

The End of the Cold War: Can American Constitutionalism Survive Victory?

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The End of the Cold War: Can American Constitutionalism Survive Victory?

STEPHEN M. FELDMAN*

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I. INTRODUCTION

The nation's Cold War battle against the Soviet Union pervasively influenced American law and society, as numerous scholars have observed.¹ The Cold War, for instance, spurred the strengthening of civil rights and the capitalist economy.² The federal government needed to protect civil rights, at least symbolically, to deflect Soviet denunciations of democracy.³ Meanwhile, the ostentatious exhibition and use of American consumer products contrasted American economic prosperity with Soviet struggles.⁴ Thus, during the Cold War, the government and the capitalist leaders were bonded together in a struggle against the communist enemy.⁵ The overriding desire for Cold War victory tempered potential political demands for *laissez-faire* governance.⁶

Despite the scholarly attention showered on the Cold War, a shockingly small number of authors have even considered the effects of the end of the Cold War on American law and society.⁷ This article takes on that task. In fact, the end of the Cold War, in the late 1980s and early 1990s, profoundly influenced national development.⁸ Most important, the nation's Cold War victory generated unanticipated and perverse changes in American democracy.⁹ The national victory unleashed corporate wealth from its Cold War strictures.¹⁰ The government and capitalists were no longer fighting

1. Some helpful sources on the Cold War include the following: H.W. BRANDS, *THE DEVIL WE KNEW: AMERICANS AND THE COLD WAR* (1993); GREG CASTILLO, *COLD WAR ON THE HOME FRONT: THE SOFT POWER OF MIDCENTURY DESIGN* (2010); RICHARD B. DAY, *COLD WAR CAPITALISM: THE VIEW FROM MOSCOW 1945-1975* (1995); MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000); JOHN LEWIS GADDIS, *THE COLD WAR: A NEW HISTORY* (2005); MELVYN P. LEFFLER, *A PREPONDERANCE OF POWER: NATIONAL SECURITY, THE TRUMAN ADMINISTRATION, AND THE COLD WAR* (1992); RICHARD SAULL, *THE COLD WAR AND AFTER: CAPITALISM, REVOLUTION AND SUPERPOWER POLITICS* (2007); MARTIN WALKER, *THE COLD WAR: A HISTORY* (1993).

2. See DUDZIAK, *supra* note 1, at 6; see CASTILLO, *supra* note 1, at viii-xi.

3. See DUDZIAK, *supra* note 1, at 6.

4. See CASTILLO, *supra* note 1, at viii-xi.

5. See *supra* notes 1-4 and accompanying text.

6. ROBERT L. KERR, *THE CORPORATE FREE-SPEECH MOVEMENT: COGNITIVE FEUDALISM AND THE ENDANGERED MARKETPLACE OF IDEAS* 32-33 (2008).

7. See DUDZIAK, *supra* note 1, at 15.

8. See *id.*

9. See *id.*

10. Helpful sources discussing the development of corporations as well as globalization include the following: see generally JOEL BAKAN, *THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER* (2004); RICHARD FRANKLIN BENSEL, *THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION, 1877-1900* (2000); BARRY EICHENGREEN, *GOLDEN FETTERS: THE GOLD STANDARD AND THE GREAT DEPRESSION, 1919-1939* (Robert W. Fogel & Clayne L. Pope eds., 1992); JEFFRY A. FRIEDEN, *GLOBAL CAPITALISM: ITS FALL AND RISE IN THE TWENTIETH CENTURY* (2006); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (2d ed. 1985); KERMIT L. HALL & PETER KARSTEN, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* (2d ed. 2009); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977); HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836-1937* (1991); JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS*

together against a common foe.¹¹ To the contrary, capitalists now seemed to view government as its enemy.¹² Demands for *laissez-faire* policies became common and overt, as did denigration of democratic government.¹³ As a result, American democracy transformed into Democracy, Inc., a government system dominated by wealthy individuals and corporations.¹⁴

The conservative justices on the Supreme Court—John Roberts, Antonin Scalia, Clarence Thomas, Samuel Alito, and Anthony Kennedy—have stamped Democracy, Inc., with a constitutional imprimatur.¹⁵ In a wide variety of cases, the Court has promoted business, especially corporate business, and protected the economic marketplace from government regulation.¹⁶ In fact, under the approving eye of the Robert's Court, the private sphere has become so bloated with power that it has, in effect,

CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970 (1970); JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA* (2003); KENICHI OHMAE, *THE END OF THE NATION STATE: THE RISE OF REGIONAL ECONOMIES* (1996); JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002); BENJAMIN R. TWISS, *LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT* (1962); LEVIATHANS: MULTINATIONAL CORPORATIONS AND THE NEW GLOBAL HISTORY (Alfred D Chandler, Jr. & Bruce Mazlish eds., 2005) [hereinafter LEVIATHANS]; Oscar Handlin & Mary F. Handlin, *Origins of the American Business Corporation*, 5 J. ECON. HIST. (1945); Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593 (1988) [hereinafter *The Classical Corporation in American Legal Thought*]; Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 WM. & MARY Q. 51 (1993); Charles W. McCurdy, *American Law and the Marketing Structure of the Large Corporation, 1875-1890*, 38 J. ECON. HIST. 631 (1978). Helpful sources discussing economic development in general (or in the United States) include the following: see generally JOHN KENNETH GALBRAITH, *THE AFFLUENT SOCIETY AND OTHER WRITINGS 1952-1967: AMERICAN CAPITALISM, THE GREAT CRASH, 1929, THE AFFLUENT SOCIETY, THE NEW INDUSTRIAL STATE* (James K. Galbraith ed., 2010); ROBERT HEILBRONER & WILLIAM MILBERG, *THE MAKING OF ECONOMIC SOCIETY* (Leah Jewell et al. ed., 10th ed. 1998); ROBERT HEILBRONER & AARON SINGER, *THE ECONOMIC TRANSFORMATION OF AMERICA: 1600 TO THE PRESENT*, (David Tatom et al. eds., 4th ed. 1999); RONALD E. SEAVOY, *AN ECONOMIC HISTORY OF THE UNITED STATES FROM 1607 TO THE PRESENT* (2006).

11. See KERR, *supra* note 6, at 32.

12. Helpful sources on the relationship between democracy and capitalism include the following: see generally FRED BLOCK & MARGARET R. SOMERS, *THE POWER OF MARKET FUNDAMENTALISM: KARL POLANYI'S CRITIQUE* (2014); TIMOTHY K. KUHNER, *CAPITALISM V. DEMOCRACY: MONEY IN POLITICS AND THE FREE MARKET CONSTITUTION* (2014); THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer trans., 2014); DANI RODRIK, *THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY* (2011); SIDNEY A. SHAPIRO & JOSEPH P. TOMAIN, *ACHIEVING DEMOCRACY: THE FUTURE OF PROGRESSIVE REGULATION* (2014); JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY* (2013).

13. See KERR, *supra* note 6, at 32-35.

14. 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* xi (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* 1, 12 (2005).

15. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 317-19 (2010); *McCutcheon v. FEC*, 134 S. Ct. 1434, 1440-42 (2014).

16. See, e.g., *Citizens United*, 558 U.S. at 351, 372; *McCutcheon*, 134 S. Ct. at 1462.

subsumed the public sphere.¹⁷ If Democracy, Inc., continues unchecked, it will threaten the constitutional system, including both American democracy and American capitalism.¹⁸

A brief summary of the history of American democracy will set the stage for this focus on the Cold War, its end, and the threat of Democracy, Inc.¹⁹ From the founding until the early twentieth century, the nation operated as a republican democratic regime.²⁰ Under republican democracy, citizens and elected officials were supposed to be virtuous; in the political realm, they were to pursue the common good or public welfare rather than their own partial or private interests.²¹ When citizens or officials used government institutions to pursue their own interests, then the government was corrupt.²² Ultimately, the constitutional framers sought balance between government power and individual rights, particularly property rights.²³ They sought to enhance the protection of property rights, but they simultaneously empowered government to act for the common good.²⁴

Republican democracy persisted in the rural, agrarian, and relatively homogeneous American society of the nineteenth century.²⁵ A variety of forces, however, strained the regime in the late-nineteenth and early-twentieth centuries.²⁶ These forces, including industrialization, urbanization, and immigration, eventually led, in the 1930s, to the collapse

17. 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, 404 (2013).

18. See generally Stephen M. Feldman, *The Interpretation of Constitutional History, or Charles Beard Becomes a Fortuneteller (With an Emphasis on Free Expression)*, 29 CONST. COMMENT. 323 (2014).

19. For a more comprehensive history of American democracy in relation to free expression, see STEPHEN M. FELDMAN, *FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY* 466 (2008) [hereinafter *FREE EXPRESSION AND DEMOCRACY IN AMERICA*].

20. See *FREE EXPRESSION AND DEMOCRACY IN AMERICA*, *supra* note 19, at 14-45, 153-208.

21. E.g., Virginia Bill of Rights (1776), reprinted in BEN PERLEY POORE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES PART II 1908-09* (2d ed. 1878) (emphasizing government for “the common benefit”); see GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, 59 (1969) (discussing republican government). Other sources on the framing include the following: see generally RICHARD BEEMAN, *PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION* (2009); FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* (1985); JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* (1990). For the most complete record of the constitutional convention, see generally *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (Max Farrand ed., 1966) [hereinafter *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*]. All citations to *The Federalist* are to the Project Gutenberg E-text of *The Federalist Papers*.

22. See *FREE EXPRESSION AND DEMOCRACY IN AMERICA*, *supra* note 19, at 16.

23. *Id.* at 21.

24. *Id.* at 22.

25. See *id.* at 170.

26. *Id.* at 187.

of the republican democratic regime and the rise of pluralist democracy.²⁷ Mainstream and old-stock Protestant values, long the foundation for the republican democratic principles of virtue and the common good, were now to be balanced with the values of other Americans who constituted the demographically diverse population.²⁸ Thus, the key to pluralist 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.²⁹ Pluralist democracy, in other words, is grounded on value (or ethical) relativism: No single set of values or interests is inherently predominant.³⁰ Numerous political and constitutional theorists celebrated pluralist democracy as the best means for accommodating “our multi-group society.”³¹ The only way to determine public values and goals, they explained, is “through the free competition of interest groups.”³² By “composing or compromising” their different values and interests,³³ the “competing groups [would] coordinate their aims in programs they can all support.”³⁴ Legislative decisions therefore turned on negotiation, persuasion, and the exertion of pressure through the normal channels of the democratic process.³⁵

Many scholars and jurists emphasized that free expression was a prerequisite to the pluralist democratic process.³⁶ According to this self-governance rationale for protecting free speech and writing, free expression allows diverse groups and individuals to contribute their views in the pluralist political arena.³⁷ Indeed, no liberty or right—not even voting—is more crucial to the pluralist democratic process than free expression.³⁸ If government officials interfere with the pluralist process by controlling public debates, then they skew the democratic outcomes and undermine the

27. See FREE EXPRESSION AND DEMOCRACY IN AMERICA, *supra* note 19, at 187.

28. *Id.* at 180.

29. JOHN DEWEY, FREEDOM AND CULTURE 176 (1939).

30. Claude J. Burtenshaw, *The Political Theory of Pluralist Democracy*, 21 W. POL. Q. 577, 585 (1968).

31. WILFRED E. BINKLEY & MALCOLM C. MOOS, A GRAMMAR OF AMERICAN POLITICS: THE NATIONAL GOVERNMENT 9 (1949).

32. *Id.*

33. *Id.*

34. *Id.* at 8.

35. See *id.* at 10. Robert Dahl has presented, perhaps, the most comprehensive explanations of the democratic process: see generally ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS (1989); ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956) [hereinafter A PREFACE TO DEMOCRATIC THEORY].

36. See, e.g., ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT, 24-26 (1948).

37. *Id.*

38. *Id.*

consent of the governed.³⁹ Thus, in the late 1930s and 1940s, the justices began to uphold one free speech claim after another, a stark-about face from the Court's consistent repudiation of First Amendment claims during the republican democratic era.⁴⁰

This article picks up the story of pluralist democracy during the post-World War II era. After emerging in the 1930s, pluralist democracy would continue to evolve.⁴¹ It retained its basic principles but changed in its details and applications.⁴² The post-war evolution of pluralist democracy intertwined closely with the development of political conservatism, particularly as it unfolded in jurisprudence and judicial decision making.⁴³ After the war, two primary strands of American political conservatism emerged: traditionalism and libertarianism.⁴⁴ Traditionalists reacted, in particular, against the pluralist democratic commitment to ethical relativism.⁴⁵ 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.⁴⁶ Meanwhile, libertarians reacted against the expanding power of the national government. Thus, liberals might advocate to continue and to strengthen New Deal (and subsequently, Great Society) social programs, but libertarians maintained that government power diminished individual liberty and dignity.⁴⁷ From the libertarian standpoint, individual liberty was the root source of American vitality, creativity, and power.⁴⁸ One important manifestation of libertarianism was neoliberalism, which emphasize economic liberty and drew partly from classical liberal thinkers such as Adam Smith.⁴⁹ Early neoliberal thought began to emerge even before World War II, and at that

39. *Id.* at 26.

40. *E.g.*, *Thornhill v. Ala.*, 310 U.S. 88, 105 (1940) (holding that labor picketing is protected free speech); *Schneider v. State*, 308 U.S. 147, 165 (1939) (invalidating conviction for distributing handbills); *Hague v. Comm. for Indus.Org.*, 307 U.S. 496, 527 (1939) (upholding right of unions to organize in streets).

41. *See* KEN I. KERSCH, *CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW* 112-17 (2004).

42. *See id.*

43. *See id.*

44. *See* PETER BERKOWITZ, *CONSTITUTIONAL CONSERVATISM: LIBERTY, SELF-GOVERNMENT, AND POLITICAL MEDERATION* 9 (2013); GEORGE H. NASH, *THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA SINCE 1945* 1-83 (2008).

45. NASH, *supra* note 44, at 40.

46. *See* BERKOWITZ, *supra* note 44, at 9-10.

47. NASH, *supra* note 44, at 57, 78-82.

48. *See* VARIETIES OF CONSERVATISM IN AMERICA xvii-xviii (Peter Berkowitz ed., 2004).

49. *See* DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 20 (2005); DANIEL STEDMAN JONES, *MASTERS OF THE UNIVERSE: HAYEK, FRIEDMAN, AND THE BIRTH OF NEOLIBERAL POLITICS* 11, 101-02 (2012); *e.g.*, F. A. HAYEK, *THE ROAD TO SERFDOM* 17 (1944).

stage, it accepted government intervention in the market.⁵⁰ But after the war, neoliberalism transformed, rapidly becoming more assertively libertarian and anti-government.⁵¹ Traditionalism (now, sometimes called social conservatism) and libertarianism united loosely in their opposition to liberalism and pluralist democracy.⁵² Nevertheless, traditionalism, with its emphasis on moral clarity, and libertarianism, with its emphasis on individual liberty, inevitably clashed in numerous situations.⁵³

Quite simply, the promotion of specific moral values sometimes decreased the degree of individual freedom, and vice versa.⁵⁴ To be sure, some conservatives, including prominent neoconservatives, attempted to harmonize these conflicting goals for the sake of political advantage.⁵⁵ Ultimately, though, such harmonizing was tenuous and fortuitous.⁵⁶ In many, if not most circumstances, traditionalism and libertarianism push in opposite directions.⁵⁷

Part II of this article focuses on two interrelated factors that contributed significantly to the evolution: the Cold War and the consumer culture.⁵⁸ This part also explains how interpretations of free speech—particularly, conservative interpretations—shifted over time, partly because of the changes in pluralist democracy.⁵⁹ Part III begins by exploring how the end of the Cold War contributed to the further evolution of pluralist democracy into Democracy, Inc.⁶⁰ Part III next focuses on the Robert's Court and its endorsement of Democracy, Inc.⁶¹ Emphasis is placed on *Citizens United v. Federal Election Commission*⁶² and its progeny.⁶³ Pursuant to these First Amendment decisions, corporations and other wealthy entities, including individuals, can spend astronomical (unlimited) sums of money to influence

50. JONES, *supra* note 49, at 100.

51. *See id.* at 6-10 (summarizing the stages of neoliberalism).

52. *See* BERKOWITZ, *supra* note 44, at 9 (referring to traditionalists as the “forebears” of social conservatives).

53. *See* NASH, *supra* note 44, at 197-98, 236.

54. *See* BERKOWITZ, *supra* note 44, at 9.

55. *See* STEPHEN M. FELDMAN, NEOCONSERVATIVE POLITICS AND THE SUPREME COURT: LAW, POWER, AND DEMOCRACY 3-4, 52 (2013) [hereinafter NEOCONSERVATIVE POLITICS AND THE SUPREME COURT]; MURRAY FRIEDMAN, THE NEOCONSERVATIVE REVOLUTION: JEWISH INTELLECTUALS AND THE SHAPING OF PUBLIC POLICY 183 (2005) [hereinafter THE NEOCONSERVATIVE REVOLUTION]

56. *See* BERKOWITZ, *supra* note 44, at 9.

57. George H. Nash, *The Uneasy Future of American Conservatism*, in THE FUTURE OF CONSERVATISM 1-20 (Charles W. Dunn ed., 2007) [hereinafter *The Uneasy Future of American Conservatism*].

58. *See infra* Part II.B.

59. *See infra* Part II.A.

60. *See infra* Part III.A.

61. *See infra* Part III.B.

62. 558 U.S. 310 (2010).

63. *McCutcheon*, 134 S. Ct. at 1438, 1441, 1462.

political elections and government officials.⁶⁴ Part IV explains why Democracy, Inc., threatens our constitutional system.⁶⁵ Part V briefly concludes.⁶⁶

II. PLURALIST DEMOCRACY EVOLVES: FREE EXPRESSION, JUDICIAL CONSERVATISM, AND THE COLD WAR

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.⁶⁷ Many political conservatives reacted to the expanding power of the national government by aligning themselves with this coalition.⁶⁸ Conservatives recognized that if the government, now seemingly controlled by diverse political outsiders, was reaching into new realms, especially of economic activity, then the courts and civil liberties might usefully shield them from government control.⁶⁹ In 1938, the president-elect of the American Bar Association reminded lawyers that civil liberties protect the “wealthy and privileged,”⁷⁰ while renowned corporate lawyer, Grenville Clark, encouraged “conservatives” to be “intelligent, enlightened guardians of . . . civil rights.”⁷¹ This conservative backing for civil liberties bolstered the transformation of free speech into a constitutional lodestar.⁷²

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.⁷³ During the 1940s and 1950s, conservatives frequently reasoned that government interests outweighed free-expression interests and thus justified suppression.⁷⁴ For instance, in *Minersville School District v. Gobitis*,⁷⁵ decided in 1940, with war looming, the Court upheld mandatory flag salutes.⁷⁶ A Pennsylvania school board required teachers and students to

64. See *Citizens United*, 558 U.S. at 315; *McCutcheon*, 134 S. Ct. at 1462.

65. See *infra* Part IV.

66. See *infra* Part V.

67. See KERSCH, *supra* note 41, at 112.

68. See *id.* at 112-17.

69. See *id.* at 112.

70. RICHARD W. STEELE, *FREE SPEECH IN THE GOOD WAR* 11 (1999).

71. Grenville Clark, *Conservatism and Civil Liberty*, XXIV A.B.A. J. 640, 644 (1938) (address delivered at annual meeting of Nassau County Bar Association on June 11, 1938).

72. See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640-42 (1943).

73. See *FREE EXPRESSION AND DEMOCRACY IN AMERICA*, *supra* note 19, at 430-31.

74. See *id.* at 430.

75. 310 U.S. 586 (1940), *overruled by Barnette*, 319 U.S. 624.

76. *Gobitis*, 310 U.S. at 600.

salute the flag and recite the pledge of allegiance.⁷⁷ When the Gobitis children, aged twelve and ten, refused to participate in the daily ceremony, the school expelled them.⁷⁸ The Gobitis family argued that the school board had violated the children's rights to free exercise of religion and free expression.⁷⁹ The Court concluded, though, that a societal interest in unity and security outweighed both First Amendment rights.⁸⁰

The Court would soon overrule itself on the issue of mandatory flag salutes in *West Virginia State Board of Education v. Barnette*,⁸¹ emphasizing that free speech is a constitutional lodestar and that democracy cannot exist without it.⁸² Yet, the onset of the Cold War immediately following World War II triggered strong impulses to suppress dissent.⁸³ 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.⁸⁴ In a speech delivered on March 12, 1947, President Harry Truman announced that the United States would aid democratic nations resisting communist takeovers.⁸⁵ He justified this policy, which would become known as the Truman Doctrine, in stark moral terms:

At the present moment in world history nearly every nation must choose between alternative ways of life. The choice is too often not a free one. 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. 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.⁸⁶

From this perspective, any dissent to American principles and policies amounted to an immoral betrayal of the nation's interests and the American

77. *Id.* at 591.

78. *Id.*

79. *Id.* at 592-93.

80. *Id.* at 593-96.

81. 319 U.S. 624.

82. *Id.* at 640-42.

83. *See* Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 385-86 (1950); *Adler v. Bd. of Educ. of City of N.Y.*, 342 U.S. 485, 486-87 (1952); *Dennis v. United States*, 341 U.S. 494, 495-96 (1951).

84. *See* GADDIS, *supra* note 1, at 98-102. In the 1980's, President Ronald Reagan would still be casting the Cold War in moral terms, as he referred to the Soviet Union an "evil empire." *Id.* at 224-25.

85. *See* DOCUMENTS OF AMERICAN HISTORY 704-06 (Henry Steele Commager ed., 6th ed. 1958).

86. *Id.* at 705.

way of life.⁸⁷ By executive order, the President established a loyalty program for all federal employees.⁸⁸ 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.⁸⁹ Loyalty investigations were means for enforcing traditional American values, including certain less savory norms such as racism and anti-intellectualism.⁹⁰ For example, loyalty review boards would ask: “Have you ever had Negroes in your homes?”⁹¹ Alternatively, they might ask: “Do you read Howard Fast? Tom Paine? Upton Sinclair?”⁹² 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?”⁹³

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.⁹⁴ In 1947, a Republican-controlled Congress overrode Truman’s veto and enacted the Taft-Hartley Act.⁹⁵ Apart from its general anti-union purposes, the Taft-Hartley Act required each union officer to sign an affidavit declaring that “he is not a member of the Communist Party or affiliated with such party”⁹⁶ Refusal to sign would preclude a union from invoking National Labor Relations Act protections and procedures.⁹⁷ In *American Communications Association v. Douds*,⁹⁸ decided in 1950, the Supreme Court upheld this affidavit requirement in the face of a First Amendment challenge.⁹⁹ Chief

87. *See id.*

88. *See* DOCUMENTS OF AMERICAN HISTORY, *supra* note 85, at 707-10

89. *Id.* at 710 (emphasis omitted). Commager dates Truman’s executive order on March 22, 1947, but the government archives date it on March 21, 1947. *Id.* at 707; *Executive Orders Disposition Tables: Harry S. Truman*, NATIONAL ARCHIVES, <<http://www.archives.gov/federal-register/executive-orders/1947.html>> (last visited Mar. 24, 2015).

90. *See* ROBERT J. GOLDSTEIN, *POLITICAL REPRESSION IN MODERN AMERICA: FROM 1870 TO 1976* 302-04 (2001).

91. *Id.* at 303.

92. *Id.*

93. *Id.* at 304; *see* GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 345-46 (2004) (discussing Truman’s loyalty hearings).

94. *See* Geoffrey R. Stone, *Free Speech in the Age of McCarthy: A Cautionary Tale*, 93 CALIF. L. REV. 1387, 1388-89, 1393-96 (2005) [hereinafter *Free Speech in the Age of McCarthy*].

95. DOCUMENTS OF AMERICAN HISTORY, *supra* note 85, at 716-19; *see* GOLDSTEIN, *supra* note 90, at 290-91; ERIK W. AUSTIN, *POLITICAL FACTS OF THE UNITED STATES SINCE 1789* 50, 52-53, 55 (1986) (depicting Republican control of the United States House of Representatives and the United States Senate in 1947).

96. DOCUMENTS OF AMERICAN HISTORY, *supra* note 85, at 718.

97. *Id.*

98. 339 U.S. 382 (1950).

99. *Douds*, 339 U.S. at 386, 389, 411-12, 415.

Justice Vinson's majority opinion stressed the specific government interest (or legislative purpose) behind the statute.¹⁰⁰ 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.¹⁰¹ Thus, Vinson reasoned that Congress had imposed the Taft-Hartley affidavit requirement in order to restrict harmful conduct, rather than to restrict unpopular expression.¹⁰² Even so, the Court acknowledged that the statutory restriction might interfere with the expression of ideas by Communists.¹⁰³ Vinson therefore proceeded to balance the government interests against the infringement of First Amendment freedoms.¹⁰⁴ Concluding that the government interests predominated, the Court emphasized that Communists remained free to express their beliefs.¹⁰⁵ 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.¹⁰⁶ The First Amendment, Vinson concluded, "does not require that [a Communist] be permitted to be the keeper of the arsenal."¹⁰⁷

Conservative Republicans in Congress continued to push an anti-Communist agenda.¹⁰⁸ 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.¹⁰⁹ 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.¹¹⁰ Meanwhile, the House Committee on Un-American Activities ("HUAC") investigated not only Hollywood insiders, most notoriously, but also doctors, lawyers,

100. *Id.* at 390-91, 393.

101. *Id.* at 387, 396.

102. *Id.* at 396.

103. *Id.* at 399.

104. *Doubs*, 399 U.S. at 399.

105. *Id.* at 402-04.

106. *Id.* at 412.

107. *Id.* For a discussion of whether Communists truly threatened to weaken the nation's defenses by calling political strikes, see MARTIN H. REDISH, *THE LOGIC OF PERSECUTION: FREE EXPRESSION AND THE MCCARTHY ERA* 29-31 (2005); ELLEN SCHRECKER, *MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA* 183-90 (1998). The scholarly consensus is that political strikes did occur, but they were far less common and serious than the government claimed. REDISH, *supra* note 107, at 31.

108. See *infra* notes 109-115 and accompanying text.

109. Internal Security Act of 1950, Pub. L. No. 831, §§ 7(a)-(b), 9(a)(1)-(2), (d), 64 Stat. 987, 993, 995-96.

110. § 7(d)(2)-(3), 64 Stat. at 993-94; GOLDSTEIN, *supra* note 90, at 322.

musicians, and others.¹¹¹ Thousands of reputations and careers were destroyed.¹¹² State legislatures, along with HUAC, investigated Communist influences in the public schools.¹¹³ Local school boards were apt to fire any teacher subject to an investigation, regardless of the result.¹¹⁴ States also imposed loyalty oaths to bar teachers who supposedly had Communist affiliations.¹¹⁵ In *Adler v. Board of Education of the City of New York*,¹¹⁶ 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.¹¹⁷ The Court reasoned that each individual had a right to free expression but not a right to be a public school teacher.¹¹⁸ The fear was that individuals with Communist affiliations were morally unfit to teach the young.¹¹⁹ Ultimately, hundreds of schoolteachers, as well as hundreds of college professors, lost their jobs “because of their actual or suspected, past or present, membership in the Communist Party.”¹²⁰

*Dennis v. United States*¹²¹ might be the most renowned Supreme Court anti-Communist decision of the post-World War II period.¹²² By a six-to-two vote, *Dennis* upheld the convictions of eleven leaders of the Communist Party of the United States (CPUSA) for advocating the violent overthrow of the government.¹²³ Even though the prosecution only proved 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.¹²⁴ The Court’s decision in *Dennis* started a “chain-reaction

111. See Kalah Auchincloss, Note, *Congressional Investigations and the Role of Privilege*, 43 AM. CRIM. L. REV. 165, 175-76 (2006); Alan I. Bigel, *The First Amendment and National Security: The Court Responds to Governmental Harassment of Alleged Communist Sympathizers*, 19 OHIO N.U. L. REV. 885, 914 (1993).

112. See José Felipé Anderson, *Freedom of Association, the Communist Party, and the Hollywood Ten: The Forgotten First Amendment Legacy of Charles Hamilton Houston*, 40 MCGEORGE L. REV. 25, 28 (2009).

113. See, e.g., N.Y. EDUC. LAW § 3022 (Consol. 1949) (repealed 1958).

114. See Seth F. Kreimer, *Sunlight, Secrets, and Scarlett Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 35-36 (1991).

115. See Bigel, *supra* note 111, at 914.

116. 342 U.S. 485 (1952).

117. *Id.* at 496.

118. *Id.* at 493.

119. JAMES T. PATTERSON, *GRAND EXPECTATIONS: THE UNITED STATES, 1945-1974* 185 (1996). At the university level, the presidents of Harvard and Columbia concluded a 1949 panel by stating, “Communists were ‘unfit’ to teach.” *Id.*

120. STONE, *supra* note 93, at 422.

121. 341 U.S. 494 (1951).

122. See *infra* notes 123-126 and accompanying text.

123. *Dennis*, 341 U.S. at 497, 516-17. The defendants were also convicted for conspiring to organize the CPUSA. *Id.* at 497.

124. *Id.* at 508-11.

process,”¹²⁵ which led to the arrest and prosecution of dozens of additional CPUSA members.¹²⁶ 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.¹²⁷ In *Adler*, the Court explicitly found that the Legislature sought to protect “truth [and] free inquiry” in the public schools.¹²⁸ 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”¹²⁹ From this perspective, free inquiry depended on moral clarity.¹³⁰ The morally unfit necessarily undermined free and open discussion and, therefore, must be suppressed.¹³¹

The nation sought to proclaim its traditional values—those that distinguished the United States from the Soviet Union—in other overt ways.¹³² For instance, in 1954, Congress amended the law specifying the words of the Pledge of Allegiance to include the phrase, “under God.”¹³³ The legislative history underscored the congressional purpose: “to distinguish the American system of government from communism and to underscore the commitment to inalienable, individual rights guaranteed by God.”¹³⁴ In 1956, Congress officially declared “In God We Trust” the national motto.¹³⁵ For many Americans, religious values seemed central to democracy.¹³⁶ 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.”¹³⁷ In his book, *Protestant-Catholic-Jew*,

125. Editorial, *The Shape of Things*, THE NATION, Jan. 31, 1953, at 89.

126. See GOLDSTEIN, *supra* note 90, at 332-33; PATTERSON, *supra* note 119, at 193.

127. See, e.g., *Douds*, 339 U.S. at 399; *Adler*, 342 U.S. at 510-11 (Douglas, dissenting); *Dennis*, 341 U.S. at 580-81 (Black, dissenting).

128. *Adler*, 342 U.S. at 489-90.

129. *Id.* at 493.

130. See *id.*

131. See *id.*

132. See *infra* notes 133-39 and accompanying text.

133. Act of June 14, 1954, Pub. L. No. 396, 68 Stat. 249 (1954).

134. 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 FOUNDATION PRESS: CONSTITUTIONAL LAW STORIES 471 (Michael C. Dorf ed., 2004) (citing legislative history).

135. ANSON PHELPS STOKES & LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES 570 (1964); Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 LOY. U. CHI. L.J. 121, 148 (2001).

136. See WILL HERBERG, PROTESTANT-CATHOLIC-JEW: AN ESSAY IN AMERICAN RELIGIOUS SOCIOLOGY 88 (1955).

137. *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952).

Will Herberg encapsulated the perception that traditional religious-cultural morality supplied “the crucial values” for “the American Way of Life.”¹³⁸ According to Herberg, Protestantism, Catholicism, and Judaism were together “the three ‘religions of democracy.’”¹³⁹

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.¹⁴⁰ Writing in 1957, Walter Berns, who had studied under political philosopher Leo Strauss,¹⁴¹ complained that “speech of almost any character, true or false, good or bad, enjoys a favored status before the Court,” except in cases involving national security.¹⁴² 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.”¹⁴³ Berns condemned this judicial attempt to eschew value judgments vis-à-vis the content of expression.¹⁴⁴ The “problem of free speech,” he explained, was really “the problem of virtue.”¹⁴⁵ In resolving free expression cases, the Court should attempt to “promote the virtue of citizens”¹⁴⁶ and to pursue the “general welfare” (that is, the common good).¹⁴⁷ 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.¹⁴⁸ The Court must distinguish between “good and evil,”¹⁴⁹ then must allow the government to cultivate citizens of “good character,”¹⁵⁰ while censoring the licentious.¹⁵¹ Otherwise, the United States would be unable to protect “against dangers to civility”¹⁵² and would no longer be a “decent society.”¹⁵³

Subsequently, in reaction to the 1960s counterculture and social unrest—including the anti-Vietnam War movement, the Black Power movement, the Women’s Rights movement, and so on—conservative scholars increasingly followed a traditionalist path condemning relativism

138. HERBERG, *supra* note 136, at 88.

139. *Id.* at 166-67. Protestants, Catholics, and Jews lived together “under the benevolent aegis of American democracy.” *Id.*

140. *See infra* notes 141-53 and accompanying text.

141. LEO STRAUSS, *NATURAL RIGHT AND HISTORY* (1953).

142. WALTER BERNs, *FREEDOM, VIRTUE, AND THE FIRST AMENDMENT* 70 (1957).

143. *See id.* at 26.

144. *Id.* at 250-51.

145. *Id.* at 255.

146. *Id.* at 256.

147. *See BERNs, supra* note 142, at 255.

148. *See id.* at 251.

149. *Id.* at 47, 72, 126.

150. *See id.* at 242, 256.

151. *Id.* at 26, 225.

152. BERNs, *supra* note 142, at 72.

153. *Id.* at 70.

and advocating for moral clarity.¹⁵⁴ Alexander Bickel worried that democracy and civil society could not survive without “a foundation of moral values.”¹⁵⁵ Bickel asserted, “[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.”¹⁵⁶ Bickel’s friend and Yale colleague, Robert Bork, emphasized the importance of such moral values to First Amendment jurisprudence.¹⁵⁷ 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.”¹⁵⁸ From Bork’s perspective, the Court had unjustifiably expanded the First Amendment protection of free expression.¹⁵⁹ “There is no basis,” Bork wrote, “for judicial intervention to protect . . . scientific, literary or that variety of expression we call obscene or pornographic.”¹⁶⁰ Pornography, in particular, should be “seen as a problem of pollution of the moral and aesthetic atmosphere precisely analogous to smoke pollution.”¹⁶¹

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

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.¹⁶² Even as the nation tried to stamp out communism, America pushed to expand liberty in the realms of both political and economic rights.¹⁶³

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.¹⁶⁴ The ideal of pluralist democracy demanded that all

154. See *infra* notes 155-61 and accompanying text.

155. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 23 (1975).

156. *Id.* at 24.

157. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 6, 8, 20 (1971).

158. *Id.* at 8; see Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 *WASH. U.L.Q.* 695, 695 (1979) [hereinafter *The Impossibility of Finding Welfare Rights in the Constitution*] (advocating for originalism).

159. See Bork, *supra* note 157, at 20-21.

160. *Id.* at 20.

161. *Id.* at 29.

162. See *infra* Parts II.B.1-2.

163. See *infra* Parts II.B.1-2.

164. See *infra* notes 165-185 and accompanying text.

citizens have an equal vote and an equal voice in democratic debates.¹⁶⁵ But particularly in the South, governments systematically denied political rights to blacks.¹⁶⁶ This denial of political rights facilitated the enactment and enforcement of “Jim Crow” laws, which imposed legal segregation in a host of public accommodations, including buses, schools, parks, and water fountains.¹⁶⁷ In fact, throughout the New Deal and early post-war years, the Democratic Party often left loopholes in federal programs that, in effect, excluded black participation.¹⁶⁸ These loopholes were the price paid to white southerners to retain their support for the Democrats.¹⁶⁹

The Cold War, however, helped undermine Jim Crow in the South.¹⁷⁰ 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.¹⁷¹ 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.¹⁷² As the Soviets gleefully pointed out, though, such claims sounded woefully hollow when many African Americans continued to suffer under a type of apartheid.¹⁷³ 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.¹⁷⁴ 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.¹⁷⁵ 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[. . .] to put it another way, we have a moral reason, an economic

165. See MICHAEL K. BROWN, ET AL., *WHITEWASHING RACE: THE MYTH OF A COLORBLIND SOCIETY* 193-94 (2003).

166. *Id.*

167. *Jim Crow Laws*, UNITED STATES HISTORY, <http://www.u-s-history.com/pages/h1559.html> (last visited Mar. 25, 2015).

168. See IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* 19-21 (2005).

169. *See id.*

170. DUDZIAK, *supra* note 1, at 15-16; See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 26-29 (1994).

171. GADDIS, *supra* note 1, at 123.

172. See DUDZIAK, *supra* note 1, at 11-13.

173. *Id.*; see WALKER, *supra* note 1, at 162-63 (emphasizing tension between American ideals and the oppression of African Americans).

174. DUDZIAK, *supra* note 1, at 12.

175. For links between Jim Crow and the economic underdevelopment of the South, see DUDZIAK, *supra* note 1, at 79; Bell, *supra* note 170, at 523-25.

reason, and an international reason” to attack segregation.¹⁷⁶ In the school segregation cases argued in the early 1950s, *Brown v. Board of Education*¹⁷⁷ and its companion *Bolling v. Sharpe*,¹⁷⁸ the Justice Department filed an amicus curiae brief arguing that segregation was unconstitutional.¹⁷⁹ Given that *Bolling* dealt with the segregated District of Columbia schools, the brief emphasized the treatment of people of color in Washington.¹⁸⁰ “Foreign 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.”¹⁸¹ Thus, the brief highlighted how racial segregation, including in the schools, contravened national interests: “The 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.”¹⁸² 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.”¹⁸³ In fact, the national government immediately used the decision to its advantage in the Cold War.¹⁸⁴ Within one hour after the Court announced *Brown*, “the Voice of America broadcast the news to Eastern Europe . . . emphasiz[ing] that ‘the issue was settled by law under democratic processes rather than by mob rule or dictatorial fiat.’”¹⁸⁵

In short, the Cold War created an imperative for the United States to champion the principles of pluralist democracy.¹⁸⁶ Likewise, to defeat the Soviets, the nation needed to temper any threat to American democracy, or

176. TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT’S COMMITTEE ON CIVIL RIGHTS 139-148 (photo reprint 2004) (1947) (elaborating 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 6, 259-60 (2013); Klarman, *supra* note 170, at 37-38, 51 (explaining how economic pressures were brought to bear in the South).

177. 347 U.S. 483 (1954).

178. 347 U.S. 497 (1954).

179. Brief for United States as Amicus Curiae, *Brown v. Board of Education*, 347 U.S. 483 (1954), 1952 WL 82045 at *3.

180. *Id.* at *4-5.

181. *Id.* at *4.

182. *Id.* at *6.

183. *Brown*, 347 U.S. at 493.

184. DUDZIAK, *supra* note 1, at 107.

185. *Id.*

186. *See id.* 15-16.

at least to the appearance of democracy.¹⁸⁷ 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.¹⁸⁸ 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 superior to communism.¹⁸⁹ In fact, conservative opponents of civil rights were quick to denounce protestors as communists or communist sympathizers, especially if they even hinted at violence.¹⁹⁰ “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*.¹⁹¹ “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.”¹⁹²

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.¹⁹³ 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.”¹⁹⁴ 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.¹⁹⁵ The VRA, in particular, produced substantive change rather than mere changes in the appearance or forms of democracy.¹⁹⁶ For instance, the percentage of blacks registered to vote in Mississippi catapulted from 6.7% in 1964 to 66.5% in 1969.¹⁹⁷

187. *Id.*

188. See DERRICK A. BELL, JR., RACE, RACISM, AND AMERICAN LAW 280-85 (2d ed. 1980) [hereinafter RACE, RACISM, AND AMERICAN LAW]; Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 466 (1990).

189. See DUDZIAK, *supra* note 1, at 249-51.

190. BRANDS, *supra* note 1, at 108-13.

191. *Id.* at 110 n.19 (quoting *U.S. News and World Report*, May 4, 1964).

192. *Id.* at 110.

193. See DUDZIAK, *supra* note 1, at 107.

194. ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 263 (2000) (quoting Johnson from 1965).

195. U.S. CONST. amend. XXIV, § 1; Voting Rights Act of 1965, 52 U.S.C.A. § 10301 et seq.; Civil Rights Act of 1964, 78 Stat. 241, 42 U.S.C. §§ 1971, 1975(a)-(d), 2000(a)-2000(h)(4).

196. BROWN, *supra* note 165, at 194.

197. MANNING MARABLE, THE GREAT WELLS OF DEMOCRACY: THE MEANING OF RACE IN AMERICAN Life 71 (2002).

The Court, too, continued to transform pluralist democracy by interpreting the Constitution to protect participation in the democratic process.¹⁹⁸ In the 1960s, the Court decided many cases that explicitly protected the democratic process and made it more inclusive.¹⁹⁹ *Gomillion v. Lightfoot*,²⁰⁰ 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.²⁰¹ The state statute, which “remov[ed] from the city all save four or five of its 400 Negro voters while not removing a single white voter or resident,”²⁰² amounted to unconstitutional gerrymandering that denied African Americans “the municipal franchise and consequent rights.”²⁰³ In *Baker v. Carr*,²⁰⁴ 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.²⁰⁵ *Baker* led to *Wesberry v. Sanders*,²⁰⁶ focusing on congressional districts, and *Reynolds v. Sims*,²⁰⁷ focusing on state legislative districts, which together established the doctrine of “one person, one vote.”²⁰⁸

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.²⁰⁹ Many of the Court’s most speech-protective decisions came during that decade.²¹⁰ Indeed, one could reasonably argue that the Court fulfilled the promise of free expression being a constitutional lodestar.²¹¹ Repeatedly, the justices in these cases emphasized the need for free and open discussions of political issues in a pluralist democratic regime.²¹²

198. See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339, 340, 346-47 (1960); *Baker v. Carr*, 369 U.S. 186, 187-88 (1962); *Reynolds v. Sims*, 377 U.S. 533, 536-37 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 2-4 (1964).

199. See, e.g., *Gomillion*, 364 U.S. at 340, 346-47; *Baker*, 369 U.S. at 187-88; *Reynolds*, 377 U.S. at 536-37; *Wesberry*, 376 U.S. at 2-4.

200. 364 U.S. 339 (1960).

201. *Gomillion*, 364 U.S. at 340.

202. *Id.* at 341.

203. *Id.* at 347.

204. 369 U.S. 186 (1962), overruling *Colegrove v. Green*, 328 U.S. 549 (1946).

205. *Baker*, 369 U.S. at 187-88, 197-98.

206. 376 U.S. 1 (1964).

207. 377 U.S. 533 (1964).

208. *Reynolds*, 377 U.S. at 558; *Wesberry*, 376 U.S. at 18.

209. See, e.g., *New York Times v. Sullivan*, 376 U.S. 254, 292 (1964); *Pickering v. Board of Education*, 391 U.S. 563, 574-75 (1968).

210. See, e.g., *Sullivan*, 376 U.S. at 292; *Pickering*, 391 U.S. at 574-75.

211. THE NEOCONSERVATIVE POLITICS AND THE SUPREME COURT, *supra* note 55, at 121.

212. See, e.g., *Sullivan*, 376 U.S. at 269-70.

New York Times v. Sullivan,²¹³ decided in 1964, asked whether the First Amendment protected the press from civil libel actions brought by government officials.²¹⁴ The *Times* had published a full-page advertisement that solicited support for the civil rights movement while criticizing the police commissioner of Montgomery, Alabama.²¹⁵ The advertisement, however, contained several minor factual errors.²¹⁶ 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.²¹⁷ The police commissioner successfully brought a civil action in the state courts for defamation.²¹⁸

The Supreme Court had previously recognized defamation as constitutionally unprotected (or low-value) speech, yet this case resembled a criminal prosecution for seditious libel.²¹⁹ The government, through the institution of the state courts, sought to punish the press for criticizing a public official, the police commissioner.²²⁰ Reversing, a unanimous Court emphasized the self-governance rationale.²²¹ “[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.”²²² 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.²²³ 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.”²²⁴

Pickering v. Board of Education,²²⁵ decided in 1968, arose when a school board dismissed a teacher for writing a letter to a newspaper.²²⁶ The

213. 376 U.S. 254 (1964).

214. *Id.* at 256.

215. *Id.* at 256-58.

216. *Id.* at 258-59.

217. *Id.*

218. *Sullivan*, 376 U.S. at 263.

219. *Id.* at 268.

220. *Id.* at 256-58, 264-65.

221. *See id.* at 270-71.

222. *Id.* at 270.

223. *Sullivan*, 376 U.S. at 277.

224. *Id.* at 279-80.

225. 391 U.S. 563 (1968).

226. *Id.* at 564.

letter criticized how the board and the school superintendent had handled funding issues.²²⁷ The Court began by emphasizing that public schools could not force teachers, as a condition of employment, to relinquish their free expression rights to comment on issues of public concern.²²⁸ 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.”²²⁹

One year later, the Court decided *Tinker v. Des Moines Independent Community School District*,²³⁰ which also involved public schools, though in this case the schools had suspended students for wearing black armbands in protest against the Vietnam War.²³¹ The Court categorized the armbands as “pure speech” rather than conduct and, therefore, as deserving of “comprehensive protection under the First Amendment.”²³² Like teachers, students do not lose their First Amendment rights merely because they enter a school, the Court reasoned.²³³ 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.”²³⁴ 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 prerequisite skills for participation in a pluralist democracy—the skills needed to become citizens and leaders.²³⁵

Brandenburg v. Ohio,²³⁶ 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?²³⁷ Compared to the World War I decisions, the Court now dramatically enlarged free expression guarantees.²³⁸ 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

227. *Id.*

228. *Id.* at 568.

229. *Id.* at 574.

230. 393 U.S. 503 (1969).

231. *Id.* at 504.

232. *Id.* at 505-06.

233. *Id.* at 506.

234. *Id.* at 511.

235. *Tinker*, 393 U.S. at 512.

236. 395 U.S. 444 (1969).

237. *Id.* at 450 (Douglas J., concurring).

238. *Id.* at 450-53.

occur imminently.²³⁹ In sum, in case after case—from *Sullivan* to *Pickering* to *Tinker* to *Brandenburg*—the Court expanded the First Amendment protection of free expression; judicial action, induced partly by the Cold War, imperative to uphold pluralist democratic principles.²⁴⁰

2. Capitalism and Democracy

The Cold War combined with other forces to contribute to the further evolution of pluralist democracy in yet another manner.²⁴¹ In particular, a maturing mass consumer culture intertwined with the Cold War to reshape the economic ground underlying the pluralist democratic regime.²⁴² 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.²⁴³ 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.²⁴⁴ But the development of the mass consumer culture did not end in the twenties.²⁴⁵ It continued in the 1930s and, even more so, after World War II, as the nation emerged out of its prolonged economic depression.²⁴⁶ Americans increasingly embraced mass consumerism after the war.²⁴⁷ Gross national product (GNP) nearly doubled from 1945 to 1955, reaching \$397.5 billion.²⁴⁸ 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.²⁴⁹ 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.²⁵⁰

239. *Id.* at 447.

240. *See supra* notes 213-239 and accompanying text.

241. STUART EWEN, CAPTAINS OF CONSCIOUSNESS: ADVERTISING AND THE SOCIAL ROOTS OF THE CONSUMER CULTURE 23-48 (1976).

242. *See id.*

243. *Id.*; FREE EXPRESSION AND DEMOCRACY IN AMERICA, *supra* note 19, at 298-303.

244. LIZABETH COHEN, A CONSUMERS' REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA 331-333 (2003).

245. *Id.* at 333.

246. *Id.* at 333-344.

247. *Id.* at 113; *see generally* 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, 700 (1993) (discussing the development of commercial advertising in the twentieth century).

248. THE STATISTICAL HISTORY OF THE UNITED STATES FROM COLONIAL TIMES TO THE PRESENT 139 (1965) (Table: Gross National Product) [hereinafter STATISTICAL HISTORY].

249. *Id.* at 178 (Table: Personal Consumption Expenditures).

250. WALKER, *supra* note 1, at 162.

Changes in commercial advertising contributed to the further growth of the mass consumer culture.²⁵¹ The very nature of advertising transformed during the twentieth century.²⁵² Early in the century, product advertisements provided potential consumers with information that would allow them to rationally assess the benefits of purchasing the respective products.²⁵³ During the 1920s, however, advertisers began to market images and lifestyles.²⁵⁴ Advertisements encouraged individuals to purchase particular products because the products symbolized certain attractive personality traits or ways of living.²⁵⁵ A particular automobile, for instance, might be marketed as conducive to a relaxed drive in the country on a Sunday afternoon.²⁵⁶ Of course, advertisers continued to experiment, questing after ever-more effective means for generating sales.²⁵⁷ Advertisements, for example, could generate previously unrecognized anxieties—"Oh no! My underarms look sweaty!"—which only a certain product could alleviate—"Thank goodness for my antiperspirant."²⁵⁸

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.²⁵⁹ Such segmentation of the population for marketing purposes has, of course, become increasingly refined.²⁶⁰ An individual buying toothpaste today, for instance, must decide from a dizzying array of products.²⁶¹ 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.²⁶²

Meanwhile, changes in the mass media transformed advertising.²⁶³ In the early twentieth century, advertisements were placed within the print

251. See LYNN DUMENIL, *THE MODERN TEMPER: AMERICAN CULTURE AND SOCIETY IN THE 1920s* 86-90, 97 (Eric Foner ed., 1995).

252. *Id.*

253. *Id.*

254. *Id.*

255. EWEN, *supra* note 241, at 25, 35-36; Collins & Skover, *supra* note 247, at 700, 702.

256. DUMENIL, *supra* note 251, at 89.

257. *Id.* at 89-92.

258. *Id.* at 90, 96-97; Collins & Skover, *supra* note 247, at 703; see EWEN, *supra* note 241, at 35 (emphasizing the creation of "fancied need").

259. See, e.g., COHEN, *supra* note 244, at 336-38 (discussing the use of targeted media in presidential race).

260. See, e.g., *infra* notes 261-62 and accompanying text.

261. See *Types of Toothpaste*, DENTAL HEALTH FOUNDATION, <http://www.dentalhealth.ie/dentalhealth/teeth/typesoftoothpaste.html> (last visited Mar. 25, 2015).

262. *Id.*

263. See *infra* notes 265-69 and accompanying text.

media, primarily newspapers and magazines.²⁶⁴ 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.²⁶⁵ 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.²⁶⁶ In 1900, \$542 million was spent on advertising, and by 1929, the amount had jumped to \$3,426 million.²⁶⁷ After World War II, advertising volumes skyrocketed: In 1949, the amount had climbed over \$5 billion, and by 1957, the amount was above \$10 billion.²⁶⁸ The numbers continued their ascent: In 1990, amazingly, almost \$130 billion was spent on advertising, a figure that nearly doubled by 2001.²⁶⁹

“The expanding mass-consumer culture fused with American law and politics in multiple ways.”²⁷⁰ Most important, pluralist democracy became, in effect, a consumers’ democracy.²⁷¹ From its outset, pluralist democracy had resonated with capitalist ideology because of the overlapping emphases on the individual pursuit of self-interest.²⁷² Yet, during the Cold War period, the connection between democracy and capitalism grew stronger; “politics grew increasingly like commercial consumption.”²⁷³

Citizens followed their own values and interests, whether shopping for a product or a candidate. In the presidential campaigns of the 1950s, New York advertising agencies successfully marketed Dwight ‘Ike’ Eisenhower. 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. Election campaigns became

264. See DUMENIL, *supra* note 251, at 86.

265. See CROSS, *supra* note 247, 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).

266. CROSS, *supra* note 247, at 34, 77.

267. STATISTICAL HISTORY, *supra* note 248, at 526 (Table: Volume of Advertising).

268. *Id.*

269. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: SECTION 27: ACCOMMODATION, FOOD SERVICES, AND OTHER SERVICES 772 (2002) (Table No. 1253: Advertising—Estimated Expenditures by Medium) [hereinafter ABSTRACT].

270. NEOCONSERVATIVE POLITICS AND THE SUPREME COURT, *supra* note 55, at 32.

271. Collins & Skover, *supra* note 247, at 724-25; see COHEN, *supra* note 244, at 113-343 (discussing the development of a consumers’ republic of democracy after World War II).

272. NEOCONSERVATIVE POLITICS AND THE SUPREME COURT, *supra* note 55, at 32.

273. *Id.*

'indistinguishable in form (and often in content) from product marketing campaigns.'²⁷⁴

The changing nature and role of corporations in American society strongly contributed to this growing connection between democracy and capitalism.²⁷⁵ During the first decades of the twentieth century, corporations often were demonized as "soulless leviathans," associated with robber barons.²⁷⁶ In 1933, Justice Brandeis referred to "giant corporations"²⁷⁷ as a "Frankenstein monster."²⁷⁸ 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.²⁷⁹ 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.²⁸⁰ In 1959, when Vice President Richard Nixon attended a trade show in Moscow,²⁸¹ he boasted about the opulence of the American kitchen appliances on display, which the *New York Times* described as a "lavish testimonial to abundance."²⁸² Nixon did not hesitate to accentuate the differences between America and the Soviet Union.²⁸³ "The United States comes closest to the ideal of prosperity for all in a classless society," he proclaimed.²⁸⁴ 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.'"²⁸⁵ In a similar vein, in 1955, when Will Herberg celebrated the American Way of Life, he was referring to more than

274. *Id.* (quoting Collins & Skover, *supra* note 247, at 725); COHEN, *supra* note 244, at 9, 333, 336-38.

275. See KERR, *supra* note 6, at 7-8.

276. BAKAN, *supra* note 10, at 16-17; see KERR, *supra* note 6, at 19-21; KEVIN PHILLIPS, WEALTH AND DEMOCRACY: A POLITICAL HISTORY OF THE AMERICAN RICH 39 (2002).

277. *Liggett Co. v. Lee*, 288 U.S. 517, 566-67 (1933) (Brandeis, J., dissenting in part).

278. *Id.*

279. KERR, *supra* note 6, at 31-32; THOMAS J. SUGRUE, SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH 117 (2008). "[T]he anti-corporate ideology of the thirties rapidly evaporated, leaving scarcely a trace." SHELDON S. WOLIN, POLITICS AND VISION: CONTINUITY AND INNOVATION IN WESTERN POLITICAL THOUGHT 552 (Expanded ed., 2004) [hereinafter POLITICS AND VISION].

280. See DUDZIAK, *supra* note 1, at 243 (emphasizing that capitalism "was championed" during Cold War). "The Cold War consolidated the power of capital and began the reaction against the welfare state." WOLIN, *supra* note 14, at 26.

281. CASTILLO, *supra* note 1, at vii, ix.

282. PATTERSON, *supra* note 119, at 317 (quoting *Times*); see CASTILLO, *supra* note 1, at vii, ix (discussing the American's Moscow exhibition).

283. See COHEN, *supra* note 244, at 126.

284. *Id.* (quoting Nixon).

285. *Id.*

democracy.²⁸⁶ He included the products and comforts that accompanied the American capitalist economy.²⁸⁷ The American Way of Life “synthesizes all that commends itself to the American as the right, the good, and the true in actual life,” he wrote.²⁸⁸ “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.”²⁸⁹ In effect, American commercial products had become “icons of anticommunism.”²⁹⁰

As the mass-consumer culture fused with pluralist democracy, corporations sought to exercise greater control over democracy and government.²⁹¹ Starting in the 1960s and 1970s, the number of organized interest groups lobbying in Washington, D.C., began to increase rapidly.²⁹² While 5,843 national nonprofit associations existed in 1959,²⁹³ that number had nearly tripled to 14,726, by 1980, and it had jumped to 22,289 by 1990.²⁹⁴ 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.²⁹⁵ Yet, by far, the largest number of associations fell into the “trade, business, commercial” category.²⁹⁶ Basically, corporations became more resolute at using their bureaucratic organizations, and accumulated wealth to intervene in the pluralist democratic marketplace.²⁹⁷ Over the last five years of the 1970s, for instance, the number of corporate political action committees zoomed from three hundred to twelve hundred.²⁹⁸ Even more extreme, from the early 1970s to the early 1980s,

286. See HERBERG, *supra* note 136, at 88-89.

287. *Id.*

288. *Id.* at 88.

289. *Id.* at 88-89; see *id.* at 91 (emphasizing free enterprise). Looking back, Sheldon Wolin emphasizes the intersection of democracy, capitalism, and the Cold War. POLITICS AND VISION, *supra* note 279, at xvi, 552-53.

290. CASTILLO, *supra* note 1, at xiii.

291. KERR, *supra* note 6, at 7-8.

292. MARK P. PETRACCA, THE POLITICS OF INTERESTS: INTEREST GROUPS TRANSFORMED 11-15 (1992).

293. GENE M. GROSSMAN & ELHANAN HELPMAN, SPECIAL INTEREST POLITICS 2 (2001).

294. ABSTRACT, *supra* note 269, at 776 (Table No. 1261: National Nonprofit Associations, compiled from *Encyclopedia of Associations*).

295. GROSSMAN & HELPMAN, *supra* note 293, at 2-3.

296. ABSTRACT, *supra* note 269, at 776 (Table No. 1261: National Nonprofit Associations, compiled from *Encyclopedia of Associations*).

297. See KERR, *supra* note 6, at 7-8.

298. JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER-AND TURNED ITS BACK ON THE MIDDLE CLASS 118 (2010).

the number of corporations with registered lobbyists in Washington expanded nearly fifteen-fold.²⁹⁹

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.³⁰⁰ Maintaining that the free enterprise system was under attack from the American left, Powell proposed a detailed program of response.³⁰¹ For instance, he advocated for the creation of conservative think tanks that would help counter liberalism on college campuses.³⁰² He also argued that business should use the corporate-owned media to shape public opinion.³⁰³ In doing so, corporate spokespersons should emphasize that any threat to business was a threat to “individual freedom”³⁰⁴—to liberty, in other words.³⁰⁵ Corporate America, Powell was suggesting, should expressly equate the interests of business with the liberty interests of individual Americans.³⁰⁶ Finally, he insisted that business must begin to assert political power more directly, whether through lobbying or other means.³⁰⁷ Business, he wrote, must learn “that political power is necessary; that such power must be assiduously [sic] cultivated; and that when necessary, it must be used aggressively and with determination.”³⁰⁸ Businesses answered Powell’s call to action with enhanced and aggressive politicizing.³⁰⁹ Membership in the Chamber of Commerce more than quadrupled over the next decade.³¹⁰ In 1972, Chief Executive Officers (CEOs) of some of America’s largest corporations formed the Business Roundtable, committed to expanding corporate political power.³¹¹ Significantly, as part of this effort, corporations explicitly advocated that their expenditures fell within the compass of First Amendment protections.³¹² During the seventies, Mobil Oil paid to publish in the *New York Times* numerous essays, which effectively appeared as op-eds, arguing

299. *Id.*; see KERR, *supra* note 6, at 33-34 (emphasizing expanding corporate political influence).

300. Memorandum from Lewis Powell on Confidential Memo: Attack of American Free Enterprise System (Aug. 23, 1971) [hereinafter The Powell Memo]. The memo was addressed to “Mr. Eugene B. Sydnor, Jr., Chairman, Education Committee, U.S. Chamber of Commerce.”

301. *See id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *See* The Powell Memo, *supra* note 300.

306. *Id.*

307. *Id.*

308. *Id.*

309. *See* CHRIS HEDGES, DEATH OF THE LIBERAL CLASS 176-77 (2010) (discussing importance of Powell’s memo); KERR, *supra* note 6, at 67-68 (same).

310. HARVEY, *supra* note 49, at 43.

311. *Id.* at 43-44.

312. KERR, *supra* note 6, at 8.

that corporate speech was integral to American liberty and democracy.³¹³ 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.”³¹⁴ Not incidentally, Powell was sitting on the Supreme Court less than six months after he had written his memorandum.³¹⁵

Despite these corporate advances, the Cold War inherently constrained the extension of capitalism and corporate power.³¹⁶ Specifically, the Cold War tempered *laissez-faire* dreams on both the international and domestic fronts.³¹⁷ 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.³¹⁸ First, political geography imposed boundaries on corporate reach.³¹⁹ 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.³²⁰ With few exceptions, corporations could not open markets behind the “Iron Curtain.”³²¹ 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 countries, but with limits protecting against the types of economic crises and disasters witnessed during the early twentieth century.³²² Bretton Woods created the International Monetary Fund (IMF) and the World Bank (the International Bank for Reconstruction and Development).³²³ The IMF would monitor and manage exchange rates and currencies with an eye to avoiding crises.³²⁴ The World Bank would provide funds to underdeveloped and war-ravaged nations.³²⁵ To be sure, Bretton Woods contained elements that resonated with the interwar

313. *Id.* at 48-53.

314. HEDGES, *supra* note 309, at 177.

315. *See* The Powell Memo, *supra* note 300.

316. *See infra* notes 317-334 and accompanying text.

317. *See* KERR, *supra* note 6, at 32-33.

318. *See id.*

319. *See generally* Stanley D. Metzger, *Federal Regulation and Prohibition of Trade with Iron Curtain Countries*, 29 LAW & CONTEMP. PROBS. 1000, 1000 (1964).

320. *See id.*

321. *See id.* at 1000-01. Winston Churchill introduced the term, Iron Curtain, in 1946. GADDIS, *supra* note 1, at 94-95.

322. FRIEDEN, *supra* note 10, at 475; SAULL, *supra* note 1, at 62; Benjamin J. Cohen, *Bretton Woods System*, in 1 ROUTLEDGE ENCYCLOPEDIA OF INTERNATIONAL POLITICAL ECONOMY 95, 95-97 (R.J. Barry Jones ed., 2001) [hereinafter *Bretton Woods System*].

323. SAULL, *supra* note 1, at 62.

324. *Id.*

325. *Id.* at 62-63; *Bretton Woods System*, *supra* note 322, at 95.

international market and gold standard.³²⁶ 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.³²⁷ Yet, John Maynard Keynes, who helped create the system, said that it was “the exact opposite of the gold standard.”³²⁸ Overall, the post-war system was designed to avoid economic crises “by lowering tariff barriers, stabilizing currencies, and coordinating government planning with the workings of markets.”³²⁹ The American and western European leaders had learned from history: International economic prosperity should not be left to the whims of an invisible hand.³³⁰ The Soviets were the utopians: They insisted that history must fit Marxist theory and that a proletarian paradise could be achieved.³³¹ 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.³³² 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 State, George Marshall—which funneled between twelve and thirteen billion dollars in grants to western European nations.³³³ 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 economic benefits.³³⁴

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.³³⁵ For better or worse, corporate capitalists were, in effect, teammates with the government

326. *Bretton Woods System*, *supra* note 322, at 95-96.

327. WYATT WELLS, AMERICAN CAPITALISM, 1945-2000: CONTINUITY AND CHANGE FROM MASS PRODUCTION TO THE INFORMATION SOCIETY, 13-14 (2003); *Bretton Woods System*, *supra* note 322, at 95-96.

328. M.J. Stephey, *Bretton Woods System*, TIME (Oct. 21, 2008), <http://content.time.com/time/business/article/0,8599,1852254,00.html> (quoting Keynes); see Michael D. Bordo, *The Bretton Woods International Monetary System: A Historical Overview*, in A RETROSPECTIVE ON THE BRETTON WOODS SYSTEM: LESSONS FOR INTERNATIONAL MONETARY REFORM 5-58 (Michael D. Bordo & Barry Eichengreen eds., 1993) (explaining differences between gold standard and Bretton Woods).

329. GADDIS, *supra* note 1, at 93; see RODRIK, *supra* note 12, at xvi-xvii, 69-76 (describing Bretton Woods as successful compromise).

330. See *Bretton Woods System*, *supra* note 322, at 95; GADDIS, *supra* note 1, at 117.

331. See GADDIS, *supra* note 1, at 32-33; Yoram Gorlizki, *Delegalization in Russia: Soviet Comrades' Courts in Retrospect*, 46 AM. J. COMP. L. 403, 403 (1998).

332. GADDIS, *supra* note 1, at 117.

333. SAULL, *supra* note 1, at 64; WELLS, *supra* note 327, at 23.

334. See GADDIS, *supra* note 1, at 30-32; LEFFLER, *supra* note 1, at 157, 59-61, 63; SAULL, *supra* note 1, at 64-68.

335. See KERR, *supra* note 6, at 31.

in the fight against communism.³³⁶ 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 had to be preserved.³³⁷ Corporate greed could not squeeze the middle class too excessively, at least not yet.³³⁸ 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”³³⁹ This assertion, that capitalism engendered widespread economic equality, which in turn promoted democratic equality, was a staple of American Cold War propaganda.³⁴⁰ The documentary film *Despotism*,³⁴¹ produced by Encyclopaedia Britannica, emphasized the inverse: if wealth became too concentrated in an upper class, if the divisions between the haves and have-nots became too distinct, “then despotism threatened.”³⁴² To be sure, neoliberals, often called libertarians during the 1950s, became more strident defenders of the economic marketplace during this post-World War II era.³⁴³ In the context of the Cold War, their conservative defense of the market took on “apocalyptic” proportions.³⁴⁴ Even so, because neoliberals viewed themselves as “foot-soldiers in the fight against communism,” they still needed to restrain their questioning of democratic government.³⁴⁵

After all, the government was leading the fight against the communists.³⁴⁶ Whenever the U.S. government successfully persuaded a third—world nation to align against the Soviet Union, American

336. *See id.* at 31-32.

337. *See* DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS: POLITICAL INTEREST AND PUBLIC OPINION 521-23 (2d ed. 1971); *see* LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION 50-54, 56-60, 62-64 (1955); *see* V.O. KEY, JR., POLITICS, PARTIES, AND PRESSURE GROUPS 54-57 (2d ed. 1947).

338. *See* COHEN, *supra* note 244, at 125-26.

339. *See id.*

340. *See id.* at 126.

341. Encyclopaedia Britannica Films-1946, *Despotism & Democracy-Documentary on 1946 or 2007?*, VIDEOSIFT.COM, <http://videosift.com/video/Despotism-Democracy-Documentary-on-1946-or-2007>.

342. COHEN, *supra* note 244, at 125.

343. *See* JONES, *supra* note 49, at 141 (linking neoliberalism and libertarianism); *See* NASH, *supra* note 44, at 32-36, 46-48 (same); *e.g.*, MILTON FRIEDMAN, CAPITALISM AND FREEDOM 34-35 (1962) [hereinafter CAPITALISM AND FREEDOM].

344. *See* JONES, *supra* note 49, at 120.

345. *See id.*

346. *See Revelations from the Russian Archives: The Soviet Union and the United States*, LIBRARY OF CONGRESS <http://www.loc.gov/exhibits/archives/sovi.html> (last visited Mar. 26, 2015) [hereinafter *Revelations from the Russian archives*].

corporations stood to profit as their markets expanded.³⁴⁷ In fact, many conservatives were moved to support government-funded research.³⁴⁸ 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.³⁴⁹ As Margaret Pugh O'Mara points out, "Cold War geopolitics prompted new political attention to science,"³⁵⁰ and transformed scientists into "elites."³⁵¹ Massive sums of money flowed to research universities, such as Stanford, MIT, and Harvard, creating affluent "cities of knowledge."³⁵²

The evolution of pluralist democracy into a consumers' democracy profoundly influenced the Supreme Court justices, especially in free expression cases.³⁵³ In 1942, soon after pluralist democracy had supplanted republican democracy, the Supreme Court held that the first amendment did not protect commercial expression.³⁵⁴ The regulation of commercial advertising, at the time, seemed no different from other permissible government regulations of the economic marketplace.³⁵⁵ But during the Cold War, as the mass-consumer culture became increasingly entangled with democratic processes, the Court modified its treatment of commercial expression.³⁵⁶ *Bigelow v. Virginia*,³⁵⁷ decided in 1975, arose when a newspaper editor ran an advertisement for the Women's Pavilion, which provided abortion services in another state.³⁵⁸ The state of Virginia convicted the editor for violating a statute that proscribed any "advertisement" that would "encourage or prompt the procuring of an abortion."³⁵⁹ Justice Blackmun wrote an opinion for a seven-justice majority, which included now-Justice Powell, holding the conviction unconstitutional.³⁶⁰ He began by acknowledging the Court's prior

347. See JOSEPH D. PHILLIPS, *Economic Effects of the Cold War*, in CORPORATIONS AND THE COLD WAR 173, 186-88 (David Horowitz ed., 1969).

348. See *id.* at 182.

349. See GADDIS, *supra* note 1, at 35-36, 61-63.

350. MARGARET PUGH O'MARA, CITIES OF KNOWLEDGE: COLD WAR SCIENCE AND THE SEARCH FOR THE NEXT SILICON VALLEY 5 (2005).

351. See *id.* at 2.

352. See *id.* at 1-9; See JONES, *supra* note 49, at 281-82.

353. See *infra* notes 354-401 and accompanying text.

354. See *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

355. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 118 (1942) (upholding a regulation of the economic marketplace, specifically in this case, production quotas).

356. See *supra* notes 242-250 and accompanying text; See generally *Bigelow v. Va.*, 421 U.S. 809 (1975); *Va. State Bd. of Pharm. v. Va. Citizens Consumers Council*, 425 U.S. 748 (1976); *Cent. Hudson Gas and Elec. Corp. v. Pub. Serv.*, 447 U.S. 557 (1980); *Buckley v. Valeo*, 424 U.S. 1 (1976).

357. 421 U.S. 809 (1975).

358. See *id.* 811-12.

359. *Id.* at 811.

360. See *id.* at 829.

recognition of several low-value “categories of speech—such as fighting words, or obscenity, or libel, or incitement—[which] have been held unprotected.”³⁶¹ Nonetheless, Blackmun insisted that “commercial advertising enjoys a degree of First Amendment protection.”³⁶² Advertising was no longer “unprotected per se,”³⁶³ though the Court allowed that it could “be subject to reasonable regulation.”³⁶⁴ Then, by applying a balancing test, weighing the government interest in regulation against the First Amendment interest in free expression, the Court held this particular statutory proscription unconstitutional.³⁶⁵

In the following year, 1976, the Court explained that the first amendment protected advertising because commercial expression and pluralist democracy had become inseparable.³⁶⁶ In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,³⁶⁷ the Court held unconstitutional a state law that prohibited licensed pharmacists from advertising prescription drug prices.³⁶⁸ Democracy involves the allocation of resources in society, the Court explained, but most resource-allocation decisions are made through the economic marketplace.³⁶⁹ “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.³⁷⁰

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.³⁷¹

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.”³⁷² Furthermore, advertising

361. *Id.* at 819.

362. *Bigelow*, 421 U.S. at 821.

363. *Id.* at 820.

364. *Id.* at 826.

365. *Id.* at 826-29.

366. *See Va. State Bd. of Pharm.*, 425 U.S. at 765.

367. 425 U.S. 748 (1976).

368. *See id.*, at 752, 755-56, 773.

369. *See id.* at 765.

370. *Id.*

371. *Id.*

372. *Va. State Bd. of Pharm.*, 425 U.S. at 765.

contributes to intelligent decision-making about how the economic marketplace “ought to be regulated or altered.”³⁷³ Finally, regardless of the overarching 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.³⁷⁴ “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.”³⁷⁵

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*,³⁷⁶ decided in 1980.³⁷⁷ This time, Powell wrote the majority opinion invalidating a state ban on promotional advertising by utility companies.³⁷⁸ 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.³⁷⁹ Unsurprisingly, the reasoning in Powell’s *Central Hudson* opinion echoed his 1971 memorandum.³⁸⁰ 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.”³⁸¹ Moreover, he emphasized the significance of the private sphere in relation to the public sphere.³⁸² “[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.”³⁸³

In 1976, the same year the Court decided *Virginia State Board of Pharmacy*, the Court first examined the constitutionality of campaign finance regulations.³⁸⁴ The seminal decision, *Buckley v. Valeo*,³⁸⁵ upheld a

373. *Id.*

374. *See id.* at 763-65.

375. *Id.* at 763.

376. 447 U.S. 557 (1980).

377. *See id.* at 566.

378. *See id.* at 570-72.

379. *Id.* at 566 (articulating four-part balancing test); *see, e.g.,* *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 574 (2001) (applying *Central Hudson* test); *44 Liquormart, Inc. v. R.I.*, 517 U.S. 484, 487, 526-27 (1996) (same).

380. *See* *Central Hudson*, 447 U.S. at 561-62; The Powell Memo, *supra* note 300.

381. *Central Hudson*, 447 U.S. at 561-62.

382. *See id.*

383. *Id.* at 562 n.5.

384. *See generally* *Buckley*, 424 U.S. at 6, 12-13; *Va. State Bd. of Pharm.*, 425 U.S. at 748.

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).³⁸⁶ 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.³⁸⁷ With Powell joining a per curiam majority opinion, the Court stressed the political importance of spending money in our consumers' democracy.³⁸⁸ "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."³⁸⁹ Money had now become speech "because virtually every means of communicating ideas in today's mass society requires the expenditure of money."³⁹⁰ 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.³⁹¹ When it came to campaign expenditures, however, the Court reasoned that the danger of corruption or the appearance of corruption was greatly diminished.³⁹² Thus, emphasizing the confrontational political battles characteristic of pluralist democracy (rather than the supposedly 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.³⁹³

[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

385. 424 U.S. 1 (1976).

386. See *id.* at 143; (summarizing holding); MELVIN I. UROFSKY, MONEY AND FREE SPEECH: CAMPAIGN FINANCE REFORM AND THE COURTS 55 (2005) (explaining *Buckley*).

387. See *Buckley*, 424 U.S. at 78-80.

388. See *id.* at 26-27, 101-02.

389. *Id.* at 19.

390. *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.*; GORDON SILVERSTEIN, LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS 167-68 (2009).

391. See *Buckley*, 424 U.S. at 25-26, 35.

392. See *id.* at 46-47.

393. See *id.* at 51.

interchange of ideas for the bringing about of political and social changes desired by the people.³⁹⁴

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*.³⁹⁵ 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.³⁹⁶ Once again, Powell's reasoning echoed his 1971 memorandum.³⁹⁷ He equated corporate interests with individual interests, and then explicitly extended First Amendment protections to corporations.³⁹⁸ Powell explained that the source of speech, corporate or otherwise, was irrelevant while the nature of the speech was crucial.³⁹⁹ Building on this premise, Powell invoked 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 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.⁴⁰⁰

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.⁴⁰¹

In short, the development of the consumers' democracy changed how the justices, particularly the conservative ones, viewed free expression.⁴⁰²

394. *Id.* at 48-49 (internal citations omitted).

395. 435 U.S. 765 (1978).

396. *See* *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. at 767.

397. *See id.* at 777-78, 784; The Powell Memo, *supra* note 300.

398. *See First Nat'l Bank*, 435 U.S. at 799-800, 802.

399. *See id.* at 777-78, 784.

400. *Id.* at 776-77 (internal citations omitted).

401. *See supra* notes 354-401 and accompanying text.

402. *See infra* notes 402-15 and accompanying text. Rehnquist was one conservative justice who did not go down this path. *See First Nat'l Bank*, 435 U.S. at 822-23, 828. (Rehnquist, J., dissenting) (arguing that corporate campaign finance restrictions are constitutional).

Free expression no longer was merely a civil liberty to be asserted by minorities and dissidents.⁴⁰³ Because of the fusion of democracy and the mass consumer culture, the expenditure of wealth became integral to politics. Spending money became a form of political expression.⁴⁰⁴ Thus, the conservative justices sought to energize the protection of liberty, as manifested in free speech.⁴⁰⁵ In short, libertarian conservatism came to the Court, albeit from an unexpected direction.⁴⁰⁶ Conservative constitutional scholars and Supreme Court justices began to follow the traditionalist path, with its focus on moral clarity, largely for the same reason as other conservatives.⁴⁰⁷ They rebelled against the ethical relativism of pluralist democracy and its manifestation in multiculturalism.⁴⁰⁸ 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.⁴⁰⁹ To be sure, conservative constitutional scholars eventually followed this libertarian path to argue against exercises of congressional power.⁴¹⁰ Moreover, the conservative justices would begin in the 1990s to implement this libertarian approach in congressional power and Tenth Amendment cases.⁴¹¹ 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.⁴¹² In those commercial speech cases, the conservative justices did not react against pluralist democracy.⁴¹³ 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.⁴¹⁴

403. *See id.* at 776-77.

404. *See id.* at 810 (White, J., dissenting).

405. *See, e.g., id.* at 795.

406. *See infra* notes 408-09, 415 and accompanying text.

407. *See City of Boerne v. Flores*, 521 U.S. 507, 512, 536 (1997) (focusing on Fourteenth Amendment, section five); *United States v. Lopez*, 514 U.S. 549, 551-52, 583, 589, 592 (1995) (focusing on commerce clause); *N.Y. v. United States*, 505 U.S. 144, 156, 189 (1992) (focusing on Tenth Amendment).

408. *See generally City of Boerne*, 521 U.S. 507 (focusing on Fourteenth Amendment, section five); *Lopez*, 514 U.S. 549 (focusing on commerce clause); *New York*, 505 U.S. 144 (focusing on Tenth Amendment).

409. *See NASH, supra* note 44, at 46-49.

410. *See generally* 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: THE PRESUMPTION OF LIBERTY* (2004); RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) [hereinafter *TAKINGS*].

411. *See generally City of Boerne*, 521 U.S. 507 (focusing on Fourteenth Amendment, section five); *Lopez*, 514 U.S. 549 (focusing on commerce clause); *N.Y.*, 505 U.S. 144 (focusing on Tenth Amendment).

412. *See generally Va. State Bd. of Pharm.*, 425 U.S. 748; *Bigelow*, 421 U.S. 809.

413. *See Bigelow*, 421 U.S. at 819-21.

414. *See id.*

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.⁴¹⁵

III. 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.⁴¹⁶ But partly because of a change in the Court's 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.⁴¹⁷ Among scholars, Bork still led the way.⁴¹⁸ He condemned the Court's free speech jurisprudence for protecting mere “self-expression, personal autonomy, or individual gratification.”⁴¹⁹ In *Cohen v. California*,⁴²⁰ for example, the defendant had worn into a courthouse a jacket inscribed with the message, “Fuck the Draft.”⁴²¹ Bork condemned the Court's reversal of the defendant's conviction for disturbing the peace.⁴²² The majority opinion “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.’”⁴²³ Bork did not similarly stumble over this distinction.⁴²⁴ To him, “‘Fuck the Draft’” was vulgar—nothing lyrical about it.⁴²⁵ Governmental and non-governmental institutions must be allowed and encouraged to promote the appropriate values.⁴²⁶ “[I]n a republican form of government

415. See *supra* notes 411-15 and accompanying text.

416. See GADDIS, *supra* note 1, at 238, 257 (discussing end of Cold War); JAMES T. PATTERSON, *RESTLESS GIANT: THE UNITED STATES FROM WATERGATE TO BUSH V. GORE* 195 (2005) [hereinafter *RESTLESS GIANT*].

417. Maureen Dowd, *The Supreme Court; Conservative Black Judge, Clarence Thomas, is Named to Marshall's Court Seat*, THE NEW YORK TIMES, (July 2, 1991), <http://www.nytimes.com/1991/07/02/us/supreme-court-conservative-black-judge-clarence-thomas-named-marshall-s-court.html>.

418. See Nina Totenberg, *Robert Bork's Supreme Court Nomination 'Changed Everything, Maybe Forever'*, N.P.R., (Sept. 19, 2012) <http://www.npr.org/blogs/itsallpolitics/2012/12/19/167645600/robert-borks-supreme-court-nomination-changed-everything-maybe-forever>.

419. ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 99 (1996) [hereinafter *SLOUCHING TOWARDS GOMORRAH*].

420. 403 U.S. 15 (1971).

421. See *Cohen*, 403 U.S. at 16-17.

422. See ROBERT H. BORK, *A TIME TO SPEAK: SELECTED WRITINGS AND ARGUMENTS* 243 (2008) [hereinafter *A TIME TO SPEAK*].

423. *Id.*; see *SLOUCHING TOWARDS GOMORRAH*, *supra* note 419, at 99 (discussing *Cohen*).

424. See *A TIME TO SPEAK*, *supra* note 422, at 243.

425. See *id.* at 243-44.

426. See *id.* at 243.

where the people rule,” Bork wrote, “it is crucial that the character of the citizenry not be debased.”⁴²⁷

The conservative justices heeded this clarion call by promoting moral clarity in numerous contexts,⁴²⁸ including free expression cases, particularly those where private (non-government) actors sought to express religious views or values on government-owned property.⁴²⁹ 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.⁴³⁰ In *Rosenberger v. Rectors and Visitors of the University of Virginia*,⁴³¹ 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 fund a student newspaper, *Wide Awake*, dedicated to evangelical “proselytizing.”⁴³² *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.’”⁴³³ The justices reached a similar result in a grade school setting. In *Good News Club v. Milford Central School*,⁴³⁴ 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 6 to 12” that sought to hold club meetings on school property.⁴³⁵ Writing for the majority, Thomas chastised the lower court for its ostensible hostility toward Christianity,⁴³⁶ prior cases already established the constitutional protection of Christian education and proselytizing on public property, including schools, and the *Good News Club* case was indistinguishable.⁴³⁷

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

427. SLOUCHING TOWARDS GOMORRAH, *supra* note 419, at 141.

428. For example, the conservative justices push for moral clarity in establishment-clause cases. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 645, 662-63 (2002) (upholding school voucher program that allowed parents to use public money to pay for religious-school education).

429. *See, e.g., Zelman*, 536 U.S. at 645, 662-63.

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

431. 515 U.S. 819 (1995).

432. *See id.* at 822, 845-46; *id.* at 874-75 (Souter, J., dissenting).

433. *Id.* at 826.

434. 533 U.S. 98 (2001).

435. *Id.* at 102-03.

436. *See id.* at 110-12.

437. *See id.* at 107-10.

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.⁴³⁸ Thus, in other cases where the protection of free speech might undermine the promotion of moral clarity, the justices have sacrificed free speech.⁴³⁹ For instance, a 2007 decision, *Morse v. Frederick*,⁴⁴⁰ 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.”⁴⁴¹ A 2009 decision, *Pleasant Grove City v. Summum*,⁴⁴² appeared to present a religious expression issue subject to a public forum analysis.⁴⁴³ In its city park, Pleasant Grove displayed several privately donated monuments, including one showing the Ten Commandments, contributed years earlier by the Fraternal Order of Eagles.⁴⁴⁴ Summum, a minority religious group, offered to donate a monument displaying its Seven Aphorisms (also called the Seven Principles of Creation).⁴⁴⁵ The city refused to accept the monument.⁴⁴⁶ Was this case like *Rosenberger* and *Good News Club* and, therefore, governed by the public forum doctrine? The Supreme Court held otherwise.⁴⁴⁷ “[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.⁴⁴⁸ “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.”⁴⁴⁹ As Alito explained the government speech doctrine: “The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.”⁴⁵⁰ Comparing *Summum* with *Rosenberger* and *Good*

438. 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); see generally David Kairys, *The Contradictory Messages of Rehnquist-Roberts Era Speech Law: Liberty and Justice for Some*, 2013 U. ILL. L. REV. 195, 195-96 (explaining Rehnquist and Roberts Courts’ inconsistencies in free-expression cases).

439. See, e.g., *Holder v. Humanitarian Law Project*, 561 U.S. 1, 16-17 (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, 538-39 (2006) (limiting severely prisoner access to written materials and photographs).

440. 551 U.S. 393 (2007).

441. *Id.* at 396-97.

442. 555 U.S. 460 (2009).

443. *Id.* at 464.

444. *Id.* at 464-65.

445. *Id.* at 465.

446. *Id.*

447. See *Pleasant Grove*, 555 U.S. at 464.

448. See *id.*

449. See *id.*

450. *Id.* at 467 (“If petitioners [the city] were engaging in their own expressive conduct, then the Free Speech Clause has no application”).

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.⁴⁵¹

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.⁴⁵² The American celebration of the nation's victory in the Cold War obscured potential untoward ramifications of that success.⁴⁵³ 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.⁴⁵⁴ Most important, as discussed, the Cold War had constrained corporate capitalism on both the international and domestic fronts.⁴⁵⁵ For instance, the political geography of the Cold War had limited the international scope of corporate markets.⁴⁵⁶ Quite simply, McDonald's could not open a franchise in Prague or Moscow in 1975.⁴⁵⁷ Perhaps more important, the Cold War struggle against communism limited the degree to which corporations could attack the process and culture of democratic government.⁴⁵⁸ If the alternative to pluralist democracy was totalitarian communism, then American critics of democracy were compelled to curb their denunciations.⁴⁵⁹ With the end of the Cold War, these constraints on corporate capitalism evaporated.⁴⁶⁰

To be sure, at the level of theory, neoliberal libertarianism evolved during the years of the Cold War by gradually shedding its earlier acceptance of government interventions in the economic marketplace.⁴⁶¹ Neoliberals became market fundamentalists, insisting that the unregulated market could best resolve all social and economic problems.⁴⁶² Any type of government planning or regulation smacked of hubris.⁴⁶³ Hayek led the way in this attack on government. "Human reason can neither predict nor

451. See generally *Pleasant Grove*, 555 U.S. 460; *Rosenberger*, 515 U.S. 819; *Good News Club*, 533 U.S. 98.

452. See *infra* notes 454-61 and accompanying text.

453. See DUDZIAK, *supra* note 1, at 15.

454. See KERSCH, *supra* note 41, at 112-117.

455. See DUDZIAK, *supra* note 1, at 15.

456. See Metzger, *supra* note 319, at 1000.

457. See *id.*

458. See KERR, *supra* note 6, at 31.

459. See DUDZIAK, *supra* note 1, at 11-13; JONES, *supra* note 49, at 120.

460. FRIEDEN, *supra* note 10, at 378.

461. See *infra* notes 463-73 and accompanying text.

462. See BLOCK & SOMERS, *supra* note 12, at 3-4 (explaining the term market fundamentalism).

463. See JONES, *supra* note 49, at 109.

deliberately shape its own future,” he wrote in 1960.⁴⁶⁴ “Progress by its very nature cannot be planned.”⁴⁶⁵ The real world was too complex for government to predict and control through rational planning, neoliberals asserted.⁴⁶⁶ The invisible hand and the market were far more efficient in accounting for human desires and actions.⁴⁶⁷ “[The invisible hand] is a highly sophisticated and subtle insight,” explained Milton Friedman in 1976.⁴⁶⁸

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.⁴⁶⁹

By this time, then, Friedman was unequivocally preaching *laissez-faire*.⁴⁷⁰ Neoliberals completely rejected “economic planning, social democracy, and New Deal liberalism.”⁴⁷¹ The unregulated market, they asserted, maximized individual liberty and human dignity.⁴⁷²

A growing American conservative movement absorbed these views in the 1970s and 1980s.⁴⁷³ To a great degree, the neoliberal message had been simplified and thus had become more politically pointed and useful.⁴⁷⁴ The early neoliberals had sought to mediate between *laissez-faire* and New Deal liberalism—an intermediate position difficult to stake out and communicate.⁴⁷⁵ Yet, shortly after World War II, Hayek explicitly recommended that neoliberals articulate a “Utopian” program to influence

464. 17 FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY: THE DEFINITIVE EDITION* 94 (Ronald Hamowy ed., 2011).

465. *Id.*

466. *See id.* at 94-95.

467. *See* MILTON FRIEDMAN, *ADAM SMITH’S RELEVANCE FOR 1976: SELECTED PAPERS NO. 50* 15 [hereinafter *ADAM SMITH’S RELEVANCE*].

468. *Id.*

469. *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 464, at 118-25.

470. *See* ADAM SMITH’S RELEVANCE, *supra* note 467, at 1.

471. *See* JONES, *supra* note 49, at 8.

472. *See* HARVEY, *supra* note 49, at 5; *See* JONES, *supra* note 49, at 118-19.

473. *See* JONES, *supra* note 49, at 9, 86.

474. *See id.*

475. *See id.* at 118-119.

public opinion and inspire enthusiasm.⁴⁷⁶ As it turned out, Hayek was right on this account: A straightforward *laissez-faire* utopianism was far easier to explain and sell.⁴⁷⁷ Not only was it clearer, but it also resonated closely with traditional American individualism as well as other forms of libertarianism.⁴⁷⁸ This more aggressive neoliberal libertarian thinking gained political traction in the late 1970s and 1980s.⁴⁷⁹ Perhaps, most important, the post-World War II Bretton Woods system collapsed.⁴⁸⁰ Consistent with Keynesian economics, Bretton Woods blended the capitalist marketplace with democratic-welfare governments.⁴⁸¹ Overall, this system produced long-running and widespread (though not universal) prosperity, especially for the United States.⁴⁸² But in the 1970s, both high inflation and high unemployment hit the U.S. and other western industrialized nations.⁴⁸³ Suddenly, Keynesian policies seemed unable to deal with this so-called stagflation.⁴⁸⁴ These economic problems provided political ammunition for advocates of neoliberal libertarianism.⁴⁸⁵ Adding to this political shift in America, the wealthy or upper class became dissatisfied with their share of the economic pie.⁴⁸⁶ 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.⁴⁸⁷ When the American economy was booming, the wealthy appeared to find this income distribution acceptable.⁴⁸⁸ But when stagflation hit, the upper class became dissatisfied with its share of income and wealth.⁴⁸⁹ Consequently, many wealthy

476. See Friedrich A. Hayek, *The Intellectuals and Socialism*, 16 U. CHI. L. REV. 417,432-33 (1948) [*The Intellectuals and Socialism*].

477. See, e.g., BLOCK & SOMERS, *supra* note 12, at 105.

478. See *id.* at 99-100; JONES, *supra* note 49, at 9, 86-87; see generally JOHN DEWEY, *INDIVIDUALISM: OLD AND NEW* (1930) (discussing individualism); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974) (presenting philosophical defense of libertarianism).

479. See JONES, *supra* note 49, at 9, 86.

480. See COHEN, *supra* note 244, at 100-01.

481. See FRIEDEN, *supra* note 10, at 359.

482. See *id.* at 359-60; See also RODRIK, *supra* note 12, at xvii (calling Bretton Woods a “roaring success”).

483. See FRIEDEN, *supra* note 10, at 359-60.

484. See *id.* at 363; see also ROBERT B. HORWITZ, *AMERICA’S RIGHT: ANTI-ESTABLISHMENT CONSERVATISM FROM GOLDWATER TO THE TEA PARTY* 16 (2013); see, e.g., Paul Craig Roberts, *The Breakdown of the Keynesian Model*, in *SUPPLY-SIDE ECONOMICS: A CRITICAL APPRAISAL* 1-2 (Richard H. Fink ed., 1982) (criticizing Keynesian approach).

485. See FRIEDEN, *supra* note 10, at 363, 378.

486. See HARVEY, *supra* note 49, at 15.

487. See *id.*; Facundo Alvaredo et al., *The Top 1 Percent in International and Historical Perspective*, 27 J. ECON. PERSP. 3, 3-4 (Table: Top 1 Percent Income Shared in the United States); see also Chad Stone et al., *A Guide to Statistics on Historical Trends in Income Inequality* 8, CENTER ON BUDGET AND POLICY PRIORITIES (Revised Feb. 20, 2015), <http://www.cbpp.org/cms/?fa=view&id=3629> (Figure 1: Income Gains Widely Shared in Early Postwar Decades, But Not Since Then).

488. See HARVEY, *supra* note 49, at 15.

489. See *id.*

Americans threw their political weight behind the neoliberal views expressed by Ronald Reagan when he ran for president in 1980.⁴⁹⁰ Then Reagan, in the U.S., and Margaret Thatcher, in Britain, began to implement neoliberal elements into their economic policies.⁴⁹¹ For instance, the Reagan administration started deregulation,—relaxing anti-trust policies that facilitated corporate mergers, such as those between oil giants Gulf, Texaco, and Chevron.⁴⁹² Reagan’s anti-union stance, as evidenced by his pro-employer appointments to the National Labor Relations Board, enhanced corporate strength in the marketplace.⁴⁹³ Meanwhile, Reagan cut the top marginal tax rate from seventy to twenty-eight 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.⁴⁹⁴ 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.⁴⁹⁵

When the Cold War ended, the political constraints came off neoliberal libertarianism.⁴⁹⁶ Corporate capitalist power was unleashed.⁴⁹⁷ An increasing number of corporations went multinational, with many flocking into former Iron-Curtain countries.⁴⁹⁸ 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.”⁴⁹⁹ From the end of the Cold War to 2002, the number of multinational corporations jumped from approximately thirty-seven thousand to sixty-three thousand.⁵⁰⁰ These multinationals reached ever deeper into new markets.⁵⁰¹ McDonalds, in effect, became “McWorld,” opening in Prague, Moscow, East Berlin, and dozens of other cities

490. See JONES, *supra* note 49, at 19, 263.

491. See *id.* at 19, 263-69; see also WELLS, *supra* note 327, at 129-132, 134-35 (Income distribution started to change dramatically in America in the 1980s); See also PIKETTY, *supra* note 12, at 24 (Figure: Income Inequality in the United States, 1910-2010).

492. See WELLS, *supra* note 327, at 129-30.

493. See *id.* at 130-35.

494. See STIGLITZ, *supra* note 12, at 8, 89; see generally George Gilder, *The Supply-Side*, in SUPPLY-SIDE ECONOMICS: A CRITICAL APPRAISAL 14 (Richard H. Fink ed., 1982).

495. See FRIEDEN, *supra* note 10, at 378; STIGLITZ, *supra* note 12, at 89, 277.

496. See FRIEDEN, *supra* note 10, at 359.

497. See *id.* at 378; JONES, *supra* note 49, at 332.

498. See FRIEDEN, *supra* note 10, at 430-32; WELLS, *supra* note 327, at 179 (discussing globalization in 1990s).

499. See FRIEDEN, *supra* note 10, at 432.

500. See LEVIATHANS, *supra* note 10, at 2, 24-25; MICKLETHWAIT & WOOLRIDGE, *supra* note 10, at 173.

501. See PHILLIPS, *supra* note 276, at 147-48 (describing growth of corporations).

formerly behind the Iron Curtain.⁵⁰² 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.”⁵⁰³ “A consumer is a consumer is a consumer.”⁵⁰⁴ Corporate business and investment began to flow around the globe as if national borders no longer existed.⁵⁰⁵

How diverse and far-reaching is a multinational corporation? Unilever provides one example.⁵⁰⁶ Unilever began as a producer of margarine in 1914, but was producing more than sixteen hundred brands by the end of the twentieth century.⁵⁰⁷ After a corporate restructuring, which entailed selling some of its brands, 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.⁵⁰⁸ Its products are used in most households in the United States, the U.K., Canada, Indonesia, and Vietnam.⁵⁰⁹ As of 2001, twenty-seven percent of Unilever’s quarter-million employees were in Europe; eight percent were in North America; eighteen percent were in Africa and the Middle East; thirty-two percent were in Asia and the Pacific, and fourteen percent were in Latin America.⁵¹⁰ Meanwhile, McDonalds was serving three million burgers per day in at least one hundred nations by the mid-1990s.⁵¹¹ Mattel, at that point, made “[t]he quintessentially American Barbie Doll” into a 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.⁵¹² By the year 2000, more than half of the world’s largest economies, based on gross domestic product, were corporations, rather than nations.⁵¹³ By 2002, approximately fifty multinational corporations were wealthier than between 120 and 130

502. See generally BENJAMIN R. BARBER, *JIHAD VS. MCWORLD* (1995).

503. *Id.* at 23.

504. *Id.*

505. See MICKLETHWAIT & WOOLRIDGE, *supra* note 10, at 173-74; OHMAE, *supra* note 10, at 2-3, 5, 7.

506. See LEVIATHANS, *supra* note 10, at 21-22.

507. See *id.* at 21 (Unilever did not originate as a United States firm).

508. See *id.*; *View our Brands*, UNILEVER BRANDS, <http://www.unileverusa.com/brands-in-action/view-brands.aspx> (last visited Mar. 27, 2015).

509. LEVIATHANS, *supra* note 10, at 21.

510. *Id.* at 21-22.

511. MICKLETHWAIT & WOOLRIDGE, *supra* note 10, at 175.

512. See FRIEDEN, *supra* note 10, at 417.

513. See LEVIATHANS, *supra* note 10, at 1, 25-26.

nations.⁵¹⁴ Multinational corporations could rightly be called the “new Leviathans,” as they challenged the power and wealth of nation-states.⁵¹⁵

Besides the end of the Cold War, multiple causes contributed to globalization and the spread of multinational corporations.⁵¹⁶ Deregulation, reduced taxes, government perks, and technological changes all played roles.⁵¹⁷ For instance, and most obviously, communication technologies based on the Internet facilitated the development of international businesses and international financial markets.⁵¹⁸ In addition, innovations in transportation, leading to less expensive and more rapid shipping of products, contributed to globalization.⁵¹⁹ Advanced communication and transportation technologies, together with the “free mobility of capital,” allow corporations to manufacture products wherever labor costs are low and environmental restrictions are lax, and then to sell the products where incomes are high.⁵²⁰ Furthermore, the corporations can still locate their offices where taxes are minimal, the views are enticing, the culture is exciting, or anywhere else.⁵²¹ 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.⁵²² 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.⁵²³

In the United States, multinational corporations dominate the mass consumer culture as never before.⁵²⁴ In the twenty-first century, individuals rarely buy their mass produced items at independent Mom-and-Pop stores.⁵²⁵ Instead, people shop at Target, Wal-Mart Supercenter, or online at Amazon.com.⁵²⁶ The American economy has thoroughly transformed into a *corporate* capitalist system.⁵²⁷ Previously, corporations in the U.S. had

514. *Id.* at 1.

515. *Id.* at 12.

516. *See infra* notes 518-524 and accompanying text.

517. BAKAN, *supra* note 10, at 21; OHMAE, *supra* note 10, at 4; LEVIATHANS, *supra* note 10, at 35.

518. *See* FRIEDEN, *supra* note 10, at 395-96; OHMAE, *supra* note 10, at 4; STIGLITZ, *supra* note 12, at 74-76.

519. *See* BAKAN, *supra* note 10, at 21-22.

520. *See* STIGLITZ, *supra* note 12, at 74; BAKAN, *supra* note 10, at 22; LEVIATHANS, *supra* note 10, at 35-36.

521. *See* STIGLITZ, *supra* note 12, at 74-75.

522. *Id.* at 74-76.

523. *See* OHMAE, *supra* note 10, at 2-5.

524. *See id.*

525. *See generally* BARBER, *supra* note 502.

526. *See id.* at 23-24.

527. *See id.* (describing McWorld); PHILLIPS, *supra* note 276, at 229, 284, 286 (explaining the process of corporate trans-nationalization).

followed Lewis Powell's memorandum by increasing their determination to influence public opinion and interest-group machinations.⁵²⁸ With the end of the Cold War, the increased wealth and power of large and multinational corporations. was also brought to bear.⁵²⁹ The result? The democratic system became corporate dominated.⁵³⁰ America's consumers' (pluralist) democracy transformed into Democracy, Inc.⁵³¹ Not only have democratic politics become more capitalistic or market oriented, but also corporate capitalism has become more politically potent.⁵³² With ever-increasing proficiency, corporations manipulate elections and government for their own advantage—benefiting the respective corporations as well as corporate business in toto.⁵³³ Citizens still vote, but corporations strongly influence “highly managed elections” and shape government policy between elections.⁵³⁴ Corporate and government power coexist incestuously, with officials going back and forth between corporate and government positions.⁵³⁵ 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.⁵³⁶ 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.⁵³⁷ Given these types of arrangements, the system readily self-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.⁵³⁸

At the end of the Cold War, the neoconservative Francis Fukuyama had metaphorically called the collapse of the Soviet Union the “end of history.”⁵³⁹ American democracy and capitalism had been locked in

528. See *supra* Part II.B.2.

529. PHILLIPS, *supra* note 347, at 20.

530. See HACKER & PIERSON, *supra* note 298, at 118.

531. See generally WOLIN, *supra* note 14; ALLEN, *supra* note 14.

532. See HACKER & PIERSON, *supra* note 298, at 118.

533. WOLIN, *supra* note 14, at 149; see HACKER & PIERSON, *supra* note 298, at 118-19; DARA Z. STROLOVITCH, AFFIRMATIVE ADVOCACY: RACE, CLASS, AND GENDER IN INTEREST GROUP POLITICS 209-10 (2007) (statistics showing corporations and businesses dominate lobbying).

534. See WOLIN, *supra* note 14, at 63, 135, 149.

535. *Id.* at 63, 135.

536. STIGLITZ, *supra* note 12, at 59 (Stiglitz refers to the latter situation, when an official is sympathetic to the industry, as “cognitive capture.”); WOLIN, *supra* note 14, at 63, 135-36.

537. See STIGLITZ, *supra* note 12, at 60.

538. See PIKETTY, *supra* note 12, at 24 (Figure: Income Inequality in the United States, 1910-2010). Thomas Piketty's graphing of American income inequality shows a sharp increase starting in the early 1990s, at the end of the Cold War. *Id.*

539. See generally Francis Fukuyama, *The End of History?*, THE NAT'L INT. (1989).

ideological struggle with Soviet communism.⁵⁴⁰ The United States had won the battle.⁵⁴¹ Democratic government and free-market economics had no more serious competitors.⁵⁴² At that point in time, most observers assumed that “capitalism and democracy would evolve along compatible lines and mutually reinforce each other.”⁵⁴³ After all, during the Cold War era of consumers’ democracy, capitalism, and pluralist democracy had appeared to coexist harmoniously, even buttressing each other.⁵⁴⁴ Yet, the emergence of Democracy, Inc., called into question this assumption of an ongoing consonant relationship.⁵⁴⁵ Maybe American democracy and capitalism had not *together* won the Cold War battle over Soviet communism.⁵⁴⁶ Instead, neoliberal libertarianism—*laissez-faire* capitalism on steroids—had conquered all.⁵⁴⁷ 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.⁵⁴⁸ 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.⁵⁴⁹

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.⁵⁵⁰ 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.⁵⁵¹ At least initially, then, winning the Cold War yielded a democracy dividend.⁵⁵² Yet, also on a global basis, an outburst of *laissez-faire* ideology accompanied the Cold War’s end and the related rise of Democracy, Inc.⁵⁵³ The free market

540. See *Revelations from the Russian archives*, *supra* note 346.

541. See Robert Gilpin & Jean Millis Gilpin, *The Challenge of Global Capitalism: The World Economy in the 21st Century*, THE NEW YORK TIMES, <https://www.nytimes.com/books/first/g/gilpin-capitalism.html> (last visited Mar. 27, 2015).

542. See *id.*

543. POLITICS AND VISION, *supra* note 279, at 596.

544. See Peter Wagner, *The Democratic Crisis of Capitalism: Reflections on Political and Economic Modernity in Europe*, THE LSE DISCUSSION PAPER SERIES 7 (2011).

545. Francis Fukuyama, *The Future of History: Can Liberal Democracy Survive the Decline of the Middle Class?*, 91 FOREIGN AFFAIRS 53, 58 (2012).

546. See FRIEDEN, *supra* note 10, at 439.

547. See WOLIN, *supra* note 14, at 87.

548. See FRAN TONKISS, CONTEMPORARY ECONOMIC SOCIOLOGY: GLOBALISATION, PRODUCTION, INEQUALITY, 60-61 (2006) (emphasizing that globalization exacerbates the tension between the “expansionary logic” of capitalism and “the domesticating logic of the nation state”).

549. See *id.* (emphasizing that globalization exacerbates the tension between the “expansionary logic” of capitalism and “the domesticating logic of the nation state”).

550. See JUDITH LARGE & TIMOTHY D. SISK, DEMOCRACY, CONFLICT AND HUMAN SECURITY: PURSUING PEACE IN THE 21ST CENTURY 50-51 (2006).

551. GADDIS, *supra* note 1, at 258; WALKER, *supra* note 1, at 310-14.

552. See GADDIS, *supra* note 1, at 258-60; WALKER, *supra* note 1, at 310-14.

553. See WOLIN, *supra* note 14, at 87.

was endowed with a “divine status.”⁵⁵⁴ The U.S. and Britain pressured the rest of the world, especially Europe and Japan, to follow neoliberal libertarian principles for a global economy.⁵⁵⁵ The so-called “Washington Consensus”—emphasizing “tax reform, trade liberalization, privatization, deregulation, and strong property rights”—took hold of international markets.⁵⁵⁶ Ironically, the IMF and World Bank, originally formed to implement the Bretton Woods Keynesian-inspired policies, now switched to neoliberal approaches.⁵⁵⁷ 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.⁵⁵⁸ Business and financial interests from the wealthiest nations dominated these international institutions, which predictably emphasized maximizing profits.⁵⁵⁹ Ultimately, though, many of the former communist nations did not respond well to this “shock therapy” approach to *laissez-faire* capitalism.⁵⁶⁰ For instance, during the 1990s, many people in the nations of the former Soviet Union were plunged into privation.⁵⁶¹ Eventually, economic inequality and its consequences undermined the development of democracy.⁵⁶² In many of the former Soviet nations, and especially in Russia, many people consequently looked to former Communist Party leaders.⁵⁶³ Authoritarian government returned.⁵⁶⁴

Meanwhile, in the U.S., the rise of Democracy, Inc., and the concomitant flourishing of *laissez faire* produced aggressive attacks on democratic government.⁵⁶⁵ From the perspective of neoliberal libertarianism, government determinations of means and goals are irrational

554. JONES, *supra* note 49, at 338.

555. HARVEY, *supra* note 49, at 93; STIGLITZ, *supra* note 10, at 53.

556. JONES, *supra* note 49, at 8; STIGLITZ, *supra* note 10, at 53.

557. STIGLITZ, *supra* note 10, at 10-13.

558. *Id.* at 16; JONES, *supra* note 49, at 8.

559. STIGLITZ, *supra* note 10, at 18-20.

560. *Id.* at 141; FRIEDEN, *supra* note 10, at 430-31, 438-39; *see* RODRIK, *supra* note 12, at 14-16 (emphasizing the role of government institutions in successful capitalist countries).

561. FRIEDEN, *supra* note 10, at 439.

562. *Id.*; STIGLITZ, *supra* note 10, at 133-34, 153.

563. *See* Joshua Kucera, *Voting Against Freedom*, WILSON QUARTERLY, <http://wilsonquarterly.com/stories/voting-against-freedom> (last visited Mar. 27, 2015).

564. FRIEDEN, *supra* note 10, at 431, 439; STIGLITZ, *supra* note 10, at 133-34. For discussions of democratic failures in Russia, *see* Kathy Lally & Will Englund, *Russia, Once Almost a Democracy*, THE WASHINGTON POST (Aug. 18, 2011), http://www.washingtonpost.com/world/russia-once-almost-a-democracy/2011/08/12/gIQAMriNOJ_story.html; 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), <http://www.newrepublic.com/article/113386/pushkin-putin-sad-tale-democracy-russia>.

565. *See* JONES, *supra* note 49, at 109-10; *see, e.g.*, ADAM SMITH’S RELEVANCE, *supra* note 467, at 11.

and inefficient.⁵⁶⁶ 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.⁵⁶⁷ Neoliberals questioned this government process on multiple grounds, but primarily by comparing it to economic transactions in the marketplace.⁵⁶⁸ 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.⁵⁶⁹ Unlike an unregulated economic marketplace, democracy cannot maximize the satisfaction of individual interests, at least under certain conditions.⁵⁷⁰ 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.⁵⁷¹ Rather, they arise from interest group machinations unrelated to individual preferences and social utility.⁵⁷²

Public choice theory illustrates how neoliberal libertarianism pushed beyond nineteenth-century *laissez-faire*.⁵⁷³ *Laissez-faire* ideology celebrated the free market; government regulations were criticized because they interfered with the marketplace.⁵⁷⁴ Neoliberal libertarianism goes further by directly attacking, by demonizing, democratic government.⁵⁷⁵ Milton Friedman and other neoliberals insisted that the economic marketplace is a wondrous device because of the invisible hand.⁵⁷⁶ From this perspective, the market operates so that “the voluntary actions of millions of individuals can be coordinated through a price mechanism

566. JONES, *supra* note 49, at 109-10; see ADAM SMITH’S RELEVANCE, *supra* note 467, at 11 (emphasizing government defects).

567. See DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 1-11 (1991).

568. See *id.*

569. *Id.* (summarizing public choice theory); JONES, *supra* note 49, at 127-32 (discussing public choice and rational choice theories); Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and ‘Empirical’ Practice of the Public Choice Movement*, 74 VA. L. REV. 199, 214-15 (1988) (criticizing public choice).

570. See FARBER & FRICKEY, *supra* note 567, at 38-39 (explaining Arrow’s Theorem); WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE 1 (Judith Wilson & Patricia Herbst eds., 1982) (arguing social choice theory calls democracy into question).

571. See Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 541 (1983) (arguing courts should not presume that legislative decisions are rational).

572. See *id.* at 533, 540-41 (arguing courts should not presume that legislative decisions are rational); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. MGMT. SCI. 3, 3-4 (1971) (discussing regulatory capture).

573. See Dag Einar Thorsen & Amund Lie, *What is Neoliberalism?* 5 (2007) (unpublished manuscript) (on file with University of Oslo Department of Political Science).

574. See WOLIN, *supra* note 14, at 87, 177-78.

575. See RIKER, *supra* note 570, at 1.

576. See ADAM SMITH’S RELEVANCE, *supra* note 467, at 15.

without central direction.”⁵⁷⁷ 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.⁵⁷⁸ But, according to Friedman, the government operates like a backward reflection of the marketplace.⁵⁷⁹ There is an “invisible hand in politics [that] is as potent a force for harm as the invisible hand in economics is for good.”⁵⁸⁰ Government actors might very well have the best of intentions, yet they cannot help but pursue harmful goals.⁵⁸¹

In politics, men who intend only to promote the public interest, as they conceive it, are ‘led by an 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.⁵⁸²

Private interests necessarily manipulate political processes in ways that cannot arise in market transactions.⁵⁸³

Moreover, even if private interests did not manipulate the government, democratic processes are inherently inefficient, according to neoliberals.⁵⁸⁴ 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.⁵⁸⁵ 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.⁵⁸⁶ 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

577. *Id.*

578. *Id.*

579. *See id.* at 18.

580. *Id.*

581. *See* ADAM SMITH’S RELEVANCE, *supra* note 467, at 18.

582. *Id.*

583. *See id.*

584. *See* J. Mark Ramseyer, *Public Choice*, in *LAW AND ECONOMICS* 101 (Eric A. Posner ed., 2000).

585. *See* Kari Karppinen, *Making a Difference to Media Pluralism: A Critique of the Pluralistic Consensus in European Media Policy*, in *RECLAIMING THE MEDIA: COMMUNICATION RIGHTS AND MEDIA ROLES* 20-21 (Bart Cammaerts & Nico Carpentier eds., 2007).

586. *See id.* at 20.

unstable.⁵⁸⁷ Is this any way to run a business? No, of course not. Unlike government, business corporations need not equivocate about goals.⁵⁸⁸ They all pursue a single overarching goal: profit.⁵⁸⁹ Consequently, corporations can focus on constructing the most efficient means for achieving their profit goals.⁵⁹⁰ Rationality unequivocally becomes economic efficiency.⁵⁹¹ Thus, while corporations have the virile confidence of heroic certainty, government appears timid and wasteful.⁵⁹²

In short, in Democracy, Inc., neoliberal libertarians denigrate government, in general, and public (or group) decision making pursuant to democratic processes, more specifically.⁵⁹³ From the neoliberal perspective, the private sphere should subsume the public sphere.⁵⁹⁴ Friedman suggested as much when he argued that politics and economics were not “separate and largely unconnected.”⁵⁹⁵ Political freedom, he insisted, cannot exist unless individuals enjoy complete economic freedom, which could exist only with an unregulated marketplace.⁵⁹⁶ Economics is primary, while politics is secondary and derivative.⁵⁹⁷ 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.”⁵⁹⁸ In a free society, according to Friedman, economic power provides “a check to political power.”⁵⁹⁹ The key to political freedom, consequently, is a *laissez-faire* marketplace.⁶⁰⁰ The best society is one that leaves the maximum degree of decision making to the market and the minimum to politics and government.⁶⁰¹ The neoliberal “obsession with the market [has] corroded the idea of the public

587. See Charles R. Kesler, Ph.D., *What Separation of Powers Means for Constitutional Government*, THE HERITAGE FOUNDATION (Dec. 17, 2007), <http://www.heritage.org/research/reports/2007/12/what-separation-of-powers-means-for-constitutional-government>.

588. See Jia Lynn Yang, *Maximizing Shareholder Value: The Goal That Changed Corporate America*, THE WASHINGTON POST (Aug. 26, 2013), http://www.washingtonpost.com/business/economy/maximizing-shareholder-value-rate-america/2013/08/26/26e9ca8e-ed74-11e2900861e94a7ea20d_story.html.

589. See *id.*

590. See Robert L. Heath & Lan Ni, *Corporate Social Responsibility*, INSTITUTE FOR PUBLIC RELATIONS (Jan. 26, 2011), <http://www.instituteforpr.org/corporate-social-responsibility/>.

591. See P.V. (Sundar) Balakrishnan et al., *Consumer Rationality and Economic Efficiency: Is the Assumed Link Justified?*, *MARKETING MGMT J.*, 1, 1 (2000).

592. See Karppinen, *supra* note 585, at 20-21.

593. See WOLIN, *supra* note 14, at 177-78.

594. See CAPITALISM AND FREEDOM, *supra* note 343, at 7-8.

595. *Id.* at 7.

596. See *id.* at 7-8.

597. See *id.* at 8.

598. *Id.*

599. CAPITALISM AND FREEDOM, *supra* note 343, at 15.

600. See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 267 (1962); see JONES, *supra* note 49, at 116-17 (discussing Friedman).

601. CAPITALISM AND FREEDOM, *supra* note 343, at 24.

realm and ate into its foundations.”⁶⁰² 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?’”⁶⁰³ Thus, neoliberal libertarians advocate for the privatization or outsourcing of numerous government functions and institutions, such as schools, prisons, and policing.⁶⁰⁴ 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 “allocate resources to their most efficient and productive use.”⁶⁰⁵ 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.”⁶⁰⁶

While democracy and government-bashing are part-and-parcel of neoliberal libertarianism, corporations do not merely denounce democratic government in *Democracy, Inc.*⁶⁰⁷ Corporations use a multi-layered systematic strategy to thwart government efforts to regulate business.⁶⁰⁸ First, if Congress (or a state legislature) begins debating an economic regulatory bill, corporate lobbyists will seek to prevent its enactment.⁶⁰⁹ Second, if Congress nonetheless passes the regulatory legislation, then corporate lobbyists will attempt to block congressional funding for its implementation.⁶¹⁰ 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).⁶¹¹ Fourth, if an agency still manages to adopt restrictive rules implementing the regulatory law, then the corporations will challenge in

602. JONES, *supra* note 49, at 270.

603. Arthur Brooks, *Why the Stimulus Failed*, NAT'L REV. (Sept. 25, 2012), <http://www.nationalreview.com/article/328432/why-stimulus-failed-arthur-c-brooks>.

604. See RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* 179-80, 261 (1998) (supporting the privatization of prisons and law enforcement) [hereinafter *THE STRUCTURE OF LIBERTY*]; see BAKAN, *supra* note 10, at 113-38 (discussing privatization); but see 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).

605. See Jones, *supra* note 49, at 332.

606. *Id.*

607. See, e.g., Gary Rivlin, *Wall Street Fires Back: After Congress Passed Dodd-Frank Financial Reform, the Real Battle Began*, THE NATION, May 20, 2013, at 11-12 (discussing conservative efforts to thwart regulatory laws).

608. BAKAN, *supra* note 10, at 97-99; See, e.g., Rivlin, *supra* note, 607, at 11-12 (discussing conservative efforts to thwart regulatory laws).

609. Rivlin, *supra* note, 607, at 14.

610. *Id.*

611. *Id.*

court the validity of the congressional action and the agency rules.⁶¹² To be clear, corporate businesses do not view their multi-layered opposition to government as contravening a public interest or good.⁶¹³ To the contrary, from an economic standpoint, they view such anti-government actions as legitimate means to promote the public interest.⁶¹⁴

Furthermore, corporations not only seek to thwart government regulations of business, but also attempt to manipulate government to pass pro-business legislation.⁶¹⁵ The actions of the American Legislative Exchange Council (ALEC) illustrate both types of corporate control over government.⁶¹⁶ ALEC identifies itself as a nonprofit that “works to advance limited government, free markets, and federalism at the state level through a nonpartisan public-private partnership of America’s state legislators, members of the private sector and the general public.”⁶¹⁷ Its membership consists of nearly 2,000 state legislators, almost all of whom are Republicans, as well as corporations and corporate officers.⁶¹⁸ The organization tracks proposed state legislation and flags bills that it deems anti-business.⁶¹⁹ Once such a bill is flagged, ALEC then advises legislative members from the respective state of the drawbacks to the proposed legislation.⁶²⁰ While such organizational actions are significant, ALEC is more renowned (or notorious) for its drafting of model legislation, which lawmakers seek to enact at the state level.⁶²¹ Most of ALEC’s funding comes from corporations, including Pfizer, Bank of America, Wal-Mart, AT&T, Verizon, and on and on.⁶²² Corporate members can effectively veto any proposed model legislation.⁶²³

612. *Id.* For examples of statutes that conservatives have fought in this manner, *see, e.g.*, *Arlington v. Fed. Comm’n Comm’n*, 133 S. Ct. 1863, 1866-68 (2013) (challenging agency’s interpretation of a statutory ambiguity in the Dodd-Frank Wall Street Reform And Consumer Protection Act concerning the scope of the agency’s statutory authority); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2577 (2012) (challenging the Patient Protection and Affordable Care Act).

613. Rivlin, *supra* note 607, at 11-12.

614. *See* BAKAN, *supra* note 10, at 106-07.

615. *See* Mike McIntire, *Conservative Nonprofit Acts as a Stealth Business Lobbyist*, N.Y. TIMES (Apr. 21, 2012), http://www.nytimes.com/2012/04/22/us/alec-a-tax-exempt-group-mixes-legislators-and-lobbyists.html?_r=0.

616. *See About ALEC*, AM. LEGISLATIVE EXCH. COUNCIL, <http://www.alec.org/about-alec/> (last visited Mar. 27, 2015); McIntire, *supra* note 615.

617. *Id.*

618. *See Membership*, AM. LEGISLATIVE EXCH. COUNCIL, <http://www.alec.org/membership> (last visited Mar. 27, 2015); McIntire, *supra* note 615.

619. McIntire, *supra* note 615.

620. *Id.*

621. *Id.*

622. *Id.*

623. John Nichols, *ALEC Exposed: A Trove of Documents Reveals the Vast Procorporate Strategy of this Powerful Right-Wing Group*, THE NATION (July 12, 2011) <http://www.thenation.com/article/161978/alec-exposed>.

In other words, through ALEC, corporations exercise close control over state legislators and state legislative processes.⁶²⁴ A prototypical example involves ExxonMobil, one of the corporate leaders in hydraulic fracturing, better known as “fracking.”⁶²⁵ ExxonMobil sponsored ALEC model legislation that supposedly would force corporations to disclose information about chemicals used in fracking fluids.⁶²⁶ The legislation was “promoted as a victory for consumers’ right to know about potential drinking water contaminants,” but in reality, it contained loopholes allowing corporations to withhold information about important chemicals or fluids, those “deemed trade secrets.”⁶²⁷ State lawmakers thus advocated for the model legislation as a consumer-protection bill, while not revealing that ExxonMobil helped mold it to be pro-business.⁶²⁸ ALEC, however, was not being duplicitous when it declared in a members-only newsletter that membership was “a good investment.”⁶²⁹ In a normal year, the newsletter explained, ALEC lawmakers introduce “more than 1,000 bills based on [its] model legislation” and successfully enact “about 17 percent of them.”⁶³⁰ The newsletter emphasized: “Nowhere else can you get a return that high.”⁶³¹ ALEC’s operations, one might fairly conclude, are the quintessence of Democracy, Inc.⁶³²

B. *The Roberts Court in Democracy, Inc.*

If a legislature enacts a regulatory statute and corporate challengers then 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.⁶³³ Fortunately, for corporations, the Roberts Court is the most pro-business Supreme Court since World War II.⁶³⁴ Of course, some conservatives have insisted that the Roberts Court is not conservative enough, that it is not truly pro-business,⁶³⁵ but empirical studies have

624. McIntire, *supra* note 615.

625. *Id.*

626. *Id.*

627. *Id.*

628. *Id.*

629. McIntire, *supra* note 615.

630. *Id.*

631. *Id.*

632. See Nichols, *supra* note 623.

633. See 28 U.S.C.A. § 1254.

634. Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1449 (2013) (quantitative study of all postwar business-related cases); see Ciocchetti, *supra* note 17, at 404 (emphasizing how strongly the Roberts Court supported business in the 2011-2012 term).

635. See, e.g., Ramesh Ponnuru, *Supreme Court Isn’t Pro-Business, But Should Be*, BLOOMBERG (July 5, 2011, 12:01AM), <http://www.bloomberg.com/news/articles/2011-07-05/supreme-court-isn-t-pro-business-but-should-be-ramesh-ponnuru>; Jonathan H. Adler, *Business, the Environment, and the Roberts Court: A Preliminary Assessment*, 49 SANTA CLARA L. REV. 943, 975 (2009); Eric Posner, *Is the*

persuasively shown otherwise.⁶³⁶ In fact, five of the current justices rank among the top ten justices most favorable to business from the 1946 through the 2011 terms.⁶³⁷ Remarkably, Alito and Roberts are first and second on the list (Powell, incidentally, ranks number eight, one spot ahead of Scalia).⁶³⁸ Moreover, particularly in free expression cases, the conservative justices support First Amendment claims of conservative speakers far more strongly than those of liberal speakers.⁶³⁹ And as one might expect, the conservative justices shape the Court's docket accordingly.⁶⁴⁰ 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.⁶⁴¹ Unsurprisingly, the Chamber had the second-highest success rate.⁶⁴² 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 pro-business.⁶⁴³ The findings also showed that these briefs influence the justices' decisions when shaping the Court's docket.⁶⁴⁴ A pro-business Court responds positively to pro-business petitioners.⁶⁴⁵

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.⁶⁴⁶ In cases after *Buckley* and *Bellotti*, the Court waffled over how

Supreme Court Biased in Favor of Business?, SLATE (March 17, 2008) http://www.slate.com/blogs/con-victions/2008/03/17/is_the_supreme_court_biased_in_favor_of_business.html.

636. MARK TUSHNET, *IN THE BALANCE: LAW AND POLITICS ON THE ROBERTS COURT* 213 (2013) (discussing evidence).

637. Epstein, *supra* note 634, at 1472-73.

638. *Id.* at 1449-51.

639. Lee Epstein et al., *Do Justices Defend the Speech They Hate? In-Group Bias, Opportunism, and the First Amendment* (APSA 2013 Annual Meeting Paper) [hereinafter *Do Justices Defend the Speech They Hate?*]. Liberal justices also show an in-group bias toward liberal speakers, but it is not as strong as that of current Roberts Court conservatives. *See id.*; *see infra* notes 647-51 and accompanying text.

640. Adam Chandler, *Cert.-stage Amicus “All Stars”: Where Are They Now?*, SCOTUSBLOG (Apr. 4, 2013, 3:00 PM), <http://www.scotusblog.com/2013/04/cert-stage-amicus-all-stars-where-are-they-now/>.

641. *Id.*

642. *Id.*

643. *Id.*; *see* Adam Chandler, *Cert.-stage Amicus Briefs: Who Files Them and To What Effect?*, SCOTUSBLOG (Sept. 27, 2007, 12:31 PM) <http://www.scotusblog.com/2007/09/cert-stage-amicus-briefs-who-files-them-and-to-what-effect-2/> (the earlier study) [hereinafter *Who Files Them and To What Effect?*].

644. Chandler, *supra* note 640.

645. *Id.*

646. *See, e.g.*, *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 668-69 (1990).

much the government could regulate corporate political expression.⁶⁴⁷ The entrenchment of Democracy, Inc., and the establishment of the Roberts Court ended this uncertainty.⁶⁴⁸ In 2010, in the monumental five-to-four decision, *Citizens United v. Federal Election Commission*,⁶⁴⁹ 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.⁶⁵⁰ Justice Kennedy’s majority opinion, which Roberts, Scalia, Thomas, and Alito joined, began by articulating two First Amendment premises.⁶⁵¹ First, Kennedy reiterated the maxim, initially stated in *Buckley*, that spending on political campaigns constitutes speech.⁶⁵² Second, Kennedy emphasized that, as stated in *Bellotti*, free speech protections extend to corporations.⁶⁵³ 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.⁶⁵⁴ “Speech is an essential mechanism of democracy,” Kennedy wrote.⁶⁵⁵ “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.”⁶⁵⁶ From the Court’s perspective, then, corporate expenditures on political campaigns go the core of the First Amendment.⁶⁵⁷ Restrictions on such political speech

647. *See id.* 668-69 (upholding restriction on corporate political spending); Fed. Election Comm’n, v. Mass. Citizens for Life, 479 U.S. 238, 263 (1986) (invalidating restriction on nonprofit corporations); Fed. Election Comm’n v. Nat’l Right to Work Comm., 459 U.S. 197, 208 (1982) (upholding restriction on nonprofit corporations); UROFSKY, *supra* note 386, at 141 (describing Court’s confusion); *see also* McConnell v. Fed. Election Comm’n, 540 U.S. 93, 94-95, 114, 121-22 (2003) (reaffirming *Buckley* and upholding main sections of Bipartisan Campaign Reform Act of 2002).

648. Given Rehnquist’s stance on commercial speech—he preferred to defer to legislative decisions, *Va. State Bd. of Pharm.*, 425 U.S. at 781 (Rehnquist, J., dissenting). He unsurprisingly also often sided with the liberal justices in campaign finance cases. *See, e.g.,* Nixon v. Shrink Mo. Gov’t PAC, 528 U.S. 377, 380-81 (2000); *Austin*, 494 U.S. at 654-55. O’Connor also voted to uphold some campaign finance restrictions. *McConnell*, 540 U.S. at 94-95, 113-14. 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.

649. 558 U.S. 310 (2010).

650. *Id.* at 320-21; Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81. In several cases preceding *Citizens United*, the Roberts Court invalidated campaign finance restrictions. *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 731-32 (2008) (invalidating federal provisions allowing certain candidates to have increased contribution and expenditure limits based on spending of opponents); *Fed. Election Comm’n v. Wis. Right To Life, Inc.*, 551 U.S. 449, 481-82 (2007) (limiting restrictions on expenditures by corporations and unions); *Randall v. Sorrell*, 548 U.S. 230, 262-63 (2006) (invalidating state limits on contributions).

651. *Citizens United*, 558 U.S. at 316, 339, 342.

652. *Id.* at 339.

653. *Id.* at 342.

654. *See id.* at 342-43.

655. *Id.* at 339.

656. *Citizens United*, 558 U.S. at 339.

657. *Id.* at 340, 343.

and writing destroy “liberty” and are necessarily unconstitutional,⁶⁵⁸ unless the government can satisfy strict scrutiny by showing that the regulation is necessary (or narrowly tailored) to achieve a compelling purpose.⁶⁵⁹

Whether the government could satisfy strict scrutiny appeared to be, at least partly, an empirical question.⁶⁶⁰ 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 of corruption” when enacting the BCRA campaign finance restrictions.⁶⁶¹ Moreover, extensive social science research shows that excessive spending, whether corporate or otherwise, can in fact corrupt or distort democracy in two ways.⁶⁶² First, it can skew electoral outcomes.⁶⁶³ Because running for office requires massive funding, wealthy contributors can “determine the pools of potential officeholders.”⁶⁶⁴ 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.”⁶⁶⁵ In a 2008 book-length empirical study of the connections between wealth and democracy, Larry Bartels concluded that had fundraising been equal over the previous fifty years, 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).⁶⁶⁶ Second, wealth can influence the behavior of government officials after their elections.⁶⁶⁷ Money buys “privileged access for contributors and [includes] the special

658. *Id.* at 354-55 (quoting *The Federalist* No. 10, at 130 (Benjamin F. Wright ed., 1961) (James Madison)).

659. *Id.* at 340.

660. See generally INEQUALITY AND AMERICAN DEMOCRACY: WHAT WE KNOW AND WHAT WE NEED TO LEARN 113-17 (Lawrence R. Jacobs & Theda Skocpol eds., 2005) (discussing social science research on the effects of wealth inequality on democracy).

661. *Citizens United*, 558 U.S. at 451-52 (Stevens, J., concurring in part and dissenting in part); see *McConnell*, 540 U.S. at 207 (discussing congressional findings).

662. INEQUALITY AND AMERICAN DEMOCRACY, *supra* note 660, at 88, 113-15.

663. See generally *id.*

664. See *id.* at 115.

665. Molly J. Walker Wilson, *Behavioral Decision Theory and Implications for the Supreme Court’s Campaign Finance Jurisprudence*, 31 CARDOZO L. REV. 679, 684 (2010).

666. See generally LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* (2008); Dan Batz, *For Richer or For Poorer*, WASH. POST (June 15, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/12/AR2008061203779.html> (voting for Reagan); see also Molly J. Walker Wilson, *Too Much of a Good Thing: Campaign Speech After Citizens United*, 31 CARDOZO L. REV. 2365, 2374-75 (2010) [hereinafter *Too Much of a Good Thing*] (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).

667. INEQUALITY AND AMERICAN DEMOCRACY, *supra* note 660, at 115.

attention of [committee] members who reward them with vigorous help in minding their business in the committee process.”⁶⁶⁸ Thus, as one might expect, empirical evidence shows that government officials are especially unresponsive to the interests of low-income citizens.⁶⁶⁹

Nonetheless, the Court’s application of strict scrutiny is only partly an empirical question; it is also partly a normative question.⁶⁷⁰ 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.⁶⁷¹ And in perhaps the most significant aspect of the Court’s reasoning, *Citizens United* severely narrowed the concept of corruption.⁶⁷² Indeed, the majority used such a cramped notion of corruption that the empirical evidence (of corruption) was rendered irrelevant.⁶⁷³ From Kennedy’s perspective, only a direct contribution to a candidate or officeholder can constitute corruption or its appearance.⁶⁷⁴ An independent expenditure, even on behalf of a specific candidate or officeholder, cannot do so.⁶⁷⁵ Thus, apparently, the government cannot ever justify its regulation of expenditures, whether by corporations or others.⁶⁷⁶ Ultimately, then, the *Citizens United* majority concluded that the government interest in avoiding corruption or its appearance was insufficient to satisfy strict scrutiny.⁶⁷⁷ The BCRA restrictions on expenditures were unconstitutional.⁶⁷⁸

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.’”⁶⁷⁹ Speech, it seems, no longer emanates from the people, from citizens, but from “segments of the economy.”⁶⁸⁰ From this standpoint, the private economic sphere has subsumed the public sphere.⁶⁸¹ The market

668. *Id.* at 116-17.

669. BARTELS, *supra* note 666, at 285-86.

670. *See Citizens United*, 558 U.S. at 340.

671. *Id.* at 345.

672. *Id.* at 372.

673. *Id.* at 345-46, 56, 61-62; *see* Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 118-21 (2010) (arguing *Citizens United* Court overly narrowed the concept of corruption); Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 64 (2012) (arguing the *Citizens United* Court’s narrowing of definition of corruption was the most important part of the case).

674. *Citizens United*, 558 U.S. at 356-57.

675. *Id.* at 357.

676. Kang, *supra* note 673, at 25-26.

677. *Citizens United*, 558 U.S. at 360-61.

678. *Id.* at 372.

679. *Id.* at 354 (quoting *McConnell*, 540 U.S. at 257-58 (2003) (Scalia, J., concurring in part, concurring in judgment in part, dissenting in part)) (emphasis added).

680. *Id.* For a similar example, see *Davis*, where Alito suggested that the strength of a candidate depends on wealth, the wealth of contributors, or celebrity. *Davis*, 554 U.S. at 742.

681. *See Citizens United*, 558 U.S. at 355-56.

governs the state.⁶⁸² Now, our democracy is based on “‘one dollar, one vote,’ [rather] than . . . ‘one person, one vote.’”⁶⁸³ *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.⁶⁸⁴ The D.C. Circuit Court of Appeals recognized as much in *SpeechNow.org v. Federal Election Commission*,⁶⁸⁵ decided barely two months after the Supreme Court handed down *Citizens United*.⁶⁸⁶ 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).⁶⁸⁷ In conjunction with *Citizens United*, this decision opened the door to the creation of so-called Super PACs, wielding enormous sums of money.⁶⁸⁸ Thus, in the democratic sphere, wealth and corporate power are unfettered.⁶⁸⁹ According to the conservative Supreme Court justices, the liberty embodied in the First Amendment protection of free speech demands as much.⁶⁹⁰ Unsurprisingly, after *Citizens United* and *SpeechNow.org*, the flow of funds into the 2010 and 2012 political campaigns increased dramatically from previous election cycles.⁶⁹¹ For the 2012 elections, seven billion dollars was spent.⁶⁹² 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 has also extended it.⁶⁹³ It’s as if Democracy, Inc., has become official judicial and government dogma.⁶⁹⁴

In one case, *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*,⁶⁹⁵ the state of Arizona created a legislative “matching funds scheme” for campaign financing.⁶⁹⁶ 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

682. KUHNER, *supra* note 12, at 26; SHAPIRO & TOMAIN, *supra* note 12, at xii.

683. STIGLITZ, *supra* note 12, at xlix-l, 149.

684. *See Citizens United*, 558 U.S. at 360.

685. 599 F.3d 686, 698 (D.C. Cir. 2010).

686. *Id.*

687. *Id.*

688. MARCIA COYLE, *THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION* 250-51, 275 (2013).

689. *See infra* note 692 and accompanying text.

690. *Citizens United*, 558 U.S. at 372.

691. *See* KUHNER, *supra* note 12, at 1-4 (detailing sums spent on recent campaigns); Kang, *supra* note 673, at 5-6 (discussing the likely effects of *Citizens United* and its actual impact on 2010 elections).

692. *McCutcheon*, 134 S. Ct. at 1457.

693. *See id.* at 1441.

694. *See infra* note 696-723 and accompanying text.

695. 131 S. Ct. 2806 (2011).

696. *Id.* at 2813.

candidate's initial allocation.⁶⁹⁷ Thus, publicly and privately financed candidates would be able to spend roughly the same amounts on their respective campaigns.⁶⁹⁸ In a five-to-four decision, the conservative majority held this campaign finance scheme unconstitutional.⁶⁹⁹ The Court, once again, emphasized the self-governance rationale,⁷⁰⁰ and then reasoned that the flexible public financing system imposed a "penalty" by diminishing the privately financed candidate's expression.⁷⁰¹ In dissent, Justice Kagan suggested that the majority's reasoning was exactly backwards.⁷⁰² The public financing, she explained, "subsidizes and so produces *more* political speech."⁷⁰³ But the conservative majority was adamant that 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 burdening (and thus reducing) the speech of privately financed candidates and independent expenditure groups.⁷⁰⁴

In a second case, *American Tradition Partnership, Inc. v. Bullock*,⁷⁰⁵ "[a] Montana state law provid[ed] 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.'"⁷⁰⁶ The Montana Supreme Court upheld this statute in the face of a First Amendment challenge based on *Citizens United*.⁷⁰⁷ 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.⁷⁰⁸ In yet another five-to-four decision, the conservative justices on the U.S. Supreme Court disagreed.⁷⁰⁹ 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

697. *Id.*

698. *See id.* at 2828-29.

699. *Id.*

700. *Ariz. Free Enter.*, 131 S. Ct. at 2816-17.

701. *Id.* at 2818.

702. *Id.* at 2830.

703. *Id.* at 2833 (Kagan, J., dissenting) (emphasis in original).

704. *Id.* at 2821.

705. 132 S. Ct. 2490 (2012).

706. *Id.* at 2491 (quoting MONT. CODE ANN. §13-35-227(1) (2011)).

707. *American Trucking Partnership, Inc., Bullock*, 132 S. Ct. at 2491.

708. *Id.* at 2491-92 (Breyer, J., dissenting) (discussing *Western Tradition Partnership v. Attorney General*, 363 Mont. 220 (2011)).

709. *Id.* at 2491.

precluded the state from even attempting to demonstrate that its factual situation was unique.⁷¹⁰

In the most recent campaign finance case, *McCutcheon v. Federal Election Commission*,⁷¹¹ the Court invalidated federal statutory limits on the aggregate contributions of campaign donors.⁷¹² *Buckley* had upheld both base and aggregate limits on contributions.⁷¹³ A base limit restricts the amount a donor can give directly to a single candidate or committee, while an aggregate limit restricts the total amount a donor can give to all candidates and committees.⁷¹⁴ 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."⁷¹⁵ Thus, government restrictions on contributions must be "closely drawn" or "narrowly tailored"⁷¹⁶ to prevent "*quid pro quo*" corruption or its appearance."⁷¹⁷ 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."⁷¹⁸ This view suggests that the more money an individual spends, the more vigorous is his or her exercise of free expression.⁷¹⁹ *McCutcheon*, it should be noted, left intact the base contribution limits, which were not in issue, though Roberts characterized them as a "prophylactic measure."⁷²⁰ 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.⁷²¹ In fact, Justice Thomas has already declared that he views all campaign finance restrictions, including the base limits on contributions, as unconstitutional.⁷²²

During the "Rehnquist Court" years, the conservative justices sought to protect traditional moral values while also protecting economic liberty.⁷²³ The Roberts Court conservatives have maintained the judicial support of

710. *Id.*

711. 134 S. Ct. 1434 (2014).

712. *Id.* at 1462.

713. *See Buckley*, 424 U.S. at 26-27, 38.

714. *McCutcheon*, 134 S. Ct. at 1442.

715. *Id.* at 1441 (quoting *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985)).

716. *Id.* at 1456-57.

717. *Id.* at 1441.

718. *Id.* at 1449 (quoting *Davis*, 554 U.S. at 739).

719. *McCutcheon*, 134 S. Ct. at 1449.

720. *Id.* at 1458.

721. *Id.* at 1462 (Thomas, J., concurring in the judgment).

722. *Id.*

723. COYLE, *supra* note 688, at 9-10.

moral values, but they have further intensified the constitutional shielding of economic liberty.⁷²⁴ In cases where the bolstering of traditional moral values clashes with the protection of economic liberty, the Roberts Court inevitably favors the latter.⁷²⁵ Two cases, in particular, involved businesses that used arguably immoral expressive activities to garner economic profits, and both cases held that the First Amendment protected the expression.⁷²⁶ Thus, the Court allowed the immoral, but profitable, activities to continue.⁷²⁷ In *United States v. Stevens*,⁷²⁸ a federal statute prohibited animal crush videos by criminalizing “the commercial creation, sale, or possession of certain depictions of animal cruelty.”⁷²⁹ The Court held the statute to be substantially overbroad on its face and therefore unconstitutional.⁷³⁰ The crush videos, the Court reasoned, did not fit into a previously recognized low-value (or unprotected) category of free speech.⁷³¹ Moreover, the government could not justify the creation of a new low-value category.⁷³² In *Brown v. Entertainment Merchants Association*,⁷³³ a state law prohibited “the sale or rental of ‘violent video games’ to minors.”⁷³⁴ Video games, the Court began, are a form of expression generally within the compass of the First Amendment.⁷³⁵ 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.⁷³⁶ To be sure, the Court did not emphasize in either *Stevens* or *Brown* that the expressive activities were commercial and profitable, but at the same time, the Court unquestionably understood that both cases involved economic activities.⁷³⁷

724. *Id.*

725. See *infra* notes 729-38 and accompanying text.

726. *United States v. Stevens*, 559 U.S. 460, 481-82 (2010); *Brown v. Entm’t Merch.*, 131 S. Ct. 2729, 2735, 2741-42 (2011).

727. *Stevens*, 559 U.S. at 464-65, 470.

728. 559 U.S. 460 (2010).

729. *Id.* at 464.

730. *Id.* at 472, 478, 480.

731. *Id.* at 468.

732. *Id.* at 470.

733. 131 S. Ct. 2729 (2011).

734. *Id.* at 2733.

735. *Id.*

736. After discussing low-value categories, the Court reasoned that the state could not justify the restriction under the strict scrutiny test. *Id.* at 2734, 2738, 2741.

737. See *Stevens*, 559 U.S. at 469, 81-82; *Brown*, 131 S. Ct. at 2735. Of note, in both *Stevens* and *Brown*, the conservative bloc divided. *Stevens*, 559 U.S. at 463; *Brown*, 131 S. Ct. at 2732. In *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, a federal statute provided funding to nongovernmental organizations to fight HIV/AIDS worldwide. *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2324 (2013). The statute required organizations, however, to agree that they opposed prostitution. *Id.* Thus, the case can be construed as pitting moral clarity (opposing prostitution) against marketplace restrictions (attaching conditions to funding). *Id.* Again, the Court held that the restrictions violated the first amendment. *Id.* at 2332.

Moreover, it should be emphasized that the bolstering of moral clarity does not necessarily conflict with economic liberty.⁷³⁸ In the recent five-to-four decision, *Burwell v. Hobby Lobby Stores, Inc.*,⁷³⁹ the conservative block of justices were able to protect both traditional religious values and corporate wealth.⁷⁴⁰ The Court decided this case pursuant to a statute, the Religious Freedom Restoration Act (“RFRA”), rather than under the Free Exercise Clause.⁷⁴¹ Regulations under the Affordable Care Act required corporations to provide health insurance coverage to employees for various types of contraceptives.⁷⁴² In *Hobby Lobby*, closely held and for-profit corporations argued that complicity in supplying certain types of contraceptives—which the corporations claimed were actually abortifacients—violated their rights to religious freedom as protected under RFRA.⁷⁴³ The government replied, in part, that corporations do not exercise religion and therefore do not have rights under RFRA.⁷⁴⁴ The Court disagreed and held in favor of the corporations.⁷⁴⁵ “[P]rotecting the free-exercise rights of corporations like Hobby Lobby,” wrote Alito for the majority, “protects the religious liberty of the humans who own and control those companies.”⁷⁴⁶

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.*,⁷⁴⁷ decided in 2011.⁷⁴⁸ When pharmacies process prescriptions, they routinely record information such as the prescribing doctor, the patient, the dosage, and so forth.⁷⁴⁹ Data mining businesses, like IMS Health Inc., buy this information, analyze it, and sell or lease their reports to pharmaceutical manufacturers.⁷⁵⁰ When armed with this information, pharmaceutical salespersons are able to market their drugs more effectively to doctors.⁷⁵¹ Vermont enacted a law to prevent pharmacies from selling this information.⁷⁵² The legislature had two

738. See *infra* notes 740-60 and accompanying text.

739. 134 S. Ct. 2751 (2014).

740. *Id.* at 2784-85.

741. *Id.*; Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488.

742. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, 163-164 (2010).

743. *Hobby Lobby*, 134 S. Ct. at 2759, 2784-85.

744. *Id.*

745. *Id.*

746. *Id.* at 2768.

747. 131 S. Ct. 2653 (2011).

748. *Id.* at 2672.

749. *Id.* at 2659-60, 2667-68.

750. *Id.* at 2660, 2667-68.

751. *Id.* at 2659-60, 2667-68.

752. *Sorrell*, 131 S. Ct. at 2659.

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.⁷⁵³ Justice Breyer's dissent, joined by Justice Ginsburg and Justice Kagan, characterized the statute as a police power regulation of the economic marketplace that did not trigger free speech concerns.⁷⁵⁴ The Court disagreed. It reasoned that the statute raised an unusual commercial speech issue.⁷⁵⁵ Commercial speech cases typically involve advertising, and as the Court admitted, the statute in *Sorrell* did not restrict advertising per se.⁷⁵⁶ Yet, the Court reasoned that the First Amendment not only applied but also required "heightened judicial scrutiny."⁷⁵⁷ The Court then invalidated the statute pursuant to this standard, which is more rigorous than the *Central Hudson* balancing test ordinarily applied in commercial speech cases.⁷⁵⁸ Therefore, in *Sorrell*, the Roberts Court went even farther down the libertarian road by extending the First Amendment to protect economic activities only tenuously connected to expression.⁷⁵⁹

IV. WHY WE SHOULD WORRY ABOUT DEMOCRACY, INC.

The Roberts Court conservatives have fully accepted and bolstered Democracy, Inc.⁷⁶⁰ Their expansive constitutional protection of economic liberty harmonizes with neoliberal libertarianism and its underlying *laissez-faire* ideology.⁷⁶¹ In *Citizens United* and other cases, the conservative justices interpreted the Constitution so that the private sphere subsumes the public.⁷⁶² "Rational self-maximization, apropos in the private sphere,

753. *Id.* at 2668.

754. *Id.* at 2673-74 (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.

755. *See id.* at 2659-60, 2667-68.

756. *See Sorrell*, 131 S. Ct. at 2662-63, 2667.

757. *Id.* at 2664.

758. *Id.* at 2663-65. The Court reasoned that it would have invalidated the law even if it had applied *Central Hudson*. *Id.* at 2667-68.

759. 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, 2501 (2011) (limiting government employee's First-Amendment right to petition the government); *Garcetti v. Ceballos*, 547 U.S. 410, 425-26 (2006) (limiting free-speech rights of government employees by distinguishing between speech as a citizen and speech as an employee).

760. Feldman, *supra* note 18, at 346.

761. Jonathan Riehl, *The Federalist Society and Movement Conservatism: How A Fractious Coalition on the Right is Changing Constitutional Law and the Way We Talk and Think About It*, CHAPEL HILL, 45 (2007).

762. *See generally McCutcheon*, 134 S. Ct. 188; *Ariz. Free Enter.*, 131 S. Ct. at 688; *Citizens United*, 558 U.S. at 384-85.

becomes the governing rule of conduct in the public sphere,” as Milton Friedman and other neoliberals have advocated.⁷⁶³

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 realm at the expense of the other seriously endangers the entire societal system, both the public and the private.⁷⁶⁴ 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 must remain relatively separate.⁷⁶⁵ The logic, structure, and culture of each sphere are distinct.⁷⁶⁶ Thus, we need to be wary not only of government unduly controlling the economy—as with a centralized or planned economy—but also of economic institutions, particularly corporations, unduly controlling the government.⁷⁶⁷ In the words of Michael Walzer, “[w]hat 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.”⁷⁶⁸ When economic concepts and reasoning are allowed to invade or colonize the political realm, these theorists all argue that democracy is threatened.⁷⁶⁹

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 a democratic-capitalist system.⁷⁷⁰ Bell divided society into three realms: the techno-economic (or social), the cultural, and the political.⁷⁷¹ The three realms, he suggested, will contribute

763. Feldman, *supra* note 18, at 344; David Beetham, *Liberal Democracy and the Limits of Democratization*, XL POL. STUD. 40, 50 (1992).

764. *See infra* notes 765-69.

765. *See generally* DANIEL BELL, *THE CULTURAL CONTRADICTIONS OF CAPITALISM* (1976); JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 322 (William Rehg trans., 1996) (discussing an ideal community); 1 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY* 340-43 (Thomas McCarthy trans., 1984) [hereinafter *THE THEORY OF COMMUNICATIVE ACTION*] (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: A STUDY OF THE CENTRAL DILEMMAS FACING MODERN MAN* 27, 29 (1958) (arguing that political sphere needs to be purified of external concerns); BARBER, *supra* note 502, 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* 100-02 (1983); *see* HACKER & PIERSON, *supra* note 298, at 74-75 (emphasizing need for “firewalls between the market and democracy”).

766. BELL, *supra* note 765, at 10-13.

767. HAYEK, *supra* note 464, at 228-30.

768. WALZER, *supra* note 765, at 298.

769. *See supra* note 765 and accompanying text.

770. BELL, *supra* note 765, at xxx, ll.

771. *Id.* at xxx-xxxi, 10-13.

to a stable society if they either remain separate or operate in ways that reinforce each other.⁷⁷² 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.⁷⁷³ 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.⁷⁷⁴ For instance, the capitalist economy required an ethos of “work, delayed gratification, career orientation, [and] devotion to the enterprise,”⁷⁷⁵ but the modernist culture imbued individuals with a hedonistic desire for self-gratification.⁷⁷⁶ More to the point of this article, tensions between the economic and political realms would also prove problematic, according to Bell.⁷⁷⁷ The operative principle of the capitalist economy was efficiency, maximizing one’s benefits while minimizing costs,⁷⁷⁸ while the operative principle of the pluralist democratic polity was equality, requiring that all individuals be “able to participate fully” as citizens.⁷⁷⁹ If the two realms had remained distinct, each could successfully fulfill its respective principle.⁷⁸⁰ But the two realms were bleeding into each other, Bell argued, thus producing discordance.⁷⁸¹ Capitalism, aiming for efficiency, relied on hierarchically structured bureaucratic organizations that collided with the political desire for participatory equality.⁷⁸² Meanwhile, citizens pressed political demands that confounded equality and efficiency, thus generating group conflict and societal instability.⁷⁸³ And to be clear, Bell perceived these dangers in the 1970s, in the midst of our consumers’ democracy.⁷⁸⁴ The emergence of Democracy, Inc., only exacerbates the threat.⁷⁸⁵

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

772. *Id.* at 36, 70, 79-80.

773. *Id.* at 54-65; MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 52-54 (Talcott Parsons trans., 2d. ed. 1998).

774. BELL, *supra* note 765, at 11-16, 37, 71-72.

775. *Id.* at xxv.

776. *Id.* at xiv-xv, 72, 74-76.

777. *Id.* at xxx, 11.

778. *Id.* at xxx-xxxi, 11.

779. BELL, *supra* note 765, at 11.

780. *See infra* notes 781-85 and accompanying text.

781. BELL, *supra* note 765, at 15.

782. *Id.* at xvi-xvii; NEOCONSERVATIVE POLITICS AND THE SUPREME COURT, *supra* note 55, at 56.

783. BELL, *supra* note 765, at 23-25, 196-98.

784. Feldman, *supra* note 18, at 337.

785. *Id.* at 338.

election or what rate should be set for taxing corporations.⁷⁸⁶ The distinct economic and democratic realms, with their respective logics and cultures, should not be permitted to intertwine excessively.⁷⁸⁷ As Habermas would put it, our democratic system is suffering from a “legitimation crisis.”⁷⁸⁸ The democratic lawmaking process can retain its legitimacy only if citizens believe participatory equality structures the process.⁷⁸⁹ If strategic manipulations characteristic of the economic marketplace distort the democratic process, then legitimacy fades like an old black-and-white photograph.⁷⁹⁰ Viewers might be able to discern the general shapes of what remains, but the images are clouded and indistinct.⁷⁹¹ Unsurprisingly, then, Democracy, Inc.—the extension of the corporate-dominated economic marketplace into the political realm of pluralist democracy—threatens the ongoing legitimacy and functionality of American democracy.⁷⁹²

Start with the inveterate idea of American exceptionalism.⁷⁹³ The meaning of exceptionalism has varied over time, as different theorists have discerned it in different aspects of the American experience.⁷⁹⁴ In the Colonial Era, the Puritans of Massachusetts believed that America could be God’s “Citty vpon a Hill.”⁷⁹⁵ Subsequently, 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.⁷⁹⁶ Indeed, at least until the Civil War, many Americans believed that the nation could escape the ravages of historical time.⁷⁹⁷ In the mid-twentieth century, liberal political theorists saw American exceptionalism in the nation’s lack of a feudal past.⁷⁹⁸ In the late twentieth century, neoconservatives viewed American exceptionalism as rooted in the

786. BELL, *supra* note 765, at 191-92; JÜRGEN HABERMAS, LEGITIMATION CRISIS 92-93 (Thomas McCarthy trans., 1975) [hereinafter LEGITIMATION CRISIS].

787. See BELL, *supra* note 765, at 15; LEGITIMATION CRISIS, *supra* note 786, at 46.

788. LEGITIMATION CRISIS, *supra* note 786, at 46.

789. Denise Vitale, *Between Deliberative and Participatory Democracy: A Contribution on Habermas*, 32 PHIL. & SOC. CRITICISM 739, 756 (2006).

790. *Id.* at 756-57.

791. HABERMAS, *supra* note 765, at 133.

792. ALLEN, *supra* note 14, at 1; LEGITIMATION CRISIS, *supra* note 786, at 92-93.

793. See generally Thomas A. McCarthy, *From Modernism to Messianism: Liberal Developmentalism and American Exceptionalism*, 14 CONSTELLATIONS 3 (2007).

794. See *infra* notes 795-99 and accompanying text.

795. 1 John Winthrop, *A Modell of Christian Charity*, reprinted in THE PURITANS 195, 199 (Perry Miller & Thomas H. Johnson eds., 1963).

796. G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE 1815-35, at 6-9 (1991).

797. DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE 53 (1991).

798. JOHN G. GUNNELL, THE DESCENT OF POLITICAL THEORY: THE GENEALOGY OF AN AMERICAN VOCATION 241 (1993).

nation's principled commitment to democracy and individual rights, thus justifying the American exercise of power in other countries.⁷⁹⁹

But today, if the concept of American exceptionalism retains any coherence, it lies in the historical persistence of our democratic culture.⁸⁰⁰ Both the republican and pluralist democratic 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.⁸⁰¹ 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.⁸⁰² Under pluralist democracy, widely shared middle class attitudes generated a willingness to negotiate and compromise politically.⁸⁰³ 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.⁸⁰⁴ 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.⁸⁰⁵ Indeed, Alexis de Tocqueville emphasized material equality as the unique key to understanding America.⁸⁰⁶

Most important, then, Democracy, Inc., undermines the stability of our democratic culture.⁸⁰⁷ Democracy, Inc., enfeebles belief in even the roughest material equality because income and wealth are concentrated in an incredibly small sliver of the population.⁸⁰⁸ From 1974 to 2007, the share of national income going to the top-earning 0.1% of American families increased “more than fourfold” (with adjustments for inflation) and

799. NEOCONSERVATIVE POLITICS AND THE SUPREME COURT, *supra* note 55, at 64-68; Kenneth Anderson, *Goodbye To All That? A Requiem For Neoconservatism*, 22 AM. U. INT'L L. REV. 277, 288-90 (2007).

800. Mark B. Rotenberg, *America's Ambiguous Exceptionalism*, 3 UNIV. ST. THOMAS L.J. 188, 190 (2005).

801. *Id.* at 190-91.

802. *See, e.g.*, PIKETTY, *supra* note 12, at 150-53 (tying widely available land to American democracy).

803. *See* HARTZ, *supra* note 337, at 48-64 (emphasizing the importance of middle class attitudes).

804. *See id.*

805. *Id.* at 48-60.

806. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 33-34 (Phillips Bradley eds., 1990).

807. *See infra* notes 808-817 and accompanying text.

808. HACKER & PIERSON, *supra* note 298, at 16; *see* BARTELS, *supra* note 666, at 6-13 (detailing income inequality); PIKETTY, *supra* note 12, at 24 (Figure: Income Inequality in the United States, 1910-2010); Alvaredo, *supra* note 487, at 4 (Table: Top 1 Percent Income Shared in the United States) (graphing income shares through 2011).

continued to remain disproportionately high in subsequent years.⁸⁰⁹ From 2009 to 2012, ninety-five percent of income gains went to the top one percent.⁸¹⁰ In fact, American income inequality has reached its highest level since the 1920s, just before the Great Depression and the collapse of the republican democratic regime.⁸¹¹ We went from being a nation in which most of its “income gains accrue to the bottom 90% of households (the pattern for the economic expansion of the 1960s) to one in which more than half go to the richest 1 percent”⁸¹² The level of income inequality—of “economic polarization”⁸¹³—has stretched to “historic scope.”⁸¹⁴ Moreover, and remarkably so, wealth inequality is even greater than income inequality.⁸¹⁵ 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!⁸¹⁶

Unquestionably, there has been no “trickle down” to the less fortunate.⁸¹⁷ If anything, America has developed a “trickle up” system.⁸¹⁸ A greater percentage of the income and wealth goes to the already-rich, partly because it is neither going to the poor nor the shrinking middle class.⁸¹⁹ Thomas Piketty, renowned French economist, has analyzed the causes of increasing income inequality.⁸²⁰ Piketty draws on historical evidence to demonstrate that income inequality has increased because the rate of return on capital has exceeded the rate of growth of wages and output.⁸²¹ That is, inequality has ballooned partly because a rentier class has been accruing greater income than the working class.⁸²² The rich can get richer without working.⁸²³ This phenomenon becomes more likely in “slowly growing economies.”⁸²⁴ Additionally, income inequality has increased because of the advent of “supersalaries.”⁸²⁵ “Supersalaries” are “extremely high remunerations at the summit of the wage hierarchy,

809. *Id.*

810. Emmanuel Saez, *Striking it Richer: The Evolution of Top Incomes in the United States (Updated with 2012 Preliminary Estimates)*, BERKELEY: U. OF CAL., DEPT. OF ECON. 1, 1 (2013).

811. PIKETTY, *supra* note 12, at 23-24; Saez, *supra* note 810, at 1-2; Stone, *supra* note 487, at 11.

812. HACKER & PIERSON, *supra* note 298, at 17.

813. PHILLIPS, *supra* note 276, at 127.

814. BARTELS, *supra* note 666, at 13.

815. STIGLITZ, *supra* note 12, at 2-3, 9-10; Stone, *supra* note 487, at 1, 12.

816. Stone, *supra* note 487, at 13.

817. HACKER & PIERSON, *supra* note 298, at 19.

818. *Id.* at 19-20.

819. STIGLITZ, *supra* note 12, at 8-11, 31-34.

820. *See infra* notes 821-29 and accompanying text.

821. PIKETTY, *supra* note 12, at 23, 571.

822. *See id.* at 264.

823. *See id.*

824. *Id.* at 25.

825. *Id.* at 298.

particularly among top managers of large firms.”⁸²⁶ In fact, Piketty shows that in the United States, while capital gains have contributed significantly (approximately one-third of the increase since 1980),⁸²⁷ the incredible pay of top managers has primarily driven the rising inequality.⁸²⁸ For instance, CEO pay in the United States before the end of the Cold War stood at approximately thirty times the average pay for workers, while today CEO pay is nearly three hundred times that of workers.⁸²⁹

Finally, Piketty emphasizes that skyrocketing income inequality does not arise because of unalterable market forces or deterministic laws of economics.⁸³⁰ Rather, inequality is a product of “deeply political” choices.⁸³¹ Government tax policies obviously influence wealth distribution, but so do government policies regarding unions, executive pay, and financial markets.⁸³² Thus, as Piketty puts it, politics can serve as an “amplifying mechanism” for increasing wealth.⁸³³ Benefiting from government policies, such as lower marginal tax rates, the rich use their enhanced power to push for additional policies that would further increase their wealth.⁸³⁴ To focus on one example, the “supersalaries” of top managers are not related to marginal productivity or managerial superiority.⁸³⁵ From the perspective of the corporate employers, the managers’ salaries are economically irrational because the corporations do not accrue proportional benefits.⁸³⁶ CEOs and other corporate officials might receive “supersalaries”—but not because they are truly “super managers.”⁸³⁷ Of course, the managers act rationally, from their own economic standpoint, by maximizing the satisfaction of their own self-interest, granting themselves outrageous salaries and bonuses.⁸³⁸ But did not managers have the same incentives to maximize their own salaries in, let’s say, 1970 as in 2010? In fact, no: Politics changed the incentives.⁸³⁹

826. PIKETTY, *supra* note 12, at 298.

827. *Id.* at 294-96, 300.

828. *Id.* at 291-92.

829. Lawrence Mishel & Alyssa Davis, *CEO Pay Continues to Rise as Typical Workers Are Paid Less*, ISSUE BRIEF #380, (Econ. Policy Inst., Washington D.C.), June 12, 2014, at 2; PAUL KRUGMAN, *THE CONSCIENCE OF A LIBERAL* 142 (2007); STIGLITZ, *supra* note 12, at 26.

830. PIKETTY, *supra* note 12, at 20-21, 353 (High returns on capital are “a historical fact, not a logical necessity.”).

831. *Id.* at 20; *see* KRUGMAN, *supra* note 829, at 7-9 (emphasizing politics).

832. HACKER & PIERSON, *supra* note 298, at 47-70; *see* PHILLIPS, *supra* note 276, at 201.

833. PIKETTY, *supra* note 12, at 335.

834. Fukuyama, *supra* note 545, at 58; Jeffrey A. Winters & Benjamin I. Page, *Oligarchy in the United States?*, 7 *PERSP. ON POL.* 731, 731, 733 (2009).

835. KRUGMAN, *supra* note 829, at 142-44; *see* PIKETTY, *supra* note 12, at 298, 314-15, 333-34.

836. HACKER & PIERSON, *supra* note 298, at 62.

837. PIKETTY, *supra* note 12, at 298-302.

838. HACKER & PERSON, *supra* note 298, at 62-64.

839. *See infra* notes 840-843 and accompanying text.

Government tax policy now encourages managers to pursue “supersalaries.”⁸⁴⁰ In the 1970s, the top marginal tax rate was seventy percent, but as of 2012, the top rate had dropped to thirty-five percent.⁸⁴¹ This change is partly because the rich have traditionally supported those officials and candidates willing to cut the rates.⁸⁴² In recent years, then, managers have had strong financial incentives to maximize their own remunerations.⁸⁴³

Consequently, American income inequality has exploded partly because neoliberal policies in Democracy, Inc., are extractive.⁸⁴⁴ It is Robin Hood in reverse: “[T]he riches accruing to the top have come at the *expense* of those down below.”⁸⁴⁵ Gains in American productivity have not generated increased income for the average American worker and household.⁸⁴⁶ The middle class, in particular, is being squeezed.⁸⁴⁷ As a recent Brookings Institute Project reported: “Many American families whose incomes are not low enough to officially place them in poverty live in economically precarious situations.”⁸⁴⁸ These families are of an expanding and “struggling lower-middle class.”⁸⁴⁹ Many of these families contain two wage-earners, but they still need to fight just to get by.⁸⁵⁰ “Though not officially poor, these individuals and families experience limited economic security. One major setback could thrust them into economic chaos.”⁸⁵¹ This “trickle up” system, it should be emphasized, is not race neutral.⁸⁵² From 2000 to 2011, the income and wealth of African Americans and Hispanics shrank more than that of other Americans.⁸⁵³ To be sure, economic inequality is not unique to the United States.⁸⁵⁴ In many nations,

840. See PIKETTY, *supra* note 12, at 335.

841. Daniel Baneman and Jim Nunns, *Income Tax Paid at Each Tax Rate, 1958–2009*, TAX POLICY CENTER 1, 3–4 (2012).

842. Winters & Page, *supra* note 834, at 739.

843. KRUGMAN, *supra* note 829, at 144; PIKETTY, *supra* note 12, at 335.

844. See HARVEY, *supra* note 49, at 29–31 (discussing extractive policies between countries).

845. STIGLITZ, *supra* note 12, at 8 (emphasis in original); see PIKETTY, *supra* note 12, at 26 (explaining advancing inequality in capitalism).

846. See generally Ian Dew-Becker & Robert Gordon, *Where Did the Productivity Growth Go? Inflation Dynamics and the Distribution of Income*, 2 BROOKINGS PAPERS ON ECON. ACTIVITY 67 (2005).

847. Melissa S. Kearney & Benjamin H. Harris, *A Dozen Facts About America’s Struggling Lower-Middle Class*, BROOKINGS INST. HAMILTON PROJECT 1 (2013).

848. *Id.* at 1.

849. *Id.*; see *Divided We Stand: Why Inequality Keeps Rising*, ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT 1, 1–2 (2011) (discussing expanding inequality).

850. Kearney & Harris, *supra* note 847, at 1, 3.

851. *Id.* at 1.

852. Thomas W. Mitchell, *Growing Inequality and Racial Economic Gaps*, 56 HOW. L.J. 849, 851, 857–61 (2012).

853. *Id.*; see PIKETTY, *supra* note 12, at 161 (noting relation between race and inequality).

854. TONKISS, *supra* note 548, at 163–65.

the economically insecure and marginalized constitute more than fifty percent of their respective populations.⁸⁵⁵ But the point of American exceptionalism is that, historically, the United States has maintained enough material equality to sustain a reasonable degree of political equality, which in turn has sustained the democratic culture.⁸⁵⁶

Exorbitant material inequality threatens to crack the pillars of democratic culture.⁸⁵⁷ For instance, gross inequality in a pluralist democratic regime will undermine commitment to the rule of law.⁸⁵⁸ Individuals obey the law because they accept it as legitimate, fear the punishment that might result from disobedience, or both.⁸⁵⁹ Without the perception of rough material equality, sustaining a sense of reasonable political equality, government proclamations of legitimacy appear bankrupt.⁸⁶⁰ Thus, citizens fear that “the political system is stacked” and mistrust their government.⁸⁶¹ In such circumstances, people have little reason to obey the law other than fear.⁸⁶² We might call such a nation a police state rather than a democracy.⁸⁶³ In fact, the prison population of the United States is per capita larger than that of any other country, including Russia.⁸⁶⁴ It is approximately seven times greater than that of Europe as a whole.⁸⁶⁵ The American prison population has catapulted in size by an incredible seven hundred percent since 1970.⁸⁶⁶ Unsurprisingly, several authors have linked neoliberal libertarian economic policies with the high incarceration rates.⁸⁶⁷ More broadly, as Piketty puts it, extreme income and

855. *Id.*

856. Rotenberg, *supra* note 800, at 190, 198.

857. TONKISS, *supra* note 548, at 162-63.

858. Susan Burgess, *Outing Courtesy: The Role of Rude Dissent in Rule of Law Systems*, 38 LAW & SOC. INQUIRY 206, 206-08 (2013).

859. See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) (arguing that the way to study the law is to place oneself in the position of the bad man, who cares only about the application of force); Francis E. Lucey, S. J., *Natural Law and American Legal Realism: Their Respective Contributions to a Theory of Law in a Democratic Society*, 30 GEO. L.J. 493, 527-28, 531 (1941) (criticizing Holmes for ignoring the importance of the good man).

860. STIGLITZ, *supra* note 12, at 167.

861. *Id.* at 151.

862. See Holmes, *supra* note 859, at 457; see also, Lucey, *supra* note 859, at 528.

863. STIGLITZ, *supra* note 12, at 157.

864. See ROY WALMSLEY, WORLD PRISON POPULATION LIST 1, 3, 5 (10 ed. 2013).

865. See *id.*

866. ROBERT A. FERGUSON, INFERNO: AN ANATOMY OF AMERICAN PUNISHMENT 2, 216 (2014); WALMSLEY, *supra* note 864, at 3; *The Prison Crisis*, ACLU, available at https://www.aclu.org/files/assets/massincarceration_problems.pdf (last visited Mar. 28, 2015).

867. BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS 31-32 (2011); NICOLA LACEY, THE PRISONERS' DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES 170 (2008); LOIC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY 1-3 (2009); James Q. Whitman, *The Free Market and the Prison*, 125 HARV. L. REV. 1212, 1213 (2012) (Reviewing BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKET PUNISHMENT AND THE MYTH OF NATURAL Order (2011)).

wealth inequalities “radically undermine the meritocratic values on which democratic societies are based.”⁸⁶⁸ Or in the words of Fukuyama, a “robust” democracy cannot survive without a “healthy middle-class.”⁸⁶⁹

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.⁸⁷⁰ Gross income inequality, again, is a contributing force as it diminishes individual allegiance to the nation.⁸⁷¹ Statistics demonstrate that the poor and lower-middle class become disaffected and, consequently, less likely to vote than the wealthy.⁸⁷² Democracy, Inc., systematically “works to depoliticize its citizenry.”⁸⁷³ Without doubt, impoverished people are more apt to resort to crime and violence.⁸⁷⁴ Moreover, multinational corporations care about profits, not borders.⁸⁷⁵ If anything, the national boundaries implicit in citizenship represent obstacles to corporations, which prefer the free flow of commercial goods to the most profitable markets, regardless of national identities.⁸⁷⁶ Corporate globalization threatens the very concept of a nation state.⁸⁷⁷ Renowned corporate advocate and management consultant, Kenichi Ohmae, has called the nation a “nostalgic fiction.”⁸⁷⁸ From his perspective, “traditional nation states have become unnatural, even impossible, business units in a global economy.”⁸⁷⁹ As Benjamin Barber aptly phrased it, “[m]arkets abhor frontiers as nature abhors a vacuum.”⁸⁸⁰ 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.⁸⁸¹ Milton Friedman has explicitly argued that the only social responsibility of business is to maximize profits.⁸⁸² Any corporate effort to do otherwise, in his opinion, would be immoral.⁸⁸³

868. PIKETTY, *supra* note 12, at 1.

869. Fukuyama, *supra* note 545, at 60.

870. WOLIN, *supra* note 14, at 43.

871. *Id.* at 269-70.

872. PHILLIPS, *supra* note 276, at 391; STIGLITZ, *supra* note 12, at 167; Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 B.U. L. REV. 1713, 1716-18 (2012).

873. POLITICS AND VISION, *supra* note 279, at 592.

874. HEDGES, *supra* note 309, at 9.

875. BARBER, *supra* note 502, at xviii.

876. *Id.* at 7-8.

877. OHMAE, *supra* note 10, at 12.

878. *Id.*

879. *Id.* at 5; see TONKISS, *supra* note 548, at 56-61 (discussing threat to nation states).

880. BARBER, *supra* note 502, at 13.

881. PHILLIPS, *supra* note 276, at 148, 412-13.

882. Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES, Sept. 13, 1970 [hereinafter *The Social Responsibility of Business*].

883. *Id.*; BAKAN, *supra* note 10, at 34.

Friedman's views are not unusual.⁸⁸⁴ Business consultant and professor, Peter Drucker, declared, “[i]f you find an executive who wants to take on social responsibilities, . . . fire him. Fast.”⁸⁸⁵

Corporations, in other words, care not one iota about promoting or sustaining national citizenship.⁸⁸⁶ 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 profit would be diagnosed a psychopath.⁸⁸⁷ 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).⁸⁸⁸ To the extent that citizens qua citizens survive in Democracy, Inc., they exist primarily “to be manipulated, managed, and intellectually massaged.”⁸⁸⁹ Corporations aim to produce consumers, not democratic citizens.⁸⁹⁰ These consumers tend to be “self-interested, exploitive, competitive, striving for inequalities, fearful of downward mobility.”⁸⁹¹ 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.’”⁸⁹² In short, Democracy, Inc., endangers the democratic culture that has sustained American government for more than two centuries.⁸⁹³

An additional 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.⁸⁹⁴ American society is a democratic-capitalist system.⁸⁹⁵ If one part of the system fails or becomes too weak, then the

884. See, e.g., *id.* at 35 (quoting Drucker).

885. *Id.*

886. See *infra* notes 887-893 and accompanying text.

887. See *The Social Responsibility of Business*, *supra* note 882, at 7 (explaining that “[a] corporation is an artificial person” and that the corporate executive's sole duty is to its owners).

888. *Id.* at 7-9 (emphasizing that a corporation's executive sole duty is to raise profits for the corporation's owners or shareholders).

889. ALLEN, *supra* note 14, at 147.

890. See POLITICS AND VISION, *supra* note 279, at 597 (explaining that the capitalism creates an “anti-democratic culture” and “deform[s] the worker qua worker [and] qua citizen.”).

891. *Id.*

892. *Id.*

893. See *id.* (“With the emergence of capitalism . . . its anti-democratic culture became steadily more obvious”).

894. David A. Bell, *The “Public Sphere,” the State, and the World of Law in Eighteenth Century France*, 17 FR. HIST. STUD. 912, 914-16 (1992) [hereinafter *The “Public Sphere”*] (discussing the work of Habermas and his theory of a “public sphere constituted by private people”).

895. Wolfgang Streeck, *The Crises of Democratic Capitalism*, 71 NEW LEFT REV. 5, 5 (2011) (“Democratic capitalism was fully established after the Second World War and only then in the ‘Western’ parts of the world. North America and Western Europe”).

entire system is threatened.⁸⁹⁶ Joseph Stiglitz, an economist, emphasizes that “the relationship between government and markets [should be viewed] as complementary, both working in partnership.”⁸⁹⁷ Thus, he adds that “failures in politics and economics are related, and they reinforce each other.”⁸⁹⁸ Daron Acemoglu, an economist, and James A. Robinson, a political scientist and economist, jointly describe a “strong synergy between economic and political institutions.”⁸⁹⁹ They explain that if either economic or political institutions are skewed—if they are not inclusive—then the entire societal system becomes unstable.⁹⁰⁰ In any democratic-capitalist system, one should recognize, there are potential tensions or conflicts between the public and private spheres.⁹⁰¹ The goals of actors in the respective spheres do not necessarily harmonize.⁹⁰² According to an apocryphal quote from Louis Brandeis: “We may have democracy, or we may have wealth concentrated in the hands of a few, but we can’t have both.”⁹⁰³ Possibly, then, in the United States, these potential tensions have created a weakness, an instability, in the political-economic system.⁹⁰⁴ Yet, in the alternative, the tensions might engender strength.⁹⁰⁵ The tense balance between the public and private spheres might well have created the flexibility that has enabled the American system to last more than two centuries despite enormous social and cultural changes.⁹⁰⁶

Because the public and private spheres are interconnected, if the private sphere subsumes the public realm, the entire democratic-capitalist system will be threatened.⁹⁰⁷ If Democracy, Inc., and its neoliberal libertarian ideology undermine democratic culture—as seems to be happening—if the

896. See Fred Block & Peter Evans, *The State and the Economy*, in THE HANDBOOK OF ECONOMIC SOCIOLOGY 505, 505-06 (Neil J. Smelser & Richard Swedberg eds., 2005).

897. STIGLITZ, *supra* note 10, at xiii.

898. See *id.* at xiii, 1 (describing that he “studied the failures of both markets *and* government, and was not so naïve as to think that government could remedy every market failure. Neither was [he] so foolish as to believe that markets by themselves solved every societal problem . . .”).

899. DARON ACEMOGLU & JAMES A. ROBINSON, WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY 81 (2012).

900. See *id.* at 3-4, 82.

901. See KUHNER, *supra* note 12, at 24 (discussing how citizens had to choose between government and their trade).

902. Samuel BOWLES & HERBERT GINTIS, A COOPERATIVE SPECIES: HUMAN RECIPROCITY AND ITS EVOLUTION 3-7 (2011); KUHNER, *supra* note 12, at 24.

903. Peter Scott Campbell, *Democracy v. Concentrated Wealth: In Search of a Louis D. Brandeis Quote*, 16 GREEN BAG 2D 251, 256 (2013).

904. See *id.* at 254 (explaining how Brandeis’s concerns actually occurred in the United States).

905. See Stephen M. Feldman, *An Interpretation of Max Weber’s Theory of Law: Metaphysics, Economics, and the Iron Cage of Constitutional Law*, 16 L. & SOC. INQUIRY 205, 216 (1991) [hereinafter *An Interpretation of Max Weber’s Theory of Law*].

906. A Weberian perspective suggests that systemic tensions can create strength rather than weakness. See *id.* at 216, 241-48 (1991).

907. See *infra* notes 908-22 and accompanying text.

people lose their faith in democratic government—as appears to be occurring—then not only American democracy but also American capitalism will be endangered.⁹⁰⁸ Government unequivocally needs the funding supplied from a functioning economic marketplace.⁹⁰⁹ The government cannot perform any task, whether road building, firefighting, public education, or anything else, without revenue derived from profit-driven economic actors.⁹¹⁰ But contrary to *laissez-faire* dreaming, the economy needs a functioning democratic government.⁹¹¹ The government supports capitalism in multiple ways.⁹¹² Among its many functions, government regulates the money supply and credit; it supplies rules for contractual agreements; it educates and trains potential workers; it regulates land and resource use; it builds and maintains roads, seaports, and airports.⁹¹³ In short, government provides “the soft and hard infrastructure” that facilitates economic transactions.⁹¹⁴ Without government infrastructure, economic transactions might be possible, but transaction costs would become astronomical.⁹¹⁵ Dani Rodrik, an economist, reiterates the basic point: “*Markets and states are complements . . .*”⁹¹⁶ 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.”⁹¹⁷ In other words, a strong democratic government does more than provide infrastructure.⁹¹⁸ Government can protect competition in the marketplace by, for instance, enacting and enforcing antitrust laws.⁹¹⁹ Government can also correct for the inequities that naturally flow from capitalist incentives by, for instance, providing sustenance during times of unemployment.⁹²⁰ Finally, government can nurture the culture that sustains a continuing democracy by restricting the

908. STIGLITZ, *supra* note 10, at 53.

909. Block & Evans, *supra* note 896, at 505-06.

910. *See id.* at 505 (explaining that “states . . . depend on the economy for the flows of revenue that finance state activity”) (internal citations omitted).

911. *See id.* at 507 (“[M]arkets . . . depend upon state power and institutional structures to achieve their ends”).

912. KARL POLANYI, *THE GREAT TRANSFORMATION* xxvi-xxvii (1944).

913. *Id.* at xxv-xxvii.

914. STIGLITZ, *supra* note 12, at 66, 116; ACEMOGLU & ROBINSON, *supra* note 899, at 76.

915. RODRIK, *supra* note 12, at 14-16.

916. *Id.* at 16 (emphasis omitted).

917. *Id.* at xviii.

918. *See* HEILBRONER & MILBERG, *supra* note 10, at 114-17 (explaining how government helps sustain capitalism).

919. U.S. Department of Justice, *Antitrust Enforcement and the Consumer* (2015).

920. HEILBRONER & MILBERG, *supra* note 10, at 114-16 (discussing how employment improved throughout the early 1900’s).

translation of economic power into political power.⁹²¹ In sum, big multinational corporations need big democratic governments to maintain a healthy, systemic balance.⁹²²

V. CONCLUSION

The constitutional framers clearly understood the need to conceptualize separate public and private spheres and to recognize their systemic interrelationship.⁹²³ In fact, the framers feared for the nation's future when they arrived in Philadelphia for the convention.⁹²⁴ From their perspective, national survival depended on their successful drafting (and the subsequent ratification) of a constitution that would maintain a healthy balance between the public and private spheres.⁹²⁵ The framers became pragmatic realists during the 1780s because, in their eyes, state governments had turned corrupt.⁹²⁶ The framers learned that most people pursued their own passions and interests, whether acting in the economic marketplace or in governmental affairs.⁹²⁷ The people and their elected officials could not be trusted to act virtuously in pursuit of the common good.⁹²⁸ When individuals enjoy liberty, many, if not most of them, will seek to satisfy their own self-interest.⁹²⁹ If they contemplate government affairs at all, it is only to increase their own profits or wealth.⁹³⁰ In other words, the framers had seen during the 1780s, to their great disappointment, an alarming

921. See *McCutcheon*, 134 S. Ct. at 1437-38 (explaining that the BCRA of 2002 and the 1976 FECA Amendments prevent wealthy donors from contributing an excessive amount of money to both individual candidates or a political party).

922. See SHAPIRO & TOMAIN, *supra* note 12, at xiii, 137-38 (recommending when government should regulate, including for fairness and equity).

923. James Madison, THE FEDERALIST NO. 10 (emphasizing the importance of “secur[ing] [both] the public good and private rights . . .”).

924. See generally James Madison, *Vices of the Political System of the United States*, reprinted in JAMES MADISON: WRITINGS 69 (1999); 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 18 (1911) (Edmund Randolph worrying about national survival).

925. Madison, *supra* note 924, at 41, 43-44; see Maier, *supra* note 10, at 81-82 (emphasizing the founders' interest in both private economic activity and the public wealth).

926. See, e.g., FARRAND, *supra* note 924, at 376 (Alexander Hamilton emphasizing realistic approach); 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 278 (1937) (John Dickinson emphasizing experience).

927. See WOOD, *supra* note 21, at 409-13; see, e.g., James Wilson, *In the Pennsylvania Convention* (Nov. 24, 1787), in 3 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 138, 141-42 (1966) (lamenting licentiousness of citizens and government problems).

928. See BEEMAN, *supra* note 21, at 7 (explaining how politicians would use “the soldiers' discontents to further their own plans . . .”).

929. McDONALD, *supra* note 21, at 179 (“[M]en, most of the time, would act out of motives of self interest rather than of the public interest”).

930. See BEEMAN, *supra* note 21, at 10 (describing member of the Continental Congress, Robert Morris, as “a man whose single-minded devotion to the pursuit of wealth and power led to business practices that were self-serving and dishonest”).

number of state citizens act like rational self-maximizers.⁹³¹ And the framers recognized that this type of unchecked self-interested action could not be sustained.⁹³² If the people continued their unchecked pursuit of self-interest in the public sphere, the American experiment would end in failure.⁹³³

History subsequent to the framing suggests the framers' perspicacity.⁹³⁴ In fact, the history of the early twentieth century suggests that the United States in the early twenty-first century is approaching a crisis—one of both democracy and capitalism.⁹³⁵ 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.⁹³⁶ *Laissez-faire* ideology grew especially strong during the early twentieth century,⁹³⁷ and neoliberal libertarianism, like *laissez-faire* on steroids, has flexed its muscles in the early twenty-first century.⁹³⁸ 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.⁹³⁹ 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.⁹⁴⁰ Predictably, then, during both the early twentieth and the early twenty-first centuries, economic inequality increased

931. Madison, *supra* note 924, at 43.

932. *See id.* at 41, 43-44.

933. *See* BEEMAN, *supra* note 21, at 7, 18; McDONALD, *supra* note 21, at 94-96, 138-42, 177-79; NEDELSKY, *supra* note 21, at 30, 125-26; WOOD, *supra* note 21, at 403-04, "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 21, at 12.

934. *See infra* notes 935-48 and accompanying text.

935. *See supra* Part II.B.2.

936. *See* HARVEY, *supra* note 49, at 153, 188-89 (anthropologist); RODRIK, *supra* note 12, at xvi (economist); POLANYI, *supra* note 912, at vii, xiv (economist); POLANYI, *supra* note 912, at xxii-xxiii (economic sociologist); *see* CHRISTOPHER CLARK, *THE SLEEPWALKERS: HOW EUROPE WENT TO WAR IN 1914* xxvii-xxviii (2012) (historian paralleling political situations of early-twentieth and early-twenty-first centuries); FRIEDEN, *supra* note 10, at xv-xvii, 391 (political scientist paralleling globalization of early-twentieth and early-twenty-first centuries); MARGARET MACMILLAN, *THE WAR THAT ENDED PEACE: THE ROAD TO 1914* xxxii (2013) (historian doing same).

937. *See, e.g.*, Warren G. Harding, *The Return to Normalcy*, 67 CONG. REC. 169 (daily ed. April 12, 1921); DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945* 33 (1999) (quoting Calvin Coolidge).

938. *See, e.g.*, WALTER LIPPMANN, *THE PHANTOM PUBLIC* 30 (1925) (criticizing voters as too manipulable).

939. Karl Polanyi referred to this connection as a "double movement." POLANYI, *supra* note 912, at 79, 136, 223; *see* POLANYI, *supra* note 912, at xxviii-xxix (explaining double-movement thesis). On the tension between Progressivism and *laissez faire*, *see* MARTIN J. SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916* 89-90 (1988); Charles W. McCurdy, *The "Liberty of Contract" Regime in American Law, in* *THE STATE AND FREEDOM OF CONTRACT* 162-63 (Harry N. Scheiber ed., 1998).

940. *See supra* Part III.A

to striking proportions.⁹⁴¹ And, to be clear, gross inequality not only weakened democracy but also undermined the operation of the economic marketplace—witness the Great Depression of the twentieth century and the Great Recession of the twenty-first century.⁹⁴² When Americans near the bottom of the income scale are so poor that they lack money to spend on consumer goods, then overall demand is reduced and unemployment rises.⁹⁴³ The rich are likely to funnel much of their extra wealth into financial investments rather than spending it on additional consumer goods; such investments, therefore, often do not boost demand, production, or employment.⁹⁴⁴ Moreover, during times of high inequality, the government is unlikely to invest adequately in hard and soft infrastructure.⁹⁴⁵ Thus, for instance, roads and bridges deteriorate and go unrepaired.⁹⁴⁶ The government is likely to reduce its support of scientific and social-scientific research—the type of support that helped create the Cold War cities of knowledge.⁹⁴⁷ Overall, gross inequality undermines social cohesion, and social cohesion is a prerequisite for a well-tuned national economy.⁹⁴⁸

The predominance of *laissez-faire* ideology during both the early twentieth and early twenty-first centuries also generated persistent and overt attacks on democratic processes and government.⁹⁴⁹ For instance, nowadays, it is almost trite to criticize Congress as dysfunctional.⁹⁵⁰ Yet, the extreme party polarization that has crippled Congress in recent years eerily mirrors Karl Polanyi's 1944 description of European interwar democracies: "A clash of group interests" had paralyzed national institutions, thus creating "an immediate peril to society."⁹⁵¹ Moreover, rhetorical attacks on democracy can have serious consequences, as demonstrated by the early twentieth century, when numerous democratic

941. STIGLITZ, *supra* note 12, at 106; Emmanuel Saez, *Income Inequality: Evidence and Policy Implications*, Arrow Lecture at Stanford University (Jan. 2013) (containing graphs illustrating changing degrees of income inequality); Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913-1998*, 118 Q. J. ECON. 1-2 (2003) (discussing income inequality).

942. STIGLITZ, *supra* note 12, at 106; *see* HARVEY, *supra* note 49, at 188-89 (explaining how inequality can lead to a "structural crisis").

943. STIGLITZ, *supra* note 12, at 288-89.

944. HEILBRONER & MILBERG, *supra* note 10, at 102-04; STIGLITZ, *supra* note 12, at 106-08.

945. *See* STIGLITZ, *supra* note 12, at 116-17.

946. *See id.*

947. *See id.* at 115-17; White House Council of Economic Advisers, *Supporting Research and Development to Promote Economic Growth: The Federal Government's Role* (1995) (discussing how federal investment on research benefits the economy).

948. STIGLITZ, *supra* note 10, at 219.

949. *See supra* Parts I, III.A.

950. Jonathan Allen and John Bresnahan, *Dysfunctional Congress 'Worse' than Ever?*, POLITICO.COM (June 30, 2011, 4:30 AM), <http://www.politico.com/news/stories/0611/58076.html>.

951. POLANYI, *supra* note 912, at 244. For discussions of polarization, *see* NEOCONSERVATIVE POLITICS AND THE SUPREME COURT, *supra* note 55, at 43-45; MORRIS P. FIORINA ET AL., *CULTURE WAR? THE MYTH OF A POLARIZED AMERICA* 37-39 (2005).

governments in Europe collapsed amidst calls for less interference with the marketplace.⁹⁵² In the United States, many conservatives today attack democratic participation in manners that echo the early twentieth century.⁹⁵³ During both eras, voting restrictions were justified as legitimate efforts to “preserve the purity of the ballot box,”⁹⁵⁴ but the effect is to exclude certain societal groups, such as the poor and racial minorities.⁹⁵⁵ The disfranchisement laws tend to discriminate especially against those lacking “time, money, and knowledge of bureaucracy.”⁹⁵⁶ In recent years, more than thirty states have enacted laws restricting voting.⁹⁵⁷ 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-registration for sixteen and seventeen-year-olds, and eliminates same-day voter registration.⁹⁵⁸ Under the Texas Voter Identification law, an individual who presents a concealed handgun permit can vote, but an individual with a student photo ID cannot.⁹⁵⁹ 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.”⁹⁶⁰ For purposes of comparison, in Canada, more than ninety-three percent of eligible voters are registered.⁹⁶¹ To be clear, many American citizens do not participate because they are purposefully discouraged or prevented from doing so, not because they are apathetic.⁹⁶² Significantly, 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.⁹⁶³ Even when people can vote, it should be noted, the political

952. For discussions of the collapse of many European interwar democracies, see FRIEDEN, *supra* note 10, at 209; IRA KATZNELSON, *DESOLATION AND ENLIGHTENMENT: POLITICAL KNOWLEDGE AFTER TOTAL WAR, TOTALITARIANISM, AND THE HOLOCAUST* 14 (2003).

953. See *supra* Part III.A.

954. Alexander Keyssar, *The Squeeze on Voting*, INT’L HERALD TRIB., Feb. 15, 2012, at 9.

955. See Walter Dean Burnham, *Democracy in Peril: The American Turnout Problem and the Path to Plutocracy* 6-11 (Roosevelt Inst., Working Paper No. 5, 2010) (describing efforts to restrict voting in American history).

956. STIGLITZ, *supra* note 12, at 163.

957. Rick Lyman, *Texas’ Stringent Voter ID Law Makes a Dent at Polls*, N.Y. TIMES, Nov. 6, 2013, at 20.

958. Brennan Center for Justice, *Summary of Voter ID Laws Passed Nov. 12, 2013* at 7-8 [hereinafter Brennan Center]; Aaron Blake, *North Carolina Governor Signs Extensive Voter ID Law*, WASH. POST, Aug. 12, 2013, at A04.

959. Brennan Center, *supra* note 958, at 13-14; Lyman, *supra* note 957.

960. *Inaccurate, Costly, and Inefficient: Evidence that America’s Voter Registration System Needs an Upgrade*, ISSUE BRIEF, (Pew Center on the States, Washington D.C.), Feb. 14, 2012, at 1.

961. *Id.* at 2.

962. See Burnham, *supra* note 955, at 25.

963. *Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (2013).

gerrymandering of legislative districts can skew voting power by creating safe districts.⁹⁶⁴

In sum, the history of the early twentieth and early twenty-first centuries supports those social and political theorists who reason that undue or improper mixing of the public and private spheres can undermine the entire societal system.⁹⁶⁵ More specifically, when one sphere undermines the operation of the other, or when either the private or public spheres languish, the entire democratic-capitalist system is threatened.⁹⁶⁶ Utopian dreams of an unregulated *laissez-faire* marketplace can weaken democratic governments.⁹⁶⁷ An inverse relationship exists: As demands for economic rationalism and *laissez-faire* increase, confidence in government decreases.⁹⁶⁸ Yet, if the government or the economy becomes too weak, the entire system can collapse.⁹⁶⁹ A pristine self-sufficient and self-regulating market economy has never existed and is literally impossible.⁹⁷⁰ Liberty cannot long continue in one sphere if it does not exist in the other.⁹⁷¹ Despite *laissez-faire* ideology, the diminishment and ultimate destruction of democracy would be bad for business—very bad.⁹⁷² To be sure, democratic politics is messy and frustrating.⁹⁷³ The allure of a *laissez-faire* utopia is strong. But if the *laissez-faire* dream were realized—if the economic marketplace determined all, if democratic governance and politics were largely eliminated—then we would find ourselves in a dystopia, not a utopia.⁹⁷⁴

964. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2379-81 (2006) (suggesting how to prevent safe districts).

965. See *supra* Part IV.

966. POLANYI, *supra* note 912, at 243-44.

967. See *supra* Part III.A.

968. See *supra* Part IV.

969. POLANYI, *supra* note 912, at 25, 240; *Id.* at xxv.

970. *Id.* at 145; BLOCK & SOMERS, *supra* note 12, at 79; POLANYI, *supra* note 912, at xxiv-xxvii.

971. POLANYI, *supra* note 912, at 243-44.

972. See *supra* Part IV.

973. MATTHEW FLINDERS, *DEFENDING POLITICS: WHY DEMOCRACY MATTERS IN THE TWENTY-FIRST CENTURY* 101 (2012).

974. BLOCK & SOMERS, *supra* note 12, at 10-11, 34-35, 101; POLANYI, *supra* note 912, at 3-4.