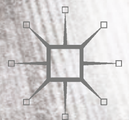
# The New Roberts Court, Donald Trump, and Our Failing Constitution

STEPHEN M. FELDMAN



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*To Laura, as always*

# Acknowledgements

This book developed from a series of articles into an evolving book project. When I decided to transform the articles into a book, I began with a critique of the Roberts Court, including Justice Antonin Scalia. Justice Scalia's death changed that project. When Hillary Clinton appeared likely to win the 2016 presidential election, I reconceived the book as explaining where a new progressive Supreme Court might go. Then, when Donald Trump won the presidency, I again reconceived the book—into the current volume.

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CHAPTER 1

# Introduction: Democracy, Inc., and the Betrayal of the Constitution

We live in the age of Democracy, Inc.[1] Advertisements package candidates in 20-second sound bites echoing car and beer commercials. Corporations and billionaires wield herculean political power. A billionaire reality-star, real-estate mogul has even been elected president and has filled his cabinet with billionaires and multi-millionaires. Citizens still vote—at least occasionally—but corporate muscle manages elections and shapes government policy to increase profits. The private economic sphere has become so bloated with power that it has, in effect, subsumed the government sphere. Yet, conservatives proclaim that government overreach is destroying America.[2]

The 5 conservative justices of the early Roberts Court—John Roberts, Antonin Scalia, Clarence Thomas, Samuel Alito, and Anthony Kennedy—stamped Democracy, Inc., with a constitutional imprimatur. In numerous decisions, starting in the fall 2005 Supreme Court term when Roberts stepped in as chief justice and continuing until Justice Scalia's death (February 13, 2016), the Court promoted business, protected economic liberties, and shielded the marketplace from government power and regulation. But these judicial decisions manifested a startling betrayal of the Constitution. The conservative justices might not have intentionally broken faith with constitutional principles, yet the betrayal was just as real—and just as dangerous. The justices, for the most part, sincerely applied constitutional text, doctrines, and precedents in accord with their political views. Yet, the Court's decisions generated unintended and perverse consequences. The conservative justices

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believed they were upholding and protecting the American way of life, but they instead placed our democratic-capitalist system in its gravest danger since World War II. Democracy, Inc., threatens the very survival of American constitutionalism.[3]

A 2012 Roberts Court case, with a history stretching back more than a century, illustrates how the conservative bloc's fundamentalist protection of the marketplace can undermine democracy. Montana in the late-nineteenth century was the Wild West of politics, where bribery, extortion, and dirty dealing ruled the day. In 1880, Marcus Daly bought a mine, the Anaconda, located in the Montana territory. Needing money for development, he persuaded a group of California capitalists to invest. Within 4 years, the Anaconda Company had built the world's largest copper smelter, and Montana's floodgates to outside wealth and corporate control opened wide. When Montana became the 41st state in 1889, the primary source of wealth was mining, and copper led all the metals, surpassing silver and gold. Corporations rushed to the state to invest in copper, with Anaconda going public in 1893.[4] Daly's former friend turned copper-mining rival, William Clark, craved one of the state's two U.S. Senate seats. 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). 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."[5]

A tidal wave of corporate mergers swept over the nation in the 1890s and engulfed the copper-mining industry. Standard Oil, already a corporate giant, sought control of Anaconda along with additional mining companies, but the Montana Supreme Court blocked the merger. Anaconda's attorney helped shove a bill countering the judicial decision through the legislative process. The governor, however, vetoed the bill. Mixing his metaphors, he warned Montanans: "If you do not assert your 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." Standard Oil was prepared for this resistance. It had already bought several state newspapers, which now pressured legislators to support the corporate interests. The legislature buckled and overrode the governor's veto. Standard Oil gained control of Anaconda

and the other mining enterprises, and shifted them into a holding company, Amalgamated Copper.[6]

Soon, though, a charismatic mining engineer, Frederick Heinze, reached to grab a cut of the copper-mining profits. Exploiting his camaraderie with local judges, he used the state courts to attack Amalgamated's mining interests. In response, Amalgamated shut all of its Montana businesses except for the newspapers, and threw four-fifths of the state workers into unemployment. The Amalgamated newspapers blamed Heinze whose popularity withered like a rose in a Montana snowstorm. 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. The *Idaho State Tribune* lamented: "It took the Amalgamated Copper Company just 3 weeks to coerce Montana into falling on her knees with promises of anything that big corporation might want."[7]

The corrupt cheated the corrupt, and the legislature was bought and paid for. But Montana citizens fought back. Bypassing the legislature, voters approved an initiative in 1912 that prohibited corporations from spending money in the state on political campaigns.[8] For nearly a century, this law controlled corporate campaign financing in Montana. Citizens had wielded democratic power and successfully checked corporate interests bent on manipulating state institutions for profit. But in 2010, corporations challenged the law as violating the national and Montana constitutions. The state Supreme Court, emphasizing the sordid state history, rejected the challenge. According to the court, the law was narrowly tailored to achieve a compelling purpose, preventing corporate corruption of the Montana democratic process.[9] 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. 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 the state restriction on corporate campaign spending was unconstitutional. For the first time since 1912, corporations could spend money to influence—or control—political campaigns in Montana.[10]

While this book culminates with the new Roberts Court—with Neil Gorsuch having filled the empty seat previously occupied by

Scalia—the narrative begins before the constitutional framing. During the Revolutionary War and under the Articles of Confederation, in the 1780s, most government power rested with the states, and most state constitutions assumed the people, following civic republicanism, would virtuously pursue the common good. American leaders of this time were political idealists. They conceptualized the citizen-self as predominantly virtuous. Virtue alone, they believed, would sustain the republican state governments.[11]

By 1787, however, the delegates to the Philadelphia (constitutional) convention had been disabused of their idealism. 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. State governments were corrupt, the nation's finances were in tatters, and property was insecure. As the delegates–framers evaluated matters, adherence to utopian ideals had led the United States 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 right conditions. Beginning with this more complex view of human nature—of the citizen-self—the framers attempted to build a constitutional system.[12]

The framers distinguished two spheres: that of civil society and that of government. The people lived simultaneously in both spheres. 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. Passions and interests should have free rein in the private sphere, but not in the public realm. The framers thus 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. The crux, then, of the constitutional scheme was pragmatic balance: balance between the public and private spheres—between government power and individual rights. Interestingly, though, the framers barely mentioned free speech and a free press during the constitutional convention. The Bill of Rights, including the First Amendment and its protection of free expression,

would be added in 1791, 2 years after the nation began operating under its new Constitution.

The framers' republican democratic constitutional system proved remarkably resilient. The public–private balance would become central to the nineteenth-century notion of a well-ordered society. Yet, conceptions of virtue and the common good evolved through that century, and the system survived vehement political disputes and 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, the burgeoning cities teeming with diverse immigrants. Moreover, consistent with the developments in other western industrialized nations, the United States 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, democracy confronted a worldwide existential crisis. Most European democracies crumbled, as they experienced 2 world wars, an economic depression and the Holocaust. The collapse of democracy proved disastrous to international capitalism. Democracy and capitalism functioned best together, as a system based on human dignity and liberty. Regardless, American democracy persevered through its troubles, partly because of a deeply rooted democratic culture grounded on a rough and relative material equality. In the crucible of the 1930s, however, 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 legitimated the political pursuit of self-interest. 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 suspected. As pluralist democracy emerged, judicial treatments of speech and writing changed, too. Free expression became a constitutional lodestar because the discussion of political views and ideas appeared to be central to the pluralist democratic process.[13]

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, entailing a pluralist democratic process that more strongly resembled the capitalist marketplace. Political campaigning for candidates, for instance, now often resembled commercial advertising for products. Unsurprisingly, then, the Supreme Court in the 1970s effectively overturned an earlier ruling and held that the First Amendment protected commercial advertising. The Court reasoned that such speech was central to democracy itself.[14] Second, the nation's Cold-War battle against the Soviet Union pervasively influenced American society. Specifically, 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 American economic prosperity with Soviet struggles. 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.

Consequently, the end of the Cold War, in the late-1980s and early-1990s, also profoundly influenced national development. The nation's Cold-War victory generated additional and unanticipated changes in pluralist democracy. In particular, corporate wealth was unleashed from its Cold-War strictures. The government and capitalists were no longer fighting together against a common foe. To the contrary, capitalists now viewed government as its enemy. Demands for laissez faire became common and insistent, as did denigration of democratic government.

The consumers' democracy transformed into Democracy, Inc., a democratic system dominated by wealthy individuals and corporations. The early Roberts Court bolstered Democracy, Inc., in a wide variety of cases, but *Citizens United v. Federal Election Commission* and its progeny, including *American Tradition Partnership*, might best emblematize the conservative justices' proclivities.[15] Based on the First-Amendment protection of free expression, these campaign finance cases prohibit most government restrictions on monetary spending on political campaigns. Corporations and other wealthy entities, including individuals, can now spend astronomical (unlimited) sums of money to influence elections and government officials. The Court seemed to conceive of the citizen-self as homo economicus, an economic self rationally maximizing the satisfaction of its own interests.

Conservatives often assert that originalism is the best (or only) method of legitimate constitutional interpretation. Originalism supposedly requires the justices to uphold either the original public meaning of the Constitution or the framers' intentions.[16] On the early Roberts Court, Scalia and Thomas were avowed originalists, though the other conservatives also used originalist arguments and joined originalist opinions.[17] Indeed, the *Citizens United* majority opinion, written by Kennedy, underscored that its holding corresponded with originalism. Ironically, then, the Roberts Court conservatives betrayed one of the most fundamental principles of the framers' constitutional scheme. The framers were pragmatic realists who rejected utopianism, whether in relation to government or economics. As realists, they understood the complexity of human nature, of the American citizen-self, and drafted a Constitution based on that foundation. They constructed a political-economic 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 market 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 framers were

not market fundamentalists. To the contrary, 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.

The conservative justices, therefore, not only misinterpreted the Constitution but also did so in a dangerous manner. Many of the framers chose to attend the constitutional convention precisely because they thought the unrestrained pursuit of private passion and interests had corrupted American government and threatened imminent national decay. The framers worried that the United States could not survive if the private sphere subsumed the public. And in fact, the tragic history of the early-twentieth century in the United States and other countries suggest that the framers were correct. Economic rights and government power must remain in balance. Neither the public nor the private should dominate the other. When laissez faire is ascendant, democratic government suffers. In the end, if either the public or private dominates the other 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 continuing existence of the American democratic-capitalist system requires no less.[18]

The election of Donald Trump as president is a *symptom* of Democracy, Inc. Most likely, without Democracy, Inc., and the Court's approval of it, Trump would not be president. But the ascendancy of the thin-skinned and authoritarian Trump only increases the vulnerability of our Constitution.[19] The one advantage of Trump's election is that it has shone a light on the weakness of American democratic capitalism. A week before Trump's election, few people recognized the precarious state of American democracy, but mere days after his inauguration, the media suddenly realized that our constitutional system is not bullet proof.[20] Even so, the threat of Trump might easily mislead people. Too many Americans might view Trump like a bad apple. Get rid of that apple, and all is well. In other words, if the nation survives Trump's presidency without a constitutional collapse, then we will likely breathe a sigh of relief and assume our democratic-capitalist system is healthy. But its underlying problems will remain.

The Senate confirmed Neil Gorsuch as the newest Supreme Court justice shortly before this book went to press. With Gorsuch having filled

the seat vacated by Scalia's death, the Roberts Court potentially has a new alignment. To be sure, Gorsuch seems likely to continue following in Scalia's footsteps. Like Scalia, Gorsuch claims to be a constitutional originalist. "Ours is the job of interpreting the Constitution," Gorsuch has written. "And that document isn't some inkblot on which litigants may project their hopes and dreams … but a carefully drafted text judges are charged with applying according to its original public meaning."[21] Indeed, shortly after Scalia's death, Gorsuch celebrated Scalia's "legacy," calling Scalia a "lion of the law." Gorsuch learned from Scalia that judges should strive "to apply the law as it is, focusing backward, not forward, and looking to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be—not to decide cases based on their own moral convictions or the policy consequences they believe might serve society best." Gorsuch does not seem concerned with justice, fairness, practical consequences, or a history of subjugation. Rather, he aims for "cold neutrality."[22] In a political science empirical ranking of the justices' political ideologies, Gorsuch ranks to the right of Roberts, Alito, and even Scalia. Quite possibly, Gorsuch will be one of the five most conservative justices from the past century.[23]

Still, change is possible on the Court. A new voice and shifting political circumstances might alter outlook. Ultimately, then, the new Roberts Court must decide: Will it continue bolstering Democracy, Inc., despite the imminent danger to our Constitution, or will it reverse direction and protect our democratic-capitalist system?

This book analyzes the evolution of government–market relations in our constitutional system. How did the nation travel the long distance from the framers' balanced constitutionalism to Democracy, Inc.? More important, why does Democracy, Inc., threaten American democracy and capitalism? And given the danger of Democracy, Inc., why did the early Roberts Court nonetheless endorse it? Finally, how might the new Roberts Court change direction, repudiate Democracy, Inc., and reinvigorate our democratic-capitalist system?

Chapter 2 focuses on the framing and the surrounding political context, including the Revolutionary background. This chapter demonstrates that the constitutional framers sought to create a political-economic system in which the public and private remained relatively balanced. Emphasis is placed on the American understandings of government and the market, including property, at the time of the framing.

This discussion requires an examination of the framers' decision to protect slavery as a legal institution. All of the framers were white men. Almost all were Protestant, and most were wealthy. Many owned slaves. How, then, did the framers' own interests and prejudices influence their conception of the political-economic system?

Chapters 3 through 6 primarily explore historical changes in the American political-economic system. Emphasis is placed on the development of corporations, the evolution of democracy, the influence of the Cold War and its end, and the rise, fall, and rise of laissez-faire ideology. A critical historical point is that during the early-twentieth century, when laissez faire reared its head in the United States and Europe—when the private dominated the public—serious problems arose not only for democratic governments but also for capitalist economies. Chapter 3 focuses on the evolution of republican democracy during the nineteenth and early-twentieth centuries. Chapter 4 explains the emergence of pluralist democracy during the 1930s and the concomitant development of free expression as a constitutional lodestar. Chapter 5 explores the evolution of pluralist democracy after World War II while paying particular attention to the influence of the Cold War. The role of Justice Powell in free-expression developments is highlighted. In the summer of 1971, Powell was still a corporate attorney with a prestigious Virginia law firm. He wrote a memorandum advising the prominent business organization, the U.S. Chamber of Commerce, to strive to increase corporate political power. Less than 6 months later, Powell sat as an associate justice on the Court deciding cases related to corporations and business in general. To what extent did Powell successfully implement his goals for corporate power? Chapter 6 focuses on the end of the Cold War and the rise of Democracy, Inc.  This chapter also examines how the early Roberts Court conservatives endorsed Democracy, Inc.

Chapter 7 analyzes the early Roberts Court's betrayal of fundamental constitutional principles and how that betrayal contributes to the current endangerment of the American democratic-capitalist system. The critique in this chapter is threefold. First, the chapter draws on the earlier discussion of the framing to underscore that the Roberts Court's endorsement of Democracy, Inc. , cannot be squared with an originalist approach. Second, the chapter draws on political philosophy and social theory. In particular, numerous theorists reason that a democratic-capitalist system cannot survive if one sphere dominates the other—as is the case in Democracy, Inc.  Emphasis is placed on the importance of democratic

culture and the problem of income and wealth inequality in the United States. The racialized slant of inequality is underscored, but this section explains why all Americans should worry about increasing inequality regardless of attitudes concerning the racial divide. Third, the chapter concludes by showing how the history of the early-twentieth century pragmatically reinforces the theoretical argument. The first part of the twentieth century illustrates that the implementation of laissez-faire policies can endanger not only democracy but also, counterintuitively, capitalism. And as a practical matter, there are alarming parallels between the early-twentieth and early-twenty-first centuries.

Chapter 8, the conclusion, begins by exploring whether the early-twentieth and early-twenty-first centuries differ in any significant ways. In fact, the most important distinction between the two eras only exacerbates the current danger to the American democratic-capitalist system. In the early-twentieth century, for a variety of reasons, most Americans eventually recognized the enormity of the threat to the nation. In the twenty-first century, at least before the election of 2016, few Americans recognized the serious danger. While an increasing number of Americans realized that growing economic inequality is problematic, too many Americans remained oblivious to the overarching threat to the nation. In fact, recent surveys showed that a remarkable number of Americans distrust democracy and favor a more authoritarian form of government.[24] Given this, the election of Trump did not bode well for our constitutional system. Yet, his early actions in office, such as his travel ban on seven predominantly Muslim countries and his attacks against the judiciary, at least woke some Americans from their slumbers. More people now realize that we need to worry about democracy.

After further elaborating the current dangers to our democratic-capitalist system, Chap. 8 examines the potential remedies. A possible call for a new constitutional convention, with a rewrite of the Constitution, is discussed, but a new convention remains unlikely. At this point in time, if one considers various private and public institutions, the one best positioned to help the nation restore its balance and escape Democracy, Inc. , is the Court itself—not a comforting conclusion, by any measure. Nevertheless, with Gorsuch having filled Scalia's former seat, the new Roberts Court must confront a profound question: Will it abet in the possible demise of the American constitutional system? Or will the conservative majority on the Court act to resuscitate democratic government (thus simultaneously preserving American capitalism)? This chapter

argues that the three-pronged critique of the early Roberts Court, articulated in Chap. 7, should serve as a roadmap for the new Court in a repudiation of Democracy, Inc.

Ultimately, then, this book is simultaneously historical and prospective. The framing of the Constitution provides the genesis and initial drive for the narrative. The delegates to the constitutional convention faced a conundrum: How could they maintain republican government while simultaneously protecting property and stabilizing the nation's economy? The framers tried to hammer out a practical solution that could achieve these goals. As the framers saw matters, national survival depended on a relative balance between public and private spheres of activity. But the American constitutional system has not remained static over its more than two centuries of life. Consequently, the book follows the historical development of our system as it eventually evolved into the perilous Democracy, Inc.  These interrelated histories—the framing and the subsequent evolution of the constitutional system—are integral to understanding the future. We cannot envision where the new Roberts Court might go without firmly grasping the past. The new Court will need to choose: Will it follow the early Roberts Court in approving and bolstering Democracy, Inc., or will it restore the crucial balance between the public and private spheres in our democratic-capitalist system?

Three caveats are in order at the outset. First, although I discuss the framing at length, I am not an originalist. Contrary to the claims of originalists, historical materials illuminating the founders' intentions and original public meanings cannot provide fixed and objective constitutional meanings that resolve concrete constitutional issues. Even so, such historical or originalist evidence is an important source that can inform constitutional interpretation.[25] Second, given that this book emphasizes the relationship between the government and the economic marketplace, one might be surprised at the attention allocated to the constitutional doctrine of free expression. But the explanation for the extensive forays into First-Amendment law is simple. In the late-twentieth and early-twenty-first centuries, the Supreme Court has interpreted the First-Amendment protection of free expression as encompassing the spending of money, at least in certain contexts. The development of free-expression jurisprudence must therefore be a significant component of any historical exploration of the relations between government and the economy. Third, this book explains constitutional doctrine as developing from a law-politics dynamic. That is, neither pure law nor raw politics

determines Supreme Court votes and decisions. Rather, in constitutional cases, whether involving free expression or otherwise, the justices for the most part 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.[26]

## Notes

*On the Format of the Notes*: The source of each quotation is identified in a note. If a series of quotations is from the same source, then one note is placed at the end of the final quotation (or at the next advantageous position). Some additional sources are cited in these quotation footnotes. As a general matter, though, additional sources are cited at advantageous points, whether at the end of a paragraph or otherwise.

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. Don Lee, *Trump to Preside Over the Richest Cabinet in U.S. History*, L.A. Times, Jan. 16, 2017; Theda Skocpol and Alexander Hertel-Frenandez, *The Koch Network and Republican Party Extremism*, 14 Perspectives on Politics 681 (2016) (emphasizing that the "Koch network" has intensified "right-tilted partisan polarization and rising economic inequality").
3. Roberto Stefan Foa and Yascha Mounk, *The Danger of Deconsolidation: The Democratic Disconnect*, 27 Journal of Democracy 5 (2016) (emphasizing the current danger to democracy).
4. C.B. Glasscock, The War of the Copper Kings (1935); Michael P. Malone and Richard B. Roeder, Montana: A History of Two Centuries (1976); Kenneth Ross Toole, Montana: An Uncommon Land (1959).
5. Mark Twain, Mark Twain in Eruption 72 (1940); Toole, supra note 4, at 174, 186–194.
6. Toole, supra note 4, at 166; Malone and Roeder, supra note 4, at 170–172.
7. Glasscock, supra note 4, at 288 (quoting *Idaho State Tribune*); Malone and Roeder, supra note 4, at 172–175; Toole, supra note 4, at 208–209.
8. Sect. 1335225, MCA; Malone and Roeder, supra note 4, at 196–197.

9. Western Tradition Partnership, Inc., v. Attorney General of Montana, 363 Mont. 220 (2011), *reversed*, 132 S. Ct. 2490 (2012).
10. 132 S. Ct. 2490, 2491 (2012).
11. As I use the term 'self' in this book, it is defined primarily by its motives, concerns, and capabilities. How does one view oneself in relation to the external world? How much does one care for others? How significant is one's belonging to a community? How much does one dwell on material well-being? How much does one strive for religious salvation? What constitutes religious salvation or a religious life? These are just some of the questions that animate a conception of the self. An individual who focuses on salvation after death might live differently from one who focuses on happiness in this life. For extensive discussions of different conceptions of the self, see Philip Cushman, Constructing the Self, Constructing America (1995); John P. Hewitt, Dilemmas of the American Self (1989); Charles Taylor, Sources of the Self (1989). For a philosophical history of notions of the self, see Louis P. Pojman, Who Are We? (2006).
12. As I explain at the beginning of Chap. 2, I will use the terms 'framer' and 'delegate' interchangeably.
13. For a more extensive discussion of the interrelated histories of free expression and democracy, see Stephen M. Feldman, Free Expression and Democracy in America: A History (2008).
14. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 765 (1976), see Bigelow v. Virginia, 421 U.S. 809, 819–820 (1975) (distinguishing *Valentine v. Chrestensen*, 316 U.S. 52 (1942)).
15. 558 U.S. 310 (2010); McCutcheon v. FEC, 134 S.Ct. 1434 (2014).
16. Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 Loyola Law Review 611 (1999); John O. McGinnis and Michael B. Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 Constitutional Commentary 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?* 28 Brigham Young University Journal of Public Law 283 (2014). In many cases, though, including *Citizens United*, the justices do not clearly identify which form of originalism is being followed.
17. District of Columbia v. Heller, 554 U.S. 570, 576–626 (2008); Antonin Scalia, A Matter of Interpretation 38 (1997). Alito "has described himself as a 'practical originalist.'" Neil S. Siegel, *The Distinctive Role of Justice Samuel Alito: From A Politics of Restoration to A Politics of Dissent*, 126 The Yale Law Jornal Forum 164, 166 (2016).

18. For another argument linking the Roberts Court to the current endangerment of the constitutional system, see Stephen E. Gottlieb, Unfit for Democracy: The Roberts Court and the Breakdown of American Politics (2016).
19. Numerous articles discuss and conjecture about Trump's psychological state. Richard A. Friedman, *Is It Time to Call Trump Mentally Ill?* NY Times, Feb. 17, 2017; Susan Milligan, *Temperament Tantrum*, U.S. New & World Report, Jan. 27, 2017; Ruth Ben-Ghiat, *Trump Is Following Authoritarian Playbook*, CNN, Jan. 17, 2017; Richard Green, *Is Donald Trump Mentally Ill? 3 Professors Of Psychiatry Ask President Obama To Conduct 'A Full Medical And Neuropsychiatric Evaluation*,' Huffington Post, Dec. 17, 2016; Jason Stanley, *Beyond Lying: Donald Trump's Authoritarian Reality*, NY Times, Nov. 4, 2016; James Hamblin, *Donald Trump: Sociopath?* The Atlantic, July 20, 2016.
20. David Frum, *How to Build an Autocracy*, The Atlantic, March 2017; Tom Ashcroft, *Guarding Against Authoritarianism*, NPR On Point, Jan. 31, 2017; Daron Acemoglu, *We Are the Last Defense Against Trump*, Foreign Policy, Jan. 18, 2017.
21. Cordova v. City of Albuquerque, 816 F.3d 645, 661 (10th Cir. 2016) (Gorsuch, Circuit Judge, concurring in the judgment).
22. Neil Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 Case Western Reserve Law Review 905, 905–906, 920 (2016).
23. Lee Epstein, Andrew D. Martin, and Kevin Quinn, *President-Elect Trump and his Possible Justices* (Dec. 15, 2016). For rankings of prior Supreme Court justices based on political ideology, see Lee Epstein et al., The Behavior of Federal Judges 106–116 (2013), which includes comparisons with the Martin-Quinn scores (accounting for changes over time) http://mqscores.wustl.edu/index.php, and the Segal-Cover scores (quantifying Court nominees' perceived political ideologies at the time of appointment) http://www.sunysb.edu/polsci/jsegal/qualtable.pdf (data drawn from Jeffrey Segal and Albert Cover, *Ideological Values and the Votes of Supreme Court Justices*, 83 The American Political Science Review 557–565 (1989); updated in Lee Epstein and Jeffrey A. Segal, Advice and Consent: The Politics of Judicial Appointments (2005)).
24. Foa and Mounk, supra note 3, at 8–13.
25. Stephen M. Feldman, *Constitutional Interpretation and History: New Originalism or Eclecticism?* 28 Brigham Young University Journal of Public Law. 283 (2014). Lawrence Solum refers approvingly to "the fixation thesis" as a key originalist point. Lawrence B. Solum, *We Are All Originalists Now*, *in* Constitutional Originalism: A Debate 1, 4 (2011); *e.g.*, Randy E. Barnett, *Interpretation and Construction*, 34 Harvard

Journal of Law and Public Policy 65, 66 (2011); Keith E. Whittington, *The New Originalism*, 2 Georgetown Journal of Law & Public Policy 599, 611 (2004). For a more complex conceptualization of originalism, see Jack M. Balkin, Living Originalism (2011).

26. Stephen M. Feldman, *Supreme Court Alchemy: Turning Law and Politics Into Mayonnaise*, 12 Georgetown Journal of Law & Public Policy 57 (2014); Stephen M. Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 Law & Social Inquiry 89 (2005).

# PART I

# The Foundation for a Balanced Structure

CHAPTER 2

# The Constitutional Framing: Republican Democracy, Private Property, and Free Expression

In 1785 and 1786, Massachusetts fell into economic depression. When the state government responded with fiscal restraint, many landowning farmers, particularly in the central and western portions of the state, fell behind on loan and tax payments and faced possible foreclosures. Town meetings produced demands for legislative action to protect the vulnerable landowners. The government instead pressed the debtors to fulfill their obligations, with imprisonment the penalty for non-payment. In desperation, groups of farmers formed armed vigilante bands. One of the leaders was Daniel Shays, a former Revolutionary War militia captain. No pauper, Shays owned a farm of more than 100 acres, yet he already had been dragged into court twice for small unpaid debts. Shays and the other armed insurrectionists, numbering somewhere between 2000 to 3000 men, forcefully closed local county courts, terrorized sheriffs, and even threatened an armory at Springfield, the main federal arsenal for all of New England.[1]

The Continental Congress asked Henry Knox to investigate in the fall of 1786. The corpulent Knox, a wartime confidant of George Washington and also a major landowner in Massachusetts, responded with a report wildly exaggerating the danger. In a letter to Washington, who had gladly retired in 1783 to his Mount Vernon estate in Virginia, Knox claimed the Shaysites were "determined to annihilate all debts public and private." By Knox's estimate, "12 or 15,000 desperate and unprincipled men" were on the verge of "a formidable rebellion against reason, the principles of all government, and against the very name of liberty."[2] Knox's inflammatory

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report frightened Congress and other political leaders. Washington reacted with suitable concern but refused to intercede directly in the conflict. In fact, Congress lacked the necessary funds for supplying federal troops that might have intervened. The Massachusetts governor nonetheless raised money from private donors and formed a state militia of 4400 men. In late-January and early-February 1787, a time of bitter cold and violent snowstorms, the militia routed Shays and his forces in and around Springfield, leaving at least four insurgents dead. Shays and several of his cohorts were caught, tried, and sentenced to hang for treason. Political sympathies intruded into debates over leniency. In the end, some Shaysites were executed, though Shays himself and others were pardoned. Shays's Rebellion appeared to be finished.[3]

The rebellion, however, continued by other means. In a republic, supporters of the Shaysites could exercise their strength in a more peaceful manner, through the vote. Soon they had elected enough new legislators that the Massachusetts assembly enacted many of the desired reforms and protections. In fact, the electoral aftermath of Shays's Rebellion seemed to disturb many national political leaders even more than the threat of armed insurgency. John Jay wrote to 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."[4] Washington replied pessimistically, lamenting that he and other Revolutionary leaders "probably had too good an opinion of human nature in forming our confederation.… Perfection falls not to the share of mortals." Washington worried most about the implications of the Massachusetts developments for the future of republican government. "What 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!"[5]

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. While Massachusetts had struggled through the most violent unrest, other states also had dealt with political conflicts revolving around debt, property, and control of government. As James Madison wrote, "The late turbulent scenes in