

## A PLEA FOR CONSTITUTIONAL BALANCE

*Stephen M. Feldman\**

We live in the age of Democracy, Inc.<sup>1</sup> Political advertisements package candidates in twenty second sound bites. Corporations and billionaires wield herculean political power. Although citizens still vote—at least once in a while—corporate muscle largely steers elections and government policy to increase profits. Income inequality, consequently, has skyrocketed.<sup>2</sup> In the late-1980s, CEO pay stood at thirty times the average pay for workers, while today CEO pay is nearly 300 times that of workers.<sup>3</sup> Yet, conservatives warn that any government efforts to alleviate wealth or income inequality will only worsen matters. How often is Ronald Reagan’s first inaugural address echoed? “[G]overnment is not the solution to our problem; government is the problem.”<sup>4</sup> In fact, a 2014 Gallup poll revealed that far more Americans view government, and not inequality, as the greatest problem facing the nation today.<sup>5</sup> Conservatives, moreover, have a ready response to complaints about rising inequality. Unstoppable market forces, they argue, cause

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\* Jerry W. House/Carl F. Arnold Distinguished Professor of Law and Adjunct Professor of Political Science, University of Wyoming.

1. *Democracy Incorporated* is the title of a book by Sheldon S. Wolin, SHELDON S. WOLIN, *DEMOCRACY INCORPORATED: MANAGED DEMOCRACY AND THE SPECTER OF INVERTED TOTALITARIANISM* (2008), while *Democracy, Inc.* is the title of a book by David S. Allen, DAVID S. ALLEN, *DEMOCRACY, INC.: THE PRESS AND LAW IN THE CORPORATE RATIONALIZATION OF THE PUBLIC SPHERE* (2005).

2. THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 23–26, 298, 571 (Arthur Goldhammer trans., 2014).

3. Lawrence Mishel & Alyssa Davis, *CEO Pay Continues to Rise as Typical Workers Are Paid Less*, *ECON. POLY INST.*, June 12, 2014, at 1, 3, <http://www.epi.org/files/2014/ceo-pay-continues-to-rise.pdf>.

4. Ronald Reagan, President of the U.S., Inaugural Address (Jan. 20, 1981).

5. See Frank Newport, *Few Americans Want More Gov’t Regulation of Business*, *GALLOP* (Sept. 15, 2014), <http://www.gallup.com/poll/176015/few-americans-gov-regulation-business.aspx>.

increasing inequality.<sup>6</sup> From this perspective, our high-technology world justifiably rewards advanced technical skills and knowledge.<sup>7</sup> The rich, in other words, merit their wealth.

The five conservative justices of the Roberts Court—John Roberts, the late Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito—have stamped Democracy, Inc., with a constitutional imprimatur. In numerous cases, the Court has shielded the economic marketplace from government power and regulation. In *National Federation of Independent Business v. Sebelius*, the Affordable Care Act case, the conservative bloc severely limited Congress's reach and invalidated a key provision in the statute (the expansion of Medicaid).<sup>8</sup> In *Citizens United v. FEC*<sup>9</sup> and its progeny,<sup>10</sup> the Court prohibited most government restrictions on monetary spending for political campaigns. Empirical studies rank the Roberts Court as the most pro-business Supreme Court since World War II.<sup>11</sup> In a grading of individual justices, all five of the aforementioned Roberts Court conservatives rank among the top ten justices most favorable to business since 1946.<sup>12</sup> Alito and Roberts stand first and second on the list, respectively.<sup>13</sup> Significantly, the conservative justices often justify their pro-business decisions, bolstering Democracy, Inc., by invoking originalist sources. Originalism, in theory, requires the justices to enforce either the original public meaning of the Constitution or the framers' intentions.<sup>14</sup> Scalia and Thomas are avowed originalists, but the other conservatives also use originalist arguments and join originalist opinions.<sup>15</sup> In *Citizens United*,

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6. See Edward P. Lazear, Chairman, President's Council of Econ. Advisors, Remarks at the Hudson Inst.: The State of the U.S. Economy and Labor Market (May 2, 2006) (articulating the conservative viewpoint). *But cf.* PAUL KRUGMAN, THE CONSCIENCE OF A LIBERAL 132–33 (2007) (noting there is little empirical support for claim that inequality is increasing because of technology and market forces).

7. See Lazear, *supra* note 6.

8. 132 S. Ct. 2566, 2608 (2012).

9. 558 U.S. 310, 316 (2010).

10. See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014).

11. See Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1455–57 (2013).

12. *Id.* at 1450–51.

13. *Id.*

14. 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?*, 28 B.Y.U. J. PUB. L. 283, 285, 292 (2014).

15. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 576–626 (2008) (relying on originalism to interpret the Second Amendment); see also Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1184–88 (1989) (advocating for originalism).

for instance, Kennedy's majority opinion underscored that the decision corresponded with originalism.<sup>16</sup>

Libertarian legal scholars such as Richard Epstein and Randy Barnett lend intellectual heft to the Court's endorsement of Democracy, Inc. Epstein, for instance, has exhaustively defended "the original classical liberal constitutional order," as he puts it.<sup>17</sup> Following a "guarded originalist view," Epstein argues that "classical liberal theory" animated the framers in their drafting of the Constitution.<sup>18</sup> That is, according to Epstein, the framers drew on classical liberal theorists such as John Locke and Adam Smith and committed normatively to "the twin pillars of private property and limited government."<sup>19</sup> When Epstein says "limited government," though, he means minimal government because government, to him, is no more than "a necessary evil."<sup>20</sup> Epstein maintains that the "Constitution embraces a theory of laissez-faire."<sup>21</sup> The government, from this perspective, cannot implement any programs that would entail "income redistribution."<sup>22</sup> The predominant purpose of the constitutional system is to protect competitive markets and the rights of individuals "to enter and exit" those markets.<sup>23</sup>

Despite the conservative invocations of originalism, the Court's decisions protecting economic liberties and restricting government power contravene the Constitution. The conservative justices might not intentionally break faith with constitutional principles, yet the betrayal is just as real—and just as dangerous. The justices, for the most part, sincerely apply constitutional text, doctrines, and precedents in accord with their political views.<sup>24</sup> Yet, the conservative bloc's decisions have generated unintended and perverse consequences. The justices believe they are upholding and protecting the American way of life, but they instead have placed our democratic-capitalist system in its gravest danger since World War II.

A 2012 Roberts Court case, with a history stretching back more than a century, illustrates how the conservative bloc's fundamentalist

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16. See 558 U.S. 310, 353–55 (2010).

17. RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION* 6 (2014).

18. *Id.* at 45.

19. *Id.* at ix (invoking Locke and Smith).

20. *Id.* at 4 (citation omitted).

21. *Id.* at 582. Government should not intrude into "individual decisions" as to "what property to own, food to buy, jobs to offer or accept, or wages to pay or receive." *Id.* at 25.

22. *Id.* at 582.

23. *Id.* at 7; see also *id.* at 37; RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 317–18 (2004); RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY* 160–67 (1998).

24. See Stephen M. Feldman, *Supreme Court Alchemy: Turning Law and Politics Into Mayonnaise*, 12 *GEO. J. L. & PUB. POLY* 57, 94–95 (2014).

protection of the marketplace can undermine democracy.<sup>25</sup> Montana, in the late nineteenth-century, was the Wild West of politics, where bribery, extortion, and dirty dealing ruled the day.<sup>26</sup> In the early 1880s, Marcus Daly bought a mine, the Anaconda, located in the Montana territory.<sup>27</sup> Needing money for development, he persuaded a group of California capitalists to invest.<sup>28</sup> Within four years, the Anaconda Company had built the world's largest copper smelter, and Montana's floodgates to outside wealth and corporate control opened wide.<sup>29</sup> When Montana became the forty-first state in 1889, the primary source of wealth was mining, and copper led all the metals, surpassing silver and gold.<sup>30</sup> Corporations rushed to the state to invest in copper, with Anaconda going public in 1891.<sup>31</sup> Daly's former friend turned copper-mining rival, William Clark, craved one of the state's two U.S. Senate seats.<sup>32</sup> Defeated twice because of Daly's opposition, Clark finally just purchased a seat by bribing state legislators (the Constitution, at the time, vested state legislatures with the power to choose senators).<sup>33</sup> None other than Mark Twain wrote that Clark "bought legislatures and judges as other men buy food and raiment. By his example he has so excused and so sweetened corruption that in Montana it no longer has an offensive smell."<sup>34</sup>

A tidal wave of corporate mergers swept over the nation in the 1890s and engulfed the copper-mining industry.<sup>35</sup> Standard Oil, already a corporate giant, sought control of Anaconda along with additional mining companies, but the Montana Supreme Court blocked the merger.<sup>36</sup> Anaconda's attorney helped shove a bill countering the judicial decision through the legislative process.<sup>37</sup> The governor, however, vetoed the bill.<sup>38</sup> Mixing his metaphors, he warned Montanans: "If you do not assert your

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25. See *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490, 2491 (2012).

26. See MICHAEL P. MALONE & RICHARD B. ROEDER, *MONTANA: A HISTORY OF TWO CENTURIES* 152–77 (1976).

27. *Id.* at 153–54.

28. *Id.* at 154.

29. See *id.* at 154–58.

30. See *id.* at 157–58.

31. *Id.* at 158; see also C.B. GLASSCOCK, *THE WAR OF THE COPPER KINGS: THE BUILDERS OF BUTTE AND WOLVES OF WALL STREET* 306–10 (1935); KENNETH ROSS TOOLE, *MONTANA: AN UNCOMMON LAND* (1959).

32. MALONE & ROEDER, *supra* note 26, at 159.

33. *Id.* at 164–66.

34. TOOLE, *supra* note 31, at 174, 186–94; MARK TWAIN, *MARK TWAIN IN ERUPTION* 72 (Bernard DeVoto ed., 1940).

35. See MALONE & ROEDER, *supra* note 26, at 158.

36. See *id.* at 171–72.

37. TOOLE, *supra* note 31, at 165.

38. *Id.*

independence now and defeat this measure, it will be too late when the tentacles of this octopus have fastened their fangs on the strong limbs of this fair commonwealth.”<sup>39</sup> Standard Oil was prepared for this resistance.<sup>40</sup> It had already bought several state newspapers, which now pressured legislators to support the corporate interests.<sup>41</sup> The legislature buckled and overrode the governor’s veto.<sup>42</sup> Standard Oil gained control of Anaconda and the other mining enterprises, and shifted them into a holding company, Amalgamated Copper (“Amalgamated”).<sup>43</sup>

Soon, though, a charismatic mining engineer, Frederick Heinze, reached to grab a cut of the copper mining profits.<sup>44</sup> Exploiting his camaraderie with local judges, he used the state courts to attack Amalgamated’s mining interests.<sup>45</sup> In response, Amalgamated shut all of its Montana businesses except for the newspapers, and threw four-fifths of the state workers into unemployment.<sup>46</sup> Amalgamated’s newspapers blamed Heinze, whose popularity withered like a rose in a Montana snowstorm.<sup>47</sup> The governor succumbed to pressure and called a special session of the legislature, which accommodated Amalgamated by passing a statute allowing corporations to choose friendly trial court venues.<sup>48</sup> The *Idaho State Tribune* lamented: “[i]t took the Amalgamated Copper Company just three weeks to coerce Montana into falling on her knees with promises of anything that big corporation might want.”<sup>49</sup>

The corrupt cheated the corrupt, and the legislature was bought and paid for.<sup>50</sup> But Montana citizens fought back.<sup>51</sup> Bypassing the legislature, voters approved an initiative in 1912 that prohibited corporations from spending money in the state on political campaigns.<sup>52</sup> For nearly a century, this law controlled corporate campaign financing in Montana.<sup>53</sup> Citizens had wielded democratic power and successfully checked corporate interests bent on manipulating state institutions for profit.<sup>54</sup>

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39. *Id.* at 166.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*; MALONE & ROEDER, *supra* note 26, at 170–72.

44. MALONE & ROEDER, *supra* note 26, at 167–68.

45. *Id.* at 172–73.

46. *Id.* at 174.

47. *See id.*

48. *Id.* at 175.

49. *Id.*

50. *See id.* at 176–77.

51. *See id.* at 196–97.

52. *See id.*

53. *See id.* at 196.

54. *See id.*

But in 2010, corporations challenged the law as violating the national and Montana constitutions.<sup>55</sup> The Montana Supreme Court, emphasizing the sordid state history, rejected the challenge.<sup>56</sup> According to the court, the law was narrowly tailored to achieve a compelling purpose, preventing corporate corruption of the Montana democratic process.<sup>57</sup> The corporations, though, did not quit. They expected the pro-business Roberts Court to look favorably on an appeal, and the conservative justices did not disappoint. In *American Tradition Partnership, Inc. v. Bullock*, the conservative bloc deemed the history irrelevant.<sup>58</sup> The democratic desires of the Montana people were beside the point. In a brief one-paragraph opinion, the Court stated “[t]here can be no serious doubt that” *Citizens United* controlled.<sup>59</sup> The state restriction on corporate campaign spending was unconstitutional.<sup>60</sup> For the first time since 1912, corporations could spend money to influence—or control—political campaigns in Montana.<sup>61</sup>

Decisions such as *Citizens United* and *American Tradition Partnership* blatantly undermine democracy. Empirical studies demonstrate that excessive spending on political campaigns skews government processes.<sup>62</sup> Yet, the conservative justices and scholars maintain that an originalist reading of the Constitution supports such decisions.<sup>63</sup> They ground this conclusion, however, on an egregious distortion of the framing.<sup>64</sup>

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55. *W. Tradition P’ship, Inc. v. Att’y Gen. of Mont.*, 271 P.3d 1, 3 (Mont. 2011), *rev’d*, 132 S. Ct. 2490, 2491 (2012).

56. *Id.* at 13.

57. *Id.*

58. 132 S. Ct. 2490, 2491 (2012).

59. *Id.*

60. *Id.*

61. *See id.*

62. *See, e.g.*, LARRY M. BARTELS, *UNEQUAL DEMOCRACY* 120–26 (2008); MARTIN GILENS, *AFFLUENCE AND INFLUENCE* 137 (2012); Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 *PERSP. ON POL.* 564, 571–77 (2014); Molly J. Walker Wilson, *Too Much of a Good Thing: Campaign Speech After Citizens United*, 31 *CARDOZO L. REV.* 2365, 2368–69 (2010).

63. *Citizens United v. FEC*, 558 U.S. 310, 353–55 (2010).

64. Helpful sources on the framing include the following: RICHARD BEEMAN, *PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION* (2009) (containing a comprehensive historical overview of the characters, issues, and conflicts involved in the 1787 drafting of the Constitution); FORREST MCDONALD, *NOVUS ORDO SECLORU: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* (1985) (containing a thorough examination of the Constitutional Convention, reconstructing the issues debates and political environment); JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* (1990) (offering a new theory regarding the framers desired protection of private property); J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT* (1975) (examining Machiavellian theory within the context of the American Revolution); GORDON S. WOOD,

To understand the Constitution, one must appreciate what was at stake for the framers in 1787. Most important, they believed the nation's existence depended on their actions.<sup>65</sup> They were committed to the principles of republican democratic government, but they feared that the American experiment, vesting sovereignty in the people, had veered awry.<sup>66</sup> And if the American republic failed, the dream of non-monarchical government might perish with it. Yet, the framers also realized that individual liberty necessarily encompassed the protection of property rights.<sup>67</sup> Democratic majorities could not be allowed to seize property or other wealth for no reason other than the fact of raw majoritarian power. The framers, therefore, faced a conundrum: How could they invigorate republican democratic government while simultaneously protecting individual liberty, including property rights?<sup>68</sup> Laboring through the hot summer months of the convention, the framers hammered out a practical solution: National survival depended on a relative balance between public and private spheres of activity.<sup>69</sup>

During the Revolutionary years and under the Articles of Confederation, in the 1780s, most government power rested with the states, and most state constitutions assumed the people would virtuously pursue the common good.<sup>70</sup> American leaders of this time were political idealists. They conceptualized the citizen-self as predominantly virtuous.<sup>71</sup> Virtue alone, they believed, would sustain the republican state governments.

But the United States was not a utopia. Many citizens seemed more concerned with their own advantages than with a communal or public good.<sup>72</sup> By the mid-1780s, state governments were corrupt, the nation's

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THE CREATION OF THE AMERICAN REPUBLIC 1776—1787 (1969) (offering a thorough analysis of the political culture during the constitutional framing). For the most complete record of the Constitutional Convention, *see generally* THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1966) [hereinafter Farrand].

65. JAMES MADISON, VICES OF THE POLITICAL SYSTEM OF THE UNITED STATES (1787), *reprinted in* JAMES MADISON: WRITINGS 69 (Library of Am., 1999); BEEMAN, *supra* note 64, at 27–29.

66. NEDELSKY, *supra* note 64, at 5.

67. *Id.* at 6, 12.

68. *Id.* at 7.

69. “Madison’s political thought was characterized by an often agonized effort to find a working balance between the rights of property and republican principles.” NEDELSKY, *supra* note 64, at 12.

70. WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS 63–66 (2001).

71. *Id.* at 125–27.

72. WOOD, *supra* note 64, at 409–13; *see also* James Wilson, *In the Pennsylvania Convention* (Nov. 24, 1787), *in* 3 Farrand, *supra* note 64, at 138, 141–42, app. A (lamenting licentiousness of citizens and government problems).

finances were in tatters, and property was insecure.<sup>73</sup> National political leaders had begun to fret about the country's survival. Shays's Rebellion in Massachusetts finally spurred these leaders to action. Daniel Shays, a former Revolutionary War militia captain, led an armed insurrection of indebted farmers threatened with foreclosures.<sup>74</sup> Although the state forcefully suppressed the rebellion, Shays's supporters soon elected enough new legislators that the Massachusetts assembly enacted statutory protections for debtors.<sup>75</sup> In fact, many national political leaders worried more about the electoral aftermath than the armed rebellion.<sup>76</sup> 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."<sup>77</sup> Washington replied that Revolutionary leaders "probably had too good an opinion of human nature in forming our confederation. . . . [P]erfection falls not to the share of mortals."<sup>78</sup> But he brooded most about the future of republican government. "[W]hat a triumph for the advocates of despotism to find that we are incapable of governing ourselves, and that systems founded on the basis of equal liberty are merely ideal and fallacious!"<sup>79</sup>

The alarm and insecurity expressed by Jay and Washington typified the attitudes of the delegates who arrived in Philadelphia in 1787 for what became the Constitutional Convention. As the delegates/framers evaluated matters, adherence to abstract ideals had led the nation to the edge of a precipice. If the nation did not change direction, it would likely fall into an abyss, amid the ruins of government decay. By necessity, then, the framers began with a more realistic outlook. They recognized that the citizen-self was driven by passions and interests, which could be controlled by reason and virtue, but only at certain times and under the

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73. WOOD, *supra* note 64, at 409–11.

74. LEONARD L. RICHARDS, SHAYS'S REBELLION 1–2, 6 (2002); DAVID P. SZATMARY, SHAYS'S REBELLION 66 (1980).

75. SZATMARY, *supra* note 74, at 119.

76. BEEMAN, *supra* note 64, at 17–18.

77. 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 also* BEEMAN, *supra* note 64, at 16–18 (describing perceptions of Shays's Rebellion); WOOD, *supra* note 64, at 410–13 (discussing Shays's Rebellion).

78. Letter from George Washington to John Jay (Aug. 1, 1786), <http://press-pubs.uchicago.edu/founders/documents/v1ch5s11.html>.

79. *Id.*

right conditions.<sup>80</sup> Beginning with this more complex view of human nature—of the citizen-self—the framers attempted to build a constitutional system.<sup>81</sup>

The framers distinguished two spheres: that of civil society and that of government. The government sphere was the realm of public affairs, while civil society was the realm of private affairs, such as commercial intercourse and the accumulation of property.<sup>82</sup> In the public sphere, American government was to be republican-democratic.<sup>83</sup> Citizens and elected officials were supposed to act virtuously by pursuing the common good rather than their own partial or private interests.<sup>84</sup> The Preamble of the Constitution memorialized the government goal: “We the People” were to “promote the general [w]elfare.”<sup>85</sup> When citizens or officials used government institutions to pursue their own interests, then government was corrupt. Groups of like-minded citizens who corrupted the government were deemed factions. 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.”<sup>86</sup> The framers wanted to prevent factions—even if they were democratic majorities—from using the government for their own private advantage. Yet, factionalism was foreordained because many, if not most, citizens were motivated to pursue their own passions and interests not only in the private, but also in the public world. For that reason, the

80. Farrand, *supra* note 64, at 376 (containing Hamilton’s remarks from June 22, 1787 on the nature of the citizen-self).

81. *Id.*

82. THE FEDERALIST NOS. 10, 14 (James Madison). “The founders of the United States did indeed define and construct their new nation in accord with Enlightenment doctrines of individual liberties and republican self-governance more than any regime before and most since . . .” ROGERS M. SMITH, CIVIC IDEALS 470–71 (1997).

83. See WOOD, *supra* note 64, at 222–23, 230–31, 586.

84. *Id.* at 59 (“[A]ll would be ‘disinterested men, who could have no interest of their own to seek,’ and ‘would employ their whole time for the public good; then there would be but one interest, the good of the people at large.’”). 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).

85. U.S. CONST. pmb1.

86. THE FEDERALIST NO. 10 (James Madison) (emphasis added); see also 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).

framers devoted much of the convention to designing government institutions that would control the effects of factionalism and induce elected officials to pursue the common good.<sup>87</sup>

In the private sphere, unlike the public realm, passions and interests were to have free rein.<sup>88</sup> The predominant interest driving individuals in the private or commercial realm was the desire for property.<sup>89</sup> But the framers and other Americans understood the concept of property in more of a mercantilist than capitalist sense.<sup>90</sup> Mercantilism—beginning in the sixteenth century, when nation-states arose—entailed close ties between governments and merchants.<sup>91</sup> In general, a government would grant a monopoly to a merchant or company—for instance, the Hudson Bay Company—to allow the merchant to develop a particular market, often times in a colony.<sup>92</sup> The primary purpose of a mercantilist enterprise was to enhance the treasure (gold and silver) and military power of the mother country.<sup>93</sup> In other words, while mercantilism relied on an economic market, it was not based on a competitive free market, the crux of capitalism.<sup>94</sup> Rather, in a mercantilist system, the state and economy intertwined closely, working together for common purposes through the creation of monopolies and the implementation of protectionist policies.<sup>95</sup> In such a system, property rights were inherently limited.<sup>96</sup> At the time of the constitutional framing and ratification, capitalism had not yet fully

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87. MCDONALD, *supra* note 64, at 189–209; NEDELSKY, *supra* note 64, at 37; POCOCK, *supra* note 64, at 513–26; WOOD, *supra* note 64, at 39–46.

88. See WOOD, *supra* note 64, at 24, 410–11, 609 (distinguishing forms of liberty).

89. *Id.* at 218.

90. Helpful sources discussing economic development include the following: JOHN KENNETH GALBRAITH, *A HISTORY OF ECONOMICS* (1987); ROBERT HEILBRONER & WILLIAM MILBERG, *THE MAKING OF ECONOMIC SOCIETY* (10th ed. 1998); ROBERT HEILBRONER & AARON SINGER, *THE ECONOMIC TRANSFORMATION OF AMERICA: FROM 1600 TO PRESENT* (1999); RONALD E. SEAVOY, *AN ECONOMIC HISTORY OF THE UNITED STATES: FROM 1607 TO THE PRESENT* (2006). Helpful sources discussing the development of corporations as well as globalization include the following: ALFRED D. CHANDLER & BRUCE MAZLISH, *Introduction*, in *LEVIATHANS 1* (Alfred D. Chandler & Bruce Mazlish eds., 2005); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (2d ed. 1985); KERMIT L. HALL, *THE MAGIC MIRROR* (1989); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* (1977); JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA* (2003); KENICHI OHMAE, *THE END OF THE NATION STATE* (1995); Alfred D. ).

91. The Editors of Encyclopedia Britannica, *Mercantilism*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/topic/mercantilism> (last visited Apr. 20, 2016).

92. GALBRAITH, *supra* note 90, at 39–42; HEILBRONER & SINGER, *supra* note 90, at 26–27.

93. GALBRAITH, *supra* note 90, at 39–42.

94. See *id.*

95. *Id.* at 39–40; HEILBRONER & SINGER, *supra* note 90, at 26–27.

96. WOOD, *supra* note 64, at 218–19.

emerged in England; it had developed even less in the United States.<sup>97</sup> The framers and other Americans could not have understood the economy as being truly capitalist, much less laissez-faire.<sup>98</sup>

The framers' multiple discussions and ultimate acceptance of slavery as a legal institution illustrated both their desire to protect property and their incomplete adoption of capitalism.<sup>99</sup> All of the framers were white men.<sup>100</sup> Almost all were Protestant, and most were wealthy.<sup>101</sup> Many owned slaves.<sup>102</sup> In 1787, slaves constituted approximately twenty percent of the American population, with the percentage higher in the southern states.<sup>103</sup> Yet, the framers could not anticipate how important slavery would soon become to the American economy.<sup>104</sup> In 1793, Eli Whitney would invent the cotton gin and revolutionize the cotton industry.<sup>105</sup> In short order, cotton would become an incredibly lucrative crop, heavily reliant on slave labor.<sup>106</sup> Slave-supported cotton production would fuel the southern economy while also bolstering the northern textile industry.<sup>107</sup> But when the framers met in Philadelphia, nobody knew about the future and King Cotton. Several northern states had already begun moving toward emancipation. The upper South, it seemed, might soon follow.<sup>108</sup>

Nevertheless, the framers overwhelmingly viewed slaves as property, and as South Carolinian Charles Cotesworth Pinckney put it, "property in slaves should not be exposed to danger."<sup>109</sup> A scarce few delegates denounced slavery as immoral, with Gouverneur Morris of Pennsylvania uttering the strongest condemnation.<sup>110</sup> "It was a nefarious institution,"

97. *See id.*

98. HEILBRONER & MILBERG, *supra* note 90, at 55; *see also* HORWITZ, *supra* note 90, at xiii–xiv (agreeing that the late-eighteenth and early-nineteenth centuries were not laissez-faire).

99. *See* BEEMAN, *supra* note 64, at 308–15.

100. *See id.* at xix–xxiii.

101. *See id.*

102. *See id.* at 309–11.

103. *Id.* at 310–11.

104. *See* Mary Bellis, *The Cotton Gin and Eli Whitney*, ABOUT MONEY, [http://inventors.about.com/od/wstartinventors/a/cotton\\_gin.htm](http://inventors.about.com/od/wstartinventors/a/cotton_gin.htm) (last visited Apr. 20, 2016).

105. *Id.*

106. *See id.*

107. HALL, *supra* note 90, at 130; SEAVOY, *supra* note 90, at 111.

108. *See* GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 519–24 (2009); *see also* DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* 21–25 (6th ed. 2008) (listing years in which northern states abolished slavery); PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS* ix (3d ed. 2014) (detailing when states eliminated slavery).

109. 1 Farrand, *supra* note 64, at 594 (July 12, 1787).

110. 2 Farrand, *supra* note 64, at 221 (Aug. 8, 1787).

he declared.<sup>111</sup> “It was the curse of heaven on the States where it prevailed.”<sup>112</sup> Yet, one cannot but be struck by the usual reactions to these moral denunciations. Silence—or at most, quick dismissal.<sup>113</sup> John Rutledge spoke for many delegates when he explained: “Religion & humanity had nothing to do with this question—[i]nterest alone is the governing principle . . . .”<sup>114</sup>

During the many discussions of slavery, no delegates protested that it would contravene the most fundamental principles of a capitalist economy.<sup>115</sup> Capitalism depends on the drive for profit in a competitive free market.<sup>116</sup> Slavery is the antithesis of a modern free market; it is coerced labor.<sup>117</sup> Slavery, though, appeared consistent with a mercantilist and pre-modern economy. Under the American common law of the late-eighteenth and early-nineteenth centuries, duties arose because of established status-relationships. The common law, for example, attached a specific duty of care to many occupations. Innkeepers owed a duty of protection to lodgers, while ferrymen owed a duty of safe transportation to travelers.<sup>118</sup> Slave and master constituted a status-relationship within this pre-modern worldview.<sup>119</sup>

Although the framers worried about protecting property rights, including property interests in slaves, they did not view the protection of property as the “be-all” and “end-all” of the Constitution.<sup>120</sup> “To secure the public good and private rights,” Madison explained, “and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed.”<sup>121</sup> The framers 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.<sup>122</sup> They wanted to protect individual rights, especially property rights, but they simultaneously wanted to promote the virtuous pursuit of the common good.<sup>123</sup> The crux, then, of the constitutional scheme was pragmatic balance: balance between the

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111. *Id.*

112. *Id.*

113. *See id.*

114. *Id.* at 364.

115. HEILBRONER & SINGER, *supra* note 90, at 9–10, 129.

116. *Id.* at 9–10.

117. *Id.* at 9–10, 134–35.

118. ALAN CALNAN, A REVISIONIST HISTORY OF TORT LAW: FROM HOLMESIAN REALISM TO NEOCLASSICAL RATIONALISM 235, 279 (2005).

119. FRIEDMAN, *supra* note 90, at 225–26; HALL, *supra* note 90, at 131.

120. *See* THE FEDERALIST NO. 10 (James Madison).

121. *Id.* (emphasis added).

122. NEDELSKY, *supra* note 64, at 12.

123. *See id.*

public and private spheres—between government power and individual rights.<sup>124</sup>

Unlike the Roberts Court conservatives, the framers never treated wealth and property rights as sacrosanct. The framers were not market fundamentalists. They were pragmatic realists who rejected utopianism, whether in relation to government or economics. Moreover, they understood that the crucial public-private balance ultimately depended on government empowerment to control private interests when they threatened the common good—including when they threatened to twist the government for their own profit.<sup>125</sup> As James Wilson explained, “no government . . . can exist, unless private and individual rights are subservient to the public and general happiness of the nation.”<sup>126</sup> Private entities, including corporations, could not be allowed to control the government for their own benefit.<sup>127</sup>

Today, though, we live in Democracy, Inc., where the private subsumes the public. The complete history of the nation’s long journey from the framers’ balanced constitutionalism to Democracy, Inc., is beyond the scope of this Essay. In brief, the balanced system proved resilient, but it was not static. Social, cultural, and economic forces pressed the system on all sides. In the private sphere, capitalism gradually emerged. In the public sphere, the practice and theory of democracy shifted, particularly with the acceptance of more widespread citizen participation.<sup>128</sup> Toward the end of the twentieth century, one crucial, though often ignored, development triggered the transition to Democracy, Inc.

Oddly, America’s Cold-War victory precipitated Democracy, Inc. After World War II, the Cold-War battle spurred the economy, especially corporate capitalism.<sup>129</sup> Yet, the Cold War also constrained corporate

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124. “Madison’s political thought was characterized by an often agonized effort to find a working balance between the rights of property and republican principles.” *Id.*; see also THE FEDERALIST NO. 14 (James Madison) (arguing that the new government would be “in favour of private rights and public happiness”).

125. WILLIAM J. NOVAK, THE PEOPLE’S WELFARE 9–11 (1996).

126. James Wilson, *In the Pennsylvania Convention* (Nov. 24, 1787), in 3 Farrand, *supra* note 64, at 141, app. A; see NOVAK, *supra* note 125, 9–11 (emphasizing that the superiority of the public over the private sphere continued at least through the nineteenth century).

127. NOVAK, *supra* note 125, at 9–11.

128. For a history of American democracy (but not including Democracy, Inc.) in relation to free expression, see STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY (2008).

129. LIZABETH COHEN, A CONSUMERS’ REPUBLIC 124–27 (1st ed. 2004); see also MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 243 (William Chafe et al. eds., 2000) (emphasizing that capitalism “was championed” during the Cold War).

capitalism on both the international and domestic fronts. The political geography of the Cold War limited the international scope of corporate markets. McDonald's could not open a franchise in Prague or Moscow in 1975.<sup>130</sup> Equally important, the Cold-War struggle against communism tempered potential corporate calls for laissez-faire and attacks on the process and culture of democratic government. If the alternative to American democracy was totalitarian communism, then critics of democracy needed to curb their denunciations. The government and capitalist leaders, in effect, bonded together in struggle against the communist enemy.<sup>131</sup>

With the end of the Cold War, these constraints on corporate capitalism evaporated. An increasing number of corporations went multinational, with many flocking into former Iron-Curtain countries.<sup>132</sup> McDonald's became "McWorld," opening in Prague, Moscow, and dozens of other cities formerly behind the Iron Curtain.<sup>133</sup> Multinational corporations aggressively sought to reach as many consumers as possible, wherever they lived. Corporate business and investment began to flow around the globe as if national borders no longer existed.<sup>134</sup> By 2002, approximately fifty multinational corporations were wealthier than between 120 and 130 nations.<sup>135</sup> Moreover, in the United States, the government and corporate capitalists no longer fought together against a common foe. To the contrary, many capitalists now viewed government as the enemy. Demands for laissez-faire became common and insistent. Libertarian icon, F.A. Hayek, argued that the world was too complex for government to predict and control.<sup>136</sup> "Human reason can neither predict nor deliberately shape its own future," he wrote, "Progress by its very nature cannot be planned."<sup>137</sup> Any type of government planning or regulation smacked of hubris. The invisible hand and the market

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130. See Benjamin J. Cohen, *Bretton Woods System*, in ROUTLEDGE, 1 ENCYCLOPEDIA OF INTERNATIONAL POLITICAL ECONOMY 95 (R.J. Barry Jones ed., 2001) (discussing the postwar international marketplace).

131. Joseph D. Phillips, *Economic Effects of the Cold War*, in CORPORATIONS AND THE COLD WAR 173 (David Horowitz ed., 1969); see also JOHN LEWIS GADDIS, *THE COLD WAR: A NEW HISTORY* 35–36, 61–63 (2005) (discussing interactions of government and capitalists during the Cold War).

132. BENJAMIN R. BARBER, *JIHAD VS. MCWORLD* 248–49 (1995).

133. *Id.* at 249; see also KEVIN PHILLIPS, *WEALTH AND DEMOCRACY: A POLITICAL HISTORY OF THE AMERICAN RICH* 147–56 (1st ed. 2002) (describing the growth of corporations).

134. MICKLETHWAIT & WOOLDRIDGE, *supra* note 90, at 174; OHMAE, *supra* note 90, at 2–5, 7.

135. CHANDLER & MAZLISH, *supra* note 90, at 1.

136. F. A. HAYEK, *THE CONSTITUTION OF LIBERTY: THE DEFINITIVE EDITION* 52 (Ronald Hamowy ed., 2011).

137. *Id.* at 94–95.

accounted for human desires and actions far more efficiently. The market “looks like chaos to the naked eye,” explained Milton Friedman, “[yet it] is a system which enables the dispersed knowledge and skill of millions of people to be coordinated for a common purpose.”<sup>138</sup>

Cold-War victory, in short, triggered the onset of Democracy, Inc., with dangerous implications for American constitutionalism. Billionaires and multinational, profit-crazed corporate behemoths control elections and government for their own advantage, yet political polarization and gridlock prevent the national government from protecting the public and the Constitution. Market fundamentalists, inspired like religious zealots, follow Hayek and Friedman in spouting laissez-faire ideology. They constantly remind Americans that democratic government is inept while the unregulated market can resolve all social and economic problems. Democracy, Inc., manifests the type of constitutional imbalance the framers dreaded. They attended the Constitutional Convention precisely because they thought the unrestrained pursuit of private passion and interest had corrupted American government and threatened national decay.<sup>139</sup>

History subsequent to the framing demonstrates the framers’ perspicacity. When laissez-faire is ascendant, then income and wealth inequality increase precariously, as occurred in the 1920s, just before the Great Depression.<sup>140</sup> The material foundation for democratic-capitalism cracks apart.<sup>141</sup> Most important, then, income and wealth in Democracy, Inc., are concentrated in a blade-thin sliver of the population.<sup>142</sup> Gains in American productivity have not generated increased income for the average American worker and household.<sup>143</sup> From 2009 to 2012, ninety-five percent of income gains went to the top one percent.<sup>144</sup> Democracy, Inc., operates like Robin Hood in reverse: It takes from the poor and middle class and gives to the rich.<sup>145</sup>

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138. MILTON FRIEDMAN, ADAM SMITH’S RELEVANCE FOR TODAY 11 (1977).

139. JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY (W.W. Norton & Co., 2013) (emphasizing that gross inequality endangers democracy and capitalism).

140. HEILBRONER & SINGER, *supra* note 90, at 263–67.

141. See FRED BLOCK & MARGARET R. SOMERS, THE POWER OF MARKET FUNDAMENTALISM: KARL POLANYI’S CRITIQUE 15–16 (2014); KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME (2001).

142. PIKETTY, *supra* note 2, at 23–27, 291–335, 350–53.

143. *Id.*

144. EMMANUEL SAEZ, U.C. BERKELEY, STRIKING IT RICHER: THE EVOLUTION OF TOP INCOMES IN THE UNITED STATES (UPDATED WITH 2013 PRELIMINARY ESTIMATES) 1 (2015), <https://eml.berkeley.edu/~saez/saez-UStopincomes-2013.pdf>.

145. STIGLITZ, *supra* note 139, at 8.

Economic liberty and government power must remain in balance. Neither the public nor the private should dominate the other. If either predominates for too long, neither will survive. In the twenty-first century, with massive multinational corporations controlling enormous wealth, the United States government must remain strong and large to maintain the public-private balance. The vitality of the American democratic-capitalist system requires no less.