THE INTERPRETATION OF CONSTITUTIONAL HISTORY, OR CHARLES BEARD BECOMES A FORTUNETELLER (WITH AN EMPHASIS ON FREE EXPRESSION)

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In *An Economic Interpretation of the Constitution of the United States*, published in 1913, Charles A. Beard argued that the framers and contemporaneous supporters of ratification advocated for and defended the Constitution because of their economic interests.[1] "The point is," he wrote, "that the direct, impelling motive . . . was the economic advantages which the beneficiaries expected would accrue to themselves first, from their action."[2] The bulk of the book focused on the framers, with Beard marshaling empirical evidence that ostensibly detailed their personal property holdings.[3] From this evidence, Beard claimed to show that the framers represented "distinct groups whose economic interests they understood and felt in concrete, definite form through their own personal experience with identical property rights."[4]

Beard acknowledged that numerous framers had proclaimed they were motivated by a virtuous desire to promote the "general welfare" or the "public good"—or as it is frequently called, the common good.[5] Yet, Beard dismissed the notion of the common good as a "vague thing."[6] He explained that invocation of "the

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1. CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1986 Free Press ed.; 1st ed. 1913).
2. *Id*. at 17–18.
3. *Id*. at 73–151.
4. *Id*. at 73. As others have noted, Beard did not precisely define the concept of an economic interpretation. Sometimes, he seemed to associate it with a "profit motive," and other times, he seemed to associate it with a general (economic) class interest. Forrest McDonald, *A New Introduction*, *in* BEARD, *supra* note 1, at vii, xiii–iv (1986 ed.).
5. *E.g.*, BEARD, *supra* note 1, at 17, 157, 199, 202, 204.
6. *Id*. at 17.

general good is a passive force, and unless we know who are the several individuals that benefit in its name, it has no meaning."[7] In other words, pursuit of the common good was not so much a motive as a veneer, which obscured economic interests.[8]

A century after the publication of *An Economic Interpretation*, one can fairly conclude both that the book was "seminal" and that subsequent scholarship has "undermined Beard's thesis."[9] When *An Economic Interpretation* first appeared, most reviewers greeted it with hostility.[10] Over the next decades, though, it became increasingly influential until, by the 1940s, it had become the "prevailing orthodoxy."[11] In the 1950s, Beard's fortune swung again: Critics and defenders engaged in a well-publicized battle.[12] Many of Beard's critics, though, continued to follow an economic approach to the framing, even as they disagreed with the details of Beard's argument.[13] The nature of framing historiography, however, started to change dramatically in the late 1960s. Several historians argued persuasively that one could better understand the framing (and the Revolution) by focusing on political ideology rather than economic interests.[14] As this more ideological approach became ascendant, one of its most prominent practitioners, Gordon Wood, unceremoniously pronounced Beard's thesis to be "undeniably dead."[15] And in fact, while several historians have chipped away at the edifice of the ideological approach, with its emphasis on civic republicanism,[16] it still dominates the skyline of historical scholarship on the framing.[17]

7. *Id*. at 155.

8. *See, e.g.*, *id*. at 73 (emphasizing "economic motives").

9. McDonald, *supra* note 4, at ix.

10. *Id*. at xviii–xx. Such hostility, however, was not universal. *Id*.

11. *Id*. at xxii.

12. For summaries of both sides of the battle, see ESSAYS ON THE MAKING OF THE CONSTITUTION (Leonard W. Levy ed., 2d ed. 1987); McDonald, *supra* note 4, at xxvi–xxxii.

13. *E.g.*, Forrest McDonald, *The Beard Thesis Attacked, II: A Political-Economic Approach*, *reprinted in* ESSAYS ON THE MAKING OF THE CONSTITUTION, *supra* note 12, at 113 (arguing that Beard's focus on personal property was too simplistic).

14. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT (1975); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 (1969); *see* FORREST MCDONALD, NOVUS ORDO SECLORUM (1985) (attempting to integrate multiple approaches).

15. WOOD, *supra* note 14, at 626.

16. *Forum: The Creation of the American Republic, 1776-1787 (A Symposium of Views and Reviews)*, 44 WM. & MARY Q. 549 (1987). Forrest McDonald, when discussing civic republicanism, acknowledged that Wood has done "the most nearly exhaustive study," but then added, "I disagree in many ways with Wood's analysis." MCDONALD, *supra* note 14, at 67 n.25.

17. *See* Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995) (assessing the historical scholarship at that point in time).

Thus, the current historical consensus is that Beard's thrust—his focus on the framers as creating a capitalist order primarily to protect their own interests—is incorrect. In this essay, I largely agree with this critical assessment of Beard's historical approach, though with qualifications. One might say that Wood exaggerated Beard's demise: A consideration of economic interests can help illuminate the ideology of the founding. To be sure, Beard missed most of the story of the founding, but his economic approach can still add an important element to the discussion. Plus, as I explain, despite Beard's historical errors, he has become a prescient fortuneteller. His economic depiction of the Constitution does not closely fit the framing, but it uncannily fits the Roberts Court's current interpretation of our constitutional order. Beard might have gotten the history wrong, but he got the future right.

Part I summarizes an ideological approach while also explaining how a consideration of economic interests illuminates the founding. It emphasizes how the framers conceived of citizenship and government in republican democratic terms, even though they were strongly concerned with the protection of individual rights, especially property rights.[18] Ultimately, the framers sought balance between government power and economic interests: They sought to enhance the protection of property rights, but they simultaneously empowered government to act for the common good, even at the expense of property. Part I concludes with a discussion of free expression under republican democracy and an assessment of Beard's interpretation of the framing. Part II describes how social and cultural forces led to the collapse of republican democracy and the rise of pluralist democracy in the early twentieth century. This transition, as explained, changed the conception of free expression. The Part concludes by examining how pluralist democracy continued to evolve after World War II. Part III focuses on the Roberts Court and its landmark First Amendment decision, *Citizens United v. Federal Election Commission*.[19] This Part underscores the overlap between Beard's thesis and the Roberts Court's interpretation of the framing and the Constitution. Part IV, the Conclusion, suggests how politics might have influenced both Beard's and the Roberts Court's interpretations of constitutional history.

18. My definition of republican democracy, as will become clear, overlaps but is not identical with a technical definition of civic republicanism. *See* RICHARD C. SINOPOLI, THE FOUNDATIONS OF AMERICAN CITIZENSHIP 9–12 (1992) (discussing definitional problems related to civic republicanism).

19. 558 U.S. 310 (2010).

I. THE FOUNDERS AND REPUBLICAN DEMOCRACY

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 "private and partial interests."[21] When citizens or officials used governmental institutions to pursue their own interests, then the government was corrupt. Groups of like-minded citizens who corrupted the government were deemed factions, whether constituted by a majority or a minority of citizens. In *Federalist Number 10*, James Madison described a faction as "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[22] By definition, then, a factionally controlled government pursues "partial interests"[23] or "private passions"[24] rather than the common good.

Founding-era Americans believed they were especially well-suited for this form of government. An agrarian economy where many white Protestant men were freeholders engendered a rough material equality, unknown elsewhere in the world, and this material equality in turn engendered a culture of political equality.[25] "I think our governments will remain virtuous for many centuries," Thomas Jefferson wrote in 1787, "as long as they are chiefly agricultural; and this will be as long as there shall be vacant lands in any part of America."[26] Sixteen years later, St. George Tucker echoed Jefferson: "[S]cenes of violence, tumult, and commotion," which had destroyed earlier republics, Tucker explained, "can

20. STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY 14–45, 153–208 (2008).

21. WOOD, *supra* note 14, at 59; *e.g.*, Virginia Bill of Rights (1776), *reprinted in* THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1908, 1908 (Ben Perley Poore ed., 2d ed. 1878) (emphasizing government for "the common benefit").

22. THE FEDERALIST NO. 10 (James Madison) (note: all citations to the Federalist are to the Project Gutenberg eText of The Federalist Papers); *see* James Madison, In Virginia Convention, June 5, 1788, *reprinted in* THE COMPLETE MADISON: HIS BASIC WRITINGS 46, 46 (Saul K. Padover ed., 1953) (arguing that majority factions have produced unjust laws) [hereinafter COMPLETE].

23. THE FEDERALIST NO. 37 (James Madison).

24. THE FEDERALIST NO. 6 (Alexander Hamilton).

25. *See* WOOD, *supra* note 14, at 100 (quoting Josiah Quincy).

26. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *reprinted in* 2 GREAT ISSUES IN AMERICAN HISTORY 112, 115 (Richard Hofstadter ed., 1958).

never be apprehended [in America], whilst we remain, as at present, an agricultural people, dispersed over an immense territory."[27] Moreover, with an overwhelming number of Americans being committed to Protestantism and tracing their ancestral roots to Western or Northern Europe, the people seemed sufficiently homogeneous to join together in the pursuit of the common good.[28]

Two aspects of republican democratic government, as understood by the founders, are worth underscoring. First, although not all Americans were white Protestant Anglo-Saxons, political exclusion preserved at least a surface homogeneity. According to republican democratic theory, non-virtuous individuals (or non-virtuous societal groups) would be unwilling to forgo the pursuit of their own private interests. Instead, they would form factions bent on corruption.[29] Significantly, then, an alleged lack of civic virtue could supposedly justify the forced exclusion of a group from the polity. On this pretext, African Americans, Irish-Catholic immigrants, women, and other peripheral groups were precluded from participating in republican democracy for much of American history.[30] Thus, although the concepts of virtue and the common good typically remained nebulous in the abstract, they closely mirrored mainstream white Protestant male values and interests in concrete political (and judicial) contexts.

Second, the framers believed that the state governments of the 1780s provided valuable experiences in the drafting of constitutions. Most important, the state constitutions had been too optimistic: They had conceptualized American citizens as predominantly virtuous. Virtue alone supposedly would sustain the republican state governments. Experience had deflated that optimism. That was the lesson of Shays's Rebellion in Massachusetts, where indebted landowners sought governmental refuge for money owed. John Jay wrote to George Washington: "Private rage for property suppresses public considerations, and personal

27. ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 31 (1803).

28. THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 219 (1986); STEPHEN M. FELDMAN, PLEASE DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE 161–68 (1997); *see* THE FEDERALIST NO. 2 (John Jay) (emphasizing the homogeneity of the American people).

29. THE FEDERALIST NO. 10 (James Madison).

30. FELDMAN, *supra* note 20, at 23–26, 38–40, 293–94. Of course, other forces—and pretexts—also contributed to the exclusion of peripheral groups.

rather than national interests have become the great objects of attention. Representative bodies will ever be faithful copies of their originals, and generally exhibit a checkered assemblage of virtue and vice, of abilities and weakness."[31] All too often, it seemed, factional groups used the institutions of government to satisfy their own interests.[32]

Consequently, the framers believed that, in constructing a republican government, they needed to devote greater attention to protecting individual rights, especially property rights.[33] Before the Revolution, Americans understood the need to protect individual rights from the British monarchy. With the repudiation of the monarchy, however, the protection of rights from the government seemed less urgent. After all, in the American (state) republics, the people were the source of government, and the government represented the people. Could the people threaten their own rights? Surprisingly, the experiences of the 1780s had answered that question affirmatively. Thus, now, Publius unequivocally declared that Lockean rights to liberty and property must be strongly protected.[34] Even though liberty and property caused factionalism—Madison metaphorically explained that "[l]iberty is to faction what air is to fire"—protecting such individual rights should be, said Madison, "the first object of government."[35]

Even so, the framers refused to sacrifice their civic republican principles. "The aim of every political constitution is, or ought to be," Madison declared, "first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust."[36] How, then, could a constitution respect

31. Letter from John Jay to George Washington (June 27, 1786), *reprinted in* 2 GREAT ISSUES, *supra* note 26, at 80-81; *see* WOOD, *supra* note 14, at 410–13 (discussing Shays' Rebellion).

32. *See, e.g.*, James Wilson, *In the Pennsylvania Convention* (Nov. 24, 1787), *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 138, 141–42, app. A (Max Farrand ed., 1966 reprint of 1937 rev. ed.) [hereinafter Farrand] (lamenting licentiousness of citizens and governmental problems).

33. *See, e.g.*, THE FEDERALIST NO. 6 (Alexander Hamilton) (discussing republican problems arising from human nature).

34. The very meaning of liberty shifted. Under civic republicanism, liberty primarily concerned individual freedom to participate in government. Now, liberty also concerned the pursuit of self-interest in the private sphere. WOOD, *supra* note 14, at 24, 609; *see* MCDONALD, *supra* note 14, at 4, 9–55 (emphasizing ambiguity of terms such as liberty).

35. THE FEDERALIST NO. 10 (James Madison).

36. THE FEDERALIST NO. 57 (James Madison).

individual rights while simultaneously maintaining civic republican principles? The framers answered this question by conceptually distinguishing two separate spheres: that of civil society or the private sphere, and that of government or the public sphere.[37] In the private sphere, individuals were expected to act as self-interested commercial and economic strivers. If people enjoyed liberty, then they would revel in their passions and interests. The strongest and most enduring interest was economic (property and wealth).[38] Moreover, the framers recognized that many if not most citizens would be motivated to pursue their own passions and interests not only in the commercial or private world but also in the public world. They understood that factions would inevitably form and seek to control government.

But still, the framers insisted that virtue and reason could overcome passion and interest in public affairs and that, therefore, government could be conducted in accord with civic republican ideals.[39] The framers believed in the existence of a virtuous elite—including themselves—who would pursue the common good in the public sphere even while pursuing their own interests in the private sphere. In a properly structured constitutional system, the people would at least sometimes elect the virtuous elite to public offices. And in the event that an insufficiently virtuous individual were elected, the system would be structured to control the "effects" of self-interest and factionalism.[40] Mechanisms such as federalism, separation of powers, bicameralism, and checks and balances dispersed power among a multitude of governmental institutions, departments, and officials, each of which would have its own interests.[41] "[T]he constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights."[42] In other words, the Constitution

37. *See, e.g.*, THE FEDERALIST NO. 10 (James Madison) (distinguishing between "public and private faith" as well as "public and personal liberty"); THE FEDERALIST NO. 14 (James Madison) (emphasizing government would be "in favor of private rights and public happiness").

38. THE FEDERALIST NO. 10 (James Madison); *see* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM (1990) (emphasizing the importance of property to the framers).

39. MCDONALD, *supra* note 14, at 189–209; POCOCK, *supra* note 14, at 513–26; WOOD, *supra* note 14, at 391–468. "In the civic humanist ethos, then, the individual knew himself to be rational and virtuous." POCOCK, *supra* note 14, at 466.

40. THE FEDERALIST NO. 10 (James Madison).

41. *See, e.g.*, THE FEDERALIST NO. 51 (James Madison) (Madison discussing the advantages of a bicameral legislature and an executive veto on legislative actions).

42. *Id.*

dispersed power among so many institutions, departments, and officials that the self-interested grasping of one would inevitably be met by the self-interested grasping of another. Ultimately, the framers intended the various structural mechanisms to promote the virtuous pursuit of the common good in the public sphere and simultaneously to protect individual rights and liberties in the private sphere.[43]

What, then, was the relationship between the government and individual rights, as understood by the framers? On the one hand, the framers feared that factions—especially factions constituted by the poor—would use governmental institutions to trample individual rights, particularly property rights. Thus, the various checks and mechanisms in the constitutional system were needed to temper the democratic potential of the government. On the other hand, and perhaps most important, the framers believed the government could diminish or infringe on individual rights and liberties *if the government acted in pursuit of the common good* (and otherwise acted consistently with the Constitution).[44] In this sense, the public took priority over the private. James Wilson, for instance, stated: "[A]s I have said before, no government, either single or confederated, can exist, unless private and individual rights are subservient to the public and general happiness of the nation."[45] The Fifth Amendment in the Bill of Rights explicitly manifested this view: "nor shall private property be taken for public use, without just compensation."[46] In other words, the Constitution protected private property, but even so, the government could still take private property for public use—that is, to promote the common good—so long as the government paid just compensation.[47] From the framers' perspective, the pursuit of the

43. "To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed." THE FEDERALIST NO. 10 (James Madison); *see* THE FEDERALIST NO. 14 (James Madison) (arguing that the new government would be "in favor of private rights and public happiness"). Rogers Smith writes: "The founders of the United States did indeed define and construct their new nation in accord with Enlightenment doctrines of individual liberties and republican self-governance more than any regime before and most since." ROGERS M. SMITH, CIVIC IDEALS 470–71 (1997).

44. Nedelsky argues that the framers created a system where ordinary people consent to their governance without truly governing themselves. NEDELSKY, *supra* note 38, at 149.

45. James Wilson, *supra* note 32, at 141, appendix A; *see* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE 9–11 (1996) (emphasizing that the superiority of the public over the private sphere continued at least through the nineteenth century).

46. U.S. CONST. amend. V.

47. In a similar vein, Madison repeatedly argued that the government could assist a particular business enterprise if doing so would further the common good. James Madison,

common good simultaneously empowered and limited the government. The government could take almost any action—even taking property—so long as it was for the common good, but simultaneously, the government could not do anything, unless it was for the common good. In this way, the framers aimed to achieve a balance between governmental power and the protection of property and other rights.[48] Or, from another perspective, the Constitution successfully curbed the democratic energies of the people without disabling the government.

Of course, subsequent to the founding, individuals would sometimes challenge the legality of governmental actions. During the long-running republican democratic era, courts would frequently resolve such disputes by focusing on the distinction between, on the one hand, the common good and, on the other, partial or private interests, or as it was sometimes phrased, the difference between reasonable and arbitrary action (arbitrary action was sometimes categorized as class legislation).[49] The key to the judicial analysis was the categorization of the governmental purpose: Was it for the common good or not? If the legislature had acted for the common good, then the court would uphold the government's action. If the legislature had instead acted for the benefit of private or partial interests, then the court would invalidate the government's action. In the early decades of nationhood, courts would frequently emphasize that the government could not indiscriminately take property from one citizen and give it to another. In typical language, Chief Justice Stephen Hosmer of Connecticut stated, "If . . . the legislature should enact a law, without any assignable reason, taking from A. his estate, and giving it to B., the injustice would be flagrant, and the act would produce a

In First Congress (Apr. 9, 1789), *reprinted in* COMPLETE, *supra* note 22, at 276; James Madison, *In First Congress* (1789), *reprinted in* COMPLETE, *supra* note 22, at 272; James Madison, *Letter to Clarkson Crolius* (Dec. 1819), *reprinted in* COMPLETE, *supra* note 22, at 270; James Madison, *Letter to D. Lynch, Jr. (June 27, 1817), reprinted in* Complete, *supra* note 22, at 271.

48. "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 38, at 12.

49. *E.g.*, Lawton v. Steele, 152 U.S. 133, 137 (1894).

sensation of universal insecurity."[50] Even so, in the words of Chancellor James Kent, "private interest must be made subservient to the general interest of the community."[51]

During the nineteenth century and the early twentieth century, jurists conceptualized free expression similarly to other individual rights. Lower courts and eventually the U.S. Supreme Court consistently allowed the government to punish speech or writing that supposedly engendered bad tendencies because such expression undermined virtue and contravened the common good.[52] For example, in a case upholding a conviction under a state flag desecration statute, the Court reasoned, "It is familiar law that even the privileges of citizenship and the rights inhering in personal liberty are subject, in their enjoyment, to such reasonable restraints as may be required for the general good."[53] Consequently, because the flag was an important "symbol of [the] country's power and prestige," a statute prohibiting the display of the flag in advertisements did not violate "any right of personal liberty."[54] Similarly, in several World War I Espionage Act cases, the Court upheld convictions of defendants for protesting against the draft and the war. In *Debs v. United States*, the Court explicitly approved jury instructions that tracked the bad tendency doctrine: "[T]he jury were most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service, &c."[55]

At this point, an assessment of Charles Beard's interpretation of the framing is in order. Beard maintained that an economic interpretation best explained the Constitution and its framing. The Constitution, he concluded, "was an economic document drawn with superb skill by men whose property interests were immediately at stake; and as such it appealed directly and unerringly

50. Goshen v. Stonington, 4 Conn. 209, 221 (1822). For additional examples, see Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.); VanHorne's Lessee v. Dorrance, 28 F.Cas. 1012 (C.C.D. Pa. 1795) (No. 16,857); Bank of the State v. Cooper, 10 Tenn. (2 Yer.) 599 (1831); Eakin v. Raub, 12 Serg. & Rawle 330 (Pa. 1825).

51. JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 276 (1827; Legal Classics Library Reprint).

52. *E.g.*, Fox v. Washington, 236 U.S. 273, 276–77 (1915); Patterson v. Colorado *ex rel.* Attorney General, 205 U.S. 454, 462 (1907); Commonwealth v. Karvonen, 106 N.E. 556 (Mass. 1914); Commonwealth v. Morris, 3 Va. 176 (1811).

53. Halter v. Nebraska, 205 U.S. 34, 42 (1907).

54. *Id*.

55. 249 U.S. 211, 216 (1919). As was commonly done, the Court also stated that the government must prove that the defendant had specific intent, but this requirement could be satisfied by constructive intent (which followed from proof of bad tendencies). *Id*.

to identical interests in the country at large."[56] To put it crassly, a wealthy minority designed the Constitution to protect the interests of the wealthy. In the words of Leonard Levy, Beard construed "the Constitution as a conservative economic document framed by an unrepresentative minority employing undemocratic means to protect personal property interests by establishing a central government responsive to their needs and able to thwart populistic majorities in the states."[57] Beard, in other words, interpreted the Constitution and the framing as if all the citizens, including the framers—especially the framers—were homines economici (that is, economic selves or rational self-maximizers).[58] For Beard, the private subsumed the public: The Constitution metamorphosed into a private sphere document. As Beard phrased it, the Constitution sprang "essentially out of conflicts of economic interests."[59]

Beard was, at best, partly right and partly wrong—but nonetheless significantly wrong. The framers unquestionably wanted to protect economic interests, and they undoubtedly were aware of their own interests. Yet, contrary to Beard's assertions, the framers also genuinely believed in the virtuous pursuit of the common good.[60] They were not wielding republican democratic principles merely as a pretext. Thus, the framers memorialized the governmental goal of the common good in the Preamble of the Constitution: "We the People" aimed to "promote the General Welfare."[61] Ultimately, the constitutional system was based on balance: balance between governmental power and the protection

56. BEARD, *supra* note 1, at 188.

57. Leonard Levy, *Introduction—The Making of the Constitution, 1776-1789*, *in* ESSAYS ON THE MAKING OF THE CONSTITUTION ix, xxxi–xxxii (2d ed. 1987). Levy colorfully added, "The *Economic Interpretation* is written in the same spirit that would describe the performances of a great violin virtuoso as the scraping of horse hair on dried cats' guts." *Id*. at xxxi.

58. "The neoclassical economists' Homo Economicus has several characteristics, the most important of which are (1) maximizing (optimizing) behavior; (2) the cognitive ability to exercise rational choice; and (3) individualistic behavior and independent tastes and preferences." Chris Doucouliagos, *A Note on the Evolution of Homo Economicus*, 28 J. ECON. ISSUES, 877, 877–878 (1994); *see* Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998) (discussing and criticizing concept of homo economicus); Tanina Rostain, *Educating Homo Economicus: Cautionary Notes on the New Behavioral Law and Economics Movement*, 34 LAW & SOC'Y REV. 973 (2000) (same).

59. Charles A. BEARD, *Introduction to the 1935 Edition*, *reprinted in* Beard, *supra* note 1, at xli, xliii.

60. *E.g.*, THE FEDERALIST NO. 10 (James Madison); THE FEDERALIST NO. 51 (James Madison); THE FEDERALIST NO. 57 (James Madison).

61. U.S. CONST. pmbl.

of property and other rights. From the framers' perspective, citizens were partly good and partly bad.[62] Men were not "angels," but neither were they beasts.[63] This was no less true of the framers themselves than of other citizens. Experience unfortunately had shown that, in republican government, passion and interest frequently overpower reason.[64] Nonetheless—and this point is crucial—Publius unequivocally believed not only that a virtuous elite existed but also that the American people as a whole possessed sufficient virtue to sustain republican government. The framers neither repudiated republican democracy nor accepted factional and self-interested government as inevitable. The framers' concerted effort to construct a republican government at the national level, Publius recognized, "presupposes the existence" of men's virtue.[65] Without such virtue, "nothing less than the chains of despotism" would be possible.[66]

II. THE TRANSITION TO PLURALIST DEMOCRACY: FREE EXPRESSION BECOMES A CONSTITUTIONAL LODESTAR

Grounded on the rural, agrarian, and relatively homogeneous American society of the nineteenth century, republican democracy persisted, but a variety of forces strained the regime in the late-nineteenth and early-twentieth centuries.[67] These forces, including industrialization, urbanization, and immigration, eventually led, in the 1930s, to the rise of pluralist democracy and the collapse of the republican democratic regime. Mainstream and old-stock Protestant values, long the foundation for the republican democratic ideals of virtue and the common good, were now to be balanced with the values of other Americans who constituted the demographically diverse population. No single set of cultural values was authoritative. Ethical relativism took hold as a political reality: All values, all interests—or at least a plurality

62. MORTON WHITE, PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION 127 (1987).

63. THE FEDERALIST NO. 51 (James Madison); *see* WHITE, *supra* note 62, at 97 (tying to Hume).

64. THE FEDERALIST NO. 6 (Alexander Hamilton).

65. THE FEDERALIST NO. 55 (James Madison).

66. *Id.*; *see* MCDONALD, *supra* note 14, at 70–77 (arguing that Southerners and New Englanders conceptualized virtue with different emphases). Madison viewed the state-level experiments in republicanism in the 1780s to be partial successes. Those successes could be attributed only to "the virtue and intelligence of the people of America." THE FEDERALIST NO. 49 (James Madison).

67. FELDMAN, *supra* note 20, at 166–97 (discussing in greater detail the development and effects of industrialization, urbanization, and immigration).

of values and interests—mattered to Franklin Roosevelt and the New Dealers.[68] Democracy now revolved around the assertion of interests and values by sundry individuals and groups. The pursuit of self-interest no longer amounted to corruption; rather it defined the nature of (pluralist) democracy. Diverse voluntary organizations, interest groups, and lobbyists openly sought to press their claims through the democratic process.[69]

For much of the 1930s, conservative Supreme Court justices resisted the transition to pluralist democracy and attempted to continue enforcing republican democratic principles.[70] This judicial resistance provoked Roosevelt's court-packing proposal, a blatant political gesture intended to compel the justices to accept the New Deal and (implicitly) pluralist democracy.[71] By the end of the decade, though—the turning point is usually deemed to be 1937—the Court had accepted the transition and stopped attempting to uphold the republican democratic principles of virtue and the common good.[72] Around this same time, political theorists began to explicate the new form of democracy. The foundation for the incipient democratic theory was the scholarly embrace of relativism. While totalitarian governments, such as those in Nazi Germany and Stalinist Russia, claimed knowledge of objective values and forcefully imposed those values and concomitant goals on their peoples, democratic governments allowed their citizens to express multitudes of values and goals.[73] The key to democracy lay not in the specification of supposedly objective goals, such as the common good, but rather in the following of processes that allowed all citizens to voice their particular values and interests within a free and open democratic arena.[74] After World War II, numerous political theorists celebrated pluralist democracy as the

68. *E.g.*, Franklin D. Roosevelt, *Commonwealth Club Speech* (Sept. 23, 1932), *reprinted in* 3 GREAT ISSUES IN AMERICAN HISTORY 335, 341–42 (Richard Hofstadter ed., 1982). Roosevelt was far more solicitous of African American interests than any previous president, yet he often sacrificed black interests and values so as to keep white Southerners aligned with the Democratic party. FELDMAN, *supra* note 20, at 327–28. Also, Roosevelt eventually broke with and became antagonistic toward big business. *Id*. at 318–19, 324.

69. *See* LIZABETH COHEN, MAKING A NEW DEAL 254–57, 362–66 (1990) (discussing the transformation of ethnic urbanites into active participants on the national political stage). Lobbying became open, aggressive, and institutionalized. *Id*. at 362.

70. HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE 147–94 (1993).

71. 81 CONG. REC. 877 (1937).

72. JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT (2010); *see* FELDMAN, *supra* note 20, at 349–59 (discussing the 1937 switch).

73. *See* John Dewey & James H. Tufts, *Ethics* (1932 ed.), *reprinted in* JOHN DEWEY, 7 THE LATER WORKS, 1925–1953, at 1, 359 (Jo Ann Boydston ed., 1985).

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

best means for accommodating "our multigroup society."[75] The only way to determine public values and goals, they explained, is "through the free competition of interest groups."[76] By "composing or compromising" their different values and interests,[77] the "competing groups [would] coordinate their aims in programs they can all support."[78] Legislative decisions therefore turned on negotiation, persuasion, and the exertion of pressure through the normal channels of the democratic process.[79]

Many scholars and jurists emphasized that free expression was a prerequisite to the pluralist democratic process. 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. If governmental officials interfere with the pluralist process, if they dictate or control public debates, then they skew the democratic outcomes and undermine the consent of the governed. In his book, *Free Speech and Its Relation to Self-Government*, Alexander Meiklejohn emphasized that the need to protect political expression "springs from the necessities of the program of self-government,"[80] or in other words, from "the structure and functioning of our political system as a whole."[81] Thus, pursuant to the self-governance rationale under pluralist democracy, free expression became a constitutional "lodestar."[82] In a stark about-face from the Court's consistent repudiation of First Amendment claims during the republican democratic era, the justices began to uphold one free-speech claim after another.[83] In the words of Robert A. Dahl,

75. WILFRED E. BINKLEY & MALCOLM C. MOOS, A GRAMMAR OF AMERICAN POLITICS 9 (1949).

76. *Id*.

77. *Id*.

78. *Id*. at 8.

79. *Id*. at 10–11. Robert Dahl has presented, perhaps, the most comprehensive explanations of the democratic process. ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS (1989) [hereinafter DEMOCRACY]; ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956).

80. ALEXANDER MEIKLEJOHN, FREE SPEECH: AND ITS RELATION TO SELF-GOVERNMENT 26 (1948).

81. *Id*. at 18.

82. G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech In Twentieth Century America*, 95 MICH. L. REV. 299, 300–01 (1996).

83. *E.g.*, Thornhill v. Alabama, 310 U.S. 88 (1940) (holding that labor picketing is protected free speech); Schneider v. State, 308 U.S. 147 (1939) (invalidating conviction for distributing handbills); Hague v. C.I.O., 307 U.S. 496 (1939) (upholding right of unions to organize in streets). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

"the democratic process does not exist" without free expression.[84] Even so, conservative scholars and justices, in particular, did not always agree that free expression should receive special judicial protection.[85] They often reasoned, for example, that governmental interests outweighed First Amendment protections.[86]

Since its emergence during the 1930s, pluralist democracy has not remained static. While its basic principles, such as the opportunity to participate in the democratic process, have remained intact, its practice has evolved. For instance, from its outset, with its emphasis on the individual pursuit of self-interest, pluralist democracy resonated with capitalist ideology. But during the post-World War II era, the practice of democracy increasingly intertwined with the expanding mass-consumer culture. The Court recognized as much in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, which held unconstitutional a state law that prohibited licensed pharmacists from advertising prescription drug prices.[87] Democracy involves the allocation of resources in society, the Court explained, but most resource-allocation decisions are made through the economic marketplace. "Advertising, however tasteless and excessive it sometimes may seem, is . . . dissemination of information as to who is producing and selling what product, for what reason, and at what price," Justice Blackmun wrote for an eight-justice majority.[88] Consequently, advertising is essential for "the proper allocation of resources in a free enterprise system."[89] In short, the American pluralist democracy had become a consumers' democracy.[90] Not only was commerce and advertising central to democracy, but also politics had grown increasingly like commercial consumption. Citizens followed their own values and interests, whether shopping for a

84. DEMOCRACY, *supra* note 79, at 170; *see id*. at 169–75 (discussing free speech and other rights integral to the democratic process); Harry Kalven, Jr., *The New York Times Case*, 1964 SUP. CT. REV. 191, 208 (emphasizing importance of free expression).

85. WALTER BERNS, FREEDOM, VIRTUE, AND THE FIRST AMENDMENT (1957).

86. *E.g.*, Dennis v. United States, 341 U.S. 494 (1951) (holding that conviction of American Communist leaders did not violate the First Amendment).

87. 425 U.S. 748 (1976).

88. *Id*. at 765.

89. *Id*.

90. LIZABETH COHEN, A CONSUMERS' REPUBLIC (2003); GARY CROSS, AN ALL-CONSUMING CENTURY: WHY COMMERCIALISM WON IN MODERN AMERICA (2000); Ronald K.L. Collins & David M. Skover, *Commerce and Communication*, 71 TEX. L. REV. 697 (1993).

product or a candidate.[91] Election campaigns became "indistinguishable in form (and often in content) from product marketing campaigns."[92]

The consumers' democracy continued to evolve as corporations grew in size, wealth, and power. By the close of the twentieth century, multinational corporations dominated the mass-consumer culture as never before.[93] Individuals rarely bought their mass-produced items at independent Mom-and-Pop stores. Instead, people shopped at Target, or a Walmart Supercenter, or online at Amazon.com. The American economy had thoroughly transformed into a corporate capitalist system.[94] Consequently, pluralist democracy also was transformed as corporations more resolutely used their bureaucratic organizations and accumulated wealth to intervene in the pluralist democratic marketplace.[95] In other words, while democratic politics had previously become more market-oriented, now corporate capitalism became more overtly political. The consumers' democracy had become Democracy, Inc.[96] With ever increasing proficiency, corporations manipulate elections and government for their own advantage—benefiting the respective corporations as well as corporate business *in toto*.[97] Citizens still vote, but corporations strongly influence "highly managed elections" and shape governmental policy between elections.[98] Corporate and governmental power coexist incestuously, with officials going back and forth between corporate and governmental positions.[99] Thus, the system readily self-prop-

91. "[S]elf-interested citizens increasingly view government policies like other market transactions, judging them by how well served they feel personally." COHEN, *supra* note 90, at 9.

92. Collins & Skover, *supra* note 90, at 725.

93. JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA 173–75 (2003).

94. *See* BENJAMIN R. BARBER, JIHAD VS. MCWORLD 23–151 (1992 ed.) (describing McWorld); KEVIN PHILLIPS, WEALTH AND DEMOCRACY 229–32, 284–86 (2002) (explaining the process of corporate transnationalization); *cf.*, ROBERT L. KERR, THE CORPORATE FREE-SPEECH MOVEMENT (2008) (describing how corporations used the First Amendment to their advantage).

95. KERR, *supra* note 94, at 7–8.

96. *Democracy Incorporated* is the title of a book by Sheldon S. Wolin, SHELDON S. WOLIN, DEMOCRACY INCORPORATED (2008), while *Democracy, Inc.* is the title of a book by David S. Allen. DAVID S. ALLEN, DEMOCRACY, INC. (2005).

97. JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS 118–19 (2010).

98. WOLIN, *supra* note 96, at 149.

99. *Id.* at 63, 135–36 (describing "dual system of state and corporation"); *see* PETER SCHWEIZER, THROW THEM ALL OUT xvii–xix (2011) (showing that congressional members reap financial benefits).

agates: Corporate wealth skews electoral outcomes and governmental policies, while governmental officials and policies further contribute to wealth inequality, in general, and corporate power, more specifically.[100]

III. THE ROBERTS COURT AND DEMOCRACY, INC.

The Roberts Court is the most pro-business Supreme Court of the post-World War II era.[101] Five of the current justices rank among the top ten justices most favorable to business from the 1946 through the 2011 terms.[102] Justice Alito and Chief Justice Roberts are first and second on the list.[103] In fact, the Roberts Court interprets the Constitution as if Charles Beard had been correct: The Constitution is an economic document designed to protect the interests of the wealthy (the framers and their cohort). The Court has demonstrated its pro-business inclination in a multitude of cases.[104] Perhaps, the most important series of such cases involves campaign finance and free expression, given that campaign finance issues focus on the intersection between democratic politics and wealth. Partly because of the evolution of pluralist democracy into, first, a consumers' democracy, and next, Democracy, Inc., the conservative justices have become far more receptive to free-expression claims, particularly when free expression intertwines with the economic marketplace.

In *Citizens United v. Federal Election Commission*, the conservative bloc of five justices invalidated provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA) that imposed limits on corporate (and union) spending for political campaign advertisements.[105] Justice Kennedy's majority opinion began by articulating two First Amendment premises. First, the Court reiterated

100. For example, besides the obvious influence of governmental tax policies on wealth distribution, governmental policies regarding unions, executive pay, and financial markets have contributed to increasing wealth inequality. HACKER & PIERSON, *supra* note 97, at 47–70; *see* PHILLIPS, *supra* note 94, at 201–48 (explaining how governmental policies affected wealth accumulation throughout American history).

101. Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431 (2013); *see* MARK TUSHNET, IN THE BALANCE: LAW AND POLITICS ON THE ROBERTS COURT (2013) (noting that some conservatives insist that Roberts Court is not pro-business but concluding that, overall, it is).

102. Epstein et al., *supra* note 101, at 1472–73.

103. *Id*. at 1449–51.

104. *See, e.g.*, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (limiting human rights suits against corporations); Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (restricting class actions under the Federal Rules of Civil Procedure).

105. 558 U.S. 310 (2010); Pub. L. No. 107–155, 116 Stat. 81; *see Citizens United*, 558 U.S. at 319–22 (discussing statutory restrictions).

the maxim, initially stated in *Buckley v. Valeo*,[106] that spending on political campaigns constitutes speech.[107] Second, the Court emphasized that, as stated in *First National Bank of Boston v. Bellotti*,[108] free-speech protections extend to corporations.[109] With those premises in hand, the Court moved to the crux of its reasoning, that free expression must be a constitutional lodestar in American democracy. "Speech is an essential mechanism of democracy," Kennedy wrote.[110] "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."[111] From the Court's perspective, then, corporate expenditures on political campaigns go the core of the First Amendment. Restrictions on such political speech and writing destroy "liberty" and are necessarily unconstitutional,[112] unless the government can satisfy strict scrutiny by showing that the regulation is necessary to achieve a compelling purpose.[113]

Could the government satisfy strict scrutiny? The prevention of governmental corruption constitutes a compelling purpose, and empirical evidence shows that excessive wealth corrupts the democratic process in multiple ways.[114] Excessive wealth can influence not only who is elected to office but also which constituents are served by government.[115] Elected officials are far more likely to respond to wealthy campaign contributors and to ignore the poor.[116] Yet, the *Citizens United* Court defined the concept of corruption so narrowly that this evidence was rendered irrelevant.[117]

106. 424 U.S. 1, 19 (1976).
107. *Citizens United*, 558 U.S. at 336–41.
108. 435 U.S. 765 (1978).
109. *Citizens United*, 558 U.S. at 340–42.
110. *Id*. at 339.
111. *Id*.
112. *Id*. at 354 (quoting THE FEDERALIST NO. 10, at 130 (Benjamin F. Wright ed., 1961) (James Madison)).
113. *Citizens United*, 558 U.S. at 340.
114. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 207 (2003) (discussing congressional findings of corruption); Brief of Amici Curiae Hachette Book Group, Inc. and HarperCollins Publishers L.L.C. in Support of Neither Party on Supplemental Questions, 13–14, Citizens United v. Federal Election Commission, 558 U.S. 310 (2010) (No. 08-205) (same).
115. Larry M. Bartels et al., *Inequality and American Governance*, *in* INEQUALITY AND AMERICAN DEMOCRACY 88, 115 (Lawrence R. Jacobs & Theda Skocpol eds., 2005); Molly J. Walker Wilson, *Behavioral Decision Theory and Implications for the Supreme Court's Campaign Finance Jurisprudence*, 31 CARDOZO L. REV. 679, 684 (2010).
116. *See* LARRY M. BARTELS, UNEQUAL DEMOCRACY 2–3, 285–86 (2008).
117. *Citizens United*, 558 U.S. at 348–62; *see* Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 118–21 (2010) (arguing that the *Citizens United* Court overly narrowed the concept of corruption); Michael S. Kang, *The End of Campaign Finance*

According to Kennedy's opinion, only a direct contribution to a candidate or officeholder can constitute corruption or its appearance.[118] An independent expenditure, even on behalf of a specific candidate or officeholder, cannot do so.[119] Anything short of a bribe or the appearance of a bribe is permissible.[120] The government, it seems, cannot justify any regulation of expenditures, whether by corporations or others.[121] Ultimately, then, the *Citizens United* majority concluded that the government could not satisfy strict scrutiny and that the BCRA restrictions on expenditures were therefore unconstitutional.[122]

The message of *Citizens United* is that money—no matter the quantity—cannot corrupt democracy, except in extraordinarily limited circumstances. The Court, in effect, proclaimed that corporations and other wealthy individuals and entities can spend unlimited sums in their efforts to determine elections and governmental policies. In the democratic sphere, wealth and corporate power are now unfettered. Money can be expended indiscriminately on politics, and governmental regulations of spending are constitutionally suspect. "The censorship we now confront is vast in its reach," the Court stated about the BCRA.[123] "The Government has 'muffle[d] the voices that best represent the most significant segments of the *economy*.'"[124] From this perspective, speech does not emanate from people, from citizens, but from "segments of the economy."[125] The private economic sphere has subsumed the public sphere.[126]

What, ultimately, justified this conclusion in *Citizens United*? Unsurprisingly, the conservative majority in *Citizens United*, like

Law, 98 VA. L. REV. 1, 2 (2012) (arguing that the *Citizens United* Court's narrowing of the definition of corruption was the most important part of the case).

118. *Citizens United*, 558 U.S. at 356–57.

119. *Id*. at 357–59.

120. *See id*. at 356–60.

121. Kang, *supra* note 117, at 25–26.

122. 558 U.S. at 356–61.

123. *Id*. at 354.

124. *Id*. (quoting McConnell v. Fed. Election Comm'n, 540 U.S. 93, 257–58 (2003) (Scalia, J., concurring in part, concurring in judgment in part, dissenting in part)) (emphasis added).

125. *Id*.

126. The Court underscored its determination to protect the private sphere and economic action in *Sorrell v. IMS Health Inc.*, which extended the First Amendment to protect marketplace activities that were only tenuously connected to expression. 131 S. Ct. 2653 (2011). *Sorrell* invalidated a state statute that prevented pharmacies from selling information about prescriptions.

in other cases, claimed to follow an originalist method of interpretation.[127] "There is simply no support for the view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations," the Court stated.[128] Indeed, the Court could have cited Charles Beard's *Economic Interpretation* to bolster this interpretation of the framing and the Constitution. Like Beard, the Court transformed the Constitution into a private-sphere document. Viewing this connection from the opposite side, Beard comes into focus as a prescient fortuneteller. While he incorrectly interpreted the history of the framing, he predicted the future with amazing foresight. His economic interpretation of the Constitution became the Roberts Court's interpretation of the Constitution. Indeed, Beard was aware that a conservative Supreme Court could rely on his book to support an economic interpretation of the Constitution—an economic interpretation that could thwart the Progressive legislation that Beard would have supported politically.[129] After all, one could reasonably argue that if "the intention of the Framers was to establish a capitalistic order, then any legislation aimed at restricting the excesses of capitalism was unconstitutional."[130] Beard's awareness of this potential conservative reliance on his work provided the first inkling of his preternatural clairvoyance: A Supreme Court justice, in fact, first cited *An Economic Interpretation* for this conservative (and originalist) proposition in 1934. *Home Building and Loan Association v. Blaisdell* held that the Minnesota Mortgage Moratorium Law did not violate the contract clause.[131] Justice Sutherland, dissenting, argued the framers had drafted the contract clause to preclude states from enacting statutes that interfered with contracts of credit and debt (like the Minnesota Mortgage Moratorium Law).[132] In support of this

127. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570 (2008) (interpreting Second Amendment supposedly pursuant to originalist methods). The *Citizens United* conservatives, it should be noted, devoted less space to originalism than has been given to it in some other cases. TUSHNET, *supra* note 101, at 279–80.

128. *Citizens United*, 558 U.S. at 353. In dissent, Justice Stevens criticized the majority's originalist argument. "This is not only because the Framers and their contemporaries conceived of speech more narrowly than we now think of it, but also because they held very different views about the nature of the First Amendment right and the role of corporations in society." *Id*. at 426 (Stevens, J., dissenting) (citation omitted). Stevens added, "The Framers thus took it as a given that corporations could be comprehensively regulated in the service of the public welfare." *Id*. at 428 (Stevens, J., dissenting).

129. *See* McDonald, *supra* note 4, at xv.

130. *Id*.

131. 290 U.S. 398 (1934).

132. *Id*. at 458–60.

argument, Sutherland quoted a lengthy passage from *An Economic Interpretation*.[133]

The Roberts Court conservatives have pushed the *Citizens United* holding and the Beardsian First Amendment interpretation in subsequent campaign finance cases. In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, the State of Arizona created a legislative "matching funds scheme" for campaign financing.[134] Under this scheme, a candidate for state office who accepted public financing would receive additional funds if a privately financed opponent spent more than the publicly financed candidate's initial allocation. Thus, publicly and privately financed candidates would be able to spend roughly the same amounts on their respective campaigns. In a five-to-four decision, the conservative majority held this campaign finance scheme unconstitutional. The Court reasoned that the flexible public financing system imposed a "penalty" by diminishing the privately financed candidate's expression.[135] In dissent, Justice Kagan suggested that the majority's reasoning was exactly backwards: The public financing, she explained, "subsidizes and so produces *more* political speech."[136] But the conservative majority was adamant: Any regulation of campaign financing constituted an unconstitutional burden on free speech. "[E]ven if the matching funds provision did result in more speech by publicly financed candidates and more speech in general, it would do so at the expense of impermissibly burdening (and thus reducing) the speech of privately financed candidates and independent expenditure groups."[137] In effect, then, an individual's wealth translates into political power, and the government cannot diminish that power—for instance, by providing equal funding to the less wealthy.

In a second case, *American Tradition Partnership, Inc. v. Bullock*, a Montana statute provided that a "corporation may not

133. *Id*. at 458 n.3 (quoting BEARD, *supra* note 1, at 31–32). After *Blaisdell*, justices have cited Beard's *Economic Interpretation* only twice more, both again in dissents. *Bell v. State of Md.*, a civil rights case, upheld a conviction of African American sit-in protesters. 378 U.S. 226 (1964). Justice Douglas, dissenting, argued that the Court was following a Beardsian approach by exalting "property in suppression of individual rights." *Id*. at 253 (Douglas, J., dissenting) (citing BEARD, *supra* note 1, at 188). In *Reeves, Inc. v. Stake*, Justice Powell cited Beard for the uncontroversial proposition that the framers drafted the commerce clause partly because "trade and commercial problems" had arisen among the states. 447 U.S. 429, 447–48 (1980) (Powell, J., dissenting).

134. 131 S. Ct. 2806, 2813 (2011).

135. *Id*. at 2818.

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

137. *Id*. at 2821.

make . . . an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party."[138] The Montana Supreme Court upheld this statute in the face of a First Amendment challenge based on *Citizens United*. The Montana Court reasoned that the specific history in the state—of corporate corruption of democracy—supported the state's claim that the regulation was narrowly tailored to achieve a compelling purpose.[139] In yet another five-to-four decision, the conservative justices on the U.S. Supreme Court disagreed. In a per curiam opinion reversing the Montana Court, the justices reasoned that "[t]here can be no serious doubt" that *Citizens United* controlled and precluded the state from even attempting to satisfy the strict scrutiny test.[140]

IV. CONCLUSION

Charles Beard interpreted the history of the framing so that the Constitution appeared to be, above all else, an economic document sheltering individuals as they pursued their self-interest, whether in the private or public sphere. On this crucial point, Beard was wrong. True, Madison and other framers believed that many citizens would follow their passions and interests while ignoring reason and virtue. But the main thrust of *Federalist, Number 10*, was that, despite this propensity in the citizenship, the nation should not succumb to passions, interests, and factional rule. Instead, the framers insisted that, in the public sphere, reason and virtue should control passion and interest. Passion and interest might have free rein in the private sphere—but not in the public sphere. The two spheres must remain separable—and usually, government power should be in balance with individual rights—but if anything, the public sometimes needs to predominate over the private.

In *Citizens United* and other cases, the Roberts Court has interpreted the Constitution to echo the Beardsian approach. The private sphere subsumes the public. Rational self-maximization, apropos in the private sphere, becomes the governing rule of conduct in the public sphere. But contrary to the Roberts Court's assertions, originalism cannot justify this economic interpretation of the Constitution. If Beard is wrong historically—and he is—then

138. 132 S. Ct. 2490, 2491 (2012) (quoting Mont. Code Ann. §13-35-227(1) (2011)).
139. 132 S. Ct. at 2491; *id*. at 2491–92 (Breyer, J., dissenting) (discussing W. Tradition P'ship v. Attorney Gen., 363 Mont. 220 (2011)).
140. *Bullock*, 132 S. Ct. at 2491.

the Roberts Court is wrong, too. Yet, if original meaning (or framers' intent) does not explain the economic interpretation, is there an alternative explanation—if not justification? In his *Introduction to the 1935 Edition* of his book, Beard maintained that his historical analysis was "coldly neutral" and "impartial."[141] Of course, as part-and-parcel to its purported originalist method, the Supreme Court conservatives likewise claim to pronounce neutral and apolitical decisions.[142] Why, then, do Beard and the Roberts Court conservatives find the Constitution to be an economic document when other historians, such as Gordon Wood, perceive a different Constitution?

Despite the claims to apolitical neutrality, politics helps explain Beard's and the justices' interpretations of constitutional history and text, though the precise manner and degree to which politics infuses their interpretive approaches are subject to debate. To be sure, Beard and the conservative Roberts Court justices stand on opposite ends of the political spectrum, yet their political outlooks nonetheless overlap at a general level. Beard was a Progressive historian who viewed societal changes as arising from conflicts among vested interests.[143] The Roberts Court conservatives, like many other conservatives of this era, believe that self-interested marketplace transactions are more efficient than and otherwise preferable to government-directed actions. Thus, Beard and the conservative justices would agree (at a general level) that self-interest politically motivates most, if not all, individuals. Several different theoretical approaches describe how politics shapes Supreme Court decisionmaking. These same theoretical approaches suggest how both Beard and the Roberts Court conservatives interpret the history of the framing so that the Constitution becomes, in their eyes, an economic document.

141. Beard, *supra* note 59, at xliv–vi.

142. *E.g.*, Cheney v. U.S. Dist. Court for Dist. of Columbia, 541 U.S. 913, 920 (2004) (memorandum of Scalia, J.) (insisting that justices should not be political). Numerous scholars claim that originalism is the only apolitical interpretive method. Indeed, they usually claim that any proposed alternatives ultimately leave the interpreter totally unconstrained. GARY L. MCDOWELL, THE LANGUAGE OF LAW AND THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 395 (2010); Stephen G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663, 701 (2009); Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2388, 2415 (2006); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 855, 862–63 (1989).

143. Progressives constantly emphasized that vested business interests were corrupting government. *E.g.*, THORSTEIN VEBLEN, THE THEORY OF BUSINESS ENTERPRISE 28–29 (1904); *see* JOHN CHAMBERS, THE TYRANNY OF CHANGE 160 (2d ed. 1992); RICHARD HOFSTADTER, THE AGE OF REFORM 215–17, 257 (1955); *see also id.* at 198–214 (discussing Beard).

For instance, some scholars, including many political scientists, would argue that *Citizens United* is a product of pure politics.[144] The conservative justices outvoted their liberal colleagues and, consequently, imposed their political preferences. Might the same be true of Beard? Indeed, he did not need to outvote anybody. He merely needed to impose unilaterally his political vision on the framing. Other scholars instead maintain that the Court generally follows the political mainstream.[145] From this perspective, *Citizens United* and its progeny seem predictable, if not inevitable, given that the Roberts Court operates within the parameters of Democracy, Inc. Similarly, one might argue, Beard followed the Progressive mainstream with his economic interpretation. Yet, another theoretical approach maintains that, in most cases, the justices sincerely interpret the Constitution but, because interpretation is never mechanical, politics is necessarily an integral part of the process. In other words, the justices naturally vote in accord with their politics even as they sincerely interpret the constitutional text.[146] In *Citizens United*, then, the conservative justices sincerely interpreted the framing and the First Amendment in natural accordance with their political views. The same would hold true for Beard.

In any event, one cannot reasonably explain either *Citizens United* or Beard's *An Economic Interpretation of the Constitution* as products of originalism. The economic interpretation of the Constitution does not correspond with either the original public meaning or the framers' intentions.[147] The framers were serious about protecting property rights, but simultaneously, they were serious about empowering the government to act for the common

144. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993).

145. BARRY FRIEDMAN, THE WILL OF THE PEOPLE (2009); LUCAS A. POWE, JR., THE SUPREME COURT AND THE AMERICAN ELITE, 1789–2008 (2009). In political science, this approach is called regimism. *E.g.*, Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); Terri Peretti, *Constructing the State Action Doctrine, 1940–1990*, 35 LAW & SOC. INQUIRY 273, 275 (2010); *see* Stephen M. Feldman, *Supreme Court Alchemy: Turning Law and Politics Into Mayonnaise*, GEO. J. L. & PUB. POL'Y (forthcoming) [hereinafter Feldman, *Alchemy*] (explaining regimist approach).

146. *See* Feldman, *Alchemy*, *supra* note 145 (comparing institutional interpretivism to other approaches); Stephen M. Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 L. & SOC. INQUIRY 89, 99–124 (2005) (introducing the approach).

147. I do not mean to suggest implicitly that originalism sometimes provides clear and certain answers to constitutional issues. It does not. *See* Stephen M. Feldman, *Constitutional Interpretation and History: New Originalism or Eclecticism?*, BYU J. PUB. L. (forthcoming) (criticizing new originalism as being historically unjustified).

good, even at the expense of private rights. The economic interpretation disregards the latter concern of the framers. The economic interpretation treats property rights as sacrosanct, but the framers did not do so. The framers had a more sensible and balanced understanding of property. On the one hand, they understood that property must be protected and that property can motivate people to act in positive ways. On the other hand, they understood that property was also a primary source of the greed that could generate factions and corrupt government. The government must have ultimate control over property, and not vice versa.

Yet, in a sense, one might nonetheless attribute partial responsibility to the framers for *Citizens United* and Beard's book—call it blame or praise, depending on one's political outlook. Wood and other historians explain that the American Revolution and constitutional framing unleashed social and cultural forces that would change America in ways beyond the anticipation of the founding generation.[148] True, the founders might have conceived of the citizen in a particular manner—they might have aimed for a balance between property rights and governmental power—but forces beyond the founders' control would ineluctably change the nation, as it would become increasingly commercial and industrial. In other words, from this perspective, the founders might have unwittingly created a society that would render their republican democratic principles of virtue and the common good anachronisms in the twenty-first century.[149] Of course, even if this historical view is correct, one does not have to accept the Roberts Court's economic Constitution as a foregone necessity anymore than one has to accept Beard's book as the best history.

Finally, I want to emphasize that I am not advocating for a return to republican democracy as it was originally understood and implemented. Such a return is neither desirable nor possible.[150] Even if republican democratic government could be separated from the exclusionary practices that so often characterized

148. GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815, 1–4 (2009); GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 3–8 (1991); *see* JOYCE APPLEBY, CAPITALISM AND A NEW SOCIAL ORDER (1984) (arguing that Americans increasingly accepted liberal capitalism in 1790s).

149. *See* NEDELSKY, *supra* note 38, at 1–14 (explaining that the Constitution ultimately gives too much protection to property despite Madison's desire to achieve a balance).

150. *See* STEPHEN M. FELDMAN, NEOCONSERVATIVE POLITICS AND THE SUPREME COURT: LAW, POWER, AND DEMOCRACY 85–92 (2013) (explaining how the early neoconservative goal of resurrecting republican democracy was doomed to fail).

it—for instance, the denial of political rights to women and minorities—it was also tied to the agrarian, rural, and (partially) homogenous American society of the eighteenth and nineteenth centuries. That society no longer exists and cannot be resurrected. Regardless, within the parameters of pluralist democracy, the Court can uphold legislative controls on the intersection of wealth and politics. The Court, without returning to republican democracy, can still seek to balance governmental power and property rights, as the framers aimed to do. In short, the Court can refuse to allow the private to subsume the public. Democratic politics should not be at the whim of wealth.