Constitution Betrayed: Free Expression, the Cold War, and the End of American Democracy

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This is a story of the Cold War and the betrayal of the American democratic-capitalist system.[1] But the perpetrators of this iniquity are not Communists. Rather, they are the conservative justices of the Roberts Court. Their names are John Roberts, Antonin Scalia, Clarence Thomas, Samuel Alito, and Anthony Kennedy.

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[1]Many sources focus on the Cold War. Some helpful ones include the following: H.W. Brands, The Devil We Knew: Americans and the Cold War (1993); Greg Castillo, Cold War on the Home Front (2010); Richard B. Day, Cold War Capitalism: The View From Moscow, 1945-1975 (1995); Mary L. Dudziak, Cold War Civil Rights (2000); John Lewis Gaddis, The Cold War: A New History (2005); Melvyn P. Leffler, A Preponderance of Power (1992); Richard Saull, The Cold War and After (2007); Martin Walker, The Cold War: A History (1993).

To be sure, these justices have not intentionally broken faith with constitutional principles, but the betrayal is nonetheless just as real—and just as dangerous. These justices, for the most part, sincerely apply constitutional text, doctrines, and precedents in accord with their conservative views. Yet, the justices' decisions have generated unintended and dangerous consequences. The justices believe they are upholding and protecting the American way of life, but they instead have placed the democratic-capitalist system in its gravest danger since World War II.

The story starts before the constitutional framing. Under the Articles of Confederation, most government power rested with the states, and most state constitutions assumed the people, following civic republicanism, would virtuously pursue the common good. From the perspective of the delegates to the Philadelphia (constitutional) convention, however, the utopian ideals of civic republican government had not been realized. Instead, the experiences in the state governments, during the 1780s, had revealed that many, if not most, citizens were more concerned with their own advantages than with a communal or public good. Following utopian ideals had led the nation to the edge of a precipice. If it did not change direction, the nation would likely fall into an abyss, amidst the ruins of government corruption. The framers, therefore, tempered their republican ideals with a more pragmatic or realistic approach to politics. They sought to construct a stable and workable government system that would mediate the conflict between private passions and interests, on the one side, and public goods, on the other. They wanted to protect individual rights, especially rights to property, but they simultaneously wanted to promote the virtuous pursuit of the common good. Thus, the crux of the constitutional scheme was balance: balance between a private sphere and a public sphere—between economic markets and government actions.

The framers' republican democratic constitutional system proved remarkably resilient. Conceptions of virtue and the common good evolved through the nineteenth century, but the system survived vehement political disputes and even a Civil War. With regard to free expression, courts accorded speech and writing minimal constitutional protection throughout the

republican democratic era. The government could punish any expression that supposedly contravened the common good or, in other words, engendered bad tendencies. In any event, by the early-twentieth century, the United States had changed so substantially that the republican democratic system had begun to crack. For most of the late-eighteenth and nineteenth centuries, the nation had been rural, agrarian, and populated by a relatively homogeneous people. But by the early-twentieth century, the nation had become urban, industrial, and heterogeneous, with a population full of diverse immigrants. Moreover, consistent with developments in other western industrialized nations, the U.S. increasingly stressed a laissez-faire approach to the economic marketplace. Citizens and government officials still talked of regulating for the common good, but the scope of the common good had shrunk to a point where any economic regulation had become constitutionally suspect—a significant change from much of the nineteenth century. Laissez-faire ideology declared that the best government was the least government, whether democratic or otherwise. Few seemed to recognize or care that this emphasis on the private sphere at the expense of the public sphere contravened the framers' pragmatic desire for balance.

During the first half of the twentieth century, most European democracies collapsed, as they experienced two world wars, an economic depression, and the Holocaust. Significantly, the collapse of democracy proved detrimental to international capitalism.[2] Democracy and capitalism functioned best together, as a system.[3] Regardless, American democracy persevered during this time period, partly because of a deeply rooted democratic culture, grounded in part on relative material equality. Even so, in the 1930s, the American system dramatically transformed from a republican to a pluralist democracy. Under pluralist democracy, the people and officials were not to focus on the substance of a common good. Instead, the pluralist regime revolved around a democratic process that encouraged more widespread participation and accepted the

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[2]Karl Polanyi, The Great Transformation (2001 ed.).

[3]*See* David Harvey, A Brief History of Neoliberalism 10-11 (2005); Daniel Stedman Jones, Masters of the Universe: Hayek, Friedman, and the Birth of Neoliberal Politics 24-26 (2012).

political pursuit of self-interest.[4] Furthermore, the New Deal, the first political manifestation of pluralist democracy, repudiated laissez faire and restored a balance between the public and private spheres; government regulations of the economic marketplace were no longer immediately suspect.[5] As pluralist democracy emerged, judicial treatments of speech and writing changed, too. Free expression became a constitutional lodestar as the discussion of political views and ideas appeared to be central to the pluralist democratic process.

Like republican democracy before it, though, pluralist democracy evolved. Two major forces shaped its initial post-World War II evolution. First, a developing mass consumer culture intertwined with pluralist democracy to produce a consumers' democracy: a pluralist democratic process that more strongly resembled the capitalist marketplace. Political advertising for candidates, for instance, seemed similar to commercial advertising for products. During the 1970s, the Supreme Court, in effect, overturned an earlier ruling and held that the first amendment protected commercial speech.[6] The Court reasoned that such speech was central to democracy itself.[7] Second, the nation's Cold War battle against the Soviet Union pervasively influenced American society. "In the United States," Melvyn Leffler has observed, "the cold war shaped our political culture, our institutions, and our national priorities."[8] Significantly, the Cold War spurred the strengthening of civil rights and the capitalist economy. The federal government needed to protect civil rights, at least symbolically, to deflect Soviet denunciations of democracy. Meanwhile, the ostentatious exhibition and use of American consumer products contrasted

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[4]Stephen M. Feldman, Free Expression and Democracy in America: A History 291-348 (2008); *see* Edward A. Purcell, Jr., The Crisis of Democratic Theory 3-30 (1973) (discussing how democracy confronted a crisis in the 1930s).

[5]Feldman, *supra* note 4, at 316, 325.

[6]Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); *see* Bigelow v. Virginia, 421 U.S. 809, 819-20 (1975) (distinguishing *Valentine v. Chrestensen*, 316 U.S. 52 (1942)).

[7]*Virginia State Board*, 425 U.S. at 765.

[8]Leffler, *supra* note 1, at vii.

American economic prosperity with Soviet struggles. Thus, during the Cold War, the government and the capitalist leaders were bonded together in struggle against the communist enemy. The overriding desire for Cold-War victory tempered any calls for laissez faire and concomitant attacks on democratic government.

Unsurprisingly, then, the end of the Cold War, in the late-1980s and early-1990s, also profoundly influenced national development. More specifically, the nation's Cold-War victory sparked additional and unanticipated changes in pluralist democracy. Corporate wealth was unleashed from its Cold-War strictures.[9] The government and capitalists were no longer fighting together against a common foe. To the contrary, capitalists now seemed to view government as its enemy. Demands for laissez faire became common and overt, as did denigration of democratic government. The consumers' democracy transformed into Democracy, Inc., a democratic system dominated by wealthy individuals and corporations.[10]

The conservative justices of the Roberts Court have stamped Democracy, Inc., with a constitutional imprimatur. In the first-amendment context, *Citizens United v. Federal Election Commission* and its progeny best emblematize the Court's acceptance and bolstering of

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[9]Helpful sources discussing the development of corporations as well as globalization include the following: Joel Bakan, The Corporation (2004); Richard F. Bensel, The Political Economy of American Industrialization, 1877-1900 (2000); Barry Eichengreen, Golden Fetters: The Gold Standard and the Great Depression, 1919-1939 (1992); Jeffry A. Frieden, Global Capitalism (2006); Lawrence M. Friedman, A History of American Law (2d ed. 1985); Horwitz, *supra* note 62; Herbert Hovenkamp, Enterprise and American Law, 1836-1937 (1991); James Willard Hurst, The Legitimacy of the Business Corporation (1970); John Micklethwait & Adrian Wooldridge, The Company: A Short History of a Revolutionary Idea (2003); Kenichi Ohmae, The End of the Nation State (1995); Dani Rodrik, The Globalization Paradox (2011); Ronald E. Seavoy, An Economic History of the United States From 1607 to the Present (2006); Joseph E. Stiglitz, Globalization and Its Discontents (2002); Benjamin R. Twiss, Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court (1962); Alfred D. Chandler & Bruce Mazlish, *Introduction*, *in* Leviathans 1 (Alfred D. Chandler & Bruce Mazlish eds., 2005); Oscar Handlin & Mary F. Handlin, *Origins of the American Business Corporation*, 5 J. Econ. Hist. 1 (1945); Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 Geo. L.J. 1593 (1988) [hereinafter Classical]; Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 William & Mary Q. 51 (1993); Charles W. McCurdy, *American Law and the Marketing Structure of the Large Corporation, 1875-1890*, 38 J. Economic Hist. 631 (1978); Brian Roach, *A Primer on Multinational Corporations*, *in* Leviathans 19 (Alfred D. Chandler & Bruce Mazlish eds., 2005).

[10]*Democracy Incorporated* is the title of a book by Sheldon S. Wolin, Sheldon S. Wolin, Democracy Incorporated (2008), while *Democracy, Inc*. is the title of a book by David S. Allen. David S. Allen, Democracy, Inc. (2005).

Democracy, Inc.[11] Those cases prohibit governments from limiting monetary expenditures on political campaigns. Thus, corporations and other wealthy entities (including individuals) can spend astronomical (unlimited) sums of money to influence elections and government officials. Indeed, the private sphere has become so bloated with power that it has, in effect, subsumed the public sphere.

Ironically, then, the Roberts Court conservatives, who frequently insist that originalism is the proper method of constitutional interpretation,[12] have betrayed one of the most fundamental principles of the framers' constitutional scheme. The framers were pragmatic realists who rejected utopian thinking, whether in relation to civic republican government or laissez-faire economics. As realists, they envisioned a (republican) democratic-capitalist system with a balance between the public and private spheres. The framers wanted virtuous citizens and government officials to pursue the common good in the public sphere, but they had learned that a government relying on virtue alone would fail. Many citizens would pursue their own passions and interests rather than virtue and reason. To be a self-interested striver in the private economic sphere, the framers believed, was legitimate and beneficial. Yet, they feared that the unrestrained pursuit of self-interest in the public sphere would scuttle the American experiment in republican government and capitalist economics. Thus, the framers aimed for a balance between property rights and government power. Unlike the Roberts Court conservatives, they never treated wealth and property rights as sacrosanct. The conservative justices, therefore, not only misinterpret the Constitution but do so in a dangerous manner. The framers believed the American democratic-capitalist system could not survive if the private sphere subsumed the public. In fact, the tragic history of the early-twentieth century in the United States and other countries suggests that the framers astutely recognized the need for balancing individual rights and government power.

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[11]558 U.S. 310 (2010).

[12]District of Columbia v. Heller, 554 U.S. 570 (2008); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989).

Part I of this Article first explains the framers' desire to establish a republican democracy that balanced between the public and private spheres. This Part then describes the evolution of republican democracy during the nineteenth and early-twentieth centuries. Part II explains the development of pluralist democracy during the 1930s and the concomitant emergence of free speech as a constitutional lodestar. Part III explores the evolution of pluralist democracy after World War II while paying particular attention to the influence of the Cold War. Part IV focuses on the end of the Cold War and the rise of Democracy, Inc. This Part examines how the Roberts Court conservatives have endorsed Democracy, Inc. Part V analyzes the Roberts Court's betrayal of fundamental constitutional principles. The framers' pragmatic desire for balance, the history of the early-twentieth century, and the arguments of numerous political philosophers and social theorists all suggest that the conservative justices' support for Democracy, Inc., their emphasis on economic rights and the marketplace, threatens to undermine the democratic-capitalist system. Part VI, the conclusion, discusses whether the framers deserve blame or praise, in light of the Court's current interpretation of the Constitution.

Three caveats are in order at the outset. First, this Article describes free-speech developments as arising from a law-politics dynamic. That is, neither pure law nor raw politics determines Supreme Court votes and decisions. Rather, in free-speech as well as other cases, the justices sincerely interpret the constitutional text and other law, but the justices' respective political horizons always influence how they interpret the law. Consequently, I discuss the reasoning and the doctrines in the justices' opinions—because the law matters—but I also discuss the justices' political orientations—because politics matters.[13] Second, exactly because politics matters, changes in Court personnel also matter. Starting with the appointment of Warren Burger as Chief Justice in 1969, the Court as a whole has gradually shifted rightward. This

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[13]Stephen M. Feldman, *Supreme Court Alchemy: Turning Law and Politics Into Mayonnaise*, _ Geo. J. L. & Pub. Pol'y _ (forthcoming); Stephen M. Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 L. & Soc. Inquiry 89 (2005).

description of the Court's conservative movement requires, of course, the designation of individual justices as either conservative or liberal; these designations are based on quantitative rankings of the justices' political ideologies.[14]

Third, legal doctrine does not describe the sum-and-substance of free expression, even if one accounts for the influence of politics on doctrine. A complete understanding of free expression requires attention to two competing traditions: a tradition of dissent and a tradition of suppression. The tradition of dissent recognizes the American ethos of speaking one's mind, without fear of government punishment. For instance, a well-developed legal doctrine of free expression did not exist in the 1790s, but a robust de facto liberty nonetheless flourished. Many Americans believed they could openly criticize the government and its officials with impunity. Yet, alongside this tradition of dissent, one must recognize a countervailing tradition of suppression. Whereas Americans have reasonably expected to speak their minds, without penalty, many (and often the same) Americans simultaneously have been quick to suppress social and cultural outsiders, whether based on race, religion, or otherwise. Suppression has often operated through unofficial but nonetheless effective mechanisms. Mob violence, tar-and-feathering, and chasing outsiders from town have been common and widely accepted means of suppressing those who seem to diverge too far from the mainstream. In fact, both these traditions have roots reaching back before the constitutional framing. During the Revolution, Patriots enjoyed a full sense of free expression; American newspapers were filled with encomiums to the glories of a free press.[15] "There is nothing so fretting and vexatious; nothing so justly terrible to tyrants, and their tools and abettors, as a free press," proclaimed Samuel Adams in the *Boston Gazette*.[16] "The reason is obvious; namely, because it is as it has been very justly observ'd [to

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[14]For rankings of the Supreme Court justices based on political ideology, see Lee Epstein et al., The Behavior of Federal Judges 106-16 (2013).

[15]Leonard W. Levy, Emergence of a Free Press 67 (1985); Arthur M. Schlesinger, Prelude to Independence 148 (1958).

[16]Levy, *supra* note 15, at 67 (quoting Samuel Adams, *Boston Gazette* (March 14, 1768)).

be] 'the bulwark of the People's Liberties.'"[17] Yet, those same Americans were quick to suppress the views of Tories who wanted to voice their support for the British. At the direction of the Continental Congress, numerous towns even created Committees of Observation or Inspection that monitored the output of suspected Tory printers, thus often scaring Tories into silence.[18] Many of the most important nineteenth-century struggles over free expression, particularly those involving abolition and slavery, took place outside the courts—sometimes in Congress but sometimes in less formal settings—and thus revolved more around the traditions of dissent and suppression than around the legal doctrine of free expression.[19] Regardless, for purposes of this Article, legal doctrine is more central than the traditions. A general point about the relationship between legal doctrine and the traditions is worth adding, however. Throughout the republican democratic era, free-expression doctrine resonated more closely with the tradition of suppression than with the tradition of dissent, while during the pluralist democratic era, the opposite has been true.

I. Republican Democracy and Free Expression

A. An Emphasis on Balance

From the constitutional framing until the early-twentieth century, American government was republican democratic.[20] Citizens and elected officials were supposed to be virtuous. In the political realm, that is, they were to pursue the common good or public welfare rather than their

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[17] *Id.*

[18] Schlesinger, *supra* note 15, at 210-12.

[19] Feldman, *supra* note 4, at 118-52; Michael Kent Curtis, Free Speech, "The People's Darling Privilege:" Struggles for Freedom of Expression in American History 3 (2000) (emphasizing tradition of dissent, or as he puts it, a "popular free speech tradition").

[20] The founders themselves did not agree on a precise definition of republican government. Gerald Stourzh, Alexander Hamilton and the Idea of Republican Government 44-45 (1970). My definition of republican democracy overlaps but is not identical with some technical definitions of civic republicanism. *See* Richard C. Sinopoli, The Foundations of American Citizenship 9-12 (1992) (discussing definitional problems related to civic republicanism).

own "partial or private interests."[21] The Preamble of the Constitution memorialized the government goal of the common good: "We the People" were to "promote the General Welfare." When citizens or officials used government institutions to pursue their own interests, then the government was corrupt. Groups of like-minded citizens who corrupted the government were deemed factions, whether constituted by a majority or a minority of citizens. In *Federalist, Number 10*, James Madison described a faction as "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[22]

For many decades after the Revolution, Americans believed they were especially well-suited for republican democratic government. An agrarian economy where "almost every man is a freeholder" engendered a rough material equality, unknown elsewhere in the world, and this material equality in turn engendered a culture of political equality.[23] "I think our governments will remain virtuous for many centuries," wrote Thomas Jefferson, "as long as they are chiefly agricultural; and this will be as long as there shall be vacant lands in any part of America."[24] Plus, with an overwhelming number of Americans being committed to Protestantism and tracing their ancestral roots to Western or Northern Europe, the people seemed sufficiently

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[21]Gordon S. Wood, The Creation of the American Republic, 1776-1787, at 59 (1969); *e.g.*, Virginia Bill of Rights (1776), *reprinted in* 2 The Federal and State Constitutions, Colonial Charters, and other Organic Laws of the United States 1908, 1908 (Ben Perley Poore ed., 2d ed. 1878) [hereinafter Poore] (emphasizing government for "the common benefit").

[22]The Federalist No. 10 (James Madison) (note: all citations to the Federalist are to the Project Gutenberg Etext of *The Federalist Papers*); *see* James Madison, *In Virginia Convention*, June 5, 1788, *reprinted in* The Complete Madison: His Basic Writings 46, 46 (Saul K. Padover ed., 1953) (arguing that majority factions have produced unjust laws) [hereinafter Complete].

[23]Wood, *supra* note 21, at 100 (quoting Josiah Quincy).

[24]Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *reprinted in* 2 Great Issues in American History 112, 115 (Richard Hofstadter ed., 1958).

homogeneous to join together in the pursuit of the common good.[25] Of course, not all Americans were white Protestant Anglo-Saxon male property owners. Nevertheless, exclusion preserved at least a surface homogeneity. According to republican democratic theory, non-virtuous individuals (or non-virtuous societal groups) would be unwilling to forgo the pursuit of their own private interests. Instead, they would form factions bent on corrupting republican democratic government.[26] Significantly, then, an alleged lack of civic virtue could supposedly justify the forced exclusion of a group from the polity. On this pretext, African Americans, Irish-Catholic immigrants, women, and other peripheral groups were precluded from participating in republican democracy for much of American history. To take one instance, when large numbers of Roman Catholic immigrants began coming to the United States in the mid-nineteenth century, Protestant nativists condemned the immigrants as "unfit for citizenship."[27] "'Protestantism favors Republicanism,'" declared Samuel Morse, "whereas 'Popery' supports 'Monarchical power.'"[28] Thus, although the concepts of virtue and the common good typically remained nebulous in the abstract, they closely mirrored mainstream white, male, Protestant values and interests in concrete political (and judicial) contexts.

If the constitutional framers had an overarching goal, it was to achieve balance: balance between government power and individual rights, especially as related to property and wealth.[29] A decade earlier, the American Revolutionaries had believed the people and their elected

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[25]Thomas J. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment 219 (1986); Stephen M. Feldman, Please Don't Wish Me a Merry Christmas: A Critical History of the Separation of Church and State 161-68 (1997); *see* The Federalist No. 2, at 38 (John Jay) (Clinton Rossiter ed., 1961) (emphasizing the homogeneity of the American people).

[26]The Federalist No. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

[27]John Higham, Strangers in the Land: Patterns of American Nativism, 1860-1925, at 6 (1992 ed.).

[28]Rogers M. Smith, Civic Ideals 209 (1997) (quoting Morse from 1830s).

[29]Jennifer Nedelsky, Private Property and the Limits of American Constitutionalism 12 (1990); *see id*. at 22, 203-04 (emphasizing goal of reconciling republicanism with the protection of private rights, with property being the prototypical private right); Sinopoli, *supra* note 20, at 4-7 (emphasizing balance).

officials would naturally be virtuous. The experiences of the 1780s, however, had demonstrated to the framers that the majority and their officials too often used government power to satisfy their own interests, thus threatening the property rights of others.[30] That was the lesson of Shays's Rebellion in Massachusetts, where indebted landowners sought government refuge for money owed. John Jay wrote to George Washington: "Private rage for property suppresses public considerations, and personal rather than national interests have become the great objects of attention. Representative bodies will ever be faithful copies of their originals, and generally exhibit a checkered assemblage of virtue and vice, of abilities and weakness."[31] Consequently, the framers sought to construct a constitutional system that would provide sufficient protection for property and other individual rights, yet simultaneously, they still believed in republican democratic government in pursuit of the common good.

The key to maintaining a balance between government power and individual rights lay in a conceptual separation between two spheres: that of civil society or the private sphere, and that of government or the public sphere.[32] In the private sphere, individuals would naturally act as self-interested commercial and economic strivers. If people enjoyed liberty, then they would revel in their passions and interests. The strongest and most enduring interest was economic (property and wealth).[33] Moreover, the framers recognized that many if not most citizens would

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[30]*See, e.g.*, James Wilson, *In the Pennsylvania Convention* (Nov. 24, 1787), *in* 3 The Records of the Federal Convention of 1787, at 138, 141-42, appendix A (Max Farrand ed., 1966 reprint of 1937 rev. ed.) [hereinafter Farrand] (lamenting licentiousness of citizens and government problems).

[31]Letter from John Jay to George Washington (June 27, 1786), *reprinted in* 2 Great Issues in American History 80, 81 (Richard Hofstadter ed., 1958); *see* Wood, *supra* note 39, at 410-13 (discussing Shays's Rebellion).

[32]*See, e.g.*, The Federalist No. 10 (James Madison) (distinguishing between "public and private faith" as well as "public and personal liberty"); The Federalist No. 14 (James Madison) (emphasizing government would be "in favor of private rights and public happiness").

[33]The Federalist No. 10 (James Madison); 1 Farrand, *supra* note 30, at 288 (June 18, 1787) (Hamilton stated: "In every community where industry is encouraged, there will be a division of it into the few & the many. Hence separate interests will arise."); *see* Nedelsky, *supra* note 29, at 1, 22, 152 (emphasizing the importance of property to the framers); Stourzh, *supra* note 20, at 80 (emphasizing property and wealth); Renée Lettow Lerner, *Enlightenment Economics and the Framing of the U.S. Constitution*, 35 Harv. J. L. & Pub. Pol'y 37, 39-40 (2011) (arguing that framers anticipated and sought to protect a vibrant commercial economy).

be motivated to pursue their own passions and interests not only in the commercial or private world but also in the public world. From the framers' perspective, factions would inevitably form and seek to control government. Nevertheless, even though liberty and property caused factionalism—Madison metaphorically explained that "[l]iberty is to faction what air is to fire"—protecting such individual rights should be, said Madison, "the first object of government."[34] Indeed, private ownership of property or similar economic wealth was a prerequisite to an individual's full participation in the government realm under all but one of the state constitutions in effect in 1787.[35] In Maryland, for instance, suffrage was extended only to those "freemen … having a freehold of fifty acres of land [or] having property in this State above the value of thirty pounds current money."[36] Private ownership of property or other wealth supposedly established one's independence, necessary for the disinterestedness of civic virtue.[37] Wealth gave one a sufficient "stake in society" or concern for the common good so as to justify the power to vote and to hold office.[38] Moreover, by the time of the framing, a type of private-sphere or social virtue was beginning to emerge. This incipient notion of virtue, distinct from the civic virtue associated with civic republican government, suggested that the individual pursuit of self-interest in the private sphere could itself further the common good, though at that time, such self-interest still had to be tempered by a benevolent and decent Protestant civility.[39]

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[34]The Federalist No. 10 (James Madison).

[35]Bernard Crick, Democracy 44-45 (2002). On the state constitutions and property or wealth requirements, see Willi Paul Adams, The First American Constitutions 315-27 (2001); Alexander Keyssar, The Right to Vote 8-24, 340-41 (2000).

[36]Constitution of Maryland (1776), *reprinted in* 1 Poore, *supra* note 21, at 817, 821.

[37]G. Edward White, *The Political Economy of the Original Constitution*, 35 Harv. J. L. & Pub. Pol'y 61, 83 (2011).

[38]Keyssar, *supra* note 35, at 5, 9; *see* Thomas G. West, Vindicating the Founders 120-24 (1997) (emphasizing that, from the founders' standpoint, property qualifications established independence).

[39]Joyce Appleby, Capitalism and a New Social Order: The Republican Vision of the 1790s 14-15 (1984); Gordon S. Wood, The Radicalism of the American Revolution 215-19, 230 (1991); *see* Sean Wilentz, Chants Democratic: New York City and the Rise of the American Working Class, 1788-1850, at 14-15 (2004) (discussing struggles over the

Despite their concern for economic interests and the private sphere, the framers insisted that virtue and reason could and should overcome passion and interest in public affairs. Therefore, government could and should be conducted in accord with civic republican principles.[40] The framers believed in the existence of a virtuous elite—including themselves—who would pursue the common good in the public sphere even while pursuing their own interests in the private sphere.[41] Hamilton believed that many people were disinclined to become involved in public affairs in the first place.[42] But in a properly structured constitutional system, the people would at least sometimes elect the virtuous elite to public offices. And in the event that an insufficiently virtuous individual were elected, the system would be structured to control the "effects" of self-interest and factionalism.[43] "The aim of every political constitution is, or ought to be," Madison declared, "first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust."[44] What types of precautions could be taken? Mechanisms such as federalism, separation of powers, bicameralism, and checks and balances dispersed power among a multitude of government institutions, departments, and officials.[45] "[T]he constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the

meaning of virtue and the common good); Isaac Kramnick, *Republican Revisionism Revisited*, 87 Am. Historical Rev. 629, 662 (1982) (emphasizing changing notion of virtue).

[40]McDonald, *supra* note 39, at 189-209; Nedelsky, *supra* note 29, at 37; Pocock, *supra* note 39, at 513-26; Wood, *supra* note 39, at 391-468.

[41]*See* Nedelsky, *supra* note 29, at 158 (explaining that even the virtuous elite could not be expected to rise constantly "above self-interest").

[42]Stourzh, *supra* note 20, at 82-83.

[43]The Federalist No. 10 (James Madison).

[44]The Federalist No. 57 (James Madison).

[45]*See, e.g.*, The Federalist No. 51 (James Madison) (Madison discussing the advantages of a bicameral legislature and an executive veto on legislative actions).

private interest of every individual may be a sentinel over the public rights."[46] In other words, the Constitution dispersed power among so many institutions, departments, and officials that the self-interested grasping of one would inevitably be met by the self-interested grasping of another. The framers designed the Constitution to channel self-interest, as much as possible, toward the pursuit of the common good. The government would act for the common good or not act at all.[47]

Both the public and private spheres were important to the framers; hence, their desire for balance.[48] A constitutional system that unduly favored either sphere could not long survive. If the private interests and passions of the people were ignored, the government system would be divorced from reality. The people were not so uniformly virtuous that they would not seek to use government for their own advantages. "[A] nation of [virtuous] philosophers," Madison explained, "is as little to be expected as the philosophical race of kings wished for by Plato."[49] At the Constitutional Convention, Hamilton emphasized that utopian conceptions of human nature, depicting people as pristinely virtuous, were dangerous. "We must take man as we find him," Hamilton said.[50] "A reliance on pure patriotism had been the source of many of our errors."[51] Hamilton and the other framers had become hardheaded realists, pragmatic about politics.[52] As such, they realized the constitutional system needed to protect against likely efforts to use the government for corrupt purposes. But if the goal of principled government for the common good

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[46] *Id.*

[47] *See* White, *supra* note 37, at 83-84 (emphasizing that Constitution was designed to encourage virtue among government officials).

[48] *See* Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 William & Mary Q. 51, 81-82 (1993) (emphasizing the founders' interest in both private economic activity and the public weal).

[49] The Federalist No. 49 (James Madison).

[50] 1 Farrand, *supra* note 30, at 376 (June 22, 1787).

[51] *Id.*

[52] Peter Gay, 2 The Enlightenment: An Interpretation 170, 566 (1969).

was jettisoned, if the people and their elected officials could not act virtuously, then "nothing less than the chains of despotism" would be possible.[53] Ultimately, then, the framers hoped that the constitutional structures would promote the virtuous pursuit of the common good in the public sphere while simultaneously protecting individual rights and liberties in the private sphere.[54]

To be sure, property rights—the prototypical private right—were enigmatic, shifting sands beneath the framers' feet. On the one hand, private property was a given in American society, and some ownership of property or other wealth seemed to be necessary for civic virtue. On the other hand, greed for excessive property—a trait common to many—was often the root source of factionalism and corruption. Thus, the framers wanted balance, but they knew it would not be easily achieved. To attain the proper balance, they needed to construct an integrated system consisting of a liberal society and a republican government.[55] If they failed to construct such an integrated system, with balance between the public and private spheres, then the entire republican democratic-capitalist society would likely crumble. From the framers' viewpoint, history proved that every society eventually decayed. If, therefore, they failed to attain their goal, America would prematurely die. The nation was at a moment of crisis.[56]

Significantly, though, while the framers sought balance between the public and private, the two spheres were neither completely separate nor exactly equal. Constitutional provisions such as the commerce clause clearly anticipated that the government would sometimes be explicitly involved in private-sphere affairs. More precisely, the framers believed the

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[53]The Federalist No. 55 (James Madison).

[54]The Federalist No. 10 (James Madison); The Federalist No. 14 (James Madison).

[55]*See* Nedelsky, *supra* note 29, at 174 (explaining framers as "blending [the] discourses" of liberalism and republicanism).

[56]Stourzh, *supra* note 20, at 38 (discussing founders who feared decay); *see* Stephen M. Feldman, American Legal Thought From Premodernism to Postmodernism: An Intellectual Voyage 61-65 (2000) [hereinafter Voyage] (discussing framers' premodern or cyclical view of history).

government could diminish or infringe on individual rights and liberties if the government acted in pursuit of the common good (and otherwise acted consistently with the Constitution). In this sense, the balance was skewed in favor of the public over the private. James Wilson stated: "[N]o government, either single or confederated, can exist, unless private and individual rights are subservient to the public and general happiness of the nation."[57] The fifth amendment in the Bill of Rights—"nor shall private property be taken for public use without just compensation"—illustrates this key point. On the one hand, the Constitution unequivocally protected private property, but on the other hand, the government could still take private property for public use—that is, to promote the common good. To be sure, under the fifth amendment, the government was required to pay just compensation for a taking. But the government was otherwise permitted to regulate property and the economic marketplace—anything short of an actual taking—without paying compensation, so long as the regulation was for the common good.

DISCUSS HAMILTON'S REPORT ON MANUFACTURES.

In short, under republican democracy, the pursuit of the common good both empowered and limited the government.[58] This was as true at the state and local levels as at the national level. Government could act in almost any manner—even taking property—so long as it was for the common good, but simultaneously, government could not act unless it was for the common good. In fact, throughout much of the nineteenth century, a "well-regulated" or "well-ordered society," including a well-regulated marketplace, was understood to evince republican democratic government.[59] During this era, economic marketplaces were local, for the most part.

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[57] James Wilson, *In the Pennsylvania Convention* (Nov. 24, 1787), *in* 3 Farrand, *supra* note 30, at 141, appendix A; *see* William J. Novak, The People's Welfare 9-11 (1996) (emphasizing that the superiority of the public over the private sphere continued at least through the nineteenth century).

[58] William Novak devotes his book, *The People's Welfare*, to discussing this simultaneous empowerment and limitation on government power at the state level. William J. Novak, The People's Welfare (1996).

[59] *Id*. at 1-2; *see* Commonwealth v. Alger, 61 Mass. 53, 7 Cush. 53, 85-86 (1851) (emphasizing "well ordered governments").

Rudimentary transportation and communication technologies limited the development of a national marketplace until after the Civil War. Thus, municipal and state governments frequently exercised their police powers to regulate the economy, particularly in the antebellum decades.[60] Such regulations could be purely promotional—intended to generate economic activity—or restrictive, or both.[61] Moreover, regulations were rarely, if ever, neutral; instead, some in society would be favored over others.[62]

Given the frequency and effects of economic regulations, individuals sometimes challenged the legality (or constitutionality) of government actions. These judicial challenges often invoked state-constitution due-process clauses or the analogous law-of-the-land provisions, but they also sometimes relied on common law or natural law principles.[63] Regardless of the specific legal foundation for the challenge, the key to the typical judicial analysis was the categorization of the government purpose: Was it for the common good—which was permissible—or was it merely for the benefit of one private interest over another—which was impermissible? The law could not be allowed to take wealth from one societal group and transfer it to another group for no reason other than that the favored group controlled the government. Chief Justice Stephen Hosmer of Connecticut phrased this judicial approach in typical terms: "If the legislature should enact a law, without any assignable reason [read: the common good],

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[60]Novak, *supra* note 58, at 10, 86, 237 (emphasizing local control, especially over economic relations).

[61]*Cf.*, Kermit L. Hall, The Magic Mirror 87-88 (1989) (emphasizing that the nation in its early decades had a mixed rather than laissez-faire economy). A growing emphasis on individualism was not equivalent to laissez faire. Walter Light, Industrializing America: The Nineteenth Century 191 (1995).

[62]Hall, *supra* note 61, at 88 (arguing that question was not whether to regulate but who would benefit from regulation); Morton J. Horwitz, The Transformation of American Law, 1780-1860, at xiv-xv (1977) (emphasizing that government regulations influenced the distribution of wealth); William J. Novak, *The Myth of the "Weak" American State*, 113 Am. Hist. Rev. 752, 754, 769-71 (2008) (emphasizing that government exercised infrastructural power, which inevitably influenced the distribution of wealth); *see* Jerry L. Mashaw, Creating the Administrative Constitution 3-12, 18-25 (2012) (showing that there was far more regulation of the economy, even at the federal level, than is ordinarily acknowledged).

[63]*See, e.g.*, Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.) (relying on natural law); Vanzant v. Waddel, 10 Tenn. 260 (1829) (relying on state law of the land provision).

taking from A. his estate, and giving it to B., the injustice would be flagrant, and the act would produce a sensation of universal insecurity."[64]

Federal and state courts consistently upheld government actions in pursuit of the common good, even when they allegedly infringed on individual rights and liberties, including the right to property. For instance, in an 1845 case, an entrepreneur sought to sell poultry in Boston that he had acquired in New Hampshire.[65] He ran afoul, however, of strict municipal regulations on the marketplace. Specifically, the city required a seller to show "that all the said articles are the produce of his own farm, or of some farm not more than three miles distant from his own dwelling-house."[66] The seller objected, contending that "the by-law is contrary to common right, in restraint of trade, against public policy, unreasonable and void."[67] The court upheld the regulations, with an opinion by Lemuel Shaw. Shaw reasoned that the city necessarily had the power to "control" its "accommodations" for sales so "as best to promote the welfare of all the citizens."[68] Shaw concluded: "[W]e think [the regulations] are well calculated to promote the public and general benefit," notwithstanding the restrictions on the economic marketplace.[69] Chancellor James Kent of New York succinctly summarized this fundamental judicial

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[64]Goshen v. Stonington, 4 Conn. 209, 221 (1822). For additional examples, see *State Bank v. Cooper*, 10 Tenn. 599 (1831); *Eakin v. Raub*, 12 Serg. & Rawle 330 (Pa. 1825); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.); *VanHorne's Lessee v. Dorrance*, 28 F.Cas. 1012 (C.C. Pa. 1795).

[65]Commonwealth v. Rice, 9 Metcalf 253, 50 Mass. 253 (1845).

[66]*Id*. at 256.

[67]*Id*. at 259.

[68]*Id*.

[69]*Id*. For similar cases, see *Thorpe v. Rutland & Burlington Railroad Co*., 27 Vt. 140 (1855); *Vandine's Case*, 23 Mass. 187 (1828); *Vanderbilt v. Adams*, 7 Cow. 349, 351-52 (N.Y. 1827).

perspective: "[P]rivate interest must be made subservient to the general interest of the community."[70]

During this time period, legal rights to free speech and a free press were no different from other individual rights. State constitutions, as well as the national Constitution, protected citizens' rights to free expression, but government could always limit such rights if in pursuit of the common good. As it was often phrased, individuals enjoyed rights to speech and press but were nonetheless responsible for abuses of those freedoms.[71] Liberty was not equivalent to license.[72] The lower courts, consequently, developed free-expression doctrine consistent with these republican democratic principles, recognizing government power to punish speech or writing if such punishment would further the common good. This republican democratic approach engendered the bad tendency doctrine or test: Criminal punishment would be for the common good and therefore permissible if the speech or writing had a bad tendency or likely pernicious consequences.[73]

B. Changing Conceptions of Virtue and the Common Good: Corporations and Laissez Faire

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[70]James Kent, 2 Commentaries on American Law 276 (1827; Legal Classics Library Reprint). Although courts readily upheld numerous government actions, the republican concept of limited government was not specious. *E.g.*, State Bank v. Cooper, 10 Tenn. 599 (1831) (invalidating law creating special court for Bank of Tennessee); Pingrey v. Washburn, 1 Aik. 264, 15 Am.Dec. 676 (1826) (invalidating turnpike toll law).

[71]For instance, the Pennsylvania Constitution stated: "[E]very citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty." Constitution of Pennsylvania (1838), *reprinted in* 2 Poore, *supra* note 21, at 1557, 1564. For similar constitutional provisions, see Constitution of Arkansas (1836), *reprinted in* 1 Poore, *supra* note 21, at 101, 102; Constitution of Delaware (1831), *reprinted in* 1 Poore, *supra* note 21, at 289, 289; Constitution of Illinois (1848), *reprinted in* 1 Poore, *supra* note 21, at 449, 467.

[72]*E.g.*, State v. Van Wye, 136 Mo. 227, 37 S.W. 938, 939 (1896).

[73]The bad tendency test first emerged as a truth-conditional standard. As articulated by Judge James Kent in *People v. Croswell*, 3 Johns. Cas. 337 (N.Y. Sup. Ct. 1804), truth was a defense to a charge of criminal libel but only if the defendant published for good motives and justifiable ends. If the published material was either false, or true but with bad tendencies, then it was criminally punishable. *E.g.*, Castle v. Houston, 19 Kan. 417 (1877); Perkins v. Mitchell, 31 Barb. 461 (N.Y. Sup. 1860); Commonwealth v. Morris, 3 Va. 176 (1811).

The basic principles of republican democracy predominated throughout the nineteenth century. Yet, the specific understandings of virtue and the common good changed during that time. For example, whereas many framers believed that virtue was concentrated in an elite segment of American society, a growing number of Americans began to believe during the early-nineteenth century that virtue was shared equally by all common people (particularly by white Protestant men).

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Partly in response to these interrelated changes in American society and culture, a growing number of individuals began to infuse the concept of the common good with a stronger emphasis on laissez-faire economic thinking.[74]

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The shift toward a laissez-faire tinged common good did not substantially affect the judicial doctrine of free expression. The U.S. Supreme Court first began to consider free-expression issues in the late-nineteenth and early-twentieth centuries, and like other courts, the Court interpreted free speech and a free press pursuant to republican democratic principles.[75] Thus, the Court consistently allowed the government to punish speech or writing that engendered bad tendencies because such expression undermined virtue and contravened the common good.[76]

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II. Pluralist Democracy Saves the United States and Invigorates Free Expression

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[74]Twiss, *supra* note 9.

[75]Feldman, *supra* note 4, at 101-52, 241-90; Howard Gillman, The Constitution Besieged: The Rise and Demise of *Lochner* Era Police Powers Jurisprudence 19-60 (1993).

[76]*E.g.*, Fox v. Washington, 236 U.S. 273, 276-77 (1915); Patterson v. Colorado *ex rel.* Attorney General, 205 U.S. 454, 462 (1907); *see* Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911) (dicta refutes free-expression challenge to injunction of labor boycott); Turner v. Williams, 194 U.S. 279 (1904) (aliens lack free speech rights); Roberston v. Baldwin, 165 U.S. 275, 281 (1897) (dicta interprets first amendment and other Bill of Rights provisions narrowly).

By the early-twentieth century, multiple pressures threatened democracy not only in the United States but also in Europe. In the United States, continuing industrialization, immigration, and urbanization further strained the republican democratic system. From 1910 through 1914, approximately one million immigrants arrived annually.[77] During the years of World War I, immigration diminished, but then resumed its high rate after the war, with over 800 thousand in 1921 and over 700 thousand in 1924.[78] Meanwhile, in 1920, the urban population for the first time surpassed the rural, with approximately 54 million urban residents and approximately 51 million rural.[79]

Cracks in the republican democratic edifice started to show in the 1920s. Many old-stock Americans who had grown disgruntled with the changing makeup of the nation sought to strike back by suppressing or excluding racial, ethnic, and religious outsiders. Many of these old-stock Americans viewed Southern and Eastern European immigrants as racially inferior and as incapable of virtuous citizenship.[80] In this vein, President Calvin Coolidge declared that the "ability for self-government is arrived at only through an extensive training and education. In our own case it required many generations."[81] Prohibition, adopted in 1919, manifested an attempt to save traditional America. Although the temperance movement had existed for decades, the nation finally ratified Prohibition as a blow against the ostensibly foreign immigrant cultures.[82] Even

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[77] Austin, *supra* note **Error! Bookmark not defined.**, at 470 (Table 7.4, Total Number of Immigrants Arriving Annually in the United States, 1820-1980).

[78] *Id*.

[79] Statistical History, *supra* note **Error! Bookmark not defined.**, at 14 (Table: Population in Urban and Rural Territory).

[80] *See* Dictionary, *supra* note 334 (classifying immigrants as racial groups); Matthew Frye Jacobson, Whiteness of a Different Color 8-9 (1998) (emphasizing changing concept of whiteness).

[81] John Gerring, Party Ideologies in America, 1828-1996, at 86 (1998).

[82] *See* Lizabeth Cohen, Making a New Deal 211 (1990).

the Ku Klux Klan reemerged, open only to "native born, white, gentile Americans."[83] Its membership surged as many old-stock Americans, disregarding the organization's vigilante outbursts, viewed the Klan as a fraternal order.[84] In truth, though, the Klan aimed to be a "militant wing of Protestantism" enforcing "100 percent Americanism," particularly "the Protestant moral code."[85] Significantly, in 1921, a new immigration law imposed a quota system, which would be tightened in 1924.[86] The unequivocal purpose of these quotas was to slash immigration from Southern and Eastern Europe while still allowing it from Northwestern Europe. The House Committee Report for the 1924 legislation explicitly declared that the quota manifested "an effort to preserve, as nearly as possible, the racial status quo in the United States. It is hoped to guarantee, as best we can at this late date, racial homogeneity."[87]

A. American Democracy Transforms: Reconciling the Public and Private

Whatever the wary old-stock Americans had hoped to accomplish, other forces for change were at work, apparent when one places the United States within the wider context of western industrialized nations. All these nations, including the United States, suffered through World War I—indeed, the European nations were at war for more than four years. And these same nations would soon be swept into a vortex of additional tragedies: the Great Depression, World War II, and the Holocaust. Of course, no single cause can explain all of these cascading catastrophes. Each was a complex event with multiple intertwined causes. Nevertheless, the widespread laissez-faire ideology stands as a persistent, significant, and even overarching causal

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[83]William E. Leuchtenburg, The Perils of Prosperity, 1914-1932, at 209 (1958).

[84]Lynn Dumenil, The Modern Temper 235-38 (1995); Leuchtenburg, Perils, *supra* note 83, at 209.

[85]Dumenil, *supra* note 84, at 235-36.

[86]*Immigration Act of 1924, reprinted in* 2 Documents of American History 372 (Henry Steele Commager ed., 3d ed. 1947) [hereinafter Commager]; E. P. Hutchinson, Legislative History of American Immigration Policy, 1798-1965, at 175-76, 187-92 (1981).

[87]Hutchinson, *supra* note 86, at 484-85 (quoting House Committee Report, Act of May 26, 1924); Jacobson, *supra* note 80, at 81-87.

link among these disasters.[88] More specifically, laissez-faire ideology contributed in two primary ways to social and economic instability in the domestic and international realms. First, domestically, laissez-faire thinking provokes many individuals and groups to oppose any type of social welfare laws, no matter how important or necessary such laws otherwise appear to be. And frequently, social welfare laws are desperately needed to help offset the economic inequities that naturally develop in capitalist societies.[89] Yet, laissez-faire ideologues simply cannot square social welfare and other economic interventions with their desire for a completely free and open marketplace. Second, internationally, laissez-faire ideology leads nations to link themselves together with devices such as the gold standard in order to engender and protect an international marketplace. But if economic or social disaster strikes one nation, its reverberations are then likely to shake many other nations as well.[90]

Laissez-faire thinking unquestionably remained strong in America throughout the 1920s as true believers incessantly criticized government regulations.

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In many instances, Americans translated their discontent with government into criticisms of specific democratic practices. For decades, old-stock Americans had complained that spreading the vote had undermined republican democratic government. Tiedeman had lamented that the spread of "universal suffrage" allowed "the great army of discontents" to oppress the rights of the minority through social welfare legislation.[91] In the early-twentieth century,

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[88]Polanyi, *supra* note 2, at 3-5. Much historical scholarship has attempted to explain each of these events, and much scholarship is still being produced. With regard to World War I, alone, three new books have recently appeared: Christopher Clark, The Sleepwalkers: How Europe Went to War in 1914 (2012); Michael S. Neiberg, Dance of the Furies: Europe and the Outbreak of World War I (2013); MacMillan, *supra* note **Error! Bookmark not defined.**.

[89]*See* Rodrik, *supra* note 9, at 121-22 (discussing market failures); Stiglitz, *supra* note **Error! Bookmark not defined.**, at 41-45 (discussing market inefficiencies).

[90]Milton Friedman would subsequently argue that classical (nineteenth-century) liberalism "supported laissez faire at home as a means of reducing the role of the state in economic affairs …; it supported free trade abroad as a means of linking the nations of the world together." Milton Friedman, Capitalism and Freedom 5 (1962).

[91]Christopher G. Tiedeman, The Unwritten Constitution of the United States 80 (1890.).

electoral reforms purposefully diminished voter participation, especially in poor and immigrant urban communities.[92] These reforms were often justified as eliminating corruption or producing "a more competent electorate," yet they typically tightened voting requirements.[93] Measures "included the introduction of literacy tests, lengthening residency periods, abolishing provisions that permitted noncitizen aliens to vote, restricting municipal elections to property owners or taxpayers, and the creation of complex, cumbersome registration procedures."[94] In 1923, for example, New York State implemented a "scientifically devised" examination that, in theory, screened new voters for intelligence and literacy, but in practice, blocked thousands of would-be voters.[95] And in the South, mechanisms such as poll taxes and literacy tests successfully disenfranchised most African Americans.[96] In presidential elections, voter turnout after the Civil War sometimes had reached above eighty percent, but in 1920 and 1924, it fell below fifty percent.[97] Even so, William B. Munro, former president of the American Political Science Association, advocated to limit suffrage in 1928. "About twenty percent of those who get on the voters' list have no business to be there," he declared.[98] "Taking the country as a whole, the total number of these interlopers must run into the millions."[99] Walter Lippmann, too, had grown disenchanted with democracy. "[T]he number of mice and monkeys known to have been

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[92]Dumenil, *supra* note 84, at 53; Link & McCormick, *supra* note **Error! Bookmark not defined.**, at 53-55.

[93]Keyssar, *supra* note 35, at 128.

[94]*Id*. at 128-29.

[95]*New Literacy Test Adopted by State*, New York Times, Aug. 9, 1923, at 30; William J. O'Shea, *Literacy Test of Voters is Pronounced a Success*, New York Times, Jan 4, 1925, at X12; *The Literacy Law*, New York Times, March 28, 1931, at 15.

[96]Keyssar, *supra* note 35, at 105-16; Link & McCormick, *supra* note **Error! Bookmark not defined.**, at 53.

[97]Austin, *supra* note **Error! Bookmark not defined.**, at 378-79 (Table: National Voter Turnout).

[98]Keyssar, *supra* note 35, at 226.

[99]*Id*.

deceived in laboratories is surpassed only by the hopeful citizens of a democracy," Lippmann lamented. "Man's reflexes are, as the psychologists say, conditioned. And, therefore, he responds quite readily to a glass egg, a decoy duck, a stuff shirt or a political platform."[100]

Criticisms of democratic government go hand-in-hand with laissez faire. Quite simply, laissez faire assumes that the best government is minimal or even no government. One cannot maintain an unregulated economic marketplace unless the government stops regulating. Thus, the less government, the better—whether government is democratic or otherwise.[101]

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Thus, rational economic action and thinking—the rational pursuit of profit accompanied by laissez-faire ideology—can have unexpected and disastrous consequences: the undermining and even destruction of democratic government (and in turn, the destruction of the capitalist economy). Historical evidence of this inverse relationship—economic rationalism and laissez-faire ideology weakening democratic government—is all too prevalent during the first half of the twentieth century. As explained by the economic historian, Karl Polanyi, the connection between laissez faire and government collapse is complex; the inverse relationship is neither simple nor direct.[102] In democracies, efforts to impose a laissez-faire system frequently generate a backlash of social welfare laws intended to ameliorate the harsh realities of an industrial marketplace.[103]

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[100]Walter Lippmann, The Phantom Public 30 (1925).

[101]*E.g.*, Friedrich A. Hayek, The Constitution of Liberty 107-22 (2011 definitive ed.) (arguing that rationalistic social engineering undermines liberty); *see* Fred Block & Peter Evans, *The State and the Economy*, *in* The Handbook of Economic Sociology 505, 505 (2d ed. 2005) (discussing laissez faire).

[102]The historical connection between laissez-faire ideology and the disastrous events of the early-twentieth century is the subject of Polanyi's book, *The Great Transformation*. Polanyi, *supra* note 2. More recently, Polanyi's argument has been confirmed and extended. Barry Eichengreen, Globalizing Capital 5-6, 191-92 (1996).

[103]Polanyi referred to this connection as a "double movement." *E.g.*, Polanyi, *supra* note 2, at 79, 136, 223; *see* Fred Block, *Introduction*, *in* Polanyi, *supra* note 2, at xviii, xxv-xxix (explaining double-movement thesis). Because of this double movement, defenders of laissez faire consistently (and falsely) blame social welfare laws for economic and other social problems. Laissez faire, they argue, would work if given the chance. Polanyi, *supra* note 2, at 150. Albert Hirschman refers to this defense of laissez faire as an example of the perversity thesis, typical of conservative thought. Albert O. Hirschman, The Rhetoric of Reaction 11-42 (1991).

For example, in the United States, Progressivism emerged as laissez-faire ideology rose to new heights in the early-twentieth century. But the tension between laissez faire and social welfare can stretch society like an "elastic band," and in some circumstances, the band snaps, destabilizing the entire democratic-capitalist system.[104]

From this perspective, the rapid onset of World War I in 1914 was understandable.[105] Early in the twentieth century, the unregulated international market glimmered beneath a veneer of wealth, but it nonetheless engendered economic winners *and* losers.[106] Neither all nations nor all people within specific nations benefitted, yet gross inequalities typically went unremedied. Consequently, the world, including Europe, was not as peaceably stable as it appeared.

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In the United States, American democracy ultimately proved more resilient than most European types. Yet, as the republican democratic regime crumbled in the U.S., a remarkable number of Americans suggested that fascism or communism might provide a workable alternative.[107] Many worried that democratic government was, quite simply, too "unintelligent and inefficient" to respond to the economic crisis of the Depression.[108]

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The new pluralist democratic regime, manifested in the New Deal, repudiated laissez faire, at least temporarily. FDR recognized that as a capitalist system approached a laissez-faire

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[104]Polanyi, *supra* note 2, at 25, 240; Block, *supra* note 103, at xxv.

[105]*See* Frieden, *supra* note 9, at 127-29 (describing the rapid spiral into war); *see* MacMillan, *supra* note **Error! Bookmark not defined.**, at 633 (emphasizing how the war seemed to start suddenly); Neiberg, *supra* note 88, at 1-9 (maintaining that most Europeans were stunned by onset of war).

[106]Frieden, *supra* note 9, at 25-27, 40, 109-11.

[107]Purcell, *supra* note 4, at 119-27.

[108]*Id*. at 127.

reality, it became self-destructive.[109] As the constitutional framers had posited, the public and private spheres need to remain in a relative balance in order for a democratic-capitalist system to be sustained. The dream of a pristine private sphere and shrunken public sphere becomes dangerous if implemented.

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Thus, to save the American democratic-capitalist system, the national government in the 1930s expanded and centralized power.[110] Under pluralist democracy, the government opened to multiple interests and values, so when those interests aligned properly, the government could reach deeply into the realms of economy and society—without constitutional question.[111] In other words, the supposedly preexisting and objective substantive goal of the common good no longer limited the government. Rather, government goals and limits were established through the pluralist democratic process itself.

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Conservatives reacted inconsistently as pluralist democracy and the New Deal unfolded. Some protested when the U.S. went off the gold standard early in FDR's first term, on June 5, 1933.[112] No less than the Budget Director Lewis Douglas, a Roosevelt appointee, pronounced, "This is the end of Western civilization."[113] Yet, some conservatives eventually praised the New Deal's reconciliation of the public and private spheres.[114] The earliest neoliberals, emphasizing

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[109]Gaddis, *supra* note 1, at 92-93; *see* Heilbroner & Singer, *supra* note **Error! Bookmark not defined.**, at 297 (emphasizing New Deal rejection of laissez faire).

[110]Bakan, *supra* note 9, at 85-86.

[111]Bruce Ackerman, We the People: Foundations 116-19 (1991); Feldman, *supra* note 4, at 316, 325; William E. Leuchtenburg, Franklin D. Roosevelt and the New Deal 335-44 (1963).

[112]Eichengreen, *supra* note 9, at 4; Polanyi, *supra* note 2, at 27; *see* Frieden, *supra* note 9, at 186 (arguing that many, including Herbert Hoover, wanted to remain on gold standard).

[113]Bakan, *supra* note 9, at 187 (quoting Douglas).

[114]Castillo, *supra* note 1, at 122-23.

individual liberty and human dignity, acknowledged the need for government action to preserve the economic marketplace.[115] Among those neoliberals, even Milton Friedman initially renounced the nineteenth-century conception of laissez faire.[116] Nevertheless, for much of the 1930s, conservative Supreme Court justices resisted the transition to pluralist democracy and attempted to continue enforcing republican democratic principles.[117] This judicial resistance provoked Roosevelt's court-packing proposal, a blatant political gesture intended to compel the justices to accept the New Deal and (implicitly) pluralist democracy. By the end of the decade, though—the turning point is usually deemed to be 1937—the Court had accepted the transition and stopped attempting to uphold the republican democratic principles of virtue and the common good. Around this same time, political theorists began to explicate the new practices and institutions of democracy. The foundation for the incipient democratic theory was the scholarly embrace of relativism. While fascist governments, such as in Nazi Germany, claimed knowledge of objective values and forcefully imposed those values and concomitant goals on their peoples, democratic governments allowed their citizens to express diverse values and goals. The key to democracy lay not in the specification of supposedly objective goals, such as the common good, but rather in the following of processes that allowed all citizens to voice their particular values and interests within a free and open democratic arena.

B. Pluralist Democratic Theory: Free Expression Becomes a Constitutional Lodestar

During and after World War II, numerous political and constitutional theorists celebrated pluralist democracy as the best means for accommodating "our multigroup society."[118] These

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[115]Jones, *supra* note 3, at 3-8, 94-97; *e.g.*, Hayek, *supra* note 138, at 44-45.

[116]Milton Friedman, *Neo-liberalism and Its Prospects*, 17 Farmand 89 (1951).

[117]Gillman, *supra* note 75, at 147-94.

[118]Wilfred E. Binkley & Malcolm C. Moos, A Grammar of American Politics 9 (1949); *e.g.*, V.O. Key, Jr., Politics, Parties, and Pressure Groups (1942); David B. Truman, The Governmental Process (1951).

theorists viewed the explanation and justification of pluralist democracy as a necessary defense of American democracy, first in opposition to the Nazis and other fascist regimes and then in opposition to the Soviets and its Cold-War totalitarian allies.[119] As the theorists explained, the only way to determine public values and goals is "through the free competition of interest groups."[120] By "composing or compromising" their different values and interests,[121] the "competing groups [would] coordinate their aims in programs they can all support."[122] Legislative decisions therefore turned on negotiation, persuasion, and the exertion of pressure through the normal channels of the democratic process.[123] But with individuals and groups all pursuing their own respective interests, what would prevent the society from splintering into embattled segments, each invigorated with growing enmity of others? Numerous theorists agreed that only a democratic culture could sustain the inevitable interest-group conflicts of pluralist democracy.[124] Engendered by widespread middle-class economic attitudes and the lack of entrenched aristocratic and proletariat classes, American culture instilled citizens with the "rules of the game" for the "democratic mold."[125] In the 1950s, Daniel Boorstin argued that the "genius" of American politics lay not in any philosophy but in a "genuine community of our

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[119]*See* Purcell, *supra* note 4, at 197-217 (explaining the urge to defend democracy).

[120]Binkley & Moos, *supra* note 118, at 9.

[121]*Id*.

[122]*Id*. at 8.

[123]*Id*. at 10-11.

[124]Robert A. Dahl, Democracy and its Critics 172 (1989) [hereinafter Democracy]; Robert A. Dahl, A Preface to Democratic Theory 4, 143 (1956) [hereinafter Preface]; Dewey, *supra* note **Error! Bookmark not defined.**, at 162, 175.

[125]David B. Truman, The Governmental Process 129, 138, 512-13 (2d ed. 1971). On the economic and middle-class foundations of the democratic culture, see *id*. at 520-23; Louis Hartz, The Liberal Tradition in America 50-64 (1955); V.O. Key, Jr., Politics, Parties, and Pressure Groups 54-57 (3d ed. 1953).

values,"[126] a "common faith" in the negotiations and compromises of pluralist democracy.[127] Indeed, faith in democracy—the democratic culture—might have helped save American democracy in the 1930s. When other democracies degenerated into authoritarian regimes, American democracy underwent a significant institutional transformation but nonetheless managed to survive.[128]

In the Cold War period, no one articulated pluralist democratic theory more comprehensively than Robert A. Dahl.[129]

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The most important component of the process, according to Dahl, is "effective participation": Citizens must have "adequate" and "equal" opportunities "for expressing their preferences … for placing questions on the agenda and for expressing reasons for endorsing one outcome rather than another."[130] If these free-expression rights are absent, Dahl insisted, then "the democratic process does not exist."[131] Dahl, it should be pointed out, was neither the first nor the last political (or constitutional) theorist to accentuate the importance of free expression within the pluralist democratic regime. To the contrary, a long line of scholars and justices committed to this self-governance rationale for protecting free speech and writing.[132]

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[126]Daniel J. Boorstin, The Genius of American Politics 1, 162 (1953).

[127]*Id*. at 162.

[128]Carr, *supra* note **Error! Bookmark not defined.**, at 27 (emphasizing that democracy needs cultural roots); Gaddis, *supra* note 1, at 102 (emphasizing parliamentary democracies that collapsed in 1930s lacked a "culture of democracy"). For a more extensive discussion of the transition from republican to pluralist democracy, see Feldman, *supra* note 4, at 291-382.

[129]Democracy, *supra* note 124; Preface, *supra* note 124; *see* Katznelson, *supra* note **Error! Bookmark not defined.**, at 107-76 (arguing that Dahl and several other post-World War II scholars sought to articulate an approach to politics and democracy that made sense in the shadow of recent world tragedies).

[130]Democracy, *supra* note 124, at 109.

[131]*Id*. at 170; *see id*. at 169-75 (discussing free speech and other rights integral to the democratic process).

[132]*E.g.*, Thornhill v. Alabama, 310 U.S. 88, 96 (1940); Harry Kalven, Jr., *The New York Times Case*, 1964 Sup. Ct. Rev. 191, 208.

Pursuant to the self-governance rationale, no liberty or right—not even voting—is more crucial to the pluralist democratic process than free expression. Free speech and writing allow diverse groups and individuals to contribute their views in the pluralist political arena. If government officials interfere with the pluralist process, if they dictate or control public debates, then they skew the democratic outcomes and undermine the consent of the governed. In his book, *Free Speech and Its Relation to Self-Government,* Alexander Meiklejohn emphasized that the need to protect political expression "springs from the necessities of the program of self-government,"[133] or in other words, from "the structure and functioning of our political system as a whole."[134] Under pluralist democracy, free expression became a constitutional "lodestar."[135]

III. Pluralist Democracy Evolves: Free Expression, Judicial Conservatism, and the Cold War

Pluralist democracy evolved after emerging in the 1930s. As with republican democracy during the nineteenth and early-twentieth centuries, pluralist democracy retained its basic principles but changed in its details and applications. In this Part of the Article, I focus on two interrelated factors that contributed significantly to the evolution: the Cold War, and the consumer culture. Also, this Part explains how interpretations of free speech—particularly, conservative interpretations—have shifted over time, partly because of the changes in pluralist democracy.

Conservative interpretations of free speech are best understood within the broader context of post-World War II political developments. After the war, two primary strands of American political conservatism emerged: traditionalism and libertarianism.[136] Traditionalists reacted, in

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[133]Alexander Meiklejohn, Free Speech: And its Relation to Self-Government 26 (1948).

[134]*Id*. at 18.

[135]G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech In Twentiethcentury America*, 95 Mich. L. Rev. 299, 300-01 (1996).

[136]George H. Nash, The Conservative Intellectual Movement in America Since 1945, at 1-83 (2008 ed.).

particular, against the pluralist democratic commitment to ethical relativism. Whereas liberals increasingly celebrated the diverse values and interests roiling through a multicultural America, traditionalists emphasized moral clarity: a need to specify and cultivate the traditional values that had made America exceptional.[137] Meanwhile, libertarians reacted against the expanding power of the national government. Thus, liberals might advocate to continue and strengthen New Deal (and subsequently, Great Society) social programs, but libertarians maintained that government power diminished individual liberty and dignity. And from the libertarian standpoint, individual liberty was the root source of American vitality, creativity, and power.[138] One important manifestation of libertarianism was neoliberalism, which emphasized economic liberty and drew partly from classical liberal thinkers such as Adam Smith.[139] As already mentioned, early neoliberal thought began to emerge before World War II, and at that stage, it accepted government intervention in the market. But after the war, neoliberalism transformed, rapidly becoming more assertively libertarian and anti-government.[140]

Traditionalism (now, sometimes called social conservatism) and libertarianism united loosely in their opposition to liberalism and pluralist democracy. Nevertheless, traditionalism, with its emphasis on moral clarity, and libertarianism, with it emphasis on individual liberty, inevitably clashed in numerous situations.[141] Quite simply, the promotion of specific moral values sometimes decreased the degree of individual freedom, and vice versa. To be sure, some conservatives, including prominent neoconservatives, attempted to harmonize these conflicting

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[137]Russell Kirk and other traditionalists expressed a Burkean reverence for tradition and religion as sources of values. Russell Kirk, The Conservative Mind: From Burke to Santayana (1953); Nash, *supra* note 136, at 104-15.

[138]Peter Berkowitz, *Introduction*, *in* Varieties of Conservatism in America xvii-xviii (2004).

[139]Jones, *supra* note 3, at 11, 101-02; *e.g.*, Hayek, *supra* note 138, at 17.

[140]Jones, *supra* note 3, at 6-10 (summarizing the stages of neoliberalism).

[141]Nash, *supra* note 136, at 197-98, 235-43.

goals for the sake of political advantage.[142] Ultimately, though, such harmonizing was tenuous and fortuitous. In many if not most circumstances, traditionalism and libertarianism push in opposite directions.[143]

A. The Early-Cold War, Free Expression, and Moral Clarity

By the late 1930s, with pluralist democracy firmly entrenched, a broad-based coalition had emerged to support the protection of civil liberties. Many political conservatives reacted to the expanding power of the national government by aligning themselves with this coalition.[144] If the government, now seemingly controlled by diverse political outsiders, was reaching into new realms, especially of economic activity, then conservatives recognized that the courts and civil liberties might usefully shield them from government control. In 1938, the president-elect of the American Bar Association reminded lawyers that civil liberties protect the "wealthy and privileged,"[145] while renowned corporate lawyer, Grenville Clark, encouraged "conservatives" to be "intelligent, enlightened guardians of … civil rights."[146] This conservative backing for civil liberties bolstered the transformation of free speech into a constitutional lodestar.

But conservative support for civil liberties was brief. Pressure to suppress speech and writing increased during World War II and the Cold War, and led to the unraveling of the broad civil-liberties coalition.[147] During the 1940s and 1950s, conservatives frequently reasoned that

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[142]Stephen M. Feldman, Neoconservative Politics and the Supreme Court: Law, Power, and Democracy 3-4, 52-54 (2013) [hereinafter Feldman, Neoconservative]. The neoconservative leader, Irving Kristol, admitted that, in the 1980s, "political effectiveness was the priority." Murray Friedman, The Neoconservative Revolution 183 (2005) (quoting Kristol); *see* Irving Kristol, Neoconservatism: The Autobiography of an Idea (1995) (explaining neoconservatism).

[143]George H. Nash, *The Uneasy Future of American Conservatism*, *in* The Future of Conservatism 1-19 (Charles W. Dunn ed., 2007).

[144]Ken I. Kersch, Constructing Civil Liberties 112-17 (2004).

[145]Richard W. Steele, Free Speech in the Good War 11 (1999) (quoting Frank Hogan).

[146]Grenville Clark, *Conservatism and Civil Liberty*, 24 A.B.A. J. 640, 640-44 (1938) (address to Nassau County Bar Association, June 11, 1938).

[147]Feldman, *supra* note 4, at 430-31.

government interests outweighed free-expression interests and thus justified suppression. For instance, in *Minersville School District v. Gobitis*, decided in 1940, with war looming, the Court upheld mandatory flag salutes.[148] A Pennsylvania school board required teachers and students to salute the flag and recite the pledge of allegiance. When the Gobitis children, aged twelve and ten, refused to participate in the daily ceremony, they were expelled. The Gobitis family argued that the school board had violated the children's rights to free exercise of religion and free expression. The Court concluded, though, that a societal interest in unity and security outweighed both first-amendment rights.[149]

The Court would soon overrule itself on the issue of mandatory flag salutes, emphasizing in *West Virginia State Board of Education v. Barnette* that free speech is a constitutional lodestar and that democracy cannot exist without it.[150] Yet, the onset of the Cold War immediately after World War II triggered strong impulses to suppress dissent. For many Americans, the conflict between the United States and the Soviet Union presented a moral choice between freedom and democracy, on the one side, and tyranny and communism, on the other.[151] In a speech delivered on March 12, 1947, President Harry Truman announced that the United States would aid all democratic nations resisting communist takeovers. He justified this policy, which would be called the Truman Doctrine, in stark moral terms.

> At the present moment in world history nearly every nation must choose between alternative ways of life. … One way of life is based upon the will of the majority, and is distinguished by free institutions, representative government, free elections, guarantees of individual liberty, freedom of speech and religion, and freedom from political oppression.

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[148]310 U.S. 586 (1940), *overruled*, West Virginia State Board of Ed. v. Barnette, 319 U.S. 624 (1943).

[149]*Gobitis*, 310 U.S. at 593-96.

[150]319 U.S. 624, 640-42 (1943).

[151]Gaddis, *supra* note 1, at 7-8, 98-102.

> The second way of life is based upon the will of a minority forcibly imposed upon the majority. It relies upon terror and oppression, a controlled press and radio; fixed elections, and the suppression of personal freedoms.[152]

From this perspective, any dissent to American principles and policies amounted to an immoral betrayal of the nation's interests and the American way of life. By executive order, the President established a loyalty program for all federal employees. Under this program, "[m]embership in, affiliation with or sympathetic association with any foreign or domestic organization … designated by the Attorney General as … Communist, or subversive" constituted disloyalty that would disqualify the individual from federal employment.[153] Loyalty investigations were means for enforcing traditional American values, including certain less savory norms such as racism and anti-intellectualism. Loyalty review boards, for example, would ask: "Have you ever had Negroes in your homes?" Or they might ask: "Do you read Howard Fast? Tom Paine? Upton Sinclair?" One review board member explained: "Of course the fact that a person believes in racial equality doesn't *prove* that he's a communist, but it certainly makes you look twice, doesn't it?"[154]

Despite such executive actions, Red baiters, such as Republicans Joseph McCarthy and Richard Nixon, persistently attacked Truman and the Democrats as being too soft on communism.[155] In 1947, a Republican-controlled Congress overrode Truman's veto and enacted the Taft-Hartley Act.[156] Apart from its general anti-union purposes, Taft-Hartley required each

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[152]The Truman Doctrine (March 12, 1947), *reprinted in* 2 Commager, *supra* note 86, at 525, 527.

[153]Truman Loyalty Order (March 21, 1947), *reprinted in* 2 Commager, *supra* note 86, at 529, 529, 532.

[154]Robert Goldstein, Political Repression in Modern America 303-04 (2001); *see* Geoffrey R. Stone, Perilous Times 345-46 (2004) (discussing loyalty hearings).

[155]Geoffrey R. Stone, *Free Speech in the Age of Mccarthy: A Cautionary Tale*, 93 Cal. L. Rev. 1387, 1388-96 (2005).

[156]Taft-Hartley Act (June 23, 1947), *reprinted in* 2 Commager, *supra* note 86, at 537; Goldstein, *supra* note 154, at 290-91. The Republicans controlled both the Senate and the House. Austin, *supra* note **Error! Bookmark not defined.**, at 50, 52, 55 (Table: Partisan Composition of the United States House of Representatives).

union officer to sign an affidavit declaring that "he is not a member of the Communist Party or affiliated with such party."[157] Refusal to sign would preclude a union from invoking NLRA protections and procedures. In *American Communications Association v. Douds*, decided in 1950, the Supreme Court upheld this affidavit requirement in the face of a first-amendment challenge.[158] Chief Justice Vinson's majority opinion stressed the specific government interest (or legislative purpose) behind the statute. Congress had sought to protect the free flow of interstate commerce from what Communists "have done and are likely to do again," namely, call political strikes—labor strikes called to advance political rather than union-employee goals.[159] Thus, Vinson reasoned, Congress had imposed the Taft-Hartley affidavit requirement to restrict harmful conduct, not to restrict unpopular expression. Even so, the Court acknowledged that the statutory restriction might interfere with the expression of ideas by Communists. Vinson therefore proceeded to balance the government interest against the infringement of first-amendment freedoms. Concluding that the government interest predominated, the Court emphasized that Communists remained free to express their beliefs.[160] The statute merely sought to discourage unions from having Communist officers because, once in such a position of power, they could then call a political strike—a dangerous possibility, particularly in a defense industry. The first amendment, Vinson concluded, "does not require that [a Communist] be permitted to be the keeper of the arsenal."[161]

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[157]Taft-Hartley Act (June 23, 1947), *reprinted in* 2 Commager, *supra* note 86, at 537, 539.

[158]339 U.S. 382 (1950).

[159]*Id*. at 396.

[160]*Id*. at 402-03.

[161]*Id*. at 412. For a discussion of whether Communists truly threatened to weaken the nation's defenses by calling political strikes, see Redish, *supra* note **Error! Bookmark not defined.**, at 29-31; Ellen Schrecker, Many Are the Crimes 183-90 (1998). The scholarly consensus is that political strikes did occur, but they were far less common and serious than the government claimed.

Conservative Republicans in Congress continued to push an anti-Communist agenda. On September 23, 1950, Congress enacted, again over Truman's veto, the McCarran Internal Security Act, which required all "Communist-action" and "Communist-front" organizations to register with the Attorney General, who then was required to publish the registrants.[162] The Act further mandated that the Communist organizations divulge the names of their officers and the sources of their funds; Communist-action organizations also needed to identify their members.[163] Meanwhile, the House Committee on Un-American Activities (HUAC) investigated not only Hollywood insiders, most notoriously, but also doctors, lawyers, musicians, and others. Thousands of reputations and careers were destroyed. State legislatures, along with HUAC, investigated Communist influences in the public schools. Local school boards were apt to fire any teacher subject to an investigation, regardless of the result. States also imposed loyalty oaths to bar teachers who supposedly had Communist affiliations. In *Adler v. Board of Education of the City of New York*, decided in 1952, the Supreme Court upheld a New York law that compelled teachers to sign affidavits swearing they did not belong to subversive organizations.[164] The Court reasoned that each individual had a right to free expression but not a right to be a public school teacher. The fear was that individuals with Communist affiliations were morally unfit to teach the young. In the end, hundreds of school teachers as well as hundreds of college professors lost their jobs "because of their actual or suspected, past or present, membership in the Communist Party."[165]

Dennis v. United States might be the most renowned Supreme Court anti-Communist decision of the post-World War II period.[166] By a six-to-two vote, *Dennis* upheld the convictions

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[162]Internal Security Act (Sept. 23, 1950), 64 Stat. 987.

[163]*Id*.; Goldstein, *supra* note 154, at 322-23

[164]342 U.S. 485 (1952).

[165]Stone, *supra* note 154, at 422.

[166]341 U.S. 494 (1951).

of eleven leaders of the Communist Party of the United States (CPUSA) for advocating the violent overthrow of the government.[167] Even though the prosecution had proven only that the defendants taught Marxist-Leninist doctrine, Chief Justice Fred Vinson's plurality opinion reasoned that the advocated evil—the violent overthrow of the government—was so grave as to outweigh any first-amendment concerns.[168] The Court's *Dennis* decision started a "chain-reaction process,"[169] which led to the arrest and prosecution of dozens of additional CPUSA members.[170]

The irony of this Red Scare era was that the nation, with the Court's approval, vigorously suppressed free expression for the overarching purpose of protecting the American way of life and traditional values. In *Adler*, the Court explicitly stated that it sought to protect "truth and free inquiry" in the public schools.[171] To maintain such free inquiry, the government must "screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools."[172] From this perspective, free inquiry depended on moral clarity. The morally unfit necessarily undermined free and open discussion and therefore must be suppressed.

The nation sought to proclaim its traditional values—those that distinguished the United States from the Soviet Union—in other overt ways. For instance, in 1954, Congress amended the law specifying the words of the Pledge of Allegiance to include the phrase, "under God."[173] The legislative history underscored the congressional purpose: "to distinguish the American system

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[167]The defendants were also convicted for conspiring to organize the CPUSA. *Id*. at 495-97.

[168]*Id*. at 508-11.

[169]Freda Kirchwey, *The Shape of Things*, The Nation, Jan. 31, 1953, at 89.

[170]Goldstein, *supra* note 154, at 332-33; Patterson, *supra* note **Error! Bookmark not defined.**, at 193.

[171]342 U.S. at 490.

[172]*Id*. at 493.

[173]Pub. L. No. 396, 68 Stat. 249 (1954).

of government from communism and to underscore the commitment to inalienable, individual rights guaranteed by God."[174] In 1956, Congress officially declared "In God We Trust" to be the national motto.[175] For many Americans, religious values seemed central to democracy. In upholding the constitutionality of a released-time program—permitting students to be released early from public school for the purpose of receiving religious instruction—the Court stated: "We are a religious people whose institutions presuppose a Supreme Being. … When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions."[176] In his book, *Protestant-Catholic-Jew*, Will Herberg encapsulated the perception that traditional religious-cultural morality supplied "the crucial values" for "the American Way of Life."[177] According to Herberg, Protestantism, Catholicism, and Judaism were together "the three 'religions of democracy.'"[178]

Even as the Supreme Court seemingly supported traditional values in the Cold War, some conservative constitutional theorists remained dissatisfied and pushed the Court to move rightward. Writing in 1957, Walter Berns, who had studied under political philosopher Leo Strauss,[179] complained that "speech of almost any character, true or false, good or bad, enjoys a

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[174]Vincent Blasi & Seana V. Shiffrin, *The Story of West Virginia State Board of Education v. Barnette: The Pledge of Allegiance and the Freedom of Thought, in* Constitutional Law Stories 433, 471 (Michael C. Dorf ed., 2004) (citing legislative history).

[175]Anson Phelps Stokes & Leo Pfeffer, Church and State in the United States 570-71 (1964); Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 Loy. U. Chi. L.J. 121, 148-49 (2001).

[176]Zorach v. Clauson, 343 U.S. 306, 313-14 (1952).

[177]Will Herberg, Protestant-Catholic-Jew 88 (1955).

[178]*Id*. at 166. Protestants, Catholics, and Jews lived together "under the benevolent aegis of American democracy." *Id*. at 167; *see* Robert N. Bellah, *Civil Religion in America*, 96 Daedalus 1 (1967) (emphasizing the importance of civil religion in America).

[179]Leo Strauss, Natural Right and History (1953).

favored status before the Court," except in cases involving national security.[180] The justices, continued Berns, were committed to the tenets of pluralist democracy, including ethical relativism, and thus acted as if "all judgments of better and worse are arbitrary."[181] Berns condemned this judicial attempt to eschew value judgments vis-à-vis the content of expression.[182] The "problem of free speech," he explained, was really "the problem of virtue."[183] In resolving free-expression cases, the Court should attempt to "promote the virtue of citizens"[184] and to pursue the "general welfare" (that is, the common good).[185] Hence, Berns recommended that the Court return to a doctrinal equivalent of the bad tendency test, which the Court had followed during the republican democratic era.[186] The Court must distinguish between "good and evil,"[187] then must allow the government to cultivate citizens of "good character,"[188] while censoring the licentious.[189] Otherwise, the United States would be unable to protect "against dangers to civility"[190] and would no longer be a "decent society."[191]

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[180]Walter Berns, Freedom, Virtue, and the First Amendment 70 (1957).

[181]*Id*. at 26.

[182]*Id*. at 250-51.

[183]*Id*. at 255.

[184]*Id*. at 256.

[185]*Id*. at 255.

[186]*Id*. at 251.

[187]*Id*. at 47, 72, 126.

[188]*Id*. at 242, 256.

[189]*Id*. at 26, 225.

[190]*Id*. at 72.

[191]*Id*. at 70.

Subsequently, in reaction to the 1960s counterculture and social unrest—including the anti-Vietnam War movement, the Black Power movement, the women's movement, and so on—conservative scholars increasingly followed a traditionalist path condemning relativism and advocating for moral clarity. Alexander Bickel worried that democracy and civil society could not survive without "a foundation of moral values."[192] "A valueless politics and valueless institutions are shameful and shameless and, what is more, man's nature is such that he finds them, and life with and under them, insupportable."[193] Bickel's friend and Yale colleague, Robert Bork, emphasized the importance of such moral values to first-amendment jurisprudence. He argued that the justices should follow an originalist approach to constitutional interpretation, thus sticking "close to the text and the history, and their fair implications."[194] From Bork's perspective, the Court had unjustifiably expanded the first-amendment protection of free expression. "There is no basis," Bork wrote, "for judicial intervention to protect … scientific, literary or that variety of expression we call obscene or pornographic."[195] Pornography, in particular, should be "seen as a problem of pollution of the moral and aesthetic atmosphere precisely analogous to smoke pollution."[196]

B. The Flip Side of the Cold War: Liberty and Equality in an Emerging Consumers' Democracy

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[192]Alexander M. Bickel, The Morality of Consent 23 (1975).

[193]*Id*. at 24.

[194]Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 8 (1971) [hereinafter Bork, Neutral]; *see* Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 Wash. U.L.Q. 695, 695 (advocating for originalism); Steven M. Teles, *Transformative Bureaucracy: Reagan's Lawyers and the Dynamics of Political Investment*, 23 Studies in American Political Development 61, 76 (2009) (emphasizing importance of Bork's advocacy of originalism to the conservative legal movement).

[195]Bork, Neutral, *supra* note 334, at 20.

[196]*Id*. at 29.

During the early pluralist democratic era, the Cold War unquestionably generated suppression in the ostensible service of traditional American values, but the Cold War also had a flip side. Even as the nation tried to stamp out communism, America pushed to expand liberty in the realms of both political and economic rights.

1. Civil Rights and Democracy

America's long-running struggle against the Soviet Union forced the United States, for strategic reasons, to confront some of its own shortcomings. The ideal of pluralist democracy demanded that all citizens have an equal vote and an equal voice in democratic debates. But particularly in the South, governments systematically denied political rights to blacks.[197] And this denial of political rights facilitated the enactment and enforcement of 'Jim Crow' laws, which imposed legal segregation in a host of public accommodations, ranging from buses to schools to parks to water fountains. In fact, throughout the New Deal and early-postwar years, the Democratic party often left loopholes in federal programs that, in effect, excluded black participation. These loopholes were the price to be paid to white southerners to retain their support for the Democrats.[198]

The Cold War, however, helped undermine Jim Crow in the South.[199] In the struggle against the Soviets, the United States sought to win the allegiance of other nations, including emerging third-world nations, often populated by people of color.[200] To appeal to these third-world nations, the United States claimed that American democracy stood for liberty and equality for all, regardless of race, color, creed, or gender. As the Soviets gleefully pointed out, though,

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[197]Michael K. Brown, et al., Whitewashing Race 193-94 (2003).

[198]Ira Katznelson, When Affirmative Action was White (2005).

[199]Dudziak, *supra* note 1; Derrick A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518 (1980); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 Va. L. Rev. 7, 26-29 (1994).

[200]Gaddis, *supra* note 1, at 123.

such claims sounded woefully hollow when many African Americans continued to suffer under a type of apartheid.[201] And federal officials were fully cognizant that the image of democracy presented to the world could be either a benefit or a detriment to the nation's Cold War interests. Thus, the federal government sought to improve the nation's image by burnishing the democratic glow, whether it was in relation to the mistreatment of blacks in the South or the impoverishment of a segment of the country (again, the South), another by-product of Jim Crow.[202] As early as 1947, President Truman's Committee on Civil Rights reported that racial segregation was no longer acceptable for reasons "of conscience, of self-interest, and of survival in a threatening world … [o]r to put it another way, we have a moral reason, an economic reason, and an international reason" to attack segregation.[203] In the school segregation cases argued in the early 1950s, *Brown v. Board of Education*[204] and its companion, *Bolling v. Sharpe*,[205] the Justice Department filed an amicus curiae brief arguing that segregation was unconstitutional. Given that *Bolling* dealt with the segregated District of Columbia schools, the brief emphasized the treatment of people of color in Washington. "[F]oreign officials and visitors naturally judge this country and our people by their experiences and observations in the nation's capital; and the treatment of colored persons here is taken as the measure of our attitude toward minorities generally."[206] Thus, the brief highlighted how racial segregation, including in the schools,

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[201]Dudziak, *supra* note 1, at 11-13; *see* Walker, *supra* note 1, at 162 (emphasizing tension between American ideals and the oppression of African Americans).

[202]For links between Jim Crow and the economic underdevelopment of the South, see Dudziak, *supra* note 1, at 79; Bell, *supra* note 199, at 523-25.

[203]To Secure These Rights: The Report of President Harry S. Truman's Committee on Civil Rights 158 (1947; 2004 reprint); *see id*. at 158-67 (elaborating these three reasons for change). Many white southerners initially resisted social change even though they would ultimately benefit economically from desegregation. Gavin Wright, Sharing the Prize: The Economics of the Civil Rights Revolution in the American South 1-31, 259-60 (2013); Klarman, *supra* note 199, at 37-51 (explaining how economic pressures were brought to bear in the South).

[204]347 U.S. 483 (1954).

[205]347 U.S. 497 (1954).

[206]Dudziak, *supra* note 1, at 99 (quoting amicus brief).

contravened national interests: "[T]he existence of discrimination against minority groups in the United States has an adverse effect upon our relations with other countries. Racial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith."[207] When the Supreme Court followed the Justice Department's recommendation and held that school segregation violated the Constitution, Chief Justice Warren's unanimous opinion emphasized that education was crucial for "good citizenship" in "our democratic society."[208] In fact, the national government immediately used the decision to its advantage in the Cold War. Within one hour after the Court announced *Brown*, "the Voice of America broadcast the news to Eastern Europe [emphasizing] that 'the issue was settled by law under democratic processes rather than by mob rule or dictatorial fiat.'"[209]

In short, the Cold War created an imperative for the United States to champion the principles of pluralist democracy. Likewise, to defeat the Soviets, the nation needed to temper any threat to American democracy—or at least to the appearance of democracy. Thus, nonviolent civil rights protests were acceptable—because they underscored how America could change in accordance with the rule of law—but any protests that became too radical or disruptive were considered subversive of national interests.[210] Violent protests suggested that the democratic process could not peacefully accommodate conflicting interests and values, while a judicial decision like *Brown* lent credibility to the nation's claim that the democratic rule of law was

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[207] *Id*. at 100 (quoting amicus brief).

[208] 347 U.S. at 493.

[209] Dudziak, *supra* note 199, at 107; *see* Stephen M. Feldman, *Do the Right Thing: Understanding the Interest-Convergence Thesis*, 106 Nw. U. L. Rev. Colloquy 248 (2012) (elaborating interest convergence as historical thesis).

[210] Derrick Bell, Race, Racism, and American Law 280-85 (2d ed. 1980); Feldman, *supra* note 4, at 413-18; Charles R. Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431.

superior to communism.[211] In fact, conservative opponents of civil rights were quick to denounce protestors as communists or communist sympathizers, especially if they even hinted at violence.[212] "All the disgraceful episodes which have occurred in New York and other cities recently were certainly not directed by patriotic American Negro leaders," declared the magazine, *U.S. News and World Report*.[213] "The time has come for the Government of the United States to do more to expose the infiltration in civic movements by the Communist Party and its agents, stooges, and allies inside this country."[214]

Regardless, after the Court decided *Brown*, the pro-democracy effects of the Cold War continued to snowball, as the nation moved toward the fulfillment of pluralist democratic principles. President Lyndon B. Johnson, a Southerner from Texas, proclaimed that "[i]t is wrongly—deadly wrong—to deny any of your fellow Americans the right to vote."[215] In 1964, the twenty-fourth amendment, proscribed poll taxes in federal elections, while the Voting Rights Act of 1965 (VRA) and parts of the Civil Rights Act of 1964 eradicated literacy, educational, and character tests that had been used to deny or discourage racial minorities from voting. The VRA, in particular, produced substantive change—not merely changes in the appearance or forms of democracy. For instance, the percentage of blacks registered to vote in Mississippi catapulted from 6.7 in 1964 to 66.5 percent in 1969.[216] The Court, too, continued to transform pluralist democracy by interpreting the Constitution to protect participation in the democratic process. In the 1960s, the Court decided many cases that explicitly protected the democratic

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[211]Dudziak, *supra* note 1, at 11-17, 249-51.

[212]Brands, *supra* note 1, at 108-15.

[213]Id. at 110 (quoting *U.S. News and World Report*, May 4, 1964).

[214]*Id*.

[215]Keyssar, *supra* note 35, at 263 (quoting Johnson from 1965).

[216]Manning Marable, The Great Wells of Democracy 71 (2002).

process and made it far more inclusive. *Gomillion v. Lightfoot*, decided in 1960, held that a state law transforming the city of Tuskegee, Alabama, "from a square to an uncouth twenty-eight-sided figure" violated the fifteenth amendment.[217] The state statute, which removed "from the city all save four or five of its 400 Negro voters while not removing a single white voter or resident,"[218] amounted to unconstitutional gerrymandering that denied African Americans "the municipal franchise and consequent rights."[219] In *Baker v. Carr*, the Court overruled an earlier decision and held that an allegation of vote dilution arising from disproportional representation, whether in a state legislature or the House of Representatives, constituted a justiciable claim.[220] *Baker* led to *Wesberry v. Sanders*, focusing on congressional districts, and *Reynolds v. Sims*, focusing on state legislative districts, which together established the doctrine of one person, one vote.[221]

Unsurprisingly, given how the self-governance rationale posits that free expression is a prerequisite for pluralist democracy, when the Court in the 1960s invigorated its protection of the democratic process, it also energized the first-amendment guarantee of free speech. Many of the Court's most speech protective decisions came during that decade. Indeed, one could reasonably argue that the Court fulfilled the promise of free expression being a constitutional lodestar. Again and again, the justices in these cases emphasized the need for free and open discussions of political issues in a pluralist democratic regime. *New York Times v. Sullivan*, decided in 1964, asked whether the first amendment protected the press from civil libel actions brought by

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[217]364 U.S. 339, 340 (1960).

[218]*Id*. at 341.

[219]*Id*. at 347.

[220]369 U.S. 186 (1962), *overruling* Colegrove v. Green, 328 U.S. 549 (1946).

[221]Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964).

government officials.[222] The *Times* had published a full-page advertisement that solicited support for the civil rights movement while criticizing the Montgomery, Alabama, police commissioner. The advertisement, however, contained several minor factual errors. For instance, it stated that students in Montgomery, Alabama, had sung "'My Country, 'Tis of Thee' on the State Capitol steps," but they had, in fact, sung the national anthem.[223] The police commissioner successfully brought a civil action in the state courts for defamation. The Supreme Court had previously recognized defamation as constitutionally unprotected (or low-value) speech, yet this case resembled a criminal prosecution for seditious libel: The government, through the institution of the state courts, sought to punish the press for criticizing a public official, the police commissioner. Reversing, a unanimous Court emphasized the self-governance rationale. "[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[224] After deeming government prosecution of seditious libel unconstitutional, the Court reasoned that if a state could not constitutionally punish criticisms of government policies and officials through a criminal prosecution, then it should not be able to impose punishment through a civil defamation action. Instead, a "public official" can recover "damages for a defamatory falsehood relating to his official conduct" only if "he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[225]

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[222]376 U.S. 254 (1964).

[223]*Id*. at 258-59.

[224]*Id*. at 270.

[225]*Id*. at 279-80.

Pickering v. Board of Education, decided in 1968, arose when a School Board dismissed a teacher for writing a letter to a newspaper.[226] The letter criticized how the Board and the school superintendent had handled funding issues. The Court began by emphasizing that public school teachers cannot be forced, as a condition of employment, to relinquish their free-expression rights to comment on issues of public concern. While the state, as an employer, might have an interest in regulating for purposes of efficiency, the first amendment protects an employee from being discharged for comments "on issues of public importance."[227] One year later, the Court decided *Tinker v. Des Moines Independent Community School District*, which also involved public schools, though in this case the schools had suspended students for wearing black armbands in protest against the Vietnam War.[228] The Court categorized the armbands as "pure speech" rather than conduct and, therefore, as deserving of "comprehensive protection under the First Amendment."[229] Like teachers, students do not lose their first-amendment rights merely because they enter a school, the Court reasoned. Although students' presence in a school environment might require some diminishment of their rights, the Court articulated a highly speech-protective doctrine: Student expression is constitutionally protected unless it causes "material and substantial interference with schoolwork or discipline."[230] In concluding that the student speech in this case was constitutionally protected, the Court underscored that public schools are training grounds where students learn the skills prerequisite for participation in pluralist democracy—the skills needed to become citizens and leaders.[231] *Brandenburg v. Ohio*,

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[226]391 U.S. 563 (1968).

[227]*Id*. at 574.

[228]393 U.S. 503 (1969).

[229]*Id*. at 505-06.

[230]*Id*. at 511.

[231]*Id*. at 512.

decided the same year as *Tinker*, directly confronted the issue raised in the World War I Espionage Act cases: When, if ever, did the Constitution protect expression encouraging unlawful conduct, particularly subversive advocacy criticizing the government?[232] Compared to the World War I decisions, the Court now dramatically enlarged free-expression guarantees. Under the *Brandenburg* test, the first amendment shields expression unless the speaker specifically intends to incite imminent unlawful action, and such unlawful action is likely to occur imminently.[233] In sum, in case after case, from *Sullivan* to *Pickering* to *Tinker* to *Brandenburg*, the Court expanded the first-amendment protection of free expression—a judicial action induced partly by the Cold War imperative to uphold pluralist democratic principles.

2. Capitalism and Democracy

The Cold War combined with other forces to contribute to the further evolution of pluralist democracy in yet another manner. In particular, a maturing mass-consumer culture intertwined with the Cold War to reshape the economic ground underlying the pluralist democratic regime. In the 1920s, the development of mass-consumerism had helped create a widely shared American culture revolving around the consumption of mass-produced items and the worship of mass-media celebrities.[234] This mass-consumer culture, in turn, helped fuse Americans into a more encompassing and less exclusionary polity that would serve as a springboard for pluralist democracy. But the development of the mass-consumer culture did not end in the twenties. It continued in the 1930s and, even more so, after World War II, as the nation emerged out of its prolonged economic depression.[235]

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[232]395 U.S. 444 (1969).

[233]*Id*. at 447.

[234]Feldman, *supra* note 4, at 298-303; *see* Stewart Ewen, Captains of Consciousness 23-50 (1976) (discussing the production of the mass-consumer culture).

[235]*See* Ewen, *supra* note 234, at 49 (describing consumption as a "political ideology").

Americans increasingly embraced mass-consumerism after the war.[236] Gross national product (GNP) nearly doubled from 1945 to 1955, going to $397.5 billion.[237] During those years, personal consumption expenditures on manufactured products increased dramatically; spending on the purchase of new and used cars alone jumped an incredible forty-fourfold.[238] Significantly, the nation's prosperity empowered a growing percentage of Americans to enjoy these consumer goods; gross disparities of wealth diminished as the middle class grew.[239] Moreover, changes in commercial advertising contributed to the growth of the mass-consumer culture. The very nature of advertising transformed during the twentieth century. Early in the century, product advertisements provided potential consumers with information that would allow them to assess rationally the benefits of purchasing the respective products. During the 1920s, however, advertisers began to market images and lifestyles. Advertisements encouraged individuals to purchase particular products because the products symbolized certain attractive personality traits or ways of living.[240] A particular automobile, for instance, might be marketed as conducive to a relaxed drive in the country on a Sunday afternoon.[241]

Of course, advertisers continued to experiment, to quest after ever-more effective means for generating sales. Advertisements, for example, could generate previously unrecognized anxieties—oh no! my underarms look sweaty!—which only a certain product could alleviate—

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[236]Lizabeth Cohen, A Consumers' Republic 113 (2003); *see* Gary Cross, An All-Consuming Century: Why Commercialism Won in Modern America (2000) (discussing the development of the mass-consumer culture); Ronald K.L. Collins & David M. Skover, *Commerce and Communication*, 71 Tex. L. Rev. 697 (1993) (discussing the development of commercial advertising in the twentieth century).

[237]Statistical History, *supra* note **Error! Bookmark not defined.**, at 139 (Table: Gross National Product)

[238]*Id*. at 178 (1965) (Table: Personal Consumption Expenditures).

[239]Walker, *supra* note 1, at 162.

[240]Ewen, *supra* note 234, at 25, 35-36; Collins & Skover, *supra* note 236, at 700-02.

[241]Dumenil, *supra* note 84, at 89.

thank goodness for my antiperspirant.[242] After World War II, marketing analysts realized that they could increase sales by targeting distinct segments of the population with particularized advertisements and products—marketing one deodorant for males and another for females, one beer for the wealthy and another for the middle-class.[243] Such segmentation of the population for marketing purposes has, of course, become increasingly refined. An individual buying toothpaste today, for instance, must decide from a dizzying array of products. No longer must one choose between Crest and Colgate. Now one must puzzle over special whitening toothpaste, special tartar-removing toothpaste, special anti-cavity toothpaste, special mouthwash-striped toothpaste, special gum-disease toothpaste, and on and on and on.

Meanwhile, changes in the mass media transformed advertising. In the early-twentieth century, advertisements were placed within the print media, primarily newspapers and magazines. The development of electronic mass-media—radio in the 1920s, television in the 1950s, and the internet in the 1990s—opened additional pathways for reaching consumers.[244] Given these new venues and the evident success of advertising as a means for increasing profits, the amount of money devoted to commercial advertising grew astronomically.[245] In 1900, $542 million was spent on advertising; by 1929, the amount had jumped to $3,426 million.[246] After World War II, advertising volumes skyrocketed: In 1949, the amount had climbed over $5,200 million, and by 1957, the amount was above $10,300 million.[247] The numbers continued their

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[242]*Id*. at 90; Collins & Skover, *supra* note 236, at 703; *see* Ewen, *supra* note 234, at 35 (emphasizing the creation of "fancied need").

[243]Cohen, *supra* note 236, at 336-38.

[244]*See* Cross, *supra* note 236, at 100 (discussing the rapid spread of television); Paul Starr, The Creation of the Media: Political Origins of Modern Communications 327-84 (2004) (discussing radio and television).

[245]Cross, *supra* note 236, at 34, 77.

[246]Statistical History, *supra* note **Error! Bookmark not defined.**, at 526 (Table: Volume of Advertising).

[247]*Id*.

ascent: In 1990, an amazing $129,968 million was spent on advertising, a figure that nearly doubled by 2001.[248]

The expanding mass-consumer culture fused with American law and politics in multiple ways. Most important, pluralist democracy became, in effect, a consumers' democracy.[249] From its outset, pluralist democracy had resonated with capitalist ideology because of the overlapping emphases on the individual pursuit of self-interest. But during the Cold War period, the connection between democracy and capitalism grew stronger; politics grew increasingly like commercial consumption. Citizens followed their own values and interests, whether shopping for a product or a candidate.[250] In the presidential campaigns of the 1950s, New York advertising agencies successfully marketed Dwight "Ike" Eisenhower.[251] Then, when market analysts realized the effectiveness of aiming advertisements at targeted population segments, political analysts followed close behind. Thus, the John F. Kennedy campaign marketed to distinct segments of the political market in the 1960 election.[252] Election campaigns became "indistinguishable in form (and often in content) from product marketing campaigns."[253]

The changing nature and role of corporations in American society strongly contributed to this growing connection between democracy and capitalism. During the first decades of the twentieth century, corporations often were demonized as "soulless leviathans," associated with

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[248]U.S. Census Bureau, Statistical Abstract of the United States: 2002 (122d ed.) 772 (Table No. 1253: Advertising—Estimated Expenditures by Medium) [hereinafter Abstract].

[249]Collins & Skover, *supra* note 236, at 724-25; *see* Cohen, *supra* note 236, at 113-342 (discussing the development of a consumers' republic or democracy after World War II).

[250]"[S]elf-interested citizens increasingly view government policies like other market transactions, judging them by how well served they feel personally." Cohen, *supra* note 236, at 9.

[251]*Id*. at 333; Collins & Skover, *supra* note 236, at 725.

[252]Cohen, *supra* note 236, at 336-38.

[253]Collins & Skover, *supra* note 236, at 725.

robber barons.[254] In 1933, Justice Brandeis referred to "giant corporations"[255] as a "Frankenstein monster."[256] After World War II, though, the corporate public image improved: Corporations became increasingly associated with and even emblematic of American capitalism in its Cold War battle against communism.[257] And in the midst of the Cold War, the connection between corporate capitalism and the United States did not remain merely implicit; it was a weapon to be wielded openly against the Soviets.[258] In 1959, Vice President Richard Nixon attended a trade show in Moscow. He boasted about the opulence of the American kitchen appliances on display, which the *New York Times* described as a "lavish testimonial to abundance."[259] Nixon did not hesitate to accentuate the differences between America and the Soviet Union. "The United States comes closest to the ideal of prosperity for all in a classless society," he proclaimed.[260] The variety and availability of consumer goods in the U.S. symbolized "'our right to choose. We do not wish to have decisions made at the top by governmental officials,' whether about [our] 'kind of house' or [our] 'kind of ideas.'"[261] In a similar vein, in 1955, when Will Herberg celebrated the American Way of Life, he was referring to more than democracy. He included the products and comforts that accompanied the American capitalist economy. The American Way of Life

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[254]Bakan, *supra* note 9, at 16-17; Robert L. Kerr, The Corporate Free-Speech Movement 19-21 (2008); Kevin Phillips, Wealth and Democracy 39 (2002).

[255]Liggett v. Lee, 288 U.S. 517, 566 (1933) (Brandeis, J., dissenting in part).

[256]*Id*. at 567 (Brandeis, J., dissenting in part).

[257]Kerr, *supra* note 254, at 31-32; Thomas J. Sugrue, Sweet Land of Liberty 117 (2008). "[T]he anti-corporate ideology of the thirties rapidly evaporated, leaving scarcely a trace." Sheldon S. Wolin, Politics and Vision 552 (Expanded ed. 2004) [hereinafter Vision].

[258]*See* Dudziak, *supra* note 1, at 243 (emphasizing that capitalism "was championed" during Cold War).

[259]Patterson, *supra* note **Error! Bookmark not defined.**, at 317 (quoting *Times*); *see* Castillo, *supra* note 1, at vii-xi (discussing the American's Moscow exhibition).

[260]Cohen, *supra* note 236, at 126 (quoting Nixon).

[261]*Id*. (quoting Nixon).

"synthesizes all that commends itself to the American as the right, the good, and the true in actual life," he wrote.[262] "It embraces such seemingly incongruous elements as sanitary plumbing and freedom of opportunity, Coca-Cola and an intense faith in education—all felt as moral questions relating to the proper way of life."[263] In effect, American commercial products had become "icons of anticommunism."[264]

As the mass-consumer culture fused with pluralist democracy, corporations sought to exercise greater control over democracy and government. Starting in the 1960s and 1970s, the number of organized interest groups lobbying in Washington, D.C., began to increase rapidly.[265] While 5,843 national nonprofit associations existed in 1959, [266] that number had nearly tripled to 14,726, by 1980, and it had jumped to 22,289 by 1990.[267] To be sure, these proliferating interest groups represented a wide variety of viewpoints and concerns, including professional associations like the American Medical Association, religious organizations like the Christian Coalition, and anti-abortion and pro-choice advocates like the National Right to Life Organization and the National Abortion and Reproductive Rights Action League.[268] Yet, by far, the largest number of associations fell into the "trade, business, and commercial" category.[269]

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[262]Herberg, *supra* note 177, at 88.

[263]*Id*. at 88-89; *see id*. at 91 (emphasizing free enterprise).

[264]Castillo, *supra* note 1, at xiii.

[265]Mark P. Petracca, *The Rediscovery of Interest Group Politics*, *in* The Politics of Interests: Interest Groups Transformed 11-14 (1992).

[266]Gene M. Grossman & Elhanan Helpman, Special Interest Politics 2 (2001).

[267]Abstract, *supra* note 248, at 776 (Table No. 1261: National Nonprofit Associations, compiled from *Encyclopedia of Associations*).

[268]Grossman & Helpman, *supra* note 266, at 3.

[269]Abstract, *supra* note 248, at 776 (Table No. 1261: National Nonprofit Associations, compiled from *Encyclopedia of Associations*).

Basically, corporations became more resolute at using their bureaucratic organizations and accumulated wealth to intervene in the pluralist democratic marketplace.[270] Over the last five years of the 1970s, for instance, the number of corporate political action committees zoomed from 300 to 1,200. Even more extreme, from the early 1970s to the early 1980s, the number of corporations with registered lobbyists in Washington expanded nearly fifteenfold.[271]

During this era, in 1971, future Supreme Court Justice Lewis Powell wrote an influential memorandum to his friend and neighbor, an official for the U.S. Chamber of Commerce.[272] Maintaining that the free enterprise system was under attack from the American left, Powell proposed a detailed program of response. For instance, he advocated for the creation of conservative think tanks that would help counter liberalism on college campuses. He also argued that business should use the corporate-owned media to shape public opinion. In doing so, corporate spokespersons should emphasize that any threat to business was a threat to "individual freedom"[273]—to liberty, in other words. Corporate America, Powell was suggesting, should expressly equate the interests of business with the liberty interests of individual Americans. Finally, he insisted that business must begin to assert political power more directly, whether through lobbying or other means. Business, he wrote, must learn "that political power is necessary; that such power must be assidously [sic] cultivated; and that when necessary, it must be used aggressively and with determination."[274] Businesses answered Powell's call to action with enhanced and aggressive politicizing.[275] Membership in the Chamber of Commerce more

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[270]Kerr, *supra* note 254, at 7-8.

[271]Jacob S. Hacker & Paul Pierson, Winner-Take-All Politics 118-19 (2010); *see* Kerr, *supra* note 254, at 33-34 (emphasizing expanding corporate political influence).

[272]Lewis Powell, *Confidential Memo: Attack of American Free Enterprise System*, Aug. 23, 1971.

[273]*Id*.

[274]*Id*.

[275]*See* Chris Hedges, Death of the Liberal Class 176-77 (2010) (discussing importance of Powell memo); Kerr, *supra* note 254, at 67-68 (same).

than quadrupled over the next decade.[276] In 1972, CEOs of some of America's largest corporations formed the Business Roundtable, committed to expanding corporate political power.[277] Significantly, as part of this effort, corporations explicitly advocated that their expenditures fell within the compass of first-amendment protections. During the seventies, Mobil Oil paid to publish in the *New York Times* numerous essays, which effectively appeared as op-eds, arguing that corporate speech was integral to American liberty and democracy.[278] In fact, over time, corporate advocates successfully changed "the debate from health, labor, and safety issues [which had predominated during the 1960s and early 1970s] to the rising cost of big government."[279] And not incidentally, Powell was sitting on the Supreme Court less than six months after he had written his memorandum.

Despite these corporate advances, the Cold War inherently constrained the extension of capitalism and corporate power. Specifically, the Cold War tempered laissez-faire dreams on both the international and domestic fronts. On the international front, the United States after World War II did not immediately attempt to reinstate the laissez-faire dream of a wide open and unregulated international marketplace. First, political geography imposed boundaries on corporate reach. Corporations seek new consumers, regardless of nationality or ethnicity, because new consumers produce additional profits. But even as corporations went multinational, they could not go global. With few exceptions, corporations could not open markets behind the "Iron Curtain."[280] Second, the Bretton Woods monetary system, negotiated toward the end of the war, was designed to nurture an international capitalist market among the non-Iron Curtain

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[276]Jones, *supra* note 3, at 43.

[277]*Id*. at 43-44.

[278]Kerr, *supra* note 254, at 48-53.

[279]Hedges, *supra* note 275, at 177.

[280]Winston Churchill introduced the term, Iron Curtain, in 1946. Gaddis, *supra* note 1, at 95.

countries, but with limits protecting against the types of economic crises and disasters witnessed during the early-twentieth century.[281] Bretton Woods created the International Monetary Fund (IMF) and the World Bank (the International Bank for Reconstruction and Development). The IMF would monitor and manage exchange rates and currencies with an eye to avoiding crises. The World Bank would provide funds to underdeveloped and war-ravaged nations.[282] To be sure, Bretton Woods contained elements that resonated with the interwar international market and gold standard. The forty-four member nations agreed to peg their currencies to the U.S. dollar, and the U.S. agreed to ground the dollar on its gold reserves.[283] Yet, Keynes, who helped create the system, said that it was "the exact opposite of the gold standard."[284] Overall, the postwar system was designed to avoid economic crises by "lowering tariff barriers, stabilizing currencies, and coordinating government planning with the workings of markets."[285] The American and western European leaders had learned from history: International economic prosperity should not be left to the whims of an invisible hand. The Soviets were the utopians: They insisted that history must fit Marxist theory and that a proletarian paradise could be achieved. The democratic-capitalists of the West had become pragmatists: They now sought practical solutions for economic and government problems while eschewing utopian verities, whether laissez faire or otherwise.[286] Thus, as soon as the Bretton Woods system appeared inadequate for rebuilding the war-shattered western European economies, the U.S. announced the Marshall Plan—named for Secretary of

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[281]Frieden, *supra* note 9, at 475; Saull, *supra* note 1, at 62; Benjamin J. Cohen, *Bretton Woods System*, *in* Routledge 1 Encyclopedia of International Political Economy 95, 95-97 (R.J. Barry Jones ed., 2001).

[282]Saull, *supra* note 1, at 62-63; Cohen, *supra* note 281, at 95.

[283]Wyatt Wells, American Capitalism, 1945-2000, at 13-14 (2003); Cohen, *supra* note 281, at 95-96.

[284]M.J. Stephey, *Bretton Woods System*, Time (Oct. 21, 2008) (quoting Keynes); *see* Eichengreen, *supra* note 102, at 93-94 (explaining differences between gold standard and Bretton Woods).

[285]Gaddis, *supra* note 1, at 93.

[286]*Id*. at 116-17.

State George Marshall—which funneled 12-13 billion dollars in grants to western European nations.[287] Although aspects of the Marshall Plan might, in the short run, contravene the concept of a laissez-faire international marketplace, Marshall and President Truman emphasized its practical benefit, preventing economic disaster.[288]

On the domestic front, no matter how strongly corporate capitalists quested after additional wealth, they could not aggressively attack the government or undermine democratic culture—so long as American democracy was locked in battle with Soviet communism. For better or worse, corporate capitalists were, in effect, teammates with the government in the fight against communism. Thus, if widespread middle-class economic attitudes generated the cultural willingness to negotiate and compromise politically, to engage in the pluralist democratic process—as numerous political theorists maintained—then the economic middle class needed to be preserved.[289] Corporate greed could not squeeze the middle class too excessively, at least not yet. And, in fact, Nixon was not alone in proclaiming that capitalism and mass consumption demonstrably created "a classless society [and thus countered] Soviet charges that capitalism created extremes of wealth and poverty."[290] This assertion, that capitalism engendered widespread economic equality, which in turn promoted democratic equality, was a staple of American Cold War propaganda. The documentary film, *Despotism*, produced by Enclycopaedia Britannica, emphasized the inverse: that if wealth became too concentrated in an upper class, if the divisions between the haves and have-nots became too distinct, "then despotism threatened."[291] To be sure, neoliberals, often called libertarians during the 1950s, became more

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[287]Saull, *supra* note 1, at 64-65; Wells, *supra* note 283, at 23-24.

[288]Gaddis, *supra* note 1, at 30-32; Leffler, *supra* note 1, at 157-64; Saull, *supra* note 1, at 64-68.

[289]Truman, *supra* note 125, at 520-23; Hartz, *supra* note 125, at 50-64; Key, *supra* note 125, at 54-57.

[290]Cohen, *supra* note 236, at 125-26.

[291]*Id*. at 125.

strident defenders of the economic marketplace during this post-World War II era.[292] In the context of the Cold War, their conservative defense of the market took on "apocalyptic" proportions.[293] Even so, because neoliberals viewed themselves as "foot-soldiers in the fight against communism," they still needed to restrain their questioning of democratic government.[294] After all, the government was leading the fight against the communists. Whenever the U.S. government successfully persuaded a third-world nation to align against the Soviet Union, American corporations stood to profit as their markets expanded.[295] In fact, many conservatives were moved to support government-funded research. More specifically, government support for particular industries and research related to national defense seemed not only justified but urgently needed, whether it involved the development of a hydrogen (fusion) bomb or the exploration of outer space.[296] As Margaret Pugh O'Mara points out, "Cold War geopolitics prompted new political attention to science,"[297] and transformed scientists into "elites."[298] Massive sums of money flowed to research universities, such as Stanford, MIT, and Harvard, creating affluent "cities of knowledge."[299]

The evolution of pluralist democracy into a consumers' democracy profoundly influenced the Supreme Court justices, especially in free-expression cases. In 1942, soon after pluralist

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[292]Jones, *supra* note 3, at 141 (linking neoliberalism and libertarianism); Nash, *supra* note 136, at 32-37, 46-49 (same); *e.g.*, Friedman, *supra* note 90.

[293]Jones, *supra* note 3, at 120.

[294]*Id*.

[295]Joseph D. Phillips, *Economic Effects of the Cold War*, *in* Corporations and the Cold War 173, 186-88 (David Horowitz ed., 1969).

[296]Gérard Duménil & Dominique Lévy, Capital Resurgent 1 (2004); Gaddis, *supra* note 1, at 35-36, 61-63.

[297]Margaret Pugh O'Mara, Cites of Knowledge 5 (2005).

[298]*Id*. at 2.

[299]*Id*. at 1-9; Jones, *supra* note 3, at 281-82.

democracy had supplanted republican democracy, the Supreme Court held that the first amendment did not protect commercial expression.[300] The regulation of commercial advertising, at the time, seemed no different from other permissible government regulations of the economic marketplace.[301] But during the Cold War, as the mass-consumer culture became increasingly entangled with democratic processes, the Court modified its treatment of commercial expression. *Bigelow v. Virginia*, decided in 1975, arose when a newspaper editor ran an advertisement for the Women's Pavilion, which provided abortion services in another state.[302] The state of Virginia convicted the editor for violating a statute that proscribed any "advertisement" that would "encourage or prompt the procuring of abortion."[303] Justice Blackmun wrote an opinion for a seven-justice majority, which included now-Justice Powell, holding the conviction unconstitutional. He began by acknowledging the Court's prior recognition of several low-value "categories of speech—such as fighting words, or obscenity, or libel, or incitement—[which] have been held unprotected."[304] Nonetheless, Blackmun insisted that "commercial advertising enjoys a degree of First Amendment protection."[305] Advertising was no longer "unprotected per se,"[306] though the Court allowed that it could "be subject to reasonable regulation."[307] Then, by applying a balancing test, weighing the government interest in regulation against the first-

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[300]Valentine v. Chrestensen, 316 U.S. 52, 54-55 (1942).

[301]*E.g.*, Wickard v. Filburn, 317 U.S. 111 (1942) (upholding a regulation of the economic marketplace, specifically in this case, production quotas).

[302]421 U.S. 809 (1975).

[303]*Id*. at 812-13.

[304]*Id*. at 819.

[305]*Id*. at 821.

[306]*Id*. at 820.

[307]*Id*. at 826.

amendment interest in free expression, the Court held this particular statutory proscription unconstitutional.[308]

In the following year, 1976, the Court explained that the first amendment protected advertising because commercial expression and pluralist democracy had become inseparable. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the Court held unconstitutional a state law that prohibited licensed pharmacists from advertising prescription-drug prices.[309] Democracy involves the allocation of resources in society, the Court explained, but most resource-allocation decisions are made through the economic marketplace. "Advertising, however tasteless and excessive it sometimes may seem, is … dissemination of information as to who is producing and selling what product, for what reason, and at what price," Blackmun wrote for an eight-justice majority, which of course included Powell.[310]

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.[311]

In other words, implicitly alluding to the self-governance rationale, the Court concluded that advertising is essential for "the proper allocation of resources in a free enterprise system." [312] Furthermore, advertising contributes to intelligent decision making about how the economic marketplace "ought to be regulated or altered."[313] Finally, regardless of the overarching

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[308]*Id*. at 821-26.

[309]425 U.S. 748 (1976).

[310]*Id*. at 765.

[311]*Id*.

[312]*Id*.

[313]*Id*.

importance of broad political debates and democratic decision making—whether about economic regulations, candidates for high office, or otherwise—Blackmun stressed that most people care more about their personal consumer-oriented decisions. "As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate."[314]

The Court continued to resolve commercial-expression issues pursuant to a balancing test, with the definitive statement of this approach coming in *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York*, decided in 1980.[315] This time, Powell wrote the majority opinion invalidating a state ban on promotional advertising by utility companies. In numerous subsequent cases, the Court has invoked Powell's four-part balancing test from *Central Hudson* to determine the constitutionality of commercial speech regulations.[316] Unsurprisingly, the reasoning in Powell's *Central Hudson* opinion echoed his 1971 memorandum. Most important, Powell equated the interests of individual Americans with the interests of business: "Commercial expression not only serves the economic interest of the [business] speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information."[317] Moreover, he emphasized the significance of the private sphere in relation to the public sphere. "[M]any, if not most, products," he wrote, "may be tied to public concerns with the environment, energy, economic policy, or individual health and safety."[318]

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[314] *Id*. at 763.

[315] 447 U.S. 557, 566 (1980).

[316] *Id*. at 566 (articulating four-part balancing test); *see, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (applying *Central Hudson* test); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (same).

[317] *Central Hudson*, 447 U.S. at 561-62.

[318] *Id*. at 562 n.5.

In 1976, the same year the Court decided *Virginia State Board of Pharmacy*, the Court first examined the constitutionality of campaign finance regulations. The seminal decision, *Buckley v. Valeo*, upheld a statutory restriction on campaign contributions to candidates but invalidated a restriction on campaign expenditures, whether made by candidates, individuals, or groups (including political action committees).[319] A contribution is money given directly to a candidate (and thus within the candidate's control), while an expenditure is money spent on a campaign but never within a candidate's immediate control. With Powell joining a per curiam majority opinion, the Court stressed the political importance of spending money in our consumers' democracy. "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[320] Money had now become speech "because virtually every means of communicating ideas in today's mass society requires the expenditure of money."[321] The Court nonetheless upheld the limits on campaign contributions largely because money given directly to a candidate created at least the appearance of corruption, if not constituting actual corruption.[322] When it came to campaign expenditures, however, the Court reasoned that the danger of corruption or the appearance of corruption was greatly diminished.[323] Thus, emphasizing the confrontational political battles characteristic of pluralist democracy (rather than the supposedly

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[319]424 U.S. 1 (1976); *see id.* at 143 (summarizing holding).

[320]424 U.S. at 19.

[321]*Id*. In *Buckley*, the justices, for the first time, used the phrase, "money is speech." Stewart used the phrase during oral argument, and White used it in his opinion. *Id*. at 262-63 (White J., concurring in part, dissenting in part); Gordon Silverstein, Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics 167-68 (2009).

[322]*Id*. at 26. The Court explained that the contribution restriction "permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributors' freedom to discuss candidates and issues." *Id*. at 21.

[323]*Id*. at 46-47.

virtuous civil exchanges that might generate the republican democratic common good), the Court evoked the self-governance rationale and concluded that limits on expenditures were unconstitutional.

> [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, 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 bringing about of political and social changes desired by the people.'"[324]

The *Buckley* Court did not explicitly discuss restrictions on *corporate* campaign expenditures, but the justices addressed that issue two years later in *First National Bank of Boston v. Bellotti*.[325] With a majority opinion written by Powell, the Court invalidated a state law that prohibited business corporations from spending money to influence voters in referendum elections. Once again, Powell's reasoning echoed his 1971 memorandum. He equated corporate interests with individual interests, then explicitly extended first-amendment protections to corporations. Powell explained that the source, corporate or otherwise, of speech was irrelevant, while the nature of the speech was crucial.[326] Building on this premise, Powell could invoke the self-governance rationale to support corporate speech:

> "[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather

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[324] *Id*. at 48-49.

[325] 435 U.S. 765 (1978).

[326] *Id*. at 778-86.

> than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.[327]

By focusing on the self-governance rationale, the conservative justices underscored the importance of free speech. And by protecting free speech, the justices simultaneously enhanced the protection of liberty vis-à-vis economic wealth.

In short, the development of the consumers' democracy changed how the justices, particularly the conservative ones, viewed free expression.[328] Free expression no longer was merely a civil liberty to be asserted by minorities and dissidents. Because of the fusion of democracy and the mass-consumer culture, the expenditure of wealth had become integral to politics. Spending money had become a form of political expression. Thus, the conservative justices sought to energize the protection of liberty, as manifested in free speech. In short, libertarian conservatism had come to the Court, albeit from an unexpected direction. Conservative constitutional scholars and Supreme Court justices had begun to follow the traditionalist path, with its focus on moral clarity, largely for the same reason that other conservatives had done so. They rebelled against the ethical relativism of pluralist democracy and its manifestation in multiculturalism. In general, libertarianism had also gained a foothold in American conservatism in reaction against an aspect of pluralist democracy: namely, its expansion of national government power.[329] To be sure, conservative constitutional scholars eventually followed this libertarian path to argue against exercises of congressional power.[330]

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[327] *Id*. at 776-77.

[328] Rehnquist was one conservative justice who did not go down this path. *Id*. at 781 (Rehnquist, J., dissenting); *see also* First National Bank of Boston v. Bellotti, 435 U.S. 765, 822 (1978) (Rehnquist, J., dissenting) (arguing that corporate campaign finance restrictions are constitutional).

[329] Nash, *supra* note 136, at 1-49.

[330] Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387 (1987). Epstein and Randy Barnett are prominent libertarian scholars. Randy E. Barnett, Restoring the Lost Constitution (2004); Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain (1985).

Moreover, the conservative justices would begin in the 1990s to implement this libertarian approach in congressional power and tenth amendment cases.[331] Yet, in free-speech cases, conservative justices had already moved in the libertarian direction: The Court decided *Bigelow* and *Virginia State Board of Pharmacy* in the mid-1970s.[332] And in those commercial speech cases, the conservative justices did not react against pluralist democracy. Instead, they acted in accord with pluralist democracy—as transformed into a consumers' democracy—relying on the self-governance rationale, characteristic of the pluralist democratic era. In the context of the consumers' democracy, in other words, the conservative justices seized upon the libertarian emphasis on individual liberty, particularly vis-à-vis the economic marketplace.

IV. Democracy, Inc., and the End of the Cold War

By the end of the Cold War—the end arrived gradually, from 1989 to 1992—conservative constitutional scholars had long been in the traditionalist camp, condemning relativism and advocating for moral clarity.[333] But partly because of a change in Court personnel—particularly the replacement of the liberal Thurgood Marshall with the conservative Clarence Thomas—this focus on moral clarity became a hallmark in the early 1990s of not only conservative scholarship but also conservative Supreme Court decision making. Among scholars, Bork still led the way. He condemned the Court's free-speech jurisprudence for protecting mere "self-expression, personal autonomy, or individual gratification."[334] In *Cohen v. California*, for example, the defendant had worn into a courthouse a jacket inscribed with the message, "Fuck

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[331]City of Boerne v. Flores, 521 U.S. 527 (1997) (focusing on fourteenth amendment, section five); United States v. Lopez, 514 U.S. 549 (1995) (focusing on commerce clause); New York v. United States, 505 U.S. 144 (1992) (focusing on tenth amendment).

[332]Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); Bigelow v. Virginia, 421 U.S. 809 (1975).

[333]*See* Gaddis, *supra* note 1, at 237-57 (discussing end of Cold War); Patterson, *supra* note **Error! Bookmark not defined.**, at 194-95 (same).

[334]Robert H. Bork, Slouching Towards Gomorrah 99 (1996) [hereinafter Bork, Slouching].

the Draft."[335] Bork condemned the Court's reversal of the defendant's conviction for disturbing the peace. The majority opinion had "asked 'How is one to distinguish this from any other offensive word?' and answered that no distinction could be made since 'one man's vulgarity is another's lyric.'"[336] Bork did not similarly stumble over this distinction. To him, 'Fuck the Draft' was vulgar—nothing lyrical about it. Governmental and non-governmental institutions must be allowed and encouraged to promote the appropriate values. "[I]n a republican form of government where the people rule," Bork wrote, "it is crucial that the character of the citizenry not be debased."[337]

The conservative justices heeded this clarion call by promoting moral clarity in numerous contexts,[338] including free-expression cases, particularly those where private (non-government) actors sought to express religious views or values on government-owned property. The Court consistently analyzed such religious-expression cases pursuant to public forum doctrine and concluded that the government must allow Christian organizations to spread their messages on public (school) properties.[339] In *Rosenberger v. Rectors and Visitors of the University of Virginia*,[340] decided in 1995, the five conservative justices—Rehnquist, Scalia, Thomas, O'Connor, and Kennedy—held that the first amendment required the University of Virginia to

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[335]Cohen v. California, 403 U.S. 15 (1971).

[336]Robert H. Bork, *Adversary Jurisprudence*, New Criterion, May 2002, at 4; *see* Bork, Slouching, *supra* note 334, at 99 (discussing *Cohen*).

[337]Bork, Slouching, *supra* note 334, at 141.

[338]For example, the conservative justices push for moral clarity in establishment-clause cases. *E.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (upholding school voucher program that allowed parents to use public money to pay for religious-school education).

[339]The Court has deemed property such as the streets and parks, open for public speaking from time immemorial, to be a public forum. In the public forum, the first amendment prohibits the government from restricting speech based on its content unless the government satisfies strict scrutiny. On other government property, however, the government can impose any reasonable restrictions on expression. Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 45 (1983).

[340]515 U.S. 819 (1995).

fund a student newspaper, *Wide Awake*, dedicated to evangelical "proselytizing."[341] *Wide Awake* explicitly challenged "Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means."[342] The justices reached a similar result in a grade school setting. In *Good News Club v. Milford Central School*,[343] decided in 2001, the five conservative justices, joined by Breyer, held that a public school violated free expression by denying access to "a private Christian organization for children ages six to twelve" that sought to hold club meetings on school property.[344] Writing for the majority, Thomas chastised the lower court for its ostensible hostility toward Christianity;[345] prior cases already had established the constitutional protection of Christian education and proselytizing on public property, including schools, and the *Good News Club* case was indistinguishable.[346]

To be clear, in these cases, the conservative justices did not appear to be motivated by an unshakable desire to protect free expression in all contexts—because free expression should be treated as a constitutional lodestar—but rather by a desire to bolster moral clarity through the promotion of traditional religious (Christian) values.[347] Thus, in other cases where the protection of free speech might undermine the promotion of moral clarity, the justices have sacrificed free

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[341] *Id*. at 874 (Souter, J., dissenting).

[342] *Id*. at 826.

[343] 533 U.S. 98 (2001).

[344] *Id*. at 103.

[345] *Id*. at 110-12.

[346] *Id*. at 108-10.

[347] *See* Erwin Chemerinsky, *Not a Free Speech Court*, 53 Ariz. L. Rev. 723, 724 (2011) (arguing that, overall, the Roberts Court has a "dismal record" in free-speech cases); David Kairys, *The Contradictory Messages of Rehnquist-Roberts Era Speech Law: Liberty and Justice for Some*, 2013 U. Ill. L. Rev. 195 (explaining Rehnquist and Roberts Courts' inconsistencies in free-expression cases).

speech.[348] For instance, a 2007 decision, *Morse v. Frederick*, rejected a student's first-amendment claim and deferred to the school principal's decision to suspend the student for displaying a banner, "BONG HiTS 4 JESUS."[349] A 2009 decision, *Pleasant Grove City v. Summum*,[350] appeared to present a religious-expression issue subject to a public forum analysis. Pleasant Grove displayed in its city park several privately donated monuments, including one showing the Ten Commandments, contributed years earlier by the Fraternal Order of Eagles. Summum, a minority religious group, offered to donate a monument showing its Seven Aphorisms (also called the Seven Principles of Creation). The city refused to accept the monument. Was this case like *Rosenberger* and *Good News Club* and, therefore, governed by the public forum doctrine? The Supreme Court held otherwise. "[T]he display of a permanent monument in a public park is not a form of expression to which forum analysis applies," Alito reasoned for the majority.[351] "Instead, the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause."[352] As Alito explained the government-speech doctrine: "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."[353] Comparing *Summum* with *Rosenberger* and *Good News Club*, the justices, it would seem, will allow (or require) the government to adopt and display traditional (Christian) values and symbols while refusing to adopt and display other values and symbols.

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[348]*E.g.*, Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010) (upholding punishment of speech that might provide material support to foreign terrorist organizations, even without proof of likely harm); Beard v. Banks, 548 U.S. 521 (2006) (limiting severely prisoner access to written materials and photographs).

[349]551 U.S. 393 (2007).

[350]555 U.S. 460 (2009).

[351]*Id*. at 464.

[352]*Id*.

[353]*Id*. at 467. "If petitioners [the city] were engaging in their own expressive conduct, then the Free Speech Clause has no application." *Id*.

A. The Rise of Democracy, Inc.: An Attack on Government

The end of the Cold War ushered in a significant change in American society that, in turn, would influence the Supreme Court so strongly as to outweigh the conservative justices' commitment to moral clarity. The American celebration of the nation's victory in the Cold War obscured potential untoward ramifications of that victory. Just as the Cold War had helped shape the evolution of pluralist democracy from the 1940s to 1990, the end of the Cold War would shape its further evolution. Most important, as discussed, the Cold War had constrained corporate capitalism on both the international and domestic fronts. For instance, the political geography of the Cold War had limited the international scope of corporate markets. Quite simply, McDonald's could not open a franchise in Prague or Moscow in 1975. Perhaps more important, the Cold War struggle against communism had limited the degree to which corporations could attack the process and culture of democratic government. If the alternative to pluralist democracy was totalitarian communism, then American critics of democracy were impelled to curb their denunciations. With the end of the Cold War, these constraints on corporate capitalism evaporated.

To be sure, at the level of theory, neoliberal libertarianism had evolved during the years of the Cold War by gradually shedding its earlier acceptance of government interventions in the economic marketplace. Neoliberals began to insist that the unregulated market could best resolve all social and economic problems. Any type of government planning or regulation smacked of hubris.[354] Hayek had led the way in this attack on government. "Human reason can neither predict nor deliberately shape its own future," he wrote in 1960.[355] "Progress by its very nature cannot be planned."[356] The real world was too complex for government to predict and control

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[354]Jones, *supra* note 3, at 109.

[355]Hayek, *supra* note 101, at 94.

[356]*Id*. at 95.

through rational planning, neoliberals asserted. The invisible hand and the market were far more efficient in accounting for human desires and actions. "[The invisible hand] is a highly sophisticated and subtle insight," explained Milton Friedman in 1976.[357] "The market, with each individual going his own way, with no central authority setting social priorities, avoiding duplication, and coordinating activities, looks like chaos to the naked eye. Yet through [Adam] Smith's eyes we see that it is a finely ordered and delicately tuned system, one which arises out of man's actions, yet is not deliberately created by man. It is a system which enables the dispersed knowledge and skill of millions of people to be coordinated for a common purpose."[358] By this time, then, Friedman was unequivocally preaching laissez faire.[359] Neoliberals completely rejected "economic planning, social democracy, and New Deal liberalism."[360] The unregulated market, they asserted, maximized individual liberty and human dignity.[361]

A growing American conservative movement absorbed these views in the 1970s and 1980s. To a great degree, the neoliberal message had been simplified and thus had become more politically pointed and useful. The early neoliberals had sought to mediate between laissez faire and New Deal liberalism—an intermediate position difficult to stake out and to communicate. A straightforward laissez-faire utopianism was far easier to articulate and sell. Not only was it clearer, but it also resonated closely with traditional American individualism as well as other forms of libertarianism.[362] This more aggressive neoliberal libertarian thinking gained political

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[357]Milton Friedman, *Adam Smith's Relevance for 1976*, Selected Papers No. 50, at 15 <http://www.chicagobooth.edu/~/media/9535E51706DF4136AB8ED7B59A873A57.PDF>.

[358]*Id*. at 15-16. Hayek emphasized the superiority of the empirical practices and institutions of the economic marketplace over rationalist attempts at social improvement. Hayek, *supra* note 101, at 118-25.

[359]Friedman, *supra* note 357, at 1.

[360]Jones, *supra* note 3, at 8.

[361]Harvey, *supra* note 3, at 5; Jones, *supra* note 3, at 118.

[362]Jones, *supra* note 3, at 9, 86-87; *see* John Dewey, Individualism: Old and New (1930) (discussing individualism); Robert Nozick, Anarchy, State, and Utopia (1974) (presenting philosophical defense of libertarianism).

traction in the late 1970s and 1980s. Perhaps, most important, the post-World War II Bretton Woods system had collapsed.[363] Consistent with Keynesian economics, Bretton Woods had blended the capitalist marketplace with democratic-welfare governments. Overall, this system had produced long-running and widespread (though not universal) prosperity, especially for the United States.[364] But in the 1970s, both high inflation and high unemployment hit the U.S. and other western industrialized nations. Suddenly, Keynesian policies seemed unable to deal with this so-called stagflation.[365] These economic problems provided political ammunition for advocates of neoliberal libertarianism. Adding to this political shift in America, the wealthy or upper class became dissatisfied with their share of the economic pie. For nearly three decades after World War II, the top one percent of income earners accrued approximately eight percent of the national income on an annual basis.[366] When the American economy was booming, the wealthy appeared to find this income distribution acceptable. But when stagflation hit, the upper class became dissatisfied with its share of income and wealth. Many wealthy Americans consequently threw their political weight behind the neoliberal views being expressed by Ronald Reagan when he ran for president in 1980. Then Reagan, in the U.S., and Margaret Thatcher, in Britain, began to implement neoliberal elements into their economic policies.[367] For instance, the Reagan administration started deregulation, relaxing anti-trust policies that then facilitated corporate mergers, such as between oil giants Gulf, Texaco, and Chevron.[368] Reagan's anti-union

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[363]Cohen, *supra* note 281, at 100-01.

[364]Frieden, *supra* note 9, at 359-60.

[365]*Id*. at 363; *e.g.*, Paul Craig Roberts, *The Breakdown of the Keynesian Model*, *reprinted in* Supply-Side Economics: A Critical Appraisal 1 (Richard H. Fink ed., 1982) (criticizing Keynesian approach).

[366]Harvey, *supra* note 3, at 15; Facundo Alvaredo et al., *The Top 1 Percent in International and Historical Perspective*, 27 J. Economic Perspectives 3, 4 (Table: Top 1 Percent Income Shared in the United States); *see* Chad Stone et al., *A Guide to Statistics on Historical Trends in Income Inequality*, Center on Budget and Policy Priorities 7 (December 5, 2013) (Figure 1: Income Gains Widely Shared in Early Postwar Decades—But Not Since Then).

[367]Jones, *supra* note 3, at 19, 263-69; Wells, *supra* note 283, at 129-35.

[368]Wells, *supra* note 283, at 129-30.

stances, as evidenced by his pro-employer appointments to the National Labor Relations Board, enhanced corporate strength in the marketplace.[369] Meanwhile, Reagan cut the top marginal tax rate from 70 to 28 percent while claiming that supply-side or "trickle-down" economics would generate more revenue for the government and greater prosperity for rich and poor alike.[370] Yet, the Reagan tax cuts, when combined with those of his successor, President George H.W. Bush, more than quadrupled the national debt over a twelve-year period while contributing to growing income and wealth disparities.[371]

When the Cold War ended, the political constraints came off neoliberal libertarianism. Corporate capitalist power was unleashed.[372] An increasing number of corporations went multinational, with many flocking into former Iron-Curtain countries.[373] For example, "Daewoo spent $1.5 billion to build two Polish auto plants; Sony set up state-of-the-art factories to make consumer electronics in Hungary; Goodyear took over a Polish tiremaker; Volkswagen bought up the Czech Republic's respected Skoda automaker."[374] From the end of the Cold War to 2002, the number of multinational corporations jumped from approximately 37 thousand to 63 thousand.[375] These multinationals reached ever deeper into new markets. McDonalds, in effect, became "McWorld," opening in Prague, Moscow, East Berlin, and dozens of other cities

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[369]*Id*. at 130-35.

[370]Stiglitz, *supra* note **Error! Bookmark not defined.**, at 8-9, 89; George Gilder, *The Supply-Side*, *in* Supply-Side Economics: A Critical Appraisal 14 (Richard H. Fink ed., 1982).

[371]Frieden, *supra* note 9, at 378; Stiglitz, *supra* note **Error! Bookmark not defined.**, at 8-9, 89, 277.

[372]Frieden, *supra* note 9, at 378; Jones, *supra* note 3, at 332.

[373]Frieden, *supra* note 9, at 430-32; *see* Wells, *supra* note 283, at 179 (discussing globalization in 1990s).

[374]Frieden, *supra* note 9, at 432.

[375]Micklethwait & Woolridge, *supra* note 9, at 173-74; Chandler & Mazlish, *supra* note 9, at 2; Roach, *supra* note 9, at 24-25.

formerly behind the Iron Curtain.[376] Multinationals sought to reach "the universal tribe of consumers [as] defined by needs and wants that are ubiquitous, if not by nature then by the cunning of advertising. A consumer is a consumer is a consumer."[377] Corporate business and investment began to flow around the globe as if national borders no longer existed.[378]

How diverse and far-reaching is a multinational corporation? Unilever provides one example. Unilever began as a producer of margarine in 1914, but was producing more than 16 hundred brands by the end of the twentieth century.[379] After a corporate restructuring, which entailed the selling "of its underperforming brands and smaller operations,"[380] Unilever still produces Lipton (teas), Hellmann's (mayonnaise), Knorr (foods), Vaseline (petroleum jelly), Dove (soaps), Bertolli (oils), Slim Fast (diet foods), Ben & Jerry's (ice cream), Breyer's (ice cream), and many other brands.[381] Their products are used in most households in the United States, the U.K., Canada, Indonesia, and Vietnam. As of 2001, 27 percent of their quarter-million employees were in Europe, 8 percent in North America, 18 percent in Africa and the Middle East, 32 percent in Asia and the Pacific, and 14 percent in Latin America.[382] With regard to some other multinationals, McDonalds was serving 3 million burgers per day in at least 100 nations by the mid-1990s.[383] Mattel, at that point, made "the quintessentially American Barbie Doll" into a

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[376]Benjamin R. Barber, Jihad vs. McWorld (2001 ed.); *see* Phillips, *supra* note 254, at 147-56 (describing growth of corporations).

[377]Barber, *supra* note 376, at 23.

[378]Micklethwait & Woolridge, *supra* note 9, at 174; Ohmae, *supra* note 9, at 2-5, 7.

[379]Roach, *supra* note 9, at 21.

[380]*Id*.

[381]Unilever's website lists many brands. <http://www.unileverusa.com/brands-in-action/view-brands.aspx>.

[382]Roach, *supra* note 9, at 21-22.

[383]Micklethwait & Woolridge, *supra* note 9, at 175.

global affair by drawing materials from and manufacturing parts in an international array of countries, including the United States, Taiwan, Japan, China, Indonesia, Malaysia, and Hong Kong.[384] By the year 2000, more than half of the world's largest economies, based on gross domestic product, were corporations, rather than nations.[385] By 2002, approximately 50 multinational corporations were wealthier than between 120 and 130 nations.[386] Multinational corporations could rightly be called the "new Leviathans," as they challenged the power and wealth of nation-states.[387]

Besides the end of the Cold War, multiple causes contributed to globalization and the spread of multinational corporations. Deregulation, reduced taxes, government perks, and technological changes all played roles.[388] For instance, and most obviously, communication technologies based on the internet facilitated the development of international businesses and international financial markets.[389] But also, innovations in transportation, leading to less expensive and more rapid shipping of products, contributed to globalization.[390] Advanced communication and transportation technologies, together with the "free mobilization of capital," allow corporations to manufacture products wherever labor costs are low and environmental

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[384]Frieden, *supra* note 9, at 417.

[385]Roach, *supra* note 9, at 25-26; Chandler & Mazlish, *supra* note 9, at 1.

[386]Chandler & Mazlish, *supra* note 9, at 1.

[387]*Id*. at 12.

[388]Bakan, *supra* note 9, at 21-25; Ohmae, *supra* note 9, at 4; Roach, *supra* note 9, at 30, 35-36; *see* David Cay Johnston, Perfectly Legal 10-19 (2003) (summarizing how corporations and the wealthy have been paying reduced taxes).

[389]Frieden, *supra* note 9, at 395-96; Ohmae, *supra* note 9, at 4; Stiglitz, *supra* note **Error! Bookmark not defined.**, at 74-76.

[390]Bakan, *supra* note 9, at 21-22.

restrictions are lax and then to sell the products where incomes are high.[391] And the corporations can still locate their offices where taxes are minimal, the views are enticing, the culture is exciting, or anywhere else. Indeed, because of the combined corporate capabilities to shift capital and to ship products rapidly around the world, corporations can pressure nations to minimize labor demands, lower taxes, and diminish environmental regulations.[392] Ultimately, though, the overriding cause of globalization was the pursuit of profit: Multinational corporations sought to maximize profits regardless of where they could be accrued.[393] Moreover, to be clear, the quest for maximum profits requires corporations to minimize costs, and the corporate minimization of costs requires shifting costs to others, whenever possible. In other words, the corporate profit motive practically mandates the externalization of costs or harms, such as pollution.[394] The fact that others, outside the corporation, must pay the costs or suffer the harms cannot deter the corporation in search of maximum profits. In effect, a corporation wants to selectively create market failures that accrue to its benefit; for instance, a corporation that prevents competitors from entering a market can realize higher profits. In a perfect market, a corporation would bear its own costs and reap its own profits. But market failures allow a corporation to change its costs into externalities, shifting them onto others, while still retaining its profits.[395]

In the U.S., in particular, multinational corporations dominate the mass-consumer culture as never before. In the twenty-first century, individuals rarely buy their mass-produced items at independent Mom-and-Pop stores. Instead, people shop at Target, or a Walmart Supercenter, or online at Amazon.com. The American economy has thoroughly transformed into a *corporate*

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[391]Stiglitz, *supra* note **Error! Bookmark not defined.**, at 74; Bakan, *supra* note 9, at 22-25; Roach, *supra* note 9, at 35-36.

[392]Stiglitz, *supra* note **Error! Bookmark not defined.**, at 74-76.

[393]Ohmae, *supra* note 9, at 2-5.

[394]Bakan, *supra* note 9, at 60-61, 72-73.

[395]Stiglitz, *supra* note **Error! Bookmark not defined.**, at 41-45.

capitalist system.[396] Previously, corporations in the U.S. had followed Lewis Powell's memorandum by increasing their determination to influence public opinion and interest-group machinations. But with the end of the Cold War, the increased wealth and power of large and multinational corporations was brought to bear. The result? The democratic system became corporate dominated. Our consumers' (pluralist) democracy transformed into Democracy, Inc.[397] Not only has democratic politics become more capitalistic or market oriented, but also corporate capitalism has become more politically potent. With ever-increasing proficiency, corporations manipulate elections and government for their own advantage—benefiting the respective corporations as well as corporate business in toto.[398] Citizens still vote, but corporations strongly influence "highly managed elections" and shape government policy between elections.[399] Corporate and government power coexist incestuously, with officials going back and forth between corporate and government positions.[400] Thus, government agencies suffer from "regulatory capture": The officials appointed to monitor an industry either worked previously in that same industry or are otherwise strongly sympathetic to its needs.[401] For example, when the time comes for an appointment to the Federal Reserve, which regulates banking, bank lobbyists will push for a candidate who believes banks do not need government monitoring because the market is self-regulating.[402] Given these types of arrangements, the system readily self-

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[396]*See* Barber, *supra* note 376, at 23-154 (describing McWorld); Phillips, *supra* note 254, at 229-32, 284-86 (explaining the process of corporate transnationalization).

[397]Wolin, *supra* note 10; Allen, *supra* note 10.

[398]Hacker & Pierson, *supra* note 271, at 118-19.

[399]Wolin, *supra* note 10, at 149.

[400]*Id*. at 63, 135-36 (describing "dual system of state and corporation"); *see* Peter Schweizer, Throw Them All Out xvii- xix (2011) (showing that congressional members reap financial benefits).

[401]Stiglitz, *supra* note **Error! Bookmark not defined.**, at 59. Stiglitz refers to the latter situation, when an official is sympathetic to the industry as "cognitive capture." *Id*.

[402]*Id*. at 60.

propagates: Corporate wealth skews electoral outcomes and government policies, while government officials and policies further contribute to wealth inequality, in general, and corporate power, more specifically.[403]

At the end of the Cold War, the neoconservative Francis Fukuyama had metaphorically called the collapse of the Soviet Union the "end of history."[404] American democracy and capitalism had been locked in ideological struggle with Soviet communism. The United States had won the battle. Democratic government and free market economics had no more serious competitors. At that point in time, most observers assumed that "capitalism and democracy would evolve along compatible lines and mutually reinforce each other."[405] After all, during the Cold-War era of consumers' democracy, capitalism and pluralist democracy had appeared to coexist harmoniously, even buttressing each other. But the emergence of Democracy, Inc., called into question this assumption of an ongoing consonant relationship.[406] Maybe, American democracy and capitalism had not *together* won the Cold-War battle over Soviet communism. Instead, neoliberal libertarianism—laissez-faire capitalism on steroids—had conquered all. It was as if the Cold War had been a scab covering a deep cut between the logics of capitalism, on the one hand, and democratic government, on the other. The end of the Cold War had torn off the scab, and suddenly, the tensions between capitalism and democracy were hemorrhaging all over the floor.[407]

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[403]For example, besides the obvious influence of government tax policies on wealth distribution, government policies regarding unions, executive pay, and financial markets have contributed to increasing wealth inequality. Hacker & Pierson, *supra* note 271, at 47-70; *see* Phillips, *supra* note 254, at 201-48 (explaining how government policies affected wealth accumulation throughout American history).

[404]Francis Fukuyama, *The End of History?*, 16 The National Interest 3-18 (Summer 1989).

[405]Vision, *supra* note 257, at 596.

[406]Francis Fukuyama, *The Future of History: Can Liberal Democracy Survive the Decline of the Middle Class?*, 91 Foreign Affairs 53 (2012).

[407]*See* Tonkiss, *supra* note **Error! Bookmark not defined.**, at 60-61 (emphasizing that globalization exacerbates the tension between the "expansionary logic" of capitalism and "the domesticating logic of the nation state").

To be sure, at the global level, the end of the Cold War engendered transitions to democracy in numerous nations formerly behind the Iron Curtain. Hungary, Poland, the Czech Republic, East Germany, as well as former geographical regions of the Soviet Union, such as Russia, Lithuania, and Estonia, were among the host of burgeoning democracies.[408] At least initially, then, winning the Cold War yielded a democracy dividend. Yet, also on a global basis, an outburst of laissez-faire ideology accompanied the Cold-War end and the related rise of Democracy, Inc. The free market was endowed with a "divine status."[409] The U.S. and Britain pressured the rest of the world, especially Europe and Japan, to follow neoliberal libertarian principles for a global economy.[410] The so-called "Washington Consensus"—emphasizing "tax reform, trade liberalization, privatization, deregulation, and strong property rights"—took hold of international markets.[411] Ironically, the IMF and World Bank, originally formed to implement the Bretton Woods Keynesian-inspired policies, now switched to neoliberal approaches.[412] New institutions and policies, including the World Trade Organization (WTO), the European Union (EU), and the North American Free Trade Agreement (NAFTA), were formed to implement the "free market mantra" and further promote global capitalism.[413] Business and financial interests from the wealthiest nations dominated these international institutions, which predictably emphasized maximizing profits.[414]

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[408]Gaddis, *supra* note 1, at 258-60; Walker, *supra* note 1, at 310-14.

[409]Jones, *supra* note 3, at 338.

[410]Harvey, *supra* note 3, at 93; Stiglitz, *supra* note 9, at 53-88.

[411]Jones, *supra* note 3, at 8; Stiglitz, *supra* note 9, at 53.

[412]Stiglitz, *supra* note 9, at 10-13.

[413]*Id*. at 16; Jones, *supra* note 3, at 8.

[414]Stiglitz, *supra* note 9, at 18-20.

Thus, the former communist nations were taught a lesson in "market fundamentalism," with the teachers being the U.S., Britain, the IMF, and other neoliberal institutions.[415] From the perspective of neoliberal libertarian ideologues, history, culture, and social structures are irrelevant to conducting capitalist marketplace transactions. If a laissez-faire market can be introduced, it should produce economic efficiency. The former communist nations lacked the traditional institutions of democratic-capitalism, including banks, structured employer-employee relations, and the rule of law in contractual agreements.[416] But from the neoliberal standpoint, these inadequacies were minor annoyances rather than serious obstacles. Let the market operate, keep the government out of the way, and all should be well. Except, in reality, many of these nations did not respond well to this "shock therapy" approach to laissez-faire capitalism.[417] For instance, during the 1990s, many people in the nations of the former Soviet Union were plunged into privation; "the proportion of the population in poverty went from 2 percent to over 50 percent."[418] The sudden fortunes of a handful of new millionaires did not ameliorate the sufferings of so many people. In the year 2000, "real income per person in the former Soviet Union was barely half what it had been a decade earlier."[419] Russia was especially hard hit. Income inequality skyrocketed, and the middle class was decimated.[420] For the poor, this transition led to a diminished quality of life and, in fact, lower life expectancies.[421] Significantly,

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[415]Stiglitz, *supra* note 9, at 134; *see* Jones, *supra* note 3, at 332-33 (explaining how the end of the Cold War facilitated the worldwide spread of neoliberalism).

[416]Stiglitz, *supra* note 9, at 138-40.

[417]Stiglitz, *supra* note 9, at 141; Frieden, *supra* note 9, at 430-31, 438-39; *see* Rodrik, *supra* note 9, at 14-16 (emphasizing the role of government institutions in successful capitalist countries).

[418]Frieden, *supra* note 9, at 439.

[419]*Id*. at 438-39.

[420]Stiglitz, *supra* note 9, at 133-34, 151-53.

[421]Frieden, *supra* note 9, at 439; *see id*. at 440-56 (emphasizing tragic consequences in other parts of the world).

economic inequality and its consequences undermined the development of democracy.[422] Desperate people will take desperate measures. Soviet "totalitarianism had been replaced by a limited democracy and a painful economic transition to wild capitalism in the 1990s that left some freer and richer than they had ever been, but others abandoned, embittered and nostalgic for the past."[423] In many of the former Soviet nations, and especially in Russia, many people consequently looked to former Communist party leaders. Authoritarian government returned.[424] Today, in Russia, ruled by former KGB officer, Vladimir Putin, "elections are not fair, courts are not independent, and political opposition is not tolerated."[425]

Meanwhile, in the U.S., the rise of Democracy, Inc., and the concomitant flourishing of laissez faire produced aggressive attacks on democratic government. From the perspective of neoliberal libertarianism, government determinations of means and goals are irrational and inefficient.[426] According to pluralist democratic theory, public (government) goals are determined through the negotiations and compromises of a wide-open process in which all individuals and groups are able to contribute their values and interests. Neoliberals questioned this government process on multiple grounds, but primarily by comparing it to economic transactions in the marketplace. For instance, public choice theorists applied economic analysis to public decision making and concluded that majority voting, as in democracy, is frequently an irrational means for making group decisions.[427] Unlike an unregulated economic marketplace,

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[422]*Id*.; Stiglitz, *supra* note 9, at 133-34, 153.

[423]Andrew Jack, Inside Putin's Russia: Can There Be Reform Without Democracy? 4 (2004).

[424]Frieden, *supra* note 9, at 431, 439; Stiglitz, *supra* note 9, at 133-34.

[425]Kathy Lally & Will Englund, *Russia, Once Almost a Democracy*, The Washington Post (Aug. 18, 2011); Anna Politkovskaya, Putin's Russia: Life in a Failing Democracy (2007); Mikhail Shishkin, *Poets and Czars, From Pushkin to Putin: The Sad Tale of Democracy in Russia*, The New Republic (July 1, 2013).

[426]Jones, *supra* note 3, at 109-10; *e.g.*, Friedman, *supra* note 357, at 11 (emphasizing government defects).

[427]Farber & Frickey, *supra* note **Error! Bookmark not defined.**, at 1-11 (summarizing public choice theory); Jones, *supra* note 3, at 126-32 (discussing public choice and rational choice theories); Mark Kelman, *On*

democracy cannot maximize the satisfaction of individual interests, at least under certain conditions.[428] Thus, public choice theorists maintained that when the government legislates—for example, by imposing economic regulations—the legislative decisions do not rest on a rational calculation of costs and benefits. Rather, they arise from interest group machinations unrelated to individual preferences and social utility.[429]

Public choice theory illustrates how neoliberal libertarianism pushed beyond nineteenth-century laissez faire. Laissez faire ideology celebrated the free market; government regulations were criticized because they interfered with the marketplace. Neoliberal libertarianism goes further by directly attacking democratic government. Milton Friedman and other neoliberals insisted that the economic marketplace is a wondrous device because of the invisible hand. From this perspective, the market operates so that "the voluntary actions of millions of individuals can be coordinated through a price mechanism without central direction."[430] Each individual's interests and knowledge lead him or her to pursue desired goals and, simultaneously, lead society as a whole to pursue appropriate goals. But the government operates like a backward reflection of the marketplace, according to Friedman. There is an "invisible hand in politics [that] is as potent a force for harm as the invisible hand in economics is for good."[431] Government actors might very well have the best of intentions, yet they cannot help but pursue harmful goals. "In politics, men who intend only to promote the public interest, as they conceive it, are 'led by an

Democracy-Bashing: A Skeptical Look at the Theoretical and 'Empirical' Practice of the Public Choice Movement, 74 Va. L. Rev. 199 (1988) (criticizing public choice).

[428]*See* Farber & Frickey, *supra* note **Error! Bookmark not defined.**, at 38-62 (explaining Arrow's Theorem); William H. Riker, Liberalism Against Populism 1 (1982) (arguing social choice theory calls democracy into question).

[429]*E.g.*, Frank Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533 (1983) (arguing courts should not presume that legislative decisions are rational); *see* Farber & Frickey, *supra* note **Error! Bookmark not defined.**, at 12-37 (discussing interest groups); Jones, *supra* note 3, at 109-10, 117-18 (emphasizing special interests).

[430]Friedman, *supra* note 357, at 15.

[431]*Id*. at 18.

invisible hand to promote an end which was no part of' their intention. They become the front-men for special interests they would never knowingly serve."[432] Private interests necessarily manipulate political processes in ways that cannot arise in market transactions.

Moreover, even if private interests did not manipulate the government, democratic processes are inherently inefficient, according to neoliberals.[433] If pluralist democracy were to stumble onto an appropriate public goal, such a goal nonetheless would still be tentative because of the constant and ongoing political battles inherent to a pluralist society. Next week, the government might settle on a different tentative goal. And if not next week, then next month, or next year. Partly for this reason, the choice of means for achieving a government-designated goal becomes problematic. Suppose the government is able to determine a cost-efficient means for achieving its democratically established goal. By the time the government institutionalizes the means, the pluralist democratic process might have established a different goal. The government is trapped in a kaleidoscopic hall of mirrors, where means and ends are constantly shifting and unstable. Is this any way to run a business? No, of course not. Unlike government, business corporations need not equivocate about goals. They all pursue a single overarching goal: profit. Consequently, corporations can focus on constructing the most efficient means for achieving their profit goals. Rationality unequivocally becomes economic efficiency. Thus, while corporations have the virile confidence of heroic certainty, government appears timid and wasteful.

In short, in Democracy, Inc., neoliberal libertarians denigrate government, in general, and public (or group) decision making pursuant to democratic processes, more specifically. From the neoliberal perspective, the private sphere should subsume the public sphere. Friedman suggested as much when he argued that politics and economics were not "separate and largely

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[432] *Id*.

[433] *E.g.*, J. Mark Ramseyer, *Public Choice*, *in* Law and Economics 101 (Eric A. Posner ed., 2000).

unconnected."[434] Political freedom, he insisted, cannot exist unless individuals enjoy complete economic freedom, which could exist only with an unregulated marketplace. Economics is primary, while politics is secondary and derivative. As Friedman put it, "economic freedom is an end in itself, [but] economic freedom is also an indispensable means toward the achievement of political freedom."[435] In a free society, according to Friedman, economic power provides "a check to political power."[436] The key to political freedom, consequently, is a laissez-faire marketplace.[437] The best society is one that leaves the maximum degree of decision making to the market and the minimum to politics and government.[438] In short, the neoliberal "obsession with the market [has] corroded the idea of the public realm and ate into its foundations."[439] Arthur Brooks, president of the American Enterprise Institute, declared: "The best government philosophy is one that starts every day with the question, 'What can we do today to get out of Americans' way?'"[440] Thus, neoliberal libertarians advocate for the privatization or outsourcing of numerous government functions and institutions, such as schools, prisons, and policing.[441] In theory, privately owned and run schools, private prisons, and so on, will naturally operate for the good of society because they will function in accordance with economic principles, which

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[434]Friedman, *supra* note 90, at 7.

[435]*Id*. at 8.

[436]*Id*. at 15.

[437]*E.g.*, James M. Buchanan & Gordon Tullock, The Calculus of Consent: Logical Foundations of Constitutional Democracy (1962); *see* Jones, *supra* note 3, at 116-17 (discussing Friedman).

[438]Friedman, *supra* note 90, at 24.

[439]Jones, *supra* note 3, at 270.

[440]Arthur Brooks, *Why the Stimulus Failed*, National Review (Sept. 25, 2012).

[441]*E.g.*, Randy Barnett, The Structure of Liberty 179-80, 261 (1998) (supporting the privatization of prisons and law enforcement); *see* Bakan, *supra* note 9, at 113-38 (discussing privatization); Harvey, *supra* note 3, at 159-69 (same); Kimberly N. Brown, "*We the People," Constitutional Accountability, and Outsourcing Government*, 88 Ind. L.J. 1347, 1348 (2013) (giving examples of where privatization created problems).

"allocate resources to their most efficient and productive use."[442] After all, from the neoliberal viewpoint, "[e]fficiency can only be achieved through the incentives that are built into markets, which therefore should become the deliverer of all public systems. … Incentive structures, profit and loss, and customer satisfaction are the values that should drive public service, just as they drive private enterprise."[443]

While democracy- and government-bashing are part-and-parcel of neoliberal libertarianism, corporations do not merely denounce democratic government in Democracy, Inc. Corporations also use a multi-layered systematic strategy to thwart government efforts to regulate business.[444] First, if Congress begins debating an economic regulatory bill, corporate lobbyists will seek to prevent its enactment. Second, if Congress nonetheless passes the regulatory legislation, then corporate lobbyists will attempt to block congressional funding for its implementation. Third, if Congress perseveres and supplies funding, then the lobbyists will work to insure the appointment of sympathetic regulators and, at the agency level, the making of favorable administrative rules (or no rules at all). Fourth, if an agency still manages to adopt restrictive rules implementing the regulatory law, then the corporations will challenge in court the validity of the congressional action and the agency rules.[445] To be clear, corporate businesses do not view their multi-layered opposition to government as contravening a public interest or good. To the contrary, from an economic standpoint, they view such anti-government actions as the only legitimate means to promote the public interest.[446]

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[442]Jones, *supra* note 3, at 332.

[443]*Id*.

[444]Bakan, *supra* note 9, at 97-106; Gary Rivlin, *Wall Street Fires Back*, The Nation (May 20, 2013), at 11 (discussing conservative efforts to thwart regulatory laws).

[445]For examples of statutes that conservatives fought in this manner, see Dodd-Frank Wall Street Reform And Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (July 21, 2010); Patient Protection and Affordable Care Act, Public Law 111–148, 124 Stat. 119 (March 23, 2010).

[446]Bakan, *supra* note 9, at 106-07.

B. The Roberts Court in Democracy, Inc.

If corporations lose in the lower courts—that is, the courts uphold the legislation and agency rules—then the corporations can petition for certiorari to the U.S. Supreme Court. Fortunately for corporations, the Roberts Court is the most pro-business Supreme Court since World War II.[447] Of course, some conservatives have insisted that the Roberts Court is not conservative enough, is not truly pro-business,[448] but empirical studies have persuasively shown otherwise.[449] In fact, five of the current justices rank among the top ten justices most favorable to business from the 1946 through the 2011 terms.[450] Remarkably, Alito and Roberts are first and second on the list (Powell, incidentally, ranks number eight, one spot in front of Scalia).[451] Moreover, these justices shape the Court's docket accordingly.[452] A study focusing on the period from May 19, 2009, to August 15, 2012, concluded that the U.S. Chamber of Commerce, representing business, filed more cert.-stage amicus briefs than any other organization. Unsurprisingly, the Chamber had the second highest success rate. Compared with a similar study conducted five years earlier—partially during the Rehnquist Court years—the new study underscored that the top sixteen filers of cert.-stage amicus briefs are now "more conservative, anti-regulatory, and pro-business" than the previous top sixteen, which already were strongly

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[447]Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 Minn. L. Rev. 1431 (2013) (quantitative study of all postwar business-related cases); *see* Corey Ciocchetti, *The Constitution, the Roberts Court, and Business: The Significant Business Impact of the 2011-2012 Supreme Court Term*, 4 Wm. & Mary Bus. L. Rev. 385 (2013) (emphasizing how strongly the Roberts Court supported business in the 2011-2012 term).

[448]Ramesh Ponnuru, *Supreme Court Isn't Pro-Business, But Should Be*, Bloomberg (July 5, 2011); Jonathan Adler, *Business, the Environment, and the Roberts Court: A Preliminary Assessment*, 49 Santa Clara L. Rev. 943 (2009); Eric Posner, *Is the Supreme Court Biased in Favor of Business?*, Slate (March 17, 2008).

[449]According to Mark Tushnet, the "Roberts Court's overall balance sheet in business cases fits the 'pro-business' view of the Court reasonably well." Mark Tushnet, In the Balance: Law and Politics on the Roberts Court 213 (2013); *see id*. at 187-214 (discussing evidence).

[450]Epstein, *supra* note 447, at 1472-73.

[451]*Id*. at 1449-51.

[452]Adam D. Chandler, *Cert.-stage Amicus "All Stars": Where Are They Now*?, Scotusblog (April 4, 2013).

pro-business.[453] The findings also showed that these briefs influence the justices' decisions when shaping the Court's docket. A pro-business Court responds positively to pro-business petitioners.[454]

The Roberts Court, it seems, perfectly fits its times. The extent to which the conservative justices accept and bolster Democracy, Inc., is nowhere clearer than in free-expression cases involving campaign finance. In cases after *Buckley* and *Bellotti*, the Court had waffled over how much the government could regulate corporate political expression.[455] The entrenchment of Democracy, Inc., and the establishment of the Roberts Court ended this uncertainty.[456] In 2010, in the monumental five-to-four decision, *Citizens United v. Federal Election Commission*, the conservative bloc of justices invalidated provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA) that imposed limits on corporate (and union) spending for political campaign advertisements.[457] Justice Kennedy's majority opinion, joined by Roberts, Scalia, Thomas, and

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[453]Chandler, *supra* note 452; *see* Adam D. Chandler, *Cert.-stage Amicus Briefs: Who Files Them and To What Effect* ?, Scotusblog (Sept. 27, 2007) (the earlier study).

[454]Chandler, *supra* note 452.

[455]*See* Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) (upholding restriction on corporate political spending); FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986) (invalidating restriction on nonprofit corporations); FEC v. National Right to Work Committee, 459 U.S. 197 (1982) (upholding restriction on nonprofit corporations); Urofsky, *supra* note 499, at 141-46 (describing Court's confusion); *see also* McConnell v. FEC, 540 U.S. 93 (2003) (reaffirming *Buckley* and upholding main sections of Bipartisan Campaign Reform Act of 2002).

[456]Given Rehnquist's stance on commercial speech—he preferred to defer to legislative decisions, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 781 (1976) (Rehnquist, J., dissenting)—he unsurprisingly also often sided with the liberal justices in campaign finance cases. *E.g.*, Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000); Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990). O'Connor also voted to uphold some campaign finance restrictions. McConnell v. Federal Election Commission, 540 U.S. 93 (2003); Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000). Thus, when Roberts and Alito replaced Rehnquist and O'Connor, respectively, the conservative bloc of justices was ready to act in accord with Democracy, Inc.

[457]558 U.S. 310 (2010); Pub. L. No. 107-155, 116 Stat. 81; *see Citizens United*, 558 U.S. at 319-22 (discussing statutory restrictions). In several cases preceding *Citizens United*, the Roberts Court invalidated campaign finance restrictions. Davis v. Federal Election Commission, 554 U.S. 724 (2008) (invalidating federal provisions allowing certain candidates to have increased contribution and expenditure limits based on spending of opponents); Federal Election Commission v. Wisconsin Right To Life, Inc., 551 U.S. 449 (2007) (limiting restrictions on expenditures by corporations and unions); Randall v. Sorrell, 548 U.S. 230 (2006) (invalidating state limits on contributions).

Alito, began by articulating two first-amendment premises. First, Kennedy reiterated the maxim, initially stated in *Buckley*, that spending on political campaigns constitutes speech.[458] Second, Kennedy emphasized that, as stated in *Bellotti*, free-speech protections extend to corporations.[459] With those premises in hand, the Court moved to the crux of its reasoning, that the self-governance rationale mandates free expression to be a constitutional lodestar. "Speech is an essential mechanism of democracy," Kennedy wrote.[460] "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."[461] From the Court's perspective, then, corporate expenditures on political campaigns go the core of the first amendment. Restrictions on such political speech and writing destroy "'liberty'" and are necessarily unconstitutional,[462] unless the government can satisfy strict scrutiny by showing that the regulation is necessary (or narrowly tailored) to achieve a compelling purpose.[463]

Whether the government could satisfy strict scrutiny appeared to be, at least partly, an empirical question.[464] Was the campaign finance regulation necessary to achieve the compelling purpose of avoiding corruption or the appearance of corruption in the democratic process? Indeed, Justice Stevens's *Citizens United* dissent stressed that Congress had relied on "evidence

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[458]558 U.S. at 336-41.

[459]*Id*. at 340-42.

[460]*Id*. at 339.

[461]*Id*.

[462]*Id*. at 354 (quoting The Federalist No. 10, at 130 (Benjamin F. Wright ed., 1961) (James Madison)).

[463]*Id*. at 340.

[464]*See* Lawrence R. Jacobs & Theda Skocpol, *American Democracy in an Era of Rising Inequality*, *in* Inequality and American Democracy 1 (Lawrence R. Jacobs & Theda Skocpol eds., 2005) (discussing social science research on the effects of wealth inequality on democracy).

of corruption" when enacting the BCRA campaign finance restrictions.[465] Moreover, extensive social science research shows that excessive spending, whether corporate or otherwise, can in fact corrupt or distort democracy in two ways.[466] First, it can skew electoral outcomes. Because running for office requires massive funding, wealthy contributors can "determine the pools of potential officeholders."[467] More broadly, social and cognitive psychology research demonstrates that wealth can be used to fund campaign strategies that purposefully manipulate the electorate and "induce sub-optimal vote decisions."[468] In a 2008 book-length empirical study of the connections between wealth and democracy, Larry Bartels concluded that if fundraising had been equal over the previous fifty years, then the number of Republican presidential victories would have been cut in half (Bartels, incidentally, revealed that the last time he voted in a presidential election, he voted for Ronald Reagan).[469] Second, wealth can influence the behavior of government officials after their elections. Money buys "privileged access for contributors [including] the special attention of [committee] members who reward them with vigorous help in

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[465]*Citizens United*, 558 U.S. at 452 (Stevens, J., concurring in part and dissenting in part); *e.g.*, Brief of Amici Curiae Hachette Book Group, Inc. and HarperCollins Publishers L.L.C. in Support of Neither Party on Supplemental Questions, Citizens United v. Federal Election Commission, 558 U.S. 310 (2010) (No. 08-205), at 13-14 (emphasizing congressional findings); *see* McConnell v. Federal Election Commission, 540 U.S. 93, 207 (2003) (discussing congressional findings).

[466]Larry M. Bartels et al., *Inequality and American Governance*, *in* Inequality and American Democracy 88, 113-17 (Lawrence R. Jacobs & Theda Skocpol eds., 2005).

[467]*Id*. at 115.

[468]Molly J. Walker Wilson, *Behavioral Decision Theory and Implications for the Supreme Court's Campaign Finance Jurisprudence*, 31 Cardozo L. Rev. 679, 684 (2010); *see* Charles E. Lindblom, Politics and Markets (1977) (arguing that empirical evidence shows that corporate wealth dominates politics).

[469]Larry M. Bartels, Unequal Democracy 125 (2008) [hereinafter Unequal]; *id*. at ix-x (voting for Reagan); *see* Molly J. Walker Wilson, *Too Much of a Good Thing: Campaign Speech After Citizens United*, 31 Cardozo L. Rev. 2365, 2374-77 (2010) [hereinafter Much] (specifying marketing mechanisms used to manipulate citizens to vote contrary to how they would vote with complete information). The empirical evidence does not show, however, that the better financed candidate always wins the election. Sometimes, the candidate with less funding wins. Bradley A. Smith, Unfree Speech: The Folly of Campaign Finance Reform 48-51 (2001); Jamin B. Raskin, *The Campaign-Finance Crucible: Is Laissez Fair?*, 101 Mich. L. Rev. 1532, 1535 (2003).

minding their business in the committee process."[470] And, thus, as one might expect, empirical evidence shows that government officials are especially unresponsive to the interests of low-income citizens.[471]

Nonetheless, the Court's application of strict scrutiny is only *partly* an empirical question; it is also partly a normative question. For instance, in a campaign finance case, the definition of corruption is crucial to the Court's determination of whether the government has identified a compelling purpose. And in perhaps the most significant aspect of the Court's reasoning, *Citizens United* severely narrowed the concept of corruption. Indeed, the majority used such a cramped notion of corruption that the empirical evidence (of corruption) was rendered irrelevant.[472] From Kennedy's perspective, only a direct contribution to a candidate or officeholder can constitute corruption or its appearance.[473] An independent expenditure, even on behalf of a specific candidate or officeholder, cannot do so.[474] Thus, apparently, the government cannot ever justify its regulation of expenditures, whether by corporations or others.[475] Ultimately, then, the *Citizens United* majority concluded that the government interest in avoiding corruption or its appearance was insufficient to satisfy strict scrutiny.[476] The BCRA restrictions on expenditures were unconstitutional.

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[470]Bartels, *supra* note 466, at 116-17; *see* Raskin, *supra* note 469, at 1550-51 (arguing that campaign expenditures are likely to lead to post-election rent-seeking).

[471]Unequal, *supra* note 469, at 2-3, 285-86.

[472]558 U.S. at 348-62; *see* Samuel Issacharoff, *On Political Corruption*, 124 Harv. L. Rev. 118, 118-21 (2010) (arguing that *Citizens United* Court overly narrowed the concept of corruption); Michael S. Kang, *The End of Campaign Finance Law*, 98 Va. L. Rev. 1 (2012) (arguing that the *Citizens United* Court's narrowing of the definition of corruption was the most important part of the case).

[473]558 U.S. at 356-57.

[474]*Id*. at 357-59.

[475]Kang, *supra* note 472, at 25-26.

[476]558 U.S. at 356-61.

The conservative justices on the Roberts Court, like conservatives in general, typically advocate for an originalist interpretation of the Constitution focusing on either the original public meaning of the document or the framers' intentions.[477] Unsurprisingly, then, the *Citizens United* majority supported its holding with originalist flourishes, even though the Court did not rely heavily on originalist arguments.[478] Kennedy characterized the statutory restriction on corporate campaign expenditures as "censorship … vast in its reach."[479] "By suppressing the speech of manifold corporations," he explained, "the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests."[480] But the framers, Kennedy reasoned, would have found such censorship or suppression impermissible, as he supposedly demonstrated with a quotation from Madison's *Federalist, Number 10*: "Factions will necessarily form in our Republic, but the remedy of 'destroying the liberty' of some factions is 'worse than the disease.' Factions should be checked by permitting them all to speak, and by entrusting the people to judge what is true and what is false."[481] Kennedy thus concluded that "[t]here is simply no support for the view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations. … the most important means of mass communication in modern times."[482]

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[477] *E.g.*, District of Columbia v. Heller, 554 U.S. 570, 576-626 (2008) (relying on originalism to interpret the second amendment); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 Loyola L. Rev. 611 (1999); John O. McGinnis & Michael B. Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 Const. Comment 371 (2007). Focusing on the original public meaning is referred to as 'new originalism,' while focusing on framers' intentions is 'old originalism.' Stephen M. Feldman, *Constitutional Interpretation and History: New Originalism or Eclecticism?*, _ B.Y.U. J. Pub. L. _ (forthcoming). In many cases, though, including *Citizens United*, the justices do not clearly identify which form of originalism is being followed.

[478] Tushnet, *supra* note 449, at 279-80.

[479] 558 U.S. at 354.

[480] *Id*.

[481] *Id*. at 354-55 (quoting The Federalist No. 10 (James Madison)).

[482] *Id*. at 353.

In a telling statement, Kennedy reasoned that "[t]he Government has 'muffle[d] the voices that best represent the most significant segments of the *economy*.'"[483] Speech, it seems, no longer emanates from the people, from citizens, but from "segments of the economy."[484] From this standpoint, the private economic sphere has subsumed the public sphere. Our democracy is now based on "one dollar, one vote," rather than "one person, one vote."[485] *Citizens United* amounted to a judicial proclamation that corporations and other wealthy entities and individuals can spend unlimited sums in their efforts to control elections and government policies. The D.C. Circuit Court of Appeals recognized as much in *SpeechNow.org v.Federal Election Commission*, decided barely two months after the Supreme Court handed down *Citizens United*.[486] The D.C. Circuit invalidated limits on contributions to political action committees that would subsequently use the funds for campaign expenditures (which would never come within the direct control of an individual candidate). In conjunction with *Citizens United*, this decision opened the door to the creation of so-called Super PACs, wielding enormous sums of money.[487] Thus, in the democratic sphere, wealth and corporate power are unfettered. According to the conservative Supreme Court justices, the liberty embodied in the first-amendment protection of free speech demands as much. Unsurprisingly, after *Citizens United* and *SpeechNow.org*, the flow of funds into the 2010 and 2012 political campaigns increased dramatically from previous election

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[483]*Id*. at 354 (quoting McConnell v. Federal Election Commission, 540 U.S. 93, 257-58 (2003) (Scalia, J., concurring in part, concurring in judgment in part, dissenting in part)) (emphasis added).

[484]*Id*.

[485]*Wesberry v. Sanders*, 376 U.S. 1 (1964), focusing on congressional districts, and *Reynolds v. Sims*, 377 U.S. 533 (1964), focusing on state legislative districts, established the doctrine of "one person, one vote." Numerous commentators have invoked the concept of "one dollar, one vote." *E.g.*, Stiglitz, *supra* note **Error! Bookmark not defined.**, at xlix-l, 149.

[486]599 F.3d 686 (D.C. Cir. 2010).

[487]Marcia Coyle, The Roberts Court 275 (2013).

cycles.[488] For the 2012 elections, $7 billion were spent.[489] Regardless, subsequent cases have shown that the conservative justices are steeled to stand strong for Democracy, Inc. The Court not only has reaffirmed the *Citizens United* holding but also has extended it. It's as if Democracy, Inc., has become official judicial and government dogma.

In one case, *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, the state of Arizona created a legislative "matching funds scheme" for campaign financing.[490] Under this scheme, a candidate for state office who accepted public financing would receive additional funds if a privately financed opponent spent more than the publicly financed candidate's initial allocation. Thus, publicly and privately financed candidates would be able to spend roughly the same amounts on their respective campaigns. In a five-to-four decision, the conservative majority held this campaign finance scheme unconstitutional. The Court, once again, emphasized the self-governance rationale,[491] then reasoned that the flexible public financing system imposed a "penalty" by diminishing the privately financed candidate's expression.[492] In dissent, Justice Kagan suggested that the majority's reasoning was exactly backwards: The public financing, she explained, "subsidizes and so produces *more* political speech."[493] But the conservative majority was adamant: Any regulation of campaign financing constituted an unconstitutional burden on free speech. "[E]ven if the matching funds provision did result in more speech by publicly financed candidates and more speech in general, it would do so at the expense of impermissibly

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[488]*See* Kang, *supra* note 472, at 5-6 (discussing the likely effects of *Citizens United* and its actual impact on 2010 elections).

[489]McCutcheon v. Federal Election Commission, _ U.S. _ (2013).

[490]131 S. Ct. 2806, 2813 (2011).

[491]*Id*. at 2816-17.

[492]*Id*. at 2818.

[493]*Id*. at 2833 (Kagan, J., dissenting) (emphasis in original).

burdening (and thus reducing) the speech of privately financed candidates and independent expenditure groups."[494]

In a second case, *American Tradition Partnership, Inc. v. Bullock*, a Montana statute provided that a "corporation may not make … an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party."[495] The Montana Supreme Court upheld this statute in the face of a first-amendment challenge based on *Citizens United*. The Montana Court reasoned that the specific history in the state—of corporate corruption of democracy—supported the state's claim that the regulation was narrowly tailored to achieve a compelling purpose.[496] In yet another five-to-four decision, the conservative justices on the U.S. Supreme Court disagreed. In a per curiam opinion reversing the Montana Court, the justices reasoned that "[t]here can be no serious doubt" that *Citizens United* controlled and precluded the state from even attempting to demonstrate that its factual situation was unique.[497]

And in the most recent campaign finance case, *McCutcheon v. Federal Election Commission*, the Court invalidated federal statutory limits on the aggregate contributions of campaign donors.[498] *Buckley* had upheld both base and aggregate limits on contributions.[499] A base limit restricts the amount a donor can give directly to a single candidate or committee, while

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[494]*Id*. at 2821.

[495]132 S. Ct. 2490, 2491 (2012) (quoting Mont. Code Ann. §13-35-227(1) (2011)).

[496]132 S. Ct. at 2491; *id*. at 2491-92 (Breyer, J., dissenting) (discussing Western Tradition Partnership v. Attorney General, 363 Mont. 220 (2011)).

[497]132 S. Ct. at 2491. In yet another subsequent case, the Court sharpened the conservative thrust of *Citizens United*. *Citizens United*, in theory, applied equally to corporations and unions. But in *Knox v. Service Employees International Union*, the Court considered whether a public employee union imposing a special assessment fee to support political advocacy had satisfied free-speech requirements when it failed to allow non-members to opt out of the fee. 132 S. Ct. 2277 (2012). The conservative justices held that even if the union had provided an opt-out for the non-members, it would have been insufficient to satisfy the first amendment. After this case, then, union efforts to raise money for political campaigns would face obstacles beyond those faced by corporations.

[498]McCutcheon v. Federal Election Commission, _ U.S. _ (2013).

[499]424 U.S. 1, 26, 38 (1976).

an aggregate limit restricts the total amount a donor can give to all candidates and committees.[500] In *McCutcheon*, Roberts's plurality opinion emphasized the narrow definition of corruption articulated in *Citizens United*. "'The hallmark of corruption is the financial quid pro quo: dollars for political favors.'"[501] Thus, government restrictions on contributions must be "closely drawn" or "narrowly tailored" to prevent "'quid pro quo' corruption or its appearance."[502] In concluding that aggregate limits on contributions were not closely enough tied to corruption, as narrowly defined, Roberts stated that contributing large sums of money to political campaigns amounts to "'robustly exercis[ing]' [one's] First Amendment rights."[503] This view suggests that the more money an individual spends, the more vigorous is his or her exercise of free expression. *McCutcheon*, it should be noted, left intact the base contribution limits, which were not in issue, though Roberts characterized them as a "prophylactic measure."[504] One might reasonably wonder, in the context of Democracy, Inc., whether the conservative justices will long abide a mere prophylactic that limits spending on political campaigns. In fact, Justice Thomas has already declared that he views all campaign finance restrictions, including the base limits on contributions, as unconstitutional.[505]

During the Rehnquist Court years, the conservative justices sought to protect traditional moral values while also protecting economic liberty. The Roberts Court conservatives have maintained the judicial support of moral values, but they have further intensified the

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[500]McCutcheon v. Federal Election Commission, _ U.S. _ (2013).

[501]McCutcheon v. Federal Election Commission, _ U.S. _ (2013) (quoting Federal Election Comm'n v. National Conservative Political Action Comm., 470 U. S. 480, 497 (1985)).

[502]*Id*. at

[503]*Id*. at (quoting Davis v. Federal Election Comm'n, 554 U. S. 724, 739 (2008)).

[504]*Id*. at

[505]*Id*. at (Thomas, J., concurring in the judgment).

constitutional shielding of economic liberty. In cases where the bolstering of traditional moral values clashes with the protection of economic liberty, the Roberts Court inevitably favors the latter. Two cases, in particular, involved businesses that used arguably immoral expressive activities to garner economic profits. Both cases held that the first amendment protected the expression. Thus, the Court allowed the immoral but profitable activities to continue. In *United States v. Stevens*, a federal statute prohibited animal crush videos by criminalizing "the commercial creation, sale, or possession of certain depictions of animal cruelty."[506] The Court held the statute to be substantially overbroad on its face and therefore unconstitutional.[507] The crush videos, the Court reasoned, did not fit into a previously-recognized low-value (or unprotected) category of free speech.[508] Moreover, the government could not justify the creation of a new low-value category.[509] In *Brown v. Entertainment Merchants Association*, a state law prohibited "the sale or rental of 'violent video games' to minors."[510] Video games, the Court began, are a form of expression generally within the compass of the first amendment.[511] Then, as in *Stevens*, the Court reasoned that this expression neither fell into a low-value category of unprotected speech nor otherwise could be justifiably restricted.[512] To be sure, the Court did not emphasize in either *Stevens* or *Brown* that the expressive activities were commercial and

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[506]130 S. Ct. 1577, 1582 (2010).

[507]*Id*. at 1586-92.

[508]*Id*. at 1584.

[509]*Id*. at 1585-86.

[510]131 S. Ct. 2729, 2732 (2011).

[511]*Id*. at 2733.

[512]After discussing low-value categories, *id*. at 2734-38, the Court reasoned that the state could not justify the restriction under the strict scrutiny test. *Id*. at 2738-41.

profitable, but at the same time, the Court unquestionably understood that both cases involved economic activities.[513]

Ultimately, the Roberts Court's stretching of the first amendment to protect economic liberty might be boundless, as demonstrated in the purported free-speech case, *Sorrell v. IMS Health Inc.*, decided in 2011.[514] When pharmacies process prescriptions, they routinely record information such as the prescribing doctor, the patient, the dosage, and so forth. Data mining businesses, like IMS Health Inc., buy this information, analyze it, and sell or lease their reports to pharmaceutical manufacturers. When armed with this information, pharmaceutical salespersons are able to market their drugs more effectively to doctors. Vermont enacted a law to prevent pharmacies from selling this information.[515] The legislature had two primary purposes: first, to protect the privacy of patients and doctors, and second, to improve public health by, for example, encouraging doctors to prescribe drugs in their patients' best interests rather than because of effective pharmaceutical marketing.[516] Stephen Breyer's dissent, joined by Ruth Bader Ginsburg and Elena Kagan, characterized the statute as a police power regulation of the economic marketplace that did not trigger free-speech concerns.[517] The Court disagreed. It reasoned that the statute raised an unusual commercial speech issue. Commercial speech cases typically involve advertising, and as the Court admitted, the statute in *Sorrell* did not restrict advertising per se.[518] Yet, the Court reasoned that the first amendment not only applied but also

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[513]*Stevens*, 130 S. Ct. at 1585, 1592; *Brown*, 131 S. Ct. at 2732, 2735. Of note, in both *Stevens* and *Brown*, the conservative bloc divided.

[514]131 S. Ct. 2653 (2011).

[515]*Id*. at 2559-60.

[516]*Id*. at 2668.

[517]*Id*. at 2673 (Breyer, J., dissenting). Breyer further reasoned that even if the statute was construed as restricting speech, then at most, the *Central Hudson* test—an intermediate level of scrutiny—should be applied. *Id*. at 2673, 2679-80.

[518]*Id*. at 2662-63, 2667.

required "heightened judicial scrutiny."[519] The Court then invalidated the statute pursuant to this standard, more rigorous than the *Central Hudson* balancing test ordinarily applied in commercial speech cases.[520] In *Sorrell*, then, the Roberts Court went even farther down the libertarian road by extending the first amendment to protect economic activities only tenuously connected to expression.[521]

V. Constitution Betrayed

The Roberts Court conservatives have fully accepted and bolstered Democracy, Inc. Their expansive constitutional protection of economic liberty harmonizes with neoliberal libertarianism and its underlying laissez-faire ideology. In *Citizens United* and other cases, the conservative justices have interpreted the Constitution so that the private sphere subsumes the public. Rational self-maximization, apropos in the private sphere, becomes the governing rule of conduct in the public sphere, as Milton Friedman and other neoliberals have advocated. Moreover, the conservative justices maintain that originalist methods—focusing on the original public meaning or the framers' intentions—support this economic understanding of the Constitution.[522]

But despite the Roberts Court's assertions, originalism cannot justify this economic and libertarian interpretation of the Constitution.[523] Whereas the Roberts Court conservatives follow

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[519]*Id*. at 2663.

[520]*Id*. at 2663. The Court reasoned that it would have invalidated the law even if it had applied *Central Hudson*. *Id.* at 2667-68.

[521]Interestingly, when the government is an employer, the Roberts Court protects the economic marketplace and the sanctity of contract by allowing the government-employer to restrict the speech of its employees. Borough of Duryea v. Guarnieri, 131 S. Ct. 2488 (2011) (limiting government employee's first-amendment right to petition the government); Garcetti v. Ceballos, 547 U.S. 410 (2006) (limiting free-speech rights of government employees by distinguishing between speech as a citizen and speech as an employee).

[522]*See* Charles A. Beard, An Economic Interpretation of the Constitution of the United States (1913) (arguing for an economic interpretation).

[523]I do not mean to suggest implicitly that originalism sometimes provides clear and certain answers to constitutional issues. It does not. *See* Stephen M. Feldman, *Constitutional Interpretation and History: New*

the neoliberal emphasis on the private sphere, the framers sought balance between the public and private spheres. True, the framers gave great importance to the private sphere. They believed that individuals, in the private sphere, would and should act as self-interested commercial and economic strivers. Moreover, the framers realized that many individuals would try to pursue their own passions and interests not only in the private realm but also in the public sphere. This realization had arisen from the hard experiences of the 1780s, during which the framers witnessed the formation of factions, which attempted to seize government power in various states. From the framers' perspective, the state constitutions, following the Revolution's civic republican ideology, had been built on utopian illusions about the average citizen's degree of virtue. Such utopianism had allowed corruption to permeate state governments and to threaten national existence. The framers rejected such utopianism for a pragmatic realism. Not all citizens would virtuously pursue the common good. Many would seek to manipulate government power for their own private advantage.

The framers nonetheless did not surrender to a cynicism that would have denied the possibility of government in accord with republican principles. They did not believe that government should be based on the individual pursuit of self-interest. Instead, they insisted that the public sphere must be distinguished from the private sphere. They maintained that virtue and reason could and should overcome passion and interest in public affairs. Government could and should be conducted in accord with the civic republican principles of virtue and the common good. Passion and interest must be acknowledged—that was part-and-parcel of the framers' realistic perspective—but they believed they had designed the Constitution to channel self-interest toward the pursuit of the common good.

In other words, the framers envisioned a balance between the public and private spheres. The constitutional structures would promote the virtuous pursuit of the common good in the

Originalism or Eclecticism?, _ B.Y.U. J. Pub. L. _ (forthcoming) (criticizing new originalism as being historically unjustified).

public sphere while simultaneously protecting individual rights and liberties in the private sphere. Perhaps, the conservative justices did not rely heavily on originalist arguments in *Citizens United* and *McCutcheon* for that very reason: The historical evidence suggests that the *Citizens United* and *McCutcheon* decisions contravene the framers' intentions and the original public meaning of the Constitution. The liberal dissenters in those cases, in fact, atypically invoked originalist sources more extensively than did the conservative majorities.[524] In short, the Roberts Court conservatives betray constitutional principles when they treat economic interests as sacrosanct rights. The framers not only aimed for a pragmatic balance, but also believed the government ultimately must have the power to control the private sphere and not vice versa.

If the Court's protection of Democracy, Inc., and glorification of a laissez-faire private sphere merely contravened the framers' intentions and the original public meaning, then the justices might, perhaps, be able nonetheless to justify their neoliberal libertarian interpretation of the Constitution—if the justices were willing to repudiate originalism.[525] But other considerations—namely, theory and history—suggest that the Court is going in a risky direction. For several decades now, political philosophers and social theorists have warned that either excessive mixing of the public and private realms or undue weakening of one of them seriously endangers the entire societal system, including both the public and private. A common theme running among these diverse scholars, ranging from the seminal neoconservative social theorist, Daniel Bell, to the renowned liberal political philosopher, Jürgen Habermas, is that the economic and political spheres need to remain separate.[526] The logic, structure, and culture of each sphere

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[524]*McCutcheon*, _ U.S. at (Breyer, J., dissenting); *Citizens United*, 558 U.S. at 426-28 (Stevens, J., dissenting). In *McCutcheon*, neither Roberts's plurality opinion nor Thomas's concurrence in the judgment invoked any originalist sources.

[525]To put this in different words, originalist methods do not identify fixed constitutional meanings. Despite conservative claims to the contrary, constitutional interpretation entails the consideration of multiple factors, such as practical consequences and precedent. *See* Philip Bobbitt, Constitutional Interpretation 12-13 (1991) (specifying six "modalities of argument" judges use to decide constitutional cases).

[526]Daniel Bell, The Cultural Contradictions of Capitalism (1978; 1st ed. 1976); Jürgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy 322 (William Rehg trans., 1996)

are distinct. Thus, we need to be wary not only of government unduly controlling the economy—as with a centralized or planned economy[527]—but also of economic institutions, particularly corporations, unduly controlling the government. In the words of Michael Walzer, "What democracy requires is that property should have no political currency, that it shouldn't convert into anything like sovereignty, authoritative command, sustained control over men and women."[528] When economic concepts and reasoning are allowed to invade or colonize the political realm, these theorists all argue that democracy is threatened.

Writing in the late 1970s, when corporations were beginning to assert themselves in the democratic arena, Bell cautioned against the dangers of mixing money and politics in pluralist democracy. Bell divided society into three realms: the techno-economic (or social), the cultural, and the political.[529] The three realms, he suggested, will contribute to a stable society if they either remain separate or operate in ways that reinforce each other. Early in the development of capitalism, a culture of hard work, self-discipline, and self-denial—characterized by Max Weber as the Protestant ethic—bolstered the capitalist economy by encouraging individuals to devote themselves to employment in bureaucratically organized workplaces.[530] By the second half of the twentieth century, however, the three realms overlapped and intersected in ways that were not mutually reinforcing; rather, they contradicted each other, causing societal instability.[531] For

[hereinafter Between] (discussing an ideal community); Jürgen Habermas, 1 The Theory of Communicative Action 340-43 (Thomas McCarthy trans., 1984) (discussing how economic and administrative rationality can skew symbolic interactions). Other theorists who have argued similarly include Hannah Arendt, Benjamin Barber, and Michael Walzer. Hannah Arendt, The Human Condition 27-29 (1958) (arguing that political sphere needs to be purified of external concerns); Barber, *supra* note 376, at 239-46 (emphasizing that capitalism and democracy are not identical, so a capitalist economy will not necessarily produce democracy); Michael Walzer, Spheres of Justice: A Defense of Pluralism and Equality (1983); *see* Hacker & Pierson, *supra* note 271, at 74-75 (emphasizing need for "firewalls between the market and democracy").

[527]Hayek emphasized the dangers of a planned economy. Hayek, *supra* note 138.

[528]Walzer, *supra* note 526, at 298.

[529]Bell, *supra* note 526, at xxx-xxxi, 10-13.

[530]*Id*. at 54-65; Max Weber, The Protestant Ethic and the Spirit of Capitalism (Talcott Parsons trans., 1958).

[531]Bell, *supra* note 526, at 11-16, 37, 71-72.

instance, the capitalist economy required an ethos of "work, delayed gratification, career orientation, [and] devotion to the enterprise,"[532] but the modernist culture imbued individuals with a hedonistic desire for self-gratification.[533] More to the point of this Article, tensions between the economic and political realms would also prove problematic, according to Bell. The operative principle of the capitalist economy was efficiency, maximizing one's benefits while minimizing costs,[534] while the operative principle of the pluralist democratic polity was equality, requiring that all individuals be "able to participate fully" as citizens.[535] If the two realms had remained distinct, each could successfully fulfill its respective principle. But the two realms were bleeding into each other, Bell argued, thus producing discordance. Capitalism, aiming for efficiency, relied on hierarchically structured bureaucratic organizations that collided with the political desire for participatory equality. Citizens pressed political demands that confounded equality and efficiency, thus generating group conflict and societal instability.[536] And to be clear, Bell perceived these dangers in the 1970s, in the midst of our consumers' democracy. The emergence of Democracy, Inc., only exacerbates the threat.

The crucial point, whether one reads the neocon Bell or the liberal Habermas, is that much is at stake, far more than who wins the next election or what rate should be set for taxing corporations. The distinct economic and democratic realms, their respective logics and cultures, should not be allowed to intertwine excessively. As Habermas would put it, our democratic system is suffering from a "legitimation crisis."[537] Democratic lawmaking can retain its

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[532] *Id*. at xxv.

[533] *Id*. at xxiv-xxv, xxx, 14.

[534] *Id*. at xxx, 11.

[535] *Id*. at 11.

[536] *Id*. at 23-25, 196-98.

[537] Jürgen Habermas, Legitimation Crisis (Thomas McCarthy trans., 1975).

legitimacy only if its procedures are undistorted by the strategic manipulations characteristic of the economic marketplace.[538] Unsurprisingly, then, Democracy, Inc.—the merging of the corporate-dominated economic marketplace with pluralist democracy—threatens the ongoing legitimacy and functionality of American democracy.

Start with the inveterate idea of American exceptionalism. The meaning of exceptionalism has varied over time, as different theorists have discerned it in different aspects of the American experience. Tracing back to the colonial era, the Puritans of Massachusetts believed that America could be God's "Citty upon a Hill."[539] Early-nineteenth century Americans viewed the nation as exceptional because it could last longer than prior republics, which had succumbed to the seemingly natural rise and fall of civilizations.[540] Indeed, at least until the Civil War, many Americans believed that the nation could escape the ravages of historical time.[541] In the mid-twentieth century, liberal political theorists saw American exceptionalism in the nation's lack of a feudal past.[542] In the late-twentieth century, neoconservatives viewed American exceptionalism as rooted in the nation's principled commitment to democracy and individual rights, thus justifying the American exercise of power in other countries.[543]

But today, if the concept of American exceptionalism retains any coherence, it lies in the historical persistence of our democratic culture. Both the republican and pluralist democratic

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[538]Between, *supra* note 526, at 135.

[539]John Winthrop, *A Modell of Christian Charity*, *reprinted in* The Puritans 195, 199 (Perry Miller & Thomas H. Johnson eds., 1963 ed.).

[540]G. Edward White, The Marshall Court and Cultural Change 1815-1835, at 6-9 (1991).

[541]Dorothy Ross, The Origins of American Social Science 468 (1991).

[542]John G. Gunnell, The Descent of Political Theory 241 (1993).

[543]Stephen M. Feldman, Neoconservative Politics and the Supreme Court: Law, Power, and Democracy 54-68 (2013) [hereinafter Feldman, Neoconservative]; Kenneth Anderson, *Goodbye To All That? A Requiem For Neoconservatism*, 22 Am. U. Int'l L. Rev. 277, 288-90 (2007).

regimes were built on the foundation of a democratic culture, which itself rested on the public perception of a rough material equality—or, at least, the lack of gross inequality, as found traditionally in European societies with entrenched aristocracies.[544] Under republican democracy, the material equality engendered by widespread land ownership contributed to a sense that citizens were political equals with a shared commitment to the common good. Under pluralist democracy, widely shared middle-class attitudes generated a willingness to negotiate and compromise politically. Because America lacked an aristocratic class, citizens believed they were political equals; they all might, at different times, be democratic winners and losers, despite sharp disagreements over various policies.[545] In fact, the significance of a persistent democratic culture grounded on perceptions of a rough material equality—running from republican democracy through the consumers' democracy—is evident in prior iterations of American exceptionalism, such as the mid-twentieth century emphasis on the lack of a feudal past.

Most important, then, Democracy, Inc., undermines the stability of our democratic culture. Democracy, Inc., enfeebles belief in even the roughest material equality because income and wealth are concentrated in an incredibly small sliver of the population. From 1974 to 2007, the share of national income going to the top-earning 0.1 percent of American families increased "more than fourfold" (with adjustments for inflation) and continued to remain disproportionately high in subsequent years.[546] From 2009 to 2012, ninety-five percent of income gains went to the top one percent.[547] In fact, American income inequality has reached its highest level since the

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[544]Tocqueville emphasized the importance of the equality of condition in America. "The more I advanced in the study of American society, the more I perceived that the equality of conditions is the fundamental fact from which all others seem to be derived, and the central point at which all my observations constantly terminated." Tocqueville, *supra* note **Error! Bookmark not defined.**, at 12.

[545]*See, e.g.*, Hartz, *supra* note 125, at 50-64 (emphasizing the importance of middle-class attitudes).

[546]Hacker & Pierson, *supra* note 271, at 16; *see* Unequal, *supra* note 469, at 6-13 (detailing income inequality); Alvaredo, *supra* note 366, at 4 (Table: Top 1 Percent Income Shared in the United States) (graphing income share through 2011).

[547]Emmanuel Saez, *Striking it Richer: The Evolution of Top Incomes in the United States (Updated with 2012 Preliminary Estimates*), at 1.

1920s, just before the Great Depression and the collapse of the republican democratic regime.[548] We went from being a nation in which most of its "income gains accrue to the bottom 90 percent of households (the pattern for the economic expansion of the 1960s) to one in which more than half go to the richest 1 percent …."[549] In short, the level of income inequality—of "economic polarization"[550]—has stretched to "historic scope."[551] Moreover, remarkably so, wealth "is much more highly concentrated than income."[552] For instance, as of 2007, the most affluent one percent of Americans controlled thirty-five percent of the nation's wealth, while the top ten percent controlled nearly seventy-five percent of the wealth![553] Unquestionably, there has been no "trickle down" to the less fortunate.[554] If anything, America has developed a "trickle up" system.[555] This trickle up system, it should be emphasized, is not race neutral. From 2000 to 2011, the income and wealth of African Americans and Hispanics shrank more than that of other Americans.[556] To be sure, economic inequality is not unique to the United States. In many nations, the economically insecure and marginalized constitute more than fifty percent of the populations.[557] But the point of American exceptionalism is that, historically, the United States

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[548]*Id*. at 1-2; Stone, *supra* note 366, at 11.

[549]Hacker & Pierson, *supra* note 271, at 17.

[550]Phillips, *supra* note 254, at 127.

[551]Unequal, *supra* note 469, at 13.

[552]Stone, *supra* note 366, at 1, 12.

[553]*Id*. at 12-13.

[554]Hacker & Pierson, *supra* note 271, at 19.

[555]*Id*. at 19-20.

[556]Thomas W. Mitchell, *Growing Inequality and Racial Economic Gaps*, 56 How. L.J. 849, 850-52, 857-61 (2013).

[557]Tonkiss, *supra* note **Error! Bookmark not defined.**, at 163-65.

has maintained enough material equality to sustain a reasonable degree of political equality, which in turn has sustained the democratic culture.

Gross material inequality threatens to crack the pillars of democratic culture. For instance, gross inequality in a pluralist democratic regime will undermine commitment to the rule of law. Individuals obey the law because they either accept it as legitimate or fear the punishment that might result from disobedience. Without the perception of rough material equality, sustaining a sense of reasonable political equality, government proclamations of legitimacy would appear bankrupt. People would have little reason to obey the law other than fear. We might call such a nation a police state rather than a democracy. "[W]hen income and wealth inequalities reach a point—as they have today—close to that which preceded the crash of 1929, then the economic imbalances become so chronic as to be in danger of generating a structural crisis."[558] Quite simply, in the words of Fukuyama, a "robust" democracy cannot survive without a "healthy middle-class."[559]

Democracy, Inc., further threatens the democratic culture because it weakens the concept of national citizenship, the glue that binds individuals together in a national polity. Gross income inequality, again, is a contributing force as it diminishes individual allegiance to the nation. Statistics demonstrate that the less affluent become disaffected and, consequently, less likely to vote than the wealthy.[560] Democracy, Inc., systematically "works to depoliticize its citizenry."[561] Without doubt, impoverished people are more apt to resort to crime and violence.[562] Moreover, multinational corporations care about profits, not borders. If anything, the national boundaries

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[558]Harvey, *supra* note 3, at 188-89.

[559]Fukuyama, *supra* note 406.

[560]Phillips, *supra* note 254, at 391.

[561]Vision, *supra* note 257, at 592.

[562]Hedges, *supra* note 275, at 6, 9.

implicit in citizenship represent obstacles to corporations, which prefer the free flow of commercial goods to the most profitable markets, regardless of national identities.[563] Corporate globalization threatens the very concept of a nation state. Renowned corporate advocate and management consultant, Kenichi Ohmae, has called the nation a "nostalgic fiction."[564] From his perspective, "traditional nation states have become unnatural, even impossible, business units in a global economy."[565] As Benjamin Barber aptly phrased it, "[m]arkets abhor frontiers as nature abhors a vacuum."[566] Indeed, nowadays, a corporate officer who sacrificed profit for the well-being of any particular community—national or otherwise—would likely be deemed untrustworthy, if not daft.[567] Milton Friedman has explicitly argued that the only social responsibility of business is to maximize profits.[568] Any corporate effort to do otherwise, in his opinion, would be "immoral."[569] Friedman's views are not unusual. Business consultant and professor, Peter Drucker, declared, "If you find an executive who wants to take on social responsibilities, fire him. Fast."[570]

Corporations, in other words, care not one iota about promoting or sustaining national citizenship. Although the Supreme Court has deemed corporations to be persons for constitutional purposes, any real person with a corporation's single-minded desire for economic

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[563]Barber, *supra* note 376, at 7-8.

[564]Ohmae, *supra* note 9, at 12.

[565]*Id*. at 5; *see* Tonkiss, *supra* note **Error! Bookmark not defined.**, at 56-61 (discussing threat to nation states).

[566]Barber, *supra* note 376, at 13.

[567]Phillips, *supra* note 254, at 148, 412-13.

[568]Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, The New York Times Magazine (Sept. 13, 1970).

[569]Bakan, *supra* note 9, at 34 (quoting Friedman).

[570]*Id*. at 35 (quoting Drucker).

profit would be diagnosed a psychopath. Like a psychopath, corporations lack empathy for others, are manipulative of others (in the corporate quest for profit), and have delusions of grandeur (because their own profit or advantage is always most important).[571] To the extent that citizens qua citizens survive in Democracy, Inc., they exist primarily "to be manipulated, managed, and intellectually massaged."[572] Corporations aim to produce consumers, not democratic citizens. These consumers tend to be "self-interested, exploitive, competitive, striving for inequalities, fearful of downward mobility."[573] As Sheldon Wolin has explained Democracy, Inc., "[o]ne's neighbor [is] either a rival or a useful object. As the world of capital became steadily more enveloping and the claims of the political more anachronistic, capital became the standard of the 'real,' the 'true world.'"[574] In short, Democracy, Inc., endangers the democratic culture that has sustained American democratic government for more than two centuries.

One crucial insight that emerges from the discussions of Bell, Habermas, and other scholars is that the public and private spheres operate together as a system. American society is a capitalist-democratic system. If one part of the system fails or becomes too weak, then the entire system is threatened. Joseph Stiglitz, an economist, emphasizes that "the relationship between government and markets [should be viewed] as complementary, both working in partnership."[575] Thus, he adds that "failures in politics and economics are related, and they reinforce each other."[576] Daron Acemoglu, an economist, and James A. Robinson, a political scientist and

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[571] *Id*. at 56-57.

[572] Allen, *supra* note 10, at 147.

[573] Vision, *supra* note 257, at 597.

[574] *Id*.

[575] Stiglitz, *supra* note 9, at xiii.

[576] Stiglitz, *supra* note **Error! Bookmark not defined.**, at 1.

economist, jointly describe a "strong synergy between economic and political institutions."[577] They explain that if either economic or political institutions are skewed—if they are not inclusive—then the entire societal system becomes unstable.[578] Barry Eichengreen, an economic historian, emphasizes the need to understand the connection between politics and economics.[579] William J. Novak, a historian, details "the interpenetration of public and private spheres—the convergence of public and private authority."[580]

Most important, the framers themselves clearly understood the need both to conceptualize separate public and private spheres and to recognize their interrelationships. Government unequivocally needs the funding supplied from a functioning economic marketplace.[581] The government cannot perform any task, whether road building, firefighting, public education, or anything else, without revenue, derived from profit-driven economic actors. But contrary to laissez-faire dreaming, the economy needs a functioning democratic government. The government supports capitalism in multiple ways. Among its many functions, government regulates the money supply and credit; it provides sustenance during times of unemployment; it educates and trains potential workers; it regulates land and resource use; it builds and maintains roads, seaports, and airports.[582] In short, government provides the hard and soft infrastructure that facilitates economic transactions.[583] Without government infrastructure, economic

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[577]Daron Acemoglu & James A. Robinson, Why Nations Fail 81 (2012).

[578]*Id*. at 3-4, 82.

[579]Eichengreen, *supra* note 9, at 10.

[580]Novak, *supra* note 62, at 770; *see* Neil J. Smelser & Richard Swedberg, *The Sociological Perspective on the Economy*, *in* The Handbook of Economic Sociology 3, 7 (1994) (explaining the discipline of economic sociology as analyzing "the connections and interactions between the economy and the rest of society").

[581]Block & Evans, *supra* note 101, at 506.

[582]Block, *supra* note 103, at xxvi-xxvii.

[583]Acemoglu & Robinson, *supra* note 577, at 76; Stiglitz, *supra* note **Error! Bookmark not defined.**, at 66, 116.

transactions might be possible, but transaction costs would become astronomical.[584] Dani Rodrik, an economist, reiterates the basic point: "Markets and states are complements."[585] But Rodrik goes further, explaining that national markets depend on national government: "If you want more and better markets, you have to have more (and better) governance. Markets work best not where states are weakest, but where they are strong."[586] Big multinational corporations need big democratic governments to maintain a healthy systemic balance.

Given the interconnection of the public and private spheres, if the private sphere subsumes the public realm, then the entire democratic-capitalist system will be threatened. If Democracy, Inc., and its neoliberal libertarian ideology undermine democratic culture—as seems to be happening—if the people lose their faith in democratic government—as appears to be occurring—then not only American democracy but also American capitalism will be endangered. In fact, the history of the early-twentieth century suggests that the United States today, in the early-twenty-first century, is approaching a crisis. Without doubt, the parallels between these two eras, separated by a century, are alarming, as numerous scholars in disciplines as diverse as economics, political science, history, anthropology, and economic sociology have recognized.[587] Laissez-faire ideology grew especially strong during the early-twentieth century, and neoliberal libertarianism, like laissez faire on steroids, has flexed its muscles in the twenty-first century. During both eras, the strength of laissez-faire ideology generated strong opposition to social welfare laws and other government policies that might impinge on the economic marketplace.

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[584]Rodrik, *supra* note 9, at 14-16.

[585]*Id*. at 16 (emphasis omitted).

[586]*Id*. at xviii.

[587]Harvey, *supra* note 3, at 153, 188-89 (antropologist); Rodrik, *supra* note 9, at xvi (economist); Joseph E. Stiglitz, *Foreword*, *in* Polanyi, *supra* note 2, at vii, xiv (economist); Fred Block, *Introduction*, *in* Polanyi, *supra* note 2, at xviii, xxxiii-xxxiv (economic sociologist); *see* Clark, *supra* note 88, at xxvii-xxviii (historian paralleling political situations of early-twentieth and early-twenty-first centuries); Frieden, *supra* note 9, at xv-xvii, 391 (political scientist paralleling globalization of early-twentieth and early-twenty-first centuries); MacMillan, *supra* note **Error! Bookmark not defined.**, at xxxii (historian doing same).

Thus, during these two time periods, the dream of laissez faire moved closer to reality—though, during both times, businesses continued to seek and to accept government favors.

During both the early-twentieth and the early-twenty-first centuries, two related consequences followed from the predominance of laissez-faire ideology. First, as discussed, economic inequality increased to striking proportions. Second, overt attacks on democratic processes and government proliferated. For instance, nowadays, it is almost trite to observe that Congress is dysfunctional. Indeed, the extreme party polarization that has crippled Congress in recent years eerily mirrors Karl Polanyi's 1944 description of European democracies in the 1920s, which emphasized how a "clash of group interests" had paralyzed national institutions, thus creating "an immediate peril to society."[588] Focusing on the United States, many conservatives today attack democratic participation in manners that echo early-twentieth-century attempts to restrict voting. During both eras, attempts to limit voting have been justified as efforts to "preserve the purity of the ballot box," but the effect is to exclude certain societal groups, such as the poor and racial minorities.[589] The disfranchisement laws tend to discriminate especially against those lacking "time, money, and knowledge of bureaucracy."[590] In recent years, more than thirty-one states have enacted laws restricting voting.[591] For instance, the Voter Information Verification Act of North Carolina not only requires voters to present government-issued photo identification at the polls but also shortens the early voting period, ends pre-

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[588]Polanyi, *supra* note 2, at 244. For discussions of polarization, see Feldman, Neoconservative, *supra* note 543, at 43-45; Morris P. Fiorina et al., Culture War? The Myth of a Polarized America (2005).

[589]Alexander Keyssar, *The Squeeze on Voting*, International Herald Tribune (Feb. 15, 2012); *see* Walter Dean Burnham, *Democracy in Peril: The American Turnout Problem and the Path to Plutocracy*, The Roosevelt Institute, Working Paper No. 5, at 2-11 (December 1, 2010) (describing efforts to restrict voting in American history).

[590]Stiglitz, *supra* note **Error! Bookmark not defined.**, at 163.

[591]Brennan Center for Justice, *Summary of Voter ID Laws Passed Since 2011* (Nov. 12, 2013); Rick Lyman, *Texas' Stringent Voter IDd Law Makes a Dent at Polls*, New York Times, Nov. 6, 2013.

registration for sixteen- and seventeen-year-olds, and eliminates same-day voter registration.[592] Under the Texas Voter Identification law, an individual who presents a concealed-gun permit can vote, but an individual with a student photo ID cannot.[593] A Pew Center study discovered that "at least 51 million eligible U.S. citizens are unregistered, or more than 24 percent of the eligible population."[594] For purposes of comparison, in Canada, more than 93 percent of eligible voters are registered.[595] To be clear, many American citizens do not participate because they are purposefully discouraged or prevented from doing so, not because they are apathetic.[596] The Roberts Court, which claimed in *Citizens United* to be concerned with protecting the democratic process, facilitated the passage of these disfranchisement laws by invalidating a key provision of the Voting Rights Act.[597]

The history of the first half of the twentieth century shows that utopian dreams of an unregulated laissez-faire marketplace can weaken democratic governments. An inverse relationship exists: As demands for economic rationalism and laissez faire increase, confidence in government decreases. During the early-twentieth century, numerous democratic governments in Europe collapsed amidst calls for less interference with the marketplace. Moreover, if either the government or the economy becomes too weak, then the entire system can collapse.[598] A pristine self-sufficient and self-regulating market economy has never existed and is literally

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[592]Brennan Center, *supra* note 591; Aaron Blake, *North Carolina Governor Signs Extensive Voter ID Law*, Washington Post (Aug. 12, 2013).

[593]Brennan Center, *supra* note 591, at 13-14; Lyman, *supra* note 591.

[594]Pew Center on the States, *Inaccurate, Costly, and Inefficient: Evidence that America's Voter Registration System Needs an Upgrade* 1 (Feb. 14, 2012).

[595]*Id*. at 2.

[596]Burnham, *supra* note 589, at 25.

[597]Shelby County v. Holder, _ U.S. _ (2013).

[598]Polanyi, *supra* note 2, at 25, 240; Block, *supra* note 103, at xxv.

impossible. Liberty cannot long continue in one sphere if it does not exist in the other. Despite laissez-faire ideology, the diminishment and ultimate destruction of democracy would be bad for business. Very bad. History shows that when either the private or public sphere collapses, or when one sphere undermines the operation of the other, then the entire democratic-capitalist system is threatened.[599]

Despite the parallels between the early-twentieth and the early-twenty-first centuries, the two eras differ in one significant way. In the twentieth century, American democracy tumbled into crisis, as did many European democracies. During that time, numerous Americans considered whether fascism or communism might provide a more efficient alternative to democracy. Yet, while most European democracies collapsed, American democracy survived. At least two factors contributed to the sustenance of American democracy. First, the nation's deep democratic culture provided a foundation for the reformation of American democratic institutions and practices: Pluralist democracy supplanted republican democracy. And the new pluralist democratic regime was, in many ways, stronger than its republican democratic predecessor. Most important, political participation was more widespread, and the New Deal manifestation of pluralist democracy emphasized the interconnection of government and capitalism. Government, it was widely recognized, could be used to bolster the economy and to correct for marketplace imperfections. For the moment, then, utopian dreams of laissez faire were buried in the nation's unconscious. Government power expanded and further centralized at the national level, and the economy entered into a period of sustained prosperity.

Second, many Americans, liberals and conservatives alike, eventually perceived the dangers threatening the United States. Here lies the key distinction between the twentieth and twenty-first centuries. By the late 1930s, the perilous position of the nation had grown conspicuous, partly because external threats (other countries) obviously endangered the nation's

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[599]Polanyi, *supra* note 2, at 243-44.

security. To be sure, the long-running Great Depression had shaken the nation's confidence, but the rise of the Nazi war machine tangibly imperiled the existence of democracy. Indeed, numerous American political and constitutional theorists from the 1930s through the 1950s, scholars like Dewey and Dahl, recognized the threat to democratic government and defended it by articulating pluralist democratic theory.[600]

But now, in the twenty-first century, few Americans seem to recognize the dangers threatening our democratic-capitalist system. One reason for this blindness is that the nation won the Cold War. When the United States won and the Soviet Union lost, it seemed only a matter of time before democracy and capitalism would rule the world. Of course, Americans soon had to worry about terrorism, but few see terrorism as an existential threat to the nation—not in the way that Soviet communism had been. But in the American Cold War victory, hidden dangers lurked, as neoliberal libertarianism was unleashed, and Democracy, Inc., emerged. Neoliberal libertarians—laissez-faire ideologues—consistently ignore market problems while emphasizing government failures. Ironically, these libertarians are tied as strongly to their utopian ideals of the marketplace as the Soviets were tied to their utopian visions of a proletarian revolution. Both the libertarians and the communists believed that capitalism cannot coexist with extensive social welfare laws interfering in the economic market. The communists favored social welfare, so they sought the end of capitalism. The libertarians favored capitalism, so they have sought to end or minimize social welfare laws and other democratic intrusions on the marketplace.[601] But utopian thinking, in general, obscures history. Utopians do not learn from experience. They do not adjust their theories to fit the evidence. Instead, they insist that the future will adhere to the theory. Hence, neoliberal libertarians persistently conceptualize the economic marketplace in ideal terms while casting government and political decision making in the worst possible lights. For

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[600] *See* Katznelson, *supra* note **Error! Bookmark not defined.**, at 1-8, 126-28, 156-58 (discussing writers who defended democracy).

[601] *See* Frieden, *supra* note 9, at 276 (explaining the Soviet Union's view of capitalism).

instance, from the libertarian standpoint, interest groups constantly manipulate legislatures and capture administrative agencies. Meanwhile, libertarians constantly seek to slash funding of government programs, then complain loudly when those underfunded programs fail to perform adequately. To be sure, many of the libertarian complaints about government are grounded in reality—and therefore need to be confronted—but simultaneously, neoliberal libertarians rarely even acknowledge that markets are imperfect.[602] Indeed, markets might be riddled with imperfections and inefficiencies for many reasons, including inadequate knowledge, high transaction costs, and purposeful corporate action (as corporations seek to maximize their own profits).[603] Yet, many neoliberal libertarians will attribute any and all market failures to government interference.[604]

Unfortunately, the Roberts Court conservatives have been swept up in the ideology of Democracy, Inc., including the utopian dreams of the neoliberal libertarians. But the framers were anything but utopians. They had moved beyond the idealism of the Revolutionary era and had become pragmatic realists. This realism extended to economic transactions. In a letter written to Robert Morris, Hamilton focused on the nation's finances. He explained: "A great source of error in disquisitions of this nature, is the judging of events by abstract calculations; which, though geometrically true, are false as they relate to the concerns of beings governed more by passion and prejudice than by an enlightened sense of their interests. A degree of illusion mixes itself in all the affairs of society."[605] In other words, Hamilton not only warned

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[602]*See* Rodrik, *supra* note 9, at xxi, 61-62 (arguing many economists describe the market too simply, but noting that not all economists are market fundamentalists). Many political scientists focus on problems in the democratic process. *E.g.*, Polarized Politics: Congress and the President in a Partisan Era (Jon R. Bond & Richard Fleisher eds., 2000); Interest Group Politics (Allen J. Cigler & Burdett A. Loomis eds., 1983).

[603]Rodrik, *supra* note 9, at xii, 134.

[604]*See* Stiglitz, *supra* note **Error! Bookmark not defined.**, at 55 (discussing influence of Chicago School of Economics). Some neoliberals, most prominently Joseph Stiglitz and Paul Krugman, have changed their positions because of the evidence. Harvey, *supra* note 3, at 186-87.

[605]Alexander Hamilton, Letter to Robert Morris (1780), *in* 3 The Works of Alexander Hamilton (Henry Cabot Lodge ed., 1904).

Morris, in general, against the illusions or ideals of utopian thinking but also cautioned him, more specifically, about assuming that individuals truly base economic transactions on rational calculations. Individuals are swayed as much by their passions and prejudices as by a rational assessment of their own interests. Regardless, whether individuals are influenced more by passions or (economic) interests, the framers never suggested that government should be subordinated to private-sphere machinations.

VI. Conclusion: Should We Praise or Blame the Framers?

Both praise and blame ….