

Donald Trump is fascism-lite. We have the US Supreme Court to thank for it.

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The 2016 election campaign and the seemingly authoritarian tendencies of President Donald Trump to have led many to raise the specter of the rise of an American form of fascism. [Ewan McGaughey](#) argues that Trump is what he terms, “fascism-lite”, and has made what has been generally implicit in Republican and Supreme Court politics up to now – high levels of corporate influence, and a general disdain for democracy and social justice – explicit.



Media outlets have repeatedly discussed [whether President Donald Trump is a fascist](#). The truth is, today’s politics are consistent with Republican Supreme Court politics over the last 40 years. Authoritarian and obsessed with corporate power, yes, but lacking a key element of concern for insider-welfare displayed by fascist parties of the 1920s and 1930s. Unhinged, but weak, Donald is fascism-lite. He just makes what was implicit explicit.

An attack on American Democracy

The 2016 election epitomises the long-term breakdown in American democracy. Even aside from Russian cyber-war and hate rallies, [it cost \\$6.9 billion](#). This can all be traced back to a plan by a corporate lawyer, Lewis Powell, in 1971. Faced with progressive success through the 1960s, Powell wrote a memo for the US Chamber of Commerce: ‘[Attack on American Free Enterprise System](#)’. It said corporate executives must start to ‘press vigorously in all political arenas for support of the enterprise system’.

It is time for American business — which has demonstrated the greatest capacity in all history to produce and to influence consumer decisions — to apply their great talents vigorously to the preservation of the system itself.

According to Powell, there were three main problems for ‘the system’: (1) public education, (2) journalism, (3) the courts. President Richard Nixon appointed Powell to the Supreme Court in 1972.

In 1976 the first and decisive change took place. [Buckley v Valeo](#), over powerful dissent, held that candidates could spend unlimited money on their own political campaigns. The Supreme Court majority said the First Amendment’s protection of ‘free speech’ includes ‘spending money’. That supposedly made the Federal Election Campaign Act of 1971 §608, which limited expenditure (rather than donations) ‘unconstitutional’. Trump, of course, often proclaimed he was self-funding his Republican primary. [Buckley was the first Trump-for-President case](#).

Along with other Republican Supreme Court justices, Justice Powell entrenched hard-line ‘free enterprise’ jurisprudence. In 1978, a 5 to 4 majority in [First National Bank of Boston v Bellotti](#) held Massachusetts could not restrict corporate spending during a ballot. These cases made the US different to every democratic country. All democracies place limits on election expenditures (usually by a monetary figure, or through advert limits) to try and ensure that ‘one person one vote’ is informed by equality in deliberation.

We have good international data showing that [the least democratic countries spend the most money in elections](#). After [Buckley](#) and [Bellotti](#), the voice of the rich and corporate interests could drown out others in scarce media resources. The Supreme Court sent American politics down the road to serfdom: politicians indentured to business,

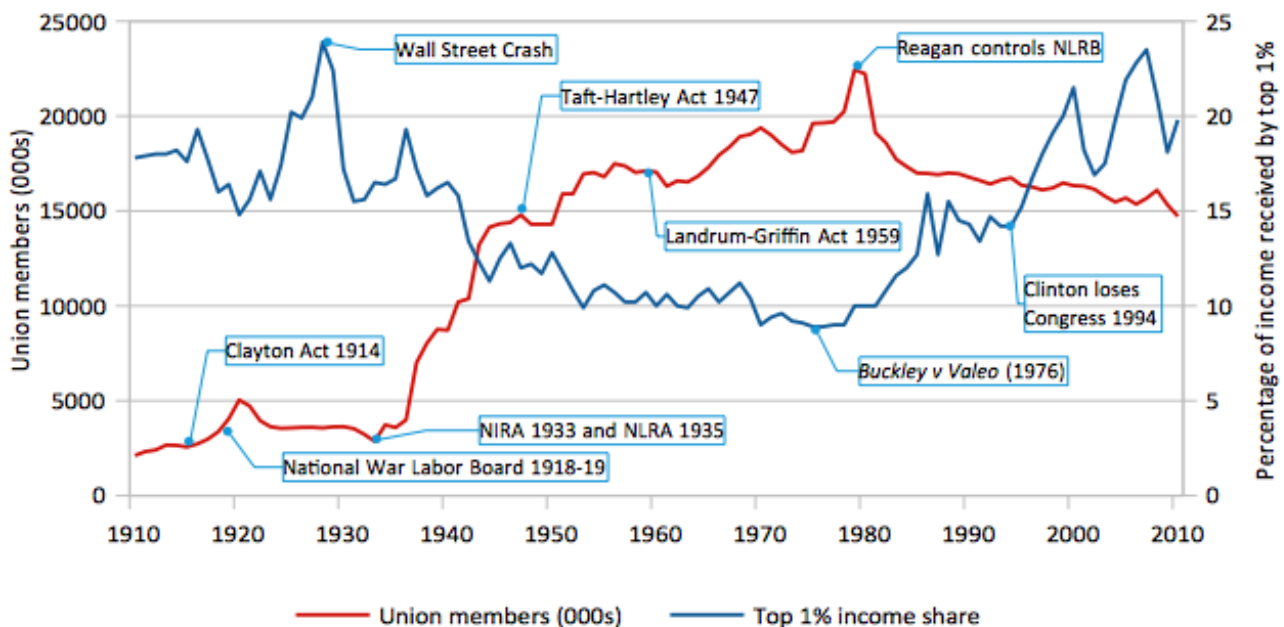
policies completely at odds with the will of the people.

Forcing Free Enterprise

The Supreme Court did not stop there. 'Free enterprise' has achieved a long list of 5 to 4 court judgments since 1979. They took away federal [rights of teachers to organize unions](#) at religious schools. They allowed [employees to be searched at work](#), like criminal suspects. They removed the fundamental [freedom to organize a union for undocumented workers](#). They tried to ensure that [discrimination claims could not be brought](#) when most employers in the market discriminated (though this was reversed by a briefly functioning Congress). They held [votes people cast in Florida could not be recounted](#), giving George W. Bush the Presidency. They [struck down protection against disenfranchising voters](#) in southern states, established for 48 years. No modern judiciary has engaged in a more sustained assault on democracy and human rights.

This degradation of voice in politics, the workplace, and the economy occurred at the same time as soaring inequality (making growth irrelevant for most people) as Figure 1 shows:

Figure 1 – US union membership and income inequality



Sources: Bureau of Labor Statistics, Series D 940-945, Piketty (2014) Technical Appendices, Table S9.2

The Conception era

But the most astonishing phase of case law, still with 5 to 4 decisions in a Republican Court, began with [Citizens United v FEC](#) in 2010. It held corporations could spend unlimited money supporting a political cause, including simply damaging (rather than supporting) a political candidate. Justice Antonin Scalia reasoned people in a corporation – employees and shareholders – are all like a political party. Apparently his understanding of political parties was that people are:

giving the leadership of the party the right to speak on their behalf. The association of individuals in a business corporation is no different—or at least it cannot be denied the right to speak on the simplistic

| ground that it is not “an individual American.

Do people, according to the Republican Court, have any rights they are not ‘giving the leadership’ of a social organisation? *AT&T Mobility LLC v Concepcion* held that any contract can transfer statutory rights to binding arbitration, without review by a public court. All these contracts, between real people and corporations, are ‘take it or leave it’. With arbitrators selected by big business and big employers, there is no fair and impartial hearing. Apparently, this included all consumer and employment rights. In the old *Lochner era* social and economic rights were declared ‘void’ by courts. Now, instead, the whole bill of social and economic rights is up ‘for sale’. In this *Concepcion era*, there are no true rights for anyone, except the enterprise ‘leader’.

Fascist legal theory

Do fascist laws in the 1930s resemble American jurisprudence? Only in part. Otto Kahn-Freund, a Berlin Labour Court judge who [was forced to escape](#), probably produced the most important analysis in 1931. He argued the Weimar Labour Courts had already adopted fascist theory, like Mussolini’s *Labour Code*, in the late 1920s. [Fascism was a political hybrid](#). Like liberalism it favored private ownership and (superficially) disliked the state. Like social-conservatism it embraced protection of welfare for insiders (but not outsiders). Like collectivism it saw associations as key to total class conflict (the leader always wins). But it would be wrong to ‘[overestimate\[...\] the political self-awareness of the judges](#).’ Fascism was a subconscious culture.

The most influential fascist corporate lawyer was Dr Johannes Zahn, a visiting scholar to Harvard and researcher for the German banking industry. He wrote the German Public Companies Act 1937, placing banks in charge of most shareholder voting rights, ensuring directors were insulated from accountability, and eliminating any meaningful voice for investors (a voice for workers was obviously repugnant). Zahn was like the Dr Strangelove of corporate law. His goal was to remake the economy so ‘democracy of capital will vanish just as it did in politics.’ And [the comic nonsense went on](#) :

When a genuine leader-follower relationship develops between the board and the shareholders, the voting rights of shareholders will lose all practical meaning. In the first place, the shareholder will have much less to say than before. He will not, however, regard himself as a victim because he will trust the leadership.

By comparison, the culmination of *Buckley* to the *Concepcion* era, is threefold: (1) the leadership in an association must always win any conflict, as in the reasoning for *Citizens United*, (2) no state interference to create rights in ‘private’ enterprise, as in *Concepcion*, and (3) even ‘public’ rights are subordinate to the corporate leader’s will, as in *Hobby Lobby*. This means there is a difference to fascism: a theoretical concern for insider welfare is missing. As in *Hobby Lobby*, rights depend on the leader’s discretion. Not fascism, but fascism-lite. This change was not sudden, as [UK Supreme Court judge Lord Sumption explains](#):

The process by which democracies decline is more subtle.... usually more mundane and insidious.... they are slowly drained of what makes them democratic, by a gradual process of internal decay and mounting indifference, until one suddenly notices that they have become something different.

‘... something different...’

That ‘something different’ was Donald Trump. He arrived as it paid politically to make the implicit explicit. Hard-line

managerialism defines his persona. He 'wins'. He says he will 'make America great again'. He will say to people in his way, 'you're fired'. The leader says 'I am your voice.' But Donald cannot be characterised as a fascist, because he is embedded in modern Republican power. There is no concern for insider welfare. There is talk of 'jobs', but no commitment to full employment. There are pledges to cut the minimum wage. Despite criticizing bad trade deals, there is no commitment to put labor, let alone environmental, standards in them. Not fascist, Donald is fascist-lite.

The strongman image is consistent with a fascist leader, but also an indistinctive Hobbesian monarch who (contrary to 17th century thought) makes everyone else's lives **nasty, brutish and short**. Donald says to combat military enemies 'you have to take out their families'. He pledges to do 'a hell of a lot worse than water-boarding'. He says there 'has to be some form of punishment' for women who have abortions. He promised a mass 'deportation force' against 11 million undocumented migrants. Under the US constitution this means inhumane and degrading treatment, infringing the right to privacy, and breaching due process of law. This is not new: the same goals, **minimizing torture, abolishing women's autonomy, total aggression toward rights for outsiders**, were consistently propounded by Justice Scalia. Donald just makes the implicit explicit.

Why would anyone have believed Donald would 'make America great', when policies are unrelated to the goal? The answer is, the 'leader' plays on systemic corruption. The idea that 'America doesn't win anymore' contains an element of truth. Texas Republican Senator Ted Cruz helped shut down government, again, in 2013. Gridlock has meant that Federal legislation to reflect the people's will has only been possible in four years since 1980 (Clinton and Obama had two each), when Republicans had not throttled Congress. Then there is linguistic propaganda: inheritance tax becomes 'death tax'. Drilling and fracking become 'energy exploration'. Employers, who bark 'you're fired', became 'job creators'. Language becomes, in Newt Gingrich's words, 'A Key Mechanism of Control'.

When propaganda does not work there is division: citizens are turned against immigrants. Christians against Muslims. Workers against unemployed. Men against women. Women against their own children. The politics of division is not accidental. It is meant to inhibit people's sense of solidarity, the basis for taking collective action. The goal is to take people's trust, and abuse it by making them vote against their own interests. It is the essential strategy of an interest group that cannot win any other way. When all else fails, they lie and steal the vote. This political reality entitles every person, every institution, especially courts, to resist. Sometimes, just sometimes, we must 'let justice be done, whatever be the consequence.'

Democracy and social justice

Though American politics may appear dangerous 'democracy and social justice', to make a 'living law', is far stronger. It is no historical accident that half the Amendments to the US constitution since 1789 extended democracy, from votes for people once classed as property, for people who had no property, for women, for young people, for all. The central question is how to undo the interest groups that produced the Powell memo, *Buckley v Valeo* and Donald Trump. Long-term political shifts are not about winning elections, but altering the underlying forces of social power. Politics reflects this. The key will be completing democracy in politics and extending democracy in all social organization: that means (1) votes at work, (2) votes in the economy, and to support the people's voice (3) an end to wealth discrimination in all education.

The fact that a mendacious coward like Donald captured the presidency was not unpredictable, but is evidence that something was deeply wrong. Donald is a deeply **troubled and insecure individual**, just more evidence that money alone does not make you happy. The politics too are driven by money: the Grand Old Party has become a wholly owned subsidiary of corporate interests and the Democrats have struggled to resist arrest. Democratic and civil society, with the silenced majority in America, will need to contain this Republican regime. This is the real, and necessary, "wall". A new dark age in the United States of America could be looming, but the case for social transformation is compelling, and greater.

**This article is based on a longer piece, originally released in May 2016, in Ewan McGaughey, 'Fascism-lite in*

America (or the Social Ideal of Donald Trump' (2016) [TLI Think! Paper 26/2016](#)

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Note: This article gives the views of the author, and not the position of USAPP – American Politics and Policy, nor the London School of Economics.

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