available at http://www.ichrp.org/files/reports/40/131_web.pdf (arguing that conventional acts of corruption violate human rights—for example, bribing a judge violates the right to fair trial and bribing voters violates the right to vote); James Thuo Gathii, *Defining the Relationship Between Human Rights and Corruption*, 31 U. PA. J. INT'L L. 125 (2009) (discussing how human rights can interfere with the prosecution of corrupt acts and how anti-corruption reforms can further marginalize the poor); C. Raj Kumar, *Corruption and Human Rights: Promoting Transparency in Governance and the Fundamental Right to Corruption-Free Service in India*, 17 COLUM. J. ASIAN L. 31, 51–61 (2003) (discussing similar linkages between corruption and human rights). The questions discussed in this Article have been hinted at, but not analyzed in depth. See Balakrishnan Rajagopal, *Corruption, Legitimacy, and Human Rights: the Dialectic of the Relationship*, 14 CONN. J. INT'L L. 495, 500 (1999) (noting the position that the right to participation is violated "when governments or international institutions take decisions that benefit private interests at the cost of the public without adequately involving them in design and implementation").

With a declining membership base and growing financial demands, political parties are easy prey for the rich and powerful for whom the political parties offer opportunities for greater wealth and power.¹⁸

This suggests a trend towards the elitist political parties described long ago by Maurice Duverger: parties focused on “enlisting the support of notable individuals [and] prominent citizens . . . sought out either because of their prestige . . . or because of their wealth, which enable[d] them to underwrite the expenditures of election campaigns.”¹⁹

Jan Black confirms the present-day importance of Duverger’s observation: “the kind of democracy that is compatible with the new version of free enterprise turns out to be very expensive” because “[w]ith campaign contributions routinely in the millions of dollars . . . corruption becomes institutionalized.”²⁰ Alexander and Rei concur, noting that “incredibly large monetary contributions . . . have permeated the world of politics in most continents.”²¹ In light of this widespread reality, Black concludes: “elected leaders . . . are in danger of being utterly discredited, along with their parties or movements and perhaps the ideal of democracy itself.”²²

Money in politics tends to corrupt democracies as a result of four common factors. First, financial power is distributed unequally in all democracies,²³ a fact which implies two things: political spending on any given issue need not correspond to the majority position on that issue, and, as economic power translates into political power, political equality decreases. Second, people and organizations have much at stake, materially speaking, in the terms of pending legislation.²⁴ Third, these actors view political spending as an effective method of obtaining access to (if not influence over) candidates, officeholders, and political parties, and setting the terms of the political debate.²⁵ The means are well-known: contributions to campaigns

18. K. D. EWING & SAMUEL ISSACHAROFF, *Introduction to PARTY FUNDING AND CAMPAIGN FINANCE IN INTERNATIONAL PERSPECTIVE* 5 (K. D. Ewing & Samuel Issacharoff eds., 2006).

19. MAURICE DUVERGER, *PARTY POLITICS AND PRESSURE GROUPS* 6–7 (David Wagoner trans., 1972).

20. Jan Knippers Black, *What Kind of Democracy Does the ‘Democratic Entitlement’ Entail?*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW*, *supra* note 2, at 527.

21. *COMPARATIVE POLITICAL FINANCE*, *supra* note 14, at 4.

22. *Id.* See generally SUSAN ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM* (1999); MICHAEL JOHNSTON, *SYNDROMES OF CORRUPTION: WEALTH, POWER, AND DEMOCRACY* (2006); POLITICAL FINANCE AND CORRUPTION IN EASTERN EUROPE (Daniel Smilov & Jurij Toplak eds., 2007); K. D. EWING, *THE COST OF DEMOCRACY: PARTY FUNDING IN MODERN BRITISH POLITICS* (2007); STEVEN D. ROPER AND JANIS ISTKENS, *PUBLIC FINANCE AND POST-COMMUNIST PARTY DEVELOPMENT* (2008) (establishing the general propositions that democracy is vulnerable to corruption and that large political expenditures exacerbate that vulnerability).

23. See Amy Chua, *The Paradox of Free Market Democracy: Rethinking Development Policy*, 41 *HARV. INT’L L.J.* 287, 313 (2000) (discussing inequality in democracies).

24. See LAWRENCE LESSIG, *REPUBLIC LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* 89–107 (2011) (discussing the supply and demand of campaign funds).

25. See Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 *U. PA. L. REV.* 73, 89 (2004) (discussing the “special access” donors obtain at fundraising events); ROBERT

and political parties; the establishment of independent political groups that oppose certain political actors and favor others, thus influencing the course of elections and creating opportunities to extract concessions; hiring lobbyists, often former officeholders, who have access to current officeholders; and funding political advertisements in major media outlets that shape popular perceptions and the political agenda.²⁶ Fourth, these political finance activities are unregulated or laxly regulated in many jurisdictions.²⁷

Basing their research on some combination of these conditions, most scholars reach troubling conclusions: financial power has undue influence, average citizens are made of little account, the issues are not debated or decided on their merits for public concerns, and the purportedly public-spirited effort to obtain the common good is, in reality, a competition among profit-maximizing interest groups.²⁸

The future outlook promises little improvement. Ewing and Issacharoff observe that political systems without restrictions on money in politics “can operate only when the political actors accept to be bound by a core set of values [emphasizing] transparency, the avoidance of improper influence or dependence, and fair electoral competition.”²⁹ These are precisely the values that the USAID survey found to be systematically lacking in the majority of democracies.³⁰ Although Ewing and Issacharoff note that non-regulation “is no longer seen to be acceptable in any major jurisdiction in the world,”³¹ this says nothing about the quality or effectiveness of the regulations undertaken. Moreover, it says nothing about the remaining jurisdictions, the numerical majority, where regulations are generally weak,

REICH, *SUPERCAPITALISM: THE TRANSFORMATION OF BUSINESS, DEMOCRACY, AND EVERYDAY LIFE* 143 (2007) (“The more one competitor pays for access, the more its rivals must pay in order to counter its influence”).

26. See generally LESSIG, *supra* note 24, at 8, 103 (discussing contributions and lobbyists); RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 152–53 (2003) (discussing political advertising); EDWARD L. BERNAYS, *PROPAGANDA* 71–128 (1928); JOHN STAUBER & SHELDON RAMPTON, *TOXIC SLUDGE IS GOOD FOR YOU! LIES, DAMN LIES AND THE PUBLIC RELATIONS INDUSTRY* 13–24 (1995).

27. See generally ROBERT KLITGAARD, *CONTROLLING CORRUPTION* (1991); EWING & ISSACHAROFF, *supra* note 18; Ingrid van Biezen, *Campaign and Party Finance*, in *COMPARING DEMOCRACIES 3: ELECTIONS AND VOTING IN THE 21ST CENTURY* (Lawrence LeDuc, Richard G. Niemi, & Pippa Norris eds., 2010); *POLITICAL FINANCE AND CORRUPTION IN EASTERN EUROPE* (Daniel Smilov & Jurij Toplak eds., 2007).

28. See generally KLITGAARD, *supra* note 27; van Biezen, *supra* note 27; ROSE-ACKERMAN, *supra* note 22. The objections over money in politics are perhaps best articulated by U.S. authors, such as LESSIG, *supra* note 24. The same might be said about defenses of money in politics. A small contingent of libertarian scholars and certain weighty, pro-industry groups dispute the value judgments inherent in the conclusions summarized in the text above. See, e.g., JOHN SAMPLES, *THE FALLACY OF CAMPAIGN FINANCE REFORM* (2006); MARTIN H. REDISH, *MONEY TALKS* (2001); BRADLEY A. SMITH, *UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM* (2001). Jurisprudential representations of this minority view will be examined in Part III(c), below. At the outset, however, I credit the consensus, which holds that high levels of money in politics threaten democracy.

29. EWING & ISSACHAROFF, *supra* note 18, at 2.

30. See *MONEY IN POLITICS HANDBOOK*, *supra* notes 12–13 and accompanying text.

31. EWING & ISSACHAROFF, *supra* note 18, at 2.

unenforced, or absent altogether.³² The emerging consensus among major jurisdictions in favor of regulating political finance could benefit from international validation and States that fail to enact reasonable reforms could benefit from international assistance or pressure. The question, then, is whether international law should take a position on the sort of democracy to which all human beings are entitled.

B. *A Lacuna in International Law*

The most thorough examination of the status of democracy under international law left off where matters of money in politics begin. In *Democratic Governance and International Law*, Gregory Fox and Brad Roth assembled numerous essays on the legal foundations of a right to democracy, the role of democracy in international relations, the legality of pro-democracy interventions, and the appropriateness of outlawing the activities of undemocratic actors in democratic States.³³ This compendium built on earlier articles by Thomas Franck and Fox that discuss participatory rights from the vantage point of positive law sources, including treaty law, soft law declarations, United Nations resolutions, and customary international law.³⁴

“Democracy,” Franck wrote in 1992, “is on the way to becoming a global entitlement, one that increasingly will be promoted and protected by collective international processes.”³⁵ Everyone was aware of democracy’s sacred status in the 1948 Universal Declaration of Human Rights, the 1966 ICCPR, and in numerous regional treaties. The ICCPR, most notably, establishes rights to free expression, peaceful assembly, and free association.³⁶ These rights must be integrated into a particular sort of political order, as is made clear by the inclusion of an additional set of rights: “to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot,” “to take part in the conduct of public affairs,” and “to have access, on general terms of equality, to public service” in one’s country.³⁷ Widespread ratification of the ICCPR sufficed to show that democracy, in this full sense, had already become a global entitlement; Franck’s focus on democracy promotion by international actors

32. See *supra* notes 22 and 27. There is an additional sort of case, admittedly unaccounted for by this Article, in which regulations are strong enough to produce a distinct form of corruption: not the disproportionate power of private actors over electoral outcomes (although this too may occur), but the disproportionate power of political parties themselves to the exclusion of civil society. See *COMPARATIVE POLITICAL FINANCE IN THE 1980s* 16–17 (Herbert E. Alexander ed., 1989) (discussing the negative consequences of public financing of political parties’ electoral and non-electoral expenses, including insulating parties from the demands of the electorate and from competition with minor parties).

33. FOX & ROTH, *supra* note 2.

34. Franck, *supra* note 8, at 46; Gregory H. Fox, *The Right to Political Participation in International Law*, 17 *YALE J. INT’L L.* 539 (1992).

35. Franck, *supra* note 8, at 46.

36. ICCPR, *supra* note 7, arts. 19–20.

37. *Id.* art. 25.

and increasing acceptance by States indicated that this entitlement was “rapidly becoming, in our time, a normative rule of the international system.”³⁸

Imbued with this sense of urgency and excitement, early works within the newly minted democratic entitlement school jumped straight to certain burning questions: What was democracy’s status within positive law sources and the practices of international bodies? How could democracy best be promoted? What were the implications of a right to democracy for state sovereignty? Soon, however, it became evident that a number of foundational issues had been neglected, beginning with the fact that democracy itself was a highly contested concept associated with both emancipation and domination. People began to wonder whether all types of democracy deserved to be elevated to the status of a human right, and whether a human right to democracy, as democracy existed in practice, was worth celebrating.

Writing in the final part of Fox and Roth’s book, several contributors offered critical observations. After defining the human right to democratic governance in terms of popular participation and popular accountability, Roth asserted: “The universal franchise may allow all sectors of the society to select once every four years from among pre-packaged candidates of parties controlled by social elites, but this scarcely implies the rudiments of accountability, let alone genuine popular empowerment.”³⁹

To Roth’s concern over accountability and empowerment, Jan Knippers Black added a warning about ideological shift. Citing “campaign contributions routinely in the millions of dollars” and institutionalized corruption, she described the ideological purpose of money in politics in these terms:

[R]edefining electoral democracy, redrawing its parameters in such a way as to . . . equate free thinking with free markets . . . to such an extent that no matter how large a majority preferred that a function (e.g., campaign finance) be removed from the private realm or that a service (e.g., running water or health care) be offered in the public realm, such a policy would be seen as antidemocratic.⁴⁰

The procedural and ideological controversies signaled by Roth and Black serve the same basic function, as other authors pointed out: to limit the reach of popular sovereignty.

In a separate article published that same year, Amy Chua called “systemic political corruption,” including subtle forms of patron-clientelism, a

38. Franck, *supra* note 8, at 46.

39. Brad R. Roth, *Evaluating Democratic Progress*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW*, *supra* note 2, at 502.

40. Black also noted that “the kind of democracy that is compatible with the new version of free enterprise turns out to be very expensive.” Jan Knippers Black, *What Kind of Democracy Does the ‘Democratic Entitlement’ Entail?*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW*, *supra* note 2, at 527.

“restraint on democracy.”⁴¹ She described this restraint as a response to “tensions . . . between markets and majoritarian politics.”⁴² The essence of these tensions is that capitalism allows for (and generally produces) great inequalities in wealth, while democracy levels political power. Economic and political power thus travel in opposite directions simultaneously, leading to what Chua termed “the paradox of free market democracy.”⁴³ Avenues for money in politics allow economic power to serve as a check on, or eventually a replacement for, political power. What Roth and Black had observed, then, were mechanisms for resolving the paradox in favor of markets and against democracy.

Concluding Fox and Roth’s volume, Susan Marks elaborated on this paradox and its resolution. Observing “a great variety of practices and institutions . . . consistent with liberal democracy,” she noted “little attention is drawn to the diversity of the values, ideas and principles that might animate those practices and institutions.”⁴⁴ In particular, Marks stressed the difference between the “liberal preoccupation with rights and freedom from government control, and the democratic preoccupation with equal participation in, and accountability of, public power.”⁴⁵ She considered the liberal preoccupation to be winning out over the democratic preoccupation, lamenting the “obvious failures of liberal democracy, its omissions with respect to the historic promise of self-rule on the basis of equality among citizens.”⁴⁶ The implication was that the right to democracy under international law could spread this failure globally. Thus, Fox and Roth’s authoritative compendium on the democratic entitlement ended with a warning: “liberal democratic universalism” could end up subjecting democratic values, structures, and aspirations to “rule by the market.”⁴⁷

The opposite possibility was neglected. Defined properly, liberal democratic universalism and its vehicle, the democratic entitlement, could serve to constrain rule by the market. If its terms were etched out with greater care so as to include stipulations on political finance, for example, then the democratic entitlement could help to accomplish that historic promise of self-rule on the basis of equality. Still, twelve years later, these opportunities and dangers have hardly been discussed, much less answered, at the international level. The literature on the democratic entitlement has not balanced Roth’s democratic deficit, resolved Chua’s paradox, or incorporated Mark’s historic promise within democracy’s international legal status.

41. Chua, *supra* note 23, at 290.

42. *Id.* at 339, 290 n.17.

43. *Id.* at 313.

44. Susan Marks, *International Law, Democracy and the End of History*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW*, *supra* note 2, at 557–58.

45. *Id.* at 540–41.

46. *Id.*

47. *Id.* at 563. See also SUSAN MARKS, *THE RIDDLE OF ALL CONSTITUTIONS: INTERNATIONAL LAW, DEMOCRACY, AND THE CRITIQUE OF IDEOLOGY 2* (2003 ed.).

As Larry Diamond's 2010 volume on democratization puts it, political finance is a "next generation issue."⁴⁸ Indeed, questions of money in politics and the potential for plutocratic control of the democratic form have gone unanalyzed under international law, perpetually left, as it were, to future generations.

The question, then, is whether international law should take notice of money in politics, modify the definition of democracy so as to include at least a minimum floor of political finance reform, and perhaps take institutional measures to facilitate the needed reforms. The increasingly global campaign against corruption spearheaded by the new U.N. Convention against Corruption ("UNCAC") has decided against all of these measures, at least for the time being.

II. THE LIMITED SCOPE OF THE U.N. CONVENTION AGAINST CORRUPTION

The UNCAC has set a minimum standard for democracies as regards obvious forms of corruption, but, like regional anti-corruption treaties, it does not touch on political finance or the subtler threat to democratic integrity associated with money in politics.⁴⁹ The UNCAC is the only global instrument in its field.⁵⁰ As of September 2012, the UNCAC has 161 par-

48. Kenneth Wollack, *Retaining the Human Dimension*, in DEBATES ON DEMOCRATIZATION 109 (Larry Diamond, Marc F. Plattner, & Philip J. Costopoulos eds., 2010).

49. Although the African Convention mentions political finance, it does not require limits on political expenditures or corporate electioneering, or counsel public funding of parties and campaigns. See The Convention on Preventing and Combating Corruption, July 11, 2003, 2nd Sess., African Union, available at http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf (last visited May 23, 2011). As such, it does not address democratic corruption. See *id.* art. 10 (requiring States Parties to "[p]roscribe the use of funds acquired through illegal and corrupt practices to finance political parties; and [i]ncorporate the principle of transparency into funding of political parties.").

50. United Nations Convention against Corruption, G.A. Res. A/RES/58/4, 31 Oct. 2003, opened for signature 9 Dec. 2003 [hereinafter UNCAC], available at http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf (last visited May 24, 2011). Cf. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1., available at <http://www.oecd.org/dataoecd/4/18/38028044.pdf> (last visited May 24, 2011); Inter-American Convention Against Corruption, Organization of American States, Caracas, Mar. 29, 1996, available at <http://www.justice.gov/criminal/fraud/fcpa/docs/iacac.pdf> (last visited May 24, 2011); European Union Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union, 1997 O.J. (C 195) 1; Council of Europe Criminal Law Convention, adopted by the Council of Ministers 4 November, 1998, available at http://www.transparency.org/global_priorities/international_conventions/conventions_instruments/coe_criminal_law (last visited May 24, 2011); Convention on Preventing and Combating Corruption, July 11, 2003, 2nd Sess., African Union, available at http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf (last visited May 23, 2011); Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78(m)(b), (d)(1), (g)-(h), 78dd-1, 78dd-2, 78dd-3, 78ff) [hereinafter FCPA], amended by Foreign Corrupt Practices Act Amendment of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1415 (1988) (codified at §§ 78dd-1 to 78dd-3, 78ff), and the International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998) (codified at §§ 78dd-1

ties, including such diverse States (and organizations) as China, the United States, the United Kingdom, Afghanistan, the European Union, Iraq, Iran, and Venezuela.⁵¹ It aims to achieve universal standards on good governance and greater consistency in the enforcement of anti-corruption norms, two innovations of tremendous importance.

The Convention's preamble justifies a global approach with these words: "corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential."⁵² At the signing conference, Secretary General Annan noted that "[t]he convention makes clear that eradicating corruption is a responsibility of States."⁵³ State responsibility for corruption under international law pursuant to global standards and global enforcement would be a large gain indeed. Such gains are still speculative, as much of the Convention depends on the passage of domestic laws by States Parties and the eventual creation of an international body to monitor implementation and compliance. Moreover, the potential value of those gains is limited by the exclusion of money in politics from the international definition of corruption.

A. *Definitions of Corruption*

Definitions of corruption offered at the international level are silent on matters of political finance. Only a willing interpreter could locate matters of money in politics within their scope.

The U.N. Office on Drugs and Crime ("UNODC"), under whose auspices the U.N. Convention is housed, offers a tautological definition of corruption: "Corruption is a complex social, political and economic phenomenon that affects all countries. Corruption undermines democratic institutions . . . [and] attacks the foundation of democratic institutions by distorting electoral processes, perverting the rule of law."⁵⁴ This definition should not be construed as expanding the definition of corruption to cover all practices that pervert the rule of law or distort elections. It merely states that corruption does so.

to 78dd-3, 78ff). The Convention built on many regional treaties on corruption, bribery, and organized crime sponsored by diverse organizations, including the Organization of American States, the Organization for Economic Co-operation and Development, the Council of Europe, and the African Union.

51. See *United Nations Treaty Collection*, UNITED NATIONS, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-14&chapter=18&lang=en (last visited Sept. 15, 2012).

52. UNCAC, *supra* note 50, preamble.

53. Message of Secretary-General Kofi Annan in United Nations Office on Drugs and Crime, *Global Action Against Corruption*, The Merida Papers 1 (2004), available at http://www.unodc.org/documents/corruption/publications_merida_e.pdf (last visited May 26, 2011).

54. See United Nations Office of Drugs and Crime, <http://www.unodc.org/unodc/en/corruption/index.html?ref=menuaside>

The definition of corruption provided by Transparency International (“TI”) is more focused: “the abuse of entrusted power for private gain.”⁵⁵ It is unclear whether lobbyists, large contributions and expenditures, and shadow fundraising groups fit into TI’s formulation. Undue influence by moneyed actors and damage to democratic integrity do not always result in easily traceable private gains. They may distort the democratic process, diminishing accountability to the average voter, and produce a qualitatively different allocation of gains and losses across the legislative and policy spectrum. Private gains necessarily result, but it is difficult to pinpoint them precisely and to estimate the extent to which those gains resulted from an abuse of power. Undue influence and democratic integrity would have to be mentioned by name in order for money in politics to be safely included within UNODC’s and TI’s definitions.

The UN Convention Against Corruption does not provide an explicit definition of corruption, but its conception of corruption can be ascertained by its requirements and prohibitions. Included within this implicit definition are bribery, money laundering, embezzlement, and, most subjectively, trading in influence.⁵⁶ The Convention’s provisions on transparency and public procurement should not be understood as defining corruption more broadly. Because they come under the heading of “preventive measures,” the Convention should not be read as treating either a lack of transparency or officeholders biased by campaign contributions as corrupt.⁵⁷ The implication is that a lack of transparency and large campaign contributions could lead to corruption, not that they, in and of themselves, are forms of corruption.

B. *The Elimination of Political Finance Regulation from the UNCAC*

UNCAC’s explanation of corruption and UNODC’s tautological definition demonstrate an unwillingness to treat even high amounts of private political spending as per se corruption. No notion of indebted officeholders or political parties can be found. In fact, an article on campaign and party finance present in early drafts of the Convention was singled out for elimination by opposing States. The travaux préparatoires of the Convention reflect the initial inclusion of terms on political finance and their gradual diminution to the point of irrelevance.

States interested in the global regulation of corruption discussed the first negotiation text in Vienna between January 2 and February 1, 2002.⁵⁸ Aus-

55. *Frequently asked questions about corruption*, TRANSPARENCY INTERNATIONAL, http://www.transparency.org/whoweare/organisation/faqs_on_corruption (last visited Sept. 29, 2012).

56. UNCAC, *supra* note 50, arts. 15, 16, 18, and 21–23.

57. UNCAC, *supra* note 50, Chapter II.

58. *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on the work of its first to seventh sessions, Addendum: Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Corruption* at vii, U.N. Doc. A/58/422/Add.1, (2003) [herein-

tria and the Netherlands had achieved the inclusion of an article entitled, “Funding of political parties.”⁵⁹ Draft Article 10 provided:

1. Each State Party shall adopt, maintain and strengthen measures and regulations concerning the funding of political parties. Such measures and regulations shall serve:
 - (a) To prevent conflicts of interest and the exercise of improper influence;
 - (b) To preserve the integrity of democratic political structures and processes;
 - (c) To proscribe the use of funds acquired through illegal and corrupt practices to finance political parties; and
 - (d) To incorporate the concept of transparency into funding of political parties by requiring declaration of donations exceeding a specified limit.
2. Each State Party shall regulate the simultaneous holding of elective office and responsibilities in the private sector so as to prevent conflicts of interest.⁶⁰

This text was notable in its use of the word “shall.” Its formulations were mandatory. That said, those formulations were broadly phrased and undemanding. Measures listed in draft Article 10 concerning the funding of political parties did indeed have to be “adopt[ed], maintain[ed] and strengthen[ed].”⁶¹ But only a purposive definition of those measures was given, and the purposes specified were vague. The draft left conflicts of interest and improper influence, as well as the integrity of democratic structures and processes undefined. The only specific obligations in this Article were to disclose donations above an unspecified limit and ensure that political parties would not be financed with funds obtained through corrupt practices.⁶² The draft text did not dare to require limits on political donations or expenditures, any sort of public financing of parties or campaigns, or prohibitions on corporate political activity.

Despite draft Article 10’s undemanding and purposive nature, several delegations requested its deletion. Another delegation suggested that its terms were impractical “given the enormous variations in political systems.”⁶³ This unfavorable climate led Austria, France, and the Netherlands to submit a revised version of Article 10, which eliminated Section 1(a)’s

after *Travaux Préparatoires*], available at <http://www.unodc.org/unodc/en/treaties/CAC/travaux-preparatoires.html> (last visited May 26, 2011).

59. *Id.* at 86.

60. *Id.*

61. *Id.* at 87.

62. *See id.* (draft art. 10(1)(c)–(d)). These are the only two portions of the text that contain specific obligations as regards political finance.

63. *Id.* at n.13.

clause on “improper influence.”⁶⁴ Still, opposition to the now weaker Article 10 grew at the third session of negotiations, which took place eight months later. Some delegations continued to request Article 10’s deletion while other delegations carefully framed their opposition as a function of “the enormous variations in political systems.”⁶⁵

The argument that variations among political systems make regulation of political finance impracticable suggests an opposition to Article 10’s purposes, not concern for its practicability (as claimed). While some allowances are surely needed to account for the diversity of institutional forms among the world’s democracies, references to the fundamental principles of each legal system go beyond the need for flexible standards. If the interest in play were truly that of ensuring meaningful action while respecting institutional variations, then another wording would be more appropriate. For example, States could be required to take whatever actions were “reasonable and effective within their own institutional structures” and those actions could be subject to “regular review to ensure their effectiveness.” Several authors on comparative political finance have had no trouble isolating different types of democracies and the different sorts of political finance reforms used in each system.⁶⁶ Because what is effective in one jurisdiction is not necessarily effective in another, requiring that all States take the exact same actions would indeed be counterproductive. That said, nobody doubts that all well-meaning States could study the role of private wealth in the political process and make a good-faith effort towards increased democratic integrity.

These sorts of actions were, however, exactly what many States sought to avoid. Tensions reached a breaking point at the sixth session of negotiations held between July 21 and August 8, 2003.⁶⁷ There, two sets of replacement text for Article 10 were considered, one submitted by Australia, the other by Argentina, Benin, Bolivia, Brazil, Chile, Colombia, Egypt, Finland, France, Germany, Guatemala, Nigeria, Peru, Portugal, and Sweden. Both proposals referenced the “funding of electoral campaigns” alongside the funding of political parties.⁶⁸ This was a helpful change, given that some democratic systems are candidate-centered rather than party-centered. Beyond this positive move, however, both proposals proceeded to empty Article 10 of what little content it possessed.

64. *Id.* at 86.

65. *Id.* at 87 n.13.

66. *See, e.g.*, EWING & ISSACHAROFF, *supra* note 18 (discussing types of regulatory methods and the particular factors that determine the appropriateness of each method); *see generally* COMPARATIVE POLITICAL FINANCE IN THE 1980s, *supra* note 32; CAMPAIGN FINANCE AND PARTY FINANCE IN NORTH AMERICA AND WESTERN EUROPE 7–8 (Arthur B. Gunlicks ed., 2000) (discussing different models of political finance reform and democratic systems, including the differences between party-based systems and candidate-based systems).

67. *Travaux Préparatoires*, *supra* note 58, at 91.

68. *Id.*

Sections 1(a) and 1(b), which addressed conflicts of interest and the integrity of democratic political structures and processes, were eliminated.⁶⁹ This left intact the goal of transparency through the disclosure of some donations and, in the case of Australia's proposal, the elimination of political funds obtained through illegal practices. The other proposal, submitted by the fourteen other countries named above, did not even retain this goal. In its place it substituted a requirement that property used for electoral purposes be declared.⁷⁰ Besides the deletion of sections 1(a) and (b), the most notable change came in the addition of a phrase now ubiquitous throughout the treaty: "in accordance with the fundamental principles of its domestic law."⁷¹ Thus, the proposed duty to "adopt, maintain and strengthen measures" on political finance was made vulnerable to any domestic law principles that opposed such measures, so long, that is, as States could make an argument that said principles were "fundamental."⁷²

These drastic changes, deletions, and qualifications were still not enough to satisfy the objections of powerful States. The Ad Hoc Committee tasked with the matter of electoral finance ultimately struck Article 10 from the treaty.⁷³ Only the delegations from Benin, Burkina Faso, Cameroon, and Senegal continued to advocate for a meaningful provision on political finance.⁷⁴ The final result was confirmed at the seventh session of negotiations held in the fall of 2003.⁷⁵ What remains of draft Article 10 is incorporated into Article 7's provisions on the public sector. According to Section 2 of that Article, each State Party: "shall also consider adopting appropriate legislative and administrative measures . . . in accordance with the fundamental principles of its domestic law . . . concerning candidature for and election to public office."⁷⁶ According to Section 3 of the same Article, each State Party: "shall also consider taking appropriate legislative and administrative measures . . . in accordance with the fundamental principles of its domestic law[] to enhance transparency in the funding of candidates for elected public office and, where applicable, the funding of political parties."⁷⁷ Finally, Section 4 notes that each State Party: "shall, in accordance with the fundamental principles of its domestic law, endeavor to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest."⁷⁸

Thus, the legacy of draft Article 10 is a series of hortatory recommendations masquerading as legal obligations. The repetition of the word "shall"

69. *See id.*

70. *Id.* at 91–92.

71. *Id.* at 92.

72. *Id.*

73. *Id.* at 93.

74. *Id.*

75. *Id.*

76. UNCAC, *supra* note 50, art. 7(2).

77. *Id.*, art. 7(3).

78. *Id.*, art. 7(4).

is tempered by the words “consider,” “endeavor,” and “in accordance with the fundamental principles of its domestic law.”⁷⁹ The meaning of these provisions is simple: States Parties may or may not regulate the financing of parties and campaigns, and if they choose to do so, they have tremendous leeway. The provision on transparency is slightly stronger. There, all States must endeavor to promote transparency—that is, they must try. As regards political finance, all recognition of improper influence and the integrity of democratic institutions has been eliminated.

C. UNCAC Fails to Create Meaningful Obligations

The fate of draft Article 10 is indicative of the fate of most of the Convention’s initial terms, even those terms that were included in the final text. The Convention is littered with qualifiers that cast doubt on its significance. For example, Article 18 obliges states to “consider” criminalizing the intentional trading in influence.⁸⁰ Or consider Article 5(2): “Each State Party shall endeavour to establish and promote effective practices aimed at the prevention of corruption.” An obligation to “endeavor” to promote a certain aim or to consider criminalizing certain behavior is no obligation at all. This is the stuff of resolutions and press conferences, not treaties. Consider Article 7 as well: “(1) Each State Party shall, *where appropriate and in accordance with the fundamental principles of its legal system, endeavour to* adopt, maintain and strengthen systems for the recruitment, hiring, retention, promotion and retirement of civil servants and, where appropriate, other non-elected public officials.”⁸¹ In such contexts, the frequent repetition of the following phrases is troubling: “shall consider adopting;” “shall endeavour to;” “where appropriate;” and “in accordance with the fundamental principles of [each party’s] legal system.” The drafters of the Convention used this last qualifier so many times that, apparently tiring of repetition, they later employed slight variations, including “to the extent consistent with the fundamental principles of [each party’s] legal system” and “whenever possible and consistent with fundamental principles of domestic law.”⁸² All together, these phrases were used over eighty times. This hortatory language is important for this Article’s examination of the remaining provisions of the Convention that could potentially be relevant to money in politics.

79. I refer to the oddity of being obligated (States Parties “shall”) to do nothing much at all (“consider” or “endeavour”) under conditions of no oversight, and always with the fallback excuse that action was untenable given the fundamental principles of one’s legal system. See *id.* art. 7(2-4).

80. *Id.* art. 18.

81. *Id.* art. 7(1) (emphasis added). See also *id.* art. 7(2).

82. See, e.g., *id.* arts. 30(6-7), 7(2), 8(5), 31(8), and 46(18) (employing these phrases and variations thereof).

D. UNCAC's Broad Language Could be Interpreted to Require Finance Reform, but Such Interpretation Is Unlikely

The Convention's definition of influence trading could lead to progressive legal development. Included are the following acts, which are not far from the dynamics of private campaign contributions and political expenditures:

The promise . . . or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that [this person] abuse his or her real or supposed influence with a view to obtaining from an administration or public authority . . . an undue advantage for the original instigator of the act or for any other person.⁸³

Section (b) of the same Article adapts this language to cover the solicitation or acceptance by a public official of such an "undue advantage."⁸⁴ It could be argued that campaign contributions and astutely placed independent political expenditures provide such an "undue advantage" for candidates, parties, and officeholders. It could further be argued that such contributions and expenditures are rewarded through the "undue advantages" provided by lawmakers to contributors and spenders in the terms of public policies enacted. This Article arguably goes the furthest distance towards tying the definition of corruption to the realities of money in politics.⁸⁵

A host of other articles are also potentially relevant to money in politics.⁸⁶ It is notable, however, that none of these articles explicitly apply to

83. *Id.* art. 18(a).

84. *Id.* art. 18(b).

85. *See id.*, preamble ("Concerned about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice . . .").

86. Article 5(1) requires "anti-corruption policies that promote the participation of society and reflect the principles of . . . integrity, transparency and accountability." Article 8(1) on codes of conduct for public officials establishes that "each State Party shall promote, inter alia, integrity, honesty and responsibility among its public officials." Article 8(5) "require[s] public officials to make declarations . . . regarding . . . their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result." Article 9's public procurement norms call for objective standards and transparency in awarding government contracts, could discourage companies from donating to parties and campaigns. If such norms were established, it follows that political donations would translate less smoothly into government contracts. Article 10's public reporting goals may include the provision of "information on the organization, functioning and decision-making processes of . . . public administration." This could discourage legislative favoritism based on contributions to candidates and parties, and favorable independent expenditures favoring the same. Article 11 encourages "measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary." This concern for judicial independence, which includes the willingness of judges to enforce anti-corruption norms, could imply limits on contributions and expenditures in relation to judicial elections, which are still held in some States, including the United States. Article 12(2)(e) establishes a duty to prevent "corruption involving the private sector," a duty which "may include . . . imposing restrictions, as appropriate and for a reasonable period of time, on the professional activities of former public officials or on the employment of public officials by the private sector after their resignation or retirement." This should be read as preventing the so-called revolving door between service in

political finance, corporate political expenditures, or the habitual activities of lobbyists. This *potential for relevancy* relates to the lack of specificity in each article. The fate of draft Article 10, moreover, suggests that many States would oppose any creative interpretation of the Convention's existing articles so as to bring money in politics within the Convention's purview. The same goes for the possibility of amending the Convention.⁸⁷ By excluding matters of political finance, anti-corruption treaties have left democracy at the mercy of economic power.

E. Movement Toward European Political Finance Regulations

There are signs of a greater willingness to limit political spending at the regional level. In 2010, The European Commission for Democracy Through Law ("Venice Commission") issued Guidelines on Political Party Regulation, which are evidence of this trend.⁸⁸ The Guidelines begin with an important caveat:

Each country's historical development and unique cultural context naturally preclude the development of a universal, single set of regulations for political parties. However, basic tenets of a democratic society, as well as recognized human rights, allow for the development of some common principles applicable to any legal system for the regulation of political parties.⁸⁹

The Guidelines then state that political finance reform is among those common principles: "The regulation of political party funding is essential to guarantee parties' independence from undue influence created by donors

the legislature and employment as a lobbyist. Article 13 requires the "promot[ion of] active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations." Section 1(b) urges that "effective access to information" be given to the public. This section of Article 13 ought to be understood as requiring action on the question of political advocacy groups that do not disclose the identity of their corporate donors. Such groups, disguised as grass-roots organizations, then use large sums of anonymous money to purchase advertisements that benefit particular candidates and parties. See, e.g., Michael Luo & Stephanie Strom, *Donors' Names Kept Secret as Rules Shift*, N.Y. TIMES, Sept. 21, 2010, at A1, available at <http://www.nytimes.com/2010/09/21/us/politics/21money.html?hp> (discussing 501(c) groups: "Unlike so-called 527 political organizations, which can also accept donations of unlimited size, 501(c) groups have the advantage of usually not having to disclose their donors' identity."). Article 26 calls on States to establish liability of legal persons for "participation in the offences established" by the Convention. Article 36 contains a duty to ensure "the existence of a body . . . specialized in combating corruption through law enforcement[, which] shall be granted the necessary independence . . . to carry out [its] functions effectively and without any undue influence." Article 69 contains a provision on amendments. It is possible that the treaty might, at some later date, be amended to cover the financing of parties and elections.

87. See UNCAC, *supra* note 50, art. 69.

88. European Commission for Democracy Through Law (Venice Commission), Guidelines on Political Party Regulation (Oct 15–16, 2010) [hereinafter Venice Guidelines], available at [http://www.venice.coe.int/docs/2010/CDL-AD\(2010\)024-e.pdf](http://www.venice.coe.int/docs/2010/CDL-AD(2010)024-e.pdf) (last visited May 1, 2011). See also OECD Convention, *supra* note 50, at Annex II(A)(5) (stipulating that companies should consider "ethics and compliance programmes" with regard to "political contributions").

89. Venice Guidelines, *supra* note 88, at I(1), 6.

and to ensure the opportunity for all parties to compete in accordance with the principle of equal opportunity and to provide for transparency in political finance.”⁹⁰ The Commission issued a warning, however, that complicates the plight of States wishing to enact reforms: “Funding of political parties through private contributions is also a form of political participation. Thus, legislation should attempt to achieve a balance between encouraging moderate contributions and limiting unduly large contributions.”⁹¹ The Guidelines therefore represent an endorsement of some minimum floor for the regulation of political parties based on its recognition of the dangers of party dependence on the undue influence of donors, unfair competition between parties on the basis of donations, and a lack of transparency. The need to respond to such dangers is tempered, however, by the Commission’s conclusion that private political contributions are a form of political participation.

This balancing act between eliminating undue influence and securing basic equality within the political sphere, on the one hand, and protecting rights of political participation, on the other, illustrates why democratic corruption is a delicate and controversial topic. Before corruption can be defined, democracy must be defined, its core values and procedures specified. Only then, as a function of violence to those values and procedures, can one decide whether a given action constitutes corruption. Because that exercise has yet to be performed as regards political finance, draft Article 10’s fate is unsurprising as a legal matter. It ought to be seen as a function of lacunae in international law. The Venice Commission’s Guidelines may be taken as evidence of an emerging consensus on political finance in Europe, but they do not fill the international legal void.

The next step is to ask whether democracy’s core values and procedures under international law imply a position on political finance. Those values and procedures are specified within the democratic entitlement.

III. MONEY IN POLITICS AND THE DEMOCRATIC ENTITLEMENT

Compared with global anti-corruption norms, the textual provisions comprising the democratic entitlement represent a richer set of normative commitments and a better established body of rules. If money in politics is to become a concern of international law, it is best for that process to emanate from the democratic entitlement and then extend to anti-corruption treaties. Were that process to flow in the opposite direction, it would lack theoretical and normative depth; rules thus established would lack a sound foundation.

90. *Id.* at para. 159.

91. *Id.*

Universal rights to voting, political participation, and political association were declared by the General Assembly in 1948 and formally ratified by States in 1976,⁹² whereas global anti-corruption norms only emerged in 2008.⁹³ The Universal Declaration of Human Rights (“Declaration”) and the International Covenant on Civil and Politics Rights (“ICCPR”), the foundational documents in question, are imbued with influential notions of freedom, equality, accountability, and State obligations. These rights and the notions surrounding them are the primary representations of democratic norms and political values at the international level. Money in politics must first pass through these filters.

The following analysis is but a first step. It isolates the textual provisions of the democratic entitlement that are relevant to money in politics, illustrates their possible applications to political finance, and discusses the controversial interpretive questions thus raised. The answers to those questions are preliminary, but they will be so far-reaching and unsettling as to compel further investigation.

A. *The Universal Declaration's Implications for Money in Politics*

1. *The Declaration's Democratic Entitlement*

Article 21(3) of the Declaration elevates popular sovereignty and elections to the universal standard for governmental legitimacy: “The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage.”⁹⁴ This invalidates not just imperial governance from afar, but any form of governance—however local—that lacks popular validation.

Complimenting and operationalizing this standard, the Declaration announced rights of free expression, free assembly and association, and, more surprisingly, rights to equal access to public service and political participation.⁹⁵ Consider the first two sections of Article 21: “(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. (2) Everyone has the right of equal access to public service in his country.”⁹⁶ This means that democratic leadership positions must remain accessible to average citizens. Indeed, these provisions suggest it would be unlawful for new forms of elite power and privilege to emerge through democracy. Thus, Article 21 makes popular sovereignty an

92. See Universal Declaration, *supra* note 6, art. 21; ICCPR, *supra* note 7, art. 25.

93. See UNCAC, *supra* note 50.

94. Universal Declaration, *supra* note 6, art. 21(3).

95. *Id.* arts. 19 (“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”) and 20(1) (“Everyone has the right to freedom of peaceful assembly and association.”).

96. *Id.* art. 21(1–2).

extremely demanding proposition—not just a forbiddance of colonial ambitions, but a limitation on domestic ambitions as well.

The Declaration's first two articles foreshadow this theme of preventing domination, even domination of the nominally democratic sort. They speak with an awareness of democracy's vulnerabilities, a discerning sense that democracy represents a new, more principled stage of social struggle, but a stage of struggle nonetheless. Its principles and rules had to be specified up front:

Article 1. All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience

Article 2. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁹⁷

When these articles are read in conjunction with the rest of the Declaration, it is difficult to imagine anything besides a humane and egalitarian socio-political order. Even holding elections, as required by Article 21, would not justify discriminatory distinctions under the Declaration. Democracy was to be a forum for political empowerment; it was not to become (or remain) a new disguise for domination.

Adopted well before racial and gender discrimination had been eliminated from any jurisdiction,⁹⁸ the Declaration is unambiguously progressive. Article 2 prohibits most imaginable forms of discrimination by name and all other forms not yet imagined through the addition of two generic qualifiers: “without distinction of any kind” and “other status.”⁹⁹ This prohibition applies to “all the rights and freedoms set forth.”¹⁰⁰ At least in the case of political rights and freedoms, discrimination on the basis of race and sex were on their way out, and discrimination on the basis of religion and birth called to mind theocracy and aristocracy, governmental forms long since unfashionable amidst the “civilized nations” leading the push for human rights. Dictatorship, also out of style, was ruled out on the face of Article 21.¹⁰¹

Article 2's prohibition of distinctions on the basis of property pushed the boundaries of the possible further than the other components of Article 2. As opposed to internationalizing pre-existing trends, political equality

97. *Id.* arts. 1–2.

98. Consider, for example, the opposition to civil rights legislation in the United States up into the 1970s and the long tenure of apartheid in South Africa. Discriminatory voting procedures endured into the early 1970s in the United States, where Southern states opposed the implementation civil rights legislation. See Michael Denning, *Neither Capitalist nor American*, in *DEMOCRATIC VISTAS* 138, 145 (Jedediah Purdy ed., 2004) (discussing the enfranchisement of black Southerners in 1970). South Africa, where apartheid continued until 1994, is also another powerful example in this regard.

99. Universal Declaration, *supra* note 6, arts. 1–2.

100. *Id.* art. 2.

101. See *id.* art. 21(3) (prescribing periodic and genuine elections).

across socio-economic classes would alter the nature of democracy in capitalist States. The revolutionary implications of this provision revolve around matters of money in politics.

2. Article 2's Prohibition of Distinctions on the Basis of Property

Herbert Alexander has noted that “[f]rom Aristotle on, many political philosophers have regarded property or economic power as the fundamental element in politics.”¹⁰² The democratic design confines, to some extent, the power of property to the economic sphere. As Alexander states, “universal suffrage[] has helped mitigate the political effects of disparities in economic resources[, because] the wealth of one group with small membership thus may be matched by the human resources or voting power of another.”¹⁰³ Although universal suffrage offsets the role of economic power in the political sphere, economic power can still express itself through political expenditures, and thus recover lost ground.

Economic power is a function of property. Assets that can be converted into cash take many forms, including real property, tangible personal property, and intangible property, such as stock options and bank accounts. All are protected by property law. Indeed, Article 2's use of the word “property” must be broadly understood, a conclusion buttressed by the other most popular languages of the Declaration. Instead of property, the French version of the Declaration uses the word “fortune” and the Spanish version uses the words “posición económica,” literally “economic position,” probably best translated as “socio-economic status.”¹⁰⁴ Besides the fact that money is a form of property under law, the other versions of Article 2 remove any doubt as to whether the Declaration meant only to prohibit distinctions on the basis of the ownership of real property or land. One's fortune, economic status, and property holdings include, if not determine, the amount of money at one's disposal.

Given that suffrage had been limited to the propertied class in many democracies, one might wonder whether Article 2's prohibition on property-based distinctions in political participation was merely a rebuke to such legal orders.¹⁰⁵ Surely Article 2 prohibits this state of af-

102. Herbert E. Alexander, *Introduction, in* COMPARATIVE POLITICAL FINANCE IN THE 1980s 9 (Cambridge University Press, Herbert E. Alexander ed., 1989).

103. *Id.*

104. Déclaration universelle des droits de l'homme, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at <http://www.un.org/fr/documents/udhr/> (last visited Sept. 9, 2012); Declaración universal de derechos humanos, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at <http://www.un.org/es/documents/udhr/> (last visited Sept. 29, 2012).

105. Montesquieu recommended that only those with property be entitled to vote. This was based on the theory that only such individuals could have truly independent minds, given that all others depended on landowners, whom they could not afford to offend. See CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* (Thomas Nugent trans., Hafner Publishing Co. 2nd ed. 1959); CHILTON WILLIAMSON, *AMERICAN SUFFRAGE FROM PROPERTY TO DEMOCRACY 1760–1860* 10 (1960).

fairs.¹⁰⁶ But confining Article 2's mention of property to this limited context of discriminatory State action would render the plain language of the text redundant. Article 21 states that "[e]veryone" has the right to political participation and equal access to public service. Also, Article 21(3) demands "genuine elections . . . by *universal* and *equal* suffrage."¹⁰⁷ Entrance requirements are ruled out by this alone. Furthermore, the Declaration's earlier articles foreclose a hierarchy among citizens, prohibiting slavery and servitude, and guaranteeing to "everyone" rights to "life, liberty, . . . recognition everywhere as a person before the law, . . . equal[ity] before the law and . . . equal protection of the law, the right to own property, and freedom of opinion and expression."¹⁰⁸

Articles 2 and 21, read together, must do more than prohibit *de jure* exclusion of and discrimination against non-propertied citizens. If these two articles reach beyond the limited case of affirmative acts by the State to limit the political rights of citizens with humble or nonexistent property holdings, then it must be the case that they require some affirmative action by the State to remedy *de facto* exclusion of or discrimination against such citizens. If the State has this responsibility and if money is a form of property for purposes of Article 2, then Articles 2 and 21 offer a new beginning for the democratic entitlement.

3. *A Case Study on the Intersection of Article 2's Prohibition on Property Distinctions with Article 21's Democratic Entitlement*

In the context of Article 21's rights of popular sovereignty, political participation, and equal access to political service, Article 2's property proviso raises the issue of money in politics. The right to "take part in the government of [one's] country, directly or through freely chosen representatives" and the right of "equal access to public service" may not be encumbered by distinctions on the basis of wealth, even distinctions that arise through State complacency in the face of a burgeoning political market (as opposed to State action).¹⁰⁹ Or, in the words of Article 2, "[e]veryone is entitled to [equal access to public service and political participation] without distinction" on the basis of property, including money. The intersection between Article 2 and Article 21, make a difficult question impossible to ignore: do rights of equal access to public service and participation in government,

106. The Human Rights Committee noted that "[i]t is unreasonable to restrict the right to vote . . . or to impose . . . property requirements." This commentary on Article 25 of the ICCPR was made without reference to Article 2's anti-distinctions clause, which is the same in the ICCPR as in the UDHR. See General Comment 25: The Right to Participate, in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25), U.N. Doc. CCPR/C/21/Rev.1/Add.7 (July 12, 1996) [hereinafter General Comment 25], para. 10.

107. Universal Declaration, *supra* note 6, art. 21(3) (emphasis added).

108. See *id.* arts. 3, 4, 6, 7, 17, and 19.

109. This is an exercise in reading Article 21 in light of Article 2, an exercise that Article 2 itself demands by stipulating that "[e]veryone is entitled to *all the rights and freedoms set forth in this Declaration, without distinction of any kind.*" See *id.* art. 2 (emphasis added).

without distinction as to the amount of money that one possesses, require something better than an expensive, unaccountable, privately-funded political sphere?

The state of democracy in the United States serves to flesh out the question. Public funding at the federal level is available only for presidential elections, is optional in that context, and is widely considered insufficient.¹¹⁰ When coupled with an absence of expenditure limits for candidates, campaigns, parties, or even for individuals and corporations acting independently, this leads to an expensive political market. The astounding consequences warrant reflection on the question of equal access to political service and participation irrespective of property, fortune, or economic position.

Consider that spending on U.S. congressional and presidential campaigns is predicted to top \$6 billion in 2012, up from \$5.3 billion in 2008 and \$4.2 billion in 2004.¹¹¹ Some political strategists foresaw the need for major party candidates to raise \$1 billion for the 2012 election, a figure which has proved accurate if interpreted to include party fundraising and superPAC donations.¹¹² In terms of candidate fundraising alone, Obama and McCain raised over \$1 billion total in 2008, Bush and Kerry raised \$646.7 million in 2004, and Bush and Gore raised (only) \$325 million in 2000.¹¹³ As of the 2008 election, it cost candidates roughly \$500 million to become

110. See, e.g., Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1735 (1999) (“The amount of public funding made available is insufficient to run a modern campaign”).

111. See *2012 Election Spending Will Reach \$6 Billion, Center for Responsive Politics Predicts*, OPEN SECRETS.ORG, <http://www.opensecrets.org/news/2012/10/2012-election-spending-will-reach-6.html> (last visited Nov. 1, 2012); Jeannie Cummings, *2008 Campaign Costliest in U.S. History*, POLITICO (Nov. 5, 2008), <http://www.politico.com/news/stories/1108/15283.html> (last visited June 7, 2011) (noting that Obama and McCain raised over \$1 billion and that “[t]he 2008 campaign was the costliest in history, with a record-shattering \$5.3 billion in spending by candidates, political parties and interest groups on the congressional and presidential races”).

112. See Jeff Zeleny, *\$350,000 Goal is Set for Re-Election Donors*, N.Y. TIMES, March 18, 2011, at A20, available at <http://www.nytimes.com/2011/03/18/us/politics/18democrats.html> (“This could be the first \$1 billion campaign, a figure that Republicans have been repeatedly invoking to encourage their donors to raise more money for candidates and the national party.”). For fundraising and spending associated with candidates, parties, and superPACs going into the 2012 election, see *The 2012 Money Race: Compare the Candidates*, NYTIMES.COM, <http://elections.nytimes.com/2012/campaign-finance> (last visited Nov. 7, 2012). Congressional and presidential fundraising figures are misleading absent consideration of fundraising by the political parties and superPACs. See *id.* (listing a variety of such figures, which, together, would situate the cost of winning the presidency at or above \$1 billion per candidate); *Independent Spending Totals*, NYTIMES.COM, <http://elections.nytimes.com/2012/campaign-finance/independent-expenditures/totals> (last visited Nov. 7, 2012) (providing updated and expanded figures on independent expenditures in the 2012 presidential race).

113. See Jonathan D. Salant, *Spending Doubled as Obama Led Billion-Dollar Campaign (Update 1)*, BLOOMBERG.COM, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=anLDS9WWPQW8> (last visited Nov. 1, 2012) (providing numbers for total spending and individual candidate spending in the 2008 election); CHARLES LEWIS, *THE BUYING OF THE PRESIDENT, 2004: WHO'S REALLY BANKROLLING BUSH AND HIS DEMOCRATIC CHALLENGERS 4* (2004) (recording the expenditures of the 2000 elections).

President,¹¹⁴ \$8 million to become a Senator, and \$1 million to become a Member of the House of Representatives.¹¹⁵ There is clear evidence as to the “frustration [some politicians] feel concerning how much time they must devote to courting potential donors.”¹¹⁶

The high cost of elections for parties and candidates naturally bestows wealthy citizens with greater political power and provides them with greater access to public service.¹¹⁷ We are reminded of Duverger’s elementary observation about political parties’ need to recruit wealthy citizens to underwrite election expenses, and Ewing and Issacharoff’s related concern over parties’ susceptibility to the demands of the rich and powerful.¹¹⁸

Spending by independent expenditure groups, funded principally by wealthy citizens and corporations, has also reached tremendous heights.¹¹⁹ Approximately 25 individuals and corporations have given over a million dollars or more to superPACs, the newest manifestation of such groups.¹²⁰ Indeed, some individuals have given upwards of \$35 million.¹²¹ Other con-

114. This number is difficult to pinpoint, however. Obama raised more than this, McCain a bit less. See Zeleny, *supra* note 112 (“The Obama campaign raised about \$750 million in the 2008 race.”). Going into the 2012 election, it appears that \$500 million per candidate remains a reasonably accurate figure. As of the end of September 2012, Obama had raised \$637.3 million, while Romney had raised \$388.1 million. See *The 2012 Money Race: Compare the Candidates*, *supra* note 112.

115. The Campaign Finance Institute, *House and Senate Winner’s Receipts 1998-2006*, available at <http://www.cfinst.org/pr/pdf/06-PostElec-Table1.pdf> (noting the mean quantity raised as \$1,132,849 for the House and \$8,160,298 for the Senate in the 2006 elections) (last visited Sept. 29, 2012) and *Campaign Funding Sources for House and Senate Candidates 1984-2006*, available at http://www.cfinst.org/data/pdf/VitalStats_t8.pdf (listing the figures for all contributions and coordinated expenditures in House and Senate races) (last visited May 15, 2011).

116. Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising*, 94 COLUM. L. REV. 1281, 1281 (1994). See generally LARRY MAKINSON AND THE STAFF AT THE CENTER FOR RESPONSIVE POLITICS, *SPEAKING FREELY: WASHINGTON INSIDERS TALK ABOUT MONEY IN POLITICS* (2003) (quoting numerous members of Congress on the difficulty and undesirability of the private fundraising imperative).

117. In the United States, for example, the phenomenon of millionaire (or billionaire) candidates has become commonplace. It is not the case that such candidates tend to win; the point is simply that they are able to mount viable campaigns on account of their personal wealth, a tremendous advantage over all citizens of a lower socio-economic status. See, e.g., Richard Wolf Hess, *No Fair Play for Millionaires? McCain-Feingold’s Wealthy Candidate Restrictions and the First Amendment*, 70 U. CHI. L. REV. 1067, 1075 (2003) (“Both the Republican and Democratic Senate campaign committees actively recruit millionaire candidates to challenge incumbents and pursue open seats.”); *Millionaire Candidates*, OPEN SECRETS.ORG, <http://www.opensecrets.org/bigpicture/millionaires.php?cycle=2010> (last visited Sept. 29, 2012) (“As the costs of running for office have escalated, more and more candidates are jumping into politics using their personal fortune, rather than trying to raise all those funds from other people.”).

118. See DUVERGER, *supra* note 19; see also EWING & ISSACHAROFF, *supra* note 18.

119. See, e.g., Times Topics, *Campaign Finance (SuperPACs)*, N.Y. TIMES (Sept. 13, 2012), http://topics.nytimes.com/top/reference/timestopics/subjects/c/campaign_finance/index.html (“A group of conservative donors led by Charles and David Koch, for example, have pledged to raise as much as \$400 million for issue groups”).

120. *The SuperPAC Superdonors*, NPR (Feb. 24, 2012), <http://www.npr.org/2012/02/13/146836082/the-superpac-super-donors> (listing donors who have given \$1 million or more to superPACs); see also *Top Donors to ‘SuperPACs’*, N.Y. TIMES (June 13, 2012), <http://www.nytimes.com/interactive/2012/06/14/us/politics/top-donors-to-super-pacs.html?ref=campaignfinance>.

121. See Nicholas Confessore, *Campaign Aid is Now Surging into 8 Figures*, N.Y. TIMES (June 13, 2012), <http://www.nytimes.com/2012/06/14/us/politics/sheldon-adelson-sets-new-standard-as-campaign-aid-surges-into-8-figures.html>.

cerns, such as the so-called revolving door, center on a different avenue through which money increases one's voice in government. Consider that 50 percent of the senators who left office between 1998 and 2005 have become lobbyists.¹²² Even discounting the migration of former politicians, the overall number of lobbyists doubled within that same time period.¹²³

There are many dynamics within fundraising and spending, and not all aspects of money in politics are identical in their causes or effects. Still, the numbers above prove the existence of a financial market provoked by the absence of public funding and expenditure limits. This is a market in which candidates, parties, members of the general public, and corporations compete for political power on the basis of the amount of money they can raise or spend. The dynamics of this market are that you must "pay in order to play," not that political goods are automatically handed to the highest bidder. Still, parties and candidates who pay the most have better chances of achieving their goals, as visibility, depth of distribution, and the degree of sophistication in packaging one's message are causally associated with one's funds. Also within this market, donors and spenders, including organized interest groups, compete for political influence. Meanwhile, the absence of public funding for congressional campaigns guarantees the continuing importance of private financial power.

Returning to the matter of the Declaration's non-discrimination clause, the U.S. case exemplifies the ways in which citizens with great "property" assets, large "fortunes," or privileged "economic positions" enjoy a massive advantage over their rivals. This is true in citizens' capacities as candidates and participants in the political debate, and as constituents of candidates and parties. Despite limits on individual donations to political campaigns, most money in U.S. federal politics comes from the rich and within this category most money comes disproportionately from white, economically conservative males.¹²⁴ In his longitudinal analysis of U.S. senators' votes on

122. Jeffrey H. Birnbaum, *Hill a Steppingstone to K Street for Some*, WASH. POST, July 27, 2005, at A19 ("Two thirds of the Republican senators who went into private life since 1998—12 of 18—have become lobbyists, compared with one-third of Democratic senators—6 of 18—who have done the same. In the House, nearly half of the Republicans eligible to become lobbyists have registered to do so over that period—46 of 94. House Democrats became lobbyists at a lower rate—32 percent, or 22 of 68 retirees."); see also Eric Lichtblau, *Lobbyists Rush to Hire G.O.P. Staff Ahead of Vote*, N.Y. TIMES, Sept. 10, 2010, at B1, available at <http://www.nytimes.com/2010/09/10/business/10lobby.html> (noting that "the going rate for Republicans—particularly current and former House staff members—has risen significantly in just the last few weeks, with salaries beginning at \$300,000 and going as high as \$1 million for private sector positions."); see also Jeffrey H. Birnbaum, *The Road to Riches Is Called K Street*, WASH. POST, June 22, 2005, at A1 (discussing the growth of lobbying).

123. See Jeffrey H. Birnbaum, *The Road to Riches Is Called K Street*, WASH. POST, June 22, 2005, at A1.

124. Evidence of donors' wealth is sporadic but convincing. See generally Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73 (2004). Even in the case of small donations, the evidence suggests that the wealthy have cornered the market for political financing. In the 1998 Congressional elections, for example, contributions of \$200 or more accounted for 66 percent of all contributions made. Three-quarters of these contributions came from people who made at least \$100,000 per year, and a majority of those characterized as the "most active donors" made

legislation on the minimum wage, civil rights, government spending, and abortion, Princeton political scientist Larry Bartels confirmed the composition of the donor class: “the views of constituents in the bottom third of the income distribution received no weight at all in the voting decisions of their senators.”¹²⁵

The U.S. case study leads to the first interpretive question raised by the intersection of Article 21 and Article 2’s property proviso. Given that these articles do more than prohibit formal, *de jure* exclusion of or discrimination against non-propertied citizens, we must ask what, exactly, they demand of States. Because the democratic entitlement posits equal access to political service and political participation without distinction as to each citizen’s financial status, it implies a State obligation to regulate money in politics. States that fail to do so run the risk of democracy becoming inaccessible to citizens of average means, a risk, that is, of violating their citizens’ human rights.

This construction of Articles 2 and 21 is supported by Article 28 of the Universal Declaration, which states: “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”¹²⁶ Thus, States must ensure that property-based distinctions do not encumber the exercise of political rights and freedoms. If they fail in this regard, it would be incumbent upon them to take remedial measures.

In sum, the Universal Declaration supplies the components of a democratic entitlement, raises the issue of money in politics, and provides a sense of the values in play. Reflecting on these fruits of the Declaration, this Article has posited a hypothesis with tremendous implications for the democratic entitlement: fulfillment of the affirmative obligation to prevent

at least \$500,000 per year. See Clyde Wilcox, *Contributing as Political Participation*, in A USER’S GUIDE TO CAMPAIGN FINANCE REFORM 117–18 (Gerald C. Lubenow ed., 2001) (labeling income “the best single predictor of giving in politics”). Wilcox cites studies showing that it is actually the wealthiest of the wealthy—those in the top 5 percent of the total population—who give drastically more and drastically more often. This group gives seven times more frequently than the bottom two-thirds of the population combined. See *id.* In terms of donors’ characteristics besides wealth, a major study of contributors to congressional campaigns reveals a number of distinguishing traits. They are much more highly educated than the average American: even among the occasional donors, 80 percent went to college, and 64 percent of the most active donors completed at least some graduate education. They are 99 percent white across the board—even among those who donate merely occasionally. A great majority is male—between 72 percent and 82 percent. They are most likely to be mainline Protestants or Catholics. And the great majority is over 46 years of age. And yet donors are not representative of any of these groups on the whole, not typical college-educated, wealthy, white males of some years. They are in fact a special cross-section of each group to which they belong. Their defining characteristic across all the groups to which they belong, even the group that is the wealthy elite, is their especially conservative views on economic issues. *Id.* at 119. From eight years of National Election Studies data, Wilcox concludes that “donors are significantly more conservative than other wealthy and well-educated citizens on economic issues—guaranteed jobs, spending on social programs, affirmative action—but not on social issues such as women’s role or abortion, or on foreign policy.” *Id.* at 117 (discussing the findings from a highly acclaimed study by Verba, Scholzman, and Brady).

125. LARRY BARTELS, *UNEQUAL DEMOCRACY* 254 (2008).

126. Universal Declaration, *supra* note 6, art. 28.

property-based distinctions requires some combination of limitations on political spending and public subsidies. Such measures would be designed to ensure that people of average economic means are not priced out of the political market, whether as candidates or constituents.

The articles from the Declaration that support this hypothesis have since been incorporated into the ICCPR and interpreted by the Human Rights Committee (“HRC”). It is necessary to analyze these sources in order to test the hypothesis that an expensive political marketplace infringes upon the democratic entitlement.

C. *The ICCPR and Interpretive Questions about Money in Politics*

The ICCPR made only minor changes to the portions of the Declaration discussed above. Article 25, the reincarnation of Article 21 of the Declaration, provides as follows:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country.

The following modifications should be noted: Article 25 specifies the impropriety of discriminatory conditions, referencing Article 2 on its face, as well as “unreasonable restrictions;” Section (a) replaces “government of his country” with “the conduct of public affairs;” Section (b) incorporates much of Article 21(3), except for the phrase about the “will of the people,” which was deleted; and Section (c) substitutes “on general terms of equality” for “equal access.” However, the phrase “equal access” continues to be used by the Human Rights Committee and the Commission on Human Rights.¹²⁷

Article 2 of the ICCPR incorporates all of Article 2 of the Declaration, and the French and Spanish versions of the ICCPR use the same words as the Declaration in lieu of property: “fortune” and “posición económica.” But, the ICCPR’s Article 2 is enhanced by an important preliminary sentence:

Each State Party to the present Covenant undertakes to respect *and to ensure* to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant,

127. See Resolution 1999/57, *supra* note 11, para. 2(h) (“[R]ights of democratic governance include . . . [t]he right to *equal access* to public service in one’s own country.”) (emphasis added).

without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹²⁸

In its General Comment on Article 25 (hereinafter “General Comment 25”), the HRC elaborated on the distinction drawn above between the obligation to “respect” and the obligation to “ensure” the rights recognized in the Covenant:

[T]he Covenant recognizes and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service. Whatever form of constitution or government is in force, *the Covenant requires States to adopt such legislative and other measures, as may be necessary to ensure that citizens have an effective opportunity to enjoy the(se) rights.*¹²⁹

This affirmative State duty is a demanding proposition, given the scope of Article 25’s rights.

Other portions of General Comment 25 indicate that the HRC was aware of the demanding quality of its interpretation. The HRC stated that the “conduct of public affairs . . . relates to the exercise of political power[,] . . . cover[ing] all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels.”¹³⁰ It noted that Article 25’s rights extend to participation in referenda and other electoral processes, as well as the “exert[ion of] influence through public debate and dialogue with [citizens’] representatives or through [citizens’] capacity to organize themselves.”¹³¹ The effective enjoyment of all these rights is to be ensured (not just respected) and, per Article 2, is not to suffer from distinctions on the basis of property, which includes wealth. These are demanding propositions indeed.

Article 25 thus requires affirmative State obligations to ensure the political rights that compose the democratic entitlement. Beyond abstaining from distinguishing between citizens on the basis of their wealth, the State is obligated to enact remedial measures when wealth-based distinctions within the political order have frustrated the enjoyment of political rights.¹³² Each State Party’s obligation to ensure the effective opportunity to enjoy rights of political participation and access to public service on

128. ICCPR, *supra* note 7, art. 2 (emphasis added).

129. General Comment 25, *supra* note 106, para. 1 (emphasis added).

130. *Id.* para. 5.

131. *Id.* paras. 5, 6, and 8.

132. *See id.* This places the right to democratic governance within two categories simultaneously, negative rights and positive rights, a place already foreshadowed by Article 21’s placement in the Declaration at the intersection between civil and political rights (arts. 3–20) and economic and social rights (arts. 22–27).

general terms of equality is therefore clear. The implications for money in politics, however, are far from clear.

Consider the matter of whether Article 25 is violated by State tolerance of privatized electoral regimes in which candidates must raise millions of dollars in order to gain the opportunity to stand for election. General Comment 25 states, for example, that persons “otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education . . . or by reason of political affiliation.”¹³³ The use of “such as” indicates that education and political affiliations are just examples, not an exhaustive list. Having to raise millions of dollars as a candidate merely to gain access to the debate and get one’s message out could constitute an “unreasonable or discriminatory” requirement.¹³⁴ The HRC further stipulates that “[c]onditions relating to nomination dates, fees or deposits should be reasonable and not discriminatory.”¹³⁵ This begs the question of whether privatized electoral processes (with no public funding or free media access) violate the democratic entitlement.

Continuing to flirt with the issue of privately financed political parties and campaigns, the HRC stated that “[a]ffirmative measures may be taken in appropriate cases to ensure that there is equal access to public service for all citizens.”¹³⁶ When candidates are free to spend unlimited sums from their personal holdings on securing the nomination of a political party or gathering the requisite number of signatures to be included on the ballot as an independent candidate, access is not truly equal for all citizens. While the poor are not formally excluded by such dynamics, they are certainly at a tremendous disadvantage to the wealthy. Does the HRC consider *de facto* fundraising requirements, which are equal in their application to all candidates, rich and poor alike, to be consistent with “equal access to public service for all citizens?” Are we to surmise that equality consists in allowing both rich and poor candidates to spend unlimited sums on their campaigns?¹³⁷

The HRC later observed that “[b]asing access to public service on equal opportunity and general principles of merit . . . ensures that persons holding public service positions are free from political interference and pres-

133. General Comment 25, *supra* note 106, para. 15.

134. This position could be argued by focusing on the difficulty of raising such high amounts of money, the need to cater to the interests of wealthy donors, the advantages naturally granted to candidates whose positions are in line with those of wealthy donors, and the advantages obtained by wealthy candidates free to spend their own personal fortunes under such a *laissez-faire* financing regime.

135. *Id.* para. 16.

136. *Id.* para. 23. The phrase “equal access” now commonly replaces the text of Article 25(c), which uses the phrase “on general terms of equality.” See Resolution 1999/57, *supra* note 11, at para. 2(h) (“[R]ights of democratic governance include . . . [t]he right to *equal access* to public service in one’s own country.”) (emphasis added).

137. The logical counterpart to this version of equality was famously described by Nobel-Prize winning author, Anatole France: “The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.” ANATOLE FRANCE, *THE RED LILY* 95 (Frederic Chapman ed. & Winifred Stephens trans. 1910, 1894).

tures.”¹³⁸ This appears inconsistent with the fact that U.S. political representatives spend up to half of their time raising money for reelection campaigns, as well as the finding of the USAID report that “payback of campaign debts in the form of political favors” is a widespread phenomenon.¹³⁹ These are not model conditions for freedom from political interference and pressures. Then again, it continues to be clear that money in politics is a second-order issue, one that is less important in this case than more acute forms of interference and pressures. The intimidation and violence prevalent in elections in many States prove this much. In sum, privatized electoral processes violate the spirit of Article 25 of the ICCPR, but progressive legal development would be necessary for this violation to be evident as a textual matter.

Paragraph 19 of General Comment 25 suggests recognition of the corrosive effects of unregulated political spending, but its implications and requirements remain uncertain. Paragraph 19 asserts:

Reasonable limitations on campaign expenditure may be justified where this is necessary to ensure that the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party.¹⁴⁰

It is remarkable that the HRC validated concerns over disproportionate expenditures. That said, this passage is thick with uncertainty.

The words “[r]easonable limitations” imply that it would be unreasonable to ban (or perhaps even to strictly limit) expenditures,¹⁴¹ which in turn implies that citizens are entitled to spend some money on political goods. Next, such limitations are appropriate only in two particular cases—those of preserving the exercise of free choice by voters or the integrity of the democratic process. And even then, in those two cases, expenditure limitations are not necessarily justified. The HRC used the words “may be justified” instead of “are justified” or “are generally justified.”

The basis upon which justifiability varies remains unclear. Is it a function of differing political values across jurisdictions (a margin of appreciation)?¹⁴² Could it vary as a function of the extent of the distortion of democracy or the undermining of free choice? Similarly, a “disproportion-

138. General Comment 25, *supra* note 106, para. 23.

139. See MONEY IN POLITICS HANDBOOK, *supra* note 12.

140. General Comment 25, *supra* note 106, para. 19.

141. *Id.* This assumes that the word “limitation” refers to a cap on a particular type of expenditure. A ban, in contrast, ought to refer to the exclusion of a particular form of spending altogether.

142. See Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT’L L. 907, 909–10 (2005) (describing the elements of the doctrine as: “(i) *Judicial deference* — international courts should grant national authorities a certain degree of deference and respect their discretion on the manner of executing their international law obligations . . . (ii) *Normative flexibility* — international norms subject to the doctrine have been characterized as open-ended or unsettled. Such norms provide limited conduct-guidance and preserve a significant ‘zone of legality’ within which states are free to operate.”).

ate expenditure” can undermine free choice and distort democracy, but it is uncertain what sort of political expenditures the HRC had in mind, and how large those expenditures must be in order to be disproportionate. The expenditure must be made “on behalf of a . . . candidate or party,”¹⁴³ which may rule out independent expenditures made in accordance with the preferences of citizens, interest groups, labor unions, or corporations. Then again, this distinction, integral to U.S. jurisprudence on campaign finance law, may not have been intended by the HRC. Several Justices of the U.S. Supreme Court and numerous scholars have expressed doubts as to whether expenditures not coordinated with a candidate or party can ever truly be independent.¹⁴⁴ After all, most political expenditures work to the benefit or detriment of one or another candidate or party, and it is naïve to assume that candidates or parties would not be aware of and grateful for benefits thus received. The phrasing “campaign expenditure” is also a source of interpretive leeway, as there are many different ways and times to spend money, including party-building activities in the moments outside of the election period.

In light of the tremendous variation between democratic States in terms of electoral procedure, political party organization, and available forms of political expenditure, the HRC clearly left most of the uncertainties above to the constitutional framework of each State Party, at least for the time being. The goals of paragraph 19 stand as the exception to this statist assumption, and they can be used as the basis for a different argument. Two conclusions are indisputable: the quoted text aims to preserve the free choice of voters and the integrity of the democratic process, and the same text regards expenditure limitations as potentially unreasonable. Although the HRC does not describe the precise uses of money that qualify as “campaign expenditure[s]” or constitute “disproportionate expenditure[s] on behalf of any candidate or party,”¹⁴⁵ these phrases likely cover large

143. See General Comment 25, *supra* note 106, para. 19.

144. See Molly J. Walker Wilson, *Behavioral Decision Theory and Implications for the Supreme Court's Campaign Finance Decisions*, 31 CARDOZO L. REV. 679 (2010) (discussing the reasons why independent expenditures are a source of corruption). In terms of notable judicial criticism of unlimited expenditures, see *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 519 (1985) (Marshall, J., dissenting) (“It simply belies reality to say that a campaign will not reward massive financial assistance provided in the only way that is legally available.”); *id.* at 510–11 (White, J., dissenting) (“The credulous acceptance of the formal distinction between coordinated and independent expenditures blinks political reality. That the PAC’s expenditures are not formally ‘coordinated’ is too slender a reed on which to distinguish them from actual contributions to the campaign. The candidate cannot help but know of the extensive efforts ‘independently’ undertaken on his behalf. In this realm of possible tacit understandings and implied agreements, I see no reason not to accept the congressional judgment that so-called independent expenditures must be closely regulated.”) These criticisms increasingly go against the grain. A recent FEC advisory opinion states: “Following *Citizens United* and *SpeechNow*, corporations, labor organizations, and political committees may make unlimited independent expenditures from their own funds, and individuals may pool unlimited funds in an independent expenditure-only political committee.” Fed. Election Comm’n, AO 2010-11, 3 (July 22, 2010), <http://saos.nictusa.com/aodocs/AO%202010-11.pdf>.

145. See General Comment 25, *supra* note 106, para. 19.

expenditures by individual citizens, interest groups, labor unions, and corporations as long as such expenditures benefit a given candidate or campaign. Expenditures by candidates and parties are certainly covered. Furthermore, it is reasonable to assume that those expenditures must be large enough to be considered disproportionate in relation to the relative availability of political monies between and among the same actors mentioned above. Paragraph 19 provides a teleological definition of those disproportionate expenditures: they are the ones that threaten free choice and democratic integrity. Although uncertainty remains as to the details, the authoritative interpretation of Article 25 indicates that the free choice of voters can be undermined and the democratic process distorted by disproportionate expenditures.

This assessment is further buttressed by the Commission on Human Rights' statements over the last 15 years. The Commission has remarked that the "rights of democratic governance include . . . [t]ransparent and accountable government institutions."¹⁴⁶ The Commission praised the "increasing number of countries . . . devote[d] . . . to the building of democratic societies where individuals have the opportunity to shape their own destiny."¹⁴⁷ It called on States to promote pluralism, "maximiz[e] the participation of individuals in decision-making," develop an "effective and accountable legislature," and, within the electoral system, to take "measures . . . to address the representation of under-represented segments of society."¹⁴⁸ Perhaps most notably for the matter of democratic integrity and disproportionate expenditures, the Commission called on States to ensure "transparency and fairness of the electoral process, including through appropriate access to funds."¹⁴⁹ The Commission lauded the commitment to "more inclusive political processes allowing genuine participation by all citizens" and declared that "full popular participation is only feasible if societies . . . guarantee to *all* their citizens the possibility both to take part in the government . . . and have equal access to public service."¹⁵⁰ Thus, the Commission emphasized that fairness in democratic politics requires attention to political funding and the plight of under-represented segments of society. It is fair to say, then, that the Commission and HRC are both amenable to political finance reform. The more difficult question pertains to how much reform is due.

146. Resolution 1999/57, *supra* note 11.

147. Comm'n on Human Rights Res. 2000/47, Promoting and Consolidating Democracy, 56th Sess., U.N. Doc. E/CN.4/RES/2000/47, preamble, (Apr. 25, 2000).

148. *Id.* paras. 1(a), (d)(iii).

149. *Id.* at 217.

150. Comm'n on Human Rights Res. 2001/36, Strengthening of Popular Participation, Equity, Social Justice, and Non-Discrimination as Essential Foundations of Democracy, 57th Sess., U.N. Doc. E/CN.4/RES/2001/36, para. 7, (Apr. 23, 2001).

The HRC specified that “reasonable limitations on campaign expenditure may be justified.”¹⁵¹ This suggests that at least some of the expenditures at issue constitute an exercise of protected rights, or that limitations on expenditures that do not constitute protected rights could nonetheless lead to an infringement on said rights. Thus, General Comment 25 tells us that disproportionate expenditures can undermine free choice, distort democracy, and, at the same time, be linked to the exercise of protected rights. States are left with the balancing act of ensuring free choice and democratic integrity, while ensuring that the means chosen do not unreasonably infringe upon rights.

*D. The Effects of Money in Politics: The Tradeoff between
Unregulated Spending and Equality*

In political orders without free media time for candidates or parties, public financing for parties or campaigns, or subsidized political fora for citizens of average means, rights to expression, assembly, and association are a costly proposition. Any citizen can communicate their political concerns from atop a soapbox in the public square; and groups of citizens—rich or poor—can organize protests in the street. Surely such activities can be complimented by neighborhood associations and epistemic communities of concerned activists who connect online. Still, these humble forms of political expression, assembly, and association are generally no match for the costly forms available to wealthy citizens and groups. In most cases, their effects can be neutralized and surpassed by some combination of the following: full page advertisements in the most widely-distributed newspapers, advertising spots on the most-watched television channels, meetings organized by lobbyists or special interests groups whose attendees include political representatives, and political associations commanding millions of dollars destined for election campaigns, party-building activities, or the message-crafting services of focus groups, political consultants, and think tanks.

If individuals, interest groups, parties, and candidates are free to spend as much money as they wish on political activities, and if parties and candidates are financed to a meaningful extent by citizens’ contributions, the implication is clear: the wealthy will enjoy disproportionate political power, and the access to political service and forms of political participation available to average citizens will be diminished and ineffective—compromised by the political market’s reliance on private property. Because the most effective forms of political expression, assembly, and association are also the least accessible, a conundrum is evident. In order to make democracy more equal, it appears that States must limit democratic freedoms.

Interpreting Article 25, the HRC stated: “free communication of information and ideas about public and political issues between citizens, candi-

151. General Comment 25, *supra* note 106, para. 19.

dates and elected representatives is essential.”¹⁵² The Committee recognized that such free communication “implies a free press and other media able to comment on public issues without censorship or restraint” and “full enjoyment and respect for the rights guaranteed in articles 19, 21, and 22,” including “freedom to . . . publish political material . . . and to advertise political ideas.”¹⁵³ Given the cost of political speech and the potential for it to be monopolized by wealthy actors, it would seem a tall order for any State to ensure Article 25’s rights of equal access to public office and political participation without property-based distinctions while, at the same time, allowing unlimited private expenditures—that is, unlimited freedom to publish and advertise.

The competition between free expression values and political equality values is common to domestic and regional constitutional arrangements, not just to the U.N. system of human rights protection. Domestic and regional courts have different views on this trade-off between freedom and equality in political finance. The answer given by the U.S. Supreme Court, for example, is directly responsible for the astronomical sums of money involved in U.S. politics today and the subjugation of equality values to a neoliberal political order.¹⁵⁴ International law should discourage this devolution of the human right to democracy into a human right to plutocracy. The choice hinges on the interpretation of ambiguous legal texts.

IV. THE INTERPRETIVE PATHS OF DISTINCT LEGAL ORDERS

A. *Competing Views on Equality*

Immediately after the passage of the first comprehensive campaign finance legislation in the United States, limiting political contributions and expenditures, the Supreme Court castigated the political branches for attempting to “equalize[e the] relative ability of individuals and groups to influence the outcome of elections.”¹⁵⁵ The Court’s 1976 opinion in *Buckley v. Valeo*, still binding today, explained why equality was an unconstitutional goal:

[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment[’s Freedom of Speech Clause], which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the

152. General Comment 25, *supra* note 106, para. 25.

153. *Id.* See also Resolution 1999/57, *supra* note 11, art. 2(b) (“the rights of democratic governance include . . . [t]he right to freedom to seek, receive and impart information and ideas through any media.”).

154. See *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 977 (2010) (Stevens, J., dissenting).

155. *Buckley v. Valeo*, 424 U.S. 1, 48 (1976).

bringing about of political and social changes desired by the people.¹⁵⁶

Congress had limited the amount of speech that could be purchased in order to enhance the relative voice of those who did not wish to or could not afford to spend much money on political speech. Thus the speech of “some elements” (*i.e.*, the wealthy or those who had pooled resources effectively) was limited while the speech of others (*i.e.*, the poor or disorganized) was enhanced.

Even if we were to prioritize the goals of securing information from diverse and antagonistic sources and fostering a robust marketplace for speech, the U.S. Court’s reasoning is questionable. Consider the Canadian Supreme Court’s justification of expenditure limits in the 2004 Harper case:

Equality in the political discourse promotes electoral fairness and is achieved, in part, by restricting the participation of those who have access to significant financial resources. The more voices that have access to the political discourse, the more voters will be empowered to exercise their right in a meaningful and informed manner.¹⁵⁷

Thus, the Canadian Supreme Court posited that increased fairness in political discourse (equality) would lead to greater voter empowerment, which the Court described as a greater exercise of participatory rights and freedom. In this view, regulations on speech will produce a greater quantity of speech, or at least speech from a greater number of sources. *Buckley* inadvertently acknowledged this by warning that the speech of some must not be reduced in order to enhance the speech of others. Both of these courts recognize, then, that increasing the participatory freedoms of some (the poor) may require restricting the participatory freedoms of others (the rich). Their disagreement concerns the propriety of such a plan.

B. *Competing Conceptions of Democracy*

In *Buckley*, the U.S. Supreme Court explicitly adopted a free market view of democratic society, one congenial to interest-group preferences.¹⁵⁸ Although a majority of U.S. Supreme Court Justices had recently construed the First Amendment as protecting an “uninhibited marketplace of

156. *Id.* at 48–49 (internal quotations omitted).

157. Harper v. Canada (Att’y Gen.), [2004] S.C.R. 827, para. 91 (Can.).

158. The Court’s hostility to expenditure limitations and the congressional purpose of political equality adhere to an open-market view of democracy, one in which interest groups are free to spend unlimited sums to advance their preferences. See Timothy K. Kuhner, *Citizens United as Neoliberal Jurisprudence: the Resurgence of Economic Theory*, 18 VA. J. SOC. POL’Y & L. 395, 460 (2011) (discussing the role of free market theory in various Supreme Court cases, including *Buckley*).

ideas,”¹⁵⁹ that idea in U.S. jurisprudence traces back to a dissenting opinion filed by Justice Holmes nearly one hundred years ago:

[T]he ultimate good desired is better reached by free trade in ideas[—]the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . That at any rate is the theory of our Constitution.¹⁶⁰

This notion had been used, although some might say misused, to strike down congressional regulation of political finance.

In contrast, the Canadian Supreme Court in *Harper* explicitly endorsed an “egalitarian model of elections . . . as an essential component of our democratic society.”¹⁶¹ Following this model, the Court proclaimed that “individuals should have an equal opportunity to participate in the electoral process” and that “wealth is the main obstacle to equal participation.”¹⁶² These principles demanded that “the wealthy [be] prevented from controlling the electoral process to the detriment of others with less economic power . . . [N]o one voice [should be] overwhelmed by another.”¹⁶³

An earlier Canadian case, *Libman v. Quebec*, elaborated on the dangers of ignoring the constitutional value of equality. There, the Canadian Supreme Court specifically drew attention to the question of property-based distinctions:

If the principle of fairness in the political sphere is to be preserved, it cannot be presumed that all persons have the same financial resources to communicate with the electorate. To ensure a right of equal participation in democratic government, laws limiting spending are needed to preserve the equality of democratic rights and ensure that one person’s exercise of the freedom to spend does not hinder the communication opportunities of others Spending limits are necessary to prevent the most affluent from monopolizing election discourse and consequently depriv-

159. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market”). The Court has used such language in many cases since, including *Fed. Election Comm’n v. MA Citizens for Life, Inc.*, 479 U.S. 238, 257–58 (1986) (“Political ‘free trade’ does not necessarily require that all who participate in the political marketplace do so with exactly equal resources Relative availability of funds is after all a rough barometer of public support.”).

160. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting). See generally ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATIONSHIP TO SELF-GOVERNMENT* (1948) (discussing the market theory of speech). See also OLIVER WENDELL HOLMES, *THE COMMON LAW* 77 (Transaction Publishers 2005) (1881) (“[T]he prevailing view is that [the State’s] cumbersome and expensive machinery ought not to be set in motion unless some clear benefit is to be derived from disturbing the *status quo*. State interference is an evil, where it cannot be shown to be a good.”).

161. *Harper*, [2004] S.C.R. para. 62 (Can.).

162. *Id.* para. 62.

163. *Id.*

ing their opponents of a reasonable opportunity to speak and be heard.¹⁶⁴

This reasoning led up to Harper's conclusion that expenditure limits serve, paradoxically, to increase participation. It is visible in Harper's estimation of wealth's role in the political process and its ability to deprive others of the effective exercise of their political rights:

For voters to be able to hear all points of view, the information disseminated by third parties, candidates and political parties cannot be unlimited. In the absence of spending limits, it is possible for the affluent or a number of persons or groups pooling their resources and acting in concert to dominate the political discourse [P]olitical advertising is a costly endeavour. If a few groups are able to flood the electoral discourse with their message, it is possible, indeed likely, that the voices of some will be drowned out This unequal dissemination of points of view undermines the voter's ability to be adequately informed of all views. In this way, equality in the political discourse is necessary for meaningful participation in the electoral process and ultimately enhances the right to vote. Therefore . . . s. 3 [of the Canadian Charter] does not guarantee a right to unlimited information or to unlimited participation.¹⁶⁵

It is important to note, however, that participation can be important for different reasons: either to cultivate the marketplace sought by the U.S. Supreme Court or the egalitarian society sought by the Canadian Supreme Court. In close cases, these priorities can conflict.

C. *A Balanced Approach*

Another notable interpretation of political values found in the democratic entitlement came in the European Court of Human Rights' ("ECtHR") 1998 opinion in *Bowman v. United Kingdom* and its reception in the House of Lords.¹⁶⁶ In *Bowman*, the ECtHR concluded that an exceedingly low limit on expenditures (GBP 5, or about 6€ or \$8) by British citizens during the election period violated the right to free expression under Article 10 of the European Convention on Human Rights and the guarantee of free elections found in Article 3 of the Convention's First Protocol.¹⁶⁷ The limit in question was part of an overall political finance reform

164. *Libman v. Quebec*, [1997] 3 S.C.R. 569, 598–99 (Can.) (citations omitted).

165. *Harper*, [2004] S.C.R. para. 72 (Can.) (citations omitted).

166. *Bowman v. United Kingdom*, 1998-I Eur. Ct. H.R. 175.

167. *Id.* para. 47.

aimed in large part at achieving equality.¹⁶⁸ The Court began by affirming the importance of freedom:

Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system . . . The two rights are inter-related and operate to reinforce each other: . . . freedom of expression is one of the “conditions” necessary to “ensure the free expression of the opinion of the people in the choice of the legislature. For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely.”¹⁶⁹

Then, foreshadowing *Harper*, the ECtHR recognized the need to limit freedom in the interest of freedom:

[Rights to free elections and freedom of expression] may come into conflict and it may be considered necessary, in the period preceding or during an election, to place certain restrictions . . . on freedom of expression, in order to secure the “free expression of the opinion of the people in the choice of the legislature.”¹⁷⁰

This attention to different types of freedom, some sustained by regulations in the interest of equality and others sustained through *laissez-faire*, led to a compromise between the overall constitutional values of freedom and equality. This compromise exemplifies General Comment 25’s emphasis on reasonable limitations.

Indeed, *Bowman* turned on the fact that the expenditure limitation was set so low: “Section 75 of the 1983 Act operated . . . as a total barrier to . . . publishing information . . . [We are] not satisfied that it was necessary thus to limit [the petitioner’s] expenditure to GBP 5 in order to achieve the legitimate aim of securing equality between candidates.”¹⁷¹ The British expenditure limitation had been set so low that equality consisted in nobody being able to spend virtually any money at all. Thus, the European Court affirmed equality as a “legitimate aim” under the European Convention so long as policies to achieve such equality did not freeze all political spend-

168. *See* *Bowman*, para. 36 (“The Government maintained that . . . spending limit[s] . . . pursued the aim of protecting the rights of others in three ways. First, it promoted fairness between competing candidates for election by preventing wealthy third parties from campaigning for or against a particular candidate or issuing material which necessitated the devotion of part of a candidate’s election budget, which was limited by law (see paragraph 18 above), to a response. Secondly, the restriction on third-party expenditure helped to ensure that candidates remained independent of the influence of powerful interest groups.”).

169. *Id.* para. 42.

170. *Id.* para. 43.

171. *Id.* para. 47.

ing. In response to Bowman, the British Parliament enacted a new GBP 500 limit in 2000.¹⁷²

Parliament's reaction exemplifies a moderate view as to how the ICCPR could be interpreted. The British Committee on Standards in Public Life noted that Article 10(2) of the European Convention allows freedom of expression to be limited when "necessary in a democratic society" and that the First Protocol's free election principle supports the "need[] to protect voters . . . from being subjected to overwhelming election propaganda by a party which has greatly superior financial resources."¹⁷³ In a 2008 opinion, members of the House of Lords supported this line of reasoning. "[T]he playing field of debate should be so far as practicable level," wrote Lord Bingham.¹⁷⁴ Even while recognizing the sacred place of free political speech, he counseled against a political order in which "political parties can, in proportion to their resources, buy unlimited opportunities to advertise in the most effective media."¹⁷⁵ When this occurs, he warned, "elections become little more than an auction."¹⁷⁶

D. *The Choice that the International Order Must Confront*

These cases represent a growing philosophical divide between the U.S. free-market view and the more egalitarian view taken by Canada and the United Kingdom. In *Citizens United v. FEC*, the U.S. Supreme Court validated the use of unlimited corporate general treasury funds to purchase political advertisements designed to oppose or support a particular candidate in the days immediately preceding an election.¹⁷⁷ The possibility that voters could thus be, as the House of Lords had put it, subjected to "overwhelming election propaganda by [whoever or *whatever*] has greatly superior financial resources" was accepted as a necessary implication of free speech.

This recanted the U.S. Court's own statement in 1990 that "[c]orporate wealth can unfairly influence elections" whether such wealth is channeled into expenditures or contributions.¹⁷⁸ In that case, *Austin v. Michigan Chamber of Commerce*, the Court had endorsed a new type of corruption that provided "a sufficiently compelling rationale" for restricting corporate independent expenditures.¹⁷⁹ It defined the new corruption as "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no

172. See Political Parties, Elections and Referendums Act, 2000, c. 41, § 131 (U.K.).

173. Committee on Standards in Public Life, Fifth Report, Standards in Public Life: The Funding of Political Parties in the United Kingdom, 1998, Cm. 4057-I, at 127, 130 (U.K.).

174. *Regina (Animal Defenders International) v. Secretary of State for Culture, Media and Sport*, [2008] UKHL 15, [2008] 1 A.C. 1312, 1346 para. 28 (appeal taken from Eng.) (U.K.).

175. *Id.*

176. *Id.*

177. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 885–86 (2010).

178. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990).

179. *Id.*

correlation to the public's support for the corporation's political ideas."¹⁸⁰ *Austin* thus squared with the House of Lord's concern over "overwhelming electoral propaganda" and the need for a relatively level playing field.

Citizens United overruled *Austin*. It is revolutionary in concluding that corporate money, regardless of its quantity or superiority to the funds available to average citizens, will inevitably and appropriately pervade the public discourse:

It is irrelevant for purposes of the First Amendment that corporate funds may "have little or no correlation to the public's support for the corporation's political ideas." . . . All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech Many persons can trace their funds to corporations, if not in the form of donations, then in the form of dividends, interest, or salary.¹⁸¹

The Court even mentioned by name several of the advantages corporations enjoy over natural persons, advantages that help explain corporations' incredible ability to amass capital: "[l]imited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets[] . . . do[] not suffice . . . to allow laws prohibiting speech."¹⁸²

These moves by the U.S. Supreme Court reveal its conception of democracy as a free market, a conception the Court is not shy about announcing. In overruling *Austin* and its concern over the corrosive and distorting effects of wealth within the political sphere, the Court gave this explanation: "*Austin* interferes with the 'open marketplace' of ideas protected by the First Amendment."¹⁸³ And yet again, something seems odd in the Court's reasoning. To maintain an open marketplace, it is uncontroversial that the government must ensure fair play and competition by preventing monopolies from forming. This is reflected in the Canadian and European conviction that vastly unequal resources can lead certain actors to dominate the political sphere, decreasing the diversity of information available to the electorate. Yet the unregulated market principle extended by *Citizens United*, namely that "ideas may compete in this marketplace without government interference,"¹⁸⁴ disregards that concern.¹⁸⁵

The U.S. Court did express concern for corporations themselves, however, holding unequivocally that "First Amendment protection extends to corpo-

180. *Id.* at 1411. A similar stance had been taken by the Court in *Fed. Election Comm'n v. National Right to Work Committee*, 459 U.S. 197, 210 (1982) ("[W]e accept Congress' judgment" that "the special characteristics of the corporate structure" create a "potential for . . . influence that demands regulation.").

181. *Citizens United*, 130 S. Ct. at 905 (citations omitted) (quoting *Austin*, 494 U.S. at 660).

182. *Id.* (quoting *Austin*, 494 U.S. at 658-59).

183. *Id.* at 906.

184. *Id.*

185. *Id.* at 904.

rations.”¹⁸⁶ The majority opinion alleged that limitations on corporate expenditures “muffle[d] the voices that best represent the most significant segments of the economy.”¹⁸⁷ Justices in the majority wrote separately, in part, to further emphasize this point. Justice Scalia, joined by Justices Thomas and Alito, said that “to exclude or impede corporate speech is to muzzle the principal agents of the modern free economy.”¹⁸⁸ These Justices recommended that we “[c]elebrate rather than condemn the addition of this speech to the public debate.”¹⁸⁹ Chief Justice Roberts, joined by Justice Alito, explained the evil that must be avoided: “First Amendment rights could be confined to individuals, subverting the vibrant public discourse that is at the foundation of our democracy.”¹⁹⁰

Through embracing corporate political participation and rejecting arguments about the undue influence and distortion caused by immense aggregations of wealth deployed in politics, the U.S. Supreme Court illustrated what it would mean to turn the ICCPR’s property proviso on its head. Five Supreme Court Justices struck down limitations on corporate political participation that responded to the tremendous wealth that corporations possess. “The First Amendment does not permit Congress to make . . . categorical distinctions based on the corporate identity of the speaker,” wrote the Court.¹⁹¹ As regards independent expenditures in U.S. law, there truly can be no distinctions on the basis of property. Legal entities that are themselves forms of property and possess no inherent dignity cannot be banned from speaking even during the thirty days before an election. The potential of that wealth to overwhelm the political participation of human beings as a class thus becomes a risk that must be taken in order to protect the greater good and systemic imperative—an unregulated political market.

V. CONCLUSION: AN INTERPRETIVE APPROACH APPROPRIATE FOR THE DEMOCRATIC ENTITLEMENT

The distinct conceptions of political finance reform examined above have demonstrated a number of pressing interpretive issues for the democratic entitlement, which are summarized below. The unregulated political market protected by the U.S. Supreme Court represents one extreme in terms of the choices available on each issue. The U.K. notion prior to *Bowman* that individual expenditures could be limited to \$8 during the election period

186. *Id.* at 899.

187. *Id.* at 907 (quoting *McCormell v. Fed. Election Comm’n*, 540 U.S. 93, 257–58 (opinion of Scalia, J.)).

188. *Id.* at 929 (Scalia, J., concurring).

189. *Id.* (Scalia, J., concurring).

190. *Id.* at 917 (Roberts, C.J., concurring).

191. *Id.* at 913.

represents another extreme.¹⁹² The ECtHR's rebuke to the U.K. and the subsequent installation of moderate spending limits represents a middle ground.

The following are the sites within the ICCPR where such interpretive controversies must play out:

- (1) *The meaning of citizenship within the democratic entitlement.* Do the words “individuals” and “everyone” used throughout the ICCPR include legal persons—*i.e.*, corporations? Do rights of political expression, speech, and association cover corporate political activity?
- (2) *The meaning of property-based distinctions in Article 2(1).* The State duty “to respect and to ensure to all individuals . . . the rights recognized in the present Covenant, without distinction of any kind, such as . . . property” could be read as preventing or requiring political finance laws that target political expenditures.¹⁹³ In the U.S. Supreme Court's view, a prohibition on corporate expenditures represents an illicit distinction on the basis of a speaker's identity in the interest of controlling the political influence of concentrated wealth. This is cast as an *illicit distinction on the basis of property*. Canadian and U.K. sources, on the other hand, describe an unregulated political order as a place where those without much wealth, *i.e.*, property, can hardly afford to make themselves heard. State toleration of such a privatized, expensive political order also can be cast as an illicit distinction on the basis of property.
- (3) *The meaning of political expression under Article 19(2).* In order to impart information through privatized media channels, would-be speakers must first employ economic currency. Are rights of expression inclusive of the economic transactions that facilitate them or that make them especially effective? Are those expenditures a protected form of expression within the meaning of the ICCPR? Similarly, when individuals and interest groups donate money to political parties or candidates, they are in some sense “expressing” their political viewpoints. Is this form of expression protected? Is money speech?
- (4) *The meaning of political association under Article 22(1).* When individuals employ their private property to fund political parties—the quintessential vehicles of political association—is it correct to treat this economic behavior as part of associational rights? The same question must be asked of the membership dues or other monies collected by ideological corporations—*e.g.*, advocacy groups that pool money and issue political attack ads. Lastly, do labor and trade industry groups qualify as political associations deserving of the full panoply of political rights?

192. *Bowman v. United Kingdom*, 1998-I Eur. Ct. H.R. 175.

193. ICCPR, *supra* note 7, art. 2.

- (5) *The meaning of political participation under Article 25(a)*. Can a citizen, interest group, labor union, or corporation “take part in public affairs directly” by financing a million-dollar film intended to discredit a political candidate or party during an election period? Can it be said that any of these actors is “taking part in public affairs through freely chosen representatives” when they purchase the services of lobbyists to gain access to representatives and in order to stress their particular points of view?
- (6) *The meaning of access to public service on general terms of equality under Article 25(c)*. This issue has been much rehearsed in the pages above. Here it is sufficient to ask whether equality is meant in the formal (*de jure*) or material (*de facto*) sense. In a privatized political order where parties and campaigns are privately financed and free media are unavailable, all citizens are equal in that no one’s money is turned down. Is the fact that candidates must raise millions of dollars in order to stand a chance a form of inequality or a neutral condition? Formal equality would consider it neutral. The material sense of equality, in contrast, demands more than an absence of discrimination against citizens seeking access to public service. It would also demand that citizens have roughly similar chances of being elected regardless of wealth.
- (7) *The meaning of democracy in UDHR Article 21(3) and ICCPR Article 25(b)*. Significant controversy attends the meaning of these respective formulations: “The will of the people shall be the basis of the authority of government” and “genuine periodic elections . . . by universal and equal suffrage . . . guaranteeing the free expression of the will of the electors.”¹⁹⁴ Answers to issues 1–6 above may derive from pre-existing philosophical positions on ideal types, especially along the lines of republicanism and interest-group pluralism. The following questions are instructive: Is democracy to be understood as a free market in which participants compete for political goods? Is political influence a commodity to be bargained for? Should members of society be free to make investments in public policy by contributing large sums of money to candidates and parties? Or is it preferable, at least as a normative matter, to conceive of democracy as a community of political equals engaged in deliberative activity? Is it appropriate for economic power to dominate the democratic process? Is it the duty of government to preserve for citizens an accessible and egalitarian political sphere?

The small sample of cases examined in Part III(c) above shows that these interpretive questions can be decided so differently as to either outlaw limitations on money in politics or to require them. This high degree of varia-

194. See Universal Declaration, *supra* note 6, art. 21(3); ICCPR, *supra* note 7, art. 25(b).

tion, if transplanted from local contexts to the ICCPR, would conflict with human rights law. What good is a *Universal Declaration* or an *International Covenant* if the rights contained therein may be interpreted in diametrically opposed ways? What good is a *human* right if one's government has unlimited discretion in the interpretation of that right? Two implications of a large margin of appreciation are untenable: First, the democratic entitlement merely provides a superficial vocabulary that States may employ in order to maintain the appearance of legitimacy. This is normatively intolerable. Second, human rights law is devoid of the sorts of textual and normative commitments that inform legal interpretation. This is descriptively inaccurate.

Before proceeding to highlight those commitments, consider a warning issued by Ewing and Issacharoff:

[Party and campaign] financing questions cannot be addressed independently of the constitutional conventions of the country, the nature of the political parties in the country, and the means of access to publication and the media in any given nation.¹⁹⁵

It is true that international law could not mandate a campaign finance regime of great specificity, because of the many institutional forms present in democracies.¹⁹⁶ Even so, a set of international *principles* (as opposed to specific norms) on political finance would be feasible. The specific reforms chosen in any given jurisdiction would depend on domestic conditions—whether the political system is party or candidate driven, the structure of the media, relevant constitutional provisions, and so on. Thus, Ewing and Issacharoff's warning does not rule out a stipulation that some meaningful political finance reform must be undertaken by every State bound by the democratic entitlement.¹⁹⁷

I propose two tenets of a human rights approach to the interpretive issues surrounding money in politics: the ICCPR's egalitarian textual elements and their cumulative meaning; and a deontological focus on human dignity.

A. *Equality and the Rights of Others in Democratic Society*

Recall from Article 19(3) of the ICCPR that “the exercise of [free expression] carries with it special duties and responsibilities [and] may therefore

195. EWING & ISSACHAROFF, *supra* note 18, at 1–2.

196. See, e.g., CHUA, *supra* note 35, at 339 (“[T]here are many different forms of democracy. Taking universal suffrage as a given, democratization can vary along a large number of axes relevant to the paradox of free market democracy: to name a few, presidentialism versus parliamentarism; ‘first-past-the-post’ versus proportional representation; and starting locally versus starting nationally. Much more consideration needs to be given to the question of what kind of democracy is suitable to particular developing nations in light of the tensions that will inevitably arise between markets and majoritarian politics.”).

197. This is essentially the outcome reached by the Venice Commission as well. See Venice Guidelines, *supra* note 88.

be subject to certain restrictions . . . [for, among other concerns,] respect of the rights . . . of others.”¹⁹⁸ The same caveat follows the rights to political assembly and association, and is there qualified as a limitation “necessary in democratic society.”¹⁹⁹ This proves conclusively that the democratic entitlement cannot be interpreted as establishing *absolute* rights to speech, association, or assembly.

In contrast to the U.S. Constitution, the Canadian Charter and the European Convention contain limitations clauses similar to those of the ICCPR.²⁰⁰ This helps to explain their interpreters’ willingness to uphold political finance regulations; and, given the presence of that clause in the ICCPR, it provides an international presumption against the U.S. view. These limitations clauses provide a textual foothold for arguments about democracy and equality. Thus, the Attorney General of Canada could successfully defend the Canada Elections Act’s expenditure limitations on the ground that they sought “to ensure the equality of each citizen in elections[, to] prevent the voices of the wealthy from drowning out those of others[,] and to preserve confidence in the electoral system.”²⁰¹ These goals could be “justified as a reasonable limit in a free and democratic society” under Section 1 of the Charter.²⁰²

The notion that political finance limitations are necessary in a democratic society for respect of the rights of others still requires a theoretical basis, however. What is necessary in a democratic society is not, after all, self-evident. The ICCPR’s theoretical foundations lie in its emphasis on equality and human dignity, which is balanced by its numerous references to freedom. The familiar provisions establishing a right to political participation on general terms of equality and the impermissibility of discrimination on the basis of property must be read in the context of these excerpts from the preamble:

[T]he inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world [T]hese rights [declared in

198. ICCPR, *supra* note 7, art. 19(3).

199. *Id.* arts. 21, 22(2).

200. See Canadian Charter of Rights and Freedoms, being Schedule B to the Canada Act 1982, c. 11 (U.K.), art. 1 (noting that the rights there guaranteed are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”); Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953), *reprinted in* COLLECTED TEXTS, COUNCIL OF EUROPE, EUR. CONV. ON HUMAN RIGHTS 4, arts. 10–11 (1987) (noting in the context of free expression that “[t]he exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society” and noting in the context of free association and assembly that restrictions may be justified by a small category of concerns, including those deemed “necessary in a democratic society . . . for the protection of the rights and freedoms of others.”).

201. Harper, [2004] S.C.R. para. 9 (Can.).

202. *Id.*

the ICCPR] derive from the inherent dignity of the human person.

[T]he ideal of free human beings enjoying civil and political freedom . . . can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights.²⁰³

When combined with the provisions on political equality, the language on inherent dignity requires some jurisprudential sensitivity to the importance of democratic integrity. Undue influence is a relevant concept if one seeks to maintain equality and to respect the dignity of all citizens, not just those with economic means.

The preamble's provision on conditions whereby everyone can enjoy his political rights is relevant to Article 2's prohibition on property-based, and thus wealth-based, distinctions. It suggests a State responsibility to maintain conditions in which *everyone* may participate meaningfully in politics. This is precisely what the Canadian Supreme Court did when it noted that the absence of spending limits enabled "the affluent or a number of persons or groups pooling their resources and acting in concert to dominate the political discourse."²⁰⁴ The U.S. insistence on an open market intolerant of restrictions illustrates the opposite position. Thus, the ICCPR's provisions on inherent human dignity, universal enjoyment of rights, and access to political office on general terms of equality, read in conjunction with Article 2, create a strong presumption against privatized political orders where citizens and candidates must "pay to play." In this view, States that create or tolerate systematic advantages for moneyed actors within the political sphere are in violation of the democratic entitlement.²⁰⁵

B. *A Deontological Focus on Human Dignity*

The ICCPR's (and indeed the human rights movement's) heavy textual emphasis on human dignity carries an additional implication. It resonates with interpretive approaches that view political participation as necessary for the full expression of human dignity. Whereas other approaches view politics as a forum for instrumental struggle, *i.e.*, groups competing for the sake of securing the best possible legislative outcomes, a human rights approach would necessarily emphasize the importance of political participation for human dignity—that is, for membership in a community of political equals, for being in every sense a citizen.

203. ICCPR, *supra* note 7, preamble.

204. Harper, [2004] S.C.R. 827, para. 72 (Can.).

205. *Contra* SAMPLES, *supra* note 28, at 133 ("A Madisonian would see a more constrained ambit for equality: votes would be allocated equally, but other forms of political participation would not have to meet the standard of equality in part because meeting that standard would impinge deeply on fundamental rights.").

This summarizes the perennial debate between interest-group pluralism and republicanism, and suggests that human rights law must side with republicanism. Consider which of the following two types of democracy is most in keeping with the ICCPR's references to "inherent dignity of the human person" and the "conditions . . . whereby *everyone* may enjoy his civil and political rights."²⁰⁶ First, take Jürgen Habermas' prescription: the "State's *raison d'être* [lies] in the guarantee of an inclusive process of opinion- and will-formation in which free and equal citizens reach an understanding on which goals and norms lie in the equal interest of all."²⁰⁷ This is complemented by Charles Beitz's view that "democratic politics creates an environment in which persons confront each other not only to manipulate but to persuade and so all must take seriously each other's nature as a rational being."²⁰⁸

Contrast these views with William Landes and Richard Posner's famous description of interest-group pluralism:

[L]egislation is supplied to groups or coalitions that outbid rival seekers of favorable legislation. The price that the winning group bids is determined both by the value of legislative protection to the group's members and the group's ability to overcome the free-rider problems that plague coalitions. Payments take the form of campaign contributions, votes, implicit promises for future favors, and sometimes outright bribes. In short, legislation is "sold" by the legislature and "bought" by the beneficiaries of the legislation.²⁰⁹

Note how interests are pursued within interest-group pluralism: through competitive, economic means. Given the forces in play, a regime of unregulated expenditures naturally transforms politics into an economic market. As Posner later wrote, "interest-group pressures make elected officials frequently unresponsive to the interests of ordinary, unorganized people."²¹⁰ This concedes that representation has become a function of capital.

206. ICCPR, *supra* note 7, preamble, art. 10.

207. JÜRGEN HABERMAS, *THE INCLUSION OF THE OTHER* 241 (C. Cronin & P. De Greiff, eds., 1998).

208. CHARLES R. BEITZ, *POLITICAL EQUALITY: AN ESSAY IN DEMOCRATIC THEORY* 93 (1989). See also RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 25 (1996) ("[T]he political process of a genuine community must express some bona fide conception of equal concern for the interests of all members, which means that the political decisions that affect the distribution of wealth, benefits, and burdens must be consistent with equal concern for all.").

209. William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877 (1975).

210. POSNER, *supra* note 26, at 153. Further detracting from the human rights value of the interest-group approach, Posner added that "[t]he increasingly sophisticated techniques employed in public-opinion polling and political advertising have made political campaigning manipulative and largely content-free." *Id.* For empirical support on political unaccountability, see generally BARTELS, *supra* note 125.

A deontological approach to the ICCPR's provisions on political expression, association, and assembly would not credit economic expenditures as inseparable from the rights themselves. The fact that money helps to disseminate one's views and expand the activities of political associations says little about the experience of political participation; it says much more about the imperative of capturing larger shares of the political market through competition with other strategically-motivated political forces. To concede that modest political expenditures must be allowed in some contexts to facilitate the enjoyment of political rights is not to justify the present-day political markets that trivialize and marginalize affordable avenues for political participation.

Interest group and market-based approaches tend to violate Habermas' prescription for an inclusive and egalitarian process of opinion and will-formation. Notions of inclusivity and accessibility remind us of famous articulations, both new and old. As Thomas Jefferson put it, "the true foundation of republican government is the equal right of every citizen."²¹¹ This understanding led Robert Dahl to call democracy those "processes by which ordinary citizens exert a relatively high degree of control over leaders."²¹² These formulations signal a linkage between democracy and human rights.

Part of the answer to why the inherent dignity of the human person is furthered by an accessible and inclusive political process comes from Ronald Dworkin, who writes that "[m]oral membership [in political community] involves reciprocity: a person is not a member unless he is treated as a member by others."²¹³ The fact of membership honors a person's equal dignity and equal status. Self-governance does this by determining that nobody, not high leaders nor notable citizens, should dominate anyone. This refers to human dignity in the static sense.

The other part of the answer relates to human dignity's dynamism. Take Walt Whitman's explanation of this point, calling democracy a "formulator, general caller-forth, [and] trainer" for a most notable purpose: "to become an enfranchised man, and now, impediments removed, to stand and start without humiliation, and equal with the rest; to commence, or have the road clear'd to commence, the grand experiment of development, whose end . . . may be the forming of a full-grown man or woman."²¹⁴ From this perspective, it is absurd to argue that corporations have a human right to political participation or that citizens have a human right to unlimited political expenditures. Such arguments further power not dignity.

In this view, democratic values should be interpreted so as to respect and further human dignity. Indeed, the question at each stage would be: "is this particular form of political participation an expression of human dig-

211. See M. REJAI, *DEMOCRACY: THE CONTEMPORARY THEORIES* 16 (1967) (quoting Jefferson).

212. ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 3 (1956).

213. DWORKIN, *supra* note 208, at 25.

214. WALT WHITMAN, *COMPLETE POETRY AND PROSE* 947-48 (Library of America, 1982).

nity?” Marginal cases need not be excluded from the realm of political participation unless they detract from the rights of others. Possessing marginal intrinsic expressive value at best, and diluting and marginalizing political participation by ordinary citizens, corporate electioneering and severely disproportionate expenditures are limitable.

C. *What Is the Democracy to Which We Are Entitled?*

In the final paragraph of his landmark article, “The Emerging Right to Democratic Governance,” Professor Franck underscored the fact that “the international system is moving toward a clearly designated democratic entitlement, with national governance validated by international standards and systematic monitoring of compliance.”²¹⁵ Franck recognized that the democratic entitlement had not yet been fully defined and that improvement was possible, if not essential, in the evolving (and globalizing) process of self-rule: “The task,” he concluded, “is to perfect what has been so wondrously begun.”²¹⁶

Having noted the widespread problem of money in politics, discussed the textual provisions of human rights law with applications to the same, examined the unsettled questions at the heart of those applications, and ventured an initial interpretive approach, this Article has begun a new discourse on the democratic entitlement. In fleshing out these new areas for reflection and legal development, this new discourse seeks to make democracy a more resilient and meaningful system, one worthy of its status under human rights law. The potential avenues for achieving this goal have been narrowed by the exclusion of political finance from anti-corruption instruments and by the U.S. Supreme Court’s holding in *Citizens United*. The importance of human rights law in this field is clearer than ever, a motivational factor that happily dovetails with the wealth of legal applications uncovered above.

The textual elements of the democratic entitlement and human rights law’s deontological emphasis on human dignity suggest that States are obligated to provide a minimum floor of political finance reform. This would entail some combination of (1) public subsidies for parties and campaigns, and (2) limitations on political expenditures by natural and legal persons alike (including donations to political parties and candidates). Although the specifics would vary in accordance with each State’s particular democratic institutions, the general obligation is clear: every democratic political sphere must implement reasonable and effective limitations on the role of money in politics; or in more general terms, every State bound by the democratic entitlement must uphold democratic integrity, not just an electoral framework.

215. FRANCK, *supra* note 8, at 91.

216. *Id.*

The pragmatic benefit of a human rights approach to money in politics has yet to be explored. This Article has focused on the text of human rights instruments and their interpretation. It has pursued formalistic and purposive tracks, focusing on the precise wording of legal texts and straying only so far as the purpose of those texts in applying them to matters of money in politics.²¹⁷ The comparatively instrumental and pragmatic contributions of human rights reporting and monitoring mechanisms have yet to be discussed. Pursuant to Article 40(1) of the ICCPR, “States Parties . . . undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights.”²¹⁸ The Human Rights Committee reads these reports and may request additional reports, make reports of its own, and issues general comments when it sees fit.²¹⁹ The HRC thus has the power to publicize States Parties’ failures to uphold human rights, to interpret those rights, and to engage parties in a dialogue on the measures that their treaty obligations require of them.²²⁰ These limited avenues for publicity, monitoring, dialogue, and progressive legal development could bring increased attention to the problem of money in politics and facilitate the move towards global standards. Indeed, should the democratic entitlement be understood as this Article proposes, political finance reform would become a criterion for human rights observance. This returns us to Franck’s formulation, “a *clearly designated* democratic entitlement, with national governance validated by *international standards* and *systematic monitoring* of compliance.”²²¹

As with pragmatic questions of monitoring, this Article has not entertained in depth the shape that international principles on political finance might take. Although it has proposed a legal basis and interpretive methodology for establishing a minimum standard of political finance reform, it has stopped short of describing that standard. What is especially true for that ultimate matter is also true for the steps leading up to it: progress depends on others weighing in with criticisms, refinements, and alternative proposals. Indeed, in order to supplement and reassess the human rights approach taken here, the political finance norms of many other countries should be considered; relevant cultural and institutional variations must be defined; the dangers of expenditure limitations and public financing must

217. Granted, this Article has employed a normative perspective as well in endorsing the consensus view that money in politics threatens democratic integrity. In evaluating the effects of money in politics on each democracy, it is impossible to escape value judgments.

218. ICCPR, *supra* note 7, art. 40(1)–(2).

219. *Id.* art. 40(4).

220. *Id.* art. 40. Also potentially relevant are the ICCPR’s optional procedure and Optional Protocol, which, respectively, allow States Parties to make communications, received by the HRC, alleging that other parties are not fulfilling their obligations, and allow individuals to file complaints alleging that their Convention rights have been violated. *See id.* art. 41 and Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966. Art. 1, 999 UNTS 302.

221. FRANCK, *supra* note 8, at 91 (emphasis added).

be contemplated; competing conceptions of sovereignty and the margin of appreciation must be laid out; and the potential competency of different international institutions in matters of money in politics ought to be debated.

For these reasons and others still, the democratic entitlement remains unsettled, its implications as unclear as one might expect from the endeavor of self-rule spread across the world's diverse polities. And yet democracy's status within the world's preeminent human rights treaty suggests a limit to the democratic deformations that people ought to be subjected to; if democracy is a human right, then plutocracy is a human rights violation.